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Dear Sir/Madam

**Final Decision on Complaint in relation to Paddington Bowling Club Ltd under  
Part 6A of the *Registered Clubs Act 1976***

**INTRODUCTION**

1. I refer to a letter of complaint (**Complaint Letter**) provided to the Independent Liquor and Gaming Authority (**Authority**) on 3 December 2014 (**Complaint**) by Mr Paul Newson, Executive Director of the Office of Liquor, Gaming and Racing (**OLGR**), now known as Liquor and Gaming NSW (**LGNSW**) in his capacity as delegate of the Secretary (**Secretary**) of (then) NSW Trade and Investment (now a function within the jurisdiction of the NSW Department of Justice), which nominates Mr Anthony Keon, OLGR Director of Compliance and Enforcement as the contact in regard to the Complaint (**Complainant**).
2. The Complaint is made under Part 6A of the *Registered Clubs Act 1976* (**Act**) in relation to the registered club known as Paddington Bowling Club Ltd, located at 2-4 Quarry Street, Paddington (**Club**). The Club holds a registered club liquor licence number LIQC300229327 pursuant to Part 3, Division 3 of the *Liquor Act 2007*.
3. The Club has been in operation since 1958 on Crown leasehold land adjacent to Trumper Park in Paddington.
4. The Complainant has provided an extract of the Club's liquor licence from the former Government Licensing Service database now known as "OneGov". It

discloses that as of 10 September 2014 (the last date of any significant change on the licence prior to the making of the Complaint), the Club held an unrestricted licence enabling it to potentially sell or supply liquor for consumption on the Club premises, 24 hours a day.

[The Authority notes that the Club's liquor licence pre-dates the operation of the mandatory six-hour daily closure period for licensed premises that is now provided by section 11A of the *Liquor Act 2007*.]

5. As a consequence of recent amendments to the *Liquor Act 2007* that commenced effect in February 2014, the Club is also licensed to sell or supply liquor, for consumption off the Club premises, from 5:00am to 10:00pm on Monday through Saturday and from 10:00am to 10:00pm on a Sunday.
6. The Club also has the benefit of a "club functions authorisation" enabling the Club to conduct functions on the Club premises for non-members under section 23 of the Act.
7. The licence record indicates that the Club has a Gaming Machine Threshold (the maximum number of approved gaming machines that may be kept on the Club premises) of 16 and that the Club actually holds 16 gaming machine entitlements – that is, the entitlements held by the Club enable it to operate gaming machines to the maximum of its threshold. The mandatory gaming machine shutdown period fixed in relation to the Club premises for the purposes of the *Gaming Machines Act 2001* is from 4:00am to 10:00am, each day of the week.
8. Licensing staff assisting the Authority provided an updated *OneGov* licence record for the Club dated 6 August 2015. The Authority notes that the Club recently entered into voluntary receivership on 16 June 2015 and that all operations of the Club are suspended until further notice. The receiver appointed to the Club with effect from that date is Mr Peter Krejci of BRI Ferrier.

## SCOPE OF COMPLAINT AND SUBMISSIONS

9. There are 33 grounds of Complaint (**Grounds**), all of which may potentially be relied upon in a disciplinary complaint in relation to a registered club, as provided by section 57F(3) of the Act.
10. While the Act requires that a Part 6A complaint be made "in relation to" a registered club, of the 33 Grounds that are agitated in this Complaint Letter, Grounds 1 to 24 specify alleged contraventions of regulatory requirements by the Club.
11. Grounds 25, 26, 27, 28, 29, 30, 31, 32 and 33 allege that seven former and/or current members of the Club's governing body, plus one former secretary and one former receiver manager/deed administrator of the Club are not fit and proper persons to hold a position as a member of the governing body or as the secretary, as the case may be, of any registered club in New South Wales.
12. Ground 25 concerns the fitness and propriety of a member of the governing body, Mr Robert Ashton Jnr, who was the Club's secretary from October 2007 to December 2008, and again from December 2010 until the Club entered into voluntary receivership in June 2015.

13. Ground 26 concerns the fitness and propriety of a former member of the governing body, Mr Marcus Levy, who was the secretary of the Club from October 2004 to October 2007.
14. Ground 27 concerns the fitness and propriety of the former receiver manager/deed administrator of the Club, Mr Andrew Wily, who acted in this capacity while the Club was under an extended period of external administration from September 2002 to May 2012.
15. Ground 28 concerns the fitness and propriety of a current member of the governing body, Mr Allan Teale, who served as a director of the Club from December 2006 until the Club entered into voluntary receivership in June 2015.
16. Ground 29 concerns the fitness and propriety of a former member of the governing body, Mr Brian Kirk, who was a director of the Club from August 2003 to April 2014.
17. Ground 30 concerns the fitness and propriety of a member of the governing body, Mr Chris Du Chesne, who was a director of the Club from March 2006 to June 2007, and again from April 2014 until the Club entered into voluntary receivership in June 2015.
18. Ground 31 concerns the fitness and propriety of a former member of the governing body, Mr Leonard Whitney, who was a director of the Club from August 1995 to November 1995; August 1996 to January 1997; August 1997 to August 2001; August 2003 to October 2007; May 2008 to September 2010; and August 2011 to April 2014.
19. Ground 32 concerns the fitness and propriety of a former member of the governing body, Mr Luke McKew, who was a director of the Club from May 2012 to April 2014.
20. Ground 33 concerns the fitness and propriety of a current member of the governing body, Mr Robert Ashton Snr, who served as a director of the Club from August 2003 until the Club entered into voluntary receivership in June 2015.

## PROGRESS OF THE COMPLAINT

21. The initial Complaint Letter is 57 pages long and within each Ground are specified numerous Particulars, mostly allegations as to factual matters that are contended by the Complainant to establish the Ground in question.
22. However, an amended version of the Complaint Letter, described by the Complainant as a “**Revised Position Statement**”, was filed with the Authority on 17 June 2015. This followed a conference convened by the Authority with the parties under section 36B of the *Gaming and Liquor Administration Act 2007* on 1 June 2015 (**Conference**).
23. The Revised Position Statement advises that the Complainant no longer presses Ground 21 of the Complaint, which concerned the alleged contravention by the Club of clause 21(1) of the *Gaming Machines Regulation 2010*.
24. Unless specified to the contrary, all following references to the "Complaint Letter" mean the Complaint Letter *as amended on 17 June 2015*.

25. The Complaint Letter is accompanied by a brief of evidence comprising some **9,600** pages of material including submissions, evidence, and other material upon which the Complainant relies (**Brief of Evidence**).
26. The Brief of Evidence was prepared by OLGR staff and includes, *inter alia*, statements of evidence prepared by nine OLGR Inspectors during 2014; records of interview between OLGR Inspectors and members of the Club's governing body; various correspondence between OLGR, the Club and members of the Club's governing body; copies of internal Club reports; copies of reports to the Club from various external advisors; material produced to OLGR in response to Notices to Produce issued by OLGR under section 21 of the *Gaming and Liquor Administration Act 2007*; minutes of Club Board meetings; reports to Club committees; various Club internal guidelines and handbooks; various Club financial reports; Club annual reports; minutes of Club Annual General Meetings; Club registers (including registers of directors' interests); various documents regarding the procurement of goods or services by the Club; documents regarding the engagement of Club executives; various Club books and transaction records; correspondence between certain members of the governing body and other miscellaneous documents gathered by OLGR during the course of its investigation that preceded the making of this Complaint.
27. Until the Club entered into voluntary receivership in June 2015, the Club was represented by Mr Tony Hatzis of the law firm *Hatzis Cusack*, instructed by the governing body of the Club.
28. The office holders or former office holders who are the subject of Grounds 25, 26, 28, 30, 31, 32 and 33 of the Complaint (Messrs Robert Ashton Jnr, Marcus Levy, Allan Teale, Chris Du Chesne, Leonard Whitney, Luke McKew and Robert Ashton Snr) are represented by Ms Katherine Czoch of the law firm *Lee and Lyons*. They are collectively referred to in this decision as the "**Ex-Officers**".
29. The former office holder of the Club who is the subject of Ground 29 of the Complaint (Mr Brian Kirk) is separately represented by Mr Simon Mitchell of the law firm *Mitchell Lawyers*. [The Authority notes that Mr Kirk was previously represented by *Lee and Lyons* until 10 February 2015.]
30. The former receiver manager/deed administrator of the Club who is the subject of Ground 27 of the Complaint (Mr Andrew Wily) is represented by his own insolvency firm *ArmstrongWily*.
31. On 22 December 2014, the Authority issued a Show Cause Notice to the Club and invitations to the Ex-Officers, Mr Kirk and Mr Wily to make written submissions. A timetable was fixed with a view to the Authority receiving all submissions addressing the merits of the matter before it by 26 March 2015.
32. Substantial procedural delays then ensued.
33. On 6 February 2015, Ms Czoch wrote to the Authority on behalf of the Ex-Officers, requesting an extension of time by which to file their primary submissions in response to the Show Cause Notice dated 22 December 2014.

34. At 1:04pm on 9 February 2015, OLGR staff wrote to the Authority, objecting to the Ex-Officers' request for an extension of time by which to file submissions.
35. At 3:50pm on 9 February 2015, Ms Czoch wrote to the Authority in response to the letter from OLGR dated 9 February 2015, noting the Ex-Officers' intention to provide a request for further and better particulars and seeking an extension of time until 26 March 2015 by which to request further and better particulars.
36. On 10 February 2015, Ms Czoch advised the Authority that she no longer acts for Mr Kirk, who is the subject of Ground 29 of the Complaint.
37. The Authority granted the Ex-Officers an extension of time to 5 March 2015 within which to request further and better particulars from the Complainant.
38. On 11 February 2015, Mr Simon Mitchell of the law firm *Mitchell Lawyers* wrote to the Authority advising that he now acts for Mr Kirk and requesting an extension of time by which to file a written submission in response to the Show Cause Notice.
39. On 16 February 2015, Ms Czoch wrote to OLGR noting that document E144 of the Complainant's Brief of Evidence (which is a transcript of an interview between OLGR inspectors and Club director Mr Robert Ashton Snr dated 20 June 2014) appeared to be missing from the Complaint material. OLGR provided this document to the parties on 16 February 2015.
40. On 4 March 2015, Mr Hatzis wrote to OLGR, requesting further and better particulars on behalf of the Club in relation to the Complaint.
41. On 5 March 2015, Mr Mitchell made a procedural submission requesting that the Complainant provide a copy of the instrument of delegation pursuant to which the Complaint was made, as well as the transcript of a 2007 inquiry under the then section 41X of the Act into the operations of the Club (the **41X Inquiry**) and records of inspections and audits undertaken by OLGR in respect of the Club. Mr Mitchell also requested an extension of time by which to file a written submission in response to the Show Cause Notice.
42. On 5 March 2015, Ms Czoch wrote to the Authority on behalf of the Ex-Officers (Messrs Robert Ashton Jnr, Marcus Levy, Allan Teale, Chris Du Chesne, Leonard Whitney, Luke McKew and Robert Ashton Snr) requesting the provision of further and better particulars.
43. On 10 March 2015, the Ex-Officers wrote to the Complainant, seeking copies of a Russell Corporate Advisory report to the Club, transcripts of the hearing of the 41X Inquiry and OLGR records of inspections and audits of the Club during the period from 2002 to 2014.
44. On 17 March 2015, OLGR responded to the Ex-Officers' request for further documents dated 10 March 2015.
45. On 19 March 2015, the Complainant provided Ms Czoch with a response to her request for further and better particulars on behalf of her clients, the Ex-Officers.

46. On 19 March 2015, the Complainant provided Mr Mitchell with a response to his request for further and better particulars on behalf of his client, former director Mr Kirk.
47. On 19 March 2015, the Complainant provided Mr Hatzis with a response to his request for further and better particulars on behalf of the Club.
48. On 20 March 2015, the Complainant wrote to Mr Hatzis, enclosing the Terms of Reference dated 10 July 2014 provided to Russell Corporate Advisory in respect of a preliminary assessment of the conduct of the Club and its former and current office holders for the purposes of section 35A of the Act, and the interim report from Russell Corporate Advisory dated 11 August 2014.
49. On 20 March 2015, the Complainant wrote to Mr Mitchell, advising a typographical error in Particular 3.4 of the Complaint.
50. On 26 March 2015, Mr Andrew Wily of *ArmstrongWily* provided a submission in response to the Show Cause Notice, addressing Grounds 24 and 27 of the Complaint as they concern him.
51. On 27 March 2015, Ms Czoch wrote to OLGR, seeking outstanding particulars and documents.
52. On 30 March 2015, Mr Mitchell wrote to the Complainant on behalf of Mr Kirk, requesting further and better particulars in relation to Ground 29 of the Complaint.
53. On 2 April 2015, Ms Czoch wrote to the Authority, noting that the Ex-Officers had requested that the Complainant provide further and better particulars in relation to the Grounds of Complaint and that the Complainant had “purported” to provide a response to this request on 19 March 2015. Ms Czoch also advised the Authority that the Ex-Officers would provide their submissions in response to the Show Cause Notice within 4 weeks of the provision of the particulars and documents requested in the Ex-Officers’ letter to OLGR dated 27 March 2015.
54. On 10 April 2015, the Complainant wrote to Ms Czoch providing a response to the Ex-Officers’ letter requesting further and better particulars dated 27 March 2015.
55. On 15 April 2015, the Complainant wrote to Mr Mitchell providing a response to Mr Kirk’s second letter requesting further and better particulars dated 30 March 2015.
56. On 5 May 2015, Ms Czoch wrote to the Authority requesting a further extension of time until at least 29 May 2015 within which to provide the Ex-Officers’ response to the Show Cause Notice.
57. On 8 May 2015, Mr Mitchell wrote to the Authority on behalf of Mr Kirk, requesting a further extension of time until 29 May 2015 within which to provide Mr Kirk’s response to the Show Cause Notice.
58. The Authority granted this final extension to the Ex-Officers and Mr Kirk, noting that the Club’s submissions in response to the Show Cause Notice were due by 12 May 2015.

59. On 15 May 2015, the Authority wrote to Mr Hatzis, warning that the Club was now in default of the timetable and the extensions sought by the Club. The Authority requested that the Club file its submissions addressing the merits of the Complaint by 18 May 2015.
60. On 17 May 2015, the Club filed its primary submissions responding to those Grounds 1 to 24 that are directed to compliance failings on the part of the Club itself. This material took the form of a detailed submission letter from *Hatzis Cusack*, to which was attached over 30 annexures.
61. On 29 May 2015, the Ex-Officers filed their primary written submissions addressing the merits of the Complaint as it concerns them, pursuant to the amended timetable fixed by the Authority. The Ex-Officers' submissions took the form of a detailed letter from *Lee and Lyons*, attaching 100 annexures comprising the primary evidence or material upon which they rely in response to the Complaint. (The Authority notes that at the time of this final decision, the Ex Officers are represented by Ms Katherine Czoch of Gilchrist Connell Solicitors).
62. Mr Kirk also filed his primary written submissions addressing the merits of the Complaint on 29 May 2015, pursuant to the amended timetable fixed by the Authority. Mr Kirk's submission took the form of a submission letter from Mr Nick Read (Mr Kirk's barrister) and Mr Mitchell. This letter attached a number of annexures.
63. Following the completion of written submissions, the Authority promptly convened a Conference with the parties on 1 June 2015. The Conference was recorded and transcribed. The Club was represented by Mr Tony Hatzis of *Hatzis Cusack Lawyers*, while the Ex-Officers were represented by Mr Patrick Saidi, instructed by Ms Katherine Czoch and Mr Malcolm Wood of *Lee and Lyons Solicitors*. Mr Kirk was represented by Mr Nick Read, instructed by Mr Simon Mitchell of *Mitchell Lawyers*. The Complainant was represented by Mr Sinclair Gray, who was accompanied by OLGR staff responsible for the Complaint.
64. Mr Wily did not attend the Conference.
65. At the Conference, the Authority directed that the Complainant make a revised submission clarifying which Grounds of Complaint were pressed and which Grounds of Complaint were no longer pressed.
66. In response to evidence produced by the Club during the Conference in the form of a Club *Membership Register*, the Club was directed by the Authority to produce a complete copy of the Club's membership records to the Complainant to enable it to reply to that material.

#### **Revised Position Statement from OLGR**

67. On 17 June 2015, the Complainant filed the Revised Position Statement amending the Complaint. The Revised Position Statement was accompanied by certain further evidence or submissions in the form of statements by OLGR officers Paul Irving and Anthony Robinson dated 17 June 2015, the bulk of which concerned OLGR's reply to the Club membership records that had been produced by the Club to the Complainant on 12 June 2015 pursuant to a Notice to Produce issued by OLGR to the Club shortly after the Conference. The Complainant also made certain additional

submissions relating to the Grounds of Complaint, particularly issues arising under the *Corporations Act 2001* concerning the role of the governing body and control of the Club while the Club was under external administration from September 2002 to May 2012.

68. On 19 June 2015, the Ex-Officers wrote to the Authority submitting that some of the additional material provided by the Complainant that had accompanied the Revised Position Statement dated 17 June 2015 was contrary to the direction made by the Authority at the Conference in that it introduced “fresh and serious allegations” and “new evidence”. The Ex-Officers sought a direction as to whether this new material should be considered by the Authority.

### **Holding Redlich Report and Invitation to Make Further Submissions**

69. The Authority gave preliminary consideration to the Complaint at its meeting on 24 June 2015. On 30 June 2015, the Authority sent an email to the parties referring to a recently published report regarding certain dealings with respect to Club property entitled *Report of the Independent Review into matters associated with Paddington Bowling Club Ltd* produced by Holding Redlich dated 11 August 2014 (**Holding Redlich Report**).
70. The Holding Redlich Report is published on the OLGR website and, while not part of the Complainant's case, had otherwise come to the attention of the Members. The Authority wrote to the parties out of an abundance of caution placing them on notice that the Members were aware of this report and advising them that if the Complainant or the other parties wished to make any submissions pertaining to any matters arising from that Report (to the extent that it was relevant to a Ground of Complaint) they were invited to do so by no later than 13 July 2015.
71. The Authority's email of 30 June 2015 also invited the Ex-Officers, Mr Kirk and Mr Wily to make any further submissions or provide any evidence in reply to the additional material that had accompanied the Complainant's Revised Position Statement by 13 July 2015.
72. Further submissions were then made by *Lee and Lyons*, Mr Mitchell and *ArmstrongWily* on behalf of the Ex-Officers, Mr Kirk and Mr Wily respectively. Broadly speaking, these submissions addressed two matters – first, whether the new evidence that had accompanied the Complainant's Revised Position Statement should be accepted by the Authority; and second, whether the Authority should have regard to the Holding Redlich Report at all.
73. On 16 July 2015, the Complainant advised in a short email that it did not propose to make any submissions addressing the relevance of the Holding Redlich Report, while questioning whether the other parties wished to maintain their position in relation to Ground 7 of the Complaint (concerning the Club's alleged contravention of section 10(1)(j) of the Act regarding the payment to another entity of unreasonable and improper rent) in light of certain findings made in that Report.
74. More extensive submissions were made from the Ex-Officers and Mr Kirk on 17 July 2015, largely reiterating their previous submissions in response to the Grounds of Complaint. Two further submissions were made from Mr Wily – the first dated 17 July 2015 addressing the Holding Redlich Report and the second dated 20 July



2015 responding to the new evidence or submissions that accompanied the Revised Position Statement of 17 June 2015.

75. While the Ex-Officers, Mr Kirk and Mr Wily made some limited further submissions touching upon the merits of the Grounds of Complaint, they argued that the Authority should not have regard to the Holding Redlich Report at all, nor should it have regard to any “new evidence” provided by OLGR along with the Revised Position Statement. Alternatively, the Ex-Officers, Mr Kirk and Mr Wily submitted that the Complainant should first be required to particularise how this “new evidence” relates to the Grounds of Complaint before they should be expected to reply to it. The Ex-Officers nevertheless made a number of observations on the Holding Redlich report, noting criticism of OLGR in dealing with certain matters that had arisen from the section 41X Inquiry.
76. Mr Wily made more substantive submissions in response to the Complainant’s analysis of his appointment as Administrator by the Club when it went into voluntary administration in 2002 and his subsequent appointment as Deed Administrator in 2003. Mr Wily also made observations on some of the findings contained in the Holding Redlich Report.
77. As a result of these procedural developments, the Authority now has before it over **14,000** pages of evidence or other material from the parties.
78. The Authority gave further consideration to the Grounds of Complaint at a special meeting to further consider the Complaint on 10 August 2015 and again at its ordinary monthly meeting on 26 August 2015.
79. This letter notifies the Authority's findings on the Grounds of Complaint as they are pressed in the Complainant's Revised Position Statement.
80. Noting that the Complainant has declined to articulate how the evidence or analysis provided by the Holding Redlich Report advances any of the matters specified in the Grounds of this Complaint, the Authority does not propose to refer to the Holding Redlich Report as evidence in relation to the matters now before it.
81. The Authority notes that a separate complaint has been made to the Independent Commission Against Corruption with regard to certain dealings with respect to the Club’s property and it is appropriate for that complaint to take its course in that forum.
82. As for the “new evidence” that the Ex-Officers claim accompanied the Revised Position Statement of 17 June 2015, the Authority will have regard to the OLGR evidence as to its analysis of the Club’s membership records. This material was provided in reply to the Club making an issue of its membership records during the Conference. It was entirely legitimate for the Complainant to deal with that new material presented by the Club and the parties have been offered an opportunity to make submissions in response to the OLGR analysis of those membership records. Those submissions in reply have been taken into account by the Authority.
83. As it happens, the “new evidence” provided by the Complainant on the Club’s membership records does little to advance the issues pleaded in the Complaint with regard to Club membership. The Complainant’s further submissions on the role of

Mr Wily concern matters to which the Club, the Ex-Officers, Mr Kirk and Mr Wily have had an ample opportunity to respond.

## CONTEXT

84. In the Club's submissions dated 17 May 2015, the Club submits that upon its incorporation in 1955 the Club met, and continues to meet, the definition of a club as defined by Dixon J in *Bennett v Cooper* (1948) 76 CLR 570, [579], as follows:

*"Club" is a word possessing a very wide and flexible meaning. But the enactment is dealing with the sale of liquor on club premises and we can put aside the application of the word to bodies of people who are associated together for purposes to which the occupation of premises is not indispensable, as for instance a walking club, a dining club, an athletic club and clubs for particular games or exercises. Among the meanings of the word given in the Oxford English Dictionary there is one, the fifteenth, which amounts to a careful definition of that class of club which, as I imagine, the statute has in view. It is as follows – an association of persons (admittance into which is usually guarded by ballot) formed mainly for social purposes and having a building (or part of one) appropriated to the exclusive use of the members and always open to them as a place of resort or in some cases of temporary residence – the Club may be political, literary, military and c., according to the aims and occupations of its members, but its main feature is to provide a place of resort for social intercourse and entertainment.*

85. Whether or not this Club has continued to meet the statutory requirements of a "*bona fide*" registered club during the relevant period at issue in this Complaint is a matter that is dealt with below, specifically with regard to the discussion on Ground 8 of the Complaint.
86. The Authority notes that New South Wales licensing law confers substantial benefits upon *registered* clubs that are not available to most other private businesses. They include the ability to hold a club liquor licence which, for those clubs whose licences were granted prior to the commencement of section 11A of the Act, may enable a club to sell or supply liquor for consumption on the premises without restriction as to time of day.
87. Importantly, registered clubs, along with only hotel licensed premises and The Star Casino, may lawfully keep gaming machines. They have the capacity to derive significant amounts of revenue. Like hotels, clubs may also provide other gambling services on the premises, such as TAB and Keno.
88. In policy terms, the *quid pro quo* for registered clubs enjoying these substantial liquor and gaming related privileges is that the revenue derived by registered clubs is expected to serve the *bona fide* purposes of that club. Unlike other hospitality industry businesses, the statutory requirements of section 10(1) and other provisions of the Act and *Registered Clubs Regulation 2015* must be observed.
89. [The Authority notes that the *Registered Clubs Regulation 2009* was repealed on 1 September 2015 and replaced by the *Registered Clubs Regulation 2015*. For the purposes of this letter, all references to the "*Registered Clubs Regulation*" refer to the (now repealed) *Registered Clubs Regulation 2009* (**Regulation**).]
90. Clubs are mutual organisations and unlike private companies, their members are not to derive, directly or indirectly, any profit, benefit or advantage from the club that

is not offered equally to every full member of the club (per section 10(1)(j) of the Act).

91. There are numerous other accountability measures imposed upon the governing body, executives and staff of registered clubs. For example, section 10(1)(k) of the Act provides that the secretary, manager, employees or members of a club governing body are not to derive, directly or indirectly, any payment calculated by reference to the quantity of liquor purchased, sold or supplied or the keeping or operation of gaming machines on the club premises.
92. Parts 4 and 4A of the Act provide additional layers of accountability controls designed to regulate the management of registered clubs and deal with conflicts of interest affecting club governing bodies, secretaries and staff. These additional statutory controls operate in addition to the duties arising under statute and general law in relation to the management of other types of liquor and gaming businesses.
93. Registered clubs are supposed to be not-for-profit organisations. Most registered clubs take the form of companies limited by guarantee and are thus prohibited from paying dividends to their members, pursuant to section 254SA of the *Corporations Act 2001*.
94. If a registered club falls under the control of private or external interests, there arises a real question as to whether that club remains a *bona fide* club within the meaning of section 10(1)(e) of the Act as distinct from just another private enterprise serving private commercial purposes.

#### **The Club's Extended Period of Administration**

95. Relevantly to this Complaint, the Club spent an extended period in external administration from September 2002 to May 2012, involving the appointment of Mr Andrew Wily, a practitioner from the insolvency practice *ArmstrongWily* to various external administrator positions on three occasions.
96. In its submission dated 17 May 2015, the Club sets out its account of the circumstances that led to the Club entering into voluntary administration during 2002.
97. The Club submits that by 1999, the Club's membership had fallen to between 30 and 40 full members and about 40 social members, with just one paid employee.
98. According to the Club, in September 1999 the Club entered into a marketing and catering arrangement with a company called Sports Marketing Pty Ltd (**SMPL**), of which Messrs Bruce Malouf and Pat Garvey were the directors. The Club saw this marketing and catering arrangement as a means of "saving the Club from extinction" at that time, by solving its financial and membership difficulties.
99. Significant renovations were undertaken by SMPL to the Club premises in order to implement SMPL's restaurant/entertainment model. However, by early 2000, it was "evident" that SMPL's business model had "failed", due to the Club "being poorly managed" by that entity.

100. The Club further submits that Mr Brian Guest, who was appointed by OLGR to conduct a commission of inquiry into the Club during 2007 pursuant to the (then) section 41X of the Act, has found that, in 1999, the Club was “struggling financially”.
101. The Club notes that in February 2002, the Club was deregistered by ASIC for failure to lodge returns and because of an “irregularity in the appointment of the Club’s auditor”. At that point, the Club’s directors “lost their statutory powers” and the Club’s assets vested in ASIC.
102. The Club submits that as a means of obtaining re-registration, a Club director, Mr Rodney Moon, applied to the Supreme Court of NSW to have Mr Andrew Wily of the insolvency firm *ArmstrongWily* appointed as the Receiver and Manager of the Club.
103. The Authority notes that this appointment is recorded in Complainant Exhibit E166 of the Brief of Evidence, being the *Short Minutes of Order of the Supreme Court of New South Wales in the Matter of Paddington Bowling Club Ltd* dated 20 September 2002 indicating Mr Wily’s appointment as Receiver and Manager of the Club effective as of 19 September 2002.
104. Shortly thereafter, the Australian Taxation Office (**ATO**) informed the directors of the Club of the unpaid group tax liability and advised that the directors would be personally liable for payment of a liability exceeding \$80,000.
105. The Club submits that on 24 October 2002, Mr Wily was appointed as voluntary administrator by the Club Board when it resolved to place the Club in voluntary administration pursuant to section 436A of the *Corporations Act 2001*. That period of voluntary administration continued until 24 March 2003.
106. As will be discussed in Ground 24 below, section 41(1) of the (then) Act required that insolvency practitioners acting in certain specified capacities (including an administrator, receiver and manager, member of a committee of management, or liquidator) in respect of a registered club be either *appointed* by the NSW Supreme Court or, if not appointed by the Court, that such appointment be *approved* by the (then) NSW Licensing Court. The Complainant alleges that no such approval of Mr Wily’s purported appointment by the Board as voluntary administrator on 24 October 2002 was ever obtained from the Licensing Court.
107. On the Club’s account of events, SMPL claimed that the monies it had expended on renovations of the Club’s clubhouse, working capital and other costs, should be “regarded as a loan made to the Club” and therefore repayable to SMPL by the Club.
108. At the first creditors’ meeting held after Mr Wily was appointed as Administrator, SMPL, which by then had been renamed B-52 Pty Ltd (**B-52**), lodged a “proof of debt” for \$1.6 million.
109. The Club contends that its directors disputed the amount of the debt claimed by B-52 Pty Ltd. According to the Club, Mr Wily then negotiated with Mr Michael Sanchez (being a person who was known to Mr Wily) a proposal to convert the Club’s lease in perpetuity into a freehold and then sell the freehold to Mr Sanchez.
110. On 11 February 2003, Mr Wily recommended to creditors that they enter into a deed of company arrangement. This arrangement would enable the proceeds of sale of

the Club land to be distributed to the Club's creditors in "full satisfaction of the Club's debts". The Club submits that, if successful, this arrangement would have resulted in a distribution of 30 cents in the dollar to the Club's creditors and the closure of the Club.

111. According to the Club, B-52 then assigned its debt to a company controlled by Mr Sanchez, Woollahra Gardens Pty Ltd (**Woollahra Gardens**) in March 2003, in consideration for a further payment to be made when the leasehold was converted to a freehold.
112. The Club submits that, in response to Mr Wily's request to be indemnified for the costs of the administration, Mr Sanchez agreed to provide such an indemnity, on the condition that he had an involvement in the conduct of the Club's management team.
113. This resulted in the appointment of the following individuals to the following roles:
  - (i) Mr Sanchez's son-in-law, Marcus Levy, to the position of Secretary/Manager of the Club. At the same time, a management agreement was entered into between the Administrator, Mr Wily (who was exercising the powers of the Club Board pursuant to the *Corporations Act*) and Marcus Levy's management company, ML Management (NSW) Pty Ltd; and
  - (ii) Mr Sanchez's daughter, Vanessa Sanchez-Levy, for the provision of promotional and marketing services. An agreement was subsequently entered into with Ms Sanchez-Levy's company, VS Management Pty Ltd.
114. According to the Club's submissions dated 17 May 2015, the Club states (and it is not in dispute) that on 24 March 2003, the Club entered into a Deed of Company Arrangement (**DOCA**) between the Club, B-52 Pty Ltd and Woollahra Gardens Pty Ltd. The parties to the DOCA appointed Mr Andrew Wily as the administrator of the DOCA (**Deed Administrator**).
115. A copy of the DOCA was provided to the Authority in the OLGR Brief of Evidence (Complainant Exhibit E167, Document 7). While the DOCA was executed by the parties on 24 March 2003, the Authority notes that the provisions of the DOCA state that the DOCA commences effect on "the day the Deed is signed or 3 March 2003, whichever is sooner".
116. The Authority notes that the commencement of the DOCA had the effect of restoring the role of the Club's Board of directors, but their powers were thereafter structured by the terms of the DOCA, in that they could not take action that was inconsistent with the terms of the DOCA.
117. On 10 December 2010, the Club entered into an Amended Deed of Company Arrangement (**ADOCA**) between the Club, B-52 Pty Ltd and Paddington Bowling and Sporting Club Pty Ltd [which the Authority notes was formerly known as Woollahra Gardens Pty Ltd]. The parties to the ADOCA appointed Mr Andrew Wily as the administrator of the ADOCA. A copy of the ADOCA was provided to the Authority in the OLGR Brief of Evidence (Complainant Exhibit E165).

#### **External Administration under the *Corporations Act 2001***

118. The Club is a company limited by guarantee. Briefly, and by way of background, the Authority notes the following provisions of the *Corporations Act 2001* (**Corps Act**) which concern the role and powers of an administrator when a company is in voluntary administration, as at 24 October 2002 (the date upon which the Club Board resolved to place the Club under voluntary administration).
119. Section 9 of the Corps Act (as at 24 October 2002) defined an “administrator” as follows:
- (a) *in relation to a body corporate but not in relation to a deed of company arrangement:*
    - (i) *means an administrator of the body or entity appointed under Part 5.3A; and*
    - (ii) *has a meaning affected by section 1381; and*
    - (iii) *if 2 or more persons are appointed under that Part as administrators of the body or entity – has a meaning affected by paragraph 451A(2)(b); or*
  - (b) *in relation to a deed of company arrangement:*
    - (i) *means an administrator of the deed appointed under Part 5.3A; and*
    - (ii) *if 2 or more persons are appointed under that Part as administrators of the deed – has a meaning affected by paragraph 451B(2)(b).*
120. Section 90 of the Corps Act (as at 24 October 2002) defined “receivers and managers” in that “a receiver of property of a body corporate is also a manager if the receiver manages, or has under the terms of the receiver’s appointment power to manage, affairs of the body”.
121. Section 435C of the Corps Act (as at 24 October 2002) made provision for when a period of administration begins and ends, in that the administration of a company begins when an administrator of the company is appointed under section 436A, 436B or 436C and ends on the happening of whichever event of a kind referred to in subsection (2) or (3) happens first after the administration begins.
122. Relevantly, subsection 435C(2)(a) of the Corps Act (as at 24 October 2002) provided that the administration of a company ends when a deed of company arrangement is executed by both the company and the deed’s administrator.
123. Section 436A of the Corps Act (as at 24 October 2002) provided that a company may appoint an administrator if its board thinks it is or will become insolvent, in that a company may, by writing, appoint an administrator of the company if the board has resolved to the effect that (a) in the opinion of the directors voting for the resolution, the company is insolvent, or is likely to become insolvent at some future time; and (b) an administrator of the company should be appointed.
- [The Authority notes that when an administrator is appointed under section 436A, the powers of directors are suspended. However, a deed of company arrangement does not commence effect until the company signs the deed.]
124. Section 436C of the Corps Act (as at 24 October 2002) provided that a chargee may appoint an administrator, in that a person who is entitled to enforce a charge on the whole, or substantially the whole, of a company’s property may by writing appoint an administrator of the company if the charge has become, and is still, enforceable.

- 125.** Division 3 of Part 5.3A of the Corps Act (as at 24 October 2002) provided that an administrator assumes control of the company's affairs. In particular, the Authority notes the following provisions:
- (i) Section 437A(d) provided that while a company is under administration, the administrator may perform any function, and exercise any power, that the company or any of its officers could perform or exercise if the company were not under administration.
  - (ii) Section 437C(1) provided that while a company is under administration, a person (other than the administrator) cannot perform or exercise, and must not purport to perform or exercise, a function or power as an officer or provisional liquidator of the company.
  - (iii) Section 437C(2) provided that subsection 437C(1) does not remove an officer of a company from his or her office.
- 126.** Section 128 of the Corps Act (as at 24 October 2002) provided that certain assumptions may be made including, per section 129(2) of the Act, that anyone who appears, from information provided by the company that is available to the public from ASIC, to be a director or a secretary of the company has been duly appointed and has authority to exercise the powers and perform the duties customarily exercised or performed by a director or secretary of a similar company.
- 127.** Section 439A of the Corps Act (as at 24 October 2002) provided that an administrator of a company under administration must convene a meeting of the company's creditors within the convening period as fixed by subsection (5) or extended under subsection (6) for the purpose of informing creditors as to certain matters. The administrator must give written notice of the meeting to as many of the company's creditors as reasonably practicable. This written notice must be accompanied by a report by the administrator about the company's business, property, affairs and financial circumstances. The written notice must also be accompanied by a statement setting out the administrator's opinion about whether it would be in the creditors' interests (i) for the company to execute a deed of company arrangement; (ii) for the administration to end; or (iii) for the company to be wound up. The administrator's statement must provide his or her reasons for those opinions and, if a deed of company arrangement is proposed, a statement setting out details of the proposed deed must also be provided.
- 128.** Section 439C of the Corps Act (as at 24 October 2002) provided for certain matters that creditors may decide at a creditors' meeting, in that at a meeting convened under section 439A, the creditors of a company may resolve (a) that the company execute a deed of company arrangement specified in the resolution (even if it differs from the proposed deed (if any), details of which accompanied the notice of meeting); or (b) that the administration should end; or (c) that the company be wound up.
- 129.** Section 444A of the Corps Act (as at 24 October 2002) provided for the effect of resolutions passed at a creditors' meeting, in that where, at a meeting convened under section 439A, a company's creditors resolve that the company execute a deed of company arrangement, the administrator of the company is to be the administrator of the deed, unless the creditors, by resolution at the meeting, appoint someone else to be administrator of the deed. This section also states that an

administrator must prepare an instrument setting out the terms of the deed and a number of specific matters as outlined in subsection (4).

130. Section 444B(3) of the Corps Act (as at 24 October 2002) provided that the board of a company under administration may, by resolution, authorise an instrument prepared under section 444A of the Corps Act to be executed by or on behalf of the company. [The Authority notes that if the board of a company can approve the execution of a deed of company arrangement, then the board continues to exist and is able to validly exercise that function.]
131. Section 444C(1) of the Corps Act (as at 24 October 2002) provided that certain persons shall not act inconsistently with a deed before its execution, in that where, at a meeting convened under section 439A, a company's creditors resolve that the company execute a deed of company arrangement, this section applies until the deed is executed by both the company and the deed's administrator; or the period within which subsection 444B(2) requires the company to execute the deed ends, whichever happens sooner.
132. Section 444C(2) of the Corps Act (as at 24 October 2002) provided that in so far as a person would be bound by the deed if it had already been so executed, the person must not do anything inconsistent with the deed, except with the leave of the Court; and is subject to section 444E of the *Corporations Act*.
133. Section 444E of the Corps Act (as at 24 October 2002) provided for protection of a company's property from persons bound by a deed of company arrangement in that until a deed of company arrangement terminates, this section applies to a person bound by the deed. Subsection (2) states that the person cannot make an application for an order to wind up the company; or proceed with such an application made before the deed became binding on the person. Subsection (3) states that the person cannot begin or proceed with a proceeding against the company or in relation to any of its property; or begin or proceed with enforcement process in relation to property of the company except with the leave of the Court and in accordance with such terms (if any) as the Court imposes.
134. Section 444G of the Corps Act (as at 24 October 2002) provided that a deed of company arrangement binds the company, its officers and members and the deed's administrator.
135. Section 445F of the Corps Act (as at 24 October 2002) provided that an administrator of a deed of company arrangement may at any time convene a meeting of a company's creditors to consider a proposed variation or termination of the deed, and sets out a number of requirements in relation to the notice that must be provided to creditors.

#### **Reform of the *Registered Clubs Act 1976***

136. The Authority notes that the extended period of time spent by this Club under external administration largely preceded the amendment of section 10(2) of the Act by the *Clubs, Liquor and Gaming Machines Legislation Amendment Act 2011*, which commenced effect on 28 November 2011.
137. As a result of that amendment, section 10(2) now provides:



(2) *For the purposes of determining whether a club is being conducted in good faith as a club, as required by subsection (1)(a), regard is to be had to the following:*

- (a) *the nature of the premises of the club,*
- (b) *whether the club has been under administration for an extended period of time (whether as an externally-administered body corporate, within the meaning of the Corporations Act 2001 of the Commonwealth, or otherwise),*
- (c) *whether any arrangements relating to the club have resulted in another person or body assuming the effective control of the club and its business,*
- (d) *such other matters as may be prescribed by the regulations.*

**138.** Under the current law, any registered club that spends an extended period of time under external administration faces the real prospect of disciplinary action being taken against that Club on the basis of non-compliance with section 10(2)(b).

**139.** Notwithstanding the Club's submissions as to the circumstances that preceded the Club's entry into administration in 2002, and accepting that the Club's financial fortunes were in decline at the time that the Club first entered into administration in 2002, the Authority notes with interest that the Club spent around ten years in external administration, yet was promptly able to emerge from administration very shortly after the new section 10(2)(b) commenced operation.

**140.** The Authority makes the general observation that had this Club taken action to emerge from external administration much sooner than it did (or alternatively, wind up operations if it was no longer profitable) then the Club and its officers would likely have avoided the regulatory scrutiny that gave rise to the making of this Complaint.

#### **Role of the Authority in a Complaint under Part 6A of the *Registered Clubs Act 1976***

**141.** Whatever public policy concerns may arise from the extended period of time spent by this Club in external administration, the Authority is largely in the hands of a complainant when considering a complaint made under Part 6A of the Act.

**142.** The Authority is not an "ombudsman" with a roving brief to explore all issues of alleged maladministration that may arise in relation to the conduct of a registered club.

**143.** A disciplinary complaint may only be framed on the basis of those grounds available under Part 6A (or alternatively the grounds available under Part 9 of the *Liquor Act 2007*). The Authority does not have a broad discretion to second guess the merits of a registered club's commercial decision making or the quality of its management. Its role is to determine whether the grounds pleaded are established and if so, what disciplinary action should be taken.

**144.** While the Authority has certain inquisitorial powers and scope to obtain evidence or other material of its own motion, the Authority's findings on a disciplinary complaint will be shaped by the grounds available under the Act and specified by the complaint in question and the evidence, material and submissions before the Authority in relation to those grounds.

**145.** The statutory grounds of complaint that are potentially available to agitate under Part 6A of the Act focus upon contraventions of the Act or Regulation, or contraventions of licence conditions and the fitness and propriety of persons who

occupy or formerly occupied certain regulated roles – club secretaries and members of governing bodies.

- 146. The Authority must take care when fact finding in the context of a disciplinary complaint. Disciplinary complaints are civil matters, and findings are made to the civil standard of proof.
- 147. However, in accordance with the principle enunciated by the High Court of Australia in *Briginshaw v Briginshaw* (1938) 60 CLR 336, the seriousness of the allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are matters that are relevant to deciding whether an allegation has been proved on the balance of probabilities.

## **FINDINGS ON GROUNDS OF COMPLAINT**

- 148. Each Ground of Complaint and the Particulars alleged by the Complainant in support of each Ground, are set out in italics below. A summary of the position taken by the Club, the Ex-Officers, Mr Kirk and Mr Wily and the Authority's findings follow in plain text beneath each Ground.
- 149. Unless specified to the contrary, the Grounds agitated by the Complainant are as set out in the Complainant's Revised Position Statement dated 17 June 2015.
- 150. The Club's position in response to Grounds 1 to 24 of the Complaint is primarily set out in written submissions from *Hatzis Cusack Lawyers* dated 17 May 2015.
- 151. The Club did not elect to make submissions in response to Grounds 25 to 33 which concern the fitness and propriety of the individual Ex-Officers, Mr Kirk and Mr Wily.
- 152. The Ex-Officers' position is primarily set out in the written submissions from *Lee and Lyons* dated 29 May 2015 and supplemented by two post-Conference submissions dated 19 June and 17 July 2015.
- 153. Mr Kirk's position is primarily set out in a written submission from *Mitchell Lawyers* dated 29 May 2015 and supplemented by a post-Conference submission dated 17 July 2015.
- 154. Mr Wily's position is primarily set out in a written submission from *ArmstrongWily* dated 26 March 2015, but supplemented by two post-Conference submissions dated 17 and 20 July 2015. Mr Wily's submission dated 17 July 2015 addresses certain aspects of the Holding Redlich Report, while his submission dated 20 July 2015 addresses the Revised Position Statement and further evidence provided by the Complainant to the Authority on 17 June 2015.
- 155. The Authority also has before it a transcript of the Conference convened in Sydney on 1 June 2015, where the parties (other than Mr Wily, who did not attend) made certain oral submissions largely in alignment with their written submissions.

## **GROUND 1**

- 156. Ground 1 states:

**Section 57F(3)(a) – The Club failed to meet the requirements of section 10(1)(d) of the Act.**

*Between 31 May 2004 and 30 June 2010, and since 30 July 2014 the Club failed to meet the requirements of section 10(1)(d) of the Act when it failed to maintain the minimum number of ordinary members prescribed by section 12 of the Act.*

- 157.** Particular 1.1 of Ground 1 alleges as follows:

*The Club is located at Quarry Street, Paddington NSW 2021.*

- 158.** Particular 1.2 of Ground 1 alleges as follows:

*It is situated within 24 kilometres of the General Post Office in Sydney.*

- 159.** Particular 1.3 of Ground 1 alleges as follows:

*No application has been made to the Independent Liquor and Gaming Authority (the Authority) for approval of a minimum number of ordinary members less than 200.*

- 160.** Particular 1.4 of Ground 1 alleges as follows:

*Between 31 May 2004 and 30 June 2010, and since 30 July 2014 the Club's membership was less than 200 members.*

- (a) On 31 May 2004 the Club consisted of 91 ordinary members.*
- (b) On 31 May 2005 the Club consisted of 100 ordinary members.*
- (c) On 31 May 2006 the Club consisted of 97 ordinary members.*
- (d) On 30 June 2007 the Club consisted of 69 ordinary members.*
- (e) On 30 June 2008 the Club consisted of 65 ordinary members.*
- (f) On 30 June 2009 the Club consisted of 53 ordinary members.*
- (g) On 30 June 2010 the Club consisted of 43 ordinary members.*
- (h) On 30 July 2014 the Club had 92 ordinary members.*
- (i) On 11 September 2014 the Club's Membership Register recorded 121 ordinary members.*

- 161.** Particular 1.5 of Ground 1 alleges as follows:

*At all times since 28 August 2003 the governing body of the Club knew, or ought to have known, that the Act required the Club to have a minimum number of 200 ordinary members and were aware, or were recklessly indifferent, to the fact that the Club did not have the requisite number of members.*

- (a) The Act sets out the minimum number of members required.*
  - (b) Mr Kirk had actual knowledge of the requirement to have a minimum number of members.*
  - (c) Messrs Roper, Ashton Snr and Ashton Jnr recently became aware of the requirement to have a minimum number of members.*
  - (d) Annual financial statements recorded the number of members.*
  - (e) Annual financial statements were tabled at Annual General Meetings (AGM).*
  - (f) During the period of administration, a "moratorium on accepting full membership" was imposed and the Club permitted its membership to decline.*
- (1) Between 19 September 2002 and 18 May 2012 the Club was under a form of external administration.*

- (2) *A moratorium on the acceptance of new ordinary members was in place during this period by the governing body of the Club.*
  - (3) *Between October 2003 and May 2007 there are 15 applicants recorded in the minutes as being approved for membership by a meeting of the governing body of the Club.*
  - (4) *Between June 2007 and June 2008 there are no records evidencing the governing body of the Club approved any applicant for membership of the Club.*
  - (5) *Between July 2008 and May 2012 there are 21 applicants recorded in the minutes as being approved for membership by a meeting of the governing body of the Club.*
  - (6) *The acceptance of Mr McKew as a member of the Club during the "moratorium" was not in accordance with the Articles of Association of the Club.*
- 
- (A) *Mr McKew of Rooty Hill NSW made an application for membership signed 28 March 2012.*
  - (B) *Mr McKew of Rooty Hill NSW was known to most directors of the Club at 28 March 2012 and expressed desire to join the Club and be nominated as a director.*
  - (C) *The members of the governing body accepted Mr McKew as a member of the Club on 28 March 2012.*
  - (D) *Article 12(a) of the Articles of Association of the Club required membership to be proposed and seconded by a full member of the Club.*
  - (E) *Article 12(c) of the Articles of Association of the Club required that the nomination be posted on the Notice Board and remain posted for at least 7 days prior to the date of the meeting of the Board at which the application was considered.*
  - (F) *Article 12(d) of the Articles of Association of the Club required that an interval of at least 14 days must elapse between the date of application and date of election of a candidate to membership.*
- 
- (g) *The "moratorium on accepting full membership" continued after the administration ceased.*
- 
- (1) *On 18 May 2012 the Club ceased to be under Administration.*
  - (2) *On 10 November 2012 the members of the governing body of the Club determined the moratorium would be lifted.*

**162.** The Authority notes that, as stated in the Complainant's Revised Position Statement dated 17 June 2015, Ground 1 is no longer pressed in relation to Mr McKew.

### **Club's Response to Ground 1**

- 163.** In its submission dated 17 May 2015, the Club contends that the average number of members in inner Sydney bowling clubs is typically fewer than 150. The Club submits that the "historical deficiency" in the number of members at this Club should have "little bearing" on whether disciplinary action is taken now in response to the Complaint currently before the Authority – as the Club had lacked the requisite number of members "at least as early as 1999" (as established by Mr Guest in the 41X Inquiry).
- 164.** The Club argues that the fact that the membership of a registered club falls below the statutory minimum required number of members does not "of itself" establish that the club is no longer being conducted as a "*bona fide*" bowls club.

- 165.** In response to Particular 1.5(f) of the Complaint, the Club refers to *Bennett v Cooper* (1948) 76 CLR 570 and submits that there is “nothing objectionable” in a club refusing to admit new members.
- 166.** The Club submits that it is “perfectly understandable” that the officers of the Club would not admit new members “in the face of such uncertainty”, given that the Club was under administration for an extended period of time and was the subject of the 41X Inquiry.
- 167.** The Club notes that “during the period of administration” (without specifying the date or who instigated it), the Club instituted a moratorium on admitting new members due to the “uncertainty” surrounding the administration.
- 168.** The Club submits that after the period of administration ended in May 2012, the moratorium on membership was lifted by the Club directors on 10 November 2012 and a “membership drive” was instituted by the Club.
- 169.** The Club submits that at this point it ceased the former practice of allowing people to join as “social members” and has encouraged people to join as full members.
- 170.** The Club contends that as at 17 May 2015, there were “greater than 2,000 full members” and that this figure is “likely to rise” given the popularity of corporate and/or social (barefoot) bowls.

#### **Ex-Officers’ Response to Ground 1**

- 171.** The Ex-Officers adopt the entirety of the Club’s submission dated 17 May 2015 in respect of Ground 1 of the Complaint.

#### **Kirk’s Response to Ground 1**

- 172.** In his submission dated 29 May 2015, Mr Kirk contends that he did not have “actual knowledge” of the matters alleged in Ground 1 of the Complaint, and that, during administration, the function of managing the Club was delegated to Mr Marcus Levy’s company, ML Management NSW (**MLM**) by Mr Wily, who was the Receiver Manager/Deed Administrator of the Club at the time.
- 173.** Mr Kirk submits that he was responsible for the motion that the moratorium on membership be lifted after administration.
- 174.** Mr Kirk submits that he retired from being a member of the governing body of the Club on 2 April 2014 and that he was not privy to any information regarding Club membership numbers on 30 July 2014, as alleged by Particular 1.4(h) of the Complaint.

#### **Wily’s Response to Ground 1**

- 175.** Mr Wily did not make any specific submissions in response to Ground 1 of the Complaint.

#### **Authority Findings on Ground 1**

- 176.** Section 10(1)(d) of the Act states as follows:

*The membership of the club shall consist of or include not less than such number of ordinary members as is prescribed in respect of it by section 12.*

**177.** Section 12 of the Act states as follows:

**12 Calculation of minimum number of ordinary members**

*For the purposes of section 10(1)(d), the number of ordinary members prescribed in respect of a club:*

- (a) whose premises are situated within a radius of 24 kilometres from the General Post Office in Sydney is:*
  - (i) in a case where a certificate of registration under the Liquor Act 1912 in respect of the club was in force immediately before the commencement of the Liquor (Amendment) Act 1954 -sixty, or*
  - (ii) in any other case-200 or such lesser number, not being less than 60, as the Authority may in special circumstances determine in respect of the club, or*
- (b) whose premises are situated elsewhere, is:*
  - (i) in a case where a certificate of registration under the Liquor Act 1912 was in force immediately before the commencement of the Liquor (Amendment) Act 1954-thirty, or*
  - (ii) in any other case-100 or such lesser number, not being less than 30, as the Authority may in special circumstances determine in respect of the club.*

**178.** The Authority is satisfied, as contended in Particular 1.1 of the Complaint, that the Club is located at Quarry Street, Paddington NSW 2021. The location of the Club is not in dispute.

**179.** The Authority is satisfied, as contended in Particular 1.2 of the Complaint, that the Club is situated within 24 kilometres of the General Post Office in Sydney. The location of the Club is not in dispute.

**180.** Particular 1.3 of the Complaint alleges that no application has been made to the Authority for approval of a minimum number of ordinary members that is fewer than 200 required by the legislation. The Authority is satisfied that Particular 1.3 of the Complaint is established on the basis of page 12 of the statement by OLGR Inspector Karen McCluskey dated 28 November 2014.

**181.** Particular 1.4 of the Complaint alleges that between 31 May 2004 and 30 June 2010, and since 30 July 2014 the Club's membership was fewer than the statutory minimum of 200 members.

**182.** The Authority rejects the Club's submission that this compliance failure should be characterised as an "historical deficiency". The non-compliance with minimum membership requirements required by the Act continued over a prolonged period of time, including in recent years.

**183.** The Authority considers that the Club's contention that the "average number of members in inner Sydney bowling clubs" is typically fewer than 150, does not assist the Authority in determining whether or not *this* Club complied with the Act in this respect.

- 184.** The Authority is satisfied that Particular 1.4 is established on the following bases:
- 185.** Particular 1.4(a) is established on the basis of the Notes to and Forming Part of the Financial Statements as contained in the Club's Financial Statements for the year ended 31 May 2004 (Complainant Exhibit E167, Document 191).
- 186.** Particular 1.4(b) is established on the basis of the Notes to and Forming Part of the Financial Statements as contained in the Club's Financial Statements as at 31 May 2005 (Complainant Exhibit E167, Document 192).
- 187.** Particular 1.4(c) is established on the basis of the Notes to and Forming Part of the Financial Statements as contained in the Club's Financial Report for the year ended 31 May 2006 (Complainant Exhibit E167, Document 193).
- 188.** Particular 1.4(d) is established on the basis of the Notes to and Forming Part of the Financial Statements as contained in the Club's Financial Report for the period ended 30 June 2007 (Complainant Exhibit E167, Document 194).
- 189.** Particular 1.4(e) is established on the basis of the Notes to and Forming Part of the Financial Statements as contained in the Club's Financial Report for the year ended 30 June 2009 (Complainant Exhibit E063).
- 190.** Particular 1.4(f) is established on the basis of the Notes to and Forming Part of the Financial Statements as contained in the Club's Financial Report for the year ended 30 June 2009 (Complainant Exhibit E063).
- 191.** Particular 1.4(g) is established on the basis of the Notes to and Forming Part of the Financial Statements as contained in the Club's Financial Report for the year ended 30 June 2010 (Complainant Exhibit E064).
- 192.** Particular 1.4(h) is established on the basis of an email from the Club Secretary, Robert Ashton Jnr to Christian Sanchez and Vanessa Sanchez-Levy dated 30 July 2014, indicating that as of that date, the Club had 88 current members and 4 life members (Complainant Exhibit E146).
- 193.** Particular 1.4(i) is established on the basis of the *Paddington Bowling Club Full Members Register* as of 11 September 2014, as provided by the Complainant (Complainant Exhibits E056 and E057).
- 194.** Particular 1.5 alleges that at all times since 28 August 2003 the governing body of the Club knew, or ought to have known, that the Act required the Club to have a minimum number of 200 ordinary members and were aware, or were recklessly indifferent, to the fact that the Club did not have the requisite number of members.
- 195.** The Authority accepts, as stated in Particular 1.5(a) of the Complaint, that sections 10(1)(d) and 12 of the Act set out the minimum number of members required.
- 196.** The Authority is satisfied, as alleged by Particular 1.5(b), that Mr Kirk had actual knowledge of the requirement to have a minimum number of members. This Particular is established on the basis of page 81 of the transcript of Mr Kirk's record of interview with OLGR inspectors dated 26 June 2014 (Complainant Exhibit E137), where Mr Kirk states that "I am aware of [the required minimum of 200 members]...that is very much why I was very keen to grow members".

- 197.** The Authority does not accept Mr Kirk's submission that the "function of managing the Club was delegated to MLM by Mr Wily" while the Club was under administration as an adequate response to this Ground. When the DOCA was executed on 24 March 2003, the powers and obligations of the officers of the Club were restored and the fact that the Deed was ultimately administered by Mr Wily does not, in any event, excuse Mr Kirk's absence of knowledge of the legislative requirements to which the Club was subject.
- 198.** The Authority is satisfied, as alleged by Particular 1.5(c), that Messrs Roper, Ashton Snr and Ashton Jnr only recently became aware of the statutory requirement to have a minimum number of members. This Particular is established on the basis of the statements made by Michael Roper at page 24 of the transcript of his record of interview with OLGR inspectors dated 20 June 2014 (Complainant Exhibit E138); the statements made by Robert Ashton Jnr at page 16 of the transcript of his record of interview with OLGR inspectors dated 23 May 2014 (Complainant Exhibit E136) and the statements made by Robert Ashton Snr at page 43 of the transcript of his record of interview with OLGR inspectors dated 30 October 2014 (Complainant Exhibit E180). Mr Ashton Jnr stated in his record of interview that the governing body of the Club became aware of the statutory requirement to have a minimum number of members "only a couple of months ago... as a result of the investigation that's going on".
- 199.** The Authority is satisfied, as alleged by Particular 1.5(d), that annual financial statements for the Club recorded the number of Club members. This Particular is established on the basis of the Notes to and Forming Part of the Financial Statements for the year ended 30 June 2009 recording that there were 53 members as at that date (Complainant Exhibit E167, Document 30); the Club Financial Statements dated 30 June 2010 recording that there were 43 members as at that date (Complainant Exhibit E167, Document 31); the Club Financial Statements for the year ended 31 May 2004 recording that there were 91 members as at that date (Complainant Exhibit E167, Document 191); the Club Financial Statements as at 31 May 2005 recording that there were 100 members as at that date (Complainant Exhibit E167, Document 192); the Club Financial Report for the year ended 31 May 2006 recording that there were 97 members as at that date (Complainant Exhibit E167, Document 193) and the Club Financial Report for the period ended 30 June 2007 recording that there were 69 members as at that date (Complainant Exhibit E167, Document 194).
- 200.** The Authority is satisfied, as alleged by Particular 1.5(e), that annual financial statements were tabled at the Club's Annual General Meetings. This Particular is established on the basis of the minutes for the Club's 2008 AGM (Complainant Exhibit E058); the minutes for the Club's 2011 AGM (Complainant Exhibit E059) and the minutes for the Club's 2006 AGM (Complainant Exhibit E099).
- 201.** Particular 1.5(f) alleges that during the period of administration, a "moratorium on accepting full membership" was imposed and the Club permitted its membership to decline.
- 202.** In response to this Particular, the Club submits that there is "nothing objectionable" in a club refusing to admit new members and that it is "perfectly understandable" that the officers of the Club would not admit new members "in the face of such



uncertainty”, given that the Club was under administration for an extended period of time and was the subject of the 41X Inquiry.

- 203.** The Authority notes and accepts the Club’s submission that after the period of administration ended in May 2012, the moratorium on membership was lifted by the Club directors on 10 November 2012 and that a “membership drive” was instituted by the Club, which at this point ceased the former practice of allowing people to join as “social members” and encouraged people to join as full members.
- 204.** Additionally, the Authority notes and accepts Mr Kirk’s submission that he was “responsible” for the motion that the moratorium on membership be lifted after administration and that, according to the Club, there were “greater than 2,000 full members” of the Club as at 17 May 2015.
- 205.** Nevertheless, the Authority is satisfied that the Club imposed a moratorium on new members and permitted its membership to decline *during the period of administration*. Particular 1.5(f) is established on the following bases:
- 206.** Particular 1.5(f)(1) is established on the basis of the ASIC extract for the Club dated 2 December 2014 (Complainant Exhibit E094).
- 207.** Particular 1.5(f)(2) is established on the basis of the statements made by Robert Ashton Snr at page 49 of the transcript of his record of interview with OLGR inspectors dated 30 October 2014 (Complainant Exhibit E180); the Club Board meeting minutes dated 29 February 2012 (Complainant Exhibit E025) and the Club Board meeting minutes dated 26 April 2012 (Complainant Exhibit E027).
- 208.** Particular 1.5(f)(3) is established on the basis of the Club Board meeting minutes for September 2003 to December 2003 (Complainant Exhibit E201); the Club Board meeting minutes for January to December 2004 (Complainant Exhibit E202); the Club Board meeting minutes for January to December 2005 (Complainant Exhibit E203); the Club Board meeting minutes for January to December 2006 (Complainant Exhibit E204) and the Club Board meeting minutes for January 2007 to May 2007 (Complainant Exhibit E205).
- 209.** Particular 1.5(f)(4) is established on the basis of the Club Board meeting minutes for January 2007 to May 2007 (Complainant Exhibit E205); the Club Board meeting minutes for July and August 2007 and January, February, April and May 2008 (Complainant Exhibit E237); the email from Robert Ashton Jnr to OLGR inspector Karen McCluskey dated 28 November 2014 (Complainant Exhibit E238) and the Club Board meeting minutes for July, August, September, October and December 2008, and January and February 2009 (Complainant Exhibit E233).
- 210.** Particular 1.5(f)(5) is established on the basis of the Club Board meeting minutes for January, February, July, August and November 2009, February, March, April, May, June, July, September, October and November 2010, January, February, March, May, July, August, September, October and December 2011, and January, February, March, April and May 2012 (Complainant Exhibits E001 through E028).
- 211.** Particular 1.5(f)(6) alleges that the acceptance of Mr McKew as a member of the Club during the “moratorium” was not in accordance with the Articles of Association of the Club. The Authority is satisfied that Particular 1.5(f)(6) is established on the following bases:

212. Particular 1.5(f)(6)(A) is established on the basis of the membership application by Mr Luke McKew signed 28 March 2012 (Complainant Exhibit E095).
213. Particular 1.5(f)(6)(B) is established on the basis of the Club Board meeting minutes for 28 March 2012 (Complainant Exhibit E026).
214. Particular 1.5(f)(6)(C) is established on the basis of the Club Board meeting minutes for 28 March 2012 (Complainant Exhibit E026).
215. Particular 1.5(f)(6)(D) is established on the basis of Article 12(a) of the Articles of Association for the Club (Complainant Exhibit E085).
216. Particular 1.5(f)(6)(E) is established on the basis of Article 12(c) of the Articles of Association for the Club (Complainant Exhibit E085).
217. Particular 1.5(f)(6)(F) is established on the basis of Article 12(d) of the Articles of Association for the Club (Complainant Exhibit E085).
218. Particular 1.5(g) alleges that the “moratorium on accepting full membership” continued after the Club’s administration ceased. The Authority is satisfied that this Particular is established on the following bases:
219. Particular 1.5(g)(1) is established on the basis of the ASIC extract for the Club dated 2 December 2014 (Complainant Exhibit E094).
220. Particular 1.5(g)(2) is established on the basis of the Club Board meeting minutes for 10 November 2012 (Complainant Exhibit E034).
221. On the basis of the Authority's findings on the above Particulars, the Authority is satisfied that the Club failed to meet the requirements of section 10(1)(d) of the Act in that, between 31 May 2004 and 30 June 2010, and since 30 July 2014 the Club failed to meet the requirements of section 10(1)(d) of the Act when it failed to maintain the minimum number of ordinary members prescribed by section 12 of the Act.
222. The Authority is satisfied that Ground 1 of the Complaint is established.

## **GROUND 2**

223. Ground 2 states:

***Section 57F(3)(a) – the Club failed to meet the requirements of section 10(1)(e) of the Act.***

*Between 2009 and 2014 the Club failed to meet the requirements of section 10(1)(e) of the Act when the Club ceased to be established for the purpose of providing accommodation for its members and their guests.*

224. Particular 2.1 of Ground 2 alleges as follows:

*The Club is operated for the provision of social and corporate bowls for "social members" and "temporary members".*

- (a) *The majority of the income generated by the Club is derived from its corporate and social bowling business.*
- (b) *The Club markets corporate and social bowls activities to generate revenue as opposed to the promotion of the full membership and the encouragement of social interaction between the members of the Club.*
- (c) *The Club uses the slogan "Bowls without the Olds" :*
  - (1) *being a slogan which is discriminatory and exclusionary of older members of the Club and the public;*
  - (2) *in circumstances where membership of the Club consists of members up to the age of 89 years old.*
- (d) *Non-members who attend the Club to participate in social and corporate bowls are admitted to the Club as "temporary members" or "social members".*
- (e) *Between January 2009 and May 2014 the Club admitted 188,620 persons to the Club's premises to participate in social and corporate bowling.*

<b>Period</b>	<b>Corporate Bowlers</b>	<b>Social Bowlers</b>
<i>Jan 2009 – Dec 2009</i>	<i>23,257</i>	<i>13,280</i>
<i>Jan 2010 – Dec 2010</i>	<i>19,591</i>	<i>14,977</i>
<i>Jan 2011 – Dec 2011</i>	<i>18,066</i>	<i>15,853</i>
<i>Jan 2012 – Dec 2012</i>	<i>16,337</i>	<i>17,256</i>
<i>Jan 2013 – Dec 2013</i>	<i>17,048</i>	<i>17,969</i>
<i>Jan 2014 – May 2014</i>	<i>5,867</i>	<i>9,119</i>

- (f) *Access to the bowling greens and other Club facilities by ordinary members of the Club is hindered by the number of "temporary members" admitted to the Club.*
  - (1) *Between January 2009 and May 2014 the Club had a significantly greater number of "temporary members" than the number of ordinary members on the membership register.*
  - (2) *Ordinary members are required to book and pay bowling green fees to use the bowling greens in the same manner as "temporary members".*
  - (3) *There is limited to nil capacity for ordinary members to access and make use of the Club's bowling greens, during peak trading periods, due to the number of "temporary members".*
- (g) *Access to the bowling greens and other Club facilities by ordinary members of the Club is hindered by the number of "social members" admitted to the Club.*
  - (1) *The Club permitted a large number of "social members" (as defined by the Club's Constitution), to enter the Club's premises and use its facilities.*
  - (2) *Ordinary members are required to book and pay bowling green fees to use the bowling greens in the same manner as "social members".*
  - (3) *There is limited to nil capacity for ordinary members to access and make use of the Club's bowling greens, during peak trading periods, due to the number of "social members".*
  - (4) *On 16 May 2014 the Club had 7,273 "social members" in the Social Membership Register.*
  - (5) *"Social members" have not been approved to membership of the Club by a meeting of the members of the governing body; a subcommittee or by the ordinary members.*

**225. Particular 2.2 of Ground 2 alleges as follows:**

*Accommodation is not provided by the Club to members and guests to undertake competitive (pennant) bowls.*

- (a) *The Club no longer offers competitive (pennant) bowls.*
- (b) *The Club fails to maintain the bowling greens and related facilities to the standard required for competitive (pennant) bowls.*
- (c) *The Club has abandoned its membership to BowlsNSW, formerly known as The Royal NSW Bowling Association Limited:*
  - (1) *On 13 September 2013 the Club was advised that annual affiliation fees had not been received, due on or before 31 July 2013, and the Club was now disaffiliated.*
  - (2) *Members of the Club are no longer eligible to participate in competitive (pennant) bowling events.*

**226.** Particular 2.3 of Ground 2 alleges as follows:

*As a result of the matters in paragraphs 2.1-2.2, ordinary members of the Club are limited in their ability to access the Club's bowling greens for the purposes of bowling.*

### **Club's Response to Ground 2**

- 227.** In response to Ground 2 of the Complaint, the Club submits that the requirement of section 10(1)(e) of the Act is “clearly satisfied” in that the Club has occupied its present premises since 1958, which includes two bowling greens and a clubhouse. The Club contends that a total of 38,000 guests have attended the Club premises during 2014.
- 228.** In response to Particular 2.1(b), the Club refers to statements made by Mr Kirk in his interview with OLGR inspectors dated 26 June 2014 and contends that bowling is the “dominant and central activity” of the Club. The Club contends that 24% of the Club’s gross revenue is derived from bowling fees, as indicated in the Profit and Loss Statement for the Club for financial year 2014.
- 229.** In response to Particular 2.1(c), the Club submits that the slogan “*Bowls without the Olds!*” is “irrelevant” to this Complaint. The Club notes that this slogan was the subject of a complaint to the Advertising Standards Board [the Authority notes that this is an apparent reference to the Advertising Standards Bureau], which did not proceed with the complaint.
- 230.** The Club submits that it has “no antipathy” toward older members, noting that some older players (Mr Elder and Mr Whitney – aged 89 and 76 respectively) have been recognised as life members of the Club.
- 231.** In response to Particular 2.1(d), the Club submits that the rules of the Club have at all times provided for the admission of temporary members, pursuant to Articles 4(d) and 9 of the 1985 Articles of Association of the Club and clauses 7.2 and 14 of the Club’s 2014 Constitution.
- 232.** The Club submits that section 10(1)(e) of the Act makes no distinction between classes of members, and submits that social members were admitted to the Club in their capacity as ostensible members.
- 233.** While the Club concedes that those “social memberships” were not put to the Board or a membership subcommittee for approval, as required by the Act, the Club

submits that this was an “honest but mistaken belief” that those persons were entitled to use the facilities as “social members”.

- 234.** The Club states that it has now ceased the practice of admitting “social members”.
- 235.** In response to Particular 2.1(e), the Club submits that the requirement to provide “accommodation” for use by members must also include the use of accommodation for temporary members.
- 236.** In response to Particular 2.1(f), the Club submits that the “common experience” is that clubs charge their ordinary members for use of club facilities. The Act does not mandate or require that one class of members must obtain cheaper or “unhindered” access to Club facilities without reservation.
- 237.** In response to Particular 2.1(g), the Club submits that this Particular “relies upon a false assumption” that free and total access, without prior reservation, should be available to full members at all times. The Club contends that this assumption is “misguided” and refers to statements made by Club director Allan Teale in his record of interview with OLGR inspectors dated 20 June 2014 to the effect that “there is always space for members to bowl”.
- 238.** In response to Particulars 2.2 and 2.3, the Club submits that the view of the Complainant that “social and corporate bowls” does not amount to the practice of “bowls” is “out of step” with “contemporary notions of bowls” and is “directly inconsistent” with the view of Bowls Australia.
- 239.** The Club submits that it “does not follow” from the fact that as the Club does not have any members who play competition bowls, that the Club’s purpose or objective is not directed toward the playing of bowls.

## **Ex-Officers’ Response to Ground 2**

- 240.** The Ex-Officers adopt the entirety of the Club’s submission dated 17 May 2015 in respect of Ground 2 of the Complaint.

## **Kirk’s Response to Ground 2**

- 241.** Mr Kirk did not make any specific submissions in response to Ground 2 of the Complaint.

## **Wily’s Response to Ground 2**

- 242.** Mr Wily did not make any specific submissions in response to Ground 2 of the Complaint.

## **Authority Findings on Ground 2**

- 243.** Section 10(1)(e) of the Act states as follows:

*The club shall be established:*

- (i) *for social, literary, political, sporting or athletic purposes or for any other lawful purposes, and*
- (ii) *for the purpose of providing accommodation for its members and their guests.*

- 244.** Particular 2.1 of the Complaint alleges that the Club is operated for the provision of “social and corporate bowls” for “social members” and “temporary members”. The Authority makes the following findings on the sub-Particulars of Particular 2.1.
- 245.** Particular 2.1(a), alleging that the majority of the income generated by the Club is derived from its corporate and social bowling business, is established on the basis of the Club Balance Sheets and Profit & Loss Statements dated between January 2009 and May 2014 (Complainant Exhibit E062); the statements made by Robert Ashton Jnr at page 42 of the transcript of his record of interview with OLGR inspectors dated 23 May 2014 (Complainant Exhibit E136); the statements made by Luke McKew at page 58 of the transcript of his record of interview with OLGR inspectors dated 22 September 2014 (Complainant Exhibit E142); the statements made by Robert Ashton Snr at page 43 of the transcript of his record of interview with OLGR inspectors dated 20 June 2014 (Complainant Exhibit E144) and page 3 of the statement of a full financial member of the Club, Robert Constable dated 21 November 2014 (Complainant Exhibit E217).
- 246.** Particular 2.1(b), alleging that the Club markets corporate and social bowling to generate revenue rather than the promotion of membership, is established on the basis of the statements made by Brian Kirk at page 108 of the transcript of his record of interview with OLGR inspectors dated 26 June 2014 (Complainant Exhibit E137); the statements made by Vanessa Sanchez-Levy at page 17 of the transcript of her record of interview with OLGR inspectors dated 22 October 2014 (Complainant Exhibit E178); pages 2 to 3 of the statement of a full financial member of the Club, Robert Constable dated 21 November 2014 (Complainant Exhibit E217) and the statement of another full financial member of the Club, George Elder dated 21 November 2014 (Complainant Exhibit E218).
- 247.** Particular 2.1(c)(1) alleges that the Club’s slogan “*Bowls without the Olds*” is discriminatory and exclusionary of older members of the Club and the public. The Authority has reviewed the evidence or other material that the Complainant relies upon in support of this contention, being the statements made by Vanessa Sanchez-Levy at page 49 of the transcript of her record of interview with OLGR inspectors dated 22 October 2014 (Complainant Exhibit E178); the photographs of a Club membership card (Complainant Exhibit E083); remittance advice dated 14 December 2012 (Complainant Exhibit E109); the emails presented during the interview with Ms Sanchez-Levy on 22 October 2014 (Complainant Exhibit E131); a photograph of a poster using the “*Bowls without the Olds!*” slogan (Complainant Exhibit E214); the statement of OLGR inspector Karen McCluskey dated 28 November 2014 and the statement of OLGR inspector Dan Tranter dated 28 November 2014.
- 248.** The Authority has also considered the Club’s submissions in respect of this Particular and notes that this slogan was previously the subject of a complaint to the Advertising Standards Bureau, which ultimately did not proceed with that complaint.
- 249.** While it is not clear that this Particular, as it has been framed, falls within the scope and purpose of the Act (and the Authority prefers a view that it does not), the Authority is not, in any event, satisfied that the use of this slogan “*Bowls without the Olds!*” is discriminatory or exclusionary toward older members of the public. It is an ironic marketing slogan alluding to the historic association between bowling and older persons and is aimed at attracting young patrons to the Club. The

Complainant provides no evidence that older members of the Club are actually offended or that older persons are discouraged from hiring the bowling greens or becoming members by reason of this marketing.

- 250. The Authority finds that Particular 2.1(c)(1) is *not* established.
- 251. Particular 2.1(c)(2), alleging that the Club's membership includes people aged up to 89 years, is established on the basis of the Club Membership Application Analysis Spreadsheet for the period from 6 August 2011 to 2 September 2014 (Complainant Exhibit E199); various Club membership forms and receipts (Complainant Exhibit E200) and page 2 of the statement of a full financial member of the Club, Robert Constable dated 21 November 2014 (Complainant Exhibit E217).
- 252. Particular 2.1(d) alleges that non-members who attend the Club to participate in social and corporate bowls are admitted to the Club as "temporary members" or "social members".
- 253. The Authority notes and accepts the Club's submission that the rules of the Club have at all times provided for the admission of temporary members, pursuant to Articles 4(d) and 9 of the 1985 Articles of Association of the Club and clauses 7.2 and 14 of the Club's 2014 Constitution.
- 254. However, the Club's submission that social members were not put to the Board or a membership subcommittee for approval, as required by the Act, and were admitted in their capacity as ostensible members in the "honest but mistaken belief" that those persons were entitled to use the facilities as "social members", is not a persuasive submission in response to this Particular.
- 255. Notwithstanding the Club's advice that it has now ceased the practice of admitting "social members", which the Authority accepts to be the case, the Authority is satisfied that Particular 2.1(d) is established on the basis of the statements made by Leonard Whitney at page 57 of the transcript of his record of interview with OLGR inspectors dated 16 September 2014 (Complainant Exhibit E141); the statements made by Brian Kirk at page 115 of the transcript of his record of interview with OLGR inspectors dated 26 June 2014 (Complainant Exhibit E137) and the statements made by Robert Ashton Jnr at page 12 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182).
- 256. Particular 2.1(e) alleges that between January 2009 and May 2014, the Club admitted **188,620** persons to the Club's premises to participate in social and corporate bowling.
- 257. The Authority is satisfied that this Particular is established, on the basis of a list of invoiced clients for corporate bowls from January 2009 to May 2014 (Complainant Exhibit E135) and a spreadsheet of Club bowling records (Complainant Exhibit E230).
- 258. Particular 2.1(f) alleges that access to the bowling greens and other Club facilities by ordinary members of the Club is "hindered" by the number of *temporary members* that are admitted to the Club. The Authority makes the following findings on the sub-Particulars of Particular 2.1(f).

259. Particular 2.1(f)(1), which concerns the ratio of temporary to ordinary members between 2009 and May 2014, is established on the basis of the evidence or other material relied upon by the Complainant in support of Particulars 2.1(e) and 1.4 as noted above.
260. Particular 2.1(f)(2), on the requirement that ordinary members must book and pay fees to use the greens, is established on the basis of the statements made by Robert Ashton Jnr at page 64 of the transcript of his record of interview with OLGR inspectors dated 23 May 2014 (Complainant Exhibit E136); the statements made by Brian Kirk at pages 54 to 55 of the transcript of his record of interview with OLGR inspectors dated 26 June 2014 (Complainant Exhibit E137); the statements made by Natali Faraguna at page 27 of the transcript of her record of interview with OLGR inspectors dated 13 October 2014 (Complainant Exhibit E143) and the statements made by Vanessa Sanchez-Levy at page 30 of the transcript of her record of interview with OLGR inspectors dated 22 October 2014 (Complainant Exhibit E178).
261. Particular 2.1(f)(3) alleges that there is a “limited to nil” ability of *ordinary members* of the Club to use the bowling greens during “peak trading periods” by reason of the use of the greens by *temporary members*.
262. The Complainant relies upon the statements made by Leonard Whitney at pages 56 and 73 to 74 of the transcript of his record of interview with OLGR inspectors dated 16 September 2014 (Complainant Exhibit E141); the statements made by Robert Ashton Jnr at page 64 of the transcript of his record of interview with OLGR inspectors dated 23 May 2014 (Complainant Exhibit E136); the statements made by Natali Faraguna at pages 11 to 12 of the transcript of her record of interview with OLGR inspectors dated 13 October 2014 (Complainant Exhibit E143) and the statements made by Robert Ashton Jnr at page 66 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182).
263. The Authority has reviewed the above evidence or material and the Club’s submissions in respect of this Particular. The Authority notes the Club’s submission that section 10(1)(e) of the Act makes no distinction between classes of members and accordingly, the provision of accommodation for use by members includes the provision of accommodation for *temporary members*.
264. The Authority further notes the Club’s submission that the Act does not mandate or require that one class of members must obtain cheaper or “unhindered” access to Club facilities without having to make a reservation. The Authority accepts the Club’s submissions in this regard.
265. The Authority is not satisfied that Particular 2.1(f)(3) is established. The Authority finds that while the Club’s practices with regard to its extensive use of bowling parties may potentially have *inconvenienced* ordinary members seeking to use the greens during periods when functions were booked, there is no evidence of any complaints from ordinary members to this effect or that their ability to access the greens should be characterised as “limited to nil”.
266. Particular 2.1(g) alleges that access to the bowling greens and other Club facilities by ordinary members of the Club is hindered by the number of *social members* that are admitted to the Club. The Authority makes the following findings on the sub-Particulars of Particular 2.1(g).



- 267.** Particular 2.1(g)(1), which alleges that the Club permitted a “large number” of *social members* to enter and use its facilities, is established on the basis of the evidence or other material relied upon by the Complainant in support of Particulars 2.1(e) and 1.4 as noted above.
- 268.** Particular 2.1(g)(2), which alleges that ordinary members are required to book and pay bowling green fees to use the bowling greens, is established on the basis of the statements made by Robert Ashton Jnr at page 64 of the transcript of his record of interview with OLGR inspectors dated 23 May 2014 (Complainant Exhibit E136); the statements made by Brian Kirk at pages 54 to 55 of the transcript of his record of interview with OLGR inspectors dated 26 June 2014 (Complainant Exhibit E137); the statements made by Natali Faraguna at page 27 of the transcript of her record of interview with OLGR inspectors dated 13 October 2014 (Complainant Exhibit E143) and the statements made by Vanessa Sanchez-Levy at page 30 of the transcript of her record of interview with OLGR inspectors dated 22 October 2014 (Complainant Exhibit E178).
- 269.** With regard to Particular 2.1(g)(3), alleging that there was “limited to nil” capacity for ordinary members to access and make use of the Club's bowling greens during peak trading periods, the Complainant relies upon the statements made by Leonard Whitney at pages 56 and 73 to 74 of the transcript of his record of interview with OLGR inspectors dated 16 September 2014 (Complainant Exhibit E141); the statements made by Natali Faraguna at pages 11 to 12 of the transcript of her record of interview with OLGR inspectors dated 13 October 2014 (Complainant Exhibit E143) and the statements made by Robert Ashton Jnr at page 66 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182).
- 270.** The Authority has reviewed the above evidence or material and the Club's submissions in respect of this Particular. The Authority notes the Club's submission that the Act does not mandate or require that one class of members must obtain cheaper or “unhindered” access to Club facilities without reservation. The Authority further notes the Club's submission that this Particular “relies upon a false assumption” that free and total access, without prior reservation, should be available to full members at all times. The Authority accepts the Club's submissions in this regard.
- 271.** In the absence of any evidence of complaints from ordinary members to the effect that they had limited ability to access the greens when they wanted, by reason of bowling parties involving social members, the Authority is *not* satisfied that Particular 2.1(g)(3) has been established. Ordinary members could have booked the greens for their use in the usual manner provided by the Club. This would have involved payment of fees, but it does not follow that access to the greens by ordinary members was “limited to nil”.
- 272.** Particular 2.1(g)(4), alleging that the Club had **7,273** social members on 16 May 2014 is established on the basis of the Club *Social Membership Register* dated 19 May 2014 (Complainant Exhibit E145).
- 273.** Particular 2.1(g)(5), alleging that social members have not been approved to membership of the Club by a meeting of the members of the governing body, a subcommittee or by the ordinary members, is established on the basis of the statements made by Natali Faraguna at page 21 of the transcript of her record of

interview with OLGR inspectors dated 13 October 2014 (Complainant Exhibit E143); the statements made by Chris Du Chesne at page 19 of the transcript of his record of interview with OLGR inspectors dated 22 October 2014 (Complainant Exhibit E179); the statements made by Robert Ashton Snr at pages 82 to 84 of the transcript of his record of interview with OLGR inspectors dated 30 October 2014 (Complainant Exhibit E180); the statements made by Robert Ashton Jnr at page 11 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182) and the statements made by Leonard Whitney at page 5 of the transcript of his record of interview with OLGR inspectors dated 3 November 2014 (Complainant Exhibit E184).

- 274.** In summary, Particular 2.1 alleges that the Club is operated for the provision of social and corporate bowls for “social members” and “temporary members”. The Authority is satisfied that the social and corporate bowls business formed a substantial part of the Club’s revenue base. However, that is not the sole basis of the Club’s operation. The Club provides a range of hospitality services, including liquor and gaming, and the Club does not operate only for the provision of social and corporate bowls bookings.
- 275.** Particular 2.2 alleges that accommodation is not provided by the Club to members and guests to undertake competitive (pennant) bowls. The Authority is satisfied that this Particular is established on the following bases.
- 276.** Particular 2.2(a), alleging that the Club no longer offers competitive pennant bowls, is established on the basis of the statements made by Leonard Whitney at page 56 of the transcript of his record of interview with OLGR inspectors dated 16 September 2014 (Complainant Exhibit E141); the statements made by Robert Ashton Snr at page 29 of the transcript of his record of interview with OLGR inspectors dated 20 June 2014 (Complainant Exhibit E144); the statements made by Robert Ashton Jnr at page 64 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182); the statements made by Leonard Whitney at page 12 of the transcript of his record of interview with OLGR inspectors dated 3 November 2014 (Complainant Exhibit E184) and pages 2 to 3 of the statement of a full financial member of the Club, Robert Constable dated 21 November 2014 (Complainant Exhibit E217).
- 277.** Particular 2.2(b), alleging that the Club fails to maintain its greens and related facilities to a competitive standard, is established on the basis of page 2 of the statement of a full financial member of the Club, Ken Hooper dated 21 November 2014 (Complainant Exhibit E216); page 4 of the statement of a full financial member of the Club, Robert Constable dated 21 November 2014 (Complainant Exhibit E217); the statements made by Allan Teale at page 40 of the transcript of his record of interview with OLGR inspectors dated 26 June 2014 (Complainant Exhibit E139) and the statements made by Robert Ashton Snr at page 30 of the transcript of his record of interview with OLGR inspectors dated 20 June 2014 (Complainant Exhibit E144).
- 278.** Particular 2.2(c) alleges that the Club has abandoned its membership to BowlsNSW, formerly known as The Royal NSW Bowling Association Ltd.
- 279.** Particular 2.2(c)(1) is established on the basis of a letter from the Royal NSW Bowling Association dated 13 September 2013 noting the Club’s disaffiliation from that organisation (Complainant Exhibit E096).

- 280.** Particular 2.2(c)(2) is established on the basis of a letter from the Royal NSW Bowling Association dated 13 September 2013 noting the Club's disaffiliation from that organisation (Complainant Exhibit E096); page 2 of the statement of a full financial member of the Club, Robert Constable dated 21 November 2014 (Complainant Exhibit E217) and the statements made by Greg Helm, CEO of BowlsNSW at page 3 of the transcript of his record of interview with OLGR inspectors dated 9 October 2014 (Complainant Exhibit E186).
- 281.** Particular 2.3 alleges that, as a result of the matters in Particulars 2.1 and 2.2, ordinary members of the Club are "limited" in their ability to access the Club's bowling greens for the purposes of bowling. In support of this contention, the Complainant relies upon the statements made by Leonard Whitney at pages 56 and 73 to 74 of the transcript of his record of interview with OLGR inspectors dated 16 September 2014 (Complainant Exhibit E141) and page 2 of the statement of a full financial member of the Club, George Elder dated 21 November 2014 (Complainant Exhibit E218).
- 282.** In response to this Particular, the Club submits that the Complainant's view that "social and corporate bowls" does not amount to "bowls" is "out of step" with contemporary notions of bowls and is "directly inconsistent" with the view of Bowls Australia.
- 283.** The Club submits that it does not follow from the fact that as the Club does not have any members who play competition bowls, the Club's purpose or objective is not directed toward the playing of bowls. The Authority accepts that submission.
- 284.** The Authority has reviewed the above evidence or material and the Club's submissions in respect of Particulars 2.1 and 2.2. On the basis of the Authority's findings on Particulars 2.1 and 2.2, the Authority is *not* satisfied that Particular 2.3 is established.
- 285.** The Authority is satisfied that ordinary members may have been inconvenienced by competition for the greens when bowling parties are booked, but it was open to ordinary members to reserve and pay for bowling greens in a similar manner to social and temporary members. Moreover, there is no evidence before the Authority that ordinary members have complained about limitations on their access to the bowling greens at times that they wished to use them.
- 286.** Ground 2 alleges that the Club failed to meet the requirements of section 10(1)(e) of the Act when the Club ceased to be established for the purpose of providing "accommodation" for its members and their guests.
- 287.** In addition to the above findings, the Authority considers that the "accommodation" of a bowling club's members and guests is a concept that encompasses more than just the bowling greens. It also includes, for example, the sale and supply of liquor, gaming and other hospitality services. The Authority is not satisfied that the Club ceased to provide "accommodation" for its members and guests.
- 288.** The Authority finds that Ground 2 of the Complaint is *not* established.

### **GROUND 3**

**289.** Ground 3 states:

***Section 57F(3)(a) – the Club failed to meet the requirements of section 10(1)(i) of the Act.***

*Between 2010 and 2014 the Club failed to meet the requirements of section 10(1)(i) of the Act when the Club permitted individuals to derive a benefit or advantage from the Club that was not offered equally to all members of the Club.*

**290.** Particular 3.1 of Ground 3 alleges as follows:

*The Club permitted members of the governing body the personal use of motor vehicles owned by the Club which was not offered equally to all members of the Club.*

- (a) *The Club is the owner of two motor vehicles.*
- (b) *The vehicles were obtained by the Club for the prime purpose of "in-house haulage, disposal of rubbish and refuse, and picking up and delivery of stock without undue delay".*
- (c) *The two vehicles are garaged off-premises at the personal residences of directors Mr Ashton Snr and Mr Teale:*
  - (1) *15 minutes away in Maroubra; and*
  - (2) *40 minutes away in Strathfield.*
- (d) *There is no Club policy or procedure on the use of the vehicles and whether or not they are used for travel unrelated to the Club.*
- (e) *The vehicles are rarely used by the Club.*
- (f) *There is no log book recording the business and private use of the vehicles.*

**291.** Particular 3.2 of Ground 3 alleges as follows:

*The Club permitted Mr Whitney to receive a free meal each day which was not offered equally to all members of the Club.*

- (a) *An email dated 22 May 2014 was sent by Mrs Vanessa Sanchez-Levy to the members of the governing body seeking approval for the Club to provide member Mr Whitney with a free meal each day.*
- (b) *An email dated 27 May 2014 was sent by Mr Ashton Snr approving the request.*

**292.** Particular 3.3 of Ground 3 alleges as follows:

*The Club provided members of the governing body, and certain members of the Club, tickets to attend Waratahs rugby games, the tickets were not offered equally to all members of the Club.*

- (a) *On or about 1 September 2013 the Club entered into a sponsorship arrangement with the NSW Waratahs Rugby Union Club (the Waratahs).*
- (b) *The Club, by use of the Club funds, sponsored the Waratahs approximately \$100,000.00 per annum.*
- (c) *Mr Ashton Jnr regularly received:*
  - (1) *a number of invitations to the Chairman's Lounge; and*
  - (2) *30 tickets to each rugby match,*

*from the Waratahs.*

- (d) *Tickets were provided to certain members of the Club. Members of the Club were not equally offered the opportunity to obtain tickets.*
- (e) *Members of the governing body attended the rugby using the invitations to the Chairman's Lounge.*

**293.** Particular 3.4 of Ground 3 alleges as follows:

*The Club reimbursed members of the governing body for expenses which were not offered equally to all members of the Club.*

- (a) *Expenses were reimbursed where there was no approval for the payment by a resolution of the governing body.*
  - (1) *Between March 2010 and 8 August 2011 26 expense claims were paid to members of the governing body totalling \$2,912.10.*
  - (2) *Between 9 August 2012 and April 2014 19 expense claims were paid to members of the governing body totalling \$4,968.00.*
  - (3) *Between 9 August 2011 and 8 August 2012 27 expense claims were paid to members of the governing body, other than Mr Kirk, totalling \$4,275.50.*
- (b) *Expenses were reimbursed where the governing body only provided approval for reasonable expenses.*
  - (1) *Between 9 August 2011 and 8 August 2012 12 expense claims were paid to Mr Kirk totalling \$5,498.40.*
- (c) *The expenses in (a)-(b) above were paid in circumstances where the majority of the claims:*
  - (1) *contained little to no detail about the expense;*
  - (2) *contained no supporting documentation despite Club policy for supporting documentation to be provided for any expense over \$80.00;*
  - (3) *in the absence of detail, cannot be said to have been for the benefit of the Club and its members;*
  - (4) *in the absence of detail, cannot be said to have been connected to their duties and responsibilities; and*
  - (5) *in the absence of detail, cannot be said to have been reasonable.*

**Club's Response to Ground 3**

- 294.** In response to Particular 3.1 regarding the use of Club motor vehicles, the Club submits in its submission dated 17 May 2015 that the benefit provided was "reasonable", pursuant to section 10(6)(a) of the Act. The Club also submits that there is "no evidence" that there was any "substantial use" of the motor vehicles for personal purposes.
- 295.** The Club contends that it had a *Motor Vehicles Policy*, but concedes that there was no log book for either of the vehicles. The Club contends that there were "substantial responsibilities" imposed upon the directors who housed these motor vehicles and that this amounted to a "nett dis-benefit" for the directors involved.
- 296.** The Club contends that there was agreement between the Club and its directors regarding the use of these motor vehicles. The Club submits that an external review

by Lawler Partners (now PKF Australia) dated February 2015 found that the Club's motor vehicle use was "acceptable".

- 297. The Club contends that one of the Club vehicles has now been sold and that a log book is now maintained in respect of the other vehicle that is still owned by the Club.
- 298. In response to Particular 3.2, concerning the provision of a daily free meal to former Club director Leonard Whitney, the Club notes that Mr Whitney is 76 years of age, lives alone, and is a pensioner. Mr Whitney is a life member and has undertaken voluntary work for the Club.
- 299. The Club submits that providing a free meal to someone in Mr Whitney's circumstances is a "reasonable benefit" and a "worthwhile humanitarian purpose". However, the Club notes that the provision of free meals to Mr Whitney ceased "in late 2014".
- 300. In response to Particular 3.3 in relation to the provision of free tickets to attend *Waratahs* rugby games, the Club submits that the sponsorship proposal relied on by the Complainant is not signed and that the actual agreement entered into in 2014 was "on different terms". The Club argues that this arrangement was "common" and "commercially justifiable".
- 301. The Club refers to statements made by Messrs Robert Ashton Jnr and Robert Ashton Snr in their respective interviews with OLGR inspectors and submits that the Club gave away tickets to members, and that these tickets were "clearly transferrable".
- 302. The Club submits that it does not matter that tickets were not requested by all of the Club's members. The Club contends that these tickets to *Waratahs* rugby games were "reasonably accessible and offered to all members in an equitable way". The Club cites *Seagulls Rugby League Club Limited v Superintendent of Licences* (1992) 29 NSWLR 357 in this regard.
- 303. The Club submits that the invitations extended to certain Club directors to use the Chairman's Lounge are a "personal benefit" and are "not transferrable".
- 304. Further, any incidental benefit derived by a Club director from accepting an invitation to the Chairman's Lounge is "certainly reasonable" in circumstances where the director was "under a duty to assess the benefits to be derived from the sponsorship". The Club submits that this would be a benefit incidental to his employment agreement to serve and act in the best interests of the Club, and as such, the exception in section 10(6)(a) of the Act applies.
- 305. In response to Particular 3.4 regarding the reimbursement of Club directors' expenses, the Club submits that a resolution was passed in 2011 for reimbursement of expenses up to \$2,000 *until the next Annual General Meeting (AGM)* – however no AGMs were held during the period of the Club's administration.
- 306. In any event, the Club submits that the expenses incurred by the Club's directors were "reasonable". The Club argues that the apparent lack of detail recording these benefits was a result of the Club's "past practice" and the prevailing circumstances while the Club was under administration.

307. The Club refers to an external review of the Club's operations conducted by Lawler Partners during February 2015 and submits that a monthly honorarium of \$250 per Club director (CPI indexed) was introduced in lieu of reimbursing expenses, as a result of the recommendations made by Lawler Partners.

### **Ex-Officers' Response to Ground 3**

308. The Ex-Officers adopt the entirety of the Club's submission dated 17 May 2015 in respect of Ground 3 of the Complaint.

### **Kirk's Response to Ground 3**

309. In response to Particular 3.1, Mr Kirk submits that as far as he was aware, the primary use of the vehicles was for Club purposes. Mr Kirk contends that he never used the vehicles, and that there was a written policy in place for the use of those motor vehicles.
310. In response to Particular 3.3, Mr Kirk notes that he was not a member of the governing body at the time when the *Waratahs* sponsorship agreement was alleged to have been entered into (September 2013). Mr Kirk contends that he never attended a *Waratahs* rugby match and that he has "no knowledge" of Particulars 3.3(c) through 3.3(e) of the Complaint.
311. In response to Particular 3.4, Mr Kirk submits that while the supporting documentation maintained by the Club for these matters may not be complete, all of the expenses incurred by him were "reasonable".
312. Mr Kirk submits that, given the historical nature of complaint, he no longer has access to further relevant documents – they were seized by OLGR as part of the investigation.
313. Mr Kirk submits that the expenses that are the subject of Particular 3.4 were incurred in investigating amalgamation and joint venture opportunities; assisting the Club in negotiations with Crown Lands and attending directors' meetings at different Sydney clubs to consider how the Club could better serve its members.
314. Further, Mr Kirk submits that he used the ATO rates to claim expenses for his motor vehicle travel.

### **Wily's Response to Ground 3**

315. Mr Wily did not make any specific submissions in response to Ground 3 of the Complaint.

### **Authority Findings on Ground 3**

316. Section 10(1)(i) of the Act states as follows:

*A member of the club, whether or not he or she is a member of the governing body, or of any committee, of the club, shall not be entitled, under the rules of the club or otherwise, to derive, directly or indirectly, any profit, benefit or advantage from the club that is not offered equally to every full member of the club.*

**317.** However, section 10(6) of the Act provides a number of exceptions to the prohibition against members of the governing body receiving such a profit, benefit or advantage not offered equally to other full members. Section 10(6) states:

- (6) *A club does not fail to meet the requirement specified in subsection (1)(i) or (1)(j) by reason only that a member of the club derives or is entitled to derive any profit, benefit or advantage from the club that is not offered equally to every full member of the club if:*
- (a) *the member derives or is entitled to derive the profit, benefit or advantage, not being a profit, benefit or advantage referred to in paragraph (b), pursuant to a contract (including a contract of employment) or agreement with the club and the deriving of or entitlement to the profit, benefit or advantage is, in the opinion of the Authority, reasonable in the circumstances of the case, or*
  - (b) *the profit, benefit or advantage consists only of a sum of money paid to the member in respect of his or her services as a member of the governing body or of any committee of the club and that payment has been approved by a resolution passed at a general meeting on which the persons entitled to vote are the same as the persons entitled to vote at the annual election of the governing body of the club, or*
  - (c) *the profit, benefit or advantage consists only of hospitality in the nature of reasonable food or refreshment offered by the holder of a dealer's licence or adviser's licence (within the meaning of the Gaming Machines Act 2001) in the normal course of a sale of an approved gaming machine on the licensee's premises, or at a display of an approved gaming machine that is held anywhere in the State for the purpose of directly promoting the products or services of the licensee, or*
  - (d) *the profit, benefit or advantage consists only of the payment of out-of-pocket expenses that are of a kind authorised by a current resolution of the governing body and are reasonably incurred by a member of the club, or by the secretary or any other employee, in the course of carrying out his or her duties in relation to the club.*

**318.** Particular 3.1 alleges that the Club permitted members of the governing body the personal use of motor vehicles owned by the Club which was a benefit not offered equally to all members of the Club. The Authority makes the following findings on the sub-Particulars of Particular 3.1.

**319.** Particular 3.1(a), which alleges that the Club was the owner of two motor vehicles, is established on the basis of records pertaining to the purchase, registration and insurance of two Mazda utility vehicles (Complainant Exhibit E076).

**320.** The Authority notes that while the Club was previously the owner of two motor vehicles, the Authority is satisfied, on the basis of advice provided by the Club in its submission dated 17 May 2015, that one of these vehicles has been sold since the date of the Complaint.

**321.** Particular 3.1(b), which alleges that the Club vehicles were obtained by the Club for the prime purpose of in-house haulage, disposal of rubbish and refuse, and picking up and delivery of stock without undue delay is established on the basis of the Club Board meeting minutes for 26 April 2012 (Complainant Exhibit E027).

**322.** Particular 3.1(c), which alleges that the two vehicles were garaged off the Club premises at the personal residences of Mr Ashton Snr and Mr Teale, is established on the basis of the statements made by Luke McKew at page 35 of the transcript of his record of interview with OLGR inspectors dated 22 September 2014 (Complainant Exhibit E142); the statements made by Robert Ashton Snr at page 41



of the transcript of his record of interview with OLGR inspectors dated 30 October 2014 (Complainant Exhibit E180); the statements made by Robert Ashton Jnr at pages 32 to 33 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182); and the statements made by Allan Teale at page 31 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E183).

- 323.** Particular 3.1(d) alleges that there is no Club policy or procedure on the use of the vehicles and whether or not they are used for travel unrelated to the Club. The Authority notes that the Complainant relies upon the statements made by Allan Teale at page 31 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E183) in support of this Particular.
- 324.** However, the Authority is satisfied, on the basis of the minutes for the Club Board meeting held on 26 April 2012 (Complainant Exhibit E027), that there was a written Club policy in place for use of the Club vehicles.
- 325.** Particular 3.1(d) is not established.
- 326.** Particular 3.1(e) alleges that the vehicles are “rarely” used by the Club. The Complainant relies upon the statements made by Robert Ashton Snr at page 42 of the transcript of his record of interview with OLGR inspectors dated 30 October 2014 (Complainant Exhibit E180) in support of this contention.
- 327.** The Authority has reviewed that evidence and is not satisfied, on the balance of probabilities, that the vehicles are “rarely” used by the Club. While the Authority is satisfied that use of the vehicles for Club purposes has declined over time, the evidence cited by the Complainant does not establish that use of the vehicles for Club purposes has been “rare”.
- 328.** Particular 3.1(e) is not established.
- 329.** With regard to Particular 3.1(f) alleging that there is no log book recording the business and private use of the Club vehicles, the Authority notes that the Complainant relies upon the statements made by Robert Ashton Snr at page 41 of the transcript of his record of interview with OLGR inspectors dated 30 October 2014 (Complainant Exhibit E180); the statements made by Robert Ashton Jnr at page 33 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182) and the statements made by Allan Teale at page 31 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E183). The Authority also notes that the Club concedes that no log book recording the business and private use of the vehicles was maintained until after the date of the Complaint.
- 330.** The Authority is satisfied that Particular 3.1(f) is established.
- 331.** With regard to Particular 3.1 generally, the Club contends that the use of the motor vehicles was “reasonable” within the meaning of the defence in section 10(6)(a) of the Act.
- 332.** The Authority has reviewed the evidence or material relied upon by the Complainant and the Club, and notes the findings of an external review conducted by Lawler Partners in February 2015 that the Club’s use of motor vehicles was “acceptable”.

- 333.** The Authority is further satisfied, on the basis of the statements made by Robert Ashton Snr at pages 41 and 42 of the transcript of his interview with OLGR inspectors dated 30 October 2014 (Complainant Exhibit E180), that the use of the motor vehicles by the Club was at times reasonable, *in so far as they were used in the conduct of Club business*, for the purposes of section 10(6)(a) of the Act.
- 334.** However the Authority is satisfied, on the basis of the statements made by Allan Teale at page 31 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E183), that the Club motor vehicle used by Mr Teale was “quite often” stored at the parking facilities at the University of Technology, Sydney where he worked.
- 335.** While Mr Teale explains that this was so the vehicle would be closer to the Club premises if required, the Authority is satisfied that Mr Teale used the vehicle for his personal use to travel to and from work and that the defence in section 10(6)(a) of the Act is not available in respect of this essentially private benefit.
- 336.** Accordingly, the Authority is satisfied that the benefits or advantages established in respect of Particular 3.1 (in relation to the use of Club motor vehicles) fall within the exceptions provided by section 10(6)(a) of the Act, but only to the extent that the Club vehicles were actually being used *for Club purposes*.
- 337.** Particular 3.1 has been established, albeit to a limited extent, with regard to the private use of the vehicles by Mr Ashton Snr and Mr Teale in that it was a private benefit enjoyed by some members of the governing body that was not available to other members of the Club.
- 338.** Particular 3.2 of the Complaint alleges that the Club permitted Mr Whitney to receive a free meal each day which was not offered equally to all members of the Club. The Authority makes the following findings on the sub-Particulars of Particular 3.2.
- 339.** Particular 3.2(a), which alleges that Ms Sanchez-Levy sought approval from the governing body for the Club to provide a free meal each day, is established on the basis of an email dated 22 May 2014 from Vanessa Sanchez-Levy to Robert Ashton Snr requesting the provision of a free meal to Mr Whitney (Complainant Exhibit E210).
- 340.** Particular 3.2(b), which alleges that Mr Ashton Snr communicated acceptance of this request to provide a daily free meal to Mr Whitney is established on the basis of an email dated 27 May 2014 from Robert Ashton Snr to Vanessa Sanchez-Levy acceding to the request for the provision of a free meal to Mr Whitney (Complainant Exhibit E210).
- 341.** While Particular 3.2 has been established factually, the Authority is satisfied that the benefit or advantage afforded to Mr Whitney in the form of a free daily meal is reasonable in the circumstances, within the meaning of the exception provided by section 10(6)(a) of the Act.
- 342.** The Authority notes and accepts the Club’s submission that the provision of a free meal to a 76 year old pensioner and life member of the Club, living alone in socially vulnerable circumstances, is a reasonable benefit for the Club to provide and is a

“worthwhile humanitarian purpose” in respect of which any registered club should be commended.

- 343.** Particular 3.3 of the Complaint alleges that the Club provided members of the governing body, and certain members of the Club, tickets to attend *Waratahs* rugby union games, and that the tickets were not offered equally to all members of the Club. The Authority makes the following findings on the sub-Particulars of Particular 3.3.
- 344.** Particular 3.3(a), alleging that the Club entered into a sponsorship agreement with the NSW Waratahs Rugby Union Club on or around 1 September 2013, is established on the basis of the statements made by Robert Ashton Snr at page 70 of the transcript of his record of interview with OLGR inspectors dated 30 October 2014 (Complainant Exhibit E180); the statements made by Robert Ashton Jnr at page 55 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182) and the statements made by Allan Teale at page 44 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E183).
- 345.** Particular 3.3(b), alleging that the Club sponsored the *Waratahs* to the value of approximately \$100,000.00 per annum, is established on the basis of the Heads of Agreement between the Club and the *Waratahs*, commencing 1 September 2013 (Complainant Exhibit E236).
- 346.** Particular 3.3(c), alleging that Mr Ashton Jnr regularly received a number of invitations to the Chairman’s Lounge and 30 tickets to each *Waratahs* rugby match, is established on the basis of the statements made by Robert Ashton Snr at page 71 of the transcript of his record of interview with OLGR inspectors dated 30 October 2014 (Complainant Exhibit E180) and the statements made by Allan Teale at page 45 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E183).
- 347.** Particular 3.3(d) alleges that tickets were provided to certain members of the Club, and that members of the Club were not equally offered the opportunity to obtain tickets. The Authority notes that the Complainant relies upon the statements made by Robert Ashton Snr at page 71 of the transcript of his record of interview with OLGR inspectors dated 30 October 2014 (Complainant Exhibit E180); the statements made by Robert Ashton Jnr at pages 56 and 80 to 81 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182) and the statements made by Allan Teale at page 45 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E183).
- 348.** The Authority has reviewed the above evidence and is satisfied, on the basis of the statements made by Messrs Robert Ashton Snr and Robert Ashton Jnr in their respective interviews with OLGR inspectors dated 30 and 31 October 2014, that the Club “gave away tickets all the time” to members and that tickets would be advertised on Facebook “to try and drive social media traffic by giving them away”.
- 349.** The Authority accepts this evidence in reply and is not satisfied, as alleged by the Complainant, that members of the Club were not equally offered the opportunity to obtain the tickets provided to the Club by the *Waratahs* to attend *Waratahs* rugby union games.

- 350.** Particular 3.3(d) is *not* established.
- 351.** The Authority is satisfied that Particular 3.3(e), alleging that members of the Governing Body attended rugby union games using the invitation extended to the Club to use the Chairman's Lounge, is established on the basis of the statements made by Robert Ashton Snr at page 71 of the transcript of his record of interview with OLGR inspectors dated 30 October 2014 (Complainant Exhibit E180) and the statements made by Robert Ashton Jnr at page 56 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182).
- 352.** The Authority notes the Club's submission in response to this Particular that the invitation to attend the Chairman's Lounge was a personal benefit that was not available to ordinary members and not transferable to other members of the Club either.
- 353.** The Authority further notes the Club's submission that any incidental benefit derived by a Club director from accepting an invitation to the Chairman's Lounge is "certainly reasonable" in circumstances where the director was "under a duty to assess the benefits to be derived from the sponsorship". The Club submits that this would be a benefit incidental to a director's agreement with the Club to serve and act in the best interests of the Club and as such, the exception in section 10(6)(a) of the Act applies to such incidental benefit.
- 354.** While the Authority accepts the Club's submission that the invitation extended to Club directors to attend the Chairman's Lounge was a personal benefit that was not available to and not transferable to other members of the Club, the Authority does not accept the Club's submission that this constitutes a "reasonable" benefit that is incidental to a Club director's agreement with the Club in respect of which the exception in section 10(6)(a) is applicable.
- 355.** There is no evidence before the Authority that the broader availability of this incidental benefit was considered by the directors, or that Club members thought that it was a reasonable benefit for the Club directors to gain from the sponsorship agreement entered into by the Club. The Authority is of the view that this incidental benefit should not have formed part of this sponsorship agreement and that the Club should have negotiated terms that were more reasonable for the *Club* as a whole – for example, a reduction in the annual sponsorship amount, or the availability of a greater number of free tickets for ordinary Club members.
- 356.** With regard to Particular 3.3 generally, the Authority is satisfied that the substantive benefit (the ability to attend the *Waratahs* games for free) was a benefit that was made available to all members of the Club. On the material before it, the Authority is satisfied that the Club provided a reasonable opportunity to other members to access these tickets as they were made available to the Club through its sponsorship agreement, on a regular basis.
- 357.** Particular 3.3 is not established, save for the allegation in Particular 3.3(e) that members of the Governing Body attended *Waratahs* rugby union games and in so doing gained the additional benefit of use of the Chairman's Lounge.

358. Particular 3.4 of the Complaint alleges that the Club reimbursed members of the governing body for expenses which were not offered equally to all members of the Club.
359. When considering such benefits, the Authority must also consider whether the benefits or advantages provided by way of reimbursed expenses do not fall within one of the exceptions available under section 10(6) of the Act.
360. The Authority makes the following findings on the sub-Particulars of Particular 3.4.
361. Particulars 3.4(a)(1), (2) and (3) respectively allege that the reimbursement of expenses claimed by members of the governing body occurred without approval for payment by a *current resolution of the governing body* (which is the exception provided by section 10(6)(d)).
362. Particular 3.4(a)(1) concerns 26 expense claims made between March 2010 and 8 August 2011, totalling \$2,912.00. Particular 3.4(a)(2) concerns 19 expense claims made between 9 August 2012 and April 2012, totalling \$4,968.00. Particular 3.4(a)(3) concerns 27 expense claims between 9 August 2011 and 8 August 2012, totalling \$4,275.50.
363. The Authority is satisfied that the allegations in Particulars 3.4(a)(1), (2) and (3) are established on the basis of the Club Board meeting minutes for 2009 through 2014 (Complainant Exhibits E003 to E050); a spreadsheet listing a summary of Club directors' expenses (Complainant Exhibit E054); Club directors' expense claim forms (Complainant Exhibit E055) and the minutes for the 2008, 2011 and 2014 Club AGMs (Complainant Exhibits E058 to E060).
364. Those Particulars are also established on the basis of the statements made by Robert Ashton Snr at pages 29 to 30 of the transcript of his record of interview with OLGR inspectors dated 30 October 2014 (Complainant Exhibit E180); the statements made by Robert Ashton Jnr at pages 27 to 30 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182); the statements made by Allan Teale at pages 27 to 28 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E183) and the statements made by Leonard Whitney at page 14 of the transcript of his record of interview with OLGR inspectors dated 3 November 2014 (Complainant Exhibit E184).
365. The Authority notes that the Club makes reference to statements that were made by Mr Teale at pages 26 to 30 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014, to the effect that a resolution was passed by the Club at its Annual General Meeting on **9 August 2011** authorising the reimbursement of directors' expenses "up to \$2,000" *up until the next AGM*, but that no further AGMs were held during the period of administration.
366. If expenses reimbursed to members of the governing body fall within the scope of a resolution passed at an AGM, the exception provided by section 10(6)(b) would be available.
367. However, the Authority has considered the Club's submission dated 17 May 2015 and the evidence of the resolutions passed at the Club AGM on 9 August 2011 that is provided in the minutes for the Club's 2011 AGM (Complainant Exhibit E059).

**368.** The Authority has reviewed all of the evidence or material relied upon by the Complainant in support of Particular 3.4(a) and is satisfied that a resolution concerning directors' expenses was passed at the Club's 2011 AGM on 9 August 2011.

**369.** The text of that 2011 AGM resolution does not actually specify a \$2,000 limit on directors' expenses as mentioned by Mr Teale in his record of interview.

**370.** The resolution, as recorded in the minutes for the 2011 AGM, states as follows:

*Pursuant to the Registered Clubs Act 1976, the members approve and agree to the following expenditure and/or benefits incurred on behalf of or granted to certain members of the Club during the period from the date of this resolution and ending with the conclusion of the next Annual General Meeting:*

1. *The reasonable costs of travel, meals and refreshments to be associated with each meeting of the Directors of the Club.*
2. *Reasonable expenses incurred in travelling to and from Directors' meetings or to other constituted meetings approved by the Board from time to time.*
3. *The reasonable costs of Directors attending industry related conferences and meetings.*
4. *The reasonable costs of Directors attending seminars, lectures, trade displays and other similar events.*
5. *The reasonable costs of Directors attending other registered clubs for the purpose of viewing and assessing their facilities and their method of operation.*
6. *The reasonable costs of Directors and their partners attending industry functions where appropriate and when representing the Club.*

**371.** The Authority accepts the Club's submission that the resolution passed at the Club's AGM on 9 August 2011 continued in effect by reason that AGMs were not held on a regular basis while the Club was under administration. The 2011 resolution continued to remain applicable as the Club held no further annual general meetings until 2014.

**372.** Had another annual general meeting been convened the following year the 2011 resolution would have expired, but as no AGM occurred during the relevant period, the Authority is satisfied that the 2011 resolution remained current and in effect at the times that the expenses that are the subject of Particulars 3.4(a)(2) and 3.4(a)(3) were reimbursed by the Club.

**373.** Particular 3.4(a) is *not* established, by reason that the Authority is satisfied that the reimbursement of expenses claimed by members of the governing body occurred with the prior approval of this type of payment made by a resolution passed at the Club's 2011 AGM, and not by a resolution of the governing body.

**374.** Particular 3.4(b) alleges that the expenses claimed by members of the governing body were reimbursed by the Club in circumstances where the governing body had only provided its approval of "reasonable" expenses.

**375.** The Authority notes that section 10(6)(d) provides an exception to the rule in section 10(1)(i) for the reimbursement of out-of-pocket expenses if they are both authorised by a current resolution of the governing body *and* are reasonably incurred.

- 376.** The Authority is satisfied that the claim pursuant to Particular 3.4(b)(1), which alleges the reimbursement of twelve (12) expenses between 9 August 2011 and 8 August 2012 (totalling \$5,498.40) has been established. That is, these payments were reimbursed by the Club.
- 377.** The Authority makes this finding on the basis of the minutes of the 2011 AGM (Complainant Exhibit E059); the minutes of the Club Board meeting dated 29 February 2012 (Complainant Exhibit E025); a spreadsheet listing a summary of Club directors' expenses (Complainant Exhibit E054) and Club directors' expense claim forms (Complainant Exhibit E055).
- 378.** However, the Authority is *not* satisfied, as contended by the Club, that all of the expenses claimed and at issue were also "reasonable".
- 379.** The Authority has reviewed the directors' expense claim forms provided by the Complainant and notes that expenses were claimed from the six broad categories of:
- "Meeting";
  - "Travel/Parking";
  - "Postage";
  - "Telephone";
  - "General"; and
  - "Other".
- 380.** While the Authority is satisfied that those expenses claimed in respect of the "Meeting" and "Travel/Parking" categories *did* fall within the scope of the 2011 AGM resolution, those expenses claimed that fell within the "Postage", "Telephone", "General" and "Other" categories *did not* fall within the categories of expenses specified by the 9 August 2011 resolution.
- 381.** While those expenses that were not covered by the 2011 AGM resolution are for minor expenses only, the Authority is nevertheless satisfied that Particular 3.4(b) is established on the evidence or material referred to above.
- 382.** Particular 3.4(c)(1) alleges that the expenses that are the subject of Particulars 3.4(a) and (b) were paid in circumstances where the majority of the expense claims made by the directors contained little or no detail about the nature of the expense incurred.
- 383.** The Authority is satisfied that this Particular is established on the basis of the Club directors' expense claim forms (Complainant Exhibit E055).
- 384.** Particular 3.4(c)(2) alleges that the expenses that are the subject of Particulars 3.4(a) and (b) contained no supporting documentation, despite a Club policy requiring the provision of supporting documentation for any expense claim above \$80.00.
- 385.** The Authority is satisfied that this Particular is established on the basis of the Club directors' expense claim forms (Complainant Exhibit E055); the statements made by Robert Ashton Snr at page 28 of the transcript of his record of interview with OLGR inspectors dated 30 October 2014 (Complainant Exhibit E180); the statements made by Chris Du Chesne at page 34 of the transcript of his record of interview with

OLGR inspectors dated 22 October 2014 (Complainant Exhibit E179) and the statements made by Robert Ashton Jnr at page 28 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182).

- 386.** Particular 3.4(c)(3) alleges that in the absence of detail, the expenses claimed cannot be said to have been for the benefit of the Club and its members.
- 387.** Particular 3.4(c)(4) alleges that in the absence of detail, the expenses claimed cannot be said to be connected to the duties and responsibilities of the claimants.
- 388.** Particular 3.4(c)(5) alleges that in the absence of detail, it cannot be said that the expenses were reasonable.
- 389.** With regard to particulars 3.4(c)(3), (4) and (5), the Complainant relies upon the statements made by Leonard Whitney at page 15 of the transcript of his record of interview with OLGR inspectors dated 3 November 2014 (Complainant Exhibit E184); the statements made by Robert Ashton Snr at pages 28 and 31 to 35 of the transcript of his record of interview with OLGR inspectors dated 30 October 2014 (Complainant Exhibit E180); the statements made by Sanjaya Nyachhyon at page 53 of his record of interview with OLGR inspectors dated 22 October 2014 (Complainant Exhibit E177); the statements made by Chris Du Chesne at pages 32 to 34 of the transcript of his record of interview with OLGR inspectors dated 22 October 2014 (Complainant Exhibit E179); the statements made by Allan Teale at pages 28 to 30 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E183); the statements made by Robert Ashton Jnr at pages 28 to 31 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182); the statements made by Brian Kirk at pages 15 to 16, 19 to 20 and 31 of his record of interview with OLGR Inspectors dated 30 October 2014 (Complainant Exhibit E181); the statements made by Leonard Whitney at pages 61 to 63 of the transcript of his record of interview with OLGR inspectors dated 16 September 2014 (Complainant Exhibit E141); the statements made by Luke McKew at pages 26 to 32, 37 to 42 and 45 of the transcript of his record of interview with OLGR inspectors dated 22 September 2014 (Complainant Exhibit E142) and the statements made by Mandhata Pokhrel at pages 5 and 28 of his record of interview with OLGR inspectors dated 3 November 2014 (Complainant Exhibit E185).
- 390.** The Authority has considered the Club's submissions that the expenses incurred by the Club's directors were "reasonable" and that the apparent lack of detail was a result of the Club's "past practice" and the prevailing circumstances while the Club was under administration.
- 391.** The Authority does not accept that the Club can rely on "past practice" as an excuse for not properly documenting expenses claimed by members of its governing body.
- 392.** The Authority further notes and accepts the Club's advice that a monthly honorarium of \$250 per Club director (CPI indexed) was introduced in lieu of reimbursing expenses, as a result of the recommendations made by Lawler Partners in an external review of the Club's operations conducted during February 2015.
- 393.** The Authority has also considered Mr Kirk's submissions that while supporting documentation for these expenses may not be complete, all of his expenses were nevertheless "reasonable".



394. Mr Kirk submits that the expenses he claimed were incurred in investigating amalgamation and joint venture opportunities, assisting the Club in negotiations with Crown Lands, and attending meetings at different Sydney clubs to consider how the Club could better serve its members. Mr Kirk also submits that he used ATO rates to charge for his motor vehicle travel expenses.
395. On the material before it, the Authority is satisfied that the expenses that are the subject of Particular 3.4 generally (being reimbursement by the Club of expenses that were not offered equally to all members of the Club), were *not* properly documented and/or substantiated, and for this reason were reimbursed by the Club in circumstances where the reimbursement was not “reasonable” for the purposes of the exception provided by section 10(6)(d) of the Act.
396. The Authority is *not* satisfied that any of the benefits or advantages established in respect of Particular 3.4 fall within the exceptions provided by section 10(6) of the Act.
397. Particular 3.4 is established.
398. In summary, Ground 3 alleges that between 2010 and 2014, the Club failed to comply with section 10(1)(i) of the Act by permitting “individuals” to derive a benefit or advantage not offered equally to all members of the Club.
399. Noting that section 10(1)(i) requires that the members of a club not be entitled to any profit, benefit or advantage that is not offered equally to every full member of the club (unless an exception in section 10(6) applies), the Authority is satisfied that Particular 3.1 has been established – with respect to some private use of the Club’s motor vehicles by two of the Club’s directors.
400. The Authority is also satisfied that Particular 3.4 has been established with respect to expenses claimed by Club directors that were reimbursed by the Club, but *only* with respect to those categories of expenses noted above that were not covered by the resolution passed by the Club at its AGM on 9 August 2011.

#### GROUND 4

401. Ground 4 states:

***Section 57F(3)(a) – The Club failed to meet the requirements of section 10(1)(l) of the Act.***

*Between January 2009 and November 2014 the Club failed to meet the requirements of section 10(1)(l) of the Act when the Club failed to comply with the reporting requirements set out in the Registered Clubs Regulation 2009 (the **Regulation**) and required by section 38 of the Act.*

402. Particular 4.1 of Ground 4 alleges as follows:

*The Club failed to provide to members of the governing body financial statements required by Clause 17 of the Regulation on a quarterly basis.*

- (a) *The Club failed to prepare “profit and loss statements” and “balance sheets” on a quarterly basis.*
- (b) *Between March 2009 and May 2014 the financial year of the club was 1 June to 31 May.*

- (c) *For 10 quarters between March 2009 and May 2014, there is no minute recording that any financial statements were provided to the governing body.*

**403.** Particular 4.2 of Ground 4 alleges as follows:

*The Club failed to display a notice on the Club's website outlining how Club members can access those financial statements.*

**404.** Particular 4.3 of Ground 4 alleges as follows:

*As a result of the governing body not approving financial statements on a quarterly basis, these statements could not have been made available to ordinary members within 48 hours of being approved by the governing body.*

**405.** Particular 4.4 of Ground 4 alleges as follows:

*Prior to 1 January 2013, the Club failed to record disclosures made by members of the governing body in a register of disclosures for the relevant financial year as required by Clause 18(1) of the Regulation.*

- (a) *The Club failed to maintain a register of disclosures prior to 1 January 2013.*

- (b) *Prior to 1 January 2013, members of the governing body made disclosures that were required to be recorded and maintained in the register of disclosures.*

(1) *Ms Madeline Kirk:*

- (A) *Ms Kirk is the daughter of director Mr Kirk;*
- (B) *Mr Kirk was a member of the governing body between 28 August 2003 and 2 April 2014;*
- (C) *Between 16 November 2010 and 25 December 2011 Ms Kirk was employed by the Club; and*
- (D) *Mr Kirk made a written declaration on 7 January 2011.*

(2) *Mr Ashton Jnr:*

- (A) *Mr Ashton Jnr is the son of director Mr Ashton Snr;*
- (B) *Mr Ashton Snr became a member of the governing body on 28 August 2003 and continues to act in that capacity;*
- (C) *Mr Ashton Jnr was employed with the Club as "bar staff" between 15 December 2005 and 4 May 2009;*
- (D) *Mr Ashton Jnr re-commenced employment with the Club on or about 29 November 2010; and*
- (E) *Mr Ashton Snr made a written declaration on 10 January 2011.*

(3) *Mr Kirk:*

- (A) *At the 2008 AGM the ordinary members were asked to consider transferring the Club premises from core to non-core property, and entering a new leasing arrangement;*
- (B) *Woollahra Gardens Pty Limited is party to the Deed of Company Arrangement;*
- (C) *Mr Kirk performed remunerated work for Mr Michael Sanchez and his associated group of companies, which includes Woollahra Gardens Pty Limited; and*
- (D) *Mr Kirk made a disclosure at the 2008 AGM identifying his relationship with Mr Sanchez.*

- (c) *The Club's register of disclosures is not maintained for each financial year.*

- (1) *The Club's financial year was from 1 June to 30 May.*
- (2) *The Club maintained a register of disclosures for the period 1 January 2013 to 31 December 2013.*
- (3) *The Club maintained a register of disclosures for the period 1 September 2013 to 31 August 2014.*

**406.** Particular 4.5 of Ground 4 alleges as follows:

*The Club failed to display a notice on the Club website informing members how they can access the Club's register of disclosures.*

#### **Club's Response to Ground 4**

- 407.** In response to Particular 4.1, the Club notes that the Profit and Loss summaries are actually provided monthly. However, the Club acknowledges that the Balance Sheets were provided "somewhat haphazardly" because the asset/liability position of the Club did not fluctuate month to month and any changes in cash flow were reflected in the Profit and Loss statements.
- 408.** In response to Particular 4.2, the Club submits that the website notification requirement is an "additional notification procedure". The Club "always" posted on its noticeboard.
- 409.** In response to Particular 4.3, the Club takes issue with the framing of this Particular. The Club submits that these financial reports were made available on a "more regular" basis so they could not have been "quarterly reports" – but all statements were posted within 48 hours of meetings. The Club advises that all financial statements are now prepared quarterly.
- 410.** In response to Particular 4.4, the Club concedes that it did not maintain a *separate* register of such disclosures at that time, but Club directors *did* make written disclosures. The Club submits that this compliance failure is "one of manner and form".
- 411.** The Club states that since 1 January 2013, a separate register of disclosures has been maintained, but notes that Mr Jason Webb (the Club's current secretary) has amended the form of recordkeeping so that the disclosures register is maintained on a financial year basis, rather than on a calendar year basis.

#### **Ex-Officers' Response to Ground 4**

- 412.** The Ex-Officers adopt the entirety of the Club's submission dated 17 May 2015 in respect of Ground 4 of the Complaint.

#### **Kirk's Response to Ground 4**

- 413.** Mr Kirk submits, with regard to Particulars 4.1 to 4.3, that during the Club's administration, he relied upon Mr Wily and MLM to ensure compliance with financial reporting requirements and notifications.
- 414.** Mr Kirk contends that in February 2011, he identified that the reports from MLM fell short in some respects and recommended a formal management report based on the *ClubsNSW* template, as noted in the Club Board meeting minutes for 28 February 2011.

415. In response to Particulars 4.4 and 4.5, Mr Kirk submits that there was a disclosure register maintained by the Club's secretary manager, as he (Mr Kirk) had made disclosures as recorded in Particulars 4.4(b)(1) and 4.4(b)(3) of the Complaint.
416. Mr Kirk submits that disclosure in respect of the Club's employment of Ms Madeline Kirk (Mr Kirk's daughter) was made at the directors' meeting prior to Ms Kirk's employment, and a further disclosure in respect of this matter was made on 7 January 2011.

#### **Wily's Response to Ground 4**

417. Mr Wily did not make any specific submissions in response to Ground 4 of the Complaint.

#### **Authority Findings on Ground 4**

418. Section 10(1)(l) of the Act states as follows:

*The club must comply with any requirements imposed on the club under section 38.*

419. Section 38 of the Act states as follows:

##### **38 Reporting requirements of registered clubs**

- (1) *The regulations may make provision for or with respect to the reporting requirements of registered clubs (including requirements relating to the financial statements and accounts of registered clubs and the information to be disclosed by registered clubs).*
- (2) *Subject to subsections (3) and (4), regulations made for the purposes of subsection (1) have effect in addition to:*
  - (a) *the provisions of the Corporations Act 2001 of the Commonwealth relating to balance sheets and profit and loss accounts of companies, and*
  - (b) *the provisions of the Co-operatives National Law (NSW) relating to balance sheets and income and expenditure accounts of co-operatives.*
- (3) *The regulations may declare a matter that is dealt with by regulations made for the purposes of subsection (1) to be an excluded matter for the purposes of section 5F of the Corporations Act 2001 of the Commonwealth in relation to:*
  - (a) *the whole of the Corporations legislation to which Part 1.1A of the Corporations Act 2001 of the Commonwealth applies, or*
  - (b) *a specified provision of that legislation, or*
  - (c) *that legislation other than a specified provision, or*
  - (d) *that legislation otherwise than to a specified extent.*

**Note:** Section 5F of the Corporations Act 2001 of the Commonwealth provides that if a State law declares a matter to be an excluded matter for the purposes of that section in relation to all or part of the Corporations legislation of the Commonwealth, then the provisions that are the subject of the declaration will not apply in relation to that matter in the State concerned.

- (4) *If any provision of any regulation made for the purposes of subsection (1) is inconsistent with any provision of the Co-operatives National Law (NSW):*
  - (a) *the provision of the regulation prevails to the extent of the inconsistency, and*

- (b) *if the provision of the regulation is complied with by the registered club, the registered club is taken not to have failed to comply with the provision of the Co-operatives National Law (NSW) with which the provision of the regulation is inconsistent.*

- (5) *In this section:  
“matter” includes act, omission, body, person or thing.*

**420.** Clause 17 of the former *Registered Clubs Regulation 2009* provided:

**17 Reporting – financial statements**

- (1) *A registered club must:*
  - (a) *prepare, on a quarterly basis, financial statements that incorporate:*
    - (i) *the club’s profit and loss accounts and trading accounts for the quarter, and*
    - (ii) *a balance sheet as at the end of the quarter, and*
  - (b) *provide the financial statements to the governing body of the club, and*
  - (c) *make the financial statements available to the members of the club within 48 hours of the statements being adopted by the governing body, and*
  - (d) *indicate, by displaying a notice in the form approved by the Director-General on the club’s premises and on the club’s website (if any), how the members of the club can access the financial statements, and*
  - (e) *provide a copy of the financial statements to any member of the club or the Director-General on the request (in writing) of the member or the Director-General.*

*Maximum penalty: 50 penalty units.*

**421.** Clause 18 of the former *Registered Clubs Regulation 2009* provided:

**18 Reporting – provision of information to members**

- (1) *A registered club must:*
  - (a) *record the information specified in subclause (2) and keep it in a form approved by the Director-General, and*
  - (b) *make the information available to the members of the club within 4 months after the end of the reporting period to which the information relates, and*
  - (c) *indicate, by displaying a notice in the form approved by the Director-General on the club’s premises and on the club’s website (if any), how the members of the club can access the information, and*
  - (d) *provide a copy of the information to any member of the club or the Director-General on the request (in writing) of the member or the Director-General.*

*Maximum penalty: 50 penalty units.*

- (2) *The information to be recorded is as follows:*

- (a) *any disclosure, declaration or return received by the club under Division 2 of Part 4A of the Act during the reporting period,*

- (b) *the number of top executives of the club (if any) whose total remuneration for the reporting period (comprising salary, allowances and other benefits) falls within each successive \$10,000 band commencing at \$100,000,*
- (c) *details (including the main purpose) of any overseas travel during the reporting period by a member of the governing body of the club or an employee of the club in the person's capacity as a member of the governing body or employee, including the costs wholly or partly met by the club for the member of the governing body, employee and any other person connected with any such travel,*
- (d) *details of any loan made during the reporting period to an employee of the club if the amount of the loan (together with the amount of any other loan to the employee by the club that has not been repaid) is more than \$1,000, including the amount of the loan and the interest rate, if any,*
- (e) *details of any contract for remuneration approved during the reporting period under section 41M of the Act,*
- (f) *the name of any employee of the club who the registered club is aware is a close relative of a member of the governing body of the club or of a top executive of the club and the amount of the remuneration package paid to the employee,*
- (g) *details of any amount equal to or more than \$30,000 paid by the club during the reporting period to a particular consultant, including the name of the consultant and the nature of the services provided by the consultant,*
- (h) *the total amount paid by the club during the reporting period to consultants (other than amounts required to be included under paragraph (g)),*
- (i) *details of any settlement made during the reporting period with a member of the governing body of the club or an employee of the club as a result of a legal dispute and the amount of any associated legal fees incurred by the member or employee that were or are to be paid by the club, unless the disclosure of such information would be in breach of any confidentiality provision agreed to by the club,*
- (j) *details of any legal fees (not referred to in paragraph (i)) paid by the club on behalf of a member of the governing body of the club or an employee of the club,*
- (k) *the total amount of the profits (within the meaning of the Gaming Machine Tax Act 2001) from the operation of approved gaming machines in the club during the gaming machine tax period relating to the reporting period,*
- (l) *the amount applied by the club during the gaming machine tax period to community development and support under Part 4 of the Gaming Machine Tax Act 2001.*
- (3) *For the purposes of subclause (2)(f), a registered club is to make all reasonable inquiries to ascertain the name of any employee of the club who is a close relative of a member of the governing body of the club or of a top executive of the club.*
- (4) *A reference in subclause (2)(f) or (3) to an employee of a registered club does not include a reference to an employee who:*
  - (a) *holds a position that is subject to an industrial award under a law of the State or the Commonwealth, and*
  - (b) *receives a remuneration package for that position of a value not exceeding the rate of pay applicable to the position that is provided for in the award.*

(5) *In this clause:*

***gaming machine tax period*** means the period of 12 months beginning on 1 September in the financial year concerned and ending on 31 August in the following year.

***reporting period*** means the relevant financial year of the registered club in relation to which the information is provided.

422. Particular 4.1 alleges that the Club failed to provide to members of the governing body financial statements required by clause 17 of the Regulation on a quarterly basis. The Authority makes the following findings on the sub-Particulars of Particular 4.1.
423. The Authority is satisfied that Particular 4.1(a) is established on the basis of the statements made by Robert Ashton Jnr at pages 16 to 17 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182); the statements made by Sanjaya Nyachhyon at pages 8 to 9 of his record of interview with OLGR inspectors dated 22 October 2014 (Complainant Exhibit E177); the statements made by Leonard Whitney at pages 10 to 11 of the transcript of his record of interview with OLGR inspectors dated 3 November 2014 (Complainant Exhibit E184) and the statements made by Robert Ashton Snr at page 38 of the transcript of his record of interview with OLGR inspectors dated 30 October 2014 (Complainant Exhibit E180).
424. Particular 4.1(b) alleges that between March 2009 and May 2014 the financial year for the Club was from 1 June to 31 May. The Authority notes that neither the Club nor the Ex-Officers have disputed this contention and the Authority accepts that this Particular is established on that basis.
425. Particular 4.1(c) alleges that for 10 quarters between March 2009 and May 2014, there is no minute recording that any financial statements were provided to the governing body. The Authority notes that neither the Club nor the Ex-Officers have disputed this contention and is satisfied that this Particular is established on that basis.
426. The Authority notes Mr Kirk's submission in respect of this Particular that in February 2011, he "took steps to familiarise himself with reporting requirements" and identified that the reports from MLM fell short in some respects and recommended a formal management report based on the *ClubsNSW* template, as noted in the Club Board meeting minutes for 28 February 2011, which states:
- BK [Brian Kirk] is to work with RA [Robert Ashton] to develop a formal management report and make it available for each meeting. The format provided by ClubsNSW is to be used as the basis. A first run report is to be available at the next meeting and for review and comment – changes to be made as required.*
427. The Authority notes that Mr Kirk does not specify in his submission in which respects he identified that the reports from MLM were deficient, nor does he specify when he first raised these deficiencies or to whom.
428. While the Authority accepts that Mr Kirk took steps in 2011 to improve compliance with the club's reporting requirements, the Authority does not accept, as an adequate response, Mr Kirk's submission in respect of Particular 4.1 that he relied

upon Mr Wily and MLM to ensure compliance with financial reporting requirements and notifications while the Club was under administration.

- 429.** The Authority is satisfied that when the DOCA was executed on 24 March 2003, the powers and obligations of the officers of the Club were restored and the fact that the Deed was ultimately administered by Mr Wily does not excuse any director's absence of knowledge with regard to statutory reporting requirements to which the Club was subject.
- 430.** The Authority is satisfied that Particular 4.1(c) is established. However, the Authority notes that the Club was *partly* in compliance with its reporting obligations under section 38 of the Act and clauses 17 and 18 of the Regulation by reason of the Club's production of a *monthly* Profit & Loss Statement at each monthly meeting of the Club directors.
- 431.** The Authority is satisfied that Particular 4.2, alleging the Club's failure to display a notice on the website as to how members can access financial statements, is established on the basis of page 11 of the statement of OLGR inspector Karen McCluskey dated 28 November 2014 and screenshots of the "*Paddo Bowls*" website (Complainant Exhibit E229).
- 432.** The Authority notes Mr Kirk's submission in respect of this Particular that in February 2011, he identified that the reports from MLM fell short in some respects and recommended a formal management report based on the *ClubsNSW* template, as noted in the Club Board meeting minutes for 28 February 2011, which states:
- BK [Brian Kirk] is to work with RA [Robert Ashton] to develop a formal management report and make it available for each meeting. The format provided by ClubsNSW is to be used as the basis. A first run report is to be available at the next meeting and for review and comment – changes to be made as required.*
- 433.** The Authority notes that Mr Kirk does not specify in his submission in which respects he identified that the reports from MLM were deficient, nor does he specify when he first raised these deficiencies or to whom.
- 434.** While the Authority accepts that Mr Kirk took steps in 2011 to improve compliance with the club's reporting requirements, the Authority does not accept as an adequate response to this allegation Mr Kirk's submission in respect of Particular 4.2 that he relied upon Mr Wily and MLM to ensure compliance with financial reporting requirements and notifications while the Club was under administration.
- 435.** The Authority notes that when the DOCA was executed on 24 March 2003, the powers and obligations of the officers of the Club were restored and the fact that the Deed was ultimately administered by Mr Wily does not excuse Mr Kirk's absence of knowledge with regard to the extent of the Club's compliance or non-compliance with the legislative requirements to which the Club was subject.
- 436.** The Authority has considered the Club's characterisation of the website notification requirement as an "additional notification procedure" which is only to apply if a registered club has a website.
- 437.** The Authority does not accept that this in any way diminishes the requirement for the Club to comply with this legislative requirement and is satisfied that the Club maintained the "*Paddo Bowls*" website at all relevant times during which this non-



compliance is alleged to have occurred. The Authority is satisfied that the non-compliance alleged in Particular 4.2 is established.

438. Particular 4.3 of the Complaint alleges that, as a result of the governing body not approving financial statements on a quarterly basis, these statements could not have been made available to ordinary members within 48 hours of being approved by the governing body.
439. The Authority again notes Mr Kirk's submission in respect of this Particular that in February 2011, he identified that the reports from MLM fell short in some respects and recommended a formal management report based on the *ClubsNSW* template, as noted in the Club Board meeting minutes for 28 February 2011, which states:

*BK [Brian Kirk] is to work with RA [Robert Ashton] to develop a formal management report and make it available for each meeting. The format provided by ClubsNSW is to be used as the basis. A first run report is to be available at the next meeting and for review and comment – changes to be made as required.*

440. The Authority notes that Mr Kirk does not specify in his submission in which respects he identified that the reports from MLM were deficient, nor does he specify when he first raised these deficiencies or to whom.
441. While the Authority accepts that Mr Kirk took steps in 2011 to improve compliance with the club's reporting requirements, the Authority does not accept Mr Kirk's submission in respect of Particular 4.3 that he relied upon Mr Wily and MLM to ensure compliance with financial reporting requirements and notifications while the Club was under administration. The Authority notes that when the DOCA was executed on 24 March 2003, the powers and obligations of the officers of the Club were restored and the fact that the Deed was ultimately administered by Mr Wily does not excuse any director from an absence of knowledge with regard to the Club's statutory obligations with regard to financial statements.
442. The Authority notes the Club's submission that these reports were made available on a more regular basis so could not have been "quarterly reports" – but that all statements were posted within 48 hours of meetings. Nevertheless, the Authority is satisfied that Particular 4.3 of the Complaint, in the form in which it is alleged, has been established.
443. Particular 4.4 of the Complaint alleges that prior to 1 January 2013, the Club failed to record disclosures made by members of the governing body in a register of disclosures for the relevant financial year, as required by clause 18(1) of the Regulation. The Authority makes the following findings on the sub-Particulars of Particular 4.4.
444. The Authority is satisfied that Particular 4.4(a), which alleges a failure to maintain a register of disclosures prior to 1 January 2013, is established on the basis of Robert Ashton's response to a Notice to Produce dated 16 September 2014 (Complainant Exhibit E066); the Club's *Register of Disclosures* dated between 1 September 2013 and 31 August 2014 (Complainant Exhibit E061); a Notice to Produce under section 21 of the *Gaming and Liquor Administration Act 2007* to Robert Ashton Jnr dated 9 September 2014 (Complainant Exhibit E158) and the statements made by Leonard Whitney at page 12 of the transcript of his record of interview with OLGR inspectors dated 3 November 2014 (Complainant Exhibit E184).

- 445.** The Authority is satisfied that Particular 4.4(b)(1)(A), alleging that a disclosure requiring publication was made in respect of Ms Madeline Kirk, the daughter of Club director Mr Kirk, is established on the basis of the Club Board meeting minutes for 29 October 2010 (Complainant Exhibit E013).
- 446.** The Authority is satisfied that Particular 4.4(b)(1)(B), regarding Mr Kirk's status as a director of the Club, is established on the basis of an ASIC extract for the Club dated 2 December 2014 (Complainant Exhibit E094).
- 447.** The Authority is satisfied that Particular 4.4(b)(1)(C), regarding Ms Kirk's employment with the Club, is established on the basis of Club staff lists, including salary, commencement and termination date (Complainant Exhibit E078) and the payment summary for Madeline Kirk (Complainant Exhibit E080).
- 448.** The Authority is satisfied that Particular 4.4(b)(1)(D), regarding Mr Kirk's written declaration on 7 January 2011, is established on the basis of the Club Board meeting minutes for 29 October 2010 (Complainant Exhibit E013); the Club Board meeting minutes for 1 February 2011 (Complainant Exhibit E015) and the statements made by Brian Kirk at page 14 of his record of interview with OLGR Inspectors dated 30 October 2014 (Complainant Exhibit E181).
- 449.** The Authority notes that Particular 4.4(b)(2)(A), stating that Mr Ashton Jnr is the son of Club director Mr Ashton Snr, is not disputed by either the Club or the Ex-Officers. The Authority also notes that Mr Ashton Jnr confirmed in his record of interview with OLGR inspectors dated 23 May 2014 that Mr Ashton Snr was his father, and accepts that this Particular is established on that basis.
- 450.** The Authority is satisfied that Particular 4.4(b)(2)(B), regarding Mr Ashton Snr's membership of the Club's governing body, is established on the basis of an ASIC extract for the Club dated 2 December 2014 (Complainant Exhibit E094).
- 451.** The Authority is satisfied that Particular 4.4(b)(2)(C), regarding Mr Ashton Jnr's employment at the Club, is established on the basis of Club staff lists, including salary, commencement and termination date (Complainant Exhibit E078).
- 452.** The Authority is satisfied that Particular 4.4(b)(2)(D), regarding Mr Ashton Jnr's further employment at the Club, is established on the basis of Club staff lists, including salary, commencement and termination date (Complainant Exhibit E078) and an ASIC extract for the Club dated 2 December 2014 (Complainant Exhibit E094).
- 453.** The Authority is satisfied that Particular 4.4(b)(2)(E), regarding Mr Ashton Snr's written declaration on 10 January 2011, is established on the basis of an ASIC extract for the Club dated 2 December 2014 (Complainant Exhibit E094); a form of disclosure signed by Robert Ashton Snr on 10 January 2011 (Complainant Exhibit E097) and an offer of employment to Robert Ashton Jnr dated 30 June 2014 (Complainant Exhibit E093).
- 454.** The Authority is satisfied that Particular 4.4(b)(3)(A), alleging that at the 2008 AGM ordinary members were asked to consider transferring the status of the Club premises from "core" to "non-core" property and entering into a new leasing arrangement, is established on the basis of the minutes for the Club's 2008 AGM (Complainant Exhibit E058).

455. The Authority is satisfied that Particular 4.4(b)(3)(B), alleging that Woollahra Gardens Pty Ltd is a party to the DOCA, is established on the basis of the minutes for the Club's 2008 AGM (Complainant Exhibit E058).
456. The Authority is satisfied that Particular 4.4(b)(3)(C), alleging that Mr Kirk performed remunerated work for Mr Michael Sanchez and his associated group of companies, which includes Woollahra Gardens Pty Ltd, is established on the basis of a form of disclosure signed by Brian Kirk dated 9 December 2008 (Complainant Exhibit E239).
457. The Authority is satisfied that Particular 4.4(b)(3)(D), alleging that Mr Kirk made a disclosure at the 2008 AGM identifying his relationship with Mr Sanchez, is established on the basis of the minutes for the Club's 2008 AGM (Complainant Exhibit E058) and a form of disclosure signed by Brian Kirk dated 9 December 2008 (Complainant Exhibit E239).
458. The Authority is satisfied that Particular 4.4(c)(1), alleging that the Club's register of disclosures is not maintained for each financial year, is established on the basis of Article 67 of the *Articles of Association* for the Club (Complainant Exhibit E085); the Club's Constitution dated 2 April 2014 (Complainant Exhibit E084) and the minutes for the Club's AGM dated November 2014 (Complainant Exhibit E209).
459. The Authority is satisfied that Particular 4.4(c)(2), alleging that the Club maintained a register of disclosures for 1 January 2013 to 31 December 2013, is established on the basis of the Club's Financial Statement for 30 June 2011 (Complainant Exhibit E187) and the statements made by Robert Ashton Jnr at page 21 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182).
460. The Authority is satisfied that Particular 4.4(c)(3), alleging that the Club maintained a register of disclosures for the period from 1 September 2013 to 31 August 2014, is established on the basis of the Club's *Register of Disclosures* dated between 1 September 2013 and 31 August 2014 (Complainant Exhibit E061).
461. With regard to Particular 4.4 generally, the Authority notes that the Club concedes that it did not maintain a *separate* register of such disclosures during the relevant time, but contends that the Club directors *did* make written disclosures.
462. The Authority accepts Mr Kirk's submission that there was actually a register of disclosures maintained by the Club's secretary manager, as evidenced by the disclosures made by Mr Kirk as recorded in Particulars 4.4(b)(1) and 4.4(b)(3) of the Complaint.
463. The Authority accepts, on the basis of the Club Board meeting minutes for 29 October 2010, which contain a disclosure that Ms Madeline Kirk is Mr Kirk's daughter (Complainant Exhibit E013); a form of disclosure signed by Brian Kirk dated 9 December 2008 in relation to Mr Kirk performing remunerated work for Mr Michael Sanchez (Complainant Exhibit E239); and the form of disclosure signed by Robert Ashton Snr dated 10 January 2011 stating that Robert Ashton Jnr is his son (Complainant Exhibit E097), that disclosures were actually made by Club directors.

464. The Authority accepts the Club's submission that the compliance failure alleged in Particular 4.4 is "one of manner and form".
465. The Authority accepts the Club's advice that since 1 January 2013, a separate register of disclosures has been maintained, on a financial year basis, rather than on a calendar year basis.
466. However, the legislative requirement is that the disclosures specified by clause 18 of the former *Registered Clubs Regulation 2009* be recorded in the *prescribed form*.
467. The Authority is satisfied that the sub-Particulars of Particular 4.4, as pleaded by the Complainant, have been established.
468. The Authority is satisfied that Particular 4.5, alleging that the Club failed to display a notice on its website informing members how to access the register of disclosures, is established on the basis of page 11 of the statement by OLGR Inspector Karen McCluskey dated 28 November 2014.
469. On the basis of the Authority's findings on the above Particulars, the Authority is satisfied that Ground 4 of the Complaint is established. That is, between January 2009 and November 2014, the Club failed to meet the requirements of section 10(1)(l) of the Act when the Club failed to comply with the reporting requirements set out in the Regulation and as required by section 38 of the Act.

## GROUND 5

470. Ground 5 states:

***Section 57F(3)(a) – The Club failed to meet the requirements of section 10(1)(m) of the Act.***

*Between 2007 and 2014 the Club failed to meet the requirements of section 10(1)(m) of the Act when the Club failed to comply with the requirements of Part 4A of the Act.*

471. Particular 5.1 of Ground 5 alleges as follows:

*Between 2009 and 2013 the Club failed to specify the core and non-core property of the Club at the end of the financial year in any of the Club's annual reports, in contravention of section 41J(2) of the Act.*

472. Particular 5.2 of Ground 5 alleges as follows:

*The Club entered into a contract for the remuneration of a "top executive" without the proposed contract having been first approved by the governing body of the Club, contravening section 41M of the Act.*

- (a) *On or about 29 November 2010 Mr Ashton Jnr commenced employment with the Club as Secretary.*
- (b) *There was no written contract between the Club and Mr Ashton Jnr outlining the terms of the employment.*
- (c) *On or about 1 February 2011 the Club appointed Mr Ashton Jnr to the position of Secretary.*
- (d) *The Secretary of the Club is a "top executive" for the purposes of section 41M of the Act.*

- (e) *The register of disclosures states that the governing body of the Club approved the remuneration or employment contract with Mr Ashton Jnr in the position of Secretary in April 2014.*
- (f) *There is no minute of a meeting of the governing body approving Mr Ashton Jnr's remuneration or employment contract in the position of Secretary.*
- (g) *On or about 30 June 2014 the Club entered into a written contract with Mr Ashton Jnr for the position of Secretary commencing on 21 April 2014, in circumstances where:*
  - (1) *Mr Ashton Jnr commenced in the role at a time between November 2010 and February 2011; and*
  - (2) *there is no minute of a meeting of the governing body approving Mr Ashton Jnr's remuneration or contract.*

**473.** Particular 5.3 of Ground 5 alleges as follows:

*The Club failed to give written notice, as soon as practicable, to Mr Ashton Jnr that he was a "top executive" of the Club and had responsibilities under Part 4A of the Act in contravention of section 41U of the Act.*

- (a) *There is no record that the Club provided Mr Ashton Jnr with written notice that he was a "top executive".*

**474.** Particular 5.4 of Ground 5 alleges as follows:

*The Club lent money to an employee where there that loan was not first approved by the governing body of the Club in contravention of section 41N of the Act.*

- (a) *Mr Matthew Brady was an employee of the Club between 10 December 2012 and 30 June 2013.*
- (b) *On 8 March 2013 the Club provided Mr Brady a loan in the sum of \$2,000.*
- (c) *The register of disclosures records that the loan was approved by the members of the governing body on 9 April 2013.*
- (d) *There is no board minute recording that the proposed loan was first approved by the governing body of the Club.*

**475.** Particular 5.5 of Ground 5 alleges as follows:

*On 1 February 2007, the Club entered into a contract with ML Management (NSW) Pty Limited ACN 104 788 070 (MLM), a company in which Mr Levy, the Secretary at that time, had a controlling interest, contravening section 41L of the Act.*

- (a) *Between 26 October 2004 and 3 October 2007 Mr Levy was the Secretary of the Club.*
- (b) *During this period Mr Levy was the sole director of MLM and had the capacity to determine the outcome of decisions about the financial and operating policies of the company.*
- (c) *On 1 February 2007 the Club entered into a deed with MLM to provide consultative and administrative services to the Club (the MLM Deed).*
- (d) *The MLM Deed was a commercial arrangement for the provision of services by MLM to the Club.*
- (e) *Before entering into the MLM Deed, the Club did not make reasonable inquiries to ensure that section 41L(1) was complied with.*

**476.** The Authority notes that, as stated in the Complainant's Revised Position Statement dated 17 June 2015, Particulars 5.1 and 5.4 of Ground 5 are no longer pressed

against Mr Du Chesne and Particulars 5.2, 5.3 and 5.5 are no longer pressed against Messrs McKew and Ashton Jnr.

### **Club's Response to Ground 5**

- 477.** In response to Particular 5.1, the Club submits that this allegation is “misconceived”. At the 2008 AGM, a resolution was passed whereby the Club’s premises were declared not to be “core property”. The Club argues that all of the Club’s property became “non-core” pursuant to that resolution and was therefore not subject to section 41J of the Act.
- 478.** In response to Particular 5.2, the Club submits that the claim that Mr Ashton Jnr’s terms of engagement required prior Board approval is “misconceived”. The Club submits that section 41M of the Act does not apply to a contract of employment between a registered club and an employee of the Club, per section 41P(1)(b) of the Act. Mr Ashton Jnr was employed by the Club.
- 479.** In response to Particular 5.3, the Club submits that failure to give a notice to Mr Ashton that he was a top executive does not constitute an offence by the Club, but an offence committed by the *secretary* and *directors* of the Club, per section 41V of the Act.
- 480.** The Club further submits that there is “no evidence” that the “substantive policy” of section 41U of the Act (that the person appointed declares to the Club any interests in hotels and gifts from affiliated bodies) was offended by the conduct at issue.
- 481.** In response to Particular 5.4, alleging that the Club lent money to an employee without approval by the governing body, the Club contends that the loan to Mr Brady was recorded in the register of loans to employees that was kept by the Club under section 18D of the Act and that the loan was repaid in full in December 2013. The Club submits that the loan was ratified and approved by the Board, as noted in Mr Ashton Jnr’s record of interview with OLGR inspectors dated 31 October 2014.
- 482.** In response to Particular 5.5, alleging that the Club’s contract with ML Management did not comply with section 41L of the Act, the Club submits that the management agreement was entered into while the Club was under administration and that it has “long since ended”. The Club submits that it was “controlled” by Mr Wily at the relevant time and had “no independent capacity” to enter into such an agreement.
- 483.** The Club submits that this is an “historical matter” which has no substantial connection to the current management of the Club. The Club argues that it is “positively unconscionable” for OLGR not to have taken disciplinary action for the past 8 years, yet now seek to rely upon this agreement as part of the current Complaint.

### **Ex-Officers’ Response to Ground 5**

- 484.** The Ex-Officers adopt the entirety of the Club’s submission dated 17 May 2015 in respect of Ground 5 of the Complaint, in so far as it supports the Ex-Officers’ position.

## Kirk's Response to Ground 5

485. Mr Kirk submits, in relation to Particular 5.1, that he sought advice from Mr Wily and relied upon Mr Wily's advice as to what was "core property" under the Act.
486. In response to Particular 5.5, Mr Kirk submits that the deed between Mr Wily and MLM was entered into prior to Mr Kirk's appointment to the Board. The deed was extended on or around 1 Feb 2007 under Mr Wily's direction.
487. Mr Kirk submits that he relied upon Mr Wily to ensure compliance with the relevant provisions of the Act with regard to contracting out management services.

## Wily's Response to Ground 5

488. Mr Wily did not make any specific submissions in relation to Ground 5 of the Complaint.

## Authority Findings on Ground 5

489. Section 41J of the Act provides as follows:

### 41J Disposal by club of real property

- (1) *In this section:*

**"core property"** of a registered club means any real property owned or occupied by the club that comprises:

- (a) *the premises of the club, or*
- (b) *any facility provided by the club for the use of its members and their guests, or*
- (c) *any other property declared, by a resolution passed by a majority of the members present at a general meeting of the ordinary members of the club, to be core property of the club,*

*but does not include any property referred to in paragraphs (a)-(c) that is declared, by a resolution passed by a majority of the members present at a general meeting of the ordinary members of the club, not to be core property of the club.*

**"dispose"** of property means to sell, lease or licence the property or to otherwise deal with the property in such manner as may be prescribed by the regulations.

**"non-core property"** of a registered club means any real property owned or occupied by the club that is not core property.

- (2) *The annual report of a registered club must specify the core property and non-core property of the club as at the end of the financial year to which the report relates.*
- (3) *A registered club must not dispose of any core property of the club unless:*
- (a) *the property has been valued by a registered valuer within the meaning of the Valuers Act 2003, and*
  - (b) *the disposal has been approved at a general meeting of the ordinary members of the club at which a majority of the votes cast supported the approval, and*
  - (c) *any sale is by way of public auction or open tender conducted by an independent real estate agent or auctioneer.*

- (4) *The regulations may create exceptions to this section.*

**490.** Section 41L of the Act provides:

**41L Contracts with secretary, manager, close relatives and others**

- (1) *A registered club must not enter into a contract with any of the following:*
- (a) *the secretary of the club, a manager appointed under the Liquor Act 2007 for any premises of the club or any other person prescribed by the regulations for the purposes of this section,*
  - (b) *any close relative of a person referred to in paragraph (a),*
  - (c) *a company or other body in which a person referred to in paragraph (a) or (b) has a controlling interest.*
- (2) *For the purposes of this section:*
- (a) *a person referred to in subsection (1) (a) is taken to have a controlling interest in a company or body if the person's interest in the company or body, when added to the interest in the company or body held by one or more close relatives of the person, is a controlling interest in the company or body, and*
  - (b) *a close relative of a person referred to in subsection (1) (a) is taken to have a controlling interest in a company or body if the relative's interest in the company or body, when added to the interest in the company or body held by any other close relative or relatives of the person, is a controlling interest in the company or body.*
- (3) *For the purposes of this section, a person has, or persons have, a "**controlling interest**" in a company or body if the person has, or persons have, the capacity to determine the outcome of decisions about the financial and operating policies of the company or body.*
- (4) *Before entering into a contract, a registered club must make all reasonable inquiries to ensure that the provisions of subsection (1) are not contravened.*
- (5) *When making any such inquiries as to whether a party to the proposed contract is or is not a person, company or body referred to in subsection (1), a registered club is entitled to rely on a statutory declaration from the party to the proposed contract (or, in the case of a company or other body that is a party to the proposed contract, from the chief executive officer of the company or body) that the party is or is not such a person, company or body.*

**491.** Section 41M of the Act provides:

**41M Remuneration of top executives**

*A registered club must not enter into a contract for the remuneration by the club of a top executive of the club unless the proposed contract has first been approved by the governing body of the club.*

**492.** Section 41N of the Act provides:

**41N Loans to members of governing body and employees**

- (1) *A registered club must not lend money to a member of the governing body of the club.*
- (2) *A registered club must not lend money to an employee of the club unless:*



- (a) *the amount of the proposed loan (together with the amount of any other loan to the employee by the club that has not been repaid to the club) is \$10,000 or less, and*
  - (b) *the proposed loan has first been approved by the governing body of the club.*
- (3) *Subsection (2) (a) does not apply to any amount of money lent to the employee in accordance with the terms and conditions of the employee's contract of employment with the registered club.*

**493.** Section 41P of the Act provides:

**41P General provisions**

- (1) *Nothing in this Division (except section 41M), applies to the following:*
- (a) *a contract of remuneration of a member of the governing body of a registered club as such a member,*
  - (b) *a contract of employment between a registered club and an employee of the club,*
  - (c) *honorariums paid to members of the governing body of a registered club or employees of a registered club.*
- (2) *Nothing in this Division (except section 41O) renders a contract void or illegal.*

**494.** Section 41U of the Act provides:

**41U Notification to top executives and defence**

- (1) *When a person becomes a top executive of a registered club, the registered club must, as soon as practicable, give written notice to the person informing the person that he or she is a top executive and has responsibilities under this Part.*
- (2) *It is a defence to a prosecution for an offence against section 41D or 41E(1) in respect of a person who is a top executive of a registered club if the person establishes that at the time the offence was committed:*
- (a) *the person had not received a notice under subsection (1) from the club, and*
  - (b) *the person could not reasonably have been expected to know that he or she was a top executive of the club without having received such a notice.*

**495.** Section 41V of the Act provides:

**41V Offences by secretary and members of governing body of registered club in relation to contracts**

*If a registered club contravenes, whether by act or omission, any provision of Division 4 or section 41U(1), the club is not guilty of an offence but each person who is the secretary of the club, a member of the governing body of the club or a close associate of the club is guilty of an offence punishable on conviction by a maximum penalty of 100 penalty units unless the person satisfies the court that:*

- (a) *the club contravened the provision without the knowledge actual, imputed or constructive of the person, or*
- (b) *the person was not in a position to influence the conduct of the club in relation to its contravention of the provision, or*
- (c) *the person, if in such a position, used all due diligence to prevent the contravention by the club.*

- 496.** Particular 5.1 alleges that between 2009 and 2013, the Club failed to specify the core and non-core property of the Club at the end of the financial year in any of the Club's annual reports, in contravention of section 41J(2) of the Act.
- 497.** The Authority is satisfied that Particular 5.1 is established on the basis of the Club's Financial Statement for 30 June 2011 (Complainant Exhibit E187); the minutes for the Club's AGM dated November 2014 (Complainant Exhibit E209); the Club's Audited Accounts for 2009 (Complainant Exhibit E063) and the Club's Audited Accounts for 2010 (Complainant Exhibit E064).
- 498.** The Authority notes and accepts the Club's contention that a resolution was passed at the Club's 2008 AGM whereby the Club premises were declared not to be "core property".
- 499.** While all of the Club property may have been designated as "non-core" after that resolution, the Act still requires disclosure of "core" and "non-core" property pursuant to section 41J(2) of the Act.
- 500.** The Authority also notes and accepts Mr Kirk's contention that he sought advice from Mr Wily and relied upon Mr Wily's advice as to what was "core property" under the Act, on the basis of the statements made by Mr Kirk at page 23 of the transcript of his record of interview with OLGR inspectors dated 30 October 2014 (Complainant Exhibit E181). However, while the Authority accepts that Mr Kirk made such enquiries of Mr Wily, the time or context of these enquiries has not been identified with a degree of specificity and it is difficult to give any weight to this submission as a response to the allegation in Particular 5.1.
- 501.** Particular 5.1 is established. However, in these circumstances, the Authority considers this to be a very minor and technical breach of the Act.
- 502.** Particular 5.2 alleges that the Club entered into a contract for the remuneration of a "top executive" without the proposed contract having been first approved by the governing body of the Club, contravening section 41M of the Act. The Authority makes the following findings on the sub-Particulars of Particular 5.2.
- 503.** The Authority is satisfied that the allegation in Particular 5.2(a), that Mr Ashton Jnr commenced employment as the Club's secretary on 29 November 2010, is established on the basis of Club staff lists, including salary, commencement and termination date (Complainant Exhibit E078) and an ASIC extract for the Club dated 2 December 2014 (Complainant Exhibit E094).
- 504.** Particular 5.2(b) alleges that there was no written contract between the Club and Mr Ashton Jnr outlining the terms of his employment. The Authority notes that this contention is not denied by either the Club or the Ex-Officers, and accepts that this Particular is established on that basis.
- 505.** Particular 5.2(c) alleges that on or about 1 February 2011, the Club appointed Mr Ashton Jnr to the position of the Club's secretary. The Authority is satisfied that this Particular is established on the basis of the minutes for the Club Board meeting held on 1 February 2011 (Complainant Exhibit E015).

- 506.** The Authority accepts, as stated in Particular 5.2(d) of the Complaint, that the secretary of the Club (or any registered club) is a “top executive” for the purposes of section 41M of the Act, noting section 41B(1) of the Act.
- 507.** Particular 5.2(e) alleges that the Club’s register of disclosures notes that the governing body approved the contract for remuneration or employment with Mr Ashton Jnr in the position of Club secretary in April 2014. This is established on the basis of the Club’s *Register of Disclosures* for 1 September 2013 to 31 August 2014 (Complainant Exhibit E061).
- 508.** The Authority is satisfied as to the allegation in Particular 5.2(f) that there is no minute of a meeting of the governing body approving Mr Ashton Jnr’s remuneration or employment contract in the position of Secretary.
- 509.** This finding is made on the basis of the Club Board meeting minutes for 29 October 2010 (Complainant Exhibit E013); the Club Board meeting minutes for 29 November 2010 (Complainant Exhibit E014); the Club Board meeting minutes for 1 February 2011 (Complainant Exhibit E015); the Club Board meeting minutes for 28 February 2011 (Complainant Exhibit E016) and the statements made by Robert Ashton Jnr at pages 6 to 7 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182).
- 510.** The Authority is satisfied as to the allegation in Particular 5.2(g)(1) that Mr Ashton Jnr commenced in the role of the Club’s secretary between November 2010 and February 2011. This finding is made on the basis of the Club Board meeting minutes for 1 February 2011 (Complainant Exhibit E015); Club staff lists, including salary, commencement and termination date (Complainant Exhibit E078); the offer of employment from Allan Teale to Robert Ashton Jnr dated 30 June 2014 (Complainant Exhibit E087); the statements made by Robert Ashton Snr at page 6 of the transcript of his record of interview with OLGR inspectors dated 30 October 2014 (Complainant Exhibit E180); the statements made by Robert Ashton Jnr at page 6 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182) and the statements made by Robert Ashton Jnr at page 1 of the transcript of his record of interview with OLGR inspectors dated 23 May 2014 (Complainant Exhibit E136).
- 511.** The Authority is satisfied, as alleged by Particular 5.2(g)(2), that there is no minute of a meeting of the governing body approving Mr Ashton Jnr’s remuneration or contract. This finding is made on the basis of the Club Board meeting minutes for 11 April 2014 (Complainant Exhibit E048); the Club Board meeting minutes for 13 May 2014 (Complainant Exhibit E049) and the Club Board meeting minutes for 23 June 2014 (Complainant Exhibit E050).
- 512.** With regard to Particular 5.2 generally, the Authority rejects the Club’s submission that section 41M of the Act does not apply to a contract of employment between a registered club and an employee of the Club, per section 41P(1)(b) of the Act.
- 513.** The Authority is satisfied that Mr Ashton Jnr was a top executive of the Club, for the purposes of section 41M of the Act, as established by Particular 5.2(d).
- 514.** Particular 5.2 of the Complaint is established.

515. Particular 5.3 alleges that the Club failed to give written notice, as soon as practicable, to Mr Ashton Jnr that he was a “top executive” of the Club and had responsibilities under Part 4A of the Act, in contravention of section 41U of the Act.
516. The Authority notes that in the Revised Position Statement, the Complainant does not press this lack of compliance with respect to Mr McKew or Mr Ashton Jnr.
517. With regard to the Club’s submission that section 41V of the Act provides that a failure to give the required notice does not give rise to the commission of any offence by the *Club* but that it constitutes an offence by the *secretary* and *directors*, the Authority notes that the Complaint does not allege that the Club has committed any “offence”. The Particular alleges that the Club failed to issue the required notice, which is factually correct.
518. Particular 5.3 of the Complaint is established.
519. Particular 5.4 of the Complaint alleges that the Club lent money to a Club employee, Mr Matthew Brady, where that loan was not first approved by the governing body of the Club, in contravention of section 41N of the Act. The Authority makes the following findings on the sub-Particulars of Particular 5.4.
520. The allegation in Particular 5.4(a), that Matthew Brady was an employee of the Club between 10 December 2012 and 30 June 2013, is established on the basis of Club staff lists, including salary, commencement and termination date (Complainant Exhibit E078).
521. The allegation in Particular 5.4(b), that on 8 March 2013 the Club provided Mr Brady with a loan in the sum of \$2,000.00, is established on the basis of the Club’s *Register of Disclosures* for 1 January 2013 to 31 December 2014 (Complainant Exhibit E188).
522. The allegation in Particular 5.4(c), that the Club’s register of disclosures records that the loan was approved by members of the governing body on 9 April 2013, is established on the basis of the Club’s *Register of Disclosures* for 1 September 2013 to 31 August 2014 (Complainant Exhibit E061).
523. The Authority is satisfied that the allegation in Particular 5.4(d), that there is no Board minute recording that the proposed loan was first approved by the governing body of the Club, is established on the basis of the Club Board meeting minutes for 6 February 2013 (Complainant Exhibit E036); the Club Board meeting minutes for 25 February 2013 (Complainant Exhibit E037) and the Club Board meeting minutes for 22 April 2013 (Complainant Exhibit E039).
524. In summary, the Authority is satisfied that Particular 5.4 of the Complaint is established. While the Authority is satisfied that the loan to Mr Brady was in fact recorded in the Club’s *Register of Disclosures*, ratification after the fact is not sufficient to comply with the Act. Compliance with section 41N of the Act requires that a loan to a Club employee receives express *prior* approval by the governing body.
525. Particular 5.5 alleges that on 1 February 2007, the Club entered into a contract with ML Management (NSW) Pty Ltd, ACN 104 788 070 (**MLM**), a company in which Mr Levy, the Club’s secretary at that time, had a controlling interest and that this

contravened section 41L of the Act. The Authority makes the following findings on the sub-Particulars of Particular 5.5.

- 526. The Authority is satisfied, as alleged by Particular 5.5(a), that between 26 October 2004 and 3 October 2007, Mr Levy was the secretary of the Club. This finding is made on the basis of the ASIC extract for the Club dated 2 December 2014, which discloses that Mr Levy held office as the Club secretary during that period (Complainant Exhibit E094).
- 527. The Authority is satisfied, as alleged in Particular 5.5(b), that during the period in which Mr Levy was secretary of the Club, he was also the sole director of MLM. His directorship of that company at that time is established on the basis of the ASIC extract for ML Management dated 27 November 2014 (Complainant Exhibit E228).
- 528. The Authority is satisfied, as alleged in Particular 5.5(c), that on 1 February 2007 the Club entered into a deed with MLM (**MLM Deed**) to provide consultative and administrative services to the Club. This finding is made on the basis of the copy of the MLM Deed that forms part of the Complainant's evidence (Complainant Exhibit E149).
- 529. The Authority is satisfied, as alleged in Particular 5.5(d), that the MLM Deed is a commercial arrangement for the provision of services by MLM to the Club. This finding is made on the basis of the terms of the MLM Deed (Complainant Exhibit E149).
- 530. The Authority notes and accepts the Club's submission in response to Particular 5.5 that the management agreement with MLM was entered into while the Club was under administration.
- 531. The Authority further notes and accepts Mr Kirk's submission in response to this Particular that the arrangement between Mr Wily and MLM was initially entered into by way of deed dated 27 May 2003, which was *prior to* Mr Kirk's appointment to the Board on 28 August 2003.
- 532. However, the Authority rejects the Club's and the Ex-Officers' submission that the Club was "controlled" by Mr Wily and had "no independent capacity" to enter into the MLM Deed.
- 533. The Authority has considered Mr Kirk's submission that he relied upon Mr Wily to ensure compliance with the relevant provisions of the Act with regard to contracting out management services, and that the initial management agreement between Mr Wily and MLM dated 27 May 2003 was "extended" on 1 February 2007 under Mr Wily's direction.
- 534. The Authority notes that when the DOCA was executed on 24 March 2003, the powers and obligations of the officers of the Club were restored. The fact that the Club was subject to the DOCA (which was ultimately administered by Mr Wily) when the management agreement the subject of Particular 5.5 of the Complaint was entered into on 1 February 2007, does not excuse the Club's, Mr Kirk's or any other Ex-Officer's apparent absence of knowledge of the legislative requirements to which the Club was subject in respect of this commercial contract.

535. The Authority notes and accepts the submission that the relevant agreement (being the MLM Deed) was entered into more than 8 years ago now and that Mr Levy no longer serves on the governing body of the Club in any capacity.
536. Nevertheless, Particular 5.5 is established.
537. On the basis of the Authority's findings on the above Particulars, the Authority is satisfied that Ground 5 of the Complaint has been established.

## GROUND 6

538. Ground 6 states:

***Section 57F(3)(a) – The Club failed to meet the requirements of section 10(1)(n) of the Act.***

*Since 18 May 2012 the Club failed to meet the requirements of section 10(1)(n) of the Act when the Club permitted Mrs Sanchez-Levy and/or VS Management Pty Ltd ACN 106 139 904 (VSM) to manage the business conducted on the premises of the Club.*

539. Particular 6.1 of Ground 6 alleges as follows:

*The Club and its operations are effectively controlled by Mrs Sanchez-Levy and/or VSM.*

- (a) *On 27 May 2003 the Club entered into a deed with VSM to provide management, marketing and promotional services to the Club, in respect of corporate bowls, social bowls and other functions at the Club until the termination of the DOCA.*
- (b) *On 23 December 2011 the Club entered into a deed with VSM to provide management, marketing and promotional services to the Club, in respect of corporate bowls, social bowls and other functions at the Club for a term of 10 years from the commencement date.*
- (c) *It is a term of the current deed (23 December 2011) that fees are charged by VSM as follows:*
  - (1) *\$5.00 per person who attends any corporate or social bowls;*
  - (2) *Reimbursement of out of pocket expenses; and*
  - (3) *Payment of \$60.00 per hour, or part thereof, of time spent by VSM in providing services to the Club other than corporate or social bowls.*
- (d) *The majority of the income generated by the Club is derived from its corporate and social bowling business.*
- (e) *Mrs Sanchez-Levy:*
  - (1) *is the sole director of VSM;*
  - (2) *identifies herself as the Club's "Marketing Manager";*
  - (3) *reports, according to the Club's organisational structure, to the Secretary;*
  - (4) *makes decisions regarding the Club's social media presence;*
  - (5) *is a point of contact for staff to seek assistance and obtain instruction;*
  - (6) *issues instructions to the Secretary and employees on staff procedures, cleaning and maintenance;*
  - (7) *makes recommendations to the Secretary and members of the governing body on legal issues;*
  - (8) *makes decisions on the pricing of function packages offered by the Club and provides approval for staff to offer such packages to patrons;*
  - (9) *receives complaints and responds without consultation with the Secretary or members of the governing body;*

- (10) *is involved in staff recruitment, having drafted the position description for a bar manager at the Club and assisted with candidate interviews; and*
- (11) *was responsible for purchases at the Club by use of her personal credit card for which [she] was reimbursed by the Club for these purchases:*
- (A) *made personally by Mrs Sanchez-Levy ; and*
- (B) *made by the Club without her knowledge.*

### **Club's Response to Ground 6**

- 540.** In response to Particular 6.1, the Club submits that “managerial-type” functions fall short of “effective control” of the Club and that “managerial” arrangements are separately regulated under section 41O of the Act.
- 541.** The Club submits that Ms Sanchez-Levy is a contractor. The Club contends that Ms Sanchez-Levy does not roster staff; does not maintain membership registers; does not hire or direct or manage staff and nor does she purchase stock.
- 542.** The Club further submits that Ms Sanchez-Levy does not attend Club Board meetings unless requested. Any suggestions made by her were made to the secretary manager (Mr Ashton Jnr) and final approval of those suggestions rested with him.
- 543.** In response to Particular 6.1(e)(2), the Club contends that Ms Sanchez-Levy identifies herself as the Club’s “Marketing Manager” in order to suggest that she liaises with external parties on behalf of the Club. The Club notes that Ms Sanchez-Levy does not use a “Paddo Bowls” email address for her communications.
- 544.** In response to Particular 6.1(e)(3), the Club refers to the evidence provided by the Complainant in support of this Particular and contends that directions are given to Ms Sanchez-Levy by the secretary manager.
- 545.** In response to Particular 6.1(e)(4), the Club refers to the evidence provided by the Complainant in support of this Particular and contends that Ms Sanchez-Levy takes instructions from the secretary manager.
- 546.** In response to Particular 6.1(e)(5), the Club submits that Ms Sanchez-Levy’s position as a point of contact for Club staff to seek assistance and obtain instruction is “consistent” with her role as marketing consultant.
- 547.** In response to Particular 6.1(e)(6), the Club refers to the evidence provided by the Complainant in support of this Particular and contends that Ms Sanchez-Levy does not “instruct” the secretary manager, but “makes requests” to him.
- 548.** In response to Particulars 6.1(e)(7) through 6.1(e)(10), the Club submits that the evidence “does not support” these Particulars – there is no proof that Ms Sanchez-Levy “controls” the Club.
- 549.** In response to Particular 6.1(e)(11), the Club refers to the statements made by Ms Sanchez-Levy in her record of interview with OLGR inspectors dated 22 October 2014 (Complainant Exhibit E178) and submits that the procedure whereby Ms Sanchez-Levy would use her personal credit card for Club purchases, for which she would later be reimbursed by the Club, had been in place for many years and that she was reimbursed by the Club “on a regular basis”. Ms Sanchez-Levy also states

in her record of interview that this practice had been instituted during the course of the 41X Inquiry.

550. The Club refers to the evidence provided by the Complainant in support of this Particular and contends that Ms Sanchez-Levy requested the termination of her employment contract on 20 April 2015 following a decision made by the Secretary of the (then) NSW Department of Trade and Investment to impose a new licence condition upon the liquor licence for the Club premises under section 81 of the *Liquor Act 2007*. Ms Sanchez-Levy's resignation was accepted by Mr Ashton Jnr on 20 April 2015.

#### **Ex-Officers' Response to Ground 6**

551. The Ex-Officers adopt the entirety of the Club's submission dated 17 May 2015 in respect of Ground 6 of the Complaint.

#### **Kirk's Response to Ground 6**

552. In response to Ground 6, Mr Kirk submits that the agreement with VS Management Pty Ltd (**VSM**) was entered into prior to Mr Kirk's becoming a member of the governing body of the Club.
553. Mr Kirk submits that a further agreement was made on or around 23 December 2011 [which the Authority notes was during Mr Kirk's tenure as a director of the Club] under the instruction of Mr Wily and this was a continuation of the agreement that was already in place.
554. Mr Kirk submits that at the end of the period of the Club being in administration, he understood that the secretary manager of the Club had "effective control" of the Club.
555. Mr Kirk contends that as far as he was aware, Ms Sanchez-Levy did not make recommendations to members of the governing body of the Club on any legal issues as alleged by Particular 6.1(e)(7) of the Complaint.

#### **Wily's Response to Ground 6**

556. Mr Wily did not make any specific submissions in response to Ground 6 of the Complaint.

#### **Authority Findings on Ground 6**

557. Section 10(1)(n) of the Act provides:

- (n) *The business conducted on the premises of the club must not be managed or controlled by any person or body other than:*
- (i) *the governing body of the club, or*
  - (ii) *the secretary of the club, or*
  - (iii) *the manager (within the meaning of the Liquor Act 2007) of the club premises, or*
  - (iv) *a person acting in a capacity referred to in section 41(1) in respect of the club, or*
  - (v) *a person appointed under section 41A in respect of the club, or*
  - (vi) *a person who is exercising functions relating to the management of the business or affairs of the club under a management contract within the meaning of section 41O.*



558. Noting the Club's reference to section 41O of the Act as the provision that governs management agreements with registered clubs, section 41O of the Act provides:

**41O Requirements relating to loan contracts and contracts involving the management of clubs by private businesses**

- (1) *In this section:*

**"loan contract"** means a contract under which the core property (within the meaning of section 41J) of a registered club is used as security for a loan of money to the club, but does not include any such contract with a bank, authorised deposit-taking institution or person or body (or class of persons or bodies) prescribed by the regulations.

**"management contract"** means a contract under which a person who is not a member of the governing body of a registered club, or the secretary or a manager or employee of a registered club, exercises functions in relation to the management of the business or affairs of the club.

- (2) *A registered club must not enter into any loan contract or management contract with any person unless the requirements of this section are complied with.*
- (3) *At least one month (or such other period as may be prescribed by the regulations) before a registered club enters into any proposed loan contract or management contract, the club must notify the members of the club of the proposed contract by means of a notice:*
- (a) *displayed on a notice board on the club's premises, and*
  - (b) *published on the club's website (if any).*
- (4) *Any such notice is to be in a form approved by the Director-General.*
- (5) *At least one month before a registered club enters into any proposed loan contract or management contract, the club must provide the Director-General with a report on the proposed contract.*
- (6) *Any such report is to be provided in a form approved by the Director-General and comply with such standards and requirements as the Director-General determines.*
- (7) *If the Director-General is of the opinion that the proposed contract does not comply with the requirements of this Act or is not in the interests of the club or its members, the Director-General may, by notice in writing given to the club, direct the club:*
- (a) *not to enter into the proposed contract, or*
  - (b) *to amend the proposed contract in accordance with the Director-General's direction before entering into the contract.*
- (8) *If the Director-General is of the opinion that a loan contract or management contract entered into by a registered club does not comply with the requirements of this Act or is not in the interests of the club or its members, the Director-General may, by notice in writing given to the club, direct the club:*
- (a) *to amend the contract, or*
  - (b) *to terminate the contract,*

*in accordance with the terms of the direction.*

**Note:** A direction by the Director-General under subsection (7) or (8) is reviewable by the Authority under section 36A of the Gaming and Liquor Administration Act 2007.

- (9) *The need to protect the interests of the club and its members is to be the paramount consideration in making any decision for the purposes of subsection (7) or (8).*
- (10) *A registered club must comply with a direction given to it by the Director-General under this section.*
- (11) *Any costs incurred by the Director-General in reviewing a report under this section are required to be paid by the registered club that provided the report unless the Director-General determines otherwise. Any such costs that are due to be paid may be recovered by the Director-General in a court of competent jurisdiction.*

- 559.** Particular 6.1 of the Complaint alleges that “the Club and its operations” are “effectively controlled” by Ms Sanchez-Levy and/or VS Management Pty Ltd. The Authority makes the following findings on the sub-Particulars specified in support of Particular 6.1.
- 560.** As alleged in Particular 6.1(a), the Authority is satisfied that on 27 May 2003, the Club entered into a deed with VSM to provide management, marketing and promotional services to the Club, in respect of corporate bowls, social bowls and other functions at the Club until the termination of the DOCA. This finding is made on the basis of the Deed between the Club and VS Management Pty Ltd dated 27 May 2003 (Complainant Exhibit E126).
- 561.** As alleged in Particular 6.1(b), the Authority is satisfied that on 23 December 2011, the Club entered into a deed with VSM to provide management, marketing and promotional services to the Club in respect of corporate bowls, social bowls and other functions at the Club for a term of 10 years from the commencement date. This finding is made on the basis of the Deed between the Club and VS Management Pty Ltd dated 23 December 2011 (Complainant Exhibit E127).
- 562.** As alleged in Particular 6.1(c)(1), the Authority is satisfied that it is a term of the 23 December 2011 Deed that fees are charged to the Club by VSM on the basis of \$5.00 per person for each person who attends any corporate or social bowls event. This finding is made on the basis of the Deed between the Club and VS Management Pty Ltd dated 23 December 2011 (Complainant Exhibit E127).
- 563.** As alleged in Particular 6.1(c)(2), the Authority is satisfied that the 23 December 2011 Deed provides for reimbursement of out-of-pocket expenses incurred by VSM. This finding is made on the basis of the Deed between the Club and VS Management Pty Ltd dated 23 December 2011 (Complainant Exhibit E127).
- 564.** As alleged in Particular 6.1(c)(3), the Authority is satisfied that the 23 December 2011 Deed provides for payment of \$60.00 per hour, or part thereof, for time spent by VSM providing services to the Club other than in respect of corporate or social bowls. This finding is made on the basis of the Deed between the Club and VS Management Pty Ltd dated 23 December 2011 (Complainant Exhibit E127).
- 565.** The Authority is satisfied, as alleged in Particular 6.1(d), that the majority of the Club’s income is derived from its corporate and social bowling business. This finding is made on the basis of the evidence relied upon in support of the Authority’s findings on Particular 2.1(a) of the Complaint.
- 566.** The Authority is satisfied, as alleged by Particular 6.1(e)(1), that Ms Sanchez-Levy is the sole director of VSM. This finding is made on the basis of the statements

made by Vanessa Sanchez-Levy at page 14 of the transcript of her record of interview with OLGR inspectors dated 22 October 2014 (Complainant Exhibit E178).

- 567.** The Authority is satisfied, as alleged by Particular 6.1(e)(2), that Ms Sanchez-Levy identifies herself as the Club's "Marketing Manager". This finding is made on the basis of the email signatures appended to the emails presented during the OLGR interview with Vanessa Sanchez-Levy dated 22 October 2014 (Complainant Exhibit E131) and the email signatures appended to a series of emails sent by Vanessa Sanchez-Levy to various Club staff (Complainant Exhibit E167, Document 124).
- 568.** The Authority notes the Club's contention that Ms Sanchez-Levy identifies herself as the Club's "Marketing Manager" to indicate that she liaises with external parties on behalf of the Club. The Authority accepts this explanation of her title. Additionally, the Authority accepts the Club's contention that Ms Sanchez-Levy does not use a "Paddo Bowls" email address.
- 569.** Nevertheless, the Authority is satisfied that Particular 6.1(e)(2) is factually established.
- 570.** The Authority is satisfied, as alleged in Particular 6.1(e)(3), that Ms Sanchez-Levy reports, according to the Club's organisational structure, to the Club's secretary manager (Mr Ashton Jnr). This finding is made on the basis of a diagram of the Club's organisational structure (Complainant Exhibit E077).
- 571.** However, the Authority notes and accepts the Club's contention that directions are given to Ms Sanchez-Levy by the Club's secretary manager.
- 572.** The Authority is satisfied, as alleged in Particular 6.1(e)(4), that Ms Sanchez-Levy makes decisions regarding the Club's social media presence. This finding is made on the basis of the statements made by Vanessa Sanchez-Levy at page 27 of the transcript of her record of interview with OLGR inspectors dated 22 October 2014 (Complainant Exhibit E178), indicating that Ms Sanchez-Levy is "responsible" for providing the content for the Club's Facebook, Twitter and Instagram pages.
- 573.** However, the Authority notes and accepts, on the basis of the above evidence and the Club's submission in respect of this Particular, that Ms Sanchez-Levy takes instructions from the Club's secretary manager with regard to the Club's social media presence.
- 574.** The Authority is satisfied, as alleged in Particular 6.1(e)(5), that Ms Sanchez-Levy is a point of contact for staff to seek assistance and obtain instruction. This finding is made on the basis of a series of emails sent by Vanessa Sanchez-Levy to Club staff members Robert Ashton Jnr and Natali Faraguna (Complainant Exhibit E189).
- 575.** While the Authority notes and accepts the Club's submission that Ms Sanchez-Levy's position as a point of contact for staff to seek assistance and obtain instruction is "consistent" with her role as marketing consultant, Particular 6.1(e)(5) is nevertheless factually established.
- 576.** The Authority has considered the allegation in Particular 6.1(e)(6) that Ms Sanchez-Levy "issues instructions" to the Club secretary and employees on staff procedures, cleaning and maintenance.

**577.** The Authority notes that, in support of this Particular, the Complainant relies upon the emails presented during the OLGR interview with Vanessa Sanchez-Levy dated 22 October 2014 (Complainant Exhibit E131); the emails sent by Vanessa Sanchez-Levy to Club staff members Robert Ashton Jnr and Natali Faraguna (Complainant Exhibit E189) and the series of emails sent by Vanessa Sanchez-Levy to various Club staff (Complainant Exhibit E167, Document 124).

**578.** The Authority has reviewed all of the above evidence or material. The Authority notes in particular an email from Ms Sanchez-Levy to the Club secretary manager and the Club directors dated 24 February 2014 where Ms Sanchez-Levy states:

*I was just hoping you could table this at tonight's director's [sic] meeting and give me the official go ahead to get it done.*

**579.** The Authority also notes another email from Ms Sanchez-Levy to the Club's secretary manager and Natali Faraguna dated 5 March 2014 where Ms Sanchez-Levy states:

*Please let me know what changes you would like...Once you have given me the changes, I will finalise and post the ad for you.*

**580.** The Authority is not satisfied that Ms Sanchez-Levy "issues instructions" to the Club secretary and Club employees. With regard to this Particular, the Authority accepts the Club's submission that the statements made by Ms Sanchez-Levy in the above noted emails are mere requests and do not amount to instructions.

**581.** The Authority finds that Particular 6.1(e)(6) is not established.

**582.** The Authority has considered the allegation in Particular 6.1(e)(7) that Ms Sanchez-Levy makes recommendations to the Club secretary and members of the governing body on legal issues.

**583.** The Authority notes that, in support of this Particular, the Complainant relies upon the emails presented during the OLGR interview with Vanessa Sanchez-Levy dated 22 October 2014 (Complainant Exhibit E131); the statements made by Vanessa Sanchez-Levy at pages 47 to 48 of the transcript of her record of interview with OLGR inspectors dated 22 October 2014 (Complainant Exhibit E178) and the emails sent by Vanessa Sanchez-Levy to Club staff members Robert Ashton Jnr and Natali Faraguna (Complainant Exhibit E189).

**584.** The Authority has reviewed all of the above evidence or material. The Authority notes in particular an email from Ms Sanchez-Levy to the Club's directors dated 19 March 2013 where Ms Sanchez-Levy states:

*Can we please commence legal action with the solicitor who gave you this advice ASAP. We should try to have a meeting this week to discuss.*

**585.** The Authority is satisfied that Ms Sanchez-Levy appears to make a number of requests or suggestions as to how the Club should conduct aspects of its business affairs. However, the Authority is not satisfied, on the evidence before it, that the statements made by Ms Sanchez-Levy support the proposition that Ms Sanchez-Levy generally makes recommendations to the Club's secretary and members of the governing body on legal matters. Particular 6.1(e)(7) is not established.

- 586.** Particular 6.1(e)(8) alleges that Ms Sanchez-Levy makes decisions on the pricing of function packages offered by the Club and provides approval for staff to offer such packages to patrons. The Authority notes that, in support of this Particular, the Complainant relies upon the emails presented during the OLGR interview with Vanessa Sanchez-Levy dated 22 October 2014 (Complainant Exhibit E131) and the emails sent by Vanessa Sanchez-Levy to Club staff members Robert Ashton Jnr and Natali Faraguna (Complainant Exhibit E189).
- 587.** The Authority has reviewed all of the above evidence or material. The Authority notes in particular an email from Ms Sanchez-Levy to Club employee Natali Faraguna dated 2 May 2014 where Ms Sanchez-Levy states:
- I will need to give approval before we offer it [charity fundraiser menu] to people.*
- 588.** However, the Authority is not satisfied that these statements by Ms Sanchez-Levy, taken in isolation, and taken together, establish that Ms Sanchez-Levy makes final or autonomous decisions on the pricing of function packages offered by the Club and provides approval for staff to offer such packages to patrons, which is the substance of the allegation in this Particular. The Authority is satisfied that Ms Sanchez-Levy reported to the Club's secretary manager on these matters, who gave final approval.
- 589.** The Authority is *not* satisfied that Particular 6.1(e)(8) is established.
- 590.** Particular 6.1(e)(9) alleges that Ms Sanchez-Levy receives complaints and responds without consultation with the Club secretary or members of the governing body. The Authority notes that the Complainant relies upon the emails presented during the OLGR interview with Natali Faraguna dated 13 October 2014 (Complainant Exhibit E130) and the emails presented during the OLGR interview with Vanessa Sanchez-Levy dated 22 October 2014 (Complainant Exhibit E131) in support of this contention.
- 591.** The Authority has reviewed all of the above evidence or material. The Authority is satisfied that Ms Sanchez-Levy's contractual role was an outward facing one. It notes in particular an email from Ms Sanchez-Levy to the Club's secretary manager and the Club directors where Ms Sanchez-Levy states, in relation to a complaint received by the Club concerning its advertisement placed in the *Good Weekend* magazine on 29 to 30 March 2014: "*I have responded already and provided the appropriate information to [the Advertising Standards Bureau]...I will let you know the outcome once I receive this.*"
- 592.** While this Particular is factually established, the Authority is not satisfied that Ms Sanchez-Levy's exercising of certain advisory functions and her exercise of a degree of professional discretion in relation to complaint handling and media liaison helps establish that Ms Sanchez-Levy "effectively controlled" the Club, as alleged by the Complainant.
- 593.** Nevertheless, Particular 6.1(e)(9) is established.
- 594.** Particular 6.1(e)(10) alleges that Ms Sanchez-Levy is involved in staff recruitment, having drafted the position description for a bar manager at the Club and assisted with candidate interviews. The Authority notes that the Complainant relies upon the emails presented during the OLGR interview with Vanessa Sanchez-Levy dated 22

October 2014 (Complainant Exhibit E131); the statements made by Vanessa Sanchez-Levy at pages 7 and 39 to 40 of the transcript of her record of interview with OLGR inspectors dated 22 October 2014 (Complainant Exhibit E178) and the emails sent by Vanessa Sanchez-Levy to Club staff members Robert Ashton Jnr and Natali Faraguna (Complainant Exhibit E189) in support of this contention.

- 595.** The Authority has reviewed all of the above evidence or material. The Authority notes in particular an email from Ms Sanchez-Levy to the secretary manager and Natali Faraguna dated 5 March 2014 where Ms Sanchez-Levy states, in relation to the position description for a duty manager at the Club that she had drafted:

*Please let me know what changes you would like...Once you have given me the changes, I will finalise and post the ad for you.*

- 596.** While this Particular is factually established in that Ms Sanchez-Levy was involved in these matters, the Authority is not satisfied that Ms Sanchez-Levy's involvement in staff recruitment indicates that Ms Sanchez-Levy "effectively controlled" the Club, as alleged by the Complainant.
- 597.** Nevertheless, Particular 6.1(e)(10) is established.
- 598.** Particular 6.1(e)(11) alleges that Ms Sanchez-Levy was responsible for purchases at the Club by use of her personal credit card for which she was reimbursed by the Club for these purchases. The Authority makes the following findings on the sub-Particulars of Particular 6.1(e)(11).
- 599.** The Authority is satisfied that Particular 6.1(e)(11)(A), regarding reimbursement of purchases made personally by Ms Sanchez-Levy, is established on the basis of a Reconciliation Report of the Club dated 14 January 2010 with a statement of account for Vanessa Sanchez-Levy (Complainant Exhibit E167, Document 26) and a series of financial documents and emails dated 2010 (Complainant Exhibit E167, Document 27).
- 600.** The Authority is satisfied that Particular 6.1(e)(11)(B), regarding purchases made by the Club on Ms Sanchez-Levy's personal credit card without Ms Sanchez-Levy's knowledge, is established on the basis of the emails presented during the OLGR interview with Vanessa Sanchez-Levy dated 22 October 2014 (Complainant Exhibit E131) and the statements made by Vanessa Sanchez-Levy at pages 7 and 44 to 46 of the transcript of her record of interview with OLGR inspectors dated 22 October 2014 (Complainant Exhibit E178).
- 601.** The Authority notes and accepts the Club's submissions in response to Particular 6.1(e)(11) generally that the procedure whereby Ms Sanchez-Levy would use her personal credit card for Club purchases, for which she would later be reimbursed by the Club, had been in place for many years and that she was reimbursed by the Club "on a regular basis". The Authority accepts the Club's submission that this practice had been instituted during the course of the 41X Inquiry.
- 602.** Nevertheless, the Authority is satisfied that Particular 6.1(e)(11) is factually established.
- 603.** In summary, on the basis of the Authority's findings on the above Particulars, the Authority is satisfied that Particulars 6.1(a), 6.1(b), 6.1(c)(1), 6.1(c)(2), 6.1(c)(3),

6.1(d), 6.1(e)(1), 6.1(e)(2), 6.1(e)(3), 6.1(e)(4), 6.1(e)(5), 6.1(e)(9), 6.1(e)(10), 6.1(e)(11)(A) and 6.1(e)(11)(B) are established.

- 604.** Notwithstanding the Authority's satisfaction as to some of the Particulars or sub-Particulars specified in Ground 6, the Authority is not satisfied, as alleged by the Complainant, that these findings, when considered individually and collectively, support the conclusion that Ms Sanchez-Levy and/or her company, VS Management Pty Ltd, "effectively controlled" the business of the Club, for the purposes of section 10(1)(n) of the Act.
- 605.** The Authority notes that section 10(1)(n) of the Act concerns the management of *all* aspects of the business of a registered club, not just some aspects. Ms Sanchez-Levy did not manage the business of the Club as a whole, but performed *some* of the functions of the Club relating to her contract under the supervision of the secretary manager, to whom she was reporting.
- 606.** The Authority is not satisfied that there is any evidence to suggest that Ms Sanchez-Levy was acting in the capacity of a director of the Club by reason that she did not perform executive functions – for example, she did not enter into any commercially significant contracts on behalf of the Club, set budgets or dispose of Club assets.
- 607.** The Authority notes and accepts the Club's submissions that Ms Sanchez-Levy was a contractor who performed management services for the Club. In her capacity as "marketing manager" of the Club, Ms Sanchez-Levy was entitled to perform the functions that she performed and to exercise a degree of professional judgment in carrying out her contractual obligations.
- 608.** The Authority notes the Club's submissions to the effect that there is a separate provision regulating management contracts for registered clubs under section 41O of the Act. The Authority is not satisfied, on the material before it, that the contractual arrangement between the Club and Ms Sanchez-Levy was of such scope as to require compliance with section 41O of the Act. It was a contract for services with regard to a substantial part of the Club's business operations, but not a contract to manage the Club as a whole.
- 609.** The Authority is satisfied that Ms Sanchez-Levy actually reported to the Club's secretary manager, from whom Ms Sanchez-Levy was required to seek final approval. The Authority does not consider that this arrangement between the Club and Ms Sanchez-Levy and/or VS Management Pty Ltd contravened section 10(1)(n)(i) or (ii) of the Act.
- 610.** Although little turns on this, the Authority accepts the Club's advice that Ms Sanchez-Levy requested termination of her contract on 20 April 2015 and did not perform contractual services for the Club after that time.
- 611.** On the material before it and on the basis of the Authority's findings on the above Particulars, the Authority is *not* satisfied that since 18 May 2012 the Club failed to meet the requirements of section 10(1)(n) of the Act when the Club permitted Ms Sanchez-Levy and/or her company VS Management Pty Ltd ACN 106 139 904 to *manage the business* (that is, the business as a whole) conducted on the premises of the Club.
- 612.** Ground 6 of the Complaint is *not* established.

## GROUND 7

613. Ground 7 states:

**Section 57F(3)(a) – the Club failed to meet the requirements of section 10(1)(j) of the Act.**

*Between 2011 and 2014 the Club permitted another entity to derive directly a profit from the occupation of the premises of the Club by way of unreasonable and improper rent in contravention of section 10(1)(j) of the Act.*

614. Particular 7.1 of Ground 7 alleges as follows:

*On or about 1 December 2010 the Club entered into a 50 year lease with Crown Lands for the property at 2-4 Quarry Street, Paddington (**Crown Lands Lease**).*

615. Particular 7.2 of Ground 7 alleges as follows:

*It was a term of that Crown Lands Lease that the Club pay the amount of \$52,000.00 per annum in rent for the first year of the lease.*

616. Particular 7.3 of Ground 7 alleges as follows:

*On 27 May 2011 the members of the governing body approved the Club entering into a sub-lease agreement with CSKS for part of the property at 2-4 Quarry Street, Paddington with an annual rent payment of \$360,000.00 (**Sub-lease**).*

617. Particular 7.4 of Ground 7 alleges as follows:

*On or about 30 December 2011 the Club transferred the Crown Lands lease to CSKS Holdings Pty Ltd (**CSKS**).*

618. Particular 7.5 of Ground 7 alleges as follows:

*On or about 30 December 2011 the Club entered into the sub-lease with CSKS for a 5 year term. The Sub-lease provided for an initial rent to 31 May 2012 of \$12,500 + GST per month following which it would increase in accordance with the clause "Payment of Rent" in the exhibit to the Sub-lease.*

619. Particular 7.6 of Ground 7 alleges as follows:

*The rental payments made by the Club under the Sub-lease:*

- (a) relate to part of the property at 2-4 Quarry Street, Paddington only; and*
- (b) are significantly higher than under the Crown Lands lease.*

620. Particular 7.7 of Ground 7 alleges as follows:

*The arrangement involving the Crown Lands lease and the Sub-lease was agreed by the Club and its creditors under the Amended Deed of Company Arrangement entered into on 10 December 2010 (**ADOCA**).*

621. Particular 7.8 of Ground 7 alleges as follows:

*The ADOCA provided that upon the approval of the Crown Lands lease, CSKS would pay \$254,000 into a fund to settle all purported debts owed by the Club to B-52 Pty Ltd.*



**622.** Particular 7.9 of Ground 7 alleges as follows:

*The June 2012 Financial Statement of the Club records a non-current loan to B-52 Pty Ltd being completely paid off between 30 June 2011 and 30 June 2012.*

**623.** Particular 7.10 of Ground 7 alleges as follows:

*The increased rent was not in the form of reasonable and proper interest paid to a lender on any loan made to the Club secured against the Club premises.*

**624.** Particular 7.11 of Ground 7 alleges as follows:

*The increased rent was not in the form of reasonable and proper rent paid to CSKS as lessor.*

**625.** Particular 7.12 of Ground 7 alleges as follows:

*In light of the payment to be made by CSKS set out in 7.8 above, the amount of rent was not reasonable in the circumstances of the case.*

### **Club's Response to Ground 7**

**626.** In response to Ground 7, the Club submits that section 10(1)(j)(ii) of the Act requires focus on the *reasonableness* and *propriety* of the rent or occupation fees paid by the Club, but this Ground of Complaint is based upon a comparison of the amount of rent that was previously paid to the Crown by CSKS (\$52,000 per annum) and the amount of rent paid by the Club to CSKS (\$360,000 per annum).

**627.** The Club submits that there is “no evidence” provided by the Complainant as to what is a “reasonable” and “proper” rent for the purposes of this statutory provision.

**628.** The Club refers to its own evidence, being a valuer's report prepared by *Robertson & Robertson* attached at Appendix 14 to the Club's submission dated 17 May 2015 and submits that the valuer, Mr Jones finds in that report that the amount of rent paid by the Club is “reasonable”.

**629.** The Club contends that the extent to which the Club pays a rent greater than the “market” rent has diminished in subsequent years as patronage has grown, the Club has become more profitable and Club profits are sustained.

**630.** The Club submits that the reasonableness and propriety of the rental payments are further reinforced by the fact that the lease arrangements were expressly approved by the NSW Department of Crown Lands.

### **Ex-Officers' Response to Ground 7**

**631.** The Ex-Officers adopt the entirety of the Club's submission dated 17 May 2015 in respect of Ground 7 of the Complaint.

**632.** However, in the Ex-Officers' further submissions dated 17 July 2015, the Ex-Officers submit that the fact that the Department of Crown Lands failed to evaluate the reasonableness and propriety of the quantum of rent paid in relation to the transactions the subject of Ground 7 “has nothing to do with the conduct of the Club”

and is “incapable of infecting” the Ex-Officers with any improper conduct in respect of those transactions.

- 633.** The Ex-Officers submit in their further submissions that the Complainant has adduced “no evidence” in support of its position and it is “procedurally unfair” for the Complainant to raise this issue without sufficient particulars.

#### **Kirk’s Response to Ground 7**

- 634.** Mr Kirk submits that he believed that the only way the Club could “survive” was by securing tenure.
- 635.** Mr Kirk contends that the allegation that the rent was unreasonable and improper is misguided because:
- (i) the Club’s old lease was a special lease in perpetuity, so the amount paid by the Club was a concessional rent to the Crown and was *not* a market rent.
  - (ii) the subsequent head lease was assessed on market rent, having regard to factors limiting the use of the land. Mr Kirk refers to section 143(1)(b) of the *Crown Lands Act 1989* which states that: “*any improvements on the land made by the holder...shall be disregarded*”.
  - (iii) Mr Kirk submits that the sub-lease to CSKS was “entirely different” as it had regard to the turnover of the Club as well as the “special value of the lease to the Club”.
- 636.** Mr Kirk states that he “believed” it was in the “best interests” of the Club to enter into the lease with CSKS as this would discharge the Club’s debts, bring the Club out of administration, save the Club money, and ensure the security of tenure of being on a commercial lease.
- 637.** However, Mr Kirk submits that Mr Wily, as Administrator of the Club, made the “ultimate decision”.
- 638.** Mr Kirk concludes with the submission that the rent was “reasonable” and “sustainable”. He also submits that the NSW Department of Crown Lands consented to CSKS granting a mortgage of the lease to the Commonwealth Bank of Australia (as stated in paragraph 15.37 of the Club’s submission dated 17 May 2015).
- 639.** In Mr Kirk’s further submissions dated 17 July 2015, Mr Kirk submits that the only evidence before the Complainant (the valuer’s report from *Robertson & Robertson* dated 22 April 2015 and Mr Kirk’s own evidence) expresses an opinion that the rent was “reasonable and maintainable”.
- 640.** Mr Kirk submits that the Complainant has not provided any expert valuation or any other evidence which rebuts the expert report relied upon by the Club as to the lease, sub-lease and mortgage arrangements. The Complainant has not contended that the Department of Crown Lands considered the arrangements unreasonable.

## Wily's Response to Ground 7

641. Mr Wily did not make any specific submissions in response to Ground 7 of the Complaint.

## Authority Findings on Ground 7

642. Section 10(1)(j) of the Act states as follows:

*Only the club and its members are to be entitled under the rules of the club or otherwise to derive, directly or indirectly, any profit, benefit or advantage from the ownership or occupation of the premises of the club unless the profit, benefit or advantage is in the form of:*

- (i) reasonable and proper interest paid to a lender on any loan made to the club that is secured against the premises of the club, or*
- (ii) reasonable and proper rent or occupation fees paid to the owner of the premises of the club,*

*being, in either case, a payment arising out of dealings reasonably carried out, or contracts reasonably made, with the club in the ordinary course of its lawful business.*

643. The Authority is satisfied that Particular 7.1 is established in that on or about 1 December 2010, the Club did enter into a new 50 year lease from the NSW Department of Crown Lands with regard to the property at 2-4 Quarry Street, Paddington. This finding is made on the basis of the Crown Lands Lease to the Club dated 1 December 2010 (Complainant Exhibit E122).
644. The Authority is satisfied that Particular 7.2 is established in that it was a term of the Crown Lands Lease that the Club pay \$52,000.00 per annum in rent for the first year of the lease. This finding is made on the basis of the Crown Lands lease to the Club dated 1 December 2010 (Complainant Exhibit E122).
645. Particular 7.3 alleges that on 27 May 2011, the members of the governing body approved the Club entering into a sub-lease agreement with CSKS Holdings Pty Ltd (**CSKS**) for part of the property at 2-4 Quarry Street, Paddington with an annual rent payment payable from CSKS Holdings to the Club of \$360,000.00.
646. The Authority notes Mr Kirk's submissions that he believed it was in the "best interests" of the Club to enter into the lease with CSKS as this would discharge the Club's debts, bring the Club out of administration, save the Club money, and ensure the security of tenure of being on a commercial lease. The Authority also notes Mr Kirk's submission that he believed that the only way the Club could "survive" was by securing tenure of the lease.
647. The Authority does not need to make an assessment, for the purpose of this Ground, as to whether it was actually in the best interests of the Club to enter into this particular lease, or the merits of the overall course of transactions that saw the Club transition from paying a small rent to the Crown to paying \$360,000.00 by way of a commercial or market rent to a private company with links to persons associated with the Club.
648. The Ground of Complaint is concerned with whether the rent paid by the Club under the resulting commercial lease was "reasonable and proper".

649. Particular 7.3, which alleges that the governing body approved the CSKS lease on 27 May 2011, is factually correct and is established on the basis of a letter dated 27 May 2011 from Mr Christian Sanchez, Director of CSKS Holdings Pty Ltd to the Club Board regarding the sub-lease of the Club premises to CSKS Holdings (Complainant Exhibit E147) and the minutes of the Club Board meeting held on 27 May 2011 (Complainant Exhibit E018).
650. The Authority is satisfied, as alleged in Particular 7.4, that on or about 30 December 2011 the Club transferred the Crown Lands Lease that had been granted to it by the NSW Crown Lands Department to CSKS Holdings.
651. This finding is made on the basis of the transfer of the Crown Lands Lease from the Club to CSKS Holdings dated 30 December 2011 (Complainant Exhibit E123) and the Club's Financial Statement for 30 June 2011 (Complainant Exhibit E187).
652. The Authority is satisfied, as alleged in Particular 7.5, that on or about 30 December 2011 the Club entered into a sub-lease with CSKS for a five (5) year term. The Authority is satisfied that the sub-lease provided for an initial rent payable from the Club to CSKS in the sum of \$12,500.00 plus GST per month, following which it would increase pursuant to the payment of rent provisions of the agreement. This finding is made on the basis of the Crown Lands sub-lease granted by CSKS Holdings to the Club dated 30 December 2011 that forms part of the Complainant's evidence (Complainant Exhibit E124).
653. Particular 7.6 alleges that the rental payments made by the Club under this sub-lease (a) relate to part of the property at 2-4 Quarry Street, Paddington only; and (b) are significantly higher than the rent payable under the Crown Lands Lease. The Authority is satisfied that this Particular is factually established on the basis of the Crown Lands sub-lease from CSKS Holdings to the Club dated 30 December 2011 (Complainant Exhibit E124) and the Crown Lands lease to the Club dated 30 November 2010 (Complainant Exhibit E167, Document 242).
654. Particular 7.7 alleges that the arrangement involving the Crown Lands Lease and the sub-lease was agreed by the Club and its creditors under the Amended Deed of Company Arrangement (**ADOCA**) entered into on 10 December 2010. The Authority is satisfied that this Particular is established, on the basis of the provisions of the ADOCA dated 10 December 2010 (Complainant Exhibit E165).
655. Particular 7.8 alleges that the ADOCA provided that, upon approval of the Crown Lands Lease, CSKS would pay \$254,000 into a fund to settle all "purported debts" owed by the Club to B-52 Pty Ltd and the balance of all outstanding fees of the Administrator. The Authority is satisfied that this Particular is established on the basis of clause 8.1(d) of the ADOCA that was entered into by the Club dated 10 December 2010 (Complainant Exhibit E165).
656. Particular 7.9 alleges that the June 2012 Financial Statement for the Club records a non-current loan to B-52 Pty Ltd being recorded as completely paid off between 30 June 2011 and 30 June 2012. The Authority is satisfied that this Particular is established on the basis of the Club's Financial Statement dated 30 June 2012, as contained in the minutes for the Club's AGM dated November 2014 (Complainant Exhibit E209).

657. Particular 7.10 alleges that the “increased rent” provided by the ADOCA did not take the form of a “reasonable and proper interest” paid to a lender on the basis of any loan made to the Club that was secured against the Club premises.
658. The Authority is satisfied that Particular 7.10 is factually established in that the ADOCA provides for the payment of *rent* and not the payment of interest on a *loan* paid to a lender in respect of a loan secured against the Club property.
659. Particular 7.11 then alleges that the “increased rent” was “not in the form of reasonable and proper rent paid to CSKS as lessor”.
660. The Authority notes the Club’s and the Ex-Officers’ submission that there is “no evidence” provided by the Complainant as to what would constitute a reasonable and proper rent for the purposes of section 10(1)(j) of the Act.
661. The Authority also notes the Ex-Officers’ further submissions of 17 July 2015 claiming that it is “procedurally unfair” for the Complainant to raise this issue without sufficient particulars.
662. With regard to this Particular, the Authority further notes Mr Kirk’s submission that the allegation (that the rent was unreasonable and improper) is “misguided” because the Club’s old lease was a special lease in perpetuity, so the amount paid by the Club was a *concessional* rent to the Crown and *not* a market rent. Mr Kirk further submits that the subsequent head lease was assessed on the basis of a *market* rent, having regard to factors limiting the use of the land. Mr Kirk also submits that the sub-lease to CSKS was “entirely different” as it had regard to the turnover of the Club as well as the “special value of the lease to the Club”.
663. The Authority notes Mr Kirk’s further submission dated 17 July 2015 that the only evidence before the Complainant (the valuer’s report from *Robertson & Robertson* dated 22 April 2015 and Mr Kirk’s own evidence) expresses an expert opinion that the rent payable by the Club to CSKS was both “reasonable and maintainable”.
664. The Authority has had regard to the valuer’s report prepared by *Robertson & Robertson* dated 22 April 2015 submitted by the Club (Appendix 14 of the Club’s submission dated 17 May 2015). The Authority notes that this constitutes the only expert analysis before the Authority addressing whether the rent payable to CSKS is a reasonable or proper rent.
665. The *Robertson & Robertson* opinion states that the amount of rent paid under the Sub-lease agreement is “a reasonable and proper rent” and that the rent payable has “never exceeded the net operating profit before rent” as calculated by the valuer.
666. Having had regard to the valuer’s report and the fact that the Complainant has not adduced any expert evidence to suggest that the rent payable by the Club under the Sub-lease was outside of market rates or otherwise improper, the Authority is *not* satisfied that the allegation in Particular 7.11 (that the rent payable to CSKS is not reasonable or proper) is established.
667. Particular 7.12 alleges that in light of the payment to be made by CSKS set out in Particular 7.8 above, the amount of rent was not reasonable in the circumstances of the case.

668. As noted above, Particular 7.8 alleges that the ADOCA provided that upon the approval of the Crown Lands Lease, CSKS would pay \$254,000 into a fund to settle all purported debts owed by the Club to B-52 Pty Ltd.
669. The Authority is not satisfied that the disparity between the \$254,000 payment required under the ADOCA to settle the Club's debts to B-52 Pty Ltd and the amount of rent payable under the lease necessarily establishes that the market rent payable under the relevant lease was not "reasonable" or "proper". In the absence of any evidence indicating that the rent payable under the May 2011 agreement was unreasonable, the Authority is not satisfied that Particular 7.12 is established.
670. It is not within the Authority's jurisdiction to investigate, on the basis of this Ground of Complaint, the merits of all of the underlying decisions that led to the Club transitioning from paying nominal rent to the Crown to a market rent to CSKS – given the prevailing circumstances at the time that those decisions were made.
671. The Authority notes the submission made by the Club and the Ex-Officers that the reasonableness and propriety of the Club's rental payments are "reinforced" by the fact that the lease arrangements were expressly approved by the New South Wales Department of Crown Lands.
672. It is a matter of public record that the conduct of certain officers of the Department in relation to transactions involving the Club property are now the subject of a complaint to the NSW Independent Commission Against Corruption. That is a matter for the ICAC.
673. In any event, the Authority does not consider the Department's approval or otherwise of the May 2011 lease is of any assistance in determining the specific allegation made in Particular 7.12 – that the amount of rent payable is not reasonable or proper.
674. The unchallenged expert assessment before the Authority comprises the valuer's report prepared by *Robertson & Robertson* dated 22 April 2015 (Appendix 14 of the Club's submission dated 17 May 2015). That assessment finds that the amount of rent paid under the May 2011 lease is a "reasonable" market rate. On the basis of this evidence, the Authority is satisfied that Particular 7.12 of the Complaint is *not* established.
675. The Authority has considered Mr Kirk's submission to the effect that entry into this lease was in the hands of Mr Wily. The Authority notes that during May 2011 when the sub-lease arrangement the subject of Ground 7 of the Complaint was entered into, the Club was subject to the ADOCA (which was ultimately administered by Mr Wily). While Ground 7 is not established, the Authority notes that the ADOCA did not oust the role of the governing body while that deed was in effect.
676. In conclusion, on the basis of the Authority's findings on the above Particulars of this Ground and on the basis of the evidence before it, the Authority is *not* satisfied that Ground 7 of the Complaint has been established.

## **GROUND 8**

677. Ground 8 states:

**Section 57F(3)(a) – The Club failed to meet the requirements of section 10(1)(a) of the Act.**

*Between 2002 and 2014 the Club failed to meet the requirements of section 10(1)(a) of the Act when the Club was not conducted in good faith as a club.*

**678.** Particular 8.1 of Ground 8 alleges as follows:

*The objects of the Club specified in the Club's Constitution are not consistent with a Club operating in good faith for the benefit of members and the promotion of the game of bowls.*

- (a) *On 2 April 2014 the members of the Club, at an AGM, adopted a constitution for the structure and governance of the Club which includes objects 5.1(d), (e), (f), (g), (l) and (m) which are unrelated and/or inconsistent with the objects of a bowling club.*

**679.** Particular 8.2 of Ground 8 alleges as follows:

*The Club failed to meet the minimum number of ordinary members required by Section 10(1)(d) of the Act.*

**680.** Particular 8.3 of Ground 8 alleges as follows:

*During the period the Club was under external administration a "moratorium on accepting full membership" was imposed and the Club permitted its membership to decline.*

**681.** Particular 8.4 of Ground 8 alleges as follows:

*The Club permitted the "moratorium on accepting full membership" to continue when the Club was no longer under administration.*

**682.** Particular 8.5 of Ground 8 alleges as follows:

*The nature of the premises of the Club is such that the Club trades predominantly as a corporate and social bowls centre, rather than for the benefit of the ordinary members.*

- (a) *The Club is operated for the provision of social and corporate bowls for "social members" and "temporary members".*
- (b) *Accommodation provided by the Club to members and guests does not meet the standard required of a NSW Bowling Club.*

**683.** Particular 8.6 of Ground 8 alleges as follows:

*The Club admits persons to membership of the Club as "social members" to allow persons who live within a 5km radius of the Club to enter the premises and utilise the facilities without being required to be approved by the members or governing body as "ordinary members".*

- (a) *At all relevant times it was a rule of the Club that it must not admit a person to the Club:*
  - (1) *as a member of the Club, other than as a "provisional member", "honorary member" or "temporary member", unless the person is elected to membership at a meeting of the full members, the governing body, or the election committee of the Club; or*
  - (2) *as a "temporary member" if the person resides in New South Wales, and within a 5km radius of the Club.*

- (b) *Persons who live within a 5km radius of the Club and attend for social and corporate bowling are admitted to the Club incorrectly as "temporary members", or admitted to membership as "social members".*
- (c) *The Club introduced "social members" as a membership category in the Club's 2014 constitution, and applicants are approved by Club staff as members of the Club at the Club entrance following the payment of a \$2.00 fee and the completion of a membership application form.*
- (d) *As at 16 May 2014 the Club had admitted 7,273 persons to membership of the Club as "social members" who were not approved by a meeting of the full members, governing body or election committee.*

**684.** Particular 8.7 of Ground 8 alleges as follows:

*The Club was under external administration for an extended period of time (10 years).*

- (a) *On or about 19 September 2002 Mr Wily was appointed Receiver Manager by the Supreme Court of NSW and acted in the role until 8 November 2011, apart from the period 23 January 2004 and 21 June 2004 when Mr Wily Snr acted in this capacity.*
- (b) *On 24 October 2002 Mr Wily was purportedly appointed Administrator of the Club and acted in the role until 28 March 2003.*
- (c) *On 24 March 2003 Mr Wily was purportedly appointed Administrator under a Deed of Company Arrangement and acted in the role until 18 May 2012, apart from the period 23 January 2004 and 21 June 2004 when Mr Wily Snr acted in this capacity.*

**685.** Particular 8.8 of Ground 8 alleges as follows:

*The Club and its operations are effectively controlled by Mrs Sanchez-Levy and/or VSM.*

**686.** The Authority notes, as stated in the Complainant's Revised Position Statement dated 17 June 2015, that Particular 8.1 of Ground 8 is not pressed against Messrs Levy, Ashton Jnr and McKew, and Particulars 8.5 and 8.6 of this Ground are not pressed against Mr Levy.

### **Club's Response to Ground 8**

- 687.** In response to Particular 8.1, the Club submits that the Club has a twofold purpose – the playing of lawn bowls, and the provision of all the usual facilities of a social/sporting club.
- 688.** The Club submits that there is “no evidence” provided by the Complainant that the objects of the Club are “inconsistent” with the objects of a bowling club, and submits that the Authority should reject this Particular.
- 689.** In response to Particulars 8.2 through 8.6, the Club refers to its above submissions on Particulars 1.1 through 1.4, 1.5(f) and (g), 2.1 and 2.2.
- 690.** The Club concedes Particular 8.7 of the Complaint, but notes that the Club is no longer under administration and that its affairs are now run by its board.
- 691.** The Club submits that its extended period of past administration is now of “historical interest only”. The Club submits that the Club has run its own affairs for over three years now; and the Club's previous period of administration between 2002 and 2012 has “no bearing” on whether the Club is now being run as a *bona fide* club.



692. The Club contends that the administration of the Club between 2002 and 2012 “took some years to complete” by reason of its negotiations with the NSW Crown Lands Department.
693. In response to Particular 8.8, the Club refers to its above submissions addressing Ground 6 of the Complaint.

#### **Ex-Officers’ Response to Ground 8**

694. The Ex-Officers adopt the entirety of the Club’s submission dated 17 May 2015 in respect of Ground 8 of the Complaint.

#### **Kirk’s Response to Ground 8**

695. Mr Kirk submits that he sought advice from Watson Mangioni Lawyers, who drafted the Club’s proposed Constitution. Mr Kirk relied upon these solicitors’ advice regarding inclusion of the terms specified in Particular 8.1 of the Complaint.
696. In response to Particular 8.7, Mr Kirk submits that he had no knowledge of any alleged invalidity of Mr Wily’s appointment as Receiver Manager or Administrator or Deed Administrator of the Club.

#### **Wily’s Response to Ground 8**

697. Mr Wily did not make any specific submissions in response to Ground 8 of the Complaint.

#### **Authority Findings on Ground 8**

698. Section 10(1)(a) of the Act states as follows:

*The club shall be conducted in good faith as a club.*

699. Particular 8.1 alleges that on 2 April 2014, the members of the Club, at an AGM, adopted a constitution for the structure and governance of the Club which includes objects 5.1(d), (e), (f), (g), (l) and (m) which the Complainant states are unrelated and/or inconsistent with the “objects of a bowling club”.
700. The Authority notes that the Complainant relies upon the Club’s Constitution dated 2 April 2014 (Complainant Exhibit E084); the minutes of the Club’s 2014 AGM (Complainant Exhibit E060); the *Model Sport Club Constitution* prepared by NSW Sports and Recreation dated May 2009 (Complainant Exhibit E206) and pages 2 to 3 of the statement of a full financial member of the Club, George Elder dated 21 November 2014 (Complainant Exhibit E218) in support of this contention.
701. The Authority notes that, as stated in the Revised Position Statement, Particular 8.1 is not pressed with regard to Messrs Levy, Ashton Jnr and McKew.
702. Having considered the Complainant’s evidence, the Authority is satisfied that the Constitution was adopted at the AGM on 2 April 2014 as alleged. However the Authority is *not* satisfied that the objects in 5.1(d), (e) (f) (g) (l) and (m) are unrelated and/or inconsistent with the objects of a registered club that is also a bowling club.

- 703.** The Club argues in response to Particular 8.1 that its purposes include both bowling and providing the usual facilities of a social or sporting club. The Authority accepts those submissions.
- 704.** Particular 8.2 alleges that the Club failed to meet the minimum number of ordinary members required by section 10(1)(d) of the Act. The Authority is satisfied that this Particular is established, on the basis of the evidence or material relied upon by the Complainant in support of Particulars 1.1 through 1.4 of the Complaint.
- 705.** Particular 8.3 alleges that during the period of external administration, the Club implemented a moratorium on the receipt of full members. The Authority is satisfied that this Particular is established, on the basis of the evidence or material relied upon by the Complainant in support of Particular 1.5(f) of the Complaint.
- 706.** Particular 8.4 alleges that, following the conclusion of the period of external administration, the Club continued the moratorium on full membership. The Authority is satisfied that this Particular is established, on the basis of the evidence or material relied upon by the Complainant in support of Particular 1.5(g) of the Complaint.
- 707.** Particular 8.5 alleges that the nature of the premises of this Club is such that the Club trades predominantly as a corporate and social bowls centre, rather than for the benefit of the ordinary members. The Authority makes the following findings on the sub-Particulars of Particular 8.5.
- 708.** Particular 8.5(a) alleges that the Club is operated for the provision of social and corporate bowls for social members and ordinary members. The Authority notes that the Complainant refers to the evidence or material relied upon by the Complainant in support of Particular 2.1 of the Complaint.
- 709.** The Authority notes the above findings on Particular 2.1 of the Complaint and accordingly, is satisfied that Particular 8.5(a) is factually established and the Club is operated for the provision of corporate and/or social bowls for both social members and temporary members.
- 710.** Particular 8.5(b) alleges that accommodation provided by the Club to members and guests does not meet the standard required of a NSW Bowling Club. The Authority notes that the Complainant refers to the evidence or material relied upon by the Complainant in support of Particular 2.2 of the Complaint.
- 711.** The Authority notes the above findings on Particular 2.2 of the Complaint, but is *not* satisfied that Particular 8.5(b) is established.
- 712.** The Authority is satisfied that the Club has predominantly catered for corporate and social bowling, but this does not mean that the Club does not provide “accommodation” for members and guests to the standards expected of a registered club in New South Wales, whatever that standard may be (which is not clear from the Particulars of the Complaint).
- 713.** The Authority is satisfied that the Club provides liquor and gaming and other hospitality services in addition to its corporate and social bowling operations. It does not operate only for social and temporary members, even though the conduct of

bowls groups has been a substantial focus of the Club's operations. In the absence of any substantial evidence of complaints as to the standard of those services, the Authority is not satisfied that it has been established, on the material before the Authority, that the Club does not adequately accommodate its members and guests.

- 714.** Particular 8.6 alleges that the Club admits persons to membership of the Club as "social members" to allow persons who live within a 5km radius of the Club to enter the premises and utilise the facilities without being required to be approved by the members or governing body as "ordinary members".
- 715.** The Authority notes that, as stated in the Revised Position Statement, this Particular is not pressed against Mr Levy.
- 716.** The Authority makes the following findings on the sub-Particulars of Particular 8.6.
- 717.** Particular 8.6(a)(1) alleges that at all relevant times, it was a rule of the Club that it must not admit a person to the Club as a member of the Club, other than as a "provisional member", "honorary member" or "temporary member", unless the person is elected to membership at a meeting of the full members, the governing body, or the election subcommittee of the Club. The Authority is satisfied that this Particular is established, on the basis of the requirements set out in section 30(1)(g) of the Act and Article 16.1 of the Club's Constitution dated 2 April 2014 (Complainant Exhibit E084).
- 718.** Particular 8.6(a)(2) alleges that at all relevant times, it was a rule of the Club that it must not admit a person to the Club as a "temporary member" if the person resides in NSW and within a 5km radius of the Club. The Authority is satisfied that this Particular is established on the basis of the requirements of sections 30(2)(c) and 30(3B) of the Act.
- 719.** Particular 8.6(b) alleges that persons who live within a 5km radius of the Club and attend for social and corporate bowling are admitted to the Club "incorrectly" as temporary members or admitted to membership as social members.
- 720.** The Authority is satisfied that this Particular is established, on the basis of the statements made by Natali Faraguna at page 19 of the transcript of her record of interview with OLGR inspectors dated 13 October 2014 (Complainant Exhibit E143); the statements made by Robert Ashton Snr at page 38 of the transcript of his record of interview with OLGR inspectors dated 20 June 2014 (Complainant Exhibit E144) and the statements made by Robert Ashton Jnr at page 12 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182).
- 721.** Particular 8.6(c) alleges that the Club introduced "social members" as a membership category in the Club's 2014 Constitution and that applicants for social membership are approved by Club staff as members at the Club entrance following the payment of a \$2.00 fee and completion of a membership application form.
- 722.** The Authority is satisfied that this Particular is established, on the basis of the statements made by Luke McKew at pages 50 to 51 of the transcript of his record of interview with OLGR inspectors dated 22 September 2014 (Complainant Exhibit E142); the statements made by Natali Faraguna at page 21 of the transcript of her record of interview with OLGR inspectors dated 13 October 2014 (Complainant

Exhibit E143); the statements made by Robert Ashton Snr at pages 82 to 84 of the transcript of his record of interview with OLGR inspectors dated 30 October 2014 (Complainant Exhibit E180); the statements made by Leonard Whitney at page 5 of the transcript of his record of interview with OLGR inspectors dated 3 November 2014 (Complainant Exhibit E184); the statements made by Robert Ashton Jnr at pages 11 to 12 and 62 to 63 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182); the statements made by Brian Kirk at pages 32 to 33 of his record of interview with OLGR Inspectors dated 30 October 2014 (Complainant Exhibit E181); the statements made by Allan Teale at pages 28 to 30 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E183) and the Club's Constitution dated 2 April 2014 (Complainant Exhibit E084).

- 723.** The Authority is satisfied that Particular 8.6(d), which alleges that by 16 May 2014, the Club had admitted **7,273** persons as “social members” but who were not approved by a meeting of the full members, governing body or election committee as required by section 30(1)(g) of the Act, is established. This finding is made on the basis of the Club *Social Membership Register* dated 19 May 2014 (Complainant Exhibit E145); the Club Board meeting minutes for January 2009 to June 2014 (Complainant Exhibits E001 through E050); the minutes for the Club's 2011 AGM (Complainant Exhibit E059); the minutes for the Club's 2014 AGM (Complainant Exhibit E060); the statements made by Luke McKew at pages 50 to 51 of the transcript of his record of interview with OLGR inspectors dated 22 September 2014 (Complainant Exhibit E142); the statements made by Allan Teale at pages 12 to 13 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E183); the statements made by Robert Ashton Snr at pages 82 to 83 of the transcript of his record of interview with OLGR inspectors dated 30 October 2014 (Complainant Exhibit E180); the statements made by Robert Ashton Jnr at pages 11 to 12 and 62 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182) and the statements made by Brian Kirk at pages 32 to 33 of his record of interview with OLGR Inspectors dated 30 October 2014 (Complainant Exhibit E181).
- 724.** Particular 8.7 of the Complaint alleges that the Club was under external administration for an extended period of time (ten years). The Authority makes the following findings on the sub-Particulars of Particular 8.7.
- 725.** Particular 8.7(a) states that “on or about 19 September 2002 Mr Wily was appointed Receiver Manager by the Supreme Court of NSW and acted in the role until 8 November 2011, apart from the period 23 January 2004 and 21 June 2004 when Mr Wily Snr acted in this capacity”. The Club concedes this allegation in its submission dated 17 May 2015 and the Authority finds that this Particular is established on that basis.
- 726.** While the Authority is satisfied that this Particular is established, the Authority notes, for the sake of completeness, that Mr Wily was also appointed by the Club Board as Administrator of the Club on 24 October 2002 when the Club resolved to enter into voluntary administration. The Authority notes that this was a separate appointment (or purported appointment) to his appointment by the Supreme Court as Receiver Manager on 19 September 2002.
- 727.** With regard to the contention in Particular 8.7(b) that “on 24 October 2002 Mr Wily was purportedly appointed Administrator of the Club and acted in the role until 28

March 2003” the Authority is satisfied that on 24 October 2002, the Club resolved to appoint Mr Wily as Administrator when the Club resolved to enter into voluntary administration on 24 October 2002.

- 728.** The Authority notes that the Complainant describes the appointment as a “purported” appointment by reason that it is not evident that this appointment was ever approved by the then regulator, the former NSW Licensing Court (the Authority’s predecessor) as was then required by section 41(1) of the Act.
- 729.** Whether or not the appointment of Mr Wily as voluntary administrator was ever approved (and in the absence of any denial or evidence or statement from any of the parties that Licensing Court approval was actually obtained, it appears that the appointment was not approved), the Authority accepts that this appointment or purported appointment as voluntary administrator nevertheless ceased when the Club signed a Deed of Company Arrangement on 24 March 2003, as alleged by Particular 8.7(c).
- 730.** With regard to the contention in Particular 8.7(c) that “on 24 March 2003 Mr Wily was purportedly appointed Administrator under a Deed of Company Arrangement and acted in the role until 18 May 2012, apart from the period 23 January 2004 and 21 June 2004 when Mr Wily Snr acted in this capacity”, the Authority is satisfied that this description of Mr Wily’s status in relation to the Club is correct. This Particular is established.
- 731.** The Authority makes these findings on Particulars 8.7(a), (b) and (c) on the basis of the *Short Minutes of Order of the Supreme Court of New South Wales in the Matter of Paddington Bowling Club Ltd* dated 20 September 2002 indicating Mr Wily’s initial appointment as Receiver and Manager of the Club (Complainant Exhibit E166); the ASIC extract for the Club company history dated 2 December 2014 which records Mr Wily’s further appointment on 24 October 2002 (Complainant Exhibit E094) and page 6 of the Review of the 41X Inquiry into the Club (Complainant Exhibit E168).
- 732.** The Authority is satisfied that Particular 8.7 of the Complaint is established.
- 733.** Particular 8.8 of the Complaint alleges that “the Club and its operations are effectively controlled by Mrs Sanchez-Levy and/or VSM”.
- 734.** The Authority notes that the Complainant refers to the evidence or material relied upon by the Complainant in support of Particular 6.1 of the Complaint.
- 735.** On the basis of the Authority’s findings on Particular 6.1, the Authority is not satisfied that the Club and its operations are “effectively controlled” by Ms Sanchez-Levy and/or VS Management Pty Ltd.
- 736.** Particular 8.8 of the Complaint is not established.
- 737.** In summary, the allegations in Particulars 8.2, 8.3, 8.4, 8.6 and 8.7 of Ground 8 have been established. Particulars 8.1, 8.5 and 8.8 are not established.
- 738.** On the basis of the Authority’s findings on the above Particulars, the Authority is satisfied that Ground 8 of the Complaint, alleging that the Club failed to meet the requirements of section 10(1)(a) of the Act, is established to the extent identified in those Particulars.

739. Section 10(1)(a) of the Act provides a number of minimum statutory requirements that must be observed by a club that is being conducted in good faith as a registered club, and the Complainant has established that this Club did not ensure compliance with some of those requirements.
740. The laxity as to the Club's administration of membership and entry controls satisfies the Authority that the Club was engaging in something akin to an "open door" policy. Considered cumulatively, the contraventions of section 10(1)(a) that have been established under this Ground satisfy the Authority that the Club was not being conducted in good faith as a registered club.
741. On the basis of the Authority's findings on the above Particulars, the Authority is satisfied that Ground 8 of the Complaint has been established.

## **GROUND 9**

742. Ground 9 states:

***Section 57F(3)(d) – The Club contravened a provision of the Act.***

*Prior to 1 January 2013 the Club failed to maintain a register of all disclosures made under Part 4A of the Act for the relevant financial year, contravening section 38 of the Act and clause 16 of the Regulation.*

743. Particular 9(a) of Ground 9 states as follows:

(a) Repeat particulars at 4.4 above.

### **Club's Response to Ground 9**

744. The Club refers to its submissions on Ground 4 above and submits that the substantive obligation to make these disclosures was complied with and that the allegation in this Ground is concerned with the "manner and form" in which registers of those disclosures were kept. The Club submits that prior to 1 January 2013, these disclosures were maintained in the Board minutes but not placed in a separate register. However, since January 2013, separate registers have been used.

### **Ex-Officers' Response to Ground 9**

745. The Ex-Officers adopt the entirety of the Club's submission dated 17 May 2015 in respect of Ground 9 of the Complaint.

### **Kirk's Response to Ground 9**

746. In response to Ground 9, Mr Kirk relies upon his above submissions addressing Particular 4.4 of the Complaint.

### **Wily's Response to Ground 9**

747. Mr Wily did not make any specific submissions in response to Ground 9 of the Complaint.

## Authority Findings on Ground 9

748. The Authority notes that the Complainant refers to the evidence or material relied upon by the Complainant in support of Particular 4.4 of the Complaint.
749. On the basis of the Authority's findings in relation to Particular 4.4 above and on the evidence identified by the Authority in support of those findings, the Authority is satisfied that prior to 1 January 2013, the Club failed to record disclosures made by members of the governing body in a register of disclosures for the relevant financial year as required by clause 18(1) of the Regulation. Particular 9(a) of the Complaint is established.
750. The Authority is satisfied that Ground 9 of the Complaint is established.

## GROUND 10

751. Ground 10 states:

***Section 57F(3)(d) – The Club contravened a provision of the Act.***

*Between January 2009 and June 2014 the Club contravened section 30(1)(c) of the Act.*

752. Particular 10.1 of Ground 10 alleges as follows:

*The Club failed to hold a meeting of the governing body at least once in every month of the year when it failed to hold meetings as follows:*

- (a) *In 2009, on eight occasions,*
  - (1) *Governing body meetings were not held in March, April, May, June, August, September, October and December 2009.*
- (b) *In 2010, on two occasions,*
  - (1) *Governing body meetings were not held in August and December 2010.*
- (c) *In 2011, on five occasions,*
  - (1) *Governing body meetings were not held in January, April, June, August and November 2011.*
- (d) *In 2012, on one occasion,*
  - (1) *A governing body meeting was not held in October 2012.*
- (e) *In 2013, on five occasions,*
  - (1) *Governing body meetings were not held in January, March, June, September and December 2013.*
- (f) *In 2014, on one occasion,*
  - (1) *A governing body meeting was not held in January 2014.*

753. Particular 10.2 of Ground 10 alleges as follows:

*The Club failed to keep minutes of all proceedings and resolutions of the governing body in a book.*

- (a) *There is no minute of proceedings and resolutions in respect of a meeting of the governing body in January 2010.*
- (b) *Minutes and resolutions were not recorded in a book.*

**754.** Particular 10.3 of Ground 10 alleges as follows:

*The Club failed to retain all documents referred to in the minutes as being tabled at the meeting.*

(a) *On 9 occasions the minutes of meeting of the governing body record that a Management Report was tabled but the Club has failed to retain a copy with the stored minutes:*

(1) *In 2009, in the meeting of the governing body held in July.*

(2) *In 2010, in the meetings of the governing body held in February, March, June, July, September and October.*

(3) *In 2011, in the meetings of the governing body held in July and October.*

### **Club's Response to Ground 10**

**755.** In response to Particular 10.1, the Club submits that the Complainant has failed to take into account meetings that were postponed to a date early the following month. The Club refers to a "comprehensive schedule" of all the governing body meetings held by the Club in Appendix 17 to the Club's submission dated 17 May 2015.

**756.** The Club concedes that several monthly meetings did not occur while the Club was under administration but argues that the "directors did not control the Club's affairs" during that period.

**757.** The Club submits that only one monthly meeting has been missed since the Club emerged from administration in May 2012.

**758.** The Club submits that the Board has been exercising its statutory charter to manage and oversee the affairs of the Club.

**759.** In response to Particular 10.2, the Club submits that the "antiquity" of section 30(1)(c) of the Act fails to account for modern recordkeeping. The Club submits that the minutes of governing body meetings are in fact typed up and stored in Lever Arch folders.

**760.** In response to Particular 10.3, the Club submits that while the Club was under administration the Club management was accountable to the Administrator, not to the Board.

**761.** The Club contends that there is "no legislative foundation" for the claim that the Club failed in any duty to keep tabled documents with its minutes per section 30(1)(c) of the Act.

### **Ex-Officers' Response to Ground 10**

**762.** The Ex-Officers adopt the entirety of the Club's submission dated 17 May 2015 in respect of Ground 10 of the Complaint.

### **Kirk's Response to Ground 10**

**763.** Mr Kirk contends that there "may be further Board minutes" that do not form part of the OLGR Brief of Evidence accompanying the Complaint.



- 764.** Mr Kirk notes that from approximately 2008 to 2012, Ms Katherine Antram took minutes of all meetings of the governing body conducted in respect of the Club.
- 765.** Mr Kirk submits that during the period of administration (all dates referred to in Particulars 10.1(a) through 10.1(f)), it was “very difficult to secure attendance of the requisite number of directors to convene governing body meetings”.

### **Wily’s Response to Ground 10**

- 766.** Mr Wily did not make any specific submissions in response to Ground 10 of the Complaint.

### **Authority Findings on Ground 10**

- 767.** Section 30(1)(c) of the Act states as follows:

*The governing body of the club shall hold a meeting at least once in each month of the year and minutes of all proceedings and resolutions of the governing body shall be kept and entered in a book provided for the purpose.*

- 768.** The Authority is satisfied that, as alleged in Particular 10.1(a)(1), meetings of the governing body were not held during the months of March, April, May, June, August, September, October and December 2009.
- 769.** This finding is made on the basis of the Club Board meeting minutes for 9 January 2009 (Complainant Exhibit E001); the Club Board meeting minutes for 24 February 2009 (Complainant Exhibit E002); the Club Board meeting minutes for 28 July 2009 (Complainant Exhibit E003); the Club Board meeting minutes for 4 August 2009 (Complainant Exhibit E004) and the Club Board meeting minutes for 27 November 2009 (Complainant Exhibit E005).
- 770.** Particular 10.1(a)(1) is factually established, in that the Club Board technically did not comply with the requirement to meet monthly, as per section 30(1)(c) of the Act.
- 771.** The Authority is satisfied that the allegation in Particular 10.1(b)(1), that governing body meetings were not held during the months of August and December 2010, is established on the basis of the Club Board meeting minutes for 25 February 2010 (Complainant Exhibit E006); the Club Board meeting minutes for 30 March 2010 (Complainant Exhibit E007); the Club Board meeting minutes for 27 April 2010 (Complainant Exhibit E008); the Club Board meeting minutes for 27 May 2010 (Complainant Exhibit E009); the Club Board meeting minutes for 29 June 2010 (Complainant Exhibit E010); the Club Board meeting minutes for 28 July 2010 (Complainant Exhibit E011); the Club Board meeting minutes for 28 September 2010 (Complainant Exhibit E012); the Club Board meeting minutes for 29 October 2010 (Complainant Exhibit E013); the Club Board meeting minutes for 29 November 2010 (Complainant Exhibit E014) and the Club Board meeting minutes for 1 February 2011 (Complainant Exhibit E015).
- 772.** Particular 10.1(b)(1) is factually established, in that the Club Board technically did not comply with the requirement to meet monthly, as per section 30(1)(c) of the Act.
- 773.** The Authority is satisfied that the allegation in Particular 10.1(c)(1), that governing body meetings were not held in January, April, June, August and November 2011, is

established on the basis of the Club Board meeting minutes for 28 February 2011 (Complainant Exhibit E016); the Club Board meeting minutes for 30 March 2011 (Complainant Exhibit E017); the Club Board meeting minutes for 27 May 2011 (Complainant Exhibit E018); the Club Board meeting minutes for 1 July 2011 (Complainant Exhibit E019); the Club Board meeting minutes for 29 July 2011 (Complainant Exhibit E020); the Club Board meeting minutes for 2 September 2011 (Complainant Exhibit E021); the Club Board meeting minutes for 28 October 2011 (Complainant Exhibit E022); the Club Board meeting minutes for 28 December 2011 (Complainant Exhibit E023) and the Club Board meeting minutes for 31 January 2012 (Complainant Exhibit E024).

- 774.** While Particular 10.1(c)(1) is factually established and the Club Board technically did not comply with the requirement to meet monthly as per section 30(1)(c) of the Act, the Authority notes and accepts, on the basis of Appendix 17 to the Club's submission, that the Club Board did, on some occasions, meet twice in one month. Specifically, a meeting of the Club Board was held on 1 February 2011 in place of the January meeting, and on 1 July 2011 in place of the June monthly meeting.
- 775.** The Authority is satisfied that the allegation in Particular 10.1(d)(1), that a governing body meeting was not held during the month of October 2012, is established on the basis of the Club Board meeting minutes for 31 January 2012 (Complainant Exhibit E024); the Club Board meeting minutes for 29 February 2012 (Complainant Exhibit E025); the Club Board meeting minutes for 28 March 2012 (Complainant Exhibit E026); the Club Board meeting minutes for 26 April 2012 (Complainant Exhibit E027); the Club Board meeting minutes for 30 May 2012 (Complainant Exhibit E028); the Club Board meeting minutes for 27 June 2012 (Complainant Exhibit E029); the Club Board meeting minutes for 25 July 2012 (Complainant Exhibit E030); the Club Board meeting minutes for 29 August 2012 (Complainant Exhibit E031); the Club Board meeting minutes for 26 September 2012 (Complainant Exhibit E032); the Club Board meeting minutes for 1 November 2012 (Complainant Exhibit E033); the Club Board meeting minutes for 10 November 2012 and 28 November 2012 (Complainant Exhibit E034) and the Club Board meeting minutes for 28 December 2012 (Complainant Exhibit E035).
- 776.** While Particular 10.1(d)(1) is factually established, in that the Club Board technically did not comply with the requirement to meet monthly as per section 30(1)(c) of the Act, the Authority notes and accepts, on the basis of Appendix 17 to the Club's submission, that the Club Board held a meeting on 1 November 2012 in place of the October meeting – thus a total of 12 meetings of the Club Board were held in 2012.
- 777.** The Authority is satisfied that Particular 10.1(e)(1), alleging that governing body meetings were not held in January, March, June, September and December 2013, is established on the basis of the Club Board meeting minutes for 6 February 2013 (Complainant Exhibit E036); the Club Board meeting minutes for 25 February 2013 (Complainant Exhibit E037); the Club Board meeting minutes for 9 April 2013 (Complainant Exhibit E038); the Club Board meeting minutes for 22 April 2013 (Complainant Exhibit E039); the Club Board meeting minutes for 27 May 2013 (Complainant Exhibit E040); the Club Board meeting minutes for 10 July 2013 (Complainant Exhibit E041); the Club Board meeting minutes for 26 August 2013 (Complainant Exhibit E042); the Club Board meeting minutes for 1 October 2013 (Complainant Exhibit E043); the Club Board meeting minutes for 18 November 2013 (Complainant Exhibit E044) and the Club Board meeting minutes for 10 February 2014 (Complainant Exhibit E045).

- 778.** While Particular 10.1(e)(1) is factually established, in that the Club Board technically did not comply with the requirement to meet monthly as per section 30(1)(c) of the Act, the Authority notes and accepts, on the basis of Appendix 17 to the Club's submission, that the Club Board did, on some occasions, meet twice in one month. Specifically, meetings of the Club Board were held on 6 February 2013 in place of the January meeting; on 9 April 2013 in place of the March meeting; on 10 July 2013 in place of the June meeting; and on 10 February 2014 in place of the December 2013 meeting – thus a total of ten meetings of the Club Board were held in 2013.
- 779.** The Authority is satisfied that Particular 10.1(f)(1), alleging that a governing body meeting was not held in January 2014, is established on the basis of the Club Board meeting minutes for 10 February 2014 (Complainant Exhibit E045).
- 780.** While Particular 10.1(f)(1) is factually established, in that the Club Board technically did not comply with the requirement to meet monthly as per section 30(1)(c) of the Act, the Authority notes and accepts, on the basis of Appendix 17 to the Club's submission, that the Club Board did, on some occasions, meet twice in one month. Specifically, a meeting of the Club Board was held on 10 February 2014 in place of the January 2014 meeting.
- 781.** The Authority is satisfied that Particular 10.1 is established.
- 782.** Particular 10.2 alleges that the Club failed to keep minutes of all proceedings and resolutions of the governing body in a book. The Authority makes the following findings on the sub-Particulars of Particular 10.2.
- 783.** The Authority is satisfied that Particular 10.2(a) is established on the basis of the Club Board meeting minutes for 27 November 2009 (Complainant Exhibit E005) and the Club Board meeting minutes for 25 February 2010 (Complainant Exhibit E006).
- 784.** The Authority is satisfied that Particular 10.2(b), alleging that the Club failed to keep minutes of all proceedings in a "book", is established on the basis of the statements made by Robert Ashton Jnr at pages 75 to 76 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182).
- 785.** While Particular 10.2 is factually established, the Authority notes and accepts the Club's submissions as to how it maintained records of minutes and is satisfied that this is a very minor and technical breach of the Act.
- 786.** Particular 10.3 alleges that the Club failed to retain all documents referred to in the minutes as being tabled at the meeting.
- 787.** The Authority is satisfied that Particulars 10.3(a)(1), with regard to the meeting of July 2009; Particular 10.3(a)(2) with regard to meetings in February, March, June, July, September and October 2010 and Particular 10.3(a)(3) regarding meetings in July and October 2011 are all established in that the Club failed to retain these tabled documents in the manner required.
- 788.** These findings are made on the basis of Club Board meeting minutes for 9 January 2009, 24 February 2009 and 28 July 2009 (Complainant Exhibits E001 to E003) and

the Club Board meeting minutes from 27 November 2009 to 23 June 2014 (Complainant Exhibits E005 through E050).

- 789.** The Authority does not accept the Club's argument, that the Deed Administrator was responsible for all of the matters alleged in Ground 10, is a satisfactory response to Ground 10. The fact that the Club had entered into a DOCA, which was administered by Mr Wily in his capacity as Deed Administrator, does not relieve the individual Ex-Officers or Mr Kirk from their obligations and responsibilities in respect of the requirements of section 30(1)(c) of the Act.
- 790.** The Authority is satisfied that Particular 10.3 is established.
- 791.** On the basis of the Authority's findings on the above Particulars, the Authority is satisfied that Ground 10 of the Complaint, alleging that the Club contravened section 30(1)(c) of the Act, is established.

## **GROUND 11**

- 792.** Ground 11 states:

***Section 57F(3)(d) – The Club contravened a provision of the Act.***

*Between August 2013 and April 2014 the Club contravened section 30(2)(k) of the Act.*

- 793.** Particular 11.1 of Ground 11 alleges as follows:

*On 31 occasions the Club failed to ensure the information of a guest of a member was recorded in the "sign-in register" in accordance with section 31(1)(c) of the Act.*

- (a) On 15 occasions the guest did not complete their full name, or their surname and first initial.*
- (b) On 16 occasions the guest did not complete their address.*
- (c) On three occasions the member did not provide their signature.*

## **Club's Response to Ground 11**

- 794.** In response to Ground 11, the Club relies upon its below submissions in response to Ground 14 of the Complaint.

## **Ex-Officers' Response to Ground 11**

- 795.** The Ex-Officers adopt the entirety of the Club's submission dated 17 May 2015 in respect of Ground 11 of the Complaint.

## **Kirk's Response to Ground 11**

- 796.** Mr Kirk submits that he relied upon MLM, the Club secretary manager and Club staff to ensure that guests were completing sign-in details correctly. Mr Kirk believed that regular staff meetings "covered these matters".

## **Wily's Response to Ground 11**

- 797.** Mr Wily did not make any specific submissions in response to Ground 11 of the Complaint.

## Authority Findings on Ground 11

798. Section 30(2)(k) of the Act states as follows:

*A register of persons of or above the age of 18 years who enter the premises of the club as guests of members shall be kept in accordance with section 31.*

799. Section 31 of the Act states:

### **31 Manner of keeping registers relating to members and guests**

(1) *A register kept for the purposes of:*

...

(c) *section 30(2)(k) shall have entered therein on each occasion on any day on which a person of or above the age of 18 years enters the premises of the club as the guest of a member the name in full or the surname and initials of the given names, and the address, of that guest, the date of that day and the signature of that member*

....

(2) *Notwithstanding subsection (1)(c), if an entry in the register kept for the purposes of section 30(2)(k) is made on any day in respect of the guest of a member, it is not necessary for an entry to be made in that register in respect of that guest if he or she subsequently enters the premises of the club on that day as the guest of that member.*

(3) *A register referred to in this section must be retained by a registered club for a period of at least 3 years after the date of the last entry in the register.*

*Maximum penalty: 20 penalty units.*

800. The Authority is satisfied that Particular 11.1 is established on the basis of a spreadsheet of the Club's *Sign-in Register* for August 2013 to September 2014 (Complainant Exhibit E052) and copies of pages of the Club's *Sign-in Register* for August 2013 to September 2014 (Complainant Exhibit E053).

801. While this allegation has been factually established, the Authority notes and accepts the Ex-Officers' submission that the error rate was only 0.31% across the relevant period. In those circumstances, this is a very minor breach. The Authority also notes that the Complainant acknowledges the fact that the Club has implemented a new automated system.

802. The Authority is satisfied that Ground 11 of the Complaint is established.

## GROUND 12

803. Ground 12 states:

### **Section 57F(3)(d) – The Club contravened a provision of the Act.**

*In 2007 and between 2009 and 2013 the Club failed to hold annual elections for the appointment of the members of the governing body in contravention of section 30(1)(a) of the Act.*

**804.** Particular 12.1 of Ground 12 alleges as follows:

*There was no rule of the Club to provide otherwise than that the governing body of the Club must be elected annually.*

**805.** Particular 12.2 of Ground 12 alleges as follows:

*In 2007, 2009 and 2010, the Club:*

- (a) did not hold an AGM of members; and*
- (b) did not hold an election by members for the appointment of the governing body.*

**806.** Particular 12.3 of Ground 12 alleges as follows:

*In 2011, the Club:*

- (a) held an AGM of members; but*
- (b) there is no minute from the AGM of members recording that the Club held an election for the appointment of the governing body.*

**807.** Particular 12.4 of Ground 12 alleges as follows:

*In 2012 and 2013, the Club:*

- (a) did not hold an AGM of members; and*
- (b) did not hold an election by members for the appointment of the governing body.*

**808.** The Authority notes that, as stated in the Complainant's Revised Position Statement dated 17 June 2015, Ground 12 is not pressed against Mr Du Chesne.

### **Club's Response to Ground 12**

**809.** In response to Ground 12, the Club submits that during administration, no AGMs can be held without the written approval of the administrator. The Club further contends that the Club and/or the Ex-Officers and Mr Kirk are not responsible if AGMs are not convened in accordance with the Act.

### **Ex-Officers' Response to Ground 12**

**810.** The Ex-Officers adopt the entirety of the Club's submission dated 17 May 2015 in respect of Ground 12 of the Complaint.

### **Kirk's Response to Ground 12**

**811.** Mr Kirk did not make any specific submissions in response to Ground 12 of the Complaint.

### **Wily's Response to Ground 12**

**812.** Mr Wily did not make any specific submissions in response to Ground 12 of the Complaint.

## Authority Findings on Ground 12

813. Section 30(1)(a) of the Act states as follows:

### 30 Rules of registered clubs

(1) *The rules of a registered club shall be deemed to include the following rules:*

(a) *Except as provided by paragraphs (a1) and (a2), the governing body of the club responsible for the management of the business and affairs of the club is to be elected:*

- (i) *annually, or*
- (ii) *if a rule of the club so provides-biennially, or*
- (iii) *if a rule of the club so provides-in accordance with Schedule 4,*

*at an election in respect of which the full members only of the club (or a subclass of full members determined by a rule of the kind referred to in subsection (9)) are entitled to vote.*

814. The Authority is satisfied that the allegation in Particular 12.1, that there is no rule of the Club otherwise than that the governing body must be elected annually, is established on the basis of Article 28 of the Articles of Association for the Club (Complainant Exhibit E085).
815. The Authority is satisfied that Particular 12.2(a), alleging that during 2007, 2009 and 2010 the Club did not hold an AGM and Particular 12.2(b), alleging that the Club did not hold an election for the governing body during 2007, 2009 and 2010, are both established on the basis of the minutes of the Club's 2008 AGM (Complainant Exhibit E058); the minutes of the Club's 2011 AGM (Complainant Exhibit E059) and the statements made by Brian Kirk at pages 10 to 11 of his record of interview with OLGR Inspectors dated 30 October 2014 (Complainant Exhibit E181).
816. The Club contends that while the Club was under administration, no annual general meetings could be held without the written approval of the Administrator and/or the Deed Administrator, as the case may be.
817. The Club submits that the Club and/or the individual Ex-Officers are not responsible for the failure of the Club to convene AGMs during 2007, 2009 and 2010 by reason that their powers to act were suspended under the *Corporations Act* during the period that the Club was under external administration.
818. As noted above, section 435C(2)(a) of the *Corporations Act* provides (and provided at all relevant times) that the administration of a company ends when a company enters into a deed of company arrangement.
819. The Authority is satisfied that the suspension of the governing body that may otherwise occur while under external administration ended when the DOCA commenced in March 2003.
820. It may be argued (subject to some uncertainty arising from the lack of evidence of regulatory approval having been obtained for Mr Wily's appointment as voluntary administrator under section 41(1) of the Act) that the governing body was not in control of the Club during the period of voluntary administration from 24 October 2002 to 24 March 2003.

- 821.** Nevertheless, the officers of the Club resumed their functions and powers while the DOCA and the ADOCA were in effect – albeit that the governing body would not be able to act in a manner that was inconsistent with those deeds of company administration.
- 822.** The Authority has reviewed the DOCA and ADOCA entered into by the Club and does not consider that those deeds prevented the Club Board from conducting an AGM or an election during the relevant years during the time of administration.
- 823.** The Authority does not accept the Club's position in this regard and is satisfied that the Club remained responsible for ensuring compliance with this legislative requirement during the period in which the DOCA and ADOCA were in effect. The Club has not contended or provided evidence that the governing body sought to convene annual general meetings but was stymied by Mr Wily.
- 824.** Particular 12.3(a) alleges that in 2011, the Club held an AGM. This is established on the basis of the minutes for the Club's 2011 AGM (Complainant Exhibit E059).
- 825.** Particular 12.3(b) alleges that there is no minute from the 2011 AGM recording that the Club held an election of the members of the governing body. This allegation is established on the basis of the minutes of the Club's 2011 AGM (Complainant Exhibit E059).
- 826.** Particular 12.4(a) alleges that the Club did not hold an AGM during 2012 and 2013, while Particular 12.4(b) alleges that the Club did not hold an election for the governing body during those years.
- 827.** These Particulars are established on the basis of the minutes of the Club's 2014 AGM (Complainant Exhibit E060); the statements made by Robert Ashton Jnr at page 27 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182) and the statements made by Brian Kirk at pages 10 to 11 of the transcript of his record of interview with OLGR Inspectors dated 30 October 2014 (Complainant Exhibit E181).
- 828.** With regard to Particular 12.4, the Authority notes the Club's submission that the Club did not hold AGMs in 2012 and 2013 by reason that it had been denied access to the relevant documentation and could not get its accounts audited. The Authority notes that, in support of this contention, the Club relies upon the letter from Domenic Cutrupi of CBC Partners, the Club's Auditor to the Club's secretary dated 28 March 2014 (Complainant Exhibit E104) and the statements made by Mr Ashton Snr and Mr Teale in their respective records of interview with OLGR inspectors to the effect that there were difficulties and lengthy delays in obtaining the necessary documentation from Mr Wily.
- 829.** However, the Authority is satisfied that even if this contention is accepted, a lack of audited accounts would not have precluded the Club from holding an AGM. The Authority does not accept the Club's submissions on this point and Particular 12.4 is established.
- 830.** On the basis of the Authority's findings on the above Particulars, the Authority is satisfied that Ground 12 of the Complaint has been established.



## GROUND 13

831. Ground 13 states:

***Section 57F(3)(d) – the Club contravened a provision of the Act.***

*On 11 September 2014 the Club contravened section 30(2)(i) of the Act, in that the Club failed to ensure the register of persons who are full members of the Club was kept in accordance with section 31(1)(a) of the Act.*

832. Particular 13.1 of Ground 13 alleges as follows:

*On 11 September 2014 the Club's membership register recorded 249 entries, however contained only 121 ordinary members.*

- (a) On one occasion the membership register did not record the member's full name.*
- (b) On 135 occasions the membership register did not record the member's occupation.*
- (c) On eight occasions the membership register did not record the member's address.*
- (d) On 85 occasions the membership register did not record the date on which the member last paid the annual fee for membership of the Club.*

833. The Authority notes that, as stated in the Complainant's Revised Position Statement dated 17 June 2015, Ground 13 is not pressed against Messrs Whitney, Kirk and McKew.

### **Club's Response to Ground 13**

834. In response to Particular 13.1(a), the Club submits that the reference to 121 members is those members recorded as "full members" who were paid up. There were another 73 *non-financial* members who had not yet paid up. The Club submits that there was "nothing sinister" about this and that the "non-financial status" of these members was "clear".

835. In response to Particular 13.1(b), the Club submits that it "inherited a poor record keeping system" from the Administrator (Mr Wily) while the Club was under administration.

### **Ex-Officers' Response to Ground 13**

836. The Ex-Officers adopt the entirety of the Club's submission dated 17 May 2015 in respect of Ground 13 of the Complaint.

### **Kirk's Response to Ground 13**

837. The Authority notes that Ground 13 is not pressed against Mr Kirk.

### **Wily's Response to Ground 13**

838. Mr Wily did not make any specific submissions in response to Ground 13 of the Complaint.

### **Authority Findings on Ground 13**

839. Section 30(2)(i) of the Act states:

*A register of persons who are full members of the club shall be kept in accordance with section 31.*

**840.** Section 31(1)(a) of the Act states:

**31 Manner of keeping registers relating to members and guests**

(1) *A register kept for the purposes of:*

(a) *section 30(2)(i) shall set forth the name in full, the occupation and the address of each full member and, if he or she is an ordinary member, the date on which he or she last paid the annual fee for membership of the club.*

- 841.** The Authority is satisfied that Particular 13.1(a), alleging that on one instance the register did not record the member's full name, is established on the basis of a spreadsheet summarising the Club's *Full Members Register* (Complainant Exhibit E056) and the Club's *Full Members Register* (Complainant Exhibit E057).
- 842.** The Authority is satisfied that Particular 13.1(b), alleging that on 135 occasions the register did not record the member's occupation, is established on the basis of a spreadsheet summarising the Club's *Full Members Register* (Complainant Exhibit E056) and the Club's *Full Members Register* (Complainant Exhibit E057).
- 843.** The Authority is satisfied that Particular 13.1(c), alleging that on eight occasions the register did not record the member's address, is established on the basis of a spreadsheet summarising the Club's *Full Members Register* (Complainant Exhibit E056) and the Club's *Full Members Register* (Complainant Exhibit E057).
- 844.** The Authority is satisfied that Particular 13.1(d), alleging that on 85 occasions the register did not record the date when the member last paid the annual membership fee, is established on the basis of a spreadsheet summarising the Club's *Full Members Register* (Complainant Exhibit E056); the Club's *Full Members Register* (Complainant Exhibit E057) and the statements made by Robert Ashton Snr at pages 37 to 38 of the transcript of his record of interview with OLGR inspectors dated 20 June 2014 (Complainant Exhibit E144).
- 845.** In summary, Particular 13.1 alleges that on 11 September 2014, the membership register recorded **249** entries but contained only **121** ordinary members. However, the Authority notes and accepts the Club's submission that the remaining **128** members who were not recorded as "full members" of the Club in the Club's *Full Members Register* had the status of either "associate members" or "non-financial members". Accordingly, the Authority is satisfied that there is no failure of compliance with section 31(1)(a) in respect of "full members".
- 846.** The Authority notes that the Club did not take any action under the Articles of Association to remove the non-financial members from the Club's membership register. The Club concedes that Article 23 of the Club's former Articles of Association provided that a "non-financial member" remained a member until it was resolved to terminate their membership.
- 847.** However, the Authority accepts the Club's further submission that clause 18.5 of the Club's amended Constitution dated 2 April 2014 provides that any members whose

fees are not paid by the last day in August each year, automatically cease to be a member of the Club.

848. On the basis of the Authority's findings on the above Particulars, the Authority is satisfied that Ground 13 of the Complaint has been established in that some of the Club's membership records were not kept in accordance with the requirements of section 31(1)(a) of the Act in respect of the manner of keeping registers relating to members and guests.

## GROUND 14

849. Ground 14 states:

***Section 57F(3)(e) – a rule of the Club referred to in section 30(1) of the Act has been broken or any other rule of the Club has been habitually broken.***

*Between August 2013 and November 2014 it was a rule of the Club, under section 30(2)(m) of the Act, that it maintain a register of "temporary members" who attend the Club each day and record information in accordance with section 31(1)(e) of the Act.*

*Between August 2013 and November 2014 the Club habitually broke this rule.*

850. Particular 14.1 of Ground 14 alleges as follows:

*The Club kept a "sign-in register" for "temporary members".*

851. Particular 14.2 of Ground 14 alleges as follows:

*The Club on 1,856 occasions failed to ensure the full name, or the surname and first initial, and the address of the "temporary member" together with his or her signature, was recorded in the "sign-in register" as follows.*

<b><i>Date/Month</i></b>	<b><i>Number of temporary members whose information was not recorded as required by section 31(1)(e)</i></b>
<i>August 2013</i>	<i>90</i>
<i>September 2013</i>	<i>83</i>
<i>October 2013</i>	<i>139</i>
<i>November 2013</i>	<i>223</i>
<i>December 2013</i>	<i>438</i>
<i>January 2014</i>	<i>111</i>
<i>February 2014</i>	<i>123</i>
<i>March 2014</i>	<i>53</i>
<i>April 2014</i>	<i>188</i>
<i>May 2014</i>	<i>78</i>
<i>June 2014</i>	<i>41</i>
<i>July 2014</i>	<i>37</i>
<i>August 2014</i>	<i>35</i>
<i>September 2014</i>	<i>44</i>
<i>October 2014</i>	<i>112</i>
<i>November 2014</i>	<i>61</i>

## Club's Response to Ground 14

852. The Club submits in response to Ground 14 that the sign-in register was monitored by security, written instructions were given to all staff, and there were controls in place.

853. The Club submits that the Complainant has only provided those entries where some details were lacking but that the “majority” of the entries are compliant. The Club submits that a manual system is harder to monitor and that some entries were illegible.
854. The Club advises that it has since replaced this manual system with an automatic system.

#### **Ex-Officers’ Response to Ground 14**

855. The Ex-Officers adopt the entirety of the Club’s submission dated 17 May 2015 in respect of Ground 14 of the Complaint.

#### **Kirk’s Response to Ground 14**

856. Mr Kirk submits that he was only a director of the Club for about 7 months while this alleged contravention was occurring. He submits that he relied on MLM and the secretary manager of the Club and Club employees to fulfil the responsibilities that are the subject of Ground 14.

#### **Wily’s Response to Ground 14**

857. Mr Wily did not make any specific submissions in response to Ground 14 of the Complaint.

#### **Authority Findings on Ground 14**

858. Section 30(2)(m) of the Act provides:

##### **30 Rules of registered clubs**

- (2) *The rules of a registered club shall be deemed also to include the following rules:*

...

- (m) *A register of temporary members of the club (other than temporary members referred to in subsection (10) or in section 30B) who attend the club each day is to be kept in accordance with section 31 either as a separate register or as part of the register referred to in paragraph (l).*

859. Section 31(1)(e) of the Act provides:

##### **31 Manner of keeping registers relating to members and guests**

- (1) *A register kept for the purposes of:*

...

- (e) *section 30(2)(m) in relation to temporary members is to have entered in it, when a temporary member first enters the club premises on any day, the full name, or the surname and initials, and the address, of the temporary member together with his or her signature.*

860. The Authority is satisfied that the Club kept a sign-in register for temporary members and that Particular 14.1 is established on the basis of a spreadsheet of the

Club's *Sign-in Register* for August 2013 to September 2014 (Complainant Exhibit E052) and copies of pages of the Club's *Sign-in Register* for August 2013 to September 2014 (Complainant Exhibit E053).

861. The Authority is satisfied that on **1,856** occasions the Club failed to ensure the full name, or the surname and first initial and the address of the temporary member together with his or her signature was recorded in the sign-in register. Particular 14.2 is established on the basis of a spreadsheet of the Club's *Sign-in Register* for August 2013 to September 2014 (Complainant Exhibit E052); copies of pages of the Club's *Sign-in Register* for August 2013 to September 2014 (Complainant Exhibit E053) and a spreadsheet summarising the Club's *Sign-in Register* for October 2014 to November 2014 (Complainant Exhibit E225).
862. With respect to the Club's contention that the sign-in process was monitored by security staff, the Authority notes that the Club states in its submissions dated 17 May 2015 that security staff were deployed "during busier trading days", but does not provide any more specific evidence as to the extent to which security staff were actually on duty.
863. With respect to the Club's submission that the sign-in process was the subject of written instructions that were given to all staff *vis-a-vis* the maintenance of the registers for temporary members, the Authority notes that the Club provides an extract of these instructions in its submissions of 17 May 2015, as follows:

**FRONT DOOR** – Ensuring everyone signs-in, or becomes a member if they live outside the 5K radius... On Saturdays you must have the portable phone with you and answer any calls and take messages/notes. When front door is quiet, you must be checking previous sign-in slips, ask manager if you don't know what this involves.

864. The Authority also notes that the Club refers to the statements made by Mr Ashton Jnr in his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182) to the effect that casual employees of the Club positioned at the front door are given basic training as to what they are required to do, and are instructed to refer to the "cheat sheet" of suburbs located within a 5km radius of the Club before directing patrons to sign either the *Temporary Members Register* or fill out a membership form.
865. The Authority accepts the broad submission made by the Club that this is an operational matter that primarily falls within the ultimate responsibility of the Club secretary.
866. The Authority accepts the Club's submissions that the sign-in register for temporary members was, at times, monitored by security staff, and accepts the Ex-Officers' submission that the error rate in relation to entries in the temporary members register was 16.74%. That is nevertheless a substantial error rate and indicates ongoing laxity, with regard to the Club's admission procedures demonstrated over around fifteen (15) months. These matters cannot be dismissed as isolated errors but a systemic laxity in the Club's compliance systems.
867. The Authority notes the Club's advice that it has since replaced the manual system with an automatic system and while this may be a matter to be considered in mitigation, it is not a response to the allegation in this Ground.

- 868.** Further, the Authority accepts Mr Kirk's submission that he was serving as a director of the Club for about seven of the fifteen months in which the Club's ongoing compliance failure has been demonstrated by the Complainant's evidence.
- 869.** On the basis of the Authority's findings on the above Particulars, the Authority is satisfied, as alleged by the Complainant, that the Club did not maintain its sign-in register pursuant to section 30(2)(m) of the Act in accordance with section 31(1)(e) of the Act between August 2013 and November 2014. Ground 14 of the Complaint has been established.

## **GROUND 15**

- 870.** Ground 15 states:

***Section 57F (3)(e) – A rule of the Club referred to in section 30(1) of the Act has been broken or any other rule of the Club has been habitually broken.***

*Between August 2013 and November 2014 it was a rule of the Club, under section 30(2)(c) of the Act, that it must not admit a person to the Club as a "temporary member" if the person resides in New South Wales, and within a 5km radius of the Club, unless the person:*

- (a) is a member of another registered club with similar objects as the Club; or*
- (b) is a member of another registered club and is attending the Club on an invitation to participate in an organised sport or competition.*

*Between August 2013 and November 2014 the Club habitually broke this rule.*

- 871.** Particular 15.1 of Ground 15 alleges as follows:

*On 1,168 occasions the Club admitted persons, whose ordinary residence was within a 5km radius of the Club, as "temporary members" of the Club.*

<b><i>Month/Year</i></b>	<b><i>Number of temporary members who resided in New South Wales and within a 5km radius of the Club</i></b>
<i>August 2013</i>	<i>43</i>
<i>September 2013</i>	<i>32</i>
<i>October 2013</i>	<i>65</i>
<i>November 2013</i>	<i>71</i>
<i>December 2013</i>	<i>222</i>
<i>January 2014</i>	<i>115</i>
<i>February 2014</i>	<i>118</i>
<i>March 2014</i>	<i>60</i>
<i>April 2014</i>	<i>146</i>
<i>May 2014</i>	<i>84</i>
<i>June 2014</i>	<i>41</i>
<i>July 2014</i>	<i>29</i>
<i>August 2014</i>	<i>18</i>
<i>September 2014</i>	<i>45</i>
<i>October 2014</i>	<i>52</i>
<i>November 2014</i>	<i>27</i>

- 872.** Particular 15.2 of Ground 15 alleges as follows:

*None of the persons entering the Club referred to at paragraph 15.1 above identified themselves in the "sign-in register" as being a member of another club.*

### Club's Response to Ground 15

873. The Club submits that it had written procedures in place to enforce the 5km rule and a map of the suburbs within a 5km radius of the Club was "prominently displayed".
874. The Club submits that it has implemented a new automatic system which "rejects" persons who live within 5km of the Club from being admitted as "temporary members".

### Ex-Officers' Response to Ground 15

875. The Ex-Officers contend that Ground 15 fails and refer to their submissions on Ground 12 above.

### Kirk's Response to Ground 15

876. Mr Kirk did not make any specific submissions in response to Ground 15 of the Complaint.

### Wily's Response to Ground 15

877. Mr Wily did not make any specific submissions in response to Ground 15 of the Complaint.

### Authority Findings on Ground 15

878. Section 30(2)(c) of the Act and related subsections provide:

#### **30 Rules of registered clubs**

- (2) *The rules of a registered club shall be deemed also to include the following rules:*

...

- (c) *A person shall not be admitted as an honorary member or as a temporary member of the club unless:*

- (i) *the person is admitted in accordance with the rules of the club, and*
- (ii) *subsection (3A) is complied with in the case of an honorary member or subsection (3B) is complied with in the case of a temporary member.*

...

- (3A) *The rules of a registered club may not provide for a person to be an honorary member of the club unless the person holds office as a patron of the club or is a prominent citizen or local dignitary.*

- (3B) *A person whose ordinary place of residence is in New South Wales and is within a radius of 5 kilometres from the premises of a registered club (in this subsection referred to as **the host club**) is not eligible for admission as a temporary member of the host club unless the person is:*

- (a) *a member of another registered club with similar objects to those of the host club, or*
- (b) *a member of another registered club who is attending the host club as provided by subsection (10).*

(3C) *The regulations may create exceptions to subsection (3B).*

- 879.** The Authority is satisfied that Particular 15.1, alleging that on **1,168** occasions the Club admitted persons whose ordinary residence was within a 5km radius of the Club as temporary members, is established on the basis of a spreadsheet of the Club's *Sign-in Register* for August 2013 to September 2014 (Complainant Exhibit E052); copies of pages of the Club's *Sign-in Register* for August 2013 to September 2014 (Complainant Exhibit E053); a zone map showing the suburbs located within a 5km radius of the Club premises (Complainant Exhibit E132) and a spreadsheet summarising the Club's *Sign-in Register* for October 2014 to November 2014 (Complainant Exhibit E225).
- 880.** The Authority is satisfied that Particular 15.2, alleging that none of the persons entering the Club referred to at Particular 15.1 above identified themselves in the "sign-in register" as being a member of another club, is established on the basis of a spreadsheet of the Club's *Sign-in Register* for August 2013 to September 2014 (Complainant Exhibit E052); copies of pages of the Club's *Sign-in Register* for August 2013 to September 2014 (Complainant Exhibit E053) and a spreadsheet summarising the Club's *Sign-in Register* for October 2014 to November 2014 (Complainant Exhibit E225).
- 881.** The Authority notes that the Club's submissions refer to the statements made by Mr McKew in his interview with OLGR inspectors on 22 September 2014 (Complainant Exhibit E142) to the effect that the Club had written procedures in place to enforce the 5km rule and submit that a map of the suburbs within a 5km radius of the Club was "prominently displayed". The Authority further notes, apparently by way of mitigation, the Club contention that it has now implemented a new automatic system which "rejects" persons who live within 5km of the Club from being admitted as "temporary members".
- 882.** Accepting that the Club did have some written procedure dealing with this requirement and that a 5km radius map was prominently displayed on the Club premises, the Authority is nevertheless satisfied that this Particular is established and is satisfied, on the basis of the submission from the Ex-Officers, that the error rate was **10.53%**, which the Authority considers to be a substantial error rate with regard to statutory entry requirements. The Authority accepts the Club's contention that it has, since this time, replaced the manual system with an automatic system but that does not rebut the allegation made in this Particular.
- 883.** On the basis of the Authority's findings on the above Particulars, the Authority is satisfied, as alleged by the Complainant, that the Club did not comply with section 30(2)(c) of the Act in relation to the admission of "temporary members". This occurred over a substantial period of around fifteen months, between August 2013 and November 2014.
- 884.** Ground 15 of the Complaint is established.

## **GROUND 16**

- 885.** Ground 16 states:

***Section 57F(3)(e) – A rule of the Club referred to in section 30(1) of the Act has been broken or any other rule of the Club has been habitually broken.***



*At all relevant times it was a rule of the Club, under section 30(1)(g) of the Act, that it must not admit a person as a member of the Club, other than as a "provisional member", "honorary member" or "temporary member", unless the person is elected to membership at a meeting of:*

- (a) the full members of the Club;*
- (b) the governing body of the Club; or*
- (c) the election committee of the Club.*

*Between 2013 and 2014 the Club habitually broke this rule.*

**886.** Particular 16.1 of Ground 16 alleges as follows:

*As at 16 May 2014 the Club had admitted 7,273 persons to membership of the Club as "social members".*

**887.** Particular 16.2 of Ground 16 alleges as follows:

*"Social members" were not a category of membership under the Club's former Articles of Association.*

[The Authority notes that Particular 16.2 of Ground 16 is no longer pressed.]

**888.** Particular 16.3 of Ground 16 alleges as follows:

*"Social members" are distinct from "provisional members", "honorary members" or "temporary members" in the Club's 2014 Constitution.*

**889.** Particular 16.4 of Ground 16 alleges as follows:

*Article 16.1 of the Club's 2014 Constitution provides:*

*"A person shall not be admitted as a member of the Club other than as a Provisional, Honorary Temporary or a Life Member unless that person is elected to membership at a meeting of the Board of the Club or duly appointed election committee of the Club".*

**890.** Particular 16.5 of Ground 16 alleges as follows:

*"Social members" are not "provisional members", "honorary members" or "temporary members" of the Club.*

**891.** Particular 16.6 of Ground 16 alleges as follows:

*"Social members" are approved by Club staff as members of the Club at the entrance to the Club following the payment of a \$2.00 fee and the completion of a membership application form.*

**892.** Particular 16.7 of Ground 16 alleges as follows:

*"Social members" are issued a membership number and card which provides access to the Club.*

**893.** Particular 16.8 of Ground 16 alleges as follows:

*The 7,273 persons admitted to membership as "social members" were not approved by a meeting of the full members, governing body or election committee.*

### Club's Response to Ground 16

894. The Club submits in response to Ground 16 that "social" memberships have a longstanding history at this Club and the category of social members is recognised by the Club's Constitution as "non-bowling members".
895. The Club concedes that a practice "developed" over time at the Club of receiving membership applications but not submitting them to the Board for approval.
896. The Club further submits that since this Complaint, the Club has received specialist legal advice and has ceased the practice of admitting "social members" to the Club, notwithstanding that the Club submits that its Constitution expressly permits the admission of such members.
897. The Club notes that Appendix 6 to the Club's submissions dated 17 May 2015 includes minutes of recent Board Committee meetings, approving the applications of some 1,129 members.

### Ex-Officers' Response to Ground 16

898. The Ex-Officers adopt the entirety of the Club's submission dated 17 May 2015 in respect of Ground 16 of the Complaint.

### Kirk's Response to Ground 16

899. Mr Kirk did not make any specific submissions in response to Ground 16 of the Complaint.

### Wily's Response to Ground 16

900. Mr Wily did not make any specific submissions in response to Ground 16 of the Complaint.

### Authority Findings on Ground 16

901. Section 30(1)(g) of the Act provides:

#### **30 Rules of registered clubs**

- (1) *The rules of a registered club shall be deemed to include the following rules:*

...

- (g) *A person shall not be admitted as a member of the club, other than as a provisional member, honorary member or temporary member, unless the person is elected to membership at a meeting of the full members of the club or at a duly convened meeting of the governing body or election committee of the club, the names of whose members present and voting at that meeting are recorded by the secretary of the club.*

902. The Authority is satisfied that Particular 16.1, alleging that as at 16 May 2014 the Club had admitted **7,273** persons as "social members", is established on the basis of the Club's *Social Membership Register* dated 19 May 2014 (Complainant Exhibit E145).

- 903.** The Authority notes that, as stated in the Complainant's Revised Position Statement dated 17 June 2015, Particular 16.2 of the Complaint is no longer pressed.
- 904.** The Authority is satisfied that Particular 16.3, alleging that social members are a distinct category from provisional members, honorary members or temporary members in the Club's 2014 constitution, is established on the basis of Article 7.2 of the Club's Constitution dated 2 April 2014 (Complainant Exhibit E084); the statements made by Robert Ashton Jnr at pages 9 and 62 to 63 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182); the statements made by Luke McKew at pages 60 to 61 of the transcript of his record of interview with OLGR inspectors dated 22 September 2014 (Complainant Exhibit E142); the statements made by Brian Kirk at pages 112 to 113 of the transcript of his record of interview with OLGR inspectors dated 26 June 2014 (Complainant Exhibit E137) and the statements made by Robert Ashton Snr at page 84 of the transcript of his record of interview with OLGR inspectors dated 30 October 2014 (Complainant Exhibit E180).
- 905.** The Authority is satisfied that Particular 16.4, alleging that article 16.1 of the Club's 2014 Constitution provides that a person shall not be admitted as a member of the Club other than as a provisional, honorary, temporary or life member unless elected to membership at a meeting of the Board or duly appointed election subcommittee, is established on the basis of Article 16.1 of the Club's Constitution dated 2 April 2014 (Complainant Exhibit E084).
- 906.** The Authority is satisfied, as alleged by Particular 16.5, that "social members" are not "provisional members", "honorary members" or "temporary members" of the Club. The Authority makes this finding on the basis of the Club's *Social Membership Register* dated 19 May 2014 (Complainant Exhibit E145); Articles 7.2 and 16.1 of the Club's Constitution dated 2 April 2014 (Complainant Exhibit E084); the statements made by Robert Ashton Jnr at pages 9 and 62 to 63 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182); the statements made by Luke McKew at pages 60 to 61 of the transcript of his record of interview with OLGR inspectors dated 22 September 2014 (Complainant Exhibit E142); the statements made by Brian Kirk at pages 112 to 113 of the transcript of his record of interview with OLGR inspectors dated 26 June 2014 (Complainant Exhibit E137) and the statements made by Robert Ashton Snr at page 84 of the transcript of his record of interview with OLGR inspectors dated 30 October 2014 (Complainant Exhibit E180).
- 907.** The Authority is satisfied that Particular 16.6, alleging that social members are approved by Club staff at the entrance to the Club premises upon payment of the \$2.00 fee and completion of a membership form, is established on the basis of the Club's Constitution dated 2 April 2014 (Complainant Exhibit E084); the statements made by Luke McKew at pages 50 to 51 of the transcript of his record of interview with OLGR inspectors dated 22 September 2014 (Complainant Exhibit E142); the statements made by Natali Faraguna at page 21 of the transcript of her record of interview with OLGR inspectors dated 13 October 2014 (Complainant Exhibit E143); the statements made by Robert Ashton Snr at pages 82 to 83 of the transcript of his record of interview with OLGR inspectors dated 30 October 2014 (Complainant Exhibit E180); the statements made by Allan Teale at page 13 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E183); the statements made by Leonard Whitney at page 5 of the transcript of his record of interview with OLGR inspectors dated 3 November 2014

(Complainant Exhibit E184); the statements made by Robert Ashton Jnr at pages 11 to 12 and 62 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182); and the statements made by Brian Kirk at pages 10 to 11 of the transcript of his record of interview with OLGR Inspectors dated 30 October 2014 (Complainant Exhibit E181).

- 908.** The Authority is satisfied that Particular 16.7, alleging that social members are issued a membership number and card, is established on the basis of the statements made by Leonard Whitney at page 5 of the transcript of his record of interview with OLGR inspectors dated 3 November 2014 (Complainant Exhibit E184).
- 909.** The Authority is satisfied that Particular 16.8, alleging that **7,273** persons who were admitted as social members were not approved by a meeting of full members, governing body or the Club's election subcommittee, is established on the basis of the Club Board meeting minutes for 9 January 2009, 24 February 2009 and 28 July 2009 (Complainant Exhibits E001 to E003); the Club Board meeting minutes from 27 November 2009 to 23 June 2014 (Complainant Exhibits E005 through E050); the minutes for the Club's 2011 AGM (Complainant Exhibit E059); the minutes for the Club's 2014 AGM (Complainant Exhibit E060); the statements made by Luke McKew at pages 50 to 51 of the transcript of his record of interview with OLGR inspectors dated 22 September 2014 (Complainant Exhibit E142); the statements made by Allan Teale at pages 12 to 13 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E183); the statements made by Robert Ashton Snr at pages 82 to 83 of the transcript of his record of interview with OLGR inspectors dated 30 October 2014 (Complainant Exhibit E180); the statements made by Robert Ashton Jnr at pages 11 to 12 and 62 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182) and the statements made by Brian Kirk at pages 32 to 33 of the transcript of his record of interview with OLGR Inspectors dated 30 October 2014 (Complainant Exhibit E181).
- 910.** The Authority has considered the Club's submissions in response to Ground 16 to the effect that "social" memberships have a longstanding history at this Club and that social members were recognised by the Club's Constitution in the form of "non-bowling members". The Authority does not accept that this is an adequate response to the allegation that the Club did not observe statutory requirements with regard to social members.
- 911.** The Authority further notes that the Club concedes that a practice developed over time at the Club of receiving membership applications, but not submitting them to the Board for approval.
- 912.** The Authority accepts the contention, made apparently by way of mitigation, that since the date of this Complaint, the Club has received specialist legal advice and has ceased the practice of admitting "social members" to the Club, notwithstanding that the Club's 2014 Constitution expressly permits the admission of such members.
- 913.** The Authority also notes that Appendix 6 to the Club's submissions dated 17 May 2015 includes minutes of recent Club Board committee meetings, approving the applications of some 1,129 new members.

914. Nevertheless, on the basis of the Authority's findings on the above Particulars, the Authority is satisfied that Ground 16 of the Complaint, alleging that the Club did not comply with section 30(1)(g) of the Act with respect to the admission of 7,273 social members, has been established.

## **GROUND 17**

915. Ground 17 states:

***Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.***

*The Club contravened clause 14 of the Gaming Machines Regulation 2010.*

916. Particular 17.1 of Ground 17 alleges as follows:

*Between August 2013 and September 2014 on 623 occasions the Club failed to keep written records with respect to the awarding or payment of each prize and short-pay of an approved gaming machine kept on the premises of the Club that contains:*

- (a) the name and signature of the person to whom the award or payment was made; and*
- (b) the signature of 2 other persons certifying that each sighted the prize-winning combination or the number of credits and that the record was correct in all its details.*

## **Club's Response to Ground 17**

917. The Club admits the Particulars of this Ground and submits that it is prepared to engage an independent auditor to check its compliance with the relevant gaming related regulations.

## **Ex-Officers' Response to Ground 17**

918. The Ex-Officers adopt the entirety of the Club's submission dated 17 May 2015 in respect of Ground 17 of the Complaint.

## **Kirk's Response to Ground 17**

919. Mr Kirk submits in response to Ground 17 that he relied on MLM and the Club secretary manager and Club staff to ensure compliance. Mr Kirk contends that the secretary manager was responsible for producing financial and gaming reports, and Mr Kirk had no reason to doubt the accuracy of the reports he reviewed during his time as a director of the Club.

## **Wily's Response to Ground 17**

920. Mr Wily did not make any specific submissions in response to Ground 17 of the Complaint.

## **Authority Findings on Ground 17**

921. Clause 14 of the *Gaming Machines Regulation 2010* provides:

#### **14 Records relating to prizes to be kept by clubs**

*A registered club must keep or cause to be kept a written record with respect to the awarding or payment of each prize and the payment of short-pay of an approved gaming machine kept on the premises of the club (other than monetary payments released directly by the gaming machine or prizes awarded or paid by way of redemption of a gaming machine ticket within the meaning of Part 7) that contains the following particulars:*

- (a) the date of the award or payment,*
- (b) the serial number of the gaming machine in respect of which the award or payment was made,*
- (c) the number of credits accumulated that are to be redeemed,*
- (d) the amount of the prize, the value of the credits or the amount of the short-pay,*
- (e) the name and signature of the person to whom the award or payment was made,*
- (f) the name and signature of an employee or person authorised by the club certifying that the employee or person has sighted the number of credits and that the record made in accordance with this clause is correct in all details.*

*Maximum penalty: 50 penalty units.*

- 922.** The Authority is satisfied that Particular 17.1(a), alleging that between August 2013 and September 2014 on 623 occasions the Club failed to keep written records with respect to the awarding or payment of each prize and short-pay of an approved gaming machine kept on the premises of the Club that contains the name and signature of the person to whom the award was made, is established on the basis of copies of 611 payout records alleged by the Complainant not to have been properly completed (Complainant Exhibit E194); 12 Club gaming machine payout records (Complainant Exhibit E207) and pages 4 to 5 of the statement by OLGR inspector Michael Fitzgerald dated 19 November 2014.
- 923.** The Authority is satisfied, as alleged by Particular 17.1(b), that between August 2013 and September 2014, on 623 occasions, the Club failed to keep written records with respect to the awarding or payment of each prize and short-pay of an approved gaming machine kept on the premises of the Club that contains the signature of two other persons certifying that each sighted the prize-winning combination or the number of credits and that the record was correct in all its details.
- 924.** While this requirement was recently changed with effect from 3 July 2015, the Authority notes that between August 2013 and September 2014, clause 14(f) of the *Gaming Machines Regulation 2010* provided as follows:

#### **14 Records relating to prizes to be kept by clubs**

*A registered club must keep or cause to be kept a written record with respect to the awarding or payment of each prize and the payment of short-pay of an approved gaming machine kept on the premises of the club (other than monetary payments released directly by the gaming machine or prizes awarded or paid by way of redemption of a gaming machine ticket within the meaning of Part 7) that contains the following particulars:*

...

- (f) the signature of 2 other persons certifying that each has sighted the prize-winning combination or the number of credits and that the record made in accordance with this clause is correct in all details.*

925. The Authority is satisfied that Particular 17.1(b) is established on the basis of copies of 611 payout records alleged by the Complainant not to have been properly completed (Complainant Exhibit E194); 12 Club gaming machine payout records (Complainant Exhibit E207) and pages 4 to 5 of the statement by OLGR inspector Michael Fitzgerald dated 19 November 2014.
926. The Authority notes that the Club admits the Particulars of this Ground and submits, apparently by way of mitigation, that it is prepared to engage an independent auditor to check compliance with the relevant gaming related regulations.
927. The Authority notes Mr Kirk's submission in response to this Ground that he relied on MLM and the Club secretary manager and Club staff to ensure compliance with the legislation in respect of producing financial and gaming reports, and that Mr Kirk had no reason to doubt the accuracy of the reports that he reviewed during his time as a director of the Club.
928. The Authority rejects Mr Kirk's submissions in respect of this contravention of the *Gaming Machines Regulation*. This is a significant failing by Mr Kirk and the other Ex-Officers who held office during the relevant period as to their duty as directors by not taking care to familiarise themselves with the requirements of the relevant gaming related legislation in order to ensure the Club's compliance and not, it would seem, having systems in place (whether by way of audits or otherwise) to ensure compliance and detect non-compliance with the requirements of the gaming machines legislation.
929. On the basis of the Authority's findings on the above Particulars, the Authority is satisfied that Ground 17 of the Complaint, alleging that the Club contravened clause 14 of the *Gaming Machines Regulation 2010* on 623 occasions between August 2013 and September 2014, has been established.

## GROUND 18

930. Ground 18 states:

***Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.***

*The Club contravened clause 17 of the Gaming Machines Regulation 2010.*

931. Particular 18.1 of Ground 18 alleges as follows:

*There is no minute of a meeting of the governing body between January 2009 and June 2014 recording the production to the governing body, at monthly intervals, of:*

- (a) a cash flow analysis in the form approved by the Director-General; and*
- (b) a comparison of cancelled credit and jackpot wins meter readings with the corresponding entries in the Club's payout sheets,*

*in respect of each approved gaming machine.*

## Club's Response to Ground 18

932. The Club admits the Particulars of this Ground.

933. The Club submits that the absence of reports was a result of the secretary manager being “unaware” of requirements and “relying on past practices”; and other Club Board members relying upon the secretary manager to effect compliance with the relevant regulations.

#### **Ex-Officers’ Response to Ground 18**

934. The Ex-Officers adopt the entirety of the Club’s submission dated 17 May 2015 in respect of Ground 18 of the Complaint.

#### **Kirk’s Response to Ground 18**

935. Mr Kirk submits in response to Ground 18 that he relied on MLM and the Club secretary manager and Club staff to ensure compliance. Mr Kirk contends that the secretary manager was responsible for producing financial and gaming reports, and Mr Kirk had no reason to doubt the accuracy of the reports he reviewed during his time as a director of the Club.

#### **Wily’s Response to Ground 18**

936. Mr Wily did not make any specific submissions in response to Ground 18 of the Complaint.

#### **Authority Findings on Ground 18**

937. Clause 17 of the *Gaming Machines Regulation 2010* provides as follows:

**17 Clubs required to record certain information in relation to gaming machines**

- (1) *A registered club must ensure that the requirements of this clause are complied with to the extent that they apply to the club.*

*Maximum penalty: 50 penalty units.*

- (2) *A registered club must, at monthly intervals, record the following information in respect of each approved gaming machine kept on the premises of the club:*

- (a) *a cash flow analysis,*
- (b) *a comparison of cancelled credit meter readings with the corresponding entries in the club’s payout sheets,*
- (c) *a comparison of the money out meter reading (in the case of an approved gaming machine that issues gaming machine tickets by means of equipment subsidiary to the gaming machine), or the cancelled credits payments meter reading (in the case of an approved gaming machine that issues gaming machine tickets otherwise than by means of subsidiary equipment), with the total of:*
  - (i) *the value of the gaming machine tickets issued from the gaming machine, being gaming machine tickets that have been redeemed, and*
  - (ii) *the value of the unclaimed gaming machine tickets issued from the gaming machine.*

- (3) *The cash flow analysis must be in or to the effect of a form approved by the Secretary.*

- (4) *The information contained in a record referred to in subclause (2) must be reported to the club’s board or committee at monthly intervals.*



- (5) *If a meter of an approved gaming machine kept on the premises of a registered club ceases to function or malfunctions, the club must cause it to be removed from play immediately and cause a notice to be attached to it indicating that it is faulty.*

- 938.** Particular 18.1(a), which alleges that there is no minute of a meeting of the governing body between January 2009 and June 2014 recording the production to the governing body, at monthly intervals, of a cash flow analysis in the form approved by the (then) Director-General (now Secretary of the Department of Justice), is established on the basis of the minutes of Club Board meetings dated 9 January 2009, 24 February 2009 and 28 July 2009 (Complainant Exhibits E001 to E003); the Club Board meeting minutes from 27 November 2009 to 23 June 2014 (Complainant Exhibits E005 through E050); an excerpt of the interview between OLGR inspectors and Robert Ashton Jnr dated 31 October 2014 (Complainant Exhibit E197) and pages 5 to 6 of the statement of OLGR inspector Michael Fitzgerald dated 19 November 2014.
- 939.** Particular 18.1(b) alleges that there is no minute of any meeting of the governing body between January 2009 and June 2014 recording the production to the governing body, at monthly intervals, of a comparison of *cancelled credit* and *jackpot wins meter readings* with the corresponding entries in the Club's payout sheets in respect of each approved gaming machine. This Particular is established on the basis of the Club Board meeting minutes for 9 January 2009, 24 February 2009 and 28 July 2009 (Complainant Exhibits E001 to E003); the Club Board meeting minutes from 27 November 2009 to 23 June 2014 (Complainant Exhibits E005 through E050); an excerpt of the interview between OLGR inspectors and Robert Ashton Jnr dated 31 October 2014 (Complainant Exhibit E197) and pages 5 to 6 of the statement of OLGR inspector Michael Fitzgerald dated 19 November 2014.
- 940.** The Authority notes that the Club admits the Particulars of this Ground, while contending that the absence of the required reports was a result of the secretary manager being "unaware" of these requirements and "relying on past practices". The Club submits that other Club Board members relied upon the secretary manager to effect compliance with the relevant regulations.
- 941.** The Authority notes Mr Kirk's submissions in response to this Ground to the effect that he relied on MLM and the Club secretary manager and Club staff to ensure compliance with the legislation in respect of producing financial and gaming reports, and that Mr Kirk had no reason to doubt the accuracy of the reports he reviewed during his time as a director of the Club.
- 942.** The Authority rejects the Club's and Mr Kirk's submissions in respect of this contravention of the *Gaming Machines Regulation*. This is a significant failing by Mr Kirk and the other Ex-Officers who held office during the relevant period as to their duty as directors by not taking care to familiarise themselves with the requirements of the relevant gaming related legislation in order to ensure the Club's compliance. The gaming machines legislation requires the production of compliant reports to the Board and the contravention of this requirement has been established over a substantial period of time.
- 943.** On the basis of the Authority's findings on the above Particular, the Authority is satisfied that Ground 18 is established.

## **GROUND 19**

944. Ground 19 states:

***Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.***

*The Club contravened clause 18 of the Gaming Machines Regulation 2010.*

945. Particular 19.1 of Ground 19 alleges as follows:

*Between January 2009 and June 2014 the Club failed to:*

- (a) produce a "net analysis report" for the previous months, and that part of the previous 12 months, for each approved gaming machine; and*
- (b) ensure the net analysis reports were examined by the Club's board within one month.*

### **Club's Response to Ground 19**

946. The Club admits the Particulars of this Ground.

947. The Club submits that the "Net Analysis" Report for each gaming machine falls into the same category as those referred to in Ground 18 above – that is, the absence of these reports was a result of the secretary manager being "unaware" of the legislative requirements and "relying on past practices". The Club submits that the other Club Board members relied upon the secretary manager to effect compliance with the relevant regulations.

### **Ex-Officers' Response to Ground 19**

948. The Ex-Officers adopt the entirety of the Club's submission dated 17 May 2015 in respect of Ground 19 of the Complaint.

### **Kirk's Response to Ground 19**

949. Mr Kirk submits in response to Ground 19 that he relied on MLM and the Club secretary manager and Club staff to ensure compliance. Mr Kirk contends that the secretary manager was responsible for producing financial and gaming reports, and Mr Kirk had no reason to doubt the accuracy of the reports he reviewed during his time as a director of the Club.

### **Wily's Response to Ground 19**

950. Mr Wily did not make any specific submissions in response to Ground 19 of the Complaint.

### **Authority Findings on Ground 19**

951. Clause 18 of the *Gaming Machines Regulation 2010* provides:

#### **18 Additional records by clubs**

- (1) A registered club must make, on or before the 21st day in each month with respect to each approved gaming machine kept on the premises of the club, a record in or*

*to the effect of a form approved for the purpose by the Authority relating to the previous month and to that part of the previous 12 months for which information is available.*

*Maximum penalty: 50 penalty units.*

- (2) *A record under this clause is to be examined by the club's board or committee within 1 month after the last date on which the record was made.*

- 952.** Particular 19.1(a), alleging that between January 2009 and June 2014 the Club failed to produce a Net Analysis Report for the previous months and that part of the previous 12 months for each approved gaming machine on the Club premises, is established on the basis of page 6 of the statement of OLGR inspector Michael Fitzgerald dated 19 November 2014.
- 953.** Particular 19.1(b) alleges that between January 2009 and June 2014 the Club failed to ensure that the Net Analysis Reports were examined by the Club board within one month. This Particular is established on the basis of page 6 of the statement of OLGR inspector Michael Fitzgerald dated 19 November 2014.
- 954.** The Authority notes that the Club admits the Particulars of this Ground, but submits that the absence of reports was a result of the secretary manager being “unaware” of requirements and “relying on past practices”; and other Club Board members relying upon the secretary manager to effect compliance with the relevant regulations.
- 955.** The Authority notes Mr Kirk’s submissions in response to this Ground that he relied upon MLM and the Club secretary manager and Club staff to ensure compliance with the legislation in respect of producing financial and gaming reports, and that Mr Kirk had no reason to doubt the accuracy of the reports he reviewed during his time as a director of the Club.
- 956.** The Authority rejects the Club’s and Mr Kirk’s submissions in respect of this contravention of the *Gaming Machines Regulation*. This is a significant failing by Mr Kirk and the other Ex-Officers who held office during the relevant period as to their duty as directors by not taking care to familiarise themselves with the requirements of the relevant gaming related legislation in order to ensure the Club’s compliance. The gaming machines legislation requires the production of compliant reports to the Board and the contravention of this requirement has been established to have occurred over a substantial period of time.
- 957.** On the basis of the Authority’s findings on the above Particulars, the Authority is satisfied that Ground 19 of the Complaint, alleging that the Club contravened clause 18 of the *Gaming Machines Regulation 2010* between January 2009 and June 2014, has been established.

## **GROUND 20**

- 958.** Ground 20 states:

***Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.***

*The Club contravened clause 20(2)(d) of the Gaming Machines Regulation 2010.*

**959.** Particular 20.1 of Ground 20 alleges as follows:

*Between July 2012 and June 2014 on 34 occasions the Club failed to keep written records with respect to each clearance of an approved gaming machine on the premises of the Club that contained the signatures of two authorised persons [sic] cleared the gaming machine certifying that the record was correct in all its details.*

#### **Club's Response to Ground 20**

**960.** The Club concedes the non-compliance alleged in this Ground.

**961.** The Club submits that this non-compliance was a result of "ignorance of statutory requirements". The Club further contends that the secretary manager has altered clearance practices since the date of the Complaint and the Club is now compliant with the "two-signature requirement".

#### **Ex-Officers' Response to Ground 20**

**962.** The Ex-Officers adopt the entirety of the Club's submission dated 17 May 2015 in respect of Ground 20 of the Complaint.

#### **Kirk's Response to Ground 20**

**963.** Mr Kirk submits in response to Ground 20 that he relied on MLM and the Club secretary manager and Club staff to ensure compliance. Mr Kirk contends that the Club's secretary manager was responsible for producing financial and gaming reports, and Mr Kirk had no reason to doubt the accuracy of the reports he reviewed during his time as a director of the Club.

#### **Wily's Response to Ground 20**

**964.** Mr Wily did not make any specific submissions in response to Ground 20 of the Complaint.

#### **Authority Findings on Ground 20**

**965.** Clause 20(2) of the *Gaming Machines Regulation 2010* provides:

##### **20 Clearance and refilling of gaming machines in clubs**

(2) *A registered club must cause to be kept a written record, with respect to each clearance of an approved gaming machine kept on the premises of the club, containing the following particulars:*

- (a) *the date of the clearance,*
- (b) *the serial number of the gaming machine cleared,*
- (c) *the amount cleared,*
- (d) *the signatures of the persons who cleared the gaming machine certifying that the record made in accordance with this clause is correct in all details.*

**966.** The allegation in Particular 20.1 that between July 2012 and June 2014, on 34 occasions, the Club failed to keep written records with respect to each clearance of an approved gaming machine on the Club premises that contained the signatures of two authorised persons who cleared the gaming machine, certifying the record was correct in all its details, is established on the basis of Club gaming machine

clearance sheets (Complainant Exhibit E192) and pages 3 to 4 of the statement of OLGR inspector Michael Fitzgerald dated 19 November 2014.

- 967.** The Authority notes that the Club admits the non-compliance alleged by this Ground, but submits that this was a result of “ignorance of the statutory requirements”. [The Authority notes that the Club does not specify whether an individual or the governing body as a whole were ignorant of these statutory requirements.]
- 968.** The Authority notes Mr Kirk’s submissions in response to this Ground to the effect that he relied upon MLM, the secretary manager and Club staff to ensure compliance with the legislation in respect of producing financial and gaming reports, and that Mr Kirk had no reason to doubt the accuracy of the reports he reviewed during his time as a director of the Club. The Authority notes that the secretary manager of the Club during the relevant period was Mr Robert Ashton Jnr.
- 969.** This is a significant failing by the Club, which concedes that the failure to comply with the legislation was the product of ignorance of the statutory requirements, without specifying who was ignorant of these requirements.
- 970.** It does not appear from any of the submissions in response to this Ground that the Ex-Officers, including Mr Kirk, claim to have been aware of this statutory requirement when they held office. Nor do they point to what actual systems were implemented, that the Board relied upon, to ensure compliance with gaming machine legislation.
- 971.** If the members of the governing body are to avoid responsibility for this significant instance of legislative non-compliance by the Club, it is incumbent upon them to at least specify what plans or systems were in place, that the Board reasonably relied upon, to ensure the Club’s compliance with gaming machine legislation.
- 972.** The Board members should at least be aware of this statutory requirement, yet none of the Ex-Officers have identified whether they knew about this requirement and, if so, what systems were in place (including, for example, auditing of regulatory compliance) that gave them the confidence to rely on the Club secretary or Club staff.
- 973.** While the operational responsibility to ensure day to day compliance with this type of legislative provision lies primarily with the Club secretary, there is an absence of any evidence or even submissions identifying the actual business plans and systems that were in place that Board members were aware of that could be reasonably relied upon by the directors to ensure legislative compliance in this regard.
- 974.** These were not isolated instances of regulatory non-compliance but occurred over a substantial period of time (from July 2012 to June 2014). In these circumstances, the non-compliance is not only an operational failing by the Club secretary and Club staff, but a systemic failure by the Club for which the Board shares some responsibility.
- 975.** On the basis of the Authority’s findings on the above Particular, the Authority is satisfied that Ground 20 of the Complaint, alleging that the Club contravened

clause 20(2)(d) of the *Gaming Machines Regulation 2010* on 34 occasions between July 2012 and June 2014, has been established.

## **GROUND 21**

976. The Authority notes that, in light of the Revised Position Statement, Ground 21 is no longer pressed by the Complainant.

## **GROUND 22**

977. Ground 22 states:

***Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.***

*The Club contravened clause 91(1) of the Gaming Machines Regulation 2010.*

978. Particular 22.1 of Ground 22 alleges as follows:

*At no time since the installation of the first authorised progressive machine on 6 March 2014 has the Club:*

- (a) recorded the amount shown on the progressive meter of any authorised progressive machine at the time the progressive jackpot has been won (progressive jackpot report); and*
- (b) ensured the progressive jackpot report was examined by the Club's board each month.*

979. The Authority notes that, as stated in the Complainant's Revised Position Statement dated 17 June 2015, Ground 22 is not maintained against Messrs Whitney, Kirk and McKew.

## **Club's Response to Ground 22**

980. The Club admits the non-compliance alleged in this Ground.

## **Ex-Officers' Response to Ground 22**

981. The Ex-Officers adopt the entirety of the Club's submission dated 17 May 2015 in respect of Ground 22 of the Complaint.

## **Kirk's Response to Ground 22**

982. Mr Kirk submits in response to Ground 22 that he relied on MLM and the Club secretary manager and Club staff to ensure compliance. Mr Kirk contends that the secretary manager was responsible for producing financial and gaming reports, and Mr Kirk had no reason to doubt the accuracy of the reports he reviewed during his time as a director of the Club.

## **Wily's Response to Ground 22**

983. Mr Wily did not make any specific submissions in response to Ground 22 of the Complaint.

## Authority Findings on Ground 22

**984.** The Authority notes that clause 91(1) of the *Gaming Machines Regulation 2010* was recently repealed on 3 July 2015.

**985.** However, during the relevant period of the Complaint, clause 91 provided as follows:

**91 Authorised progressive gaming machines—reading and recording of meters and jackpot reconciliations**

(1) *A registered club must comply with the requirements of this clause.*

*Maximum penalty: 50 penalty units.*

(2) *A registered club must cause to be read and recorded in a form and manner approved by the Authority:*

- (a) *monthly, the electronic turnover meters of the authorised progressive gaming machines kept on the premises of the club, and*
- (b) *monthly, the amount shown on the progressive meters of those authorised progressive machines, and*
- (c) *the amount shown on the progressive meter of each such authorised progressive machine at the time the progressive jackpot is won.*

(3) *A registered club must keep or cause to be kept a monthly written record of the readings made under subclause (2)(a) and (b) in a form approved by the Authority containing the following particulars:*

- (a) *the serial number of each authorised progressive machine,*
- (b) *the date of the reading,*
- (c) *the turnover meter reading,*
- (d) *the amount shown on the progressive meter.*

(4) *A registered club must carry out a monthly progressive jackpot reconciliation in respect of the authorised progressive machines kept on the premises of the club.*

(5) *The progressive jackpot reconciliation must be in or to the effect of a form approved by the Authority and must be retained by the registered club for not less than 3 years after the reconciliation is carried out.*

(6) *If the reconciliation referred to in subclause (4) indicates that a malfunction has occurred with an authorised progressive gaming machine, the Authority may determine and direct the registered club to adjust the progressive jackpot amount and pay an additional amount to a jackpot recipient, if applicable. The club must comply with any such direction.*

(7) *The information referred to in subclause (5) must be reported to the registered club's board or committee at least once in each month.*

(8) *The registered club must ensure the results of authorised progressive gaming machines are, in any net analysis report, kept separate from the results of all other approved gaming machines on the premises of the club.*

**986.** Particular 22.1(a) alleges that at no time since the installation of the first authorised progressive [jackpot] machine on 6 March 2014, has the Club recorded the amount shown on the progressive meter of any authorised progressive machine at the time the progressive jackpot has been won (progressive jackpot report).

987. The Authority is satisfied that this Particular is established, on the basis of photographs of progressive machines and their authorisation history (Complainant Exhibit E198) and pages 6 to 7 of the statement of OLGR inspector Michael Fitzgerald dated 19 November 2014.
988. Particular 22.1(b) alleges that at no time since the installation of the first authorised progressive [jackpot] machine on 6 March 2014, has the Club ensured that the progressive jackpot report was examined by the Club's board each month.
989. The Authority is satisfied that Particular 22.1(b) is established on the basis of photographs of progressive machines and their authorisation history (Complainant Exhibit E198) and pages 6 to 7 of the statement of OLGR inspector Michael Fitzgerald dated 19 November 2014.
990. The Authority notes that the Club admits the non-compliance alleged by the Particulars of this Ground.
991. This Ground is not raised by the Complainant against Messrs Whitney, Kirk or McKew. The Authority notes that Messrs Whitney, Kirk and McKew ceased their service as directors of the Club on 2 April 2014.
992. The Authority notes, but does not accept, Mr Kirk's submissions in response to this Ground to the effect that he relied upon MLM, the secretary manager and Club staff to ensure compliance with the legislation in respect of producing financial and gaming reports, and that Mr Kirk had no reason to doubt the accuracy of the reports he reviewed during his time as a director of the Club.
993. This is a failing by the Club to ensure compliance with a legislative requirement in respect of the operation of gaming machines on the Club premises. The legislative requirement required the presentation of information in the required form to the Board and the Club's directors should have taken care to familiarise themselves with the requirements of the relevant gaming related legislation in order to identify whether the reports being presented to the Board were compliant. The non-compliance established by the Complainant was not an isolated operational failing but occurred over a substantial period of time, from 6 March 2014 until the Club entered into receivership in June 2015.
994. On the basis of the Authority's findings on the above Particulars, the Authority is satisfied that Ground 22 of the Complaint has been established against the Club.
995. However, the Authority notes that clause 91 of the *Gaming Machines Regulation 2010* has been repealed since the date of the Complaint.
996. This is a matter that will be taken into account when assessing the weight that should now be accorded to this particular instance of non-compliance by the Club, responsibility for which may be attributed to the Club secretary and also the Board members during the relevant period.

## **GROUND 23**

997. Ground 23 states:



**Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.**

*On 18 August 2011, it became a condition of the Club's liquor licence that on NRL Grand Final Day that two nominated staff of the Club maintain a count of persons on the licensed premises (condition 3410).*

**998.** Particular 23.1 of Ground 23 alleges as follows:

*On 5 October 2014 the Club failed to ensure two nominated staff maintained a count of persons on the licensed premises in circumstances where:*

- (a) Inspectors from OLGR conducted a covert inspection;*
- (b) Ms Natalie Turner, an employee of the Club, and Mr Jason Loveday, a security guard contracted by the Club, were stationed at the entrance of the Club; and*
- (c) Neither Ms Turner nor Mr Loveday were instructed to, and subsequently did not, maintain a count of persons on the licensed premises.*

**999.** The Authority notes that, as stated in the Complainant's Revised Position Statement dated 17 June 2015, Ground 23 is not maintained against Messrs Whitney, Kirk and McKew.

**Club's Response to Ground 23**

**1000.** The Club submits that the number of guards on NRL Grand Final Day (5 October 2014) was "sufficient for up to 300 members/guests", but there were only around 190 patrons attending the Club on that occasion.

**1001.** The Club submits that "no useful purpose would be served" in maintaining a running count where patron numbers were "well below" the required number. The Club contends that the "substantive purpose" of the condition had been fulfilled and that this instance of non-compliance with the licence condition is, at its highest, a "technical breach".

**Ex-Officers' Response to Ground 23**

**1002.** The Ex-Officers adopt the entirety of the Club's submission dated 17 May 2015 in respect of Ground 23 of the Complaint.

**Kirk's Response to Ground 23**

**1003.** The Authority notes that Ground 23 of the Complaint is not pressed against Mr Kirk.

**Wily's Response to Ground 23**

**1004.** Mr Wily did not make any specific submissions in response to Ground 23 of the Complaint.

**Authority Findings on Ground 23**

**1005.** Particular 23.1(a), alleging that inspectors from OLGR conducted a covert inspection of the Club premises on 5 October 2014, is established on the basis of the file note pertaining to a covert inspection of the Club prepared by OLGR inspector Ryan Williams dated 10 October 2014 (Complainant Exhibit E219); the contemporaneous notebook entry of OLGR inspector Ryan Williams (Complainant

Exhibit E220) and pages 4 to 6 of the transcript of a record of interview between OLGR inspectors and Jason Loveday dated 20 November 2014 (Complainant Exhibit E232).

- 1006.** Particular 23.1(b), which alleges that on 5 October 2014 Ms Natalie Turner, an employee of the Club and Mr Jason Loveday, a security guard contracted by the Club were stationed at the entrance of the Club, is established on the basis of the file note pertaining to a covert inspection of the Club prepared by OLGR inspector Ryan Williams dated 10 October 2014 (Complainant Exhibit E219); the contemporaneous notebook entry of OLGR inspector Ryan Williams (Complainant Exhibit E220) and pages 4 to 6 of the transcript of a record of interview between OLGR inspectors and Jason Loveday dated 20 November 2014 (Complainant Exhibit E232).
- 1007.** Particular 23.1(c), which alleges that on 5 October 2014 neither Ms Turner nor Mr Loveday were instructed to, and subsequently did not, maintain a count of persons on the licensed premises, is established on the basis of the file note pertaining to a covert inspection of the Club prepared by OLGR inspector Ryan Williams dated 10 October 2014 (Complainant Exhibit E219); the contemporaneous notebook entry of OLGR inspector Ryan Williams (Complainant Exhibit E220) and pages 4 to 6 of the transcript of a record of interview between OLGR inspectors and Jason Loveday dated 20 November 2014 (Complainant Exhibit E232).
- 1008.** The Authority does not accept the Club's submission that no useful purpose would be served in maintaining a count of patrons on this day, given the numbers on the Club premises. Such a requirement was mandated by a licence condition and, given the nature of the sporting event in question, the Club may well have encountered a sudden influx of patrons on the premises and should have been ready to deal with that contingency.
- 1009.** On the basis of the Authority's findings on the above Particulars, the Authority is satisfied that Ground 23 of the Complaint has been established, in that the Club failed to comply with a condition of the Club's liquor licence requiring it to maintain a count of persons on the Club premises on NRL Grand Final Day. This is an operational failing for which the Club secretary is ultimately responsible. Absent evidence of a repeated or systemic failure to observe this licence requirement, it is not a matter that supports an adverse inference against the members of the Club board at the time.

## **GROUND 24**

- 1010.** Ground 24 states:

***Section 57F(3)(d) – The Club contravened a provision of the Act.***

*Between 24 October 2002 and 18 May 2012 the Club contravened section 41 of the Act when it purported to appoint Mr Wily to act in the capacity of administrator of the Club.*

- 1011.** The Particulars of Ground 24 allege as follows:

- (a) *The Club is a company within the meaning of the Corporations Act 2001.*
- (b) *On or about 20 September 2002 Mr Wily was appointed to act as Receiver Manager of the Club by the Supreme Court of New South Wales.*

- (c) *On or about 24 October 2002 Mr Wily was purportedly appointed to act as Administrator of the Club in circumstances where there is no record of Mr Wily being appointed to act in this capacity by:*

- (1) *the Supreme Court of NSW; or*
- (2) *the former Licensing Court; or*
- (3) *the Authority.*

#### **Club's Response to Ground 24**

- 1012.** In response to this Ground, the Club argues that section 41 of the Act “imposes no duty on the Club”.
- 1013.** The Authority notes that the Club does not deny the facts alleged but submits that even if there were a contravention of section 41, the Club and all persons dealing with the Club's Administrator, Mr Wily, were “entitled to assume” that Mr Wily had been duly appointed and had the authority to exercise the powers seemingly conferred upon him in his capacity as administrator pursuant to section 129(3) of the *Corporations Act 2001* and as discussed in *Correa v Whittingham* [2013] NSWCA 263.

#### **Ex-Officers' Response to Ground 24**

- 1014.** The Ex-Officers adopt the entirety of the Club's submission dated 17 May 2015 in respect of Ground 24 of the Complaint.

#### **Kirk's Response to Ground 24**

- 1015.** Mr Kirk submits that he was not a director of the Club in 2002. Mr Kirk contends that it was “always presumed” that Mr Wily was appropriately appointed and had no reason to question the validity of Mr Wily's appointment as Administrator of the Club.

#### **Wily's Response to Ground 24**

- 1016.** In his submission dated 26 March 2015, Mr Wily “accepts” Particular 24(a) of the Complaint (that the Club is a company), but submits that it is “irrelevant”.
- 1017.** In response to Particular 24(b) which alleges that Mr Wily was appointed as “receiver/manager” of the Club by the Supreme Court on 20 September 2002, Mr Wily submits that this Particular is “irrelevant” in that Ground 24 as it is specified is concerned with Mr Wily's appointment as the Club's Administrator, not his appointment by the Supreme Court as its Receiver Manager which occurred on 19 September 2002. [Mr Wily notes that there is a typographical error in the Complaint and that he was appointed as Receiver Manager of the Club on 19 September 2002, not 20 September 2002 as alleged in Particular 24(b) of the Complaint.]
- 1018.** In response to Particular 24(c), Mr Wily submits that the “appointment” of an administrator “is complete” once the requirements in section 436A(1) of the *Corporations Act* are met, which “did occur”.
- 1019.** Mr Wily submits that if the Club contravened section 41(1) of the Act (as it then was on 24 October 2002), then it was a “discrete breach” and not a “continuing contravention” as alleged in the Complaint.

- 1020.** Mr Wily argues that any non-compliance with section 41(1) as it was at 24 October 2002 would not give rise to an offence under the Act by the Club – it would only render the appointment of the administrator void, as held in *Correa v Whittingham* [2013] NSWCA 263.
- 1021.** Mr Wily submits, in response to Particular 24(c), that if one has regard to the terms of section 41(1) of the Act as at 24 October 2002, the reference to the Authority is “misconceived”.
- 1022.** Mr Wily submits that under the *Corporations Act* at that time, an administrator was “appointed” either under section 436A, section 436B or section 436C of that Act. Neither the Supreme Court nor the NSW Licensing Court had power under the *Corporations Act* to “appoint” an administrator as at that time (24 October 2002).
- 1023.** Mr Wily argues that if he had been appointed by a Court, there would have been “no need” for an appointment by the Club.
- 1024.** Mr Wily submits that section 41(1) could have been complied with if Mr Wily had been approved by the Licensing Court to act in the capacity of Administrator of the Club prior to his appointment by the Club.
- 1025.** Mr Wily alternatively argues that “no evidence is adduced or referred to by the Complainant to suggest that such approval from the Licensing Court was not obtained”.

## **Authority Findings on Ground 24**

- 1026.** Section 41(1) of the Act currently provides:

### **41 Registered clubs under official management or receivership or in liquidation**

- (1) *A person is not capable of being appointed to act in the capacity of the administrator, the controller of property, the official manager, the receiver or manager, a member of the committee of management, the liquidator or the special manager of a registered club that is a company within the meaning of the Corporations Act 2001 of the Commonwealth or a co-operative registered under the Co-operatives National Law (NSW) or of acting in any such capacity unless the person has been:*
- (a) *appointed to act in that capacity by the Supreme Court, or*  
 (b) *approved to act in that capacity by the Authority.*

- 1027.** However, from 1 June 2002 to 31 December 2002, section 41(1) of the Act provided:

### **41 Registered clubs under official management or receivership or in liquidation**

- (1) *A person is not capable of being appointed to act in the capacity of the administrator, the controller of property, the official manager, the receiver or manager, a member of the committee of management, the liquidator or the special manager of a registered club that is a company within the meaning of the Corporations Act 2001 of the Commonwealth or a co-operative registered under the Co-operatives Act 1992 or of acting in any such capacity unless the person has been:*

- (a) *appointed to act in that capacity by the Supreme Court, or*
  - (b) *approved to act in that capacity by the Licensing Court.*
- (2) *An application for approval to act in any capacity referred to in subsection (1) may be made to the Licensing Court by any person by delivering the application to the registrar.*
  - (3) *The Licensing Court shall hear and determine an application made under subsection (2) and, except as provided in this section, shall grant the application.*
  - (4) *The Licensing Court shall not grant the application if it is satisfied that any objection to the granting of the application has been sustained.*
  - (5) *Objection to the granting of the application may be taken on the ground that the applicant is not a fit and proper person to act in the capacity specified in the application and may be so taken only by the Director or the Commissioner of Police.*

**1028.** Section 129(3) of the *Corporations Act 2001*, which is referred to by the Club in its submissions, states:

**129 Assumptions that can be made under section 128**

Constitution and replaceable rules complied with

- (1) *A person may assume that the company's constitution (if any), and any provisions of this Act that apply to the company as replaceable rules, have been complied with.*

Director or company secretary

- (2) *A person may assume that anyone who appears, from information provided by the company that is available to the public from ASIC, to be a director or a company secretary of the company:*
  - (a) *has been duly appointed; and*
  - (b) *has authority to exercise the powers and perform the duties customarily exercised or performed by a director or company secretary of a similar company.*

Officer or agent

- (3) *A person may assume that anyone who is held out by the company to be an officer or agent of the company:*
  - (a) *has been duly appointed; and*
  - (b) *has authority to exercise the powers and perform the duties customarily exercised or performed by that kind of officer or agent of a similar company.*

**1029.** Section 128 of the *Corporations Act* states:

**128 Entitlement to make assumptions**

- (1) *A person is entitled to make the assumptions in section 129 in relation to dealings with a company. The company is not entitled to assert in proceedings in relation to the dealings that any of the assumptions are incorrect.*
- (2) *A person is entitled to make the assumptions in section 129 in relation to dealings with another person who has, or purports to have, directly or indirectly acquired title to property from a company. The company and the other person are not entitled to*

*assert in proceedings in relation to the dealings that any of the assumptions are incorrect.*

- (3) *The assumptions may be made even if an officer or agent of the company acts fraudulently, or forges a document, in connection with the dealings.*
- (4) *A person is not entitled to make an assumption in section 129 if at the time of the dealings they knew or suspected that the assumption was incorrect.*

- 1030.** The Authority notes that Mr Wily was *appointed* by the Supreme Court to act as the *Receiver Manager* of the Club on 19 September 2002.
- 1031.** The Authority is satisfied, on the basis of the Club’s submissions dated 17 May 2015, that this appointment was made by that Court in response to an application made by a then director of the Club, Mr Rodney Moon, to appoint Mr Wily as Receiver Manager as a means to restore the company registration of the Club following its deregistration by ASIC during February 2002.
- 1032.** However, this appointment is not the subject of Ground 24.
- 1033.** Ground 24 is concerned with Mr Wily’s appointment as administrator on 24 October 2002, at which time Mr Wily was appointed by the then governing body to serve as voluntary administrator of the Club pursuant to section 436A of the *Corporations Act 2001*.
- 1034.** The Authority is satisfied, as alleged by Particular 24(a), that the Club is a company, on the basis of the ASIC extract for the Club dated 2 December 2014 (Complainant Exhibit E094) and the definition of “company” within the meaning of section 9 of the *Corporations Act*.
- 1035.** Particular 24(b) alleges that on or about 20 September 2002, Mr Wily was appointed to act as Receiver Manager of the Club by the Supreme Court of New South Wales. The Authority is satisfied that this Particular is established on the basis of the *Short Minutes of Order of the Supreme Court of New South Wales in the Matter of Paddington Bowling Club Ltd* dated 20 September 2002 indicating Mr Wily’s appointment as Receiver and Manager of the Club (Complainant Exhibit E166) and the ASIC extract for the Club dated 2 December 2014 (Complainant Exhibit E094).
- 1036.** Particular 24(c) alleges that on 24 October 2002, Mr Wily was “purportedly appointed” to act as Administrator of the Club in circumstances where there is no record of Mr Wily being “appointed” to act in *that* capacity by either the Supreme Court of NSW, the former Licensing Court, or the Authority.
- 1037.** Section 41(1) of the Act required at the relevant time that if an insolvency professional was to be appointed in a relevant capacity (receiver, manager, administrator, liquidator or the like) in respect of a registered club, then such appointment must either be made by the New South Wales Supreme Court or, if not made by the Court (for example, an appointment by a club board of a person to act as a voluntary administrator), such appointment must be approved by the prescribed licensing regulator – which in 2002 was the Licensing Court of New South Wales, whose jurisdiction in this regard was conferred upon the Authority when it commenced operations on 1 July 2008.

- 1038.** Having considered the evidence and submissions before the Authority, the Authority accepts that the *appointment* or *purported appointment* of Mr Wily was not made by the New South Wales Supreme Court, the former Licensing Court or the Authority. That is, the appointment or purported appointment of Mr Wily as Administrator was made by the Club Board itself when it resolved to enter into voluntary administration.
- 1039.** An issue arises from the manner in which Ground 24 has been pleaded. It is apparent that the Complainant intended to make the point that Mr Wily was purportedly *appointed* by the Club as its Administrator on 24 October 2002 but there is no record of that appointment being *approved* by the relevant regulator.
- 1040.** However, that is not the allegation as pleaded in Particular 24(c) – which alleges that no “appointment” was made by the Supreme Court, the Licensing Court or the Authority.
- 1041.** The Authority is satisfied that the allegation, as it has been framed in Particular 24(c), is established. The Authority notes that the purported *appointment* of Mr Wily as voluntary administrator is recorded in the ASIC extract for the Club dated 2 December 2014 (Complainant Exhibit E094).
- 1042.** However, Particular 24(c) as it has been pleaded does not address the distinction between *appointment* of an insolvency professional in a relevant capacity with regard to a registered club and the *approval* of a proposed appointment.
- 1043.** Mr Wily’s submission is that his *appointment* as voluntary Administrator was made by the Club board on 24 October 2002. His submissions distinguish between the appointment of an administrator under the *Corporations Act* and the approval of such appointment under the *Registered Clubs Act*.
- 1044.** Neither the Club nor Mr Wily has directly denied that no approval of Mr Wily’s appointment on 24 October 2002 was ever obtained from the Licensing Court before or after the Club board resolved to enter into voluntary administration and appoint Mr Wily as Administrator. Those parties are best placed to either confirm or deny whether the requisite approval was ever obtained.
- 1045.** In their respective submissions, the Club and Mr Wily refer to the clarification of those provisions regarding the approval of an administrator appointed by a registered club in the judgment of the New South Wales Court of Appeal in *Correa v Whittingham* [2013] NSWCA 263.
- 1046.** While this judgment clarified the operation of section 41(1) of the Act, it does not exculpate the Club or Mr Wily from the requirement to obtain regulatory approval from the Licensing Court.
- 1047.** Plainly enough, the Club should have approached the Licensing Court to obtain the necessary *approval* of the board’s appointment on 24 October 2002 of Mr Wily to serve as Administrator of the Club. It is a provision of the Act with respect to which the directors and secretary of the Club should have been aware.
- 1048.** Nevertheless, Particular 24(c) as it has been pleaded is deficient in that it does not distinguish between an *appointment* made by the Supreme Court or a club board

and an *approval* granted by the licensing regulator (previously the Licensing Court, now the Authority).

1049. On the basis of the Authority's findings on the above Particulars, the Authority is satisfied that Ground 24 of the Complaint, *in the form in which it has been pleaded by the Complainant*, has been established. No *appointment* of Mr Wily in the capacity of voluntary administrator was ever made by the Supreme Court, Licensing Court or the Authority – however little turns on this, because section 41(1) required at the relevant time that an *approval* of this purported appointment (by the Club board) be obtained from the Licensing Court – and that is not what has been pleaded. No adverse finding is made against the Club or Mr Wily in respect of Ground 24.

## GROUND 25

1050. Ground 25 alleges as follows:

***Section 57F(3)(g) – The Secretary is not a "fit and proper" person to act as such.***

*By reason of the conduct of Mr Ashton Jnr whilst Secretary of the Club he is not a "fit and proper" person to hold such a position.*

1051. Particular 25.1 of Ground 25 alleges as follows:

*Mr Ashton Jnr was appointed as the Secretary of the Club between about 3 October 2007 and about 10 December 2008 and from on or about 2 December 2010. Mr Ashton Jnr is currently the Secretary of the Club.*

1052. Particular 25.2 of Ground 25 alleges as follows:

*During the entire period that Mr Ashton Jnr has held the position of Secretary of the Club, he failed to exercise his duties as a Secretary with a degree of knowledge, ability, care and diligence, by reason of:*

- (a) *The non-compliance with the legislation outlined in paragraphs 1-24 above.*
- (b) *The non-compliance with ClubsNSW Guidelines:*
  - (1) *Failure to comply with any relevant legislative, industrial or administrative requirement, and keep up to date with any changes.*
  - (2) *Failure to maintain adequate documentation to support decisions made by the governing body.*
  - (3) *Failure to obtain value for Club money spent and avoid waste and extravagance in the use of Club resources:*
    - (A) *the Club purchased and maintains motor vehicles that are rarely used by the Club;*
    - (B) *the Club reimbursed unapproved expenses of members of the governing body;*
    - (C) *the Club engaged VSM to provide marketing services at a cost of:*
      - i. *\$212,247.00 for the financial year 2009-10;*
      - ii. *\$194,601.00 for the financial year 2010-11;*
      - iii. *\$184,435.00 for the financial year 2011-12;*
      - iv. *\$220,543.00 for the financial year 2012-13; and*
      - v. *\$240,636.00 for the financial year 2013-14.*
    - (D) *the Club purchased \$5,000.00 in MasterCard Gift Cards for staff Christmas bonuses in 2012;*



- (E) *the Club purchased \$10,000.00 in Woolworths Gift Cards for staff Christmas bonuses in 2013:*
  - i. *there is no minute of a meeting of the governing body approving this purchase in accordance with the Club's Purchasing and Tendering Policy.*
- (4) *Failure to provide strategic direction to the Club by constructive engagement in the development, execution and modification of the Club's strategy:*
  - (A) *the Club has produced a five year plan for the improvement of the Crown Asset rather than a strategy to further the Club's purpose of providing accommodation for its members and their guests.*
- (5) *Failure to report to members and ensure all regulatory requirements are met.*
- (6) *Failure to ensure all appropriate compliance frameworks and controls are in place.*
- (7) *Failure to ensure the Club obtained value for money when making procurement decisions:*
  - (A) *the Club did not undertake a tender process when engaging accounting and marketing services.*
- (8) *Failure to ensure the Club benchmarked the core activities of bar, food and gaming.*
- (c) *The non-compliance with the Articles of Association of the Club:*
  - (1) *Failure to ensure membership applications were posted on the Notice Board for at least seven days prior to the date of the meeting to consider the application, and at least 14 days lapse between the date of application and the date of election.*
  - (2) *Failure to ensure members who were not financial were removed from membership register.*
  - (3) *Failure to ensure the members of the Board were elected annually.*
  - (4) *Failure to ensure the Board met at least once in every month.*
  - (5) *Failure to ensure the required quorum of five members of the Board was met for each meeting:*
    - (A) *in 2011, on five occasions, meetings held of the governing body did not consist of a quorum of five members as follows;*
      - i. *1 February, 28 February, March, September and October 2011.*
    - (B) *in 2014, on three occasions, meetings held of the governing body did not consist of a quorum of 5 members as follows;*
      - i. *March, April and June 2014.*
  - (6) *Failure to ensure the Club held an annual general meeting of members each year.*
- (d) *The lack of internal controls and procedures.*
  - (1) *The Club Auditor was unable to form an unqualified opinion of the Club's financial accounts for the year ending 30 June 2011 due to poor internal controls and systems.*
  - (2) *Failure to maintain the Club's register of disclosure.*
  - (3) *Failure to ensure a current governing body resolution approved the payment of expenses to members of the governing body.*
  - (4) *Maintaining high risk practices including paying expenses of directors in cash directly from the safe.*
  - (5) *Failure to maintain an assets register prior to 18 July 2014.*

- (6) *Failure to ensure Club auditors provided reports each year:*
- (A) *the Auditor's Reports for the years ending 30 June 2009 and 30 June 2010 are dated 27 May 2011;*
  - (B) *the Auditor's Report for the year ending 30 June 2011 is dated 2 April 2014; and*
  - (C) *the Auditor's Report for the years ending 30 June 2012 and 30 June 2013 are dated 6 November 2014.*
- (7) *Failure to have an understanding of legislative requirements of a registered club.*
- (8) *Failure to have an understanding of the Club's licence conditions.*

### **Club's Response to Ground 25**

**1053.** The Club did not provide a response to Ground 25 of the Complaint.

### **Ex-Officers' Response to Ground 25**

- 1054.** The Authority notes that Particular 25.1 (specifying the dates of Mr Ashton Jnr's employment at the Club as secretary manager) is not disputed by the Ex-Officers.
- 1055.** In response to Particular 25.2(a), the Ex-Officers refer to their submissions on Grounds 1 through 24 above.
- 1056.** In response to Particular 25.2(b)(1), regarding the alleged failure to comply with legislative, industrial, and administrative requirements, the Ex-Officers submit that the *ClubsNSW Guidelines* are not enforceable – they are “best practice” guidelines only.
- 1057.** In response to Particular 25.2(b)(2), regarding the alleged failure to maintain documents to support the decisions of governing body, the Ex-Officers refer to and repeat their submissions on Ground 10.3 of the Complaint and argue that the Guidelines are “best practice” guidelines only.
- 1058.** In response to Particular 25.2(b)(3)(A), regarding the alleged failure to obtain value for Club money in relation to Club motor vehicles, the Ex-Officers refer to and repeat their submissions in response to Ground 3.1 of the Complaint.
- 1059.** In response to Particular 25.2(b)(3)(B), regarding the alleged failure to obtain value for Club money in relation to the reimbursement of unapproved expenses, the Ex-Officers refer to and repeat their submissions on Ground 3.4 of the Complaint.
- 1060.** In response to Particular 25.2(b)(3)(C), regarding the alleged failure to obtain value for Club money in relation to the engagement of VSM to provide marketing services for the Club, the Ex-Officers refer to and repeat their submissions on Ground 6 of the Complaint.
- 1061.** The Ex-Officers contend that engaging VSM represented a “substantial cost saving” for the Club, and refer to the transcript of the 41X inquiry (provided at Tab 64 of the Ex-Officers' Exhibits) which indicates that the marketing fees charged by VSM were significantly lower than those charged by the company previously retained to provide marketing services for the Club.

- 1062.** In response to Particulars 25.2(b)(3)(D) and (E), regarding the alleged failure to obtain value for Club money in relation to the payment of staff Christmas bonuses, the Ex-Officers submit that these bonuses were “not wasteful” and refer to the statement of Mr Ashton Jnr in his statutory declaration dated 28 May 2015 to the effect that the Christmas bonuses he recommended were always linked to performance, especially in cases where the employee was unlikely to receive any wage increase but worked extremely long hours. Mr Ashton Jnr also states that he received advice from the Federal Secretary of the *Club Managers Association Australia* that the payment of bonuses is industry standard.
- 1063.** The Ex-Officers concede, in relation to the above Particulars, that there was no minute of a meeting of the governing body approving the expenditure for staff Christmas bonuses, but submit that “this will change” in future. They contend that the staff bonuses paid out in 2014 were minuted and refer to Exhibit RJA4 (attached to Mr Ashton Snr’s statutory declaration dated 28 May 2015) which is a copy of the minutes of the Club Board meeting held on 22 December 2014 noting Board approval of Christmas bonuses to certain Club employees.
- 1064.** In response to Particular 25.2(b)(4), regarding the alleged failure to provide strategic direction to the Club, the Ex-Officers submit that marketing strategies were developed and implemented for increasing Club revenue, and refer to the statements of Mr Ashton Snr in his statutory declaration dated 28 May 2015. Mr Ashton Snr states that some marketing strategies employed by the Club included the engagement of Paul Kelly Design to redesign the clubhouse, and the implementation of a number of local community initiatives such as “Reading Time”.
- 1065.** In response to Particular 25.2(b)(5), regarding the alleged failure to report to members and ensure that regulatory requirements were met, the Ex-Officers refer to and repeat their submissions in response to Grounds 1 through 24 of the Complaint.
- 1066.** In response to Particular 25.2(b)(6), regarding the alleged failure to ensure that all appropriate compliance frameworks and controls are in place, the Ex-Officers refer to and repeat their submissions on Grounds 1 through 24 of the Complaint.
- 1067.** In response to Particular 25.2(b)(7), regarding the alleged failure to obtain value for money when making procurement decisions, the Ex-Officers submit that there is no requirement for a registered club to undertake a tender process. The Ex-Officers refer to the Club’s submission that accounting and marketing services are not “major procurements” but rather “par for the course” in this context. The Club contends that, on a “proper construction” of section 6 of the Guidelines, that tender is “effectively a choice open to the Club to be made”.
- 1068.** In response to Particular 25.2(b)(8), regarding the alleged failure to benchmark the core activities of bar, food and gaming, the Ex-Officers “accept” this allegation, but contend that any obligation to benchmark was the responsibility of Mr Wily during the period of the Club’s administration.
- 1069.** The Ex-Officers further submit that this failure to benchmark, which is not enforceable in any event, has not caused any detriment to the Club and it is “clear” that the Club is “very competitive and successful in its marketplace”.

- 1070.** In response to Particular 25.2(c)(1), regarding the alleged failure to post membership applications to the Club's Notice Board, the Ex-Officers submit that the Complainant's wording of this Particular is "misleading" in that it suggests that multiple breaches occurred where only one breach has occurred, with respect to Mr McKew's application.
- 1071.** The Ex-Officers "accept that the expedition of Mr McKew's application contravened Article 12" of the Club's Articles of Association, but submit that there are currently 2,460 members in respect of which applications were "appropriately considered and approved". The Ex-Officers submit that it would be "harsh and draconian" to find any of the Ex-Officers as not being fit and proper persons on account of "not following protocol in respect of one membership application out of thousands".
- 1072.** In response to Particular 25.2(c)(2), regarding the failure to remove non-financial members from the Club's members register, the Ex-Officers submit that Article 23 of the Articles of Association is no longer in force, but the Ex-Officers conceded that they had the power and authority and discretion to remove members from the register.
- 1073.** The Ex-Officers submit that there is no direction or order under Article 23 that *compels* the removal of non-financial members and note the use of the word "may" in Article 23 as opposed to "shall" or "will".
- 1074.** In response to Particular 25.2(c)(3), regarding the failure to ensure members of the Board were elected annually, the Ex-Officers refer to and repeat their submissions in response to Ground 12 of the Complaint.
- 1075.** In response to Particular 25.2(c)(4), regarding the failure to ensure that the Board met at least once every month, the Ex-Officers refer to and repeat their submissions in response to Ground 10 of the Complaint. The Ex-Officers further contend that Mr Wily was in charge at the relevant time and that the Ex-Officers "had no power to alter" Mr Wily's conduct and for this reason no question of the fitness and propriety of the Ex-Officers arises from this failure to conduct monthly board meetings.
- 1076.** In response to Particular 25.2(c)(5), regarding the failure to maintain a quorum of the governing body for Board meetings, the Ex-Officers contend that not meeting the quorum requirement does not go to the question of fitness and propriety of the Ex-Officers. They argue that this failure was not a result of a lack of honesty, knowledge, or ability. The Ex-Officers argue that the law offers a company the opportunity to validate decisions made without a quorum so this matter "ought not to be a basis" for the allegation that the Ex-Officers are not fit and proper persons.
- 1077.** In response to Particular 25.2(c)(6), regarding the failure to have an AGM each year, the Ex-Officers refer to and repeat their submissions on Ground 12 of the Complaint. The Ex-Officers further contend that Mr Wily was in charge of the Club at the relevant time and that the Ex-Officers "had no power to alter" Mr Wily's conduct – thus no question of fitness and propriety arises in respect of the Ex-Officers.
- 1078.** In response to Particular 25.2(d)(1), alleging that the Club's auditor was unable to form an unqualified opinion of the Club's financial accounts for the year ended 30 June 2011 due to poor internal controls and systems, the Ex-Officers submit that all

these issues arose during the period of administration and were the responsibility of Mr Wily.

- 1079.** In response to Particular 25.2(d)(2), concerning the failure to maintain the Club's register of disclosure prior to 1 January 2013, the Ex-Officers refer to and repeat their submissions on Grounds 4.3 and 4.4 of the Complaint.
- 1080.** In response to Particular 25.2(d)(3), concerning the failure to ensure a current governing body resolution approved the payment of expenses to members of the governing body between August 2011 and August 2012, the Ex-Officers refer to and repeat their submissions on Ground 3.4 of the Complaint.
- 1081.** In response to Particular 25.2(d)(4), concerning the maintenance of allegedly high risk practices, the Ex-Officers submit that in respect of Mr Ashton Jnr's practice of reimbursing claims for directors' expenses in cash, directly from the safe, there is "nothing" in the Act or the Regulation that prohibits this practice or identifies it as a high risk.
- 1082.** In response to Particular 25.2(d)(5), concerning the alleged failure to maintain an assets register prior to 18 July 2014, the Ex-Officers submit that it was Mr Wily's responsibility to keep the Club's assets register, but in any event, there is "nothing" in the Act or Regulation that requires any club to keep an assets register.
- 1083.** In response to Particular 25.2(d)(6), concerning the Club's auditors not providing reports each year between 2009 and 2013, the Ex-Officers submit that the reason for the "late" submission of these reports is because the Club was under administration and Mr Wily was responsible for all the information which was not provided. The Ex-Officers argue that there is nothing to suggest that these past breaches are continuing or that they will continue, and note that the 2014 Annual Reports were duly completed.
- 1084.** In response to Particular 25.2(d)(7), concerning the alleged failure of Mr Ashton Jnr to understand the legislative requirements of a registered club, the Ex-Officers refer to and repeat their submissions on Grounds 1 through 24 of the Complaint.
- 1085.** In response to Particular 25.2(d)(8) concerning the failure of Mr Ashton Jnr to understand the Club's licence conditions, the Ex-Officers refer to and repeat their submissions in response to Ground 23 of the Complaint. The Ex-Officers submit that keeping a count of patrons on the Club premises was a function that was delegated by Mr Ashton Jnr to the Duty Manager, and the Duty Manager "had a process in place" to deal with this requirement. The Ex-Officers submit that this allegation "cannot be conducive to" an adverse finding on Mr Ashton Jnr's fitness and propriety, by reason that such a finding requires a consideration of Mr Ashton Jnr's honesty, knowledge and ability.

#### **Kirk's Response to Ground 25**

- 1086.** Mr Kirk did not make any specific submissions in response to Ground 25 of the Complaint.

## Wily's Response to Ground 25

1087. Mr Wily did not make any specific submissions in response to Ground 25 of the Complaint.

## Authority Findings on Ground 25

### Fitness and Propriety at General Law

1088. It is well established at common law that to be "fit and proper" for the purposes of licensing a person must have a requisite knowledge of the Act (or Acts) under which he or she is to be licensed and the obligations and duties imposed thereby: *Ex parte Meagher* (1919) 36 WN 175 and *Sakellis v Police* (1968) 88 WN (Pt 1) (NSW) 541.

1089. In *Hughes & Vale Pty Ltd v NSW (No 2)* (1955) 93 CLR 127, the High Court of Australia held that:

*"Fit" (or "idoneus") with respect to an office is said to involve three things, honesty knowledge and ability: "honesty to execute it truly, without malice, affection or partiality; knowledge to know what he ought duly to do; and ability as well in estate as in body, that he may intend and execute his office, when need is, diligently, and not for impotency or poverty neglect it.*

1090. In *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, the High Court of Australia held that:

*The expression "fit and proper person" standing alone, carries no precise meaning. It takes its meaning from its context, from the activities in which the person is or will be engaged and the ends to be served by those activities. The concept of 'fit and proper' cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities. However, depending on the nature of those activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur. The list is not exhaustive but it does indicate that, in certain contexts, character (because it provides an indication of likely future conduct) or reputation (because it provides an indication of public perception as to likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question.*

1091. Particular 25.1 alleges that Mr Ashton Jnr was appointed as Club secretary between about **3 October 2007** and about **10 December 2008** and again from about **2 December 2010** until the date of the Complaint.
1092. The Authority notes that this contention is made in the Complaint Letter and it is not in dispute that Mr Robert Ashton Jnr was in fact appointed as the secretary of the Club between about 3 October 2007 and about 10 December 2008 and from on or about 2 December 2010. Mr Ashton Jnr is currently the secretary of the Club, although his responsibility for the Club's affairs ended when the Club resolved in June 2015 to voluntarily wind up its operations and appoint Mr Peter Krejci of BRI Ferrier as receiver.
1093. Particular 25.2 makes the broad allegation that during the entire period that Mr Ashton Jnr held the position of secretary of the Club, he "failed to exercise his duties as a Secretary with a degree of knowledge, ability, care and diligence". This

is in turn founded upon numerous specific allegations contained within the sub-Particulars of Particular 25.2.

- 1094.** The Authority makes the following findings on those sub-Particulars and its conclusion is stated at the end of these findings.

Particular 25.2(a)

- 1095.** The Authority is satisfied that Mr Robert Ashton Jnr did serve as the Club's secretary from October 2007 to December 2008 and from December 2010 until the Club entered into receivership in June 2015.
- 1096.** The Authority notes that the Complainant repeats the allegations in Grounds 1 to 24 as matters that go to Mr Ashton Jnr's fitness and propriety as a club secretary.
- 1097.** The Authority notes that Particular 16.2 and Ground 21 have not been pressed by the Complainant against the Club and therefore have not been taken into account when assessing Mr Ashton Jnr's fitness and propriety.
- 1098.** Furthermore, Particulars 5.2, 5.3 and 5.5 of the Complaint are not pressed by the Complainant against Mr Ashton Jnr and hence have not been taken into account when assessing Mr Ashton Jnr's fitness and propriety.
- 1099.** Moreover, the Authority notes that the following alleged contraventions of liquor and gaming legislation detailed in Grounds 1 to 24 of the Complaint have not been established against the Club and these allegations have not been taken into account when assessing Mr Ashton Jnr's personal fitness and propriety:
- Ground 2
  - Particulars 3.2 and 3.3
  - Ground 6
  - Ground 7
  - Particulars 8.1, 8.5 and 8.8.
- 1100.** For ease of reference, the Authority repeats below the text of those Grounds 1 to 24 that the Authority is satisfied *have* been established in respect of the Club and also concern matters that the Authority is satisfied *are* reasonably attributable to the scope of responsibility of a registered club's secretary and chief executive officer. That is, the Club's non-compliance is a matter in which the secretary at the time shares responsibility.
- 1101.** The following Grounds support an inference that the secretary, Mr Ashton Jnr, was either not aware of the relevant legislative duty or that the Complainant has established that he did not demonstrate the ability to ensure the Club's compliance with that duty. Some of the Grounds established against the Club warrant greater weight than other Grounds which demonstrate more minor instances of non-compliance.
- 1102.** The Authority notes in **bold** those Particulars and sub-Particulars of allegations of non-compliance with legislative requirements that are alleged to have occurred during Mr Ashton Jnr's tenure as the Club's secretary.

**1103. Ground 1:**

***Section 57F(3)(a) – The Club failed to meet the requirements of section 10(1)(d) of the Act.***

***Between 31 May 2004 and 30 June 2010, and since 30 July 2014 the Club failed to meet the requirements of section 10(1)(d) of the Act when it failed to maintain the minimum number of ordinary members prescribed by section 12 of the Act.***

**Particular 1.1:**

*The Club is located at Quarry Street, Paddington NSW 2021.*

**Particular 1.2:**

*It is situated within 24 kilometres of the General Post Office in Sydney.*

**Particular 1.3:**

*No application has been made to the Independent Liquor and Gaming Authority (the Authority) for approval of a minimum number of ordinary members less than 200.*

**Particular 1.4:**

***Between 31 May 2004 and 30 June 2010, and since 30 July 2014 the Club's membership was less than 200 members.***

- (a) *On 31 May 2004 the Club consisted of 91 ordinary members.*
- (b) *On 31 May 2005 the Club consisted of 100 ordinary members.*
- (c) *On 31 May 2006 the Club consisted of 97 ordinary members.*
- (d) *On 30 June 2007 the Club consisted of 69 ordinary members.*
- (e) ***On 30 June 2008 the Club consisted of 65 ordinary members.***
- (f) *On 30 June 2009 the Club consisted of 53 ordinary members.*
- (g) *On 30 June 2010 the Club consisted of 43 ordinary members.*
- (h) ***On 30 July 2014 the Club had 92 ordinary members.***
- (i) ***On 11 September 2014 the Club's Membership Register recorded 121 ordinary members.***

**Particular 1.5:**

***At all times since 28 August 2003 the governing body of the Club knew, or ought to have known, that the Act required the Club to have a minimum number of 200 ordinary members and were aware, or were recklessly indifferent, to the fact that the Club did not have the requisite number of members.***

- (a) *The Act sets out the minimum number of members required.*
  - (b) *Mr Kirk had actual knowledge of the requirement to have a minimum number of members.*
  - (c) *Messrs Roper, Ashton Snr and Ashton Jnr recently became aware of the requirement to have a minimum number of members.*
  - (d) *Annual financial statements recorded the number of members.*
  - (e) *Annual financial statements were tabled at Annual General Meetings (AGM).*
  - (f) *During the period of administration, a "moratorium on accepting full membership" was imposed and the Club permitted its membership to decline.*
- (1) ***Between 19 September 2002 and 18 May 2012 the Club was under a form of external administration.***



- (2) *A moratorium on the acceptance of new ordinary members was in place during this period by the governing body of the Club.*
  - (3) *Between October 2003 and May 2007 there are 15 applicants recorded in the minutes as being approved for membership by a meeting of the governing body of the Club.*
  - (4) ***Between June 2007 and June 2008 there are no records evidencing the governing body of the Club approved any applicant for membership of the Club.***
  - (5) ***Between July 2008 and May 2012 there are 21 applicants recorded in the minutes as being approved for membership by a meeting of the governing body of the Club.***
  - (6) *The acceptance of Mr McKew as a member of the Club during the "moratorium" was not in accordance with the Articles of Association of the Club.*
- (A) ***Mr McKew of Rooty Hill NSW made an application for membership signed 28 March 2012.***
  - (B) ***Mr McKew of Rooty Hill NSW was known to most directors of the Club at 28 March 2012 and expressed desire to join the Club and be nominated as a director.***
  - (C) ***The members of the governing body accepted Mr McKew as a member of the Club on 28 March 2012.***
  - (D) *Article 12(a) of the Articles of Association of the Club required membership to be proposed and seconded by a full member of the Club.*
  - (E) *Article 12(c) of the Articles of Association of the Club required that the nomination be posted on the Notice Board and remain posted for at least 7 days prior to the date of the meeting of the Board at which the application was considered.*
  - (F) *Article 12(d) of the Articles of Association of the Club required that an interval of at least 14 days must elapse between the date of application and date of election of a candidate to membership.*
- (g) *The "moratorium on accepting full membership" continued after the administration ceased.*
- (1) ***On 18 May 2012 the Club ceased to be under Administration.***
  - (2) ***On 10 November 2012 the members of the governing body of the Club determined the moratorium would be lifted.***

**1104. Ground 3:**

**Section 57F(3)(a) – the Club failed to meet the requirements of section 10(1)(i) of the Act.**

***Between 2010 and 2014 the Club failed to meet the requirements of section 10(1)(i) of the Act when the Club permitted individuals to derive a benefit or advantage from the Club that was not offered equally to all members of the Club.***

**Particular 3.1:**

*The Club permitted members of the governing body the personal use of motor vehicles owned by the Club which was not offered equally to all members of the Club.*

- (a) *The Club is the owner of two motor vehicles.*
- (b) *The vehicles were obtained by the Club for the prime purpose of "in-house haulage, disposal of rubbish and refuse, and picking up and delivery of stock without undue delay".*
- (c) *The two vehicles are garaged off-premises at the personal residences of directors Mr Ashton Snr and Mr Teale:*

- (1) 15 minutes away in Maroubra; and
- (2) 40 minutes away in Strathfield.
- (d) There is no Club policy or procedure on the use of the vehicles and whether or not they are used for travel unrelated to the Club.
- (e) The vehicles are rarely used by the Club.
- (f) There is no log book recording the business and private use of the vehicles.

**Particular 3.4:**

*The Club reimbursed members of the governing body for expenses which were not offered equally to all members of the Club.*

- (a) Expenses were reimbursed where there was no approval for the payment by a resolution of the governing body.
  - (1) **Between March 2010 and 8 August 2011** 26 expense claims were paid to members of the governing body totalling \$2,912.10.
  - (2) **Between 9 August 2012 and April 2014** 19 expense claims were paid to members of the governing body totalling \$4,968.00.
  - (3) **Between 9 August 2011 and 8 August 2012** 27 expense claims were paid to members of the governing body, other than Mr Kirk, totalling \$4,275.50.
- (b) Expenses were reimbursed where the governing body only provided approval for reasonable expenses.
  - (1) **Between 9 August 2011 and 8 August 2012** 12 expense claims were paid to Mr Kirk totalling \$5,498.40.
- (c) The expenses in (a)-(b) above were paid in circumstances where the majority of the claims:
  - (1) contained little to no detail about the expense;
  - (2) contained no supporting documentation despite Club policy for supporting documentation to be provided for any expense over \$80.00;
  - (3) in the absence of detail, cannot be said to have been for the benefit of the Club and its members;
  - (4) in the absence of detail, cannot be said to have been connected to their duties and responsibilities; and
  - (5) in the absence of detail, cannot be said to have been reasonable.

**1105. Ground 4:**

**Section 57F(3)(a) – The Club failed to meet the requirements of section 10(1)(l) of the Act.**

**Between January 2009 and November 2014** the Club failed to meet the requirements of section 10(1)(l) of the Act when the Club failed to comply with the reporting requirements set out in the Registered Clubs Regulation 2009 (the **Regulation**) and required by section 38 of the Act.

**Particular 4.1:**

*The Club failed to provide to members of the governing body financial statements required by Clause 17 of the Regulation on a quarterly basis.*

- (a) The Club failed to prepare "profit and loss statements" and "balance sheets" on a quarterly basis.
- (b) **Between March 2009 and May 2014** the financial year of the club was 1 June to 31 May.

- (c) **For 10 quarters between March 2009 and May 2014**, there is no minute recording that any financial statements were provided to the governing body.

**Particular 4.2:**

*The Club failed to display a notice on the Club's website outlining how Club members can access those financial statements.*

**Particular 4.3:**

*As a result of the governing body not approving financial statements on a quarterly basis, these statements could not have been made available to ordinary members within 48 hours of being approved by the governing body.*

**Particular 4.4:**

**Prior to 1 January 2013**, the Club failed to record disclosures made by members of the governing body in a register of disclosures for the relevant financial year as required by Clause 18(1) of the Regulation.

- (a) The Club failed to maintain a register of disclosures **prior to 1 January 2013**.

- (b) **Prior to 1 January 2013**, members of the governing body made disclosures that were required to be recorded and maintained in the register of disclosures.

- (1) Ms Madeline Kirk:

- (A) Ms Kirk is the daughter of director Mr Kirk;
- (B) **Mr Kirk was a member of the governing body between 28 August 2003 and 2 April 2014;**
- (C) **Between 16 November 2010 and 25 December 2011 Ms Kirk was employed by the Club; and**
- (D) Mr Kirk made a written declaration **on 7 January 2011**.

- (2) Mr Ashton Jnr:

- (A) Mr Ashton Jnr is the son of director Mr Ashton Snr;
- (B) Mr Ashton Snr became a member of the governing body on 28 August 2003 and continues to act in that capacity;
- (C) **Mr Ashton Jnr was employed with the Club as "bar staff" between 15 December 2005 and 4 May 2009;**
- (D) **Mr Ashton Jnr re-commenced employment with the Club on or about 29 November 2010; and**
- (E) **Mr Ashton Snr made a written declaration on 10 January 2011.**

- (3) Mr Kirk:

- (A) **At the 2008 AGM** [the Authority notes that this took place on 10 December 2008] *the ordinary members were asked to consider transferring the Club premises from core to non-core property, and entering a new leasing arrangement;*
- (B) *Woollahra Gardens Pty Limited is party to the Deed of Company Arrangement;*
- (C) *Mr Kirk performed remunerated work for Mr Michael Sanchez and his associated group of companies, which includes Woollahra Gardens Pty Limited; and*
- (D) *Mr Kirk made a disclosure at the 2008 AGM identifying his relationship with Mr Sanchez.*

- (c) The Club's register of disclosures is not maintained for each financial year.

- (1) *The Club's financial year was from 1 June to 30 May.*
- (2) *The Club maintained a register of disclosures for the period **1 January 2013 to 31 December 2013.***
- (3) *The Club maintained a register of disclosures for the period **1 September 2013 to 31 August 2014.***

**Particular 4.5:**

*The Club failed to display a notice on the Club website informing members how they can access the Club's register of disclosures.*

**1106. Ground 5:**

**Section 57F(3)(a) – The Club failed to meet the requirements of section 10(1)(m) of the Act.**

***Between 2007 and 2014** the Club failed to meet the requirements of section 10(1)(m) of the Act when the Club failed to comply with the requirements of Part 4A of the Act.*

**Particular 5.1:**

***Between 2009 and 2013** the Club failed to specify the core and non-core property of the Club at the end of the financial year in any of the Club's annual reports, in contravention of section 41J(2) of the Act.*

**Particular 5.4:**

*The Club lent money to an employee where there that loan was not first approved by the governing body of the Club in contravention of section 41N of the Act.*

- (a) *Mr Matthew Brady was an employee of the Club **between 10 December 2012 and 30 June 2013.***
- (b) ***On 8 March 2013** the Club provided Mr Brady a loan in the sum of \$2,000.*
- (c) *The register of disclosures records that the loan was approved by the members of the governing body **on 9 April 2013.***
- (d) *There is no board minute recording that the proposed loan was first approved by the governing body of the Club.*

**1107. Ground 8:**

**Section 57F(3)(a) – The Club failed to meet the requirements of section 10(1)(a) of the Act.**

***Between 2002 and 2014** the Club failed to meet the requirements of section 10(1)(a) of the Act when the Club was not conducted in good faith as a club.*

**Particular 8.2:**

*The Club failed to meet the minimum number of ordinary members required by Section 10(1)(d) of the Act.*

**Particular 8.3:**

*During the period the Club was under external administration a "moratorium on accepting full membership" was imposed and the Club permitted its membership to decline.*

**Particular 8.4:**

*The Club permitted the "moratorium on accepting full membership" to continue when the Club was no longer under administration.*

**Particular 8.6:**

*The Club admits persons to membership of the Club as "social members" to allow persons who live within a 5km radius of the Club to enter the premises and utilise the facilities without being required to be approved by the members or governing body as "ordinary members".*

- (a) *At all relevant times it was a rule of the Club that it must not admit a person to the Club:*
  - (1) *as a member of the Club, other than as a "provisional member", "honorary member" or "temporary member", unless the person is elected to membership at a meeting of the full members, the governing body, or the election committee of the Club; or*
  - (2) *as a "temporary member" if the person resides in New South Wales, and within a 5km radius of the Club.*
- (b) *Persons who live within a 5km radius of the Club and attend for social and corporate bowling are admitted to the Club incorrectly as "temporary members", or admitted to membership as "social members".*
- (c) *The Club introduced "social members" as a membership category in the Club's 2014 constitution, and applicants are approved by Club staff as members of the Club at the Club entrance following the payment of a \$2.00 fee and the completion of a membership application form.*
- (d) **As at 16 May 2014** *the Club had admitted 7,273 persons to membership of the Club as "social members" who were not approved by a meeting of the full members, governing body or election committee.*

**Particular 8.7:**

*The Club was under external administration for an extended period of time (10 years).*

- (a) *On or about 19 September 2002 Mr Wily was appointed Receiver Manager by the Supreme Court of NSW and acted in the role **until 8 November 2011**, apart from the period 23 January 2004 and 21 June 2004 when Mr Wily Snr acted in this capacity.*
- (b) *On 24 October 2002 Mr Wily was purportedly appointed Administrator of the Club and acted in the role until 28 March 2003.*
- (c) *On 24 March 2003 Mr Wily was purportedly appointed Administrator under a Deed of Company Arrangement and acted in the role **until 18 May 2012**, apart from the period 23 January 2004 and 21 June 2004 when Mr Wily Snr acted in this capacity.*

**1108. Ground 9:**

**Section 57F(3)(d) – The Club contravened a provision of the Act.**

**Prior to 1 January 2013** *the Club failed to maintain a register of all disclosures made under Part 4A of the Act for the relevant financial year, contravening section 38 of the Act and clause 16 of the Regulation.*

**Particular 9(a):**

- (a) *Repeat particulars at 4.4 above.*

**1109. Ground 10:**

**Section 57F(3)(d) – The Club contravened a provision of the Act.**

**Between January 2009 and June 2014** *the Club contravened section 30(1)(c) of the Act.*

**Particular 10.1:**

*The Club failed to hold a meeting of the governing body at least once in every month of the year when it failed to hold meetings as follows;*

- (a) *In 2009, on eight occasions,*
  - (1) *Governing body meetings were not held in March, April, May, June, August, September, October and December 2009.*
- (b) *In 2010, on two occasions,*
  - (1) *Governing body meetings were not held in August and **December 2010.***
- (c) *In 2011, on five occasions,*
  - (1) *Governing body meetings were not held in **January, April, June, August and November 2011.***
- (d) *In 2012, on one occasion,*
  - (1) *A governing body meeting was not held in **October 2012.***
- (e) *In 2013, on five occasions,*
  - (1) *Governing body meetings were not held in **January, March, June, September and December 2013.***
- (f) *In 2014, on one occasion,*
  - (1) *A governing body meeting was not held in **January 2014.***

**Particular 10.2:**

*The Club failed to keep minutes of all proceedings and resolutions of the governing body in a book.*

- (a) *There is no minute of proceedings and resolutions in respect of a meeting of the governing body in January 2010.*
- (b) *Minutes and resolutions were not recorded in a book.*

**Particular 10.3:**

*The Club failed to retain all documents referred to in the minutes as being tabled at the meeting.*

- (a) *On 9 occasions the minutes of meeting of the governing body record that a Management Report was tabled but the Club has failed to retain a copy with the stored minutes:*
  - (1) *In 2009, in the meeting of the governing body held in July.*
  - (2) *In 2010, in the meetings of the governing body held in February, March, June, July, September and October.*
  - (3) ***In 2011, in the meetings of the governing body held in July and October.***

**1110. Ground 11:**

**Section 57F(3)(d) – The Club contravened a provision of the Act.**

**Between August 2013 and April 2014 the Club contravened section 30(2)(k) of the Act.**

**Particular 11.1:**

*On 31 occasions the Club failed to ensure the information of a guest of a member was recorded in the "sign-in register" in accordance with section 31(1)(c) of the Act.*

- (a) On 15 occasions the guest did not complete their full name, or their surname and first initial.
- (b) On 16 occasions the guest did not complete their address.
- (c) On three occasions the member did not provide their signature.

**1111. Ground 12:**

**Section 57F(3)(d) – The Club contravened a provision of the Act.**

*In 2007 and **between 2009 and 2013** the Club failed to hold annual elections for the appointment of the members of the governing body in contravention of section 30(1)(a) of the Act.*

**Particular 12.1:**

*There was no rule of the Club to provide otherwise than that the governing body of the Club must be elected annually.*

**Particular 12.2:**

*In 2007, **2009 and 2010**, the Club:*

- (a) *did not hold an AGM of members; and*
- (b) *did not hold an election by members for the appointment of the governing body.*

**Particular 12.3:**

*In **2011**, the Club:*

- (a) *held an AGM of members; but*
- (b) *there is no minute from the AGM of members recording that the Club held an election for the appointment of the governing body.*

**Particular 12.4:**

*In **2012 and 2013**, the Club:*

- (a) *did not hold an AGM of members; and*
- (b) *did not hold an election by members for the appointment of the governing body.*

**1112. Ground 13:**

**Section 57F(3)(d) – the Club contravened a provision of the Act.**

***On 11 September 2014** the Club contravened section 30(2)(i) of the Act, in that the Club failed to ensure the register of persons who are full members of the Club was kept in accordance with section 31(1)(a) of the Act.*

**Particular 13.1:**

***On 11 September 2014** the Club's membership register recorded 249 entries, however contained only 121 ordinary members.*

- (a) *On one occasion the membership register did not record the member's full name.*
- (b) *On 135 occasions the membership register did not record the member's occupation.*
- (c) *On eight occasions the membership register did not record the member's address.*
- (d) *On 85 occasions the membership register did not record the date on which the member last paid the annual fee for membership of the Club.*

**1113. Ground 14:**

***Section 57F(3)(e) – a rule of the Club referred to in section 30(1) of the Act has been broken or any other rule of the Club has been habitually broken.***

***Between August 2013 and November 2014 it was a rule of the Club, under section 30(2)(m) of the Act, that it maintain a register of "temporary members" who attend the Club each day and record information in accordance with section 31(1)(e) of the Act.***

***Between August 2013 and November 2014 the Club habitually broke this rule.***

**Particular 14.1:**

*The Club kept a "sign-in register" for "temporary members".*

**Particular 14.2:**

*The Club on 1,856 occasions failed to ensure the full name, or the surname and first initial, and the address of the "temporary member" together with his or her signature, was recorded in the "sign-in register" as follows.*

<b><i>Date/Month</i></b>	<b><i>Number of temporary members whose information was not recorded as required by section 31(1)(e)</i></b>
<i>August 2013</i>	<i>90</i>
<i>September 2013</i>	<i>83</i>
<i>October 2013</i>	<i>139</i>
<i>November 2013</i>	<i>223</i>
<i>December 2013</i>	<i>438</i>
<i>January 2014</i>	<i>111</i>
<i>February 2014</i>	<i>123</i>
<i>March 2014</i>	<i>53</i>
<i>April 2014</i>	<i>188</i>
<i>May 2014</i>	<i>78</i>
<i>June 2014</i>	<i>41</i>
<i>July 2014</i>	<i>37</i>
<i>August 2014</i>	<i>35</i>
<i>September 2014</i>	<i>44</i>
<i>October 2014</i>	<i>112</i>
<i>November 2014</i>	<i>61</i>

**1114. Ground 15:**

***Section 57F (3)(e) – A rule of the Club referred to in section 30(1) of the Act has been broken or any other rule of the Club has been habitually broken.***

***Between August 2013 and November 2014 it was a rule of the Club, under section 30(2)(c) of the Act, that it must not admit a person to the Club as a "temporary member" if the person resides in New South Wales, and within a 5km radius of the Club, unless the person:***

- (a) is a member of another registered club with similar objects as the Club; or***
- (b) is a member of another registered club and is attending the Club on an invitation to participate in an organised sport or competition.***

***Between August 2013 and November 2014 the Club habitually broke this rule.***

**Particular 15.1:**

*On 1,168 occasions the Club admitted persons, whose ordinary residence was within a 5km radius of the Club, as "temporary members" of the Club.*



<b>Month/Year</b>	<b>Number of temporary members who resided in New South Wales and within a 5km radius of the Club</b>
<i>August 2013</i>	43
<i>September 2013</i>	32
<i>October 2013</i>	65
<i>November 2013</i>	71
<i>December 2013</i>	222
<i>January 2014</i>	115
<i>February 2014</i>	118
<i>March 2014</i>	60
<i>April 2014</i>	146
<i>May 2014</i>	84
<i>June 2014</i>	41
<i>July 2014</i>	29
<i>August 2014</i>	18
<i>September 2014</i>	45
<i>October 2014</i>	52
<i>November 2014</i>	27

**Particular 15.2:**

*None of the persons entering the Club referred to at paragraph 15.1 above identified themselves in the "sign-in register" as being a member of another club.*

**1115. Ground 16:**

***Section 57F(3)(e) – A rule of the Club referred to in section 30(1) of the Act has been broken or any other rule of the Club has been habitually broken.***

*At all relevant times it was a rule of the Club, under section 30(1)(g) of the Act, that it must not admit a person as a member of the Club, other than as a "provisional member", "honorary member" or "temporary member", unless the person is elected to membership at a meeting of:*

- (a) the full members of the Club;*
- (b) the governing body of the Club; or*
- (c) the election committee of the Club.*

***Between 2013 and 2014 the Club habitually broke this rule.***

**Particular 16.1:**

*As at 16 May 2014 the Club had admitted 7,273 persons to membership of the Club as "social members".*

**Particular 16.3:**

*"Social members" are distinct from "provisional members", "honorary members" or "temporary members" in the Club's 2014 Constitution.*

**Particular 16.4:**

*Article 16.1 of the Club's 2014 Constitution provides:*

*"A person shall not be admitted as a member of the Club other than as a Provisional, Honorary Temporary or a Life Member unless that person is elected to membership at a meeting of the Board of the Club or duly appointed election committee of the Club".*

**Particular 16.5:**

*"Social members" are not "provisional members", "honorary members" or "temporary members" of the Club.*

**Particular 16.6:**

*"Social members" are approved by Club staff as members of the Club at the entrance to the Club following the payment of a \$2.00 fee and the completion of a membership application form.*

**Particular 16.7:**

*"Social members" are issued a membership number and card which provides access to the Club.*

**Particular 16.8:**

*The 7,273 persons admitted to membership as "social members" were not approved by a meeting of the full members, governing body or election committee.*

**1116. Ground 17:**

***Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.***

*The Club contravened clause 14 of the Gaming Machines Regulation 2010.*

**Particular 17.1:**

***Between August 2013 and September 2014*** on 623 occasions the Club failed to keep written records with respect to the awarding or payment of each prize and short-pay of an approved gaming machine kept on the premises of the Club that contains:

- (a) *the name and signature of the person to whom the award or payment was made; and*
- (b) *the signature of 2 other persons certifying that each sighted the prize-winning combination or the number of credits and that the record was correct in all its details.*

**1117. Ground 18:**

***Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.***

*The Club contravened clause 17 of the Gaming Machines Regulation 2010.*

**Particular 18.1:**

*There is no minute of a meeting of the governing body **between January 2009 and June 2014** recording the production to the governing body, at monthly intervals, of:*

- (a) *a cash flow analysis in the form approved by the Director-General; and*
- (b) *a comparison of cancelled credit and jackpot wins meter readings with the corresponding entries in the Club's payout sheets,*

*in respect of each approved gaming machine.*

**1118. Ground 19:**

***Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.***

*The Club contravened clause 18 of the Gaming Machines Regulation 2010.*

**Particular 19.1:**

***Between January 2009 and June 2014 the Club failed to:***

- (a) *produce a "net analysis report" for the previous months, and that part of the previous 12 months, for each approved gaming machine; and*
- (b) *ensure the net analysis reports were examined by the Club's board within one month.*

**1119. Ground 20:**

***Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.***

*The Club contravened clause 20(2)(d) of the Gaming Machines Regulation 2010.*

**Particular 20.1:**

***Between July 2012 and June 2014 on 34 occasions the Club failed to keep written records with respect to each clearance of an approved gaming machine on the premises of the Club that contained the signatures of two authorised persons [sic] cleared the gaming machine certifying that the record was correct in all its details.***

**1120. Ground 22:**

***Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.***

*The Club contravened clause 91(1) of the Gaming Machines Regulation 2010.*

**Particular 22.1:**

***At no time since the installation of the first authorised progressive machine on 6 March 2014 has the Club:***

- (a) *recorded the amount shown on the progressive meter of any authorised progressive machine at the time the progressive jackpot has been won (progressive jackpot report); and*
- (b) *ensured the progressive jackpot report was examined by the Club's board each month.*

**1121. Ground 23:**

***Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.***

***On 18 August 2011, it became a condition of the Club's liquor licence that on NRL Grand Final Day that two nominated staff of the Club maintain a count of persons on the licensed premises (condition 3410).***

**Particular 23.1:**

***On 5 October 2014 the Club failed to ensure two nominated staff maintained a count of persons on the licensed premises in circumstances where:***

- (a) *Inspectors from OLGR conducted a covert inspection;*
- (b) *Ms Natalie Turner, an employee of the Club, and Mr Jason Loveday, a security guard contracted by the Club, were stationed at the entrance of the Club; and*

- (c) *Neither Ms Turner nor Mr Loveday were instructed to, and subsequently did not, maintain a count of persons on the licensed premises.*

**1122. Ground 24:**

***Section 57F(3)(d) – The Club contravened a provision of the Act.***

***Between 24 October 2002 and 18 May 2012 the Club contravened section 41 of the Act when it purported to appoint Mr Wily to act in the capacity of administrator of the Club.***

**Particulars:**

- (a) *The Club is a company within the meaning of the Corporations Act 2001.*
- (b) *On or about 20 September 2002 Mr Wily was appointed to act as Receiver Manager of the Club by the Supreme Court of New South Wales.*
- (c) *On or about 24 October 2002 Mr Wily was purportedly appointed to act as Administrator of the Club in circumstances where there is no record of Mr Wily being appointed to act in this capacity by:*
  - (1) *the Supreme Court of NSW; or*
  - (2) *the former Licensing Court; or*
  - (3) *the Authority.*

- 1123.** The Authority notes that while the Club was under voluntary administration between October 2002 and March 2003, the operation of section 437C(1) of the *Corporations Act 2001* served to limit the powers of the Club's officers to act without the consent of the Club's administrator, Mr Wily.
- 1124.** However, this period of administration ended when a deed of company arrangement was executed by the Club on 24 March 2003. This restored the powers of the governing body and the officers of the Club, in so far as they did not act inconsistently with the terms of the deed of company arrangement administered by Mr Wily.
- 1125.** The Authority is satisfied that, as its chief executive officer and the Club's highest ranking employee during the periods in which he served as Secretary, Mr Ashton Jnr had ultimate operational responsibility for ensuring the Club's compliance with the various legislative requirements to which it is subject – notwithstanding the fact that the Club was a party to a deed of company arrangement from 24 March 2003 onward.
- 1126.** On the basis of the above findings, in respect of those Grounds 1 to 24 that are also found to be attributable to Mr Ashton Jnr's tenure, the Authority is satisfied that Mr Ashton Jnr failed to exercise his duties as secretary of the Club with a degree of knowledge, ability, care and diligence expected of a club secretary. There is no basis for impugning Mr Ashton Jnr's honesty.
- 1127.** Particular 25.2(a) is established.

**Particular 25.2(b)**

- 1128.** With respect to Particular 25.2(b) regarding Mr Ashton Jnr's alleged failure to comply with *ClubsNSW Guidelines*, the Authority accepts the Ex-Officers' submission that these documents are guidelines that provide advice on *best practice* in the industry. They do not prescribe minimum legal rules in respect of which non-compliance may found an independent ground of complaint.

- 1129.** Industry guidelines provide a useful framework for the training of club officers and staff and may, in their terms, provide a plain English guide to minimum statutory requirements.
- 1130.** A good working knowledge of *ClubsNSW Guidelines* on the part of club directors or senior executives and particularly its secretary may have the collateral benefit of enhancing knowledge and skill and provide a means by which regulated officers become aware of and refresh themselves as to regulatory requirements and avoid managing club premises in a manner that exposes an enterprise to systemic risk and/or regulatory action.
- 1131.** *ClubsNSW Guidelines* may also provide a source of evidence as to what the industry considers to be best practice with regard to the content of a regulatory duty that is the subject of a statutory requirement.
- 1132.** The chief executive officer and secretary of a registered club has greater operational responsibility over the day to day affairs of a registered club than the members of its governing body.
- 1133.** A secretary of a club that is a member of *ClubsNSW* may be expected to possess a reasonable working knowledge of that organisation's Guidelines. If not, this may assist to support a conclusion that some identified failing by a club to satisfy a statutory requirement was the product of a lack of knowledge or skill on the part of its secretary.
- 1134.** However, the Authority does not need to make findings on the sub-Particulars of Particular 25.2(b) by reason that it is already satisfied as to Mr Ashton Jnr's responsibility for those instances of statutory non-compliance found against the Club that are found to be also attributable to Mr Ashton Jnr's personal fitness and propriety.
- 1135.** The Authority does not consider that non-compliance with individual *ClubsNSW Guidelines* gives rise to an independent ground for disciplinary action and that any lack of knowledge or skill in respect of the Club's conduct by comparison to these guidelines in this case adds little to identifying a lack of knowledge or skill in respect of the failure to demonstrate knowledge and skill in respect of the relevant statutory minimum requirements that have been found by the Authority.

Particular 25.2(c)

- 1136.** With respect to Particular 25.2(c), regarding Mr Ashton Jnr's alleged responsibility for the Club's non-compliance with the Articles of Association of the Club, the Authority makes the following findings.
- 1137.** Particular 25.2(c)(1) attributes to Mr Ashton Jnr's fitness and propriety the Club's failure to post membership applications to the Club Notice Board.
- 1138.** The Authority notes the Ex-Officers' submissions in respect of this Particular that the Complainant's wording is "misleading" in that it suggests multiple breaches where only one breach has occurred, being Mr McKew's application. The Authority accepts that one breach occurred with regard to Mr McKew's application.

- 1139.** The Ex-Officers accept that the expedition of Mr McKew’s application contravened Article 12 of the Club’s Articles of Association, but submit that there are currently 2,460 members in respect of which applications were “appropriately considered and approved”. The Authority accepts the Ex-Officers’ submissions in this regard but is nevertheless satisfied that Particular 25.2(c)(1) is factually established, on the basis of Article 12 of the Articles of Association for the Club (Complainant Exhibit E085) and the evidence or material referred to in the Authority’s findings on Particular 1.5(f)(6) above. The Authority notes that this breach occurred during Mr Ashton Jnr’s tenure as Club secretary.
- 1140.** Particular 25.2(c)(2) attributes to Mr Ashton Jnr’s fitness and propriety the Club’s failure to remove non-financial members from the Club’s membership register.
- 1141.** The Authority notes the Ex-Officers’ submissions in respect of this Particular that Article 23 is no longer in force, but that the Ex-Officers had the power and authority and discretion to remove members. The Ex-Officers submit that there is no direction or order under Article 23 that compels the removal of non-financial members and note the use of the word “may” as opposed to “shall” or “will”.
- 1142.** The Authority has reviewed Article 23 of the Club’s Articles of Association and accepts that there was a discretion provided in that:
- ...if such subscription shall be unpaid on the due day the defaulting member may be debarred or suspended from all privileges of membership and his name may be removed from the register of members and he may be disqualified from all Club competitions in which he may be participating [emphasis added].*
- 1143.** Nevertheless, the Authority is satisfied that Particular 25.2(c)(2) is factually established on the basis of Article 23 of the Articles of Association for the Club (Complainant Exhibit E085) and the *Paddington Bowling Club Full Members Register* as of 11 September 2014 (Complainant Exhibit E057).
- 1144.** The Authority is satisfied that the discretion provided to the Club to remove non-financial members from the register was not considered or exercised during the relevant period and this is a matter that further underpins an apparent laxity of control with regard to membership and access to the Club premises. It supports an inference that the Club maintained something akin to an “open door” policy and this provides some cause for an adverse assessment as to the fitness of the secretary and members of the governing body for not exercising more diligence in this regard.
- 1145.** Particular 25.2(c)(3) attributes to Mr Ashton Jnr’s fitness and propriety the Club’s failure to ensure members of the Board were elected annually. The Authority notes that the Ex-Officers refer to and repeat their submissions on Ground 12 of the Complaint in response to this Particular.
- 1146.** The Authority is satisfied that Particular 25.2(c)(3) is established on the basis of Article 28 of the Articles of Association for the Club (Complainant Exhibit E085); the statements made by Robert Ashton Jnr at page 27 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182) and the evidence or material referred to in the Authority’s findings on Ground 12 above.
- 1147.** Particular 25.2(c)(4) attributes to Mr Ashton Jnr’s fitness and propriety the Club’s failure to ensure the Board met at least once in every month. The Authority notes

that the Ex-Officers refer to and repeat their submissions on Ground 10 of the Complaint and contend that Mr Wily was in charge and that the Ex-Officers “had no power to alter” Mr Wily’s conduct – thus no question of fitness and propriety arises.

- 1148.** The Authority accepts the Ex-Officers’ submissions in this regard, noting that the Board sometimes met twice in a month. However, Particular 25.2(c)(4) is factually established on the basis of Article 41 of the Articles of Association for the Club (Complainant Exhibit E085) and the evidence or material referred to in the Authority’s findings on Ground 10 above. Notwithstanding this finding, the Authority notes that this matter does not have a substantial bearing on an issue of fitness and propriety of the secretary or directors, including Mr Ashton Jnr, by reason of the number of meetings convened by the Club during the relevant years.
- 1149.** Particular 25.2(c)(5)(A), which attributes to Mr Ashton Jnr’s fitness and propriety the Club’s failure to ensure the required quorum of five members of the Board was met for each of the five meetings specified during 2011 is established on the basis of Article 41 of the Articles of Association for the Club (Complainant Exhibit E085); the Club Board meeting minutes for 1 February 2011 (Complainant Exhibit E015); the Club Board meeting minutes for 28 February 2011 (Complainant Exhibit E016); the Club Board meeting minutes for 30 March 2011 (Complainant Exhibit E017); the Club Board meeting minutes for 27 May 2011 (Complainant Exhibit E018); the Club Board meeting minutes for 1 July 2011 (Complainant Exhibit E019); the Club Board meeting minutes for 29 July 2011 (Complainant Exhibit E020); the Club Board meeting minutes for 2 September 2011 (Complainant Exhibit E021); the Club Board meeting minutes for 28 October 2011 (Complainant Exhibit E022) and the Club Board meeting minutes for 28 December 2011 (Complainant Exhibit E023).
- 1150.** Particular 25.2(c)(5)(B), which attributes to Mr Ashton’s fitness and propriety the Club’s failure to ensure the required quorum of five members of the Board was met for each of the three meetings specified during 2014 is established on the basis of Article 41 of the Articles of Association for the Club (Complainant Exhibit E085); the Club Board meeting minutes for 10 February 2014 (Complainant Exhibit E045); the Club Board meeting minutes for 24 February 2014 (Complainant Exhibit E046); the Club Board meeting minutes for 8 March 2014 (Complainant Exhibit E047); the Club Board meeting minutes for 11 April 2014 (Complainant Exhibit E048); the Club Board meeting minutes for 13 May 2014 (Complainant Exhibit E049) and the Club Board meeting minutes for 23 June 2014 (Complainant Exhibit E050).
- 1151.** In response to Particular 25.2(c)(5) generally, the Authority notes the Ex-Officers’ contention that not meeting the quorum requirement is not a matter that goes to their fitness and propriety. They submit that this was not a result of a lack of honesty, knowledge, or ability. The Ex-Officers argue that the law offers a company the opportunity to validate decisions made without a quorum and so this matter “ought not to be a basis” for alleging that the Ex-Officers are not fit and proper persons.
- 1152.** The Authority notes the submission made by Mr Kirk dated 29 May 2015 that at the 2004 AGM, there was an amendment to the by-laws reducing the quorum of directors at a Board meeting from five to three, and that all of the matters the subject of Particulars 29.3(c)(5)(A) and 29.3(c)(5)(B) occurred *after* the 2004 resolution and were attended by three or more members of the governing body. Mr Kirk states in his submissions that while he told OLGR investigators in his record of interview dated 5 November 2014 (Complainant Exhibit E181) that he thought the

quorum requirement changed from five to three in 2006, on reflection he believes it changed in 2004.

- 1153.** The Authority rejects the Ex-Officers' and Mr Kirk's submissions in this regard. A failure to meet the quorum requirement is not only a technical or administrative failing, but if not observed could increase the scope for the potential conduct of secret meetings or the formation of cabals within a club's governing body. A resolution to reduce the quorum to three does not remove the duty under the Club's Articles of Association to comply with this requirement.
- 1154.** This basic requirement of corporate governance should have been observed by the Club's governing body and it adversely reflects upon the ability of the relevant members of the governing body and the Club's secretary that the quorum requirement was not met on the occasions that have been established on the evidence.
- 1155.** Particular 25.2(c)(5) is established.
- 1156.** Particular 25.2(c)(6) attributes to Mr Ashton Jnr's fitness and propriety the Club's failure to ensure the Club held an annual general meeting of members each year. The Authority notes that the Ex-Officers refer to and repeat their submissions on Ground 12 of the Complaint and contend that Mr Wily was in charge of the Club during the period of administration and that the Ex-Officers "had no power to alter" Mr Wily's conduct and for this reason, no question of fitness and propriety arises.
- 1157.** The Authority does not accept the Ex-Officers' submissions in this regard. The failure to hold an annual general meeting of the members in the years of 2007, 2010, 2012 and 2013 as alleged by Particular 25.2(c)(6) is established on the basis of Article 49 of the Articles of Association for the Club (Complainant Exhibit E085) and the evidence or material referred to in support of the Authority's findings on Ground 12 above.
- 1158.** The Authority has considered, but rejects, the submissions made by the Ex-Officers that the matters alleged in Particular 25.2(c) do not properly go to the consideration of the honesty, knowledge and ability of the Club's secretary.
- 1159.** The secretary of a registered club, as its chief executive officer and highest ranking employee, has a greater degree of direct operational responsibility over the day to day affairs of a registered club than the members of its governing body. The duty to ensure compliance by a registered club with that club's articles of association is shared by the secretary and its governing body but it falls more directly upon a club's secretary than any individual member of a club's board.

#### Particular 25.2(d)

- 1160.** With respect to Particular 25.2(d), attributing to Mr Ashton Jnr's fitness and propriety the Club's alleged lack of internal controls and procedures, the Authority rejects the Ex-Officers' submission that the issues that are the subject of Particular 25.2(d) arose during the administration of the Club and as such, were the responsibility of Mr Wily.



- 1161.** The Authority notes that while the Club was under administration, the powers of the officers of the Club were suspended, pursuant to section 437C(1) of the *Corporations Act 2001*.
- 1162.** However, when the Deed of Company Arrangement was signed on 24 March 2003, the Club was no longer under administration, through the operation of section 435C of the *Corporations Act 2001*. The Ex-Officers resumed their powers and obligations in relation to the Club's governance, subject to the terms of the Deed of Company Arrangement.
- 1163.** The Authority makes the following findings on the sub-Particulars of Particular 25.2(d).
- 1164.** Particular 25.2(d)(1), attributing to Mr Ashton Jnr's fitness and propriety the inability of the Club's Auditor to form an unqualified opinion of the Club's financial accounts for the year ended 30 June 2011, due to poor internal controls and systems, is established on the basis of a letter from Michael Bulgin, the Club's Auditor to the Club's secretary dated 20 May 2011 (Complainant Exhibit E103); the letter from Domenic Cutrupi of CBC Partners, the Club's Auditor to the Club secretary dated 28 March 2014 (Complainant Exhibit E104) and the statements made by Robert Ashton Jnr at page 12 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182).
- 1165.** Particular 25.2(d)(2), attributing to Mr Ashton Jnr's fitness and propriety the alleged failure to maintain the Club's register of disclosures, is established on the basis of the evidence or material referred to in the Authority's findings on Particular 4.3 above.
- 1166.** Particular 25.2(d)(3), attributing to Mr Ashton Jnr's fitness and propriety the alleged failure to ensure that a current governing body resolution approved the payment of expenses to members of the governing body, is established on the basis of the evidence or material referred to in the Authority's findings on Particular 3.4 above.
- 1167.** Particular 25.2(d)(4) attributes to Mr Ashton Jnr's fitness and propriety the allegation that the Ex-Officers maintained "high risk practices" including Mr Ashton Jnr's paying expenses of directors in cash, directly from the safe. The Authority notes that the Complainant relies upon the statements made by Robert Ashton Jnr at page 28 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182) in support of this contention.
- 1168.** The Authority has reviewed the above evidence or material and is *not* satisfied that this Particular is established. While the practice of paying directors' expenses directly from the safe is not recommended as the most prudent method of payment, the Authority is not satisfied that the evidence or material as to the circumstances in which these payments were made establishes that this practice should be characterised as "high risk".
- 1169.** There is no evidence before the Authority to suggest that the Ex-Officers did not comply with proper accounting practices, and the Authority notes that these payments were reconciled through petty cash, which is a common industry practice. Particular 25.2(d)(4) is *not* established.

- 1170.** Particular 25.2(d)(5), attributing to Mr Ashton Jnr's fitness and propriety the Club's failure to maintain an assets register prior to 18 July 2014, is established on the basis of the statements made by Allan Teale at pages 30 to 31 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E183). This is an instance of operational non-compliance for which the Club secretary and chief executive officer is ultimately responsible.
- 1171.** Particular 25.2(d)(6) attributes to Mr Ashton Jnr's fitness and propriety the Club's failure to ensure that Club auditors provided reports each year. Particular 25.2(d)(6)(A) alleges that the Auditor's Reports for the years ended 30 June 2009 and 30 June 2010 are dated 27 May 2011. Particular 25.2(d)(6)(B) alleges that the Auditor's Report for the year ended 30 June 2012 is dated 2 April 2014. Particular 25.2(d)(6)(C) alleges that the Auditor's Report for the years ended 30 June 2012 and 30 June 2013 are dated 6 November 2014.
- 1172.** The Authority is satisfied that these sub-Particulars are established on the basis of the Notes to and Forming Part of the Financial Statements as contained in the Club's Financial Report for the year ended 30 June 2009 (Complainant Exhibit E063); the Notes to and Forming Part of the Financial Statements as contained in the Club's Financial Report for the year ended 30 June 2010 (Complainant Exhibit E064); the Club's Financial Statement for the year ended 30 June 2011 (Complainant Exhibit E187) and the minutes for the Club's AGM dated November 2014 (Complainant Exhibit E209). These are matters of financial governance that are ultimately the responsibility of the Club's secretary and chief executive officer.
- 1173.** Particular 25.2(d)(7) attributes to Mr Ashton Jnr's fitness and propriety an alleged failure to have an understanding of legislative requirements of a registered club. The Authority is satisfied that this Particular is established on the basis of the evidence or material referred to in the Authority's findings on Grounds 1 through 24 above that have been attributed to Mr Ashton Jnr. While the Complainant also relies upon the statements made by Robert Ashton Jnr at page 9 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182), that is not particularly persuasive evidence demonstrating Mr Ashton Jnr's lack of knowledge of statutory requirements.
- 1174.** Particular 25.2(d)(8) concerns Mr Ashton Jnr's alleged failure to have an understanding of the Club's licence conditions. The Authority notes that this contention is made in relation to only one detected breach of condition 3410 requiring that two nominated staff of the Club maintain a count of persons on the licensed premises on NRL Grand Final Day.
- 1175.** The Authority notes that the Complainant relies upon a copy of the Club's liquor licence number LIQC300229372 dated 10 September 2014 (Complainant Exhibit E090); the file note pertaining to a covert inspection of the Club prepared by OLGR inspector Ryan Williams dated 10 October 2014 (Complainant Exhibit E219); the contemporaneous notebook entry of OLGR inspector Ryan Williams (Complainant Exhibit E220) and pages 4 to 6 of the transcript of a record of interview between OLGR inspectors and Jason Loveday dated 20 November 2014 (Complainant Exhibit E232) in support of this contention.
- 1176.** The Authority has reviewed all of the above evidence or material and notes that Ground 23 of the Complaint, which alleges the same failing on the part of the Club, is established in respect of the Club.

1177. However the Authority is *not* satisfied that it follows from this failure to ensure compliance with licence condition 3410 that Mr Ashton Jnr does not have an understanding of [all] of the "Club's licence conditions".
1178. Particular 25.2(d)(8) is not established.
1179. The Authority has considered cumulatively the Authority's findings with regard to the Particulars specified in Ground 25. The Authority notes the multiple instances of non-compliance by the Club with legislative requirements that are established among Grounds 1 to 24, responsibility for which also falls upon the Club's chief executive officer. The Authority notes those further instances of non-compliance with the Club's Articles of Association and failings with respect to corporate governance that are established in the Particulars noted above.
1180. The Authority is satisfied that Ground 25 is established and that Mr Robert Ashton Jnr is not a fit and proper person to be a secretary of the registered club, by reason that the Complainant has established that he did not demonstrate the degree of knowledge, ability, care and diligence that the Authority would expect from a reasonably competent secretary of a club of this scale. There is no basis for impugning Mr Ashton Jnr's honesty arising from the Authority's findings on Ground 25.
1181. As its chief executive officer and the Club's highest ranking employee during the periods in which he served as secretary, Mr Ashton Jnr had ultimate operational responsibility for ensuring the Club's compliance with the legislative and constitutional requirements to which the Club is subject.
1182. The Authority notes that, during the time the Club was subject to the Deed of Company Arrangement from 24 March 2003 and the Amended Deed of Company Arrangement from 10 December 2010, these documents imposed certain restrictions upon the discretion of the governing body in that they could not act contrary to those agreements.
1183. While the degree of responsibility for the Club's affairs may *potentially* be reduced to the extent that certain aspects of Club governance actually required the consent of the Deed Administrator, Mr Wily – the fact that the Club was subject to a deed of company arrangement does not provide a complete excuse for Mr Ashton Jnr's failure, as secretary, to ensure that the Club complied with relevant legislation.
1184. Mr Ashton Jnr and the members of the governing body did have a role to play during the currency of the DOCA and ADOCA. It is certainly no excuse for Mr Ashton Jnr or any member of the governing body not to have knowledge of the legislative and constitutional requirements to which the Club was subject.

## GROUND 26

1185. Ground 26 alleges as follows:

***Section 57F(3)(g) – The Secretary is not a "fit and proper" person to act as such.***

*By reason of the conduct of Mr Levy whilst Secretary of the Club he is not a "fit and proper" person to hold such a position.*

**1186.** Particular 26.1 of Ground 26 alleges as follows:

*Mr Levy was appointed the Secretary of the Club on or about 26 October 2004 and acted in this capacity until 3 October 2007.*

**1187.** Particular 26.2 of Ground 26 alleges as follows:

*During this period Mr Levy failed to exercise his duties as a Secretary with a degree of knowledge, ability, care and diligence, by reason of:*

- (a) The failure to ensure the Club maintained the minimum number of ordinary members prescribed by Section 12 of the Act.*
- (b) The non-compliance with Section 41L of the Act in permitting the Club to enter into a contractual arrangement with MLM, a company of which Mr Levy was the sole director and had the capacity to determine the outcome of decisions about the financial and operating policies of the company.*
- (c) The failure to ensure the Club operated in good faith as a club.*
- (d) The failure to ensure the Club maintained a register of all disclosures required under Part 4A of the Act for the relevant financial years.*
- (e) The failure to ensure the Club held annual elections for the appointment of the members of the governing body.*
- (f) The non-compliance with ClubsNSW Guidelines:*
  - (1) Failure to comply with any relevant legislative, industrial or administrative requirement, and keep up to date with any changes.*
  - (2) Failure to ensure all appropriate compliance frameworks and controls are in place.*
- (g) The non-compliance with the Articles of Association of the Club:*
  - (1) Failure to ensure the members of the Board were elected annually.*
  - (2) Failure to ensure the Club held an annual general meeting of members each year.*
- (h) The lack of internal controls and procedures.*
  - (1) Failure to maintain the Club's register of disclosure.*
  - (2) Maintaining high risk practices including pre-signing cheques.*
  - (3) Failure to maintain an assets register prior to 18 July 2014.*

### **Club's Response to Ground 26**

**1188.** The Club did not provide a response to Ground 26 of the Complaint.

### **Ex-Officers' Response to Ground 26**

**1189.** The Authority notes that Particular 26.1, specifying the dates of Mr Levy's employment at the Club, is not disputed by the Ex-Officers.

**1190.** In response to Particular 26.2(a), the Ex-Officers refer to and repeat their submissions on Ground 1 above.

**1191.** In response to Particular 26.2(b), the Ex-Officers refer to and repeat their submissions on Ground 5 above.

**1192.** The Ex-Officers submit that the obligations imposed by section 41L of the Act with regard to contracts between registered clubs and club secretaries, managers, close relatives and certain other persons are directed to the *Club*, not a person with the controlling interest in a company *contracting* with the Club.

- 1193.** The Ex-Officers note that at the time of the conduct alleged in this Particular (which the Authority notes concerns the period from February 2007 onwards), the Club was under administration. They contend that Mr Wily was responsible for the Club during this time.
- 1194.** The Ex-Officers submit that the last time that Mr Levy was the secretary of the Club was in 2007, when the contract with MLM (Mr Levy's company) that is the subject of this Particular ended. [The Authority notes that Mr Levy ceased to be the Club secretary in October 2007.]
- 1195.** The Ex-Officers submit that Mr Levy has had no further dealings with the Club and that any further "breaches" are unlikely to occur.
- 1196.** The Ex-Officers argue that that this matter is of "historical significance only" with "no chance" of repetition.
- 1197.** In response to Particular 26.2(c), attributing to Mr Levy's fitness and propriety a failure to ensure that the Club operated in good faith as a registered club, the Ex-Officers refer to and repeat their submissions on Ground 8 of the Complaint.
- 1198.** In response to Particular 26.2(d), attributing to Mr Levy's fitness and propriety a failure to ensure that the Club maintained a register of all disclosures required by Part 4A for the "relevant financial years" (which the Authority understands to mean those financial years in which Mr Levy was Club secretary) the Ex-Officers refer to and repeat their submissions on Ground 9 of the Complaint.
- 1199.** In response to Particular 26.2(e), attributing to Mr Levy's fitness and propriety a failure to ensure that the Club held annual elections for the governing body, the Ex-Officers refer to and repeat their submissions on Ground 12 of the Complaint.
- 1200.** In response to Particular 26.2(f)(1), attributing to Mr Levy's fitness and propriety the Club's alleged failure to comply with legislative, industrial, and administrative requirements arising from the *ClubsNSW Guidelines*, the Ex-Officers submit that these guidelines are not enforceable – they are "best practice" guidelines only.
- 1201.** In response to Particular 26.2(f)(2), attributing to Mr Levy's fitness and propriety the alleged failure to ensure that all appropriate compliance frameworks and controls are in place (a duty said to arise from the *ClubsNSW Guidelines*), the Ex-Officers submit that these guidelines are not enforceable – they are "best practice" guidelines only and any breach of these Guidelines cannot amount to a finding that any of the Ex-Officers are not fit and proper persons. The Ex-Officers also refer to and repeat their submissions in response to Grounds 1 through 24 of the Complaint.
- 1202.** In response to Particular 26.2(g)(1), attributing to Mr Levy's fitness and propriety the Club's failure to ensure that members of the Board were elected annually (as required by the Club's Articles of Association), the Ex-Officers refer to and repeat their submissions on Ground 10 of the Complaint.
- 1203.** In response to Particular 26.2(g)(2) attributing to Mr Levy's fitness and propriety the Club's failure to ensure that the Club held an AGM each year (as required by the Club's Articles of Association), the Ex-Officers refer to and repeat their submissions on Ground 12 of the Complaint. The Ex-Officers contend that Mr Wily was in charge

of the Club and that the Ex-Officers “had no power to alter” Mr Wily’s conduct. On this basis, they argue that no question of fitness and propriety arises on the part of any of the Ex-Officers.

- 1204.** In response to Particular 26.2(h)(1), attributing to Mr Levy’s fitness and propriety the Club’s failure to maintain its register of disclosures prior to 1 January 2013, the Ex-Officers refer to and repeat their submissions on Grounds 4.3 and 4.4 of the Complaint.
- 1205.** In response to Particular 26.2(h)(2), attributing to Mr Levy’s fitness and propriety the Club’s alleged conduct of “high risk” practices, the Ex-Officers submit, in respect of Mr Levy’s practice of pre-signing cheques, that this practice was only in place in the event that prizes needed to be paid and Mr Levy was not available at the time. The Ex-Officers refer to Mr Levy’s statutory declaration dated 28 May 2015 which states that this practice ceased once Mr Levy was advised by Mr Michael Bulgin, the Club’s Auditor, that this practice was not appropriate. [The Authority notes that Mr Levy’s statutory declaration does not specify when this occurred.]
- 1206.** In response to Particular 26.2(h)(3), attributing to Mr Levy’s fitness and propriety the Club’s failure to maintain an assets register prior to 18 July 2014, the Ex-Officers submit that it was Mr Wily’s responsibility to keep the assets register, but that in any event, there is “nothing” in the Act or Regulation that requires any club to keep an assets register.

#### **Kirk’s Response to Ground 26**

- 1207.** Mr Kirk did not make any specific submissions in response to Ground 26 of the Complaint.

#### **Wily’s Response to Ground 26**

- 1208.** Mr Wily did not make any specific submissions in response to Ground 26 of the Complaint.

#### **Authority Findings on Ground 26**

- 1209.** Particular 26.1 is established. It is contended in the Complaint Letter and is not in dispute that Mr Marcus Levy was appointed the secretary of the Club on or about **26 October 2004** and acted in this capacity until **3 October 2007**.
- 1210.** Particular 26.2 makes the broad allegation that during this period, Mr Levy “failed to exercise his duties as a secretary with a degree of knowledge, ability, care and diligence”. This broad allegation is in turn founded upon numerous specific allegations contained within the sub-Particulars of Particular 26.2.
- 1211.** Notably, unlike all the other Ex-Officers, the Complainant does not attribute to Mr Levy’s fitness those numerous acts of non-compliance by the Club that are identified under Grounds 1 to 24 of the Complaint.
- 1212.** Rather, the Complainant provides a discrete set of allegations against Mr Levy in the Particulars for Ground 26. The Authority makes the following findings on those Particulars.

#### Particular 26.2(a)

- 1213.** Particular 26.2(a) attributes to Mr Levy's fitness and propriety the Club's failure to maintain the minimum number of ordinary members prescribed by section 12 of the Act between 31 May 2004 and 30 June 2010, and since July 2014.
- 1214.** The Authority notes that the Ex-Officers repeat their submissions on Ground 1 of the Complaint in response to this Particular.
- 1215.** The Authority notes that Ground 1 is established against the Club. Particular 26.2(a) is established on the basis of the evidence or material referred to in the Authority's findings on Ground 1 of the Complaint.
- 1216.** The Authority notes that this non-compliance occurred during Mr Levy's tenure as Club secretary between October 2004 and October 2007. Mr Levy was not secretary since July 2014 so the Club's non-compliance during that period does not apply to Mr Levy.
- 1217.** The Authority is satisfied that as the secretary and chief executive officer of the Club from October 2004 to October 2007, Mr Levy was ultimately responsible for the Club's compliance with the licensing legislation.
- 1218.** While Mr Levy no longer serves on the governing body of the Club in any capacity, the Authority is satisfied that the regulatory non-compliance alleged by Particular 26.2(a) has been established and the Club's non-compliance does reflect adversely upon the extent to which Mr Levy has demonstrated, during his tenure as Club secretary, the requisite degree of knowledge and/or ability to serve as the secretary of the registered club during the relevant period.

#### Particular 26.2(b)

- 1219.** Particular 26.2(b) attributes to Mr Levy's fitness and propriety the Club's non-compliance with section 41L of the Act in that he permitted the Club to enter into a contractual arrangement with MLM, a company of which Mr Levy was the sole director and had the capacity to determine the outcome of decisions about the financial and operating policies of the company.
- 1220.** This Particular is established on the basis of the evidence or material referred to in the Authority's findings on Particular 5.5 of the Complaint.
- 1221.** In relation to this Particular, the Authority does not accept as an adequate response the Ex-Officers' submission that Mr Wily was responsible for ensuring compliance with the legislative requirements of section 41L of the Act by reason that he was the administrator of the Club.
- 1222.** The Authority notes that this non-compliance occurred during Mr Levy's tenure as Club secretary between October 2004 and October 2007.
- 1223.** The Authority is satisfied, on the basis of the copy of the MLM Deed that forms part of the Complainant's evidence (Complainant Exhibit E149) that the contract between MLM and the Club was entered into on 1 February 2007.

- 1224.** Mr Levy, as the secretary of the Club at the time, was ultimately responsible for the Club's compliance with the licensing legislation.
- 1225.** The Authority notes that the relevant agreement was entered into more than 8 years ago and Mr Levy no longer serves on the governing body of the Club in any capacity. Nevertheless, the non-compliance alleged by Particular 26.2(b) is established as an incident of Mr Levy's lack of knowledge and ability as a club secretary at that time.

Particular 26.2(c)

- 1226.** Particular 26.2(c) attributes to Mr Levy's fitness and propriety a failure to ensure the Club operated in good faith as a club between 2002 and 2014. The Authority notes that the Ex-Officers repeat their submissions on Ground 8 of the Complaint in response to this Particular.
- 1227.** The Authority is satisfied that Particular 26.2(c) is established on the basis of the evidence or material referred to in the Authority's findings on Ground 8 of the Complaint and to the extent that Particulars 8.2, 8.3, 8.4, 8.6 and 8.7 have been established against the Club.
- 1228.** The Authority notes that this non-compliance occurred during Mr Levy's tenure as Club secretary between October 2004 and October 2007.
- 1229.** Mr Levy, as the secretary of the Club at the time, was ultimately responsible for the Club's compliance with the licensing legislation. While Mr Levy no longer serves on the governing body of the Club in any capacity, the non-compliance alleged by Particular 26.2(c) is established as an incident of Mr Levy's lack of knowledge and ability as a club secretary at that time.

Particular 26.2(d)

- 1230.** Particular 26.2(d) attributes to Mr Levy's fitness and propriety a failure to ensure the Club maintained a register of all disclosures required under Part 4A of the Act for the relevant financial years, prior to 1 January 2013. This Particular is established on the basis of the evidence or material referred to in the Authority's findings on Ground 4 of the Complaint and to the extent that the Particulars of Ground 4 of the Complaint have been established.
- 1231.** The Authority notes that this non-compliance occurred during Mr Levy's tenure as Club secretary between October 2004 and October 2007.
- 1232.** Mr Levy, as the secretary of the Club at the time, was ultimately responsible for the Club's compliance with the licensing legislation. While Mr Levy no longer serves on the governing body of the Club in any capacity, the non-compliance alleged by Particular 26.2(d) is established as an incident of Mr Levy's lack of demonstrated knowledge and ability as a club secretary at that time.

Particular 26.2(e)

- 1233.** Particular 26.2(e) attributes to Mr Levy's fitness and propriety a failure to ensure the Club held annual elections for the appointment of the members of the governing body, in 2007, 2009 and 2010. The Authority is satisfied that this Particular is



established on the basis of the evidence or material referred to in the Authority's findings on Ground 12 of the Complaint, to the extent that Ground 12 of the Complaint is established.

- 1234. The Authority notes that this non-compliance occurred during Mr Levy's tenure as Club secretary between October 2004 and October 2007, in respect of the failure to hold an AGM in 2007.
- 1235. Mr Levy, as the secretary of the Club at the time, was ultimately responsible for the Club's compliance with the licensing legislation. While Mr Levy no longer serves on the governing body of the Club in any capacity, the non-compliance alleged in Particular 26.2(e) is established as an incident of Mr Levy's lack of demonstrated knowledge and ability as a club secretary at that time.

Particular 26.2(f)

- 1236. With respect to Particular 26.2(f) which attributes to Mr Levy's fitness and propriety an alleged failure to ensure the Club's compliance with *ClubsNSW Guidelines*, the Authority accepts the Ex-Officers' submission that these documents are guidelines that provide advice on "best practice", but do not prescribe minimum legal rules in respect of which non-compliance may found an independent ground of complaint.
- 1237. Industry guidelines provide a useful framework for the training of club officers and staff and may, in their terms, provide a plain English guide to minimum statutory requirements. A good working knowledge of *ClubsNSW Guidelines* on the part of club directors or senior executives may have the collateral benefit of enhancing knowledge and skill and provide a means by which regulated officers become aware of and refresh themselves as to regulatory requirements and avoid managing club premises in a manner that exposes an enterprise to systemic risk and/or regulatory action.
- 1238. *ClubsNSW Guidelines* may also provide a source of evidence as to what the industry considers to be best practice with regard to the content of a regulatory duty that is the subject of a statutory requirement.
- 1239. The chief executive officer and secretary of a registered club has greater operational responsibility over the day to day affairs of a registered club than the members of its governing body.
- 1240. A secretary of a club that is a member of *ClubsNSW* may be expected to possess a reasonable working knowledge of that organisation's Guidelines. If not, this may assist to support a conclusion that some identified failing by a club to satisfy a statutory requirement was the product of a lack of knowledge or skill on the part of its secretary.
- 1241. However, the Authority does not need to make findings on the sub-Particulars of Particular 26.2(f) by reason that it is not satisfied that non-compliance with individual *ClubsNSW Guidelines* gives rise to an independent ground for disciplinary action and by reason of the findings made with respect to Mr Levy's responsibility for the Club's non-compliance with licensing legislation during his tenure as Club secretary.

Particular 26.2(g)

- 1242.** Particular 26.2(g) attributes to Mr Levy's fitness and propriety the Club's non-compliance with the Club's Articles of Association during 2007 and between 2009 and 2013. Noting that Mr Levy was no longer the Club secretary after October 2007 (and that the Club's non-compliance cannot be attributed to his role as secretary after that date), the Authority makes the following findings on the sub-Particulars of Particular 26.2(g).
- 1243.** Particular 26.2(g)(1) attributes to Mr Levy's fitness and propriety the failure by the Club to ensure that the members of its Board were elected annually.
- 1244.** The Authority notes that this requirement was provided for by the Club's Articles of Association, specifically Article 28 of the Articles of Association for the Club (Complainant Exhibit E085). Noting that Mr Levy was secretary from October 2004 to October 2007 only, any contravention of the Club's Articles of Association that occurred after he ceased acting as secretary cannot be attributed to his fitness and propriety as a club secretary.
- 1245.** The Authority is satisfied, on the basis of the Articles of Association; the statements made by Robert Ashton Jnr at page 27 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182) and the evidence or material referred to in the Authority's findings on Ground 12 above that members of the Board were not elected annually, as required by Article 28 of the Articles of Association, in 2007 (which the Authority notes occurred during Mr Levy's tenure as Club secretary).
- 1246.** This non-compliance reflects adversely upon the extent to which Mr Levy has demonstrated the degree of knowledge and ability that would reasonably be expected of the secretary of a registered club.
- 1247.** Particular 26.2(g)(2) attributes to Mr Levy a failure to ensure the Club held an *annual general meeting* of the members each year. This Particular is established on the basis of Article 49 of the Articles of Association for the Club (Complainant Exhibit E085) and the evidence or material referred to in the Authority's findings on Ground 12 above.
- 1248.** The Authority notes that this aspect of the Club's non-compliance occurred during Mr Levy's tenure as Club secretary between October 2004 and October 2007, in that no annual general meeting occurred in 2007.
- 1249.** While the Authority accepts the contention made by the Ex-Officers that Mr Levy no longer serves on the governing body of the Club in any capacity, the non-compliance alleged by Particular 26.2(g) is established and it is a further adverse incident going to the extent to which Mr Levy demonstrated the extent of knowledge and ability to be expected of a club secretary.
- 1250.** The Authority does not accept the Ex-Officers' submission that the issues that are the subject of this Particular arose during the administration of the Club and as such, were the responsibility of Mr Wily.

- 1251.** The Authority notes that while the Club was under voluntary administration from 24 October 2002 to 24 March 2003, the powers of the officers of the Club were suspended, pursuant to section 437C(1) of the *Corporations Act 2001*.
- 1252.** However, when the Deed of Company Arrangement was signed on 24 March 2003, the Club was no longer under voluntary administration, for the purposes of section 435C of the *Corporations Act 2001*. The Authority notes that the Ex-Officers then resumed their powers and obligations in relation to the Club's governance as of that date, subject to the terms of the Deed of Company Arrangement.
- 1253.** Particular 26.2(g), attributing to Mr Levy's fitness and propriety the Club's alleged non-compliance with the Club's Articles of Association, is established. To the extent that such non-compliance occurred during Mr Levy's tenure – that is, between October 2004 and October 2007 – these are matters that reflect adversely upon Mr Levy's knowledge and ability as a club secretary.
- 1254.** The requirements to maintain elections and to conduct annual general meetings are, in the Authority's opinion, substantial aspects of corporate governance. Mr Levy and the members of the governing body at the relevant time share responsibility for not ensuring the Club's compliance with its Articles of Association.

Particular 26.2(h)

- 1255.** Particular 26.2(h) attributes to Mr Levy's fitness and propriety an alleged lack of internal controls and procedures at the Club.
- 1256.** The Authority notes that the allegations the subject of Particular 26.2(h) occurred during Mr Levy's tenure as Club secretary between October 2004 and October 2007.
- 1257.** Mr Levy, as the secretary and chief executive officer of the Club at the time, was ultimately responsible for the Club's maintenance of internal controls and procedures at the Club. While Mr Levy no longer serves on the governing body of the Club in any capacity, the non-compliance alleged by Particular 26.2(g) is established as an incident of Mr Levy's lack of knowledge and ability as a club secretary at that time.
- 1258.** The Authority does not accept the Ex-Officers' submission that the issues that are the subject of this Particular arose during the administration of the Club and as such, remain the responsibility of Mr Wily.
- 1259.** The Authority notes that while the Club was under voluntary administration, the powers of the officers of the Club were suspended, pursuant to section 437C(1) of the *Corporations Act 2001*. However, when the Deed of Company Arrangement was signed on 24 March 2003, the Club was no longer under administration, through the operation of section 435C of the *Corporations Act 2001*. The Authority notes that with the commencement of the DOCA, the Ex-Officers resumed their powers and obligations in relation to the Club's governance as of that date, subject to the terms of the Deed of Company Arrangement.
- 1260.** The Authority makes the following findings on the sub-Particulars of Particular 26.2(h).

- 1261.** Particular 26.2(h)(1), which attributes to Mr Levy's fitness and propriety the Club's failure to maintain the Club's register of disclosures (during the time of his tenure as secretary between October 2004 and October 2007), is established. This finding is made on the basis of the letter from Michael Bulgin, Club Auditor to the Club dated 29 September 2005 (Complainant Exhibit E101); the letter from Michael Bulgin, Club Auditor to the Club dated 8 October 2007 (Complainant Exhibit E102) and the evidence or material referred to in the Authority's findings on Particular 4.3 above.
- 1262.** Particular 26.2(h)(2) attributes to Mr Levy's fitness and propriety the Club maintaining certain "high risk practices" including a failure to maintain a register of disclosures and pre-signing cheques. The Authority is satisfied that the Club engaged in a high risk practice of pre-signing cheques and that this Particular is established, on the basis of the letter from Michael Bulgin, Club Auditor to the Club dated 8 October 2007 (Complainant Exhibit E102).
- 1263.** Particular 26.2(h)(3) attributes to Mr Levy's fitness and propriety the Club's failure to maintain an assets register prior to 18 July 2014. The Authority is satisfied that the Club did not maintain an assets register on the basis of the statements made by Allan Teale at pages 30 to 31 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E183).
- 1264.** The Authority accepts the submission from the Ex-Officers that there is no statutory duty to maintain an assets register, but it is a common practice of clubs and other businesses to maintain a register of assets in the prudent exercise of financial control of an enterprise. It is surprising that the Club did not maintain such a register and the Authority accepts, as alleged by the Complainant, that not doing so represents a significant lack of internal controls and procedures.
- 1265.** Having considered the Authority's findings with regard to the Particulars specified in Ground 26 as they applied to Mr Levy's tenure as Club secretary, the Authority is satisfied that Ground 26 has been established and that Mr Marcus Levy is not a fit and proper person to be a secretary of the registered club, by reason that the Complainant has established that he did not demonstrate the degree of knowledge, ability, care and diligence that the Authority would expect from a reasonably competent secretary of the registered club.
- 1266.** The Authority notes that, during the time the Club was subject to the Deed of Company Arrangement from 24 March 2003 and the Amended Deed of Company Arrangement from 10 December 2010, these documents imposed certain restrictions upon the discretion of the governing body in that they could not act contrary to those agreements.
- 1267.** While the degree of responsibility for the Club's affairs may be reduced to the extent that certain aspects of Club governance required the consent of the Deed Administrator, Mr Wily – this does not provide a complete excuse for Mr Levy's failure to ensure that the Club complied with relevant legislation, as the Club Board and secretary did have a role to play during the currency of the DOCA and ADOCA. It is certainly no excuse for an absence of knowledge of the legislative requirements to which the Club was subject.
- 1268.** In making this finding, the Authority has taken into account the age of the matters attributable to an assessment of Mr Levy's fitness and propriety, and that Mr Levy

ceased to serve on the governing body of the Club in any capacity from October 2007.

1269. The Authority notes that there is no basis for impugning Mr Levy's honesty arising from the findings made against Mr Levy in respect of this Ground of the Complaint.

## **GROUND 27**

1270. Ground 27 alleges as follows:

***Section 57F(3)(g) – The Secretary or a member of a governing body is not a "fit and proper" person to act as such.***

*By reason of the conduct of Mr Wily whilst acting as the purported administrator of the Club, he is not a "fit and proper" person to hold such a position.*

1271. Particular 27.1 of Ground 27 alleges as follows:

*On or about 20 September 2002 Mr Wily was appointed to act as Receiver Manager of the Club by the Supreme Court of New South Wales.*

1272. Particular 27.2 of Ground 27 alleges as follows:

*On or about 24 October 2002 Mr Wily was purportedly appointed to act as administrator of the Club in circumstances where there is no record of Mr Wily being appointed to act in this capacity by:*

- (1) the Supreme Court of NSW; or*
- (2) the former Licensing Court; or*
- (3) the Authority.*

1273. Particular 27.3 of Ground 27 alleges as follows:

*Mr Wily failed to act with care, diligence and skill in failing to ensure he was appointed as administrator of the Club as required by Section 41 of the Act.*

1274. Particular 27.4 of Ground 27 alleges as follows:

*During the period from on or about 8 August 2003 until on or about 26 October 2004, there was no appointed Secretary of the Club holding approval of the Authority to act as Secretary of the Club.*

1275. Particular 27.5 of Ground 27 alleges as follows:

*During the period from on or about 8 August 2003 until on or about 26 October 2004, Mr Wily acted as Secretary of the Club.*

1276. Particular 27.6 of Ground 27 alleges as follows:

*While acting as administrator, Mr Wily managed the operations of the Club as a member of the governing body.*

1277. Particular 27.7 of Ground 27 alleges as follows:

*Mr Wily continued to act as purported administrator of the Club until 18 May 2012.*

**1278.** Particular 27.8 of Ground 27 alleges as follows:

*From 20 September 2002 until 18 May 2012, Mr Wily failed to exercise his duties as a Secretary and as a member of the governing body with a degree of knowledge, ability, care and diligence, by reason of:*

- (a) *The non-compliance with the legislation outlined in paragraphs 1-5, 7-10, 12, 18-19 and 24 above.*
- (b) *The non-compliance with ClubsNSW Guidelines:*
  - (1) *Failure to comply with any relevant legislative, industrial or administrative requirement, and keep up to date with any changes.*
  - (2) *Failure to maintain adequate documentation to support decisions made by the governing body.*
  - (3) *Failure to obtain value for Club money spent and avoid waste and extravagance in the use of Club resources:*
    - (A) *the Club engaged VSM to provide marketing services at a cost of*
      - i. \$212,247.00 for the financial year 2009-10;*
      - ii. \$194,601.00 for the financial year 2010-11;*
      - iii. \$184,435.00 for the financial year 2011-12; and*
      - iv. \$220,543.00 for the financial year 2012-13.*
  - (4) *Failure to report to members and ensure all regulatory requirements are met.*
  - (5) *Failure to ensure all appropriate compliance frameworks and controls are in place.*
  - (6) *Failure to ensure the Club obtained value for money when making procurement decisions:*
    - (A) *the Club did not undertake a tender process when engaging accounting and marketing services.*
- (c) *The non-compliance with the Articles of Association of the Club:*
  - (1) *Failure to ensure the members of the Board were elected annually.*
  - (2) *Failure to ensure the Board met at least once in every month.*
  - (3) *Failure to ensure the required quorum of 5 members of the Board was met for each meeting:*
    - (A) *in 2011, on 5 occasions, meetings held of the governing body did not consist of a quorum of 5 members as follows:*
      - i. 1 February, 28 February, March, September and October 2011.*
  - (4) *Failure to ensure the Club held an annual general meeting of members each year.*
- (d) *The lack of internal controls and procedures.*
  - (1) *The Club Auditor was unable to form an unqualified opinion of the Club's financial accounts for the year ending 30 June 2011 due to poor internal controls and systems.*
  - (2) *Failure to maintain the Club's register of disclosures.*
  - (3) *Failure to maintain an assets register prior to 18 July 2014.*
  - (4) *Maintaining high risk practices including pre-signing cheques.*
  - (5) *Failure to ensure Club auditors provided reports each year:*
    - (A) *the Auditor's Reports for the years ending 30 June 2009 and 30 June 2010 are dated 27 May 2011; and*
    - (B) *the Auditor's Report for the year ending 30 June 2011 is dated 2 April 2014.*

### **Club's Response to Ground 27**

**1279.** The Club did not provide a response to Ground 27 of the Complaint.

### **Ex-Officers' Response to Ground 27**

**1280.** The Ex-Officers did not provide a response to Ground 27 of the Complaint.

### **Kirk's Response to Ground 27**

**1281.** Mr Kirk did not provide a response to Ground 27 of the Complaint.

### **Wily's Response to Ground 27**

- 1282.** In response to Particular 27.1, Mr Wily refers to his above submissions on Particular 24(a) of the Complaint.
- 1283.** In response to Particular 27.2, Mr Wily refers to his above submissions on Particular 24(c) of the Complaint and submits that it "cannot be concluded" that Mr Wily was not validly appointed as administrator of the Club on or about 24 October 2002.
- 1284.** In response to Particular 27.3, Mr Wily submits that Ground 24 is concerned with the alleged contravention by the *Club* of section 41 of the Act and that it does not relate to Mr Wily's care, diligence and skill.
- 1285.** Mr Wily refers to his submissions on Ground 24 and contends that, to the extent that Ground 24 alleges a contravention by the Club of section 41 of the Act, it "cannot succeed".
- 1286.** Mr Wily submits that section 41(1) of the Act, as it was at that time, imposed no obligation upon Mr Wily to fulfil the "precondition" of prior approval from a Court.
- 1287.** Mr Wily submits that the Club appointed him as the Club's administrator under section 436A(1) of the *Corporations Act*. Mr Wily submits that he "did not, and could not have appointed [himself]" and that it cannot be concluded that Mr Wily was not validly appointed as administrator of the Club on or about 24 October 2002.
- 1288.** Mr Wily submits that Ground 27 concerns his fitness and propriety, but Particular 27.3 is only about Mr Wily's conduct *prior* to his appointment by the Club as administrator. Mr Wily argues that Particular 27.3 is outside the scope of Ground 27 of the Complaint.
- 1289.** In response to Particular 27.4, Mr Wily submits that this Particular is "misconceived" as the Authority did not exist in 2003. Mr Wily argues that even if "Licensing Court" were substituted for "Authority", there is still "no supporting evidence" to prove this Particular.
- 1290.** Mr Wily submits that the evidence relied upon by the Complainant lists former secretaries of the Club for the purposes of sections 1274A(3) and 1274A(4) of the *Corporations Act*, not for the purposes of section 33 of the Act.

- 1291.** In response to Particular 27.5, Mr Wily submits that the evidence provided by the Complainant “does not indicate anything” to suggest that Mr Wily acted in this capacity; he was acting only as “Deed Administrator and Receiver and Manager”.
- 1292.** Mr Wily submits that the (then) provisions of Part 4 of the Act, especially sections 33(1) and 41(1), state that an external administrator may be appointed to a Club *without* thereby becoming the secretary of the Club. Mr Wily notes that there was no allegation made by the Complainant that Mr Wily’s appointment as administrator of the Deed of Company Arrangement (**DOCA**) for the Club was invalid.
- 1293.** In response to Particular 27.6, Mr Wily submits that this Particular is “misconceived”. While Mr Wily was acting as administrator of the Club (between 24 October 2002 and 24 March 2003 only) he did not act as a member of the governing body. Mr Wily contends that he exercised powers under the *Corporations Act* during this period *to the exclusion of the governing body of the Club* and was “properly discharging” his obligations under the *Corporations Act*.
- 1294.** In response to Particular 27.7, Mr Wily submits that under the *Corporations Act* as at 24 October 2002, the definition of “administrator” in section 9 drew a distinction between an administrator in relation to a body corporate and an administrator in relation to a DOCA. Mr Wily submits that when this definition is compared with the terms of section 41(1) of the Act as at 24 October 2002, it is referring *only* to an administrator in relation to a body corporate and *not* also to an administrator in relation to a deed of company arrangement.
- 1295.** Mr Wily submits that the administration of the Club ended when a DOCA was entered into on 24 March 2003 through the operation of section 435C of the *Corporations Act*. Therefore, Mr Wily argues that he ceased to be the administrator of the Club on 24 March 2003, not 18 May 2012, as alleged by the Complainant.
- 1296.** In response to Particular 27.8, Mr Wily submits that Ground 27 is about his conduct in the capacity of “purported administrator of the Club”, not of “Secretary”.
- 1297.** Mr Wily refers to his submissions on Particulars 27.1 through 27.7 above and submits that he did not act as secretary or as a member of the governing body of the Club at any time. Mr Wily contends that, of their very nature, his appointments as Receiver Manager, then later as Administrator, “were sole ones”.
- 1298.** Mr Wily submits that Ground 27 of the Complaint should be dismissed in its entirety.

#### **Authority Findings on Ground 27**

- 1299.** Particular 27.1 alleges that on or about 20 September 2002, Mr Wily was appointed to act as Receiver Manager of the Club by the Supreme Court of New South Wales. As noted above, the Authority is satisfied that this Particular is established on the basis of the ASIC extract for the Club dated 2 December 2014 (Complainant Exhibit E094) and the *Short Minutes of Order of the Supreme Court of New South Wales in the Matter of Paddington Bowling Club Ltd* dated 20 September 2002 indicating Mr Wily’s appointment as Receiver and Manager of the Club (Complainant Exhibit E166).



- 1300.** The Authority notes and accepts Mr Wily's statement in his submission dated 26 March 2015 that he was appointed as Receiver Manager of the Club on 19 September 2002, and not 20 September 2002, as alleged by the Complainant.
- 1301.** Particular 27.2 alleges that on or about 24 October 2002, Mr Wily was "purportedly appointed" to act as Administrator of the Club in circumstances where there is no record of Mr Wily being actually "appointed" to act in this capacity by either the Supreme Court of NSW, the former Licensing Court, or the Authority.
- 1302.** As noted above, the Authority is satisfied, on the basis of the ASIC extract for the Club dated 2 December 2014 (Complainant Exhibit E094), that Mr Wily was purportedly appointed by the Club Board to act as the Administrator of the Club on 24 October 2002. However, as discussed in relation to Ground 24, the pleading in Particular 27.2 is defective in that it does not distinguish between the function of *appointing* an insolvency professional in a relevant role and the requirement for such appointment to be *approved by* the licensing regulator (the Authority or its predecessor), unless such appointment was made by the Supreme Court of New South Wales.
- 1303.** While the Authority accepts that no "appointment" of Mr Wily as voluntary administrator was made by the New South Wales Supreme Court, the New South Wales Licensing Court or the Authority, little turns on this. The Complainant may have *intended* to allege that Mr Wily's appointment as voluntary administrator was not approved by the New South Wales Licensing Court as required by the then section 41(1) of the Act, but that is not how the Particular has been specified.
- 1304.** Particular 27.3 then alleges that Mr Wily failed to act with care, diligence and skill in failing to ensure he was appointed as administrator of the Club as required by section 41 of the Act. The Authority notes that the Complainant relies upon the evidence or material referred to in Ground 24 above in support of this contention.
- 1305.** The Authority has reviewed all of the evidence, material and submissions provided by the parties in relation to Particular 27.3 and is not satisfied that there is any evidence to suggest that Mr Wily was appointed to, or acted in, the capacity of "secretary" of the Club, which is the statutory basis of Ground 27.
- 1306.** Particular 27.4 alleges that there was no appointment as secretary of the Club between about 8 and 26 October 2004. Particular 27.5 alleges that during that period, Mr Wily acted as secretary of the Club. Particular 27.6 then alleges that while acting as "administrator", Mr Wily managed the operations of the Club "as a member of the governing body". Particular 27.7 alleges that Mr Wily continued to act as purported administrator until 18 May 2012. Particular 27.8 then alleges that from 20 September 2002 until 18 May 2012, Mr Wily failed to exercise his "duties as a secretary and as a member of the governing body" with a degree of knowledge, ability, care and diligence" by reason of the matters pleaded in the sub-Particulars of Particular 27.8.
- 1307.** However, having considered the evidence identified by the Complainant and the submissions of Mr Wily, the Authority is not satisfied that Mr Wily ever served as the Club's secretary during the relevant period, and was not a member of the governing body either – not having been elected or appointed to either role.

- 1308.** The Authority notes and accepts Mr Wily's submission that the (then) provisions of Part 4 of the Act, particularly sections 33(1) and 41(1), stated that an external administrator may be appointed to a Club without thereby becoming the secretary of the Club. The Authority further notes that there is no allegation made by the Complainant that Mr Wily's appointment as Deed Administrator in respect of the DOCA was invalid.
- 1309.** The difficulty the Authority has with Ground 27 is that while many of the allegations may be factually correct, Mr Wily was not the Club secretary, nor was he a member of the governing body. To the extent that the Particulars specified in Ground 27 are intended to establish that Mr Wily failed to exercise his duties as a club secretary with the requisite degree of knowledge, ability, care and diligence, this Ground is misconceived.
- 1310.** The Authority is not satisfied that there is sufficient evidence that Mr Wily was ever approved to act, or was purportedly appointed to act, as the Club's secretary or as a member of the governing body of the Club, pursuant to sections 33 and 34 of the Act.
- 1311.** As noted above, the Authority is satisfied, as alleged by the Complainant (and not denied by Mr Wily or the Club), that Mr Wily was appointed, or purportedly appointed, by the Club Board to serve as the Club's *Administrator* when the Club entered into voluntary administration on 24 October 2002.
- 1312.** The Authority is further satisfied that from 24 March 2003 until 18 May 2012, Mr Wily served as administrator of the two deeds of company arrangement that were entered into on 24 March 2003 and 10 December 2010 respectively.
- 1313.** The Authority is not satisfied that there is sufficient evidence establishing that Mr Wily was appointed to act or purported to act, or held himself out as the Club's secretary or a member of the Club's governing body.
- 1314.** Ground 27 is not available to be specified in relation to Mr Wily's fitness as a company administrator or deed administrator. Ground 27 is based upon the statutory ground provided by section 57F(3)(g) of the Act, that:
- Section 57F(3)(g) – The Secretary or a member of a governing body is not a "fit and proper" person to act as such.*
- 1315.** As Mr Wily did not act in either capacity, the Authority does not have the jurisdiction under section 57F(3)(g) of the Act to consider his fitness as an administrator, or a deed administrator in relation to a registered club.
- 1316.** The scope and purpose of the Act does not extend to dealing with persons acting in the capacity of administrator or deed administrator, within the meaning of the *Corporations Act*. In those circumstances, there is no utility in making findings on the rest of the allegations in Ground 27.
- 1317.** Ground 27 is *not* established.

## **GROUND 28**

- 1318.** Ground 28 alleges as follows:

**Section 57F(3)(g) – A member of the governing body of the Club is not a "fit and proper" person to act as such.**

**1319.** Particular 28.1 of Ground 28 alleges as follows:

*By reason of the conduct of Mr Teale whilst a member of the governing body of the Club he is not a "fit and proper" person to hold such a position.*

**1320.** Particular 28.2 of Ground 28 alleges as follows:

*Mr Teale was elected to the governing body on 12 December 2006 as a Director of the Club and currently holds that position.*

**1321.** Particular 28.3 of Ground 28 alleges as follows:

*Since 12 December 2006, Mr Teale failed to exercise his duties as a member of the governing body with a degree of knowledge, ability, care and diligence, by reason of:*

- (a) The non-compliance with the legislation outlined in paragraphs 1-24 above.*
- (b) The non-compliance with ClubsNSW Guidelines:*
  - (1) Failure to ensure the Board determined, agreed and offered a remuneration package to the Secretary.*
  - (2) Failure to ensure key performance indicators were developed and clearly expressed in the contract of the Secretary.*
  - (3) Failure to be aware of, and comply with, any legislative requirements that pertain to executive remuneration.*
  - (4) Failure to ensure the employment contract of the Secretary was approved by the Board.*
  - (5) Failure to ensure the performance of the Secretary is reviewed periodically, at least annually, and assessed against clear KPI's in the employment contract.*
  - (6) Failure to comply with any relevant legislative, industrial or administrative requirement, and keep up to date with any changes.*
  - (7) Failure to obtain value for Club money spent and avoid waste and extravagance in the use of Club resources:*
    - (A) the Club purchased and maintains motor vehicles that are rarely used by the Club;*
    - (B) the Club reimbursed unapproved expenses of members of the governing body;*
    - (C) the Club engaged VSM to provide marketing services at a cost of:*
      - i. \$212,247.00 for the financial year 2009-10;*
      - ii. \$194,601.00 for the financial year 2010-11;*
      - iii. \$184,435.00 for the financial year 2011-12;*
      - iv. \$220,543.00 for the financial year 2012-13; and*
      - v. \$240,636.00 for the financial year 2013-14.*
    - (D) the Club purchased \$5,000.00 in MasterCard Gift Cards for staff Christmas bonuses in 2012;*
    - (E) the Club purchased \$10,000.00 in Woolworths Gift Cards for staff Christmas bonuses in 2013:*
      - i. there is no minute of a meeting of the governing body approving this purchase in accordance with the Club's Purchasing and Tendering Policy.*
  - (8) Failure to provide strategic direction to the Club by constructive engagement in the development, execution and modification of the Club's strategy:*

- (A) *the Club has produced a five year plan for the improvement of the Crown Asset rather than a strategy to further the Club's purpose of providing accommodation for its members and their guests.*
- (9) *Failure to report to members and ensure all regulatory requirements are met.*
- (10) *Failure to ensure all appropriate compliance frameworks and controls are in place.*
- (11) *Failure to ensure the Club obtained value for money when making procurement decisions:*
  - (A) *the Club did not undertake a tender process when engaging accounting and marketing services.*
- (12) *Failure to ensure the Club benchmarked the core activities of bar, food and gaming.*
- (c) *The non-compliance with the Articles of Association of the Club.*
  - (1) *Failure to ensure membership applications were posted on the Notice Board for at least seven days prior to the date of the meeting to consider the application, and at least 14 days lapse between the date of application and the date of election.*
  - (2) *Failure to ensure members who were not financial were removed from membership register.*
  - (3) *Failure to ensure the members of the Board were elected annually.*
  - (4) *Failure to ensure the Board met at least once in every month.*
  - (5) *Failure to ensure the required quorum of five members of the Board was met for each meeting:*
    - (A) *in 2011, on 5 occasions, meetings held of the governing body did not consist of a quorum of five members as follows;*
      - i. *1 February, 28 February, March, September and October 2011.*
    - (B) *in 2014, on three occasions, meetings held of the governing body did not consist of a quorum of five members as follows;*
      - i. *March, April and June 2014.*
  - (6) *Failure to ensure the Club held an annual general meeting of members each year.*
- (d) *The lack of internal controls and procedures:*
  - (1) *The Club Auditor was unable to form an unqualified opinion of the Club's financial accounts for the year ending 30 June 2011 due to poor internal controls and systems.*
  - (2) *Failure to maintain the Club's register of disclosures.*
  - (3) *Failure to ensure a current governing body resolution approved the payment of expenses to members of the governing body.*
  - (4) *Maintaining high risk practices including paying expenses of directors in cash directly from the safe and pre-signing cheques.*
  - (5) *Failure to maintain an assets register prior to 18 July 2014.*
  - (6) *Failure to ensure Club auditors provided reports each year:*
    - (A) *the Auditor's Reports for the years ending 30 June 2009 and 30 June 2010 are dated 27 May 2011;*
    - (B) *the Auditor's Report for the year ending 30 June 2011 is dated 2 April 2014; and*
    - (C) *the Auditor's Report for the years ending 30 June 2012 and 30 June 2013 are dated 6 November 2014.*

## **Club's Response to Ground 28**

**1322.** The Club did not provide a response to Ground 28 of the Complaint.

## **Ex-Officers' Response to Ground 28**

- 1323.** The Authority notes that Particular 28.2 of the Complaint (specifying the dates of Mr Teale's employment at the Club as a director) is not disputed by the Ex-Officers.
- 1324.** In response to Particular 28.3(a), the Ex-Officers refer to their submissions on Grounds 1 through 24 of the Complaint.
- 1325.** In response to Particular 28.3(b)(1), regarding the failure of the Board to determine the remuneration package to the Club's secretary, the Ex-Officers repeat their submissions on Ground 5.2 of the Complaint. The Ex-Officers submit that Mr Wily was responsible for this under the terms of the DOCA and ADOCA and that the Ex-Officers "did not have the power" to achieve the outcome required by the Guidelines.
- 1326.** In response to Particulars 28.3(b)(2), (3), (4) and (5), regarding the secretary's contract and Key Performance Indicators (**KPIs**), the Ex-Officers repeat their submissions on Particular 5.2 of the Complaint.
- 1327.** The Ex-Officers submit that Mr Wily was responsible and that the *ClubsNSW Guidelines* are not enforceable and are best practice guidelines only.
- 1328.** The Ex-Officers submit that they did not have any independent power to employ Mr Ashton Jnr and were only permitted to do so if they had received notice that Mr Wily had endorsed Mr Ashton Jnr's employment.
- 1329.** In response to Particular 28.3(b)(6), regarding the alleged failure to comply with legislative, industrial and administrative requirements, the Ex-Officers submit that the *ClubsNSW Guidelines* are not enforceable – they are best practice guidelines only.
- 1330.** In response to Particular 28.3(b)(7)(A), regarding the alleged failure to obtain value for Club money in relation to Club motor vehicles, the Ex-Officers refer to and repeat their submissions on Ground 3.1 of the Complaint.
- 1331.** In response to Particular 28.3(b)(7)(B), regarding the alleged failure to obtain value for Club money in relation to the reimbursement of unapproved expenses, the Ex-Officers refer to and repeat their submissions on Ground 3.4 of the Complaint.
- 1332.** In response to Particular 28.3(b)(7)(C) regarding the alleged failure to obtain value for Club money in relation to the engagement of VSM to provide marketing services for the Club, the Ex-Officers repeat their submissions on Ground 6 of the Complaint.
- 1333.** The Ex-Officers contend that engaging VSM represented a "substantial cost saving" for the Club, and refer to the transcript of the 41X inquiry (provided at Tab 64 of the Ex-Officers' Exhibits) which indicates that the marketing fees charged by VSM were significantly lower than those charged by the company previously retained to provide marketing services for the Club.

- 1334.** In response to Particulars 28.3(b)(7)(D) and (E), regarding the alleged failure to obtain value for Club money in relation to the payment of staff Christmas bonuses, the Ex-Officers submit that these bonuses were “not wasteful” and refer to the statement of Mr Ashton Jnr in his statutory declaration dated 28 May 2015 to the effect that the Christmas bonuses he recommended were always linked to performance, especially in cases where the employee was unlikely to receive any wage increase but worked extremely long hours. Mr Ashton Jnr also states that he received advice from the Federal Secretary of the *Club Managers Association Australia* that the payment of bonuses is industry standard.
- 1335.** The Ex-Officers concede, in relation to the above Particulars, that there was no minute of a meeting of the governing body approving the expenditure for staff Christmas bonuses, but submit that this will change in future. They contend that the staff bonuses paid out in 2014 were minuted and refer to Exhibit RJA4 (attached to Mr Ashton Snr’s statutory declaration dated 28 May 2015) which is a copy of the minutes of the Club Board meeting held on 22 December 2014 noting Board approval of Christmas bonuses to certain Club employees.
- 1336.** In response to Particular 28.3(b)(8), regarding the alleged failure by the Board to provide strategic direction to the Club, the Ex-Officers contend that marketing strategies were developed and implemented for increasing Club revenue, and refer to the statements of Mr Ashton Snr in his statutory declaration dated 28 May 2015. Mr Ashton Snr states that some marketing strategies employed by the Club included the engagement of Paul Kelly Design to redesign the clubhouse, and the implementation of a number of local community initiatives such as “Reading Time”.
- 1337.** In response to Particular 28.3(b)(9), regarding the alleged failure to report to members and ensure that regulatory requirements were met, the Ex-Officers refer to and repeat their submissions on Grounds 1 through 24 of the Complaint.
- 1338.** In response to Particular 28.3(b)(10), regarding the failure to ensure that all appropriate compliance frameworks and controls are in place, the Ex-Officers refer to and repeat their submissions on Grounds 1 through 24 of the Complaint.
- 1339.** In response to Particular 28.3(b)(11), regarding the failure to obtain value for money when making procurement decisions, the Ex-Officers submit that there is no requirement to undertake a tender process. The Ex-Officers refer to the Club’s submission that accounting and marketing services are not “major procurements” but rather “par for the course” in this context. The Club contends that, on a “proper construction” of section 6 of the Guidelines, that tender is “effectively a choice open to the Club to be made”.
- 1340.** In response to Particular 28.3(b)(12), regarding the failure to benchmark the core activities of bar, food and gaming, the Ex-Officers “accept” this allegation, but contend that any obligation to benchmark was the responsibility of Mr Wily during the period of the Club’s administration.
- 1341.** The Ex-Officers further submit that this failure to benchmark, which is not enforceable in any event, has not caused any detriment to the Club and that it is “clear” that the Club is “very competitive and successful in its marketplace”.

- 1342.** In response to Particular 28.3(c)(1), regarding the alleged failure to post membership applications to the Club's Notice Board, the Ex-Officers submit that the Complainant's wording is "misleading" in that it suggests multiple breaches where only one has occurred, being a failure with respect to posting Mr McKew's application.
- 1343.** The Ex-Officers "accept that the expedition of Mr McKew's application contravened Article 12" of the Club's Articles of Association, but submit that there are currently 2,460 members in respect of which applications were "appropriately considered and approved". The Ex-Officers submit that it would be "harsh and draconian" to find the Ex-Officers to be not fit and proper persons on account of "not following protocol in respect of one membership application out of thousands".
- 1344.** In response to Particular 28.3(c)(2), regarding the Club not removing non-financial members from the members register, the Ex-Officers submit that Article 23 of the Articles of Association is no longer in force, but the Ex-Officers had the power and authority and a discretion to remove members. The Ex-Officers submit that there is no "direction" under Article 23 that compels the removal of non-financial members. They note the use of the word "may" in Article 23 as opposed to terms such as "shall" or "will".
- 1345.** In response to Particular 28.3(c)(3), regarding the failure to ensure members of the Club's Board were elected annually, the Ex-Officers refer to and repeat their submissions on Ground 12 of the Complaint.
- 1346.** In response to Particular 28.3(c)(4), regarding the failure to ensure that the Board met at least once every month during Mr Teale's tenure as a director of the Club, the Ex-Officers refer to and repeat their submissions on Ground 10 of the Complaint. The Ex-Officers further contend that Mr Wily was in charge of the Club during administration and that the Ex-Officers "had no power to alter" Mr Wily's conduct and for this reason no question of the directors' fitness and propriety arises from this failure to conduct monthly Board meetings.
- 1347.** In response to Particular 28.3(c)(5), regarding the failure to maintain a quorum of the Club's governing body at Board meetings, the Ex-Officers submit that not meeting the quorum requirement is not a matter that goes to the directors' fitness and propriety. This failure was not a result of any lack of honesty, knowledge, or ability. The Ex-Officers argue that the law offers a company the opportunity to validate decisions made without a quorum and so this matter "ought not to be a basis" for an allegation that the Ex-Officers are not fit and proper persons.
- 1348.** In response to Particular 28.3(c)(6), regarding the failure to have an AGM each year, the Ex-Officers repeat their submissions on Ground 12 of the Complaint. The Ex-Officers further contend that Mr Wily was in charge and that the Ex-Officers "had no power to alter" Mr Wily's conduct – thus no question of fitness and propriety arises.
- 1349.** In response to Particular 28.3(d)(1), alleging that the Club's auditor was unable to form an unqualified opinion of the Club's financial accounts for the year ended 30 June 2011 due to poor internal controls and systems, the Ex-Officers submit that all these issues arose during administration and were the responsibility of Mr Wily.

- 1350.** In response to Particular 28.3(d)(2), concerning the failure to maintain the Club's register of disclosure prior to 1 January 2013, the Ex-Officers repeat their submissions on Grounds 4.3 and 4.4 of the Complaint.
- 1351.** In response to Particular 28.3(d)(3), concerning the failure to ensure a current governing body resolution approved the payment of expenses to members of the governing body between August 2011 and August 2012, the Ex-Officers repeat their submissions on Ground 3.4 of the Complaint.
- 1352.** In response to Particular 28.3(d)(4), concerning the maintenance of allegedly high risk practices, the Ex-Officers submit that in respect of Mr Ashton Jnr's practice of reimbursing directors' expenses in cash, directly from the safe, there is "nothing" in the Act or the Regulation that prohibits this practice or identifies it as high risk.
- 1353.** Also in response to Particular 28.3(d)(4), the Ex-Officers submit in respect of Mr Levy's practice of pre-signing cheques, that this practice was only in place in the event that cash prizes needed to be paid out and Mr Levy was not available. The Ex-Officers refer to Mr Levy's statutory declaration dated 28 May 2015 which states that this practice ceased once Mr Levy was advised by Mr Michael Bulgin, the Club's Auditor, that it was not appropriate. [The Authority notes that Mr Levy's statutory declaration does not specify when this occurred.]
- 1354.** In response to Particular 28.3(d)(5), concerning the alleged failure to maintain an assets register prior to 18 July 2014, the Ex-Officers submit that it was Mr Wily's responsibility to keep the assets register, but in any event, there is "nothing" in the Act or Regulation that requires any club to keep an assets register.
- 1355.** In response to Particular 28.3(d)(6), concerning the Club's auditors not providing reports each year between 2009 and 2013, the Ex-Officers submit that the reason for the "late" submission of reports is because the Club was under administration and Mr Wily was responsible for all the information which was not provided. The Ex-Officers argue that there is nothing to suggest that these past breaches are continuing or that they will continue, and note that the 2014 Annual Reports were completed.

#### **Kirk's Response to Ground 28**

- 1356.** Mr Kirk did not provide a response to Ground 28 of the Complaint.

#### **Wily's Response to Ground 28**

- 1357.** Mr Wily did not provide a response to Ground 28 of the Complaint.

#### **Authority Findings on Ground 28**

- 1358.** Particular 28.1 alleges that, by reason of the conduct of Mr Allan Teale whilst a member of the governing body of the Club, he is not a "fit and proper" person to hold such a position.
- 1359.** Particular 28.2, which specifies the period of time in which Mr Teale served as a director of the Club, is established. It is contended in the Complaint Letter and is not in dispute that Mr Teale was elected to the governing body on 12 December 2006



as a director of the Club and held that position until the Club entered into receivership in June 2015.

**1360.** Particular 28.3 makes the broad allegation that since 12 December 2006, Mr Teale “failed to exercise his duties as a member of the governing body with a degree of knowledge, ability, care and diligence”. This broad allegation is in turn founded upon numerous specific allegations contained within the sub-Particulars of Particular 28.3.

**1361.** The Authority makes the following findings on those sub-Particulars.

Particular 28.3(a)

**1362.** The Authority is satisfied that Mr Allan Teale has been serving as a director of the Club since **12 December 2006** and continued to hold that position until the Club entered into receivership in **June 2015**.

**1363.** The Authority notes that the Complainant repeats the allegations in Grounds 1 to 24 as matters that go to Mr Teale’s fitness and propriety as a director of the Club.

**1364.** However, the Authority notes that Particular 16.2 and Ground 21 have not been pressed by the Complainant against the Club and therefore have not been taken into account when assessing Mr Teale’s fitness and propriety.

**1365.** Furthermore, the Authority notes that the following alleged contraventions of the liquor and gaming legislation detailed in Grounds 1 to 24 of the Complaint have not been established against the Club and these allegations have not been taken into account when assessing Mr Teale’s personal fitness and propriety:

- Ground 2
- Particulars 3.2 and 3.3
- Ground 6
- Ground 7
- Particulars 8.1, 8.5 and 8.8.

**1366.** The Authority is satisfied that the following Grounds include acts or omissions by the Club in respect of minimum statutory requirements that occurred during Mr Teale’s tenure as a director and are matters for which the relevant directors, including Mr Teale share responsibility with the Club secretary.

**1367.** The following Grounds support an inference that the governing body, including Mr Teale, were either not aware of the Club’s legislative duties or that the Complainant has established that Mr Teale did not demonstrate the ability to ensure compliance with respect to matters for which the members of the governing body share responsibility. This is either because the relevant legislative requirement involved the Board, or the Club’s non-compliance was of such a nature and duration that it supports an inference of systemic failure of compliance, in which the governing body shares responsibility. Some of the following Grounds represent failings of compliance that warrant less weight than others when adverse inferences are drawn against the directors’ knowledge and/or ability.

**1368.** For ease of reference, the Authority repeats below the text of those Grounds 1 to 24 that the Authority is satisfied *have* been established in respect of the Club and also

concern matters that the Authority is satisfied are reasonably attributable to the scope and responsibility of a director of a registered club.

**1369.** The Authority notes in **bold** those Particulars and sub-Particulars that have been established on the evidence and include allegations of non-compliance with legislative requirements that are alleged to have occurred during Mr Teale's tenure as a director of the Club.

**1370.** Ground 1:

***Section 57F(3)(a) – The Club failed to meet the requirements of section 10(1)(d) of the Act.***

***Between 31 May 2004 and 30 June 2010, and since 30 July 2014 the Club failed to meet the requirements of section 10(1)(d) of the Act when it failed to maintain the minimum number of ordinary members prescribed by section 12 of the Act.***

**Particular 1.1:**

*The Club is located at Quarry Street, Paddington NSW 2021.*

**Particular 1.2:**

*It is situated within 24 kilometres of the General Post Office in Sydney.*

**Particular 1.3:**

*No application has been made to the Independent Liquor and Gaming Authority (the Authority) for approval of a minimum number of ordinary members less than 200.*

**Particular 1.4:**

***Between 31 May 2004 and 30 June 2010, and since 30 July 2014 the Club's membership was less than 200 members.***

- (a) *On 31 May 2004 the Club consisted of 91 ordinary members.*
- (b) *On 31 May 2005 the Club consisted of 100 ordinary members.*
- (c) *On 31 May 2006 the Club consisted of 97 ordinary members.*
- (d) ***On 30 June 2007 the Club consisted of 69 ordinary members.***
- (e) ***On 30 June 2008 the Club consisted of 65 ordinary members.***
- (f) ***On 30 June 2009 the Club consisted of 53 ordinary members.***
- (g) ***On 30 June 2010 the Club consisted of 43 ordinary members.***
- (h) ***On 30 July 2014 the Club had 92 ordinary members.***
- (i) ***On 11 September 2014 the Club's Membership Register recorded 121 ordinary members.***

**Particular 1.5:**

***At all times since 28 August 2003 the governing body of the Club knew, or ought to have known, that the Act required the Club to have a minimum number of 200 ordinary members and were aware, or were recklessly indifferent, to the fact that the Club did not have the requisite number of members.***

- (a) *The Act sets out the minimum number of members required.*
- (b) *Mr Kirk had actual knowledge of the requirement to have a minimum number of members.*
- (c) *Messrs Roper, Ashton Snr and Ashton Jnr recently became aware of the requirement to have a minimum number of members.*

- (d) *Annual financial statements recorded the number of members.*
- (e) *Annual financial statements were tabled at Annual General Meetings (AGM).*
- (f) *During the period of administration, a "moratorium on accepting full membership" was imposed and the Club permitted its membership to decline.*
  - (1) ***Between 19 September 2002 and 18 May 2012 the Club was under a form of external administration.***
  - (2) *A moratorium on the acceptance of new ordinary members was in place during this period by the governing body of the Club.*
  - (3) ***Between October 2003 and May 2007 there are 15 applicants recorded in the minutes as being approved for membership by a meeting of the governing body of the Club.***
  - (4) ***Between June 2007 and June 2008 there are no records evidencing the governing body of the Club approved any applicant for membership of the Club.***
  - (5) ***Between July 2008 and May 2012 there are 21 applicants recorded in the minutes as being approved for membership by a meeting of the governing body of the Club.***
  - (6) *The acceptance of Mr McKew as a member of the Club during the "moratorium" was not in accordance with the Articles of Association of the Club.*
    - (A) ***Mr McKew of Rooty Hill NSW made an application for membership signed 28 March 2012.***
    - (B) ***Mr McKew of Rooty Hill NSW was known to most directors of the Club at 28 March 2012 and expressed desire to join the Club and be nominated as a director.***
    - (C) ***The members of the governing body accepted Mr McKew as a member of the Club on 28 March 2012.***
    - (D) *Article 12(a) of the Articles of Association of the Club required membership to be proposed and seconded by a full member of the Club.*
    - (E) *Article 12(c) of the Articles of Association of the Club required that the nomination be posted on the Notice Board and remain posted for at least 7 days prior to the date of the meeting of the Board at which the application was considered.*
    - (F) *Article 12(d) of the Articles of Association of the Club required that an interval of at least 14 days must elapse between the date of application and date of election of a candidate to membership.*
- (g) *The "moratorium on accepting full membership" continued after the administration ceased.*
  - (1) ***On 18 May 2012 the Club ceased to be under Administration.***
  - (2) ***On 10 November 2012 the members of the governing body of the Club determined the moratorium would be lifted.***

**1371. Ground 3:**

**Section 57F(3)(a) – the Club failed to meet the requirements of section 10(1)(i) of the Act.**

***Between 2010 and 2014 the Club failed to meet the requirements of section 10(1)(i) of the Act when the Club permitted individuals to derive a benefit or advantage from the Club that was not offered equally to all members of the Club.***

**Particular 3.1:**

*The Club permitted members of the governing body the personal use of motor vehicles owned by the Club which was not offered equally to all members of the Club.*

- (a) *The Club is the owner of two motor vehicles.*
- (b) *The vehicles were obtained by the Club for the prime purpose of "in-house haulage, disposal of rubbish and refuse, and picking up and delivery of stock without undue delay".*
- (c) *The two vehicles are garaged off-premises at the personal residences of directors Mr Ashton Snr and Mr Teale:*
  - (1) *15 minutes away in Maroubra; and*
  - (2) *40 minutes away in Strathfield.*
- (d) *There is no Club policy or procedure on the use of the vehicles and whether or not they are used for travel unrelated to the Club.*
- (e) *The vehicles are rarely used by the Club.*
- (f) *There is no log book recording the business and private use of the vehicles.*

**Particular 3.4:**

*The Club reimbursed members of the governing body for expenses which were not offered equally to all members of the Club.*

- (a) *Expenses were reimbursed where there was no approval for the payment by a resolution of the governing body.*
  - (1) ***Between March 2010 and 8 August 2011*** 26 expense claims were paid to members of the governing body totalling \$2,912.10.
  - (2) ***Between 9 August 2012 and April 2014*** 19 expense claims were paid to members of the governing body totalling \$4,968.00.
  - (3) ***Between 9 August 2011 and 8 August 2012*** 27 expense claims were paid to members of the governing body, other than Mr Kirk, totalling \$4,275.50.
- (b) *Expenses were reimbursed where the governing body only provided approval for reasonable expenses.*
  - (1) ***Between 9 August 2011 and 8 August 2012*** 12 expense claims were paid to Mr Kirk totalling \$5,498.40.
- (c) *The expenses in (a)-(b) above were paid in circumstances where the majority of the claims:*
  - (1) *contained little to no detail about the expense;*
  - (2) *contained no supporting documentation despite Club policy for supporting documentation to be provided for any expense over \$80.00;*
  - (3) *in the absence of detail, cannot be said to have been for the benefit of the Club and its members;*
  - (4) *in the absence of detail, cannot be said to have been connected to their duties and responsibilities; and*
  - (5) *in the absence of detail, cannot be said to have been reasonable.*

**1372. Ground 4:**

**Section 57F(3)(a) – The Club failed to meet the requirements of section 10(1)(l) of the Act.**

***Between January 2009 and November 2014*** the Club failed to meet the requirements of section 10(1)(l) of the Act when the Club failed to comply with the reporting requirements set out in the Registered Clubs Regulation 2009 (the **Regulation**) and required by section 38 of the Act.

**Particular 4.1:**

*The Club failed to provide to members of the governing body financial statements required by Clause 17 of the Regulation on a quarterly basis.*

- (a) *The Club failed to prepare "profit and loss statements" and "balance sheets" on a quarterly basis.*
- (b) ***Between March 2009 and May 2014** the financial year of the club was 1 June to 31 May.*
- (c) ***For 10 quarters between March 2009 and May 2014**, there is no minute recording that any financial statements were provided to the governing body.*

**Particular 4.2:**

*The Club failed to display a notice on the Club's website outlining how Club members can access those financial statements.*

**Particular 4.3:**

*As a result of the governing body not approving financial statements on a quarterly basis, these statements could not have been made available to ordinary members within 48 hours of being approved by the governing body.*

**Particular 4.4:**

***Prior to 1 January 2013**, the Club failed to record disclosures made by members of the governing body in a register of disclosures for the relevant financial year as required by Clause 18(1) of the Regulation.*

- (a) *The Club failed to maintain a register of disclosures **prior to 1 January 2013**.*
- (b) ***Prior to 1 January 2013**, members of the governing body made disclosures that were required to be recorded and maintained in the register of disclosures.*
  - (1) *Ms Madeline Kirk:*
    - (A) *Ms Kirk is the daughter of director Mr Kirk;*
    - (B) *Mr Kirk was a member of the governing body **between 28 August 2003 and 2 April 2014**;*
    - (C) ***Between 16 November 2010 and 25 December 2011** Ms Kirk was employed by the Club; and*
    - (D) *Mr Kirk made a written declaration **on 7 January 2011**.*
  - (2) *Mr Ashton Jnr:*
    - (A) *Mr Ashton Jnr is the son of director Mr Ashton Snr;*
    - (B) *Mr Ashton Snr became a member of the governing body **on 28 August 2003** and continues to act in that capacity;*
    - (C) *Mr Ashton Jnr was employed with the Club as "bar staff" **between 15 December 2005 and 4 May 2009**;*
    - (D) *Mr Ashton Jnr re-commenced employment with the Club **on or about 29 November 2010**; and*
    - (E) *Mr Ashton Snr made a written declaration **on 10 January 2011**.*
  - (3) *Mr Kirk:*
    - (A) ***At the 2008 AGM** [the Authority notes that this took place on 10 December 2008] the ordinary members were asked to consider transferring the Club premises from core to non-core property, and entering a new leasing arrangement;*

- (B) *Woollahra Gardens Pty Limited is party to the Deed of Company Arrangement;*
  - (C) *Mr Kirk performed remunerated work for Mr Michael Sanchez and his associated group of companies, which includes Woollahra Gardens Pty Limited; and*
  - (D) *Mr Kirk made a disclosure **at the 2008 AGM** identifying his relationship with Mr Sanchez.*
- (c) *The Club's register of disclosures is not maintained for each financial year.*
- (1) *The Club's financial year was from 1 June to 30 May.*
  - (2) *The Club maintained a register of disclosures for the period **1 January 2013 to 31 December 2013.***
  - (3) *The Club maintained a register of disclosures for the period **1 September 2013 to 31 August 2014.***

**Particular 4.5:**

*The Club failed to display a notice on the Club website informing members how they can access the Club's register of disclosures.*

**1373. Ground 5:**

**Section 57F(3)(a) – The Club failed to meet the requirements of section 10(1)(m) of the Act.**

**Between 2007 and 2014** the Club failed to meet the requirements of section 10(1)(m) of the Act when the Club failed to comply with the requirements of Part 4A of the Act.

**Particular 5.1:**

**Between 2009 and 2013** the Club failed to specify the core and non-core property of the Club at the end of the financial year in any of the Club's annual reports, in contravention of section 41J(2) of the Act.

**Particular 5.2:**

*The Club entered into a contract for the remuneration of a "top executive" without the proposed contract having been first approved by the governing body of the Club, contravening section 41M of the Act.*

- (a) **On or about 29 November 2010** Mr Ashton Jnr commenced employment with the Club as Secretary.
- (b) *There was no written contract between the Club and Mr Ashton Jnr outlining the terms of the employment.*
- (c) **On or about 1 February 2011** the Club appointed Mr Ashton Jnr to the position of Secretary.
- (d) *The Secretary of the Club is a "top executive" for the purposes of section 41M of the Act.*
- (e) *The register of disclosures states that the governing body of the Club approved the remuneration or employment contract with Mr Ashton Jnr in the position of Secretary **in April 2014.***
- (f) *There is no minute of a meeting of the governing body approving Mr Ashton Jnr's remuneration or employment contract in the position of Secretary.*

(g) **On or about 30 June 2014** the Club entered into a written contract with Mr Ashton Jnr for the position of Secretary commencing on 21 April 2014, in circumstances where:

- (1) Mr Ashton Jnr commenced in the role at a time **between November 2010 and February 2011**; and
- (2) there is no minute of a meeting of the governing body approving Mr Ashton Jnr's remuneration or contract.

**Particular 5.3:**

The Club failed to give written notice, as soon as practicable, to Mr Ashton Jnr that he was a "top executive" of the Club and had responsibilities under Part 4A of the Act in contravention of section 41U of the Act.

- (a) There is no record that the Club provided Mr Ashton Jnr with written notice that he was a "top executive".

**Particular 5.4:**

The Club lent money to an employee where there that loan was not first approved by the governing body of the Club in contravention of section 41N of the Act.

- (a) Mr Matthew Brady was an employee of the Club **between 10 December 2012 and 30 June 2013**.
- (b) **On 8 March 2013** the Club provided Mr Brady a loan in the sum of \$2,000.
- (c) The register of disclosures records that the loan was approved by the members of the governing body **on 9 April 2013**.
- (d) There is no board minute recording that the proposed loan was first approved by the governing body of the Club.

**Particular 5.5:**

**On 1 February 2007**, the Club entered into a contract with ML Management (NSW) Pty Limited ACN 104 788 070 (**MLM**), a company in which Mr Levy, the Secretary at that time, had a controlling interest, contravening section 41L of the Act.

- (a) **Between 26 October 2004 and 3 October 2007** Mr Levy was the Secretary of the Club.
- (b) During this period Mr Levy was the sole director of MLM and had the capacity to determine the outcome of decisions about the financial and operating policies of the company.
- (c) **On 1 February 2007** the Club entered into a deed with MLM to provide consultative and administrative services to the Club (the MLM Deed).
- (d) The MLM Deed was a commercial arrangement for the provision of services by MLM to the Club.
- (e) Before entering into the MLM Deed, the Club did not make reasonable inquiries to ensure that section 41L(1) was complied with.

**1374. Ground 8:**

**Section 57F(3)(a) – The Club failed to meet the requirements of section 10(1)(a) of the Act.**

**Between 2002 and 2014** the Club failed to meet the requirements of section 10(1)(a) of the Act when the Club was not conducted in good faith as a club.

**Particular 8.2:**

The Club failed to meet the minimum number of ordinary members required by Section 10(1)(d) of the Act.

**Particular 8.3:**

*During the period the Club was under external administration a "moratorium on accepting full membership" was imposed and the Club permitted its membership to decline.*

**Particular 8.4:**

*The Club permitted the "moratorium on accepting full membership" to continue when the Club was no longer under administration.*

**Particular 8.6:**

*The Club admits persons to membership of the Club as "social members" to allow persons who live within a 5km radius of the Club to enter the premises and utilise the facilities without being required to be approved by the members or governing body as "ordinary members".*

- (a) *At all relevant times it was a rule of the Club that it must not admit a person to the Club:*
  - (1) *as a member of the Club, other than as a "provisional member", "honorary member" or "temporary member", unless the person is elected to membership at a meeting of the full members, the governing body, or the election committee of the Club; or*
  - (2) *as a "temporary member" if the person resides in New South Wales, and within a 5km radius of the Club.*
- (b) *Persons who live within a 5km radius of the Club and attend for social and corporate bowling are admitted to the Club incorrectly as "temporary members", or admitted to membership as "social members".*
- (c) *The Club introduced "social members" as a membership category in the Club's 2014 constitution, and applicants are approved by Club staff as members of the Club at the Club entrance following the payment of a \$2.00 fee and the completion of a membership application form.*
- (d) **As at 16 May 2014** *the Club had admitted 7,273 persons to membership of the Club as "social members" who were not approved by a meeting of the full members, governing body or election committee.*

**Particular 8.7:**

*The Club was under external administration for an extended period of time (10 years).*

- (a) *On or about 19 September 2002 Mr Wily was appointed Receiver Manager by the Supreme Court of NSW and acted in the role **until 8 November 2011**, apart from the period 23 January 2004 and 21 June 2004 when Mr Wily Snr acted in this capacity.*
- (b) *On 24 October 2002 Mr Wily was purportedly appointed Administrator of the Club and acted in the role until 28 March 2003.*
- (c) *On 24 March 2003 Mr Wily was purportedly appointed Administrator under a Deed of Company Arrangement and acted in the role **until 18 May 2012**, apart from the period 23 January 2004 and 21 June 2004 when Mr Wily Snr acted in this capacity.*

**1375. Ground 9:**

**Section 57F(3)(d) – The Club contravened a provision of the Act.**

**Prior to 1 January 2013** *the Club failed to maintain a register of all disclosures made under Part 4A of the Act for the relevant financial year, contravening section 38 of the Act and clause 16 of the Regulation.*



**Particular 9(a):**

- (a) Repeat particulars at 4.4 above.

**1376. Ground 10:**

**Section 57F(3)(d) – The Club contravened a provision of the Act.**

**Between January 2009 and June 2014 the Club contravened section 30(1)(c) of the Act.**

**Particular 10.1:**

*The Club failed to hold a meeting of the governing body at least once in every month of the year when it failed to hold meetings as follows;*

- (a) **In 2009, on eight occasions,**
  - (1) **Governing body meetings were not held in March, April, May, June, August, September, October and December 2009.**
- (b) **In 2010, on two occasions,**
  - (1) **Governing body meetings were not held in August and December 2010.**
- (c) **In 2011, on five occasions,**
  - (1) **Governing body meetings were not held in January, April, June, August and November 2011.**
- (d) **In 2012, on one occasion,**
  - (1) **A governing body meeting was not held in October 2012.**
- (e) **In 2013, on five occasions,**
  - (1) **Governing body meetings were not held in January, March, June, September and December 2013.**
- (f) **In 2014, on one occasion,**
  - (1) **A governing body meeting was not held in January 2014.**

**Particular 10.2:**

*The Club failed to keep minutes of all proceedings and resolutions of the governing body in a book.*

- (a) *There is no minute of proceedings and resolutions in respect of a meeting of the governing body in January 2010.*
- (b) *Minutes and resolutions were not recorded in a book.*

**Particular 10.3:**

*The Club failed to retain all documents referred to in the minutes as being tabled at the meeting.*

- (a) *On 9 occasions the minutes of meeting of the governing body record that a Management Report was tabled but the Club has failed to retain a copy with the stored minutes:*
  - (1) **In 2009, in the meeting of the governing body held in July.**
  - (2) **In 2010, in the meetings of the governing body held in February, March, June, July, September and October.**
  - (3) **In 2011, in the meetings of the governing body held in July and October.**

**1377. Ground 11:**

***Section 57F(3)(d) – The Club contravened a provision of the Act.***

***Between August 2013 and April 2014 the Club contravened section 30(2)(k) of the Act.***

**Particular 11.1:**

*On 31 occasions the Club failed to ensure the information of a guest of a member was recorded in the "sign-in register" in accordance with section 31(1)(c) of the Act.*

- (a) On 15 occasions the guest did not complete their full name, or their surname and first initial.*
- (b) On 16 occasions the guest did not complete their address.*
- (c) On three occasions the member did not provide their signature.*

**1378. Ground 12:**

***Section 57F(3)(d) – The Club contravened a provision of the Act.***

***In 2007 and between 2009 and 2013 the Club failed to hold annual elections for the appointment of the members of the governing body in contravention of section 30(1)(a) of the Act.***

**Particular 12.1:**

*There was no rule of the Club to provide otherwise than that the governing body of the Club must be elected annually.*

**Particular 12.2:**

***In 2007, 2009 and 2010, the Club:***

- (a) did not hold an AGM of members; and*
- (b) did not hold an election by members for the appointment of the governing body.*

**Particular 12.3:**

***In 2011, the Club:***

- (a) held an AGM of members; but*
- (b) there is no minute from the AGM of members recording that the Club held an election for the appointment of the governing body.*

**Particular 12.4:**

***In 2012 and 2013, the Club:***

- (a) did not hold an AGM of members; and*
- (b) did not hold an election by members for the appointment of the governing body.*

**1379. Ground 13:**

***Section 57F(3)(d) – the Club contravened a provision of the Act.***

***On 11 September 2014 the Club contravened section 30(2)(i) of the Act, in that the Club failed to ensure the register of persons who are full members of the Club was kept in accordance with section 31(1)(a) of the Act.***

**Particular 13.1:**

**On 11 September 2014** the Club's membership register recorded 249 entries, however contained only 121 ordinary members.

- (a) On one occasion the membership register did not record the member's full name.
- (b) On 135 occasions the membership register did not record the member's occupation.
- (c) On eight occasions the membership register did not record the member's address.
- (d) On 85 occasions the membership register did not record the date on which the member last paid the annual fee for membership of the Club.

**1380.** Ground 14:

**Section 57F(3)(e) – a rule of the Club referred to in section 30(1) of the Act has been broken or any other rule of the Club has been habitually broken.**

**Between August 2013 and November 2014** it was a rule of the Club, under section 30(2)(m) of the Act, that it maintain a register of "temporary members" who attend the Club each day and record information in accordance with section 31(1)(e) of the Act.

**Between August 2013 and November 2014** the Club habitually broke this rule.

**Particular 14.1:**

The Club kept a "sign-in register" for "temporary members".

**Particular 14.2:**

The Club on 1,856 occasions failed to ensure the full name, or the surname and first initial, and the address of the "temporary member" together with his or her signature, was recorded in the "sign-in register" as follows.

<b>Date/Month</b>	<b>Number of temporary members whose information was not recorded as required by section 31(1)(e)</b>
August 2013	90
September 2013	83
October 2013	139
November 2013	223
December 2013	438
January 2014	111
February 2014	123
March 2014	53
April 2014	188
May 2014	78
June 2014	41
July 2014	37
August 2014	35
September 2014	44
October 2014	112
November 2014	61

**1381.** Ground 15:

**Section 57F (3)(e) – A rule of the Club referred to in section 30(1) of the Act has been broken or any other rule of the Club has been habitually broken.**

**Between August 2013 and November 2014** it was a rule of the Club, under section 30(2)(c) of the Act, that it must not admit a person to the Club as a "temporary member" if the person resides in New South Wales, and within a 5km radius of the Club, unless the person:

- (a) *is a member of another registered club with similar objects as the Club; or*
- (b) *is a member of another registered club and is attending the Club on an invitation to participate in an organised sport or competition.*

***Between August 2013 and November 2014 the Club habitually broke this rule.***

**Particular 15.1:**

*On 1,168 occasions the Club admitted persons, whose ordinary residence was within a 5km radius of the Club, as "temporary members" of the Club.*

<b><i>Month/Year</i></b>	<b><i>Number of temporary members who resided in New South Wales and within a 5km radius of the Club</i></b>
<i>August 2013</i>	<i>43</i>
<i>September 2013</i>	<i>32</i>
<i>October 2013</i>	<i>65</i>
<i>November 2013</i>	<i>71</i>
<i>December 2013</i>	<i>222</i>
<i>January 2014</i>	<i>115</i>
<i>February 2014</i>	<i>118</i>
<i>March 2014</i>	<i>60</i>
<i>April 2014</i>	<i>146</i>
<i>May 2014</i>	<i>84</i>
<i>June 2014</i>	<i>41</i>
<i>July 2014</i>	<i>29</i>
<i>August 2014</i>	<i>18</i>
<i>September 2014</i>	<i>45</i>
<i>October 2014</i>	<i>52</i>
<i>November 2014</i>	<i>27</i>

**Particular 15.2:**

*None of the persons entering the Club referred to at paragraph 15.1 above identified themselves in the "sign-in register" as being a member of another club.*

**1382. Ground 16:**

***Section 57F(3)(e) – A rule of the Club referred to in section 30(1) of the Act has been broken or any other rule of the Club has been habitually broken.***

*At all relevant times it was a rule of the Club, under section 30(1)(g) of the Act, that it must not admit a person as a member of the Club, other than as a "provisional member", "honorary member" or "temporary member", unless the person is elected to membership at a meeting of:*

- (a) *the full members of the Club;*
- (b) *the governing body of the Club; or*
- (c) *the election committee of the Club.*

***Between 2013 and 2014 the Club habitually broke this rule.***

**Particular 16.1:**

***As at 16 May 2014 the Club had admitted 7,273 persons to membership of the Club as "social members".***

**Particular 16.3:**

*"Social members" are distinct from "provisional members", "honorary members" or "temporary members" in the Club's 2014 Constitution.*

**Particular 16.4:**

*Article 16.1 of the Club's 2014 Constitution provides:*

*"A person shall not be admitted as a member of the Club other than as a Provisional, Honorary Temporary or a Life Member unless that person is elected to membership at a meeting of the Board of the Club or duly appointed election committee of the Club".*

**Particular 16.5:**

*"Social members" are not "provisional members", "honorary members" or "temporary members" of the Club.*

**Particular 16.6:**

*"Social members" are approved by Club staff as members of the Club at the entrance to the Club following the payment of a \$2.00 fee and the completion of a membership application form.*

**Particular 16.7:**

*"Social members" are issued a membership number and card which provides access to the Club.*

**Particular 16.8:**

*The 7,273 persons admitted to membership as "social members" were not approved by a meeting of the full members, governing body or election committee.*

**1383. Ground 17:**

***Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.***

*The Club contravened clause 14 of the Gaming Machines Regulation 2010.*

**Particular 17.1:**

***Between August 2013 and September 2014 on 623 occasions the Club failed to keep written records with respect to the awarding or payment of each prize and short-pay of an approved gaming machine kept on the premises of the Club that contains:***

- (a) the name and signature of the person to whom the award or payment was made; and*
- (b) the signature of 2 other persons certifying that each sighted the prize-winning combination or the number of credits and that the record was correct in all its details.*

**1384. Ground 18:**

***Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.***

*The Club contravened clause 17 of the Gaming Machines Regulation 2010.*

**Particular 18.1:**

*There is no minute of a meeting of the governing body **between January 2009 and June 2014** recording the production to the governing body, at monthly intervals, of:*

- (a) a cash flow analysis in the form approved by the Director-General; and*
- (b) a comparison of cancelled credit and jackpot wins meter readings with the corresponding entries in the Club's payout sheets,*

*in respect of each approved gaming machine.*

**1385. Ground 19:**

**Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.**

*The Club contravened clause 18 of the Gaming Machines Regulation 2010.*

**Particular 19.1:**

***Between January 2009 and June 2014 the Club failed to:***

- (a) produce a "net analysis report" for the previous months, and that part of the previous 12 months, for each approved gaming machine; and*
- (b) ensure the net analysis reports were examined by the Club's board within one month.*

**1386. Ground 20:**

**Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.**

*The Club contravened clause 20(2)(d) of the Gaming Machines Regulation 2010.*

**Particular 20.1:**

***Between July 2012 and June 2014 on 34 occasions the Club failed to keep written records with respect to each clearance of an approved gaming machine on the premises of the Club that contained the signatures of two authorised persons [sic] cleared the gaming machine certifying that the record was correct in all its details.***

**1387. Ground 22:**

**Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.**

*The Club contravened clause 91(1) of the Gaming Machines Regulation 2010.*

**Particular 22.1:**

***At no time since the installation of the first authorised progressive machine on 6 March 2014 has the Club:***

- (a) recorded the amount shown on the progressive meter of any authorised progressive machine at the time the progressive jackpot has been won (progressive jackpot report); and*
- (b) ensured the progressive jackpot report was examined by the Club's board each month.*

**1388. Ground 23:**

**Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.**

**On 18 August 2011**, it became a condition of the Club's liquor licence that on NRL Grand Final Day that two nominated staff of the Club maintain a count of persons on the licensed premises (condition 3410).

**Particular 23.1:**

**On 5 October 2014** the Club failed to ensure two nominated staff maintained a count of persons on the licensed premises in circumstances where:

- (a) Inspectors from OLGR conducted a covert inspection;
- (b) Ms Natalie Turner, an employee of the Club, and Mr Jason Loveday, a security guard contracted by the Club, were stationed at the entrance of the Club; and
- (c) Neither Ms Turner nor Mr Loveday were instructed to, and subsequently did not, maintain a count of persons on the licensed premises.

**1389. Ground 24:**

**Section 57F(3)(d) – The Club contravened a provision of the Act.**

**Between 24 October 2002 and 18 May 2012** the Club contravened section 41 of the Act when it purported to appoint Mr Wily to act in the capacity of administrator of the Club.

**Particulars:**

- (a) The Club is a company within the meaning of the Corporations Act 2001.
- (b) On or about 20 September 2002 Mr Wily was appointed to act as Receiver Manager of the Club by the Supreme Court of New South Wales.
- (c) On or about 24 October 2002 Mr Wily was purportedly appointed to act as Administrator of the Club in circumstances where there is no record of Mr Wily being appointed to act in this capacity by:
  - (1) the Supreme Court of NSW; or
  - (2) the former Licensing Court; or
  - (3) the Authority.

**1390.** The Authority notes that while the Club was under apparent voluntary administration between October 2002 and March 2003, the operation of section 437C(1) of the *Corporations Act 2001* served to limit the powers of the Club's officers to act without the consent of the Club's administrator, Mr Wily.

**1391.** However, this period of administration ended, by the operation of section 435C(2)(a) of the *Corporations Act 2001*, when a deed of company arrangement was executed by the Club on 24 March 2003. This restored the powers of the officers of the Club, in so far as they did not act inconsistently with the terms of the deed of company arrangement.

**1392.** The Authority is satisfied that, as a director of the Club, Mr Teale was partly responsible for ensuring the Club's compliance with the legislative requirements to which it is subject – notwithstanding the fact that the Club was a party to a deed of company arrangement from 24 March 2003 onward.

**1393.** On the basis of the above findings, in respect of those Grounds 1 to 24 that are also found to be attributable to Mr Teale's tenure, the Authority is satisfied that Mr Teale failed to exercise his duties as a director of the Club with a degree of knowledge, ability, care and diligence. There is no basis for impugning Mr Teale's honesty.

**1394.** Particular 28.3(a) is established.

#### Particular 28.3(b)

- 1395.** With respect to Particular 28.3(b), attributing to Mr Teale's fitness and propriety the Club's alleged failure to comply with *ClubsNSW Guidelines*, the Authority accepts the Ex-Officers' submission that these documents are guidelines that provide advice on *best practice* in the industry. They do not prescribe minimum legal rules in respect of which non-compliance may found an independent ground of complaint.
- 1396.** Industry guidelines provide a useful framework for the training of club officers and staff and may, in their terms, provide a plain English guide to minimum statutory requirements.
- 1397.** A good working knowledge of *ClubsNSW Guidelines* on the part of club directors or senior executives may have the collateral benefit of enhancing knowledge and skill and provide a means by which regulated officers become aware of and refresh themselves as to regulatory requirements and avoid managing club premises in a manner that exposes an enterprise to systemic risk and/or regulatory action.
- 1398.** *ClubsNSW Guidelines* may also provide a source of evidence as to what the industry considers to be best practice with regard to the content of a regulatory duty that is the subject of a statutory requirement.
- 1399.** However, the Authority does not need to make findings on the sub-Particulars of Particular 28.3(b) by reason that it is already satisfied as to Mr Teale's responsibility for those instances of statutory non-compliance found against the Club that are found to be also attributable to Mr Teale's personal fitness and propriety.
- 1400.** The Authority does not consider that non-compliance with individual *ClubsNSW Guidelines* gives rise to an independent ground for disciplinary action and that any lack of knowledge or skill in respect of the Club's conduct by comparison to these guidelines adds little to identifying a lack of knowledge or skill in respect of the failure to demonstrate knowledge and skill in respect of the relevant statutory minimum requirements that have been found by the Authority.

#### Particular 28.3(c)

- 1401.** Particular 28.3(c) attributes to Mr Teale's fitness and propriety as a director certain instances of non-compliance by the Club with the Club's Articles of Association. The Authority makes the following findings to the extent that they occurred during Mr Teale's tenure as a director.
- 1402.** Particular 28.3(c)(1) attributes to Mr Teale's fitness and propriety the Club's failure to post a membership application to the Club Notice Board.
- 1403.** The Authority notes the Ex-Officers' submissions in respect of this Particular that the Complainant's wording is "misleading" in that it suggests multiple breaches where only one breach has occurred, being Mr McKew's application. The Authority accepts that one breach occurred with regard to Mr McKew's application.
- 1404.** The Ex-Officers accept that the expedition of Mr McKew's application contravened Article 12 of the Club's Articles of Association, but submit that there are currently 2,460 members in respect of which applications were "appropriately considered and



approved". The Authority accepts the Ex-Officers' submissions in this regard but is nevertheless satisfied that Particular 28.3(c)(1) is factually established, on the basis of Article 12 of the Articles of Association for the Club (Complainant Exhibit E085) and the evidence or material referred to in the Authority's findings on Particular 1.5(f)(6) above. The Authority notes that this breach occurred during Mr Teale's tenure as a Club director.

- 1405.** Particular 28.3(c)(2) attributes to Mr Teale's fitness and propriety the Club's failure to remove non-financial members from the Club's membership register.
- 1406.** The Authority notes the Ex-Officers' submissions in respect of this Particular that Article 23 is no longer in force, but that the Ex-Officers had the power and authority and a discretion to remove members. The Ex-Officers submit that there is no direction or order under Article 23 that compels the removal of non-financial members and note the use of the word "may" as opposed to terms such as "shall" or "will".
- 1407.** The Authority has reviewed Article 23 of the Club's Articles of Association and accepts that there was a discretion provided in that:

*...if such subscription shall be unpaid on the due day the defaulting member may be debarred or suspended from all privileges of membership and his name may be removed from the register of members and he may be disqualified from all Club competitions in which he may be participating [emphasis added].*

- 1408.** Nevertheless, the Authority is satisfied that Particular 28.3(c)(2) is established on the basis of Article 23 of the Articles of Association for the Club (Complainant Exhibit E085) and the *Paddington Bowling Club Full Members Register* as of 11 September 2014, as provided by the Complainant (Complainant Exhibit E057).
- 1409.** The Authority is satisfied that the discretion provided to the Club to remove non-financial members from the register was not considered or exercised during the relevant period and this is a matter that further underpins an apparent laxity of control with regard to membership and access to the Club premises. It supports an inference that the Club maintained something akin to an "open door" policy and this provides some cause for an adverse assessment as to the fitness of the secretary and members of the governing body for not exercising more diligence in this regard.
- 1410.** Particular 28.3(c)(3) attributes to Mr Teale's fitness and propriety the Club's failure to ensure that members of the Board were elected annually. The Authority notes that the Ex-Officers repeat their submissions on Ground 12 of the Complaint in response to this Particular.
- 1411.** The Authority is satisfied that Particular 28.3(c)(3) is established on the basis of Article 28 of the Articles of Association for the Club (Complainant Exhibit E085); the statements made by Robert Ashton Jnr at page 27 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182) and the evidence or material referred to in the Authority's findings on Ground 12 above.
- 1412.** Particular 28.3(c)(4) attributes to Mr Teale's fitness and propriety the Club's failure to ensure the Board met at least once in every month. The Authority notes that the Ex-Officers repeat their submissions on Ground 10 of the Complaint and contend

that Mr Wily was in charge and that the Ex-Officers “had no power to alter” Mr Wily’s conduct – thus no question of fitness and propriety arises.

- 1413.** The Authority accepts the Ex-Officers’ submissions in this regard, noting that the Board sometimes met twice in a month. However, Particular 28.3(c)(4) is factually established on the basis of Article 41 of the Articles of Association for the Club (Complainant Exhibit E085) and the evidence or material referred to in the Authority’s findings on Ground 10 above. Notwithstanding this finding, the Authority notes that this matter does not have a substantial bearing on an issue of fitness and propriety of the secretary or directors, including Mr Teale, by reason of the number of meetings convened by the Club during the relevant years.
- 1414.** Particular 28.3(c)(5)(A), which attributes to Mr Teale’s fitness and propriety the Club’s failure to ensure the required quorum of five members of the Board was met for each meeting during 2011, is established on the basis of Article 41 of the Articles of Association for the Club (Complainant Exhibit E085); the Club Board meeting minutes for 1 February 2011 (Complainant Exhibit E015); the Club Board meeting minutes for 28 February 2011 (Complainant Exhibit E016); the Club Board meeting minutes for 30 March 2011 (Complainant Exhibit E017); the Club Board meeting minutes for 27 May 2011 (Complainant Exhibit E018); the Club Board meeting minutes for 1 July 2011 (Complainant Exhibit E019); the Club Board meeting minutes for 29 July 2011 (Complainant Exhibit E020); the Club Board meeting minutes for 2 September 2011 (Complainant Exhibit E021); the Club Board meeting minutes for 28 October 2011 (Complainant Exhibit E022) and the Club Board meeting minutes for 28 December 2011 (Complainant Exhibit E023).
- 1415.** Particular 28.3(c)(5)(B), which attributes to Mr Teale’s fitness and propriety the Club’s failure to ensure the required quorum of five members of the Board was met for each meeting during 2014, is established on the basis of Article 41 of the Articles of Association for the Club (Complainant Exhibit E085); the Club Board meeting minutes for 10 February 2014 (Complainant Exhibit E045); the Club Board meeting minutes for 24 February 2014 (Complainant Exhibit E046); the Club Board meeting minutes for 8 March 2014 (Complainant Exhibit E047); the Club Board meeting minutes for 11 April 2014 (Complainant Exhibit E048); the Club Board meeting minutes for 13 May 2014 (Complainant Exhibit E049) and the Club Board meeting minutes for 23 June 2014 (Complainant Exhibit E050).
- 1416.** In response to Particular 28.3(c)(5) generally, the Authority notes the Ex-Officers’ contention that not meeting the quorum does not go to the question of fitness and propriety. This failure was not a result of a lack of honesty, knowledge, or ability. The Ex-Officers argue that the law offers a company the opportunity to validate decisions made without a quorum and so this matter “ought not to be a basis” for the allegation that the Ex-Officers are not fit and proper persons.
- 1417.** The Authority notes the submission made by Mr Kirk dated 29 May 2015 that at the 2004 AGM, there was an amendment to the Club’s Articles of Association reducing the quorum of directors at a Board meeting from five to three, and that all of the matters the subject of Particulars 29.3(c)(5)(A) and 29.3(c)(5)(B) occurred *after* the 2004 resolution and were attended by three or more members of the governing body. Mr Kirk states in his submissions that while he told OLGR investigators in his record of interview dated 5 November 2014 (Complainant Exhibit E181) that he thought the quorum requirement changed from five to three in 2006, on reflection he believes it changed in 2004.

- 1418.** The Authority rejects the Ex-Officers' and Mr Kirk's submissions in this regard. A failure to meet the quorum requirement is not only a technical or administrative failing, but if not observed could increase the scope for the potential conduct of secret meetings or the formation of cabals within a club's governing body. A resolution to reduce the quorum to three does not remove the duty under the Club's Articles of Association to comply with this requirement.
- 1419.** This basic requirement of corporate governance should have been observed by the Club's governing body and it adversely reflects upon the ability of the relevant members of the governing body and the Club's secretary that the quorum requirement was not met on the occasions that have been established on the evidence.
- 1420.** Particular 28.3(c)(5) is established.
- 1421.** Particular 28.3(c)(6) attributes to Mr Teale's fitness and propriety the Club's failure to ensure the Club held an annual general meeting of members each year. The Authority notes that the Ex-Officers repeat their submissions on Ground 12 of the Complaint and contend that Mr Wily was in charge of the Club and the Ex-Officers "had no power to alter" Mr Wily's conduct and for this reason, no question of fitness and propriety arises.
- 1422.** The Authority does not accept the Ex-Officers' submissions in this regard. The failure to hold an annual general meeting of the members in the years of 2007, 2009, 2010, 2012 and 2013 as alleged by Particular 28.3(c)(6) is established on the basis of Article 49 of the Articles of Association for the Club (Complainant Exhibit E085) and the evidence or material referred to in the Authority's findings on Ground 12 above.
- 1423.** The Authority has considered, but rejects, the submissions made by the Ex-Officers that the matters alleged in Particular 28.3(c) do not properly go to the consideration of the honesty, knowledge and ability of any director of the Club. While the secretary and chief executive officer of a registered club has greater operational responsibility over the day to day affairs of a registered club than the members of its governing body, the duty to comply with a club's Articles of Association also falls upon the club's directors.

Particular 28.3(d)

- 1424.** With regard to Particular 28.3(d) attributing to Mr Teale the Club's alleged lack of internal controls and procedures, the Authority rejects the Ex-Officers' submission that the issues that are the subject of Particular 28.3(d) arose during the administration of the Club and as such, were the responsibility of Mr Wily.
- 1425.** The Authority notes that while the Club was under administration, the powers of the officers of the Club were suspended, pursuant to section 437C(1) of the *Corporations Act 2001*. However (as previously observed), once the Deed of Company Arrangement was signed on 24 March 2003, the Club was no longer under administration, through the operation of section 435C of the *Corporations Act 2001*. The Authority notes that the Ex-Officers resumed their powers and obligations in relation to the Club's governance as of that date, subject to the terms of the Deed of Company Arrangement.

- 1426.** The Authority makes the following findings on the sub-Particulars of Particular 28.3(d).
- 1427.** Particular 28.3(d)(1), which attributes to Mr Teale's fitness and propriety the inability of the Club Auditor to form an unqualified opinion of the Club's financial accounts for the year ended 30 June 2011 due to poor internal controls and systems, is established on the basis of a letter from Michael Bulgin, the Club's Auditor to the Club secretary dated 20 May 2011 (Complainant Exhibit E103); the letter from Domenic Cutrupi of CBC Partners, the Club's Auditor to the Club secretary dated 28 March 2014 (Complainant Exhibit E104) and the statements made by Robert Ashton Jnr at page 12 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182).
- 1428.** Particular 28.3(d)(2), which attributes to Mr Teale's fitness and propriety the alleged failure to maintain the Club's register of disclosures, is established on the basis of the evidence or material referred to in the Authority's findings on Particular 4.3 above.
- 1429.** Particular 28.3(d)(3), which attributes to Mr Teale's fitness and propriety the alleged failure to ensure a current governing body resolution approved the payment of expenses to members of the governing body, is established on the basis of the evidence or material referred to in the Authority's findings on Particular 3.4 above.
- 1430.** Particular 28.3(d)(4) attributes to Mr Teale's fitness and propriety the allegation that the Ex-Officers maintained "high risk practices" including Mr Ashton Jnr's paying expenses of directors in cash directly from the safe. The Authority notes that the Complainant relies upon the statements made by Robert Ashton Jnr at page 28 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182) in support of this contention.
- 1431.** The Authority has reviewed the above evidence or material and is *not* satisfied that this Particular is established. While the practice of paying directors' expenses directly from the safe is not recommended as the most prudent method of payment, the Authority is not satisfied that the evidence or material as to the circumstances in which these payments were made establishes that this practice should be characterised as "high risk".
- 1432.** There is no evidence before the Authority to suggest that the Ex-Officers did not comply with proper accounting practices, and the Authority notes that these payments were reconciled through petty cash, which is a common industry practice. Particular 28.3(d)(4) is not established.
- 1433.** Particular 28.3(d)(5), which attributes to Mr Teale's fitness and propriety the Club's failure to maintain an assets register prior to 18 July 2014, is established on the basis of the statements made by Allan Teale at pages 30 to 31 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E183).
- 1434.** Particular 28.3(d)(6) attributes to Mr Teale's fitness and propriety the Club's failure to ensure that Club auditors provided reports each year. Particular 28.3(d)(6)(A) alleges that the Auditor's Reports for the years ended 30 June 2009 and 30 June 2010 are dated 27 May 2011. Particular 28.3(d)(6)(B) alleges that the Auditor's

Report for the year ended 30 June 2012 is dated 2 April 2014. Particular 28.3(d)(6)(C) alleges that the Auditor's Reports for the years ended 30 June 2012 and 30 June 2013 are dated 6 November 2014.

- 1435.** The Authority is satisfied that these sub-Particulars are established on the basis of the Notes to and Forming Part of the Financial Statements as contained in the Club's Financial Report for the year ended 30 June 2009 (Complainant Exhibit E063); the Notes to and Forming Part of the Financial Statements as contained in the Club's Financial Report for the year ended 30 June 2010 (Complainant Exhibit E064); the Club's Financial Statement for 30 June 2011 (Complainant Exhibit E187) and the minutes for the Club's AGM dated November 2014 (Complainant Exhibit E209).
- 1436.** The Authority has considered cumulatively the Authority's findings with regard to the Particulars specified in Ground 28. The Authority notes the multiple instances of non-compliance by the Club with legislative requirements established among Grounds 1 to 24. The Authority notes those further instances of non-compliance with the Club's Articles of Association and failings with respect to corporate governance that are established in the Particulars noted above.
- 1437.** The Authority is satisfied that Ground 28 is established and that Mr Allan Teale is not a fit and proper person to be a member of the governing body of the registered club, by reason that the Complainant has established that he did not demonstrate the degree of knowledge, ability, care and diligence that the Authority would expect from a reasonably competent director of a club of this scale. There is no basis for impugning Mr Teale's honesty arising from the Authority's findings on Ground 28.
- 1438.** The Authority notes that, during the time the Club was subject to the Deed of Company Arrangement from 24 March 2003 and the Amended Deed of Company Arrangement from 10 December 2010, these documents imposed certain restrictions upon the discretion of the governing body in that they could not act contrary to those agreements.
- 1439.** While the degree of responsibility for the Club's affairs may *potentially* be reduced to the extent that certain aspects of Club governance required the consent of the Deed Administrator, Mr Wily – the fact that the Club was subject to a deed of company arrangement does not provide a complete excuse for Mr Teale's failure, as a Club director, to ensure that the Club complied with relevant legislation.
- 1440.** Mr Teale and the members of the governing body did have a role to play during the currency of the DOCA and ADOCA during that period. It is certainly no excuse for Mr Teale or any member of the governing body not to have knowledge of the legislative and constitutional requirements to which the Club was subject.

## **GROUND 29**

- 1441.** Ground 29 alleges as follows:

***Section 57F(3)(g) – A member of the governing body of the Club is not a "fit and proper" person to act as such.***

- 1442.** Particular 29.1 of Ground 29 alleges as follows:

*By reason of the conduct of Mr Kirk whilst a member of the governing body of the Club is not a "fit and proper" person to hold such a position.*

**1443.** Particular 29.2 of Ground 29 alleges as follows:

*Mr Kirk was elected to the governing body on 28 August 2003 as a Director of the Club and held that position until 2 April 2014.*

**1444.** Particular 29.3 of Ground 29 alleges as follows:

*Since 28 August 2003, Mr Kirk failed to exercise his duties as a member of the governing body with a degree of knowledge, ability, care and diligence, by reason of:*

- (a) The non-compliance with the legislation outlined in paragraphs 1-24 above.*
- (b) The non-compliance with ClubsNSW Guidelines:*
  - (1) Failure to ensure the Board determined, agreed and offered a remuneration package to the Secretary.*
  - (2) Failure to ensure key performance indicators were developed and clearly expressed in the contract of the Secretary.*
  - (3) Failure to be aware of, and comply with, any legislative requirements that pertain to executive remuneration.*
  - (4) Failure to ensure the employment contract of the Secretary was approved by the Board.*
  - (5) Failure to ensure the performance of the Secretary is reviewed periodically, at least annually, and assessed against clear KPI's in the employment contract.*
  - (6) Failure to comply with any relevant legislative, industrial or administrative requirement, and keep up to date with any changes.*
  - (7) Failure to obtain value for Club money spent and avoid waste and extravagance in the use of Club resources:*
    - (A) the Club purchased and maintains motor vehicles that are rarely used by the Club;*
    - (B) the Club reimbursed unapproved expenses of members of the governing body;*
    - (C) the Club engaged VSM to provide marketing services at a cost of:*
      - i. \$212,247.00 for the financial year 2009-10;*
      - ii. \$194,601.00 for the financial year 2010-11;*
      - iii. \$184,435.00 for the financial year 2011-12;*
      - iv. \$220,543.00 for the financial year 2012-13; and*
      - v. \$240,636.00 for the financial year 2013-14.*
    - (D) the Club purchased \$5,000.00 in MasterCard Gift Cards for staff Christmas bonuses in 2012;*
    - (E) the Club purchased \$10,000.00 in Woolworths Gift Cards for staff Christmas bonuses in 2013:*
      - i. there is no minute of a meeting of the governing body approving this purchase in accordance with the Club's Purchasing and Tendering Policy.*
  - (8) Failure to provide strategic direction to the Club by constructive engagement in the development, execution and modification of the Club's strategy:*
    - (A) the Club has produced a five year plan for the improvement of the Crown Asset rather than a strategy to further the Club's purpose of providing accommodation for its members and their guests.*
  - (9) Failure to report to members and ensure all regulatory requirements are met.*
  - (10) Failure to ensure all appropriate compliance frameworks and controls are in place.*

- (11) *Failure to ensure the Club obtained value for money when making procurement decisions:*
    - (A) *the Club did not undertake a tender process when engaging accounting and marketing services.*
  - (12) *Failure to ensure the Club benchmarked the core activities of bar, food and gaming.*
- (c) *The non-compliance with the Articles of Association of the Club.*
- (1) *Failure to ensure membership applications were posted on the Notice Board for at least seven days prior to the date of the meeting to consider the application, and at least 14 days lapse between the date of application and the date of election.*
  - (2) *Failure to ensure members who were not financial were removed from membership register.*
  - (3) *Failure to ensure the members of the Board were elected annually.*
  - (4) *Failure to ensure the Board met at least once in every month.*
  - (5) *Failure to ensure the required quorum of five members of the Board was met for each meeting;*
    - (A) *in 2011, on 5 occasions, meetings held of the governing body did not consist of a quorum of five members as follows;*
      - i. *1 February, 28 February, March, September and October 2011.*
    - (B) *in 2014, on 3 occasions, meetings held of the governing body did not consist of a quorum of five members as follows;*
      - i. *March, April and June 2014.*
  - (6) *Failure to ensure the Club held an annual general meeting of members each year.*
- (d) *The lack of internal controls and procedures:*
- (1) *The Club Auditor was unable to form an unqualified opinion of the Club's financial accounts for the year ending 30 June 2011 due to poor internal controls and systems.*
  - (2) *Failure to maintain the Club's register of disclosures.*
  - (3) *Failure to ensure a current governing body resolution approved the payment of expenses to members of the governing body.*
  - (4) *Maintaining high risk practices including paying expenses of directors in cash directly from the safe and pre-signing cheques.*
  - (5) *Failure to maintain an assets register prior to 18 July 2014.*
  - (6) *Failure to ensure Club auditors provided reports each year:*
    - (A) *the Auditor's Reports for the years ending 30 June 2009 and 30 June 2010 are dated 27 May 2011;*
    - (B) *the Auditor's Report for the year ending 30 June 2011 is dated 2 April 2014; and*
    - (C) *the Auditor's Report for the years ending 30 June 2012 and 30 June 2013 are dated 6 November 2014.*

## **Club's Response to Ground 29**

**1445.** The Club did not provide a response to Ground 29 of the Complaint.

## **Ex-Officers' Response to Ground 29**

**1446.** The Ex-Officers did not provide a response to Ground 29 of the Complaint.

## Kirk's Response to Ground 29

- 1447.** In relation to Particular 29.1, Mr Kirk notes that he adopts and relies upon the Club's submission dated 17 May 2015.
- 1448.** The Authority notes that Particular 29.2, which specifies the period of Mr Kirk's tenure as a director of the Club, is not in dispute.
- 1449.** In response to Particular 29.3(a), Mr Kirk repeats his submissions on Grounds 1 through 24 of the Complaint.
- 1450.** In response to Particular 29.3(b), Mr Kirk submits that this Particular is "repetitious" as it simply "recasts alleged non-compliance with the legislation outlined in Grounds 1 to 24 of the Complaint, as non-compliance with *ClubsNSW Guidelines*". Mr Kirk notes that the Complainant relies upon the same alleged facts.
- 1451.** In response to Particulars 29.3(b)(1) through (5), Mr Kirk submits that he relied on Mr Wily and MLM to ensure compliance with the obligations in respect of the appointment, remuneration and performance monitoring of the Club's secretary manager. Mr Kirk submits that these matters were all dealt with through Mr Wily at the relevant times.
- 1452.** In response to Particular 29.3(b)(6), Mr Kirk refers to his above submissions on Grounds 1 through 24 of the Complaint. Mr Kirk notes that further particulars were requested regarding the "industrial or administrative requirements", but were not provided by the Complainant.
- 1453.** In response to Particulars 29.3(b)(7)(A) through (E), Mr Kirk refers to his above submissions in relation to Ground 3 of the Complaint.
- 1454.** In response to Particular 29.3(b)(8), Mr Kirk submits that in January 2009, a documented five year business plan was prepared and presented to Crown Lands in support of an application to convert the Club's lease (this document is attached at Appendix 6 to Mr Kirk's submission dated 29 May 2015).
- 1455.** Mr Kirk submits that this five year plan would not disadvantage the Club's members and guests. Any improvements to the land would benefit the Club and would not impact on any redetermination of the rent, per section 143 of the *Crown Lands Act 1989*.
- 1456.** The Authority notes that Mr Kirk did not make any specific submissions in response to Particular 29.3(b)(9) of the Complaint.
- 1457.** In response to Particular 29.3(b)(10), Mr Kirk contends that neither Mr Wily nor Mr Levy provided a "proper handover of management systems". Prior to resigning from the Board, Mr Kirk recommended that the Club engage an external consultant. Mr Kirk submits that this was later followed and regulatory compliance at the Club "has significantly improved" as a result.
- 1458.** In response to Particular 29.3(b)(11), Mr Kirk submits that the agreements with both MLM and VSM came into existence prior to Mr Kirk's appointment to the Club Board. In relation to the renewal of the agreement with MLM, Mr Kirk submits that



he followed the direction of Mr Wily, and refers to the minutes of the Club Board meeting held on 13 February 2007 in support of this submission.

- 1459.** In response to Particular 29.3(b)(12), Mr Kirk submits that benchmarking of the Club's core activities of bar, food and gaming did not occur during Mr Kirk's time as a member of the governing body.
- 1460.** In response to Particular 29.3(c)(1), Mr Kirk does not accept this Particular. Mr Kirk submits that from around February 2013, Club director Mr Teale was responsible for all membership issues.
- 1461.** In response to Particular 29.3(c)(2), Mr Kirk submits that he relied on MLM to be responsible for the Club's membership register. Mr Kirk submits that he also took steps to "remedy issues with the register".
- 1462.** In response to Particular 29.3(c)(3), Mr Kirk submits that the appointment of directors was open to Mr Wily during the administration of the Club. Mr Kirk submits that after the Club came out of administration, there was "general continued disinterest" from any other person to become a member of the Board, consistent with the Complainant's evidence.
- 1463.** In response to Particular 29.3(c)(4), Mr Kirk submits that it was "very difficult" for the Board to meet monthly, given the Board members' external commitments and lack of interest from some due to the fact that the Club was under external administration. Mr Kirk submits that he "aimed" for the Board members to meet monthly.
- 1464.** In response to Particular 29.3(c)(5), Mr Kirk submits that in 2004, a resolution was passed changing the quorum to hold a meeting from 5 to 3. All these matters alleged in this Particular occurred *after* the 2004 resolution and were attended by greater than three Board members.
- 1465.** In response to Particular 29.3(c)(6), Mr Kirk does not contest this Particular. Mr Kirk relies upon Part 12 of the Club's submission dated 17 May 2015 and submits that the lack of annual meetings was because the Club was in external administration under Mr Wily. Mr Kirk submits that he relied upon Mr Wily to put in place appropriate internal controls and procedures in respect of the Club.
- 1466.** In response to Particulars 29.3(d)(1) and (6), Mr Kirk submits that Mr Wily and MLM were responsible for financial matters during the Club's administration.
- 1467.** In response to Particular 29.3(d)(3), Mr Kirk submits that on 25 February 2010, a motion was passed that directors could submit claims for out-of-pocket expenses commencing immediately, but any claim was to be limited to a maximum of \$150.00 unless prior approval was obtained.
- 1468.** In response to Particular 29.3(d)(4), Mr Kirk did not consider the payment of "minor expenses" from the Club's safe to be a "high risk practice" and understood that all expenses paid to members of the governing body were documented.
- 1469.** In response to Particular 29.3(d)(5), Mr Kirk submits that during administration, Mr Wily and MLM were responsible for maintaining an assets register. Mr Kirk submits that he "took steps to improve his knowledge" during the transitional period.

## Wily's Response to Ground 29

1470. Mr Wily did not provide a response to Ground 29 of the Complaint.

## Authority Findings on Ground 29

1471. Particular 29.1 alleges that, by reason of the conduct of Mr Brian Kirk whilst a member of the governing body of the Club, he is not a "fit and proper" person to hold such a position.
1472. Particular 29.2, which specifies the period of time in which Mr Kirk served as a director of the Club, is established. It is contended in the Complaint Letter and is not in dispute that Mr Kirk was elected to the governing body on **28 August 2003** as a director of the Club and held that position until **2 April 2014**. The Authority notes that Mr Kirk remained the Chairman and President of the Club until 2 April 2014.
1473. Particular 29.3 makes the broad allegation that since 28 August 2003, Mr Kirk "failed to exercise his duties as a member of the governing body with a degree of knowledge, ability, care and diligence". This broad allegation is in turn founded upon numerous specific allegations contained within the sub-Particulars of Particular 29.3.
1474. The Authority makes the following findings on those sub-Particulars.

### Particular 29.3(a)

1475. The Authority is satisfied that Mr Brian Kirk served as a director of the Club between **28 August 2003** and **2 April 2014**. That is, he was a director throughout most of the relevant period that is the subject of this Complaint. The Authority notes that Mr Kirk remained the Chairman and President of the Club until 2 April 2014.
1476. The Authority notes that the Complainant repeats the allegations of contraventions of liquor and gaming legislation by the Club in Grounds 1 to 24 as matters that are also attributable to an assessment of Mr Kirk's fitness and propriety as a director of a registered club.
1477. However, the Authority notes that Particular 16.2 and Ground 21 have not been pressed by the Complainant against the Club and therefore have not been taken into account by the Authority when considering Mr Kirk's fitness and propriety.
1478. Furthermore, Grounds 13, 22 and 23 of the Complaint have not been pressed by the Complainant with respect to Mr Kirk personally, hence have not been taken into account by the Authority when considering Mr Kirk's fitness and propriety.
1479. Moreover, the Authority notes that the following alleged contraventions of the liquor and gaming legislation detailed in Grounds 1 to 24 of the Complaint have not been established against the Club and these allegations have not been taken into account when assessing Mr Kirk's personal fitness and propriety:
- Ground 2
  - Particulars 3.2 and 3.3
  - Ground 6

- Ground 7
- Particulars 8.1, 8.5 and 8.8.

- 1480.** The Authority is satisfied that the following Grounds include acts or omissions by the Club in respect of minimum statutory requirements that occurred during Mr Kirk's tenure as a director and are matters for which the relevant directors, including Mr Kirk share responsibility with the Club secretary.
- 1481.** The following Grounds support an inference that the governing body, including Mr Kirk were either not aware of the Club's legislative duties or that the Complainant has established that he did not demonstrate the ability to ensure compliance with respect to matters for which the members of the governing body share responsibility. This is either because the legislative requirement involved the Board, or the Club's non-compliance was of such a nature and duration that it supports an inference of systemic failure of compliance, in which the governing body shares responsibility. Some of the following Grounds represent failings of compliance that warrant less weight than others when adverse inferences are drawn against the directors' knowledge and/or ability.
- 1482.** For ease of reference, the Authority repeats below the text of those Grounds 1 to 24 that the Authority is satisfied *have been established* in respect of the Club and also concern matters that the Authority is satisfied are reasonably attributable to the scope and responsibility of a director of a registered club.
- 1483.** The Authority notes in **bold** those Particulars and sub-Particulars that include allegations of non-compliance with legislative requirements that are alleged to have occurred during Mr Kirk's tenure as a director of the Club.
- 1484.** Ground 1:

***Section 57F(3)(a) – The Club failed to meet the requirements of section 10(1)(d) of the Act.***

*Between 31 May 2004 and 30 June 2010, and since 30 July 2014 the Club failed to meet the requirements of section 10(1)(d) of the Act when it failed to maintain the minimum number of ordinary members prescribed by section 12 of the Act.*

**Particular 1.1:**

*The Club is located at Quarry Street, Paddington NSW 2021.*

**Particular 1.2:**

*It is situated within 24 kilometres of the General Post Office in Sydney.*

**Particular 1.3:**

*No application has been made to the Independent Liquor and Gaming Authority (the Authority) for approval of a minimum number of ordinary members less than 200.*

**Particular 1.4:**

***Between 31 May 2004 and 30 June 2010, and since 30 July 2014 the Club's membership was less than 200 members.***

- (a) On 31 May 2004 the Club consisted of 91 ordinary members.**
- (b) On 31 May 2005 the Club consisted of 100 ordinary members.**
- (c) On 31 May 2006 the Club consisted of 97 ordinary members.**

- (d) *On 30 June 2007 the Club consisted of 69 ordinary members.*
- (e) *On 30 June 2008 the Club consisted of 65 ordinary members.*
- (f) *On 30 June 2009 the Club consisted of 53 ordinary members.*
- (g) *On 30 June 2010 the Club consisted of 43 ordinary members.*
- (h) *On 30 July 2014 the Club had 92 ordinary members.*
- (i) *On 11 September 2014 the Club's Membership Register recorded 121 ordinary members.*

**Particular 1.5:**

***At all times since 28 August 2003*** the governing body of the Club knew, or ought to have known, that the Act required the Club to have a minimum number of 200 ordinary members and were aware, or were recklessly indifferent, to the fact that the Club did not have the requisite number of members.

- (a) *The Act sets out the minimum number of members required.*
- (b) *Mr Kirk had actual knowledge of the requirement to have a minimum number of members.*
- (c) *Messrs Roper, Ashton Snr and Ashton Jnr recently became aware of the requirement to have a minimum number of members.*
- (d) *Annual financial statements recorded the number of members.*
- (e) *Annual financial statements were tabled at Annual General Meetings (AGM).*
- (f) *During the period of administration, a "moratorium on accepting full membership" was imposed and the Club permitted its membership to decline.*
  - (1) ***Between 19 September 2002 and 18 May 2012*** the Club was under a form of external administration.
  - (2) *A moratorium on the acceptance of new ordinary members was in place during this period by the governing body of the Club.*
  - (3) ***Between October 2003 and May 2007*** there are 15 applicants recorded in the minutes as being approved for membership by a meeting of the governing body of the Club.
  - (4) ***Between June 2007 and June 2008*** there are no records evidencing the governing body of the Club approved any applicant for membership of the Club.
  - (5) ***Between July 2008 and May 2012*** there are 21 applicants recorded in the minutes as being approved for membership by a meeting of the governing body of the Club.
  - (6) *The acceptance of Mr McKew as a member of the Club during the "moratorium" was not in accordance with the Articles of Association of the Club.*
    - (A) ***Mr McKew of Rooty Hill NSW made an application for membership signed 28 March 2012.***
    - (B) ***Mr McKew of Rooty Hill NSW was known to most directors of the Club at 28 March 2012 and expressed desire to join the Club and be nominated as a director.***
    - (C) ***The members of the governing body accepted Mr McKew as a member of the Club on 28 March 2012.***
    - (D) *Article 12(a) of the Articles of Association of the Club required membership to be proposed and seconded by a full member of the Club.*
    - (E) *Article 12(c) of the Articles of Association of the Club required that the nomination be posted on the Notice Board and remain posted for at least 7 days prior to the date of the meeting of the Board at which the application was considered.*
    - (F) *Article 12(d) of the Articles of Association of the Club required that an interval of at least 14 days must elapse between the date of application and date of election of a candidate to membership.*
- (g) *The "moratorium on accepting full membership" continued after the administration ceased.*

- (1) **On 18 May 2012** the Club ceased to be under Administration.
- (2) **On 10 November 2012** the members of the governing body of the Club determined the moratorium would be lifted.

**1485. Ground 3:**

**Section 57F(3)(a) – the Club failed to meet the requirements of section 10(1)(i) of the Act.**

**Between 2010 and 2014** the Club failed to meet the requirements of section 10(1)(i) of the Act when the Club permitted individuals to derive a benefit or advantage from the Club that was not offered equally to all members of the Club.

**Particular 3.1:**

*The Club permitted members of the governing body the personal use of motor vehicles owned by the Club which was not offered equally to all members of the Club.*

- (a) *The Club is the owner of two motor vehicles.*
- (b) *The vehicles were obtained by the Club for the prime purpose of "in-house haulage, disposal of rubbish and refuse, and picking up and delivery of stock without undue delay".*
- (c) *The two vehicles are garaged off-premises at the personal residences of directors Mr Ashton Snr and Mr Teale:*
  - (1) *15 minutes away in Maroubra; and*
  - (2) *40 minutes away in Strathfield.*
- (d) *There is no Club policy or procedure on the use of the vehicles and whether or not they are used for travel unrelated to the Club.*
- (e) *The vehicles are rarely used by the Club.*
- (f) *There is no log book recording the business and private use of the vehicles.*

**Particular 3.4:**

*The Club reimbursed members of the governing body for expenses which were not offered equally to all members of the Club.*

- (a) *Expenses were reimbursed where there was no approval for the payment by a resolution of the governing body.*
  - (1) **Between March 2010 and 8 August 2011** 26 expense claims were paid to members of the governing body totalling \$2,912.10.
  - (2) **Between 9 August 2012 and April 2014** 19 expense claims were paid to members of the governing body totalling \$4,968.00.
  - (3) **Between 9 August 2011 and 8 August 2012** 27 expense claims were paid to members of the governing body, other than Mr Kirk, totalling \$4,275.50.
- (b) *Expenses were reimbursed where the governing body only provided approval for reasonable expenses.*
  - (1) **Between 9 August 2011 and 8 August 2012** 12 expense claims were paid to Mr Kirk totalling \$5,498.40.
- (c) *The expenses in (a)-(b) above were paid in circumstances where the majority of the claims:*

- (1) contained little to no detail about the expense;
- (2) contained no supporting documentation despite Club policy for supporting documentation to be provided for any expense over \$80.00;
- (3) in the absence of detail, cannot be said to have been for the benefit of the Club and its members;
- (4) in the absence of detail, cannot be said to have been connected to their duties and responsibilities; and
- (5) in the absence of detail, cannot be said to have been reasonable.

**1486. Ground 4:**

**Section 57F(3)(a) – The Club failed to meet the requirements of section 10(1)(l) of the Act.**

*Between January 2009 and November 2014 the Club failed to meet the requirements of section 10(1)(l) of the Act when the Club failed to comply with the reporting requirements set out in the Registered Clubs Regulation 2009 (the **Regulation**) and required by section 38 of the Act.*

**Particular 4.1:**

*The Club failed to provide to members of the governing body financial statements required by Clause 17 of the Regulation on a quarterly basis.*

- (a) *The Club failed to prepare "profit and loss statements" and "balance sheets" on a quarterly basis.*
- (b) **Between March 2009 and May 2014** the financial year of the club was 1 June to 31 May.
- (c) **For 10 quarters between March 2009 and May 2014**, there is no minute recording that any financial statements were provided to the governing body.

**Particular 4.2:**

*The Club failed to display a notice on the Club's website outlining how Club members can access those financial statements.*

**Particular 4.3:**

*As a result of the governing body not approving financial statements on a quarterly basis, these statements could not have been made available to ordinary members within 48 hours of being approved by the governing body.*

**Particular 4.4:**

**Prior to 1 January 2013**, the Club failed to record disclosures made by members of the governing body in a register of disclosures for the relevant financial year as required by Clause 18(1) of the Regulation.

- (a) *The Club failed to maintain a register of disclosures **prior to 1 January 2013**.*
- (b) **Prior to 1 January 2013**, members of the governing body made disclosures that were required to be recorded and maintained in the register of disclosures.
  - (1) *Ms Madeline Kirk:*
    - (A) *Ms Kirk is the daughter of director Mr Kirk;*
    - (B) **Mr Kirk was a member of the governing body between 28 August 2003 and 2 April 2014;**
    - (C) **Between 16 November 2010 and 25 December 2011 Ms Kirk was employed by the Club; and**
    - (D) **Mr Kirk made a written declaration on 7 January 2011.**
  - (2) *Mr Ashton Jnr:*

- (A) *Mr Ashton Jnr is the son of director Mr Ashton Snr;*
  - (B) *Mr Ashton Snr became a member of the governing body **on 28 August 2003** and continues to act in that capacity;*
  - (C) *Mr Ashton Jnr was employed with the Club as "bar staff" **between 15 December 2005 and 4 May 2009;***
  - (D) *Mr Ashton Jnr re-commenced employment with the Club **on or about 29 November 2010;** and*
  - (E) *Mr Ashton Snr made a written declaration **on 10 January 2011.***
- (3) *Mr Kirk:*
- (A) *At the **2008 AGM** [the Authority notes that this took place on 10 December 2008] the ordinary members were asked to consider transferring the Club premises from core to non-core property, and entering a new leasing arrangement;*
  - (B) *Woollahra Gardens Pty Limited is party to the Deed of Company Arrangement;*
  - (C) *Mr Kirk performed remunerated work for Mr Michael Sanchez and his associated group of companies, which includes Woollahra Gardens Pty Limited; and*
  - (D) ***Mr Kirk made a disclosure at the 2008 AGM identifying his relationship with Mr Sanchez.***
- (c) *The Club's register of disclosures is not maintained for each financial year.*
- (1) *The Club's financial year was from 1 June to 30 May.*
  - (2) *The Club maintained a register of disclosures for the period **1 January 2013 to 31 December 2013.***
  - (3) *The Club maintained a register of disclosures for the period **1 September 2013 to 31 August 2014.***

**Particular 4.5:**

*The Club failed to display a notice on the Club website informing members how they can access the Club's register of disclosures.*

**1487. Ground 5:**

**Section 57F(3)(a) – The Club failed to meet the requirements of section 10(1)(m) of the Act.**

***Between 2007 and 2014 the Club failed to meet the requirements of section 10(1)(m) of the Act when the Club failed to comply with the requirements of Part 4A of the Act.***

**Particular 5.1:**

***Between 2009 and 2013 the Club failed to specify the core and non-core property of the Club at the end of the financial year in any of the Club's annual reports, in contravention of section 41J(2) of the Act.***

**Particular 5.2:**

*The Club entered into a contract for the remuneration of a "top executive" without the proposed contract having been first approved by the governing body of the Club, contravening section 41M of the Act.*

- (a) ***On or about 29 November 2010 Mr Ashton Jnr commenced employment with the Club as Secretary.***
- (b) *There was no written contract between the Club and Mr Ashton Jnr outlining the terms of the employment.*

- (c) **On or about 1 February 2011** the Club appointed Mr Ashton Jnr to the position of Secretary.
- (d) The Secretary of the Club is a "top executive" for the purposes of section 41M of the Act.
- (e) The register of disclosures states that the governing body of the Club approved the remuneration or employment contract with Mr Ashton Jnr in the position of Secretary **in April 2014**.
- (f) There is no minute of a meeting of the governing body approving Mr Ashton Jnr's remuneration or employment contract in the position of Secretary.
- (g) On or about 30 June 2014 the Club entered into a written contract with Mr Ashton Jnr for the position of Secretary commencing on 21 April 2014, in circumstances where:
  - (1) Mr Ashton Jnr commenced in the role at a time **between November 2010 and February 2011**; and
  - (2) there is no minute of a meeting of the governing body approving Mr Ashton Jnr's remuneration or contract.

**Particular 5.3:**

*The Club failed to give written notice, as soon as practicable, to Mr Ashton Jnr that he was a "top executive" of the Club and had responsibilities under Part 4A of the Act in contravention of section 41U of the Act.*

- (a) *There is no record that the Club provided Mr Ashton Jnr with written notice that he was a "top executive".*

**Particular 5.4:**

*The Club lent money to an employee where there that loan was not first approved by the governing body of the Club in contravention of section 41N of the Act.*

- (a) *Mr Matthew Brady was an employee of the Club **between 10 December 2012 and 30 June 2013**.*
- (b) ***On 8 March 2013** the Club provided Mr Brady a loan in the sum of \$2,000.*
- (c) *The register of disclosures records that the loan was approved by the members of the governing body **on 9 April 2013**.*
- (d) *There is no board minute recording that the proposed loan was first approved by the governing body of the Club.*

**Particular 5.5:**

***On 1 February 2007**, the Club entered into a contract with ML Management (NSW) Pty Limited ACN 104 788 070 (**MLM**), a company in which Mr Levy, the Secretary at that time, had a controlling interest, contravening section 41L of the Act.*

- (a) ***Between 26 October 2004 and 3 October 2007** Mr Levy was the Secretary of the Club.*
- (b) *During this period Mr Levy was the sole director of MLM and had the capacity to determine the outcome of decisions about the financial and operating policies of the company.*
- (c) ***On 1 February 2007** the Club entered into a deed with MLM to provide consultative and administrative services to the Club (the MLM Deed).*
- (d) *The MLM Deed was a commercial arrangement for the provision of services by MLM to the Club.*



- (e) *Before entering into the MLM Deed, the Club did not make reasonable inquiries to ensure that section 41L(1) was complied with.*

**1488. Ground 8:**

**Section 57F(3)(a) – The Club failed to meet the requirements of section 10(1)(a) of the Act.**

*Between 2002 and 2014 the Club failed to meet the requirements of section 10(1)(a) of the Act when the Club was not conducted in good faith as a club.*

**Particular 8.2:**

*The Club failed to meet the minimum number of ordinary members required by Section 10(1)(d) of the Act.*

**Particular 8.3:**

*During the period the Club was under external administration a "moratorium on accepting full membership" was imposed and the Club permitted its membership to decline.*

**Particular 8.4:**

*The Club permitted the "moratorium on accepting full membership" to continue when the Club was no longer under administration.*

**Particular 8.6:**

*The Club admits persons to membership of the Club as "social members" to allow persons who live within a 5km radius of the Club to enter the premises and utilise the facilities without being required to be approved by the members or governing body as "ordinary members".*

- (a) *At all relevant times it was a rule of the Club that it must not admit a person to the Club:*
- (1) *as a member of the Club, other than as a "provisional member", "honorary member" or "temporary member", unless the person is elected to membership at a meeting of the full members, the governing body, or the election committee of the Club; or*
  - (2) *as a "temporary member" if the person resides in New South Wales, and within a 5km radius of the Club.*
- (b) *Persons who live within a 5km radius of the Club and attend for social and corporate bowling are admitted to the Club incorrectly as "temporary members", or admitted to membership as "social members".*
- (c) *The Club introduced "social members" as a membership category in the Club's 2014 constitution, and applicants are approved by Club staff as members of the Club at the Club entrance following the payment of a \$2.00 fee and the completion of a membership application form.*
- (d) *As at 16 May 2014 the Club had admitted 7,273 persons to membership of the Club as "social members" who were not approved by a meeting of the full members, governing body or election committee.*

**Particular 8.7:**

*The Club was under external administration for an extended period of time (10 years).*

- (a) *On or about 19 September 2002 Mr Wily was appointed Receiver Manager by the Supreme Court of NSW and acted in the role **until 8 November 2011**, apart from*

*the period 23 January 2004 and 21 June 2004 when Mr Wily Snr acted in this capacity.*

- (b) *On 24 October 2002 Mr Wily was purportedly appointed Administrator of the Club and acted in the role until 28 March 2003.*
- (c) *On 24 March 2003 Mr Wily was purportedly appointed Administrator under a Deed of Company Arrangement and acted in the role **until 18 May 2012**, apart from the period 23 January 2004 and 21 June 2004 when Mr Wily Snr acted in this capacity.*

**1489. Ground 9:**

**Section 57F(3)(d) – The Club contravened a provision of the Act.**

**Prior to 1 January 2013** the Club failed to maintain a register of all disclosures made under Part 4A of the Act for the relevant financial year, contravening section 38 of the Act and clause 16 of the Regulation.

**Particular 9(a):**

- (a) *Repeat particulars at 4.4 above.*

**1490. Ground 10:**

**Section 57F(3)(d) – The Club contravened a provision of the Act.**

**Between January 2009 and June 2014** the Club contravened section 30(1)(c) of the Act.

**Particular 10.1:**

*The Club failed to hold a meeting of the governing body at least once in every month of the year when it failed to hold meetings as follows;*

- (a) **In 2009**, on eight occasions,
  - (1) **Governing body meetings were not held in March, April, May, June, August, September, October and December 2009.**
- (b) **In 2010**, on two occasions,
  - (1) **Governing body meetings were not held in August and December 2010.**
- (c) **In 2011**, on five occasions,
  - (1) **Governing body meetings were not held in January, April, June, August and November 2011.**
- (d) **In 2012**, on one occasion,
  - (1) **A governing body meeting was not held in October 2012.**
- (e) **In 2013**, on five occasions,
  - (1) **Governing body meetings were not held in January, March, June, September and December 2013.**
- (f) **In 2014**, on one occasion,
  - (1) **A governing body meeting was not held in January 2014.**

**Particular 10.2:**

*The Club failed to keep minutes of all proceedings and resolutions of the governing body in a book.*

- (a) *There is no minute of proceedings and resolutions in respect of a meeting of the governing body in **January 2010**.*
- (b) *Minutes and resolutions were not recorded in a book.*

**Particular 10.3:**

*The Club failed to retain all documents referred to in the minutes as being tabled at the meeting.*

- (a) *On 9 occasions the minutes of meeting of the governing body record that a Management Report was tabled but the Club has failed to retain a copy with the stored minutes:*
  - (1) ***In 2009***, in the meeting of the governing body held in July.
  - (2) ***In 2010***, in the meetings of the governing body held in February, March, June, July, September and October.
  - (3) ***In 2011***, in the meetings of the governing body held in July and October.

**1491. Ground 11:**

***Section 57F(3)(d) – The Club contravened a provision of the Act.***

***Between August 2013 and April 2014 the Club contravened section 30(2)(k) of the Act.***

**Particular 11.1:**

*On 31 occasions the Club failed to ensure the information of a guest of a member was recorded in the "sign-in register" in accordance with section 31(1)(c) of the Act.*

- (a) *On 15 occasions the guest did not complete their full name, or their surname and first initial.*
- (b) *On 16 occasions the guest did not complete their address.*
- (c) *On three occasions the member did not provide their signature.*

**1492. Ground 12:**

***Section 57F(3)(d) – The Club contravened a provision of the Act.***

***In 2007 and between 2009 and 2013 the Club failed to hold annual elections for the appointment of the members of the governing body in contravention of section 30(1)(a) of the Act.***

**Particular 12.1:**

*There was no rule of the Club to provide otherwise than that the governing body of the Club must be elected annually.*

**Particular 12.2:**

***In 2007, 2009 and 2010, the Club:***

- (a) *did not hold an AGM of members; and*
- (b) *did not hold an election by members for the appointment of the governing body.*

**Particular 12.3:**

***In 2011, the Club:***

- (a) *held an AGM of members; but*
- (b) *there is no minute from the AGM of members recording that the Club held an election for the appointment of the governing body.*

**Particular 12.4:**

**In 2012 and 2013, the Club:**

- (a) did not hold an AGM of members; and
- (b) did not hold an election by members for the appointment of the governing body.

**1493. Ground 14:**

**Section 57F(3)(e) – a rule of the Club referred to in section 30(1) of the Act has been broken or any other rule of the Club has been habitually broken.**

**Between August 2013 and November 2014** it was a rule of the Club, under section 30(2)(m) of the Act, that it maintain a register of "temporary members" who attend the Club each day and record information in accordance with section 31(1)(e) of the Act.

**Between August 2013 and November 2014** the Club habitually broke this rule.

**Particular 14.1:**

The Club kept a "sign-in register" for "temporary members".

**Particular 14.2:**

The Club on 1,856 occasions failed to ensure the full name, or the surname and first initial, and the address of the "temporary member" together with his or her signature, was recorded in the "sign-in register" as follows.

<b>Date/Month</b>	<b>Number of temporary members whose information was not recorded as required by section 31(1)(e)</b>
August 2013	90
September 2013	83
October 2013	139
November 2013	223
December 2013	438
January 2014	111
February 2014	123
March 2014	53
April 2014	188
May 2014	78
June 2014	41
July 2014	37
August 2014	35
September 2014	44
October 2014	112
November 2014	61

**1494. Ground 15:**

**Section 57F (3)(e) – A rule of the Club referred to in section 30(1) of the Act has been broken or any other rule of the Club has been habitually broken.**

**Between August 2013 and November 2014** it was a rule of the Club, under section 30(2)(c) of the Act, that it must not admit a person to the Club as a "temporary member" if the person resides in New South Wales, and within a 5km radius of the Club, unless the person:

- (a) is a member of another registered club with similar objects as the Club; or
- (b) is a member of another registered club and is attending the Club on an invitation to participate in an organised sport or competition.

**Between August 2013 and November 2014** the Club habitually broke this rule.

**Particular 15.1:**

*On 1,168 occasions the Club admitted persons, whose ordinary residence was within a 5km radius of the Club, as "temporary members" of the Club.*

<b>Month/Year</b>	<b>Number of temporary members who resided in New South Wales and within a 5km radius of the Club</b>
<i>August 2013</i>	<i>43</i>
<i>September 2013</i>	<i>32</i>
<i>October 2013</i>	<i>65</i>
<i>November 2013</i>	<i>71</i>
<i>December 2013</i>	<i>222</i>
<i>January 2014</i>	<i>115</i>
<i>February 2014</i>	<i>118</i>
<i>March 2014</i>	<i>60</i>
<i>April 2014</i>	<i>146</i>
<i>May 2014</i>	<i>84</i>
<i>June 2014</i>	<i>41</i>
<i>July 2014</i>	<i>29</i>
<i>August 2014</i>	<i>18</i>
<i>September 2014</i>	<i>45</i>
<i>October 2014</i>	<i>52</i>
<i>November 2014</i>	<i>27</i>

**Particular 15.2:**

*None of the persons entering the Club referred to at paragraph 15.1 above identified themselves in the "sign-in register" as being a member of another club.*

**1495. Ground 16:**

***Section 57F(3)(e) – A rule of the Club referred to in section 30(1) of the Act has been broken or any other rule of the Club has been habitually broken.***

*At all relevant times it was a rule of the Club, under section 30(1)(g) of the Act, that it must not admit a person as a member of the Club, other than as a "provisional member", "honorary member" or "temporary member", unless the person is elected to membership at a meeting of:*

- (a) the full members of the Club;*
- (b) the governing body of the Club; or*
- (c) the election committee of the Club.*

***Between 2013 and 2014 the Club habitually broke this rule.***

**Particular 16.1:**

*As at 16 May 2014 the Club had admitted 7,273 persons to membership of the Club as "social members".*

**Particular 16.3:**

*"Social members" are distinct from "provisional members", "honorary members" or "temporary members" in the Club's 2014 Constitution.*

**Particular 16.4:**

*Article 16.1 of the Club's 2014 Constitution provides:*

*"A person shall not be admitted as a member of the Club other than as a Provisional, Honorary Temporary or a Life Member unless that person is elected to membership at a meeting of the Board of the Club or duly appointed election committee of the Club".*

**Particular 16.5:**

*"Social members" are not "provisional members", "honorary members" or "temporary members" of the Club.*

**Particular 16.6:**

*"Social members" are approved by Club staff as members of the Club at the entrance to the Club following the payment of a \$2.00 fee and the completion of a membership application form.*

**Particular 16.7:**

*"Social members" are issued a membership number and card which provides access to the Club.*

**Particular 16.8:**

*The 7,273 persons admitted to membership as "social members" were not approved by a meeting of the full members, governing body or election committee.*

**1496. Ground 17:**

**Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.**

*The Club contravened clause 14 of the Gaming Machines Regulation 2010.*

**Particular 17.1:**

***Between August 2013 and September 2014*** on 623 occasions the Club failed to keep written records with respect to the awarding or payment of each prize and short-pay of an approved gaming machine kept on the premises of the Club that contains:

- (a) *the name and signature of the person to whom the award or payment was made; and*
- (b) *the signature of 2 other persons certifying that each sighted the prize-winning combination or the number of credits and that the record was correct in all its details.*

**1497. Ground 18:**

**Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.**

*The Club contravened clause 17 of the Gaming Machines Regulation 2010.*

**Particular 18.1:**

*There is no minute of a meeting of the governing body **between January 2009 and June 2014** recording the production to the governing body, at monthly intervals, of:*

- (a) *a cash flow analysis in the form approved by the Director-General; and*
- (b) *a comparison of cancelled credit and jackpot wins meter readings with the corresponding entries in the Club's payout sheets,*

*in respect of each approved gaming machine.*

**1498.** Ground 19:

**Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.**

*The Club contravened clause 18 of the Gaming Machines Regulation 2010.*

**Particular 19.1:**

***Between January 2009 and June 2014 the Club failed to:***

- (a) *produce a "net analysis report" for the previous months, and that part of the previous 12 months, for each approved gaming machine; and*
- (b) *ensure the net analysis reports were examined by the Club's board within one month.*

**1499.** Ground 20:

**Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.**

*The Club contravened clause 20(2)(d) of the Gaming Machines Regulation 2010.*

**Particular 20.1:**

***Between July 2012 and June 2014 on 34 occasions the Club failed to keep written records with respect to each clearance of an approved gaming machine on the premises of the Club that contained the signatures of two authorised persons [sic] cleared the gaming machine certifying that the record was correct in all its details.***

**1500.** Ground 24:

**Section 57F(3)(d) – The Club contravened a provision of the Act.**

***Between 24 October 2002 and 18 May 2012 the Club contravened section 41 of the Act when it purported to appoint Mr Wily to act in the capacity of administrator of the Club.***

**Particulars:**

- (a) *The Club is a company within the meaning of the Corporations Act 2001.*
- (b) *On or about 20 September 2002 Mr Wily was appointed to act as Receiver Manager of the Club by the Supreme Court of New South Wales.*
- (c) *On or about 24 October 2002 Mr Wily was purportedly appointed to act as Administrator of the Club in circumstances where there is no record of Mr Wily being appointed to act in this capacity by:*
  - (1) *the Supreme Court of NSW; or*
  - (2) *the former Licensing Court; or*
  - (3) *the Authority.*

**1501.** As previously noted, while the Club was under voluntary administration between October 2002 and March 2003, the operation of section 437C(1) of the *Corporations Act 2001* served to limit the powers of the Club's officers to act without the consent of the Club's administrator, Mr Wily.

**1502.** However, this period of voluntary administration ended, through the operation of section 435C(2)(a) of the *Corporations Act 2001*, when a deed of company arrangement was executed by the Club on 24 March 2003. This restored the

powers of the officers of the Club, in so far as they did not act inconsistently with the terms of the deed of company arrangement.

- 1503.** The Authority is satisfied that, as a director (and President and Chairman) of the Club, Mr Kirk had a degree of responsibility for ensuring the Club's compliance with the legislative requirements to which it is subject – notwithstanding the fact that the Club was a party to a deed of company arrangement from 24 March 2003 onward.
- 1504.** On the basis of the above findings, the Authority is satisfied that Mr Kirk failed to exercise his duties as a director of the Club with a degree of knowledge, ability, care and diligence. Particular 29.3(a) is established.

#### Particular 29.3(b)

- 1505.** Particular 29.3(b) attributes to Mr Kirk's fitness and propriety an alleged failure to comply with *ClubsNSW Guidelines*. The Authority accepts Mr Kirk's submission that these documents are guidelines that provide advice on industry best practice, but do not prescribe minimum legal rules in respect of which non-compliance may found an independent ground of complaint.
- 1506.** Industry guidelines provide a useful framework for the training of club officers and staff and may, in their terms, provide a plain English guide to minimum statutory requirements.
- 1507.** A good working knowledge of *ClubsNSW Guidelines* on the part of club directors or senior executives may have the collateral benefit of enhancing knowledge and skill and provide a means by which regulated officers become aware of and refresh themselves as to regulatory requirements and avoid managing club premises in a manner that exposes an enterprise to systemic risk and/or regulatory action.
- 1508.** *ClubsNSW Guidelines* may also provide a source of evidence as to what the industry considers to be best practice with regard to the content of a regulatory duty that is the subject of a statutory requirement.
- 1509.** However, the Authority does not need to make findings on the sub-Particulars of Particular 29.3(b) by reason that it is already satisfied as to Mr Kirk's responsibility for those instances of statutory non-compliance found against the Club that are found to be also attributable to Mr Kirk's personal fitness and propriety.
- 1510.** The Authority does not consider that non-compliance with individual *ClubsNSW Guidelines* gives rise to an independent basis for disciplinary action and that any lack of knowledge or skill in respect of the Club's conduct by comparison to these guidelines adds little to identifying a lack of knowledge or skill in respect of the failure to demonstrate knowledge and skill in respect of the relevant statutory minimum requirements that have been found by the Authority.

#### Particular 29.3(c)

- 1511.** Particular 29.3(c) attributes to Mr Kirk's fitness and propriety as a director of a registered club certain instances of non-compliance by the Club with the Club's Articles of Association. The Authority makes the following findings to the extent that they occurred during Mr Kirk's tenure as a director.



- 1512.** Particular 29.3(c)(1) attributes to Mr Kirk's fitness and propriety the Club's failure to post membership applications to the Club Notice Board. This Particular is established on the basis of Article 12 of the Articles of Association for the Club (Complainant Exhibit E085) and the evidence or material referred to in the Authority's findings on Particular 1.5(f)(6) above.
- 1513.** The incident of non-compliance established on the evidence concerns the failure to post a membership application with regard to Mr McKew that occurred around 28 March 2012.
- 1514.** Mr Kirk submits that he was not aware of this act of non-compliance and contends that from around February 2013, Club director Mr Teale was responsible for all membership issues. However, the Authority notes that Mr Kirk does not rely on any evidence in support of this contention.
- 1515.** The Authority considers that *all* the directors and the Club secretary are responsible for the Club's compliance with its Articles of Association – however the Club secretary will in practice have a more direct responsibility for this operational matter.
- 1516.** The Authority accepts Mr Kirk's contention that the Board had delegated this function to one single director, Mr Teale. There is no evidence before the Authority to contradict this assertion by Mr Kirk.
- 1517.** Noting that this is only a single incident of non-compliance and not a systemic failure by the Club or Mr Kirk in this regard, the Authority is nevertheless satisfied that this incident of non-compliance with the Articles of Association is a matter that reflects upon the knowledge and ability of the other directors.
- 1518.** Particular 29.3(c)(2) attributes to Mr Kirk's fitness and propriety the Club's failure to remove non-financial members from the Club's membership register. This non-compliance is factually established on the basis of Article 23 of the Articles of Association for the Club (Complainant Exhibit E085) and the *Paddington Bowling Club Full Members Register* as of 11 September 2014, as provided by the Complainant (Complainant Exhibit E057).
- 1519.** The Authority has considered Mr Kirk's contention that he took a number of steps to attempt to remedy the issues with the membership register. The Authority notes that Mr Kirk refers to his interview with OLGR inspectors on 5 November 2014 (Complainant Exhibit E181) where Mr Kirk states that he "tried a few times" to have the Club's membership register updated.
- 1520.** However, in light of the evidence and degree of specificity provided in this regard, the Authority is not satisfied that Mr Kirk took sufficient action at the relevant time to avoid sharing responsibility for the Club's lack of action in this regard.
- 1521.** The Authority is satisfied that the discretion provided to the Club to remove non-financial members from the register was not considered or exercised during the relevant period and this is a matter that further underpins an apparent laxity of control with regard to membership and access to the Club premises. It supports an inference that the Club maintained something akin to an "open door" policy and this provides some cause for an adverse assessment as to the fitness of the secretary and members of the governing body for not exercising more diligence in this regard.

- 1522.** The Authority rejects Mr Kirk's submission that he relied on MLM to be responsible for the Club's membership register. Compliance with the Club's own Articles of Association is a matter for which responsibility is ultimately shared between the Club's secretary and its directors. The Club had the power to take action with regard to non-financial members and it would have been prudent for the Club to have considered taking such action. Neither the Club board nor the secretary seems to have considered taking such action to remove non-financial members from the register over a substantial period of time.
- 1523.** Particular 29.3(c)(3) attributes to Mr Kirk's fitness and propriety the Club's failure to ensure members of the Board were elected annually. The Authority notes Mr Kirk's submissions in response to this Particular that the appointment of directors was open to Mr Wily during the administration of the Club, but this does not excuse the directors from failing to take steps to conduct annual elections.
- 1524.** The Authority accepts Mr Kirk's contention that after the Club came out of administration, there was "general continued disinterest" from any other person to become a member of the Board, consistent with the evidence adduced by the Complainant.
- 1525.** Nevertheless, this Particular is factually established on the basis of Article 28 of the Articles of Association for the Club (Complainant Exhibit E085); the statements made by Robert Ashton Jnr at page 27 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182) and the evidence or material referred to in the Authority's findings on Ground 12 above.
- 1526.** Particular 29.3(c)(4) attributes to Mr Kirk's fitness and propriety the Club's failure to ensure the Board met at least once in every month. The Authority has considered Mr Kirk's submission that it was "very difficult" for the Board to meet monthly, given the Board members' external commitments and lack of interest from some Board members due to the fact that the Club was under external administration.
- 1527.** The Authority further notes and accepts Mr Kirk's submission that he "aimed" for the Board members to meet monthly, and accepts that the Board sometimes met twice in one month.
- 1528.** Nevertheless, this Particular is factually established on the basis of Article 41 of the Articles of Association for the Club (Complainant Exhibit E085) and the evidence or material referred to in the Authority's findings on Ground 10 above. Notwithstanding this finding, the Authority notes that this matter does not have a substantial bearing on an issue of fitness and propriety of the secretary or directors, including Mr Kirk, by reason of the number of meetings actually convened by the Club during the relevant years.
- 1529.** Particular 29.3(c)(5)(A), which attributes to Mr Kirk's fitness and propriety the Club's alleged failure to ensure the required quorum of five members of the Board was met for each of the five meetings specified during 2011, is established on the basis of Article 41 of the Articles of Association for the Club (Complainant Exhibit E085); the Club Board meeting minutes for 1 February 2011 (Complainant Exhibit E015); the Club Board meeting minutes for 28 February 2011 (Complainant Exhibit E016); the Club Board meeting minutes for 30 March 2011 (Complainant Exhibit E017); the Club Board meeting minutes for 27 May 2011 (Complainant Exhibit E018); the Club Board meeting minutes for 1 July 2011 (Complainant Exhibit E019); the Club Board

meeting minutes for 29 July 2011 (Complainant Exhibit E020); the Club Board meeting minutes for 2 September 2011 (Complainant Exhibit E021); the Club Board meeting minutes for 28 October 2011 (Complainant Exhibit E022) and the Club Board meeting minutes for 28 December 2011 (Complainant Exhibit E023).

- 1530.** Particular 29.3(c)(5)(B), which attributes to Mr Kirk's fitness and propriety the Club's alleged failure to ensure the required quorum of five members of the Board was met for each of the three meetings specified during 2014, is established on the basis of Article 41 of the Articles of Association for the Club (Complainant Exhibit E085); the Club Board meeting minutes for 10 February 2014 (Complainant Exhibit E045); the Club Board meeting minutes for 24 February 2014 (Complainant Exhibit E046); the Club Board meeting minutes for 8 March 2014 (Complainant Exhibit E047); the Club Board meeting minutes for 11 April 2014 (Complainant Exhibit E048); the Club Board meeting minutes for 13 May 2014 (Complainant Exhibit E049) and the Club Board meeting minutes for 23 June 2014 (Complainant Exhibit E050).
- 1531.** With regard to Particular 29.3(c)(5) generally, the Authority notes Mr Kirk's submission that at the 2004 AGM, there was an amendment to the Club's former Articles of Association reducing the quorum of directors at a Board meeting from five to three, and that all of the matters the subject of Particulars 29.3(c)(5)(A) and 29.3(c)(5)(B) occurred *after* the 2004 resolution and were attended by three or more members of the governing body. Mr Kirk states in his submissions dated 29 May 2015 that while he told OLGR investigators in his record of interview dated 5 November 2014 (Complainant Exhibit E181) that he thought the quorum requirement changed from five to three in 2006, on reflection he believes it changed in 2004.
- 1532.** The Authority rejects Mr Kirk's submissions in this regard. A failure to meet the quorum requirement is not only a technical or administrative failing, but if not observed could increase the scope for the potential conduct of secret meetings or the formation of cabals within a club's governing body. A resolution passed by a club board cannot supersede the requirements of the Articles of Association of a registered club. The Authority also notes that Mr Kirk has provided no documentary evidence in support of his contention that the quorum requirement in the Club's Articles of Association was amended in 2004.
- 1533.** This basic requirement of corporate governance should have been observed by the Club's governing body and it adversely reflects upon the ability of the relevant members of the governing body and the Club's secretary that the quorum requirement was not met on the occasions that have been established on the evidence.
- 1534.** Particular 29.3(c)(5) is established. It is a matter for which Mr Kirk shares responsibility along with the secretary and other members of the governing body at the relevant times.
- 1535.** Particular 29.3(c)(6) attributes to Mr Kirk's fitness and propriety the Club's failure to ensure the Club held an annual general meeting of members each year. The Authority notes that Mr Kirk relies upon the Club's submissions on Ground 12 of the Complaint and contends that the lack of annual general meetings occurred because the Club was in external administration under Mr Wily. Mr Kirk submits that he relied upon Mr Wily to put in place appropriate internal controls and procedures in respect of the Club.

- 1536.** The Authority does not accept Mr Kirk's submissions in this regard. Particular 29.3(c)(6) is established on the basis of Article 49 of the Articles of Association for the Club (Complainant Exhibit E085) and the evidence or material referred to in the Authority's findings on Ground 12 above.
- 1537.** The Authority has considered, but rejects the submissions by Mr Kirk that the matters alleged in Particular 29.3(c) do not go to a proper consideration of the honesty, knowledge and ability of a director of the Club.
- 1538.** While the secretary of a registered club has greater operational responsibility over the day to day affairs of a registered club than the members of its governing body, the duty to comply with a club's Articles of Association also falls upon the directors of a club including its President, Mr Kirk.

Particular 29.3(d)

- 1539.** With regard to Particular 29.3(d) attributing to Mr Kirk's fitness and propriety the Club's alleged lack of internal controls and procedures, the Authority rejects Mr Kirk's submission that the issues the subject of Particular 29.3(d) arose during the administration of the Club and as such, were the responsibility of Mr Wily.
- 1540.** As previously noted, while the Club was under administration, the powers of the officers of the Club were suspended, pursuant to section 437C(1) of the *Corporations Act 2001*. However, when the Deed of Company Arrangement was signed on 24 March 2003, the Club was no longer under administration, for the purposes of section 435C of the *Corporations Act 2001*. The Ex-Officers resumed their powers and obligations in relation to the Club's governance as of that date, subject to the terms of the Deed of Company Arrangement.
- 1541.** The Authority makes the following findings on the sub-Particulars of Particular 29.3(d).
- 1542.** Particular 29.3(d)(1) attributes to Mr Kirk's fitness and propriety the Club Auditor's inability to form an unqualified opinion of the Club's financial accounts for the year ended 30 June 2011, due to poor internal controls and systems. The Authority rejects Mr Kirk's submission in response to this Particular that Mr Wily and MLM were responsible for financial matters while the Club was under administration. This is a systemic failure with respect to which the Club's secretary and members of the governing body share responsibility.
- 1543.** Particular 29.3(d)(1) is established on the basis of a letter from Michael Bulgin, the Club's Auditor to the Club secretary dated 20 May 2011 (Complainant Exhibit E103); the letter from Domenic Cutrupi of CBC Partners, the Club's Auditor to the Club secretary dated 28 March 2014 (Complainant Exhibit E104) and the statements made by Robert Ashton Jnr at page 12 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182).
- 1544.** Particular 29.3(d)(2) attributes to Mr Kirk's fitness and propriety the failure to maintain the Club's register of disclosures. This Particular is established on the basis of the evidence or material referred to in the Authority's findings on Particular 4.3 above.

- 1545.** Particular 29.3(d)(3) attributes to Mr Kirk's fitness and propriety the failure to ensure a current governing body resolution approved the payment of expenses to members of the governing body.
- 1546.** The Authority notes and accepts Mr Kirk's submission that on 25 February 2010, a motion was passed such that directors could submit claims for out-of-pocket expenses commencing immediately, but that any claim was to be limited to a maximum of \$150.00 unless prior approval was obtained.
- 1547.** Nevertheless, Particular 29.3(d)(3) is established on the basis of the evidence or material referred to in the Authority's findings on Particular 3.4 above. The Authority is satisfied that this is a matter that reflects upon the knowledge and/or ability demonstrated by the board in this regard, including Mr Kirk.
- 1548.** Particular 29.3(d)(4) attributes to Mr Kirk's fitness and propriety the allegation that the Ex-Officers and Mr Kirk maintained "high risk practices" including Mr Ashton Jnr's practice of paying expenses of directors in cash directly from the safe. The Authority notes that the Complainant relies upon the statements made by Robert Ashton Jnr at page 28 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182) in support of this contention.
- 1549.** The Authority has reviewed the above evidence or material and is *not* satisfied that this Particular is established. While the practice of paying directors' expenses directly from the safe is not recommended, the Authority is not satisfied that in the circumstances of this Club and on the evidence or material before it the practice should be characterised as "high risk".
- 1550.** There is no evidence before the Authority to suggest that the Ex-Officers or Mr Kirk did not comply with proper accounting practices, and the Authority notes that these payments were reconciled through petty cash, which is a common industry practice. Particular 29.3(d)(4) is *not* established.
- 1551.** Particular 29.3(d)(5) attributes to Mr Kirk's fitness and propriety the Club's failure to maintain an assets register prior to 18 July 2014.
- 1552.** With regard to this Particular, the Authority accepts Mr Kirk's submission that he took steps to improve his knowledge in respect of the legislative requirements to which the Club was subject during the transitional period. The Authority notes that the failure to maintain an assets register is not a breach of a *statutory* requirement but is nevertheless a commonly exercised form of financial record maintained by registered clubs and other enterprises to enable the prudent control and awareness of an entity's assets. It reflects adversely upon the degree of financial control exercised by the Board and the secretary, and the absence of such a register was not apparently acted upon by the Board during the relevant period. It is a matter that also reflects adversely upon the knowledge and ability demonstrated by the Board as a whole, including Mr Kirk.
- 1553.** The Authority rejects Mr Kirk's submission in response to this Particular that Mr Wily and MLM were responsible for maintaining the Club's assets register. Mr Kirk, as a director and President of the Club, had a greater level of responsibility for ensuring compliance with the relevant legislation to which the Club was subject.

- 1554.** Particular 29.3(d)(5) is established on the basis of the statements made by Allan Teale at pages 30 to 31 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E183).
- 1555.** Particular 29.3(d)(6) attributes to Mr Kirk's fitness and propriety the Club's failure to ensure that the Club's auditors provided reports each year. Particular 29.3(d)(6)(A) alleges that the Auditor's Reports for the years ended 30 June 2009 and 30 June 2010 are dated 27 May 2011. Particular 29.3(d)(6)(B) alleges that the Auditor's Report for the year ended 30 June 2012 is dated 2 April 2014. Particular 29.3(d)(6)(C) alleges that the Auditor's Reports for the years ended 30 June 2012 and 30 June 2013 are dated 6 November 2014.
- 1556.** The Authority is satisfied that these sub-Particulars are established on the basis of the Notes to and Forming Part of the Financial Statements as contained in the Club's Financial Report for the year ended 30 June 2009 (Complainant Exhibit E063); the Notes to and Forming Part of the Financial Statements as contained in the Club's Financial Report for the year ended 30 June 2010 (Complainant Exhibit E064); the Club's Financial Statement for 30 June 2011 (Complainant Exhibit E187) and the minutes for the Club's AGM dated November 2014 (Complainant Exhibit E209).
- 1557.** The Authority has considered cumulatively the Authority's findings with regard to the Particulars specified in Ground 29. The Authority notes the multiple instances of non-compliance by the Club with legislative requirements established among Grounds 1 to 24. The Authority notes those further instances of non-compliance with the Club's Articles of Association and failings with respect to corporate governance that are established in the Particulars noted above.
- 1558.** The Authority is satisfied that Ground 29 is established and that Mr Brian Kirk is not a fit and proper person to be a member of the governing body of the registered club, by reason that the Complainant has established that he did not demonstrate the degree of knowledge, ability, care and diligence that the Authority would expect from a reasonably competent director (and President and Chairman) of a registered club of this scale. There is no basis for impugning Mr Kirk's honesty arising from the Authority's findings on Ground 29.
- 1559.** The Authority notes that, during the time the Club was subject to the Deed of Company Arrangement from 24 March 2003 and the Amended Deed of Company Arrangement from 10 December 2010, these documents imposed certain restrictions upon the discretion of the governing body in that they could not act contrary to those agreements.
- 1560.** While the degree of responsibility for the Club's affairs may *potentially* be reduced to the extent that certain aspects of Club governance required the consent of the Deed Administrator, Mr Wily – the fact that the Club was subject to a deed of company arrangement does not provide a complete excuse for Mr Kirk's failure, as a Club director and President, to ensure that the Club complied with relevant legislation.
- 1561.** Mr Kirk and the members of the governing body did have a role to play during the currency of the DOCA and ADOCA during that period. It is certainly no excuse for Mr Kirk or any member of the governing body not to have knowledge of the relevant legislative and constitutional requirements to which the Club was subject.

1562. The Authority notes that as President of the Club Board between 28 August 2003 and 2 April 2014, Mr Kirk had, if anything, a stronger duty than the other directors to ensure that the Club complied with the legislative requirements to which it was subject and for which responsibility may be reasonably attributed to the governing body.
1563. However, the Authority acknowledges the effort that Mr Kirk has made and the positive steps taken by Mr Kirk to correct deficiencies in the Club's compliance with the relevant legislation.

### GROUND 30

1564. Ground 30 alleges as follows:

***Section 57F(3)(g) – A member of the governing body of the Club is not a "fit and proper" person to act as such.***

1565. Particular 30.1 of Ground 30 alleges as follows:

*By reason of the conduct of Mr Du Chesne whilst a member of the governing body of the Club he is not a "fit and proper" person to hold such a position.*

1566. Particular 30.2 of Ground 30 alleges as follows:

*Mr Du Chesne was elected to the governing body on 28 March 2006 as a Director of the Club and held that position until 19 June 2007.*

1567. Particular 30.3 of Ground 30 alleges as follows:

*Mr Du Chesne was re-appointed to the governing body as a Director of the Club on 2 April 2014 and currently holds that position.*

1568. Particular 30.4 of Ground 30 alleges as follows:

*Between 28 March 2006 and 19 June 2007, and since 2 April 2014, Mr Du Chesne failed to exercise his duties as a member of the governing body with a degree of knowledge, ability, care and diligence, by reason of:*

- (a) *The non-compliance with the legislation outlined in paragraphs 1-24 above.*
- (b) *The non-compliance with ClubsNSW Guidelines:*

- (1) *Failure to ensure the Board determined, agreed and offered a remuneration package to the Club Secretary.*
- (2) *Failure to ensure key performance indicators were developed and clearly expressed in the contract of the Secretary.*
- (3) *Failure to be aware of, and comply with, any legislative requirements that pertain to executive remuneration.*
- (4) *Failure to ensure the employment contract of the Secretary was approved by the Board.*
- (5) *Failure to ensure the performance of the Secretary is reviewed periodically, at least annually, and assessed against clear KPI's in the employment contract.*
- (6) *Failure to comply with any relevant legislative, industrial or administrative requirement, and keep up to date with any changes.*
- (7) *Failure to obtain value for Club money spent and avoid waste and extravagance in the use of Club resources:*

- (A) *the Club purchased and maintains motor vehicles that are rarely used by the Club.*
  - (B) *the Club reimbursed unapproved expenses of members of the governing body.*
  - (C) *the Club engaged VSM to provide marketing services at a cost of:*
    - i. *\$240,636.00 for the financial year 2013-14.*
- (8) *Failure to provide strategic direction to the Club by constructive engagement in the development, execution and modification of the Club's strategy;*
- (A) *the Club has produced a five year plan for the improvement of the Crown Asset rather than a strategy to further the Club's purpose of providing accommodation for its members and their guests.*
- (9) *Failure to report to members and ensure all regulatory requirements are met.*
- (10) *Failure to ensure all appropriate compliance frameworks and controls are in place.*
- (11) *Failure to ensure the Club obtained value for money when making procurement decisions:*
- (A) *the Club did not undertake a tender process when engaging accounting and marketing services.*
- (12) *Failure to ensure the Club benchmarked the core activities of bar, food and gaming.*
- (c) *The non-compliance with the Articles of Association of the Club:*
- (1) *Failure to ensure members who were not financial were removed from membership register.*
  - (2) *Failure to ensure the members of the Board were elected annually.*
  - (3) *Failure to ensure the Board met at least once in every month.*
  - (4) *Failure to ensure the required quorum of five members of the Board was met for each meeting:*
    - (A) *in 2014, on three occasions, meetings held of the governing body did not consist of a quorum of five members as follows;*
      - i. *March, April and June 2014.*
  - (5) *Failure to ensure the Club held an annual general meeting of members each year.*
- (d) *The lack of internal controls and procedures.*
- (1) *Failure to maintain the Club's register of disclosure.*
  - (2) *Failure to ensure a current governing body resolution approved the payment of expenses to members of the governing body.*
  - (3) *Maintaining high risk practices including paying expenses of directors in cash directly from the safe and pre-signing cheques.*
  - (4) *Failure to maintain an assets register prior to 18 July 2014.*

### **Club's Response to Ground 30**

**1569.** The Club did not provide a response to Ground 30 of the Complaint.

### **Ex-Officers' Response to Ground 30**

**1570.** The Authority notes that Particulars 30.2 and 30.3 of the Complaint (specifying the dates of Mr Du Chesne's employment at the Club as a director) are not disputed by the Ex-Officers.



- 1571.** In response to Particular 30.4(a), the Ex-Officers refer to and repeat their submissions on Grounds 1 through 24 of the Complaint.
- 1572.** In response to Particular 30.4(b)(1) regarding the failure of the Board to determine the remuneration package to the secretary, the Ex-Officers repeat their submissions in relation to Ground 5.2 of the Complaint. The Ex-Officers submit that Mr Wily was responsible for this under the terms of the DOCA and ADOCA and that the Ex-Officers “did not have the power” to achieve the outcome required by the Guidelines.
- 1573.** In response to Particulars 30.4(b)(2), (3), (4) and (5) regarding the secretary’s contract and KPIs, the Ex-Officers repeat their submissions in relation to Particular 5.2 of the Complaint.
- 1574.** The Ex-Officers submit that Mr Wily was responsible and that the *ClubsNSW Guidelines* are not enforceable and are best practice guidelines only. The Ex-Officers submit that they did not have any independent power to employ Mr Ashton Jnr and were only permitted to do so if they had received notice that Mr Wily had endorsed Mr Ashton Jnr’s employment.
- 1575.** In response to Particular 30.4(b)(6), regarding the alleged failure to comply with legislative, industrial and administrative requirements, the Ex-Officers submit that *ClubsNSW Guidelines* are not enforceable – they are best practice guidelines only.
- 1576.** In response to Particular 30.4(b)(7)(A), regarding the alleged failure to obtain value for Club money in relation to Club motor vehicles, the Ex-Officers refer to and repeat their submissions on Ground 3.1 of the Complaint.
- 1577.** In response to Particular 30.4(b)(7)(B), regarding the alleged failure to obtain value for Club money in relation to the reimbursement of unapproved expenses, the Ex-Officers refer to and repeat their submissions on Ground 3.4 of the Complaint.
- 1578.** In response to Particular 30.4(b)(7)(C), regarding the alleged failure to obtain value for Club money in relation to the engagement of VSM to provide marketing services for the Club, the Ex-Officers refer to and repeat their submissions on Ground 6 of the Complaint.
- 1579.** The Ex-Officers contend that engaging VSM represented a “substantial cost saving” for the Club, and refer to the transcript of the 41X inquiry (provided at Tab 64 of the Ex-Officers’ Exhibits) which indicates that the marketing fees charged by VSM were significantly lower than those charged by the company previously retained to provide marketing services for the Club.
- 1580.** In response to Particulars 30.4(b)(7)(D) and (E), regarding the alleged failure to obtain value for Club money in relation to the payment of staff Christmas bonuses, the Ex-Officers submit that these bonuses were “not wasteful”, and refer to the statement of Mr Ashton Jnr in his statutory declaration dated 28 May 2015 to the effect that the Christmas bonuses he recommended were always linked to performance, especially in cases where the employee was unlikely to receive any wage increase but worked extremely long hours. Mr Ashton Jnr also states that he received advice from the Federal Secretary of the *Club Managers Association Australia* that the payment of bonuses is industry standard.

- 1581.** The Ex-Officers concede, in relation to the above Particulars, that there was no minute of a meeting of the governing body approving the expenditure for staff Christmas bonuses, but submit that this will change in future. They contend that the staff bonuses paid out in 2014 were minuted and refer to Exhibit RJA4 (attached to Mr Ashton Snr's statutory declaration dated 28 May 2015) which is a copy of the minutes of the Club Board meeting held on 22 December 2014 noting Board approval of Christmas bonuses to certain Club employees.
- 1582.** In response to Particular 30.4(b)(8), regarding the alleged failure by the Board to provide strategic direction to the Club, the Ex-Officers submit that marketing strategies were developed and implemented for increasing Club revenue, and refer to the statements of Mr Ashton Snr in his statutory declaration dated 28 May 2015. Mr Ashton Snr states that some marketing strategies employed by the Club included the engagement of Paul Kelly Design to redesign the clubhouse, and the implementation of a number of local community initiatives such as "Reading Time".
- 1583.** In response to Particular 30.4(b)(9), regarding the alleged failure to report to members and ensure regulatory requirements were met, the Ex-Officers refer to and repeat their submissions on Grounds 1 through 24 of the Complaint.
- 1584.** In response to Particular 30.4(b)(10), regarding the failure to ensure that all appropriate compliance frameworks and controls are in place, the Ex-Officers refer to and repeat their submissions on Grounds 1 through 24 of the Complaint.
- 1585.** In response to Particular 30.4(b)(11), regarding the failure to obtain value for money when making procurement decisions, the Ex-Officers submit that there is no requirement to undertake a tender process. The Ex-Officers refer to the Club's submission that accounting and marketing services are not "major procurements" but rather "par for the course" in this context. The Club contends that, on a "proper construction" of section 6 of the Guidelines, that tender is "effectively a choice open to the Club to be made".
- 1586.** In response to Particular 30.4(b)(12), regarding the failure to benchmark the core activities of bar, food and gaming, the Ex-Officers "accept" this allegation, but contend that any obligation to benchmark was the responsibility of Mr Wily during the period of the Club's administration.
- 1587.** The Ex-Officers submit that this failure to benchmark, which is not enforceable in any event, has not caused any detriment to the Club and that it is "clear" that the Club is "very competitive and successful in its marketplace".
- 1588.** In response to Particular 30.4(c)(1), regarding the Club not removing non-financial members from the members register, the Ex-Officers submit that Article 23 is no longer in force, but that the Ex-Officers had the power and authority and discretion to remove members. The Ex-Officers submit that there is no direction or order under Article 23 that compels the removal of non-financial members and note the use of the word "may" as opposed to terms such as "shall" or "will".
- 1589.** In response to Particular 30.4(c)(2), regarding the failure to ensure members of the Board were elected annually, the Ex-Officers refer to and repeat their submissions on Ground 12 of the Complaint.

- 1590.** In response to Particular 30.4(c)(3), regarding the failure to ensure that the Board met at least once every month during Mr Du Chesne's tenure as a director of the Club, the Ex-Officers refer to and repeat their submissions on Ground 10 of the Complaint. The Ex-Officers further contend that Mr Wily was in charge and that the Ex-Officers "had no power to alter" Mr Wily's conduct, and for this reason, no question of the directors' fitness and propriety arises from this failure to conduct monthly Board meetings.
- 1591.** In response to Particular 30.4(c)(4), regarding the failure to maintain a quorum of the governing body at Board meetings, the Ex-Officers submit that not meeting the quorum requirement is not a matter that goes to the directors' fitness and propriety. This failure was not a result of a lack of honesty, knowledge, or ability. The Ex-Officers argue that the law offers a company the opportunity to validate decisions made without a quorum and so this matter "ought not to be a basis" for an allegation that the Ex-Officers are not fit and proper persons.
- 1592.** In response to Particular 30.4(c)(5), regarding the failure to have an AGM each year, the Ex-Officers refer to and repeat their submissions on Ground 12 of the Complaint. The Ex-Officers further contend that Mr Wily was in charge and that the Ex-Officers "had no power to alter" Mr Wily's conduct – thus no question of fitness and propriety arises.
- 1593.** In response to Particular 30.4(d)(1), concerning the failure to maintain the Club's register of disclosure prior to 1 January 2013, the Ex-Officers refer to and repeat their submissions on Grounds 4.3 and 4.4 of the Complaint.
- 1594.** In response to Particular 30.4(d)(2), concerning the failure to ensure a current governing body resolution approved the payment of expenses to members of the governing body between August 2011 and August 2012, the Ex-Officers refer to and repeat their submissions on Ground 3.4 of the Complaint.
- 1595.** In response to Particular 30.4(d)(3), concerning the maintenance of allegedly high risk practices, the Ex-Officers submit that in respect of Mr Ashton Jnr's practice of reimbursing directors' expenses in cash, directly from the safe, there is "nothing" in the Act or the Regulation that prohibits this practice or identifies it as high risk.
- 1596.** Also in response to Particular 30.4(d)(3), the Ex-Officers submit in respect of Mr Levy's practice of pre-signing cheques, that this practice was only in place in the event that prizes needed to be paid out and Mr Levy was not available. The Ex-Officers refer to Mr Levy's statutory declaration dated 28 May 2015 which states that this practice ceased once Mr Levy was advised by Mr Michael Bulgin, the Club's Auditor, that it was not appropriate. [The Authority notes that Mr Levy's statutory declaration does not specify when this occurred.]
- 1597.** In response to Particular 30.4(d)(4), concerning the failure to maintain an assets register prior to 18 July 2014, the Ex-Officers submit that it was Mr Wily's responsibility to keep the assets register, but in any event, there is "nothing" in the Act or Regulation that requires any club to keep an assets register.

### **Kirk's Response to Ground 30**

- 1598.** Mr Kirk did not provide a response to Ground 30 of the Complaint.

## Wily's Response to Ground 30

**1599.** Mr Wily did not provide a response to Ground 30 of the Complaint.

## Authority Findings on Ground 30

- 1600.** Particular 30.1 alleges that, by reason of the conduct of Mr Chris Du Chesne whilst a member of the governing body of the Club, he is not a "fit and proper" person to hold such a position.
- 1601.** Particular 30.2, which specifies the period of time in which Mr Du Chesne served as a director, is established. It is contended in the Complaint Letter and is not in dispute that Mr Du Chesne was elected to the governing body on 28 March 2006 as a director of the Club and held that position until 19 June 2007.
- 1602.** Particular 30.3 is also established. It is contended in the Complaint Letter and is not in dispute that Mr Du Chesne was re-appointed to the governing body as a director of the Club on 2 April 2014 and held that position until the Club entered into receivership in June 2015.
- 1603.** Particular 30.4 makes the broad allegation that between 28 March 2006 and 19 June 2007, and since 2 April 2014, Mr Du Chesne "failed to exercise his duties as a member of the governing body with a degree of knowledge, ability, care and diligence". This broad allegation is in turn founded upon numerous specific allegations contained within the sub-Particulars of Particular 30.4.
- 1604.** The Authority makes the following findings on those sub-Particulars.

### Particular 30.4(a)

- 1605.** The Authority is satisfied that Mr Chris Du Chesne served as a director of the Club **between March 2006 and June 2007**, and again from **2 April 2014** until the Club entered into receivership in **June 2015**.
- 1606.** The Authority notes that the Complainant repeats the allegations in Grounds 1 to 24 as matters that go to Mr Du Chesne's fitness and propriety as a director of the Club.
- 1607.** However, the Authority notes that Particular 16.2 and Ground 21 have not been pressed by the Complainant against the Club and therefore have not been taken into account when assessing Mr Du Chesne's fitness and propriety.
- 1608.** Furthermore, the Authority notes that the following alleged contraventions of the liquor and gaming legislation detailed in Grounds 1 to 24 of the Complaint have not been established against the Club and these allegations have not been taken into account when assessing Mr Du Chesne's personal fitness and propriety:
- Ground 2
  - Particulars 3.2 and 3.3
  - Ground 6
  - Ground 7
  - Particulars 8.1, 8.5 and 8.8.

- 1609.** Furthermore, Particulars 5.1 and 5.4 and Ground 12 of the Complaint have not been pressed by the Complainant with respect to Mr Du Chesne and are not attributable to Mr Du Chesne's fitness and propriety.
- 1610.** The Authority is satisfied that the following Grounds include acts or omissions by the Club in respect of minimum statutory requirements that occurred during Mr Du Chesne's tenure as a director and are matters for which the relevant directors, including Mr Du Chesne, share responsibility with the Club secretary.
- 1611.** The following Grounds support an inference that the governing body, including Mr Du Chesne were either not aware of the Club's legislative duties or that the Complainant has established that he did not demonstrate the ability to ensure compliance with respect to matters for which the members of the governing body share responsibility. This is either because the legislative requirement involved the Board, or the Club's non-compliance was of such a nature and duration that it supports an inference of systemic failure of compliance, in which the governing body shares responsibility. Some of the following Grounds represent failings of compliance that warrant less weight than others when adverse inferences are drawn against the directors' knowledge and/or ability.
- 1612.** For ease of reference, the Authority repeats below the text of those Grounds 1 to 24 that the Authority is satisfied *have been established* in respect of the Club and also concern matters that the Authority is satisfied are reasonably attributable to the scope and responsibility of a director of a registered club.
- 1613.** The Authority notes in **bold** those Particulars and sub-Particulars that have been established on the evidence and include allegations of non-compliance with legislative requirements that are alleged to have occurred during Mr Du Chesne's tenure as a director of the Club.
- 1614.** Ground 1:

***Section 57F(3)(a) – The Club failed to meet the requirements of section 10(1)(d) of the Act.***

***Between 31 May 2004 and 30 June 2010, and since 30 July 2014 the Club failed to meet the requirements of section 10(1)(d) of the Act when it failed to maintain the minimum number of ordinary members prescribed by section 12 of the Act.***

**Particular 1.1:**

*The Club is located at Quarry Street, Paddington NSW 2021.*

**Particular 1.2:**

*It is situated within 24 kilometres of the General Post Office in Sydney.*

**Particular 1.3:**

*No application has been made to the Independent Liquor and Gaming Authority (the Authority) for approval of a minimum number of ordinary members less than 200.*

**Particular 1.4:**

***Between 31 May 2004 and 30 June 2010, and since 30 July 2014 the Club's membership was less than 200 members.***

- (a) On 31 May 2004 the Club consisted of 91 ordinary members.
- (b) On 31 May 2005 the Club consisted of 100 ordinary members.
- (c) On 31 May 2006 the Club consisted of 97 ordinary members.**
- (d) On 30 June 2007 the Club consisted of 69 ordinary members.
- (e) On 30 June 2008 the Club consisted of 65 ordinary members.
- (f) On 30 June 2009 the Club consisted of 53 ordinary members.
- (g) On 30 June 2010 the Club consisted of 43 ordinary members.
- (h) On 30 July 2014 the Club had 92 ordinary members.**
- (i) On 11 September 2014 the Club's Membership Register recorded 121 ordinary members.**

**Particular 1.5:**

**At all times since 28 August 2003** the governing body of the Club knew, or ought to have known, that the Act required the Club to have a minimum number of 200 ordinary members and were aware, or were recklessly indifferent, to the fact that the Club did not have the requisite number of members.

- (a) The Act sets out the minimum number of members required.
  - (b) Mr Kirk had actual knowledge of the requirement to have a minimum number of members.
  - (c) Messrs Roper, Ashton Snr and Ashton Jnr recently became aware of the requirement to have a minimum number of members.
  - (d) Annual financial statements recorded the number of members.
  - (e) Annual financial statements were tabled at Annual General Meetings (AGM).
  - (f) During the period of administration, a "moratorium on accepting full membership" was imposed and the Club permitted its membership to decline.
- (1) **Between 19 September 2002 and 18 May 2012** the Club was under a form of external administration.
  - (2) A moratorium on the acceptance of new ordinary members was in place during this period by the governing body of the Club.
  - (3) **Between October 2003 and May 2007** there are 15 applicants recorded in the minutes as being approved for membership by a meeting of the governing body of the Club.
  - (4) **Between June 2007 and June 2008** there are no records evidencing the governing body of the Club approved any applicant for membership of the Club.
  - (5) Between July 2008 and May 2012 there are 21 applicants recorded in the minutes as being approved for membership by a meeting of the governing body of the Club.
  - (6) The acceptance of Mr McKew as a member of the Club during the "moratorium" was not in accordance with the Articles of Association of the Club.
- (A) Mr McKew of Rooty Hill NSW made an application for membership signed 28 March 2012.
  - (B) Mr McKew of Rooty Hill NSW was known to most directors of the Club at 28 March 2012 and expressed desire to join the Club and be nominated as a director.
  - (C) The members of the governing body accepted Mr McKew as a member of the Club on 28 March 2012.
  - (D) Article 12(a) of the Articles of Association of the Club required membership to be proposed and seconded by a full member of the Club.

- (E) *Article 12(c) of the Articles of Association of the Club required that the nomination be posted on the Notice Board and remain posted for at least 7 days prior to the date of the meeting of the Board at which the application was considered.*
- (F) *Article 12(d) of the Articles of Association of the Club required that an interval of at least 14 days must elapse between the date of application and date of election of a candidate to membership.*
- (g) *The "moratorium on accepting full membership" continued after the administration ceased.*
  - (1) *On 18 May 2012 the Club ceased to be under Administration.*
  - (2) *On 10 November 2012 the members of the governing body of the Club determined the moratorium would be lifted.*

**1615. Ground 3:**

**Section 57F(3)(a) – the Club failed to meet the requirements of section 10(1)(i) of the Act.**

**Between 2010 and 2014** the Club failed to meet the requirements of section 10(1)(i) of the Act when the Club permitted individuals to derive a benefit or advantage from the Club that was not offered equally to all members of the Club.

**Particular 3.1:**

*The Club permitted members of the governing body the personal use of motor vehicles owned by the Club which was not offered equally to all members of the Club.*

- (a) *The Club is the owner of two motor vehicles.*
- (b) *The vehicles were obtained by the Club for the prime purpose of "in-house haulage, disposal of rubbish and refuse, and picking up and delivery of stock without undue delay".*
- (c) *The two vehicles are garaged off-premises at the personal residences of directors Mr Ashton Snr and Mr Teale:*
  - (1) *15 minutes away in Maroubra; and*
  - (2) *40 minutes away in Strathfield.*
- (d) *There is no Club policy or procedure on the use of the vehicles and whether or not they are used for travel unrelated to the Club.*
- (e) *The vehicles are rarely used by the Club.*
- (f) *There is no log book recording the business and private use of the vehicles.*

**Particular 3.4:**

*The Club reimbursed members of the governing body for expenses which were not offered equally to all members of the Club.*

- (a) *Expenses were reimbursed where there was no approval for the payment by a resolution of the governing body.*
  - (1) *Between March 2010 and 8 August 2011 26 expense claims were paid to members of the governing body totalling \$2,912.10.*
  - (2) **Between 9 August 2012 and April 2014** 19 expense claims were paid to members of the governing body totalling \$4,968.00.
  - (3) *Between 9 August 2011 and 8 August 2012 27 expense claims were paid to members of the governing body, other than Mr Kirk, totalling \$4,275.50.*

- (b) *Expenses were reimbursed where the governing body only provided approval for reasonable expenses.*
  - (1) *Between 9 August 2011 and 8 August 2012 12 expense claims were paid to Mr Kirk totalling \$5,498.40.*
- (c) *The expenses in (a)-(b) above were paid in circumstances where the majority of the claims:*
  - (1) *contained little to no detail about the expense;*
  - (2) *contained no supporting documentation despite Club policy for supporting documentation to be provided for any expense over \$80.00;*
  - (3) *in the absence of detail, cannot be said to have been for the benefit of the Club and its members;*
  - (4) *in the absence of detail, cannot be said to have been connected to their duties and responsibilities; and*
  - (5) *in the absence of detail, cannot be said to have been reasonable.*

**1616. Ground 4:**

**Section 57F(3)(a) – The Club failed to meet the requirements of section 10(1)(l) of the Act.**

**Between January 2009 and November 2014** the Club failed to meet the requirements of section 10(1)(l) of the Act when the Club failed to comply with the reporting requirements set out in the Registered Clubs Regulation 2009 (the **Regulation**) and required by section 38 of the Act.

**Particular 4.1:**

*The Club failed to provide to members of the governing body financial statements required by Clause 17 of the Regulation on a quarterly basis.*

- (a) *The Club failed to prepare "profit and loss statements" and "balance sheets" on a quarterly basis.*
- (b) **Between March 2009 and May 2014** the financial year of the club was 1 June to 31 May.
- (c) **For 10 quarters between March 2009 and May 2014**, there is no minute recording that any financial statements were provided to the governing body.

**Particular 4.2:**

*The Club failed to display a notice on the Club's website outlining how Club members can access those financial statements.*

**Particular 4.3:**

*As a result of the governing body not approving financial statements on a quarterly basis, these statements could not have been made available to ordinary members within 48 hours of being approved by the governing body.*

**Particular 4.4:**

**Prior to 1 January 2013**, the Club failed to record disclosures made by members of the governing body in a register of disclosures for the relevant financial year as required by Clause 18(1) of the Regulation.

- (a) *The Club failed to maintain a register of disclosures **prior to 1 January 2013**.*
- (b) **Prior to 1 January 2013**, members of the governing body made disclosures that were required to be recorded and maintained in the register of disclosures.



(1) Ms Madeline Kirk:

- (A) Ms Kirk is the daughter of director Mr Kirk;
- (B) Mr Kirk was a member of the governing body **between 28 August 2003 and 2 April 2014;**
- (C) Between 16 November 2010 and 25 December 2011 Ms Kirk was employed by the Club; and
- (D) Mr Kirk made a written declaration on 7 January 2011.

(2) Mr Ashton Jnr:

- (A) Mr Ashton Jnr is the son of director Mr Ashton Snr;
- (B) Mr Ashton Snr became a member of the governing body on 28 August 2003 and continues to act in that capacity;
- (C) Mr Ashton Jnr was employed with the Club as "bar staff" between 15 December 2005 and 4 May 2009;
- (D) Mr Ashton Jnr re-commenced employment with the Club on or about 29 November 2010; and
- (E) Mr Ashton Snr made a written declaration on 10 January 2011.

(3) Mr Kirk:

- (A) At the 2008 AGM [the Authority notes that this took place on 10 December 2008] the ordinary members were asked to consider transferring the Club premises from core to non-core property, and entering a new leasing arrangement;
- (B) Woollahra Gardens Pty Limited is party to the Deed of Company Arrangement;
- (C) Mr Kirk performed remunerated work for Mr Michael Sanchez and his associated group of companies, which includes Woollahra Gardens Pty Limited; and
- (D) Mr Kirk made a disclosure at the 2008 AGM identifying his relationship with Mr Sanchez.

(c) The Club's register of disclosures is not maintained for each financial year.

- (1) The Club's financial year was from 1 June to 30 May.
- (2) The Club maintained a register of disclosures for the period 1 January 2013 to 31 December 2013.
- (3) The Club maintained a register of disclosures for the period **1 September 2013 to 31 August 2014.**

**Particular 4.5:**

*The Club failed to display a notice on the Club website informing members how they can access the Club's register of disclosures.*

**1617. Ground 5:**

**Section 57F(3)(a) – The Club failed to meet the requirements of section 10(1)(m) of the Act.**

**Between 2007 and 2014 the Club failed to meet the requirements of section 10(1)(m) of the Act when the Club failed to comply with the requirements of Part 4A of the Act.**

**Particular 5.2:**

*The Club entered into a contract for the remuneration of a "top executive" without the proposed contract having been first approved by the governing body of the Club, contravening section 41M of the Act.*

- (a) *On or about 29 November 2010 Mr Ashton Jnr commenced employment with the Club as Secretary.*
- (b) *There was no written contract between the Club and Mr Ashton Jnr outlining the terms of the employment.*
- (c) *On or about 1 February 2011 the Club appointed Mr Ashton Jnr to the position of Secretary.*
- (d) *The Secretary of the Club is a "top executive" for the purposes of section 41M of the Act.*
- (e) *The register of disclosures states that the governing body of the Club approved the remuneration or employment contract with Mr Ashton Jnr in the position of Secretary in April 2014.*
- (f) *There is no minute of a meeting of the governing body approving Mr Ashton Jnr's remuneration or employment contract in the position of Secretary.*
- (g) **On or about 30 June 2014** *the Club entered into a written contract with Mr Ashton Jnr for the position of Secretary commencing on 21 April 2014, in circumstances where:*
  - (1) *Mr Ashton Jnr commenced in the role at a time between November 2010 and February 2011; and*
  - (2) *there is no minute of a meeting of the governing body approving Mr Ashton Jnr's remuneration or contract.*

**Particular 5.3:**

*The Club failed to give written notice, as soon as practicable, to Mr Ashton Jnr that he was a "top executive" of the Club and had responsibilities under Part 4A of the Act in contravention of section 41U of the Act.*

- (a) *There is no record that the Club provided Mr Ashton Jnr with written notice that he was a "top executive".*

**Particular 5.5:**

**On 1 February 2007**, *the Club entered into a contract with ML Management (NSW) Pty Limited ACN 104 788 070 (MLM), a company in which Mr Levy, the Secretary at that time, had a controlling interest, contravening section 41L of the Act.*

- (a) **Between 26 October 2004 and 3 October 2007** *Mr Levy was the Secretary of the Club.*
- (b) *During this period Mr Levy was the sole director of MLM and had the capacity to determine the outcome of decisions about the financial and operating policies of the company.*
- (c) **On 1 February 2007** *the Club entered into a deed with MLM to provide consultative and administrative services to the Club (the MLM Deed).*
- (d) *The MLM Deed was a commercial arrangement for the provision of services by MLM to the Club.*
- (e) *Before entering into the MLM Deed, the Club did not make reasonable inquiries to ensure that section 41L(1) was complied with.*

**1618. Ground 8:**

**Section 57F(3)(a) – The Club failed to meet the requirements of section 10(1)(a) of the Act.**

**Between 2002 and 2014** *the Club failed to meet the requirements of section 10(1)(a) of the Act when the Club was not conducted in good faith as a club.*

**Particular 8.2:**

*The Club failed to meet the minimum number of ordinary members required by Section 10(1)(d) of the Act.*

**Particular 8.3:**

*During the period the Club was under external administration a "moratorium on accepting full membership" was imposed and the Club permitted its membership to decline.*

**Particular 8.4:**

*The Club permitted the "moratorium on accepting full membership" to continue when the Club was no longer under administration.*

**Particular 8.6:**

*The Club admits persons to membership of the Club as "social members" to allow persons who live within a 5km radius of the Club to enter the premises and utilise the facilities without being required to be approved by the members or governing body as "ordinary members".*

- (a) *At all relevant times it was a rule of the Club that it must not admit a person to the Club:*
  - (1) *as a member of the Club, other than as a "provisional member", "honorary member" or "temporary member", unless the person is elected to membership at a meeting of the full members, the governing body, or the election committee of the Club; or*
  - (2) *as a "temporary member" if the person resides in New South Wales, and within a 5km radius of the Club.*
- (b) *Persons who live within a 5km radius of the Club and attend for social and corporate bowling are admitted to the Club incorrectly as "temporary members", or admitted to membership as "social members".*
- (c) *The Club introduced "social members" as a membership category in the Club's 2014 constitution, and applicants are approved by Club staff as members of the Club at the Club entrance following the payment of a \$2.00 fee and the completion of a membership application form.*
- (d) **As at 16 May 2014** *the Club had admitted 7,273 persons to membership of the Club as "social members" who were not approved by a meeting of the full members, governing body or election committee.*

**Particular 8.7:**

*The Club was under external administration for an extended period of time (10 years).*

- (a) *On or about 19 September 2002 Mr Wily was appointed Receiver Manager by the Supreme Court of NSW and acted in the role until 8 November 2011, apart from the period 23 January 2004 and 21 June 2004 when Mr Wily Snr acted in this capacity.*
- (b) *On 24 October 2002 Mr Wily was purportedly appointed Administrator of the Club and acted in the role until 28 March 2003.*
- (c) *On 24 March 2003 Mr Wily was purportedly appointed Administrator under a Deed of Company Arrangement and acted in the role until 18 May 2012, apart from the period 23 January 2004 and 21 June 2004 when Mr Wily Snr acted in this capacity.*

**Section 57F(3)(d) – The Club contravened a provision of the Act.**

**Prior to 1 January 2013** the Club failed to maintain a register of all disclosures made under Part 4A of the Act for the relevant financial year, contravening section 38 of the Act and clause 16 of the Regulation.

**Particular 9(a):**

- (a) Repeat particulars at 4.4 above.

**1620. Ground 10:**

**Section 57F(3)(d) – The Club contravened a provision of the Act.**

**Between January 2009 and June 2014** the Club contravened section 30(1)(c) of the Act.

**Particular 10.1:**

*The Club failed to hold a meeting of the governing body at least once in every month of the year when it failed to hold meetings as follows;*

- (a) *In 2009, on eight occasions,*
  - (1) *Governing body meetings were not held in March, April, May, June, August, September, October and December 2009.*
- (b) *In 2010, on two occasions,*
  - (1) *Governing body meetings were not held in August and December 2010.*
- (c) *In 2011, on five occasions,*
  - (1) *Governing body meetings were not held in January, April, June, August and November 2011.*
- (d) *In 2012, on one occasion,*
  - (1) *A governing body meeting was not held in October 2012.*
- (e) *In 2013, on five occasions,*
  - (1) *Governing body meetings were not held in January, March, June, September and December 2013.*
- (f) *In 2014, on one occasion,*
  - (1) *A governing body meeting was not held in January 2014.*

**Particular 10.2:**

*The Club failed to keep minutes of all proceedings and resolutions of the governing body in a book.*

- (a) *There is no minute of proceedings and resolutions in respect of a meeting of the governing body in January 2010.*
- (b) *Minutes and resolutions were not recorded in a book.*

**Particular 10.3:**

*The Club failed to retain all documents referred to in the minutes as being tabled at the meeting.*

- (a) *On 9 occasions the minutes of meeting of the governing body record that a Management Report was tabled but the Club has failed to retain a copy with the stored minutes:*
  - (1) *In 2009, in the meeting of the governing body held in July.*

- (2) *In 2010, in the meetings of the governing body held in February, March, June, July, September and October.*
- (3) *In 2011, in the meetings of the governing body held in July and October.*

**1621. Ground 11:**

***Section 57F(3)(d) – The Club contravened a provision of the Act.***

***Between August 2013 and April 2014 the Club contravened section 30(2)(k) of the Act.***

**Particular 11.1:**

*On 31 occasions the Club failed to ensure the information of a guest of a member was recorded in the "sign-in register" in accordance with section 31(1)(c) of the Act.*

- (a) *On 15 occasions the guest did not complete their full name, or their surname and first initial.*
- (b) *On 16 occasions the guest did not complete their address.*
- (c) *On three occasions the member did not provide their signature.*

**1622. Ground 13:**

***Section 57F(3)(d) – the Club contravened a provision of the Act.***

***On 11 September 2014 the Club contravened section 30(2)(i) of the Act, in that the Club failed to ensure the register of persons who are full members of the Club was kept in accordance with section 31(1)(a) of the Act.***

**Particular 13.1:**

***On 11 September 2014 the Club's membership register recorded 249 entries, however contained only 121 ordinary members.***

- (a) *On one occasion the membership register did not record the member's full name.*
- (b) *On 135 occasions the membership register did not record the member's occupation.*
- (c) *On eight occasions the membership register did not record the member's address.*
- (d) *On 85 occasions the membership register did not record the date on which the member last paid the annual fee for membership of the Club.*

**1623. Ground 14:**

***Section 57F(3)(e) – a rule of the Club referred to in section 30(1) of the Act has been broken or any other rule of the Club has been habitually broken.***

***Between August 2013 and November 2014 it was a rule of the Club, under section 30(2)(m) of the Act, that it maintain a register of "temporary members" who attend the Club each day and record information in accordance with section 31(1)(e) of the Act.***

***Between August 2013 and November 2014 the Club habitually broke this rule.***

**Particular 14.1:**

*The Club kept a "sign-in register" for "temporary members".*

**Particular 14.2:**

*The Club on 1,856 occasions failed to ensure the full name, or the surname and first initial, and the address of the "temporary member" together with his or her signature, was recorded in the "sign-in register" as follows.*

<b>Date/Month</b>	<b>Number of temporary members whose information was not recorded as required by section 31(1)(e)</b>
August 2013	90
September 2013	83
October 2013	139
November 2013	223
December 2013	438
January 2014	111
February 2014	123
March 2014	53
April 2014	188
May 2014	78
June 2014	41
July 2014	37
August 2014	35
September 2014	44
October 2014	112
November 2014	61

**1624.** Ground 15:

**Section 57F (3)(e) – A rule of the Club referred to in section 30(1) of the Act has been broken or any other rule of the Club has been habitually broken.**

**Between August 2013 and November 2014** it was a rule of the Club, under section 30(2)(c) of the Act, that it must not admit a person to the Club as a "temporary member" if the person resides in New South Wales, and within a 5km radius of the Club, unless the person:

- (a) is a member of another registered club with similar objects as the Club; or
- (b) is a member of another registered club and is attending the Club on an invitation to participate in an organised sport or competition.

**Between August 2013 and November 2014** the Club habitually broke this rule.

**Particular 15.1:**

On 1,168 occasions the Club admitted persons, whose ordinary residence was within a 5km radius of the Club, as "temporary members" of the Club.

<b>Month/Year</b>	<b>Number of temporary members who resided in New South Wales and within a 5km radius of the Club</b>
August 2013	43
September 2013	32
October 2013	65
November 2013	71
December 2013	222
January 2014	115
February 2014	118
March 2014	60
April 2014	146
May 2014	84
June 2014	41
July 2014	29
August 2014	18
September 2014	45
October 2014	52
November 2014	27

**Particular 15.2:**

*None of the persons entering the Club referred to at paragraph 15.1 above identified themselves in the "sign-in register" as being a member of another club.*

**1625. Ground 16:**

**Section 57F(3)(e) – A rule of the Club referred to in section 30(1) of the Act has been broken or any other rule of the Club has been habitually broken.**

*At all relevant times it was a rule of the Club, under section 30(1)(g) of the Act, that it must not admit a person as a member of the Club, other than as a "provisional member", "honorary member" or "temporary member", unless the person is elected to membership at a meeting of:*

- (a) the full members of the Club;*
- (b) the governing body of the Club; or*
- (c) the election committee of the Club.*

***Between 2013 and 2014 the Club habitually broke this rule.***

**Particular 16.1:**

***As at 16 May 2014 the Club had admitted 7,273 persons to membership of the Club as "social members".***

**Particular 16.3:**

*"Social members" are distinct from "provisional members", "honorary members" or "temporary members" in the Club's 2014 Constitution.*

**Particular 16.4:**

*Article 16.1 of the Club's 2014 Constitution provides:*

*"A person shall not be admitted as a member of the Club other than as a Provisional, Honorary Temporary or a Life Member unless that person is elected to membership at a meeting of the Board of the Club or duly appointed election committee of the Club".*

**Particular 16.5:**

*"Social members" are not "provisional members", "honorary members" or "temporary members" of the Club.*

**Particular 16.6:**

*"Social members" are approved by Club staff as members of the Club at the entrance to the Club following the payment of a \$2.00 fee and the completion of a membership application form.*

**Particular 16.7:**

*"Social members" are issued a membership number and card which provides access to the Club.*

**Particular 16.8:**

*The 7,273 persons admitted to membership as "social members" were not approved by a meeting of the full members, governing body or election committee.*

**1626.** Ground 17:

**Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.**

*The Club contravened clause 14 of the Gaming Machines Regulation 2010.*

**Particular 17.1:**

**Between August 2013 and September 2014** on 623 occasions the Club failed to keep written records with respect to the awarding or payment of each prize and short-pay of an approved gaming machine kept on the premises of the Club that contains:

- (a) the name and signature of the person to whom the award or payment was made; and
- (b) the signature of 2 other persons certifying that each sighted the prize-winning combination or the number of credits and that the record was correct in all its details.

**1627.** Ground 18:

**Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.**

*The Club contravened clause 17 of the Gaming Machines Regulation 2010.*

**Particular 18.1:**

There is no minute of a meeting of the governing body **between January 2009 and June 2014** recording the production to the governing body, at monthly intervals, of:

- (a) a cash flow analysis in the form approved by the Director-General; and
- (b) a comparison of cancelled credit and jackpot wins meter readings with the corresponding entries in the Club's payout sheets,

*in respect of each approved gaming machine.*

**1628.** Ground 19:

**Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.**

*The Club contravened clause 18 of the Gaming Machines Regulation 2010.*

**Particular 19.1:**

**Between January 2009 and June 2014** the Club failed to:

- (a) produce a "net analysis report" for the previous months, and that part of the previous 12 months, for each approved gaming machine; and
- (b) ensure the net analysis reports were examined by the Club's board within one month.

**1629.** Ground 20:

**Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.**

*The Club contravened clause 20(2)(d) of the Gaming Machines Regulation 2010.*

**Particular 20.1:**



***Between July 2012 and June 2014 on 34 occasions the Club failed to keep written records with respect to each clearance of an approved gaming machine on the premises of the Club that contained the signatures of two authorised persons [sic] cleared the gaming machine certifying that the record was correct in all its details.***

**1630. Ground 22:**

***Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.***

*The Club contravened clause 91(1) of the Gaming Machines Regulation 2010.*

**Particular 22.1:**

***At no time since the installation of the first authorised progressive machine on 6 March 2014 has the Club:***

- (a) recorded the amount shown on the progressive meter of any authorised progressive machine at the time the progressive jackpot has been won (progressive jackpot report); and*
- (b) ensured the progressive jackpot report was examined by the Club's board each month.*

**1631. Ground 23:**

***Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.***

*On 18 August 2011, it became a condition of the Club's liquor licence that on NRL Grand Final Day that two nominated staff of the Club maintain a count of persons on the licensed premises (condition 3410).*

**Particular 23.1:**

***On 5 October 2014 the Club failed to ensure two nominated staff maintained a count of persons on the licensed premises in circumstances where:***

- (a) Inspectors from OLGR conducted a covert inspection;*
- (b) Ms Natalie Turner, an employee of the Club, and Mr Jason Loveday, a security guard contracted by the Club, were stationed at the entrance of the Club; and*
- (c) Neither Ms Turner nor Mr Loveday were instructed to, and subsequently did not, maintain a count of persons on the licensed premises.*

**1632. Ground 24:**

***Section 57F(3)(d) – The Club contravened a provision of the Act.***

***Between 24 October 2002 and 18 May 2012 the Club contravened section 41 of the Act when it purported to appoint Mr Wily to act in the capacity of administrator of the Club.***

**Particulars:**

- (a) The Club is a company within the meaning of the Corporations Act 2001.*
- (b) On or about 20 September 2002 Mr Wily was appointed to act as Receiver Manager of the Club by the Supreme Court of New South Wales.*
- (c) On or about 24 October 2002 Mr Wily was purportedly appointed to act as Administrator of the Club in circumstances where there is no record of Mr Wily being appointed to act in this capacity by:*
  - (1) the Supreme Court of NSW; or*

- (2) the former Licensing Court; or
- (3) the Authority.

- 1633.** Again, the Authority notes that while the Club was under apparent voluntary administration between October 2002 and March 2003, the operation of section 437C(1) of the *Corporations Act 2001* served to limit the powers of the Club's officers to act without the consent of the Club's administrator, Mr Wily.
- 1634.** However, this period of administration ended, through the operation of section 435C(2)(a) of the *Corporations Act 2001*, when a deed of company arrangement was executed by the Club on 24 March 2003. This restored the powers of the officers of the Club, in so far as they did not act inconsistently with the terms of the deed of company arrangement.
- 1635.** The Authority is satisfied that, as a director of the Club, Mr Du Chesne was partly responsible for ensuring the Club's compliance with the legislative requirements to which it is subject – notwithstanding the fact that the Club was a party to a deed of company arrangement from 24 March 2003 onward.
- 1636.** On the basis of the above findings, in respect of those Grounds 1 to 24 that are also found to be attributable to Mr Du Chesne's tenure, the Authority is satisfied that Mr Du Chesne failed to exercise his duties as a director of the Club with a degree of knowledge, ability, care and diligence. There is no basis for impugning Mr Du Chesne's honesty.
- 1637.** Particular 30.4(a) is established.

Particular 30.4(b)

- 1638.** With respect to Particular 30.4(b), attributing to Mr Du Chesne's fitness and propriety the Club's alleged failure to comply with *ClubsNSW Guidelines*, the Authority accepts the Ex-Officers' submission that these documents are guidelines that provide advice on *best practice* in the industry. They do not prescribe minimum legal rules in respect of which non-compliance may constitute an independent ground of complaint.
- 1639.** Industry guidelines provide a useful framework for the training of club officers and staff and may, in their terms, provide a plain English guide to minimum statutory requirements.
- 1640.** A good working knowledge of *ClubsNSW Guidelines* on the part of club directors or senior executives may have the collateral benefit of enhancing knowledge and skill and provide a means by which regulated officers become aware of and refresh themselves as to regulatory requirements and avoid managing club premises in a manner that exposes an enterprise to systemic risk and/or regulatory action.
- 1641.** *ClubsNSW Guidelines* may also provide a source of evidence as to what the industry considers to be best practice with regard to the content of a regulatory duty that is the subject of a statutory requirement.
- 1642.** However, the Authority does not need to make findings on the sub-Particulars of Particular 30.4(b) by reason that it is already satisfied as to Mr Du Chesne's responsibility for those instances of statutory non-compliance found against the

Club that are found to be also attributable to Mr Du Chesne's personal fitness and propriety.

- 1643.** The Authority does not consider that non-compliance with individual *ClubsNSW Guidelines* gives rise to an independent basis for disciplinary action and that any lack of knowledge or skill in respect of the Club's conduct by comparison to these guidelines adds little to identifying a lack of knowledge or skill in respect of the failure to demonstrate knowledge and skill in respect of the relevant statutory minimum requirements that have been found by the Authority.

Particular 30.4(c)

- 1644.** Particular 30.4(c) attributes to Mr Du Chesne's fitness and propriety as a director certain instances of non-compliance by the Club with the Club's own Articles of Association. The Authority makes the following findings on the sub-Particulars of Particular 30.4(c), to the extent that they occurred during Mr Du Chesne's tenure as a director.
- 1645.** Particular 30.4(c)(1) attributes to Mr Du Chesne's fitness and propriety the Club's failure to remove non-financial members from the Club's membership register.
- 1646.** The Authority notes the Ex-Officers' submissions in respect of this Particular that Article 23 is no longer in force, but that the Ex-Officers had the power and authority and a discretion to remove members. The Ex-Officers submit that there is no direction made by Article 23 that *compels* the removal of non-financial members. They note the use of the word "may" in Article 23 as opposed to terms such as "shall" or "will".
- 1647.** The Authority has reviewed Article 23 of the Club's Articles of Association and accepts that there was a discretion provided to the Club, in that it specifies that:
- ...if such subscription shall be unpaid on the due day the defaulting member may be debarred or suspended from all privileges of membership and his name may be removed from the register of members and he may be disqualified from all Club competitions in which he may be participating [emphasis added].*
- 1648.** Nevertheless, the Authority is satisfied that Particular 30.4(c)(1) is established on the basis of Article 23 of the Articles of Association for the Club (Complainant Exhibit E085) and the *Paddington Bowling Club Full Members Register* as of 11 September 2014, as provided by the Complainant (Complainant Exhibit E057). The Authority is satisfied that the Club did not take action or consider taking action under Article 23 to remove non-financial members from its register while that Article was in force.
- 1649.** The Authority is satisfied that the discretion provided to the Club to remove non-financial members from the register was not considered or exercised during the relevant period and this is a matter that further underpins an apparent laxity of control with regard to membership and access to the Club premises. It supports an inference that the Club maintained something akin to an "open door" policy and this provides some cause for an adverse assessment as to the fitness of the secretary and members of the governing body for not exercising more diligence in this regard.
- 1650.** It would have been prudent to exercise that power as an act of good management and to avoid the implication that this Club, due to its loose controls over

membership and admission, was running something akin to an “open door policy”. This Particular is established and it does reflect on the Club secretary and the directors that this power under the Articles of Association was not exercised to remove non-financial members. Non-implementation of the power conferred by Article 23 is a further matter that reflects adversely upon the diligence or ability of the secretary and its directors.

- 1651.** Particular 30.4(c)(2) attributes to Mr Du Chesne’s fitness and propriety the Club’s failure to ensure that members of the Board were elected annually. The Authority notes that the Ex-Officers refer to and repeat their submissions on Ground 12 of the Complaint in response to this Particular.
- 1652.** The Authority is satisfied that Particular 30.4(c)(2) is established on the basis of Article 28 of the Articles of Association for the Club (Complainant Exhibit E085); the statements made by Robert Ashton Jnr at page 27 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182) and the evidence or material referred to in the Authority’s findings on Ground 12 above. The Authority is satisfied that this is a matter arising under the Club’s Articles of Association that reflects adversely upon the diligence or ability demonstrated by the Club secretary and its directors.
- 1653.** Particular 30.4(c)(3) attributes to Mr Du Chesne’s fitness and propriety the Club’s failure to ensure that the Board met at least once in every month. The Authority notes that the Ex-Officers repeat their submissions on Ground 10 of the Complaint and contend that Mr Wily was in charge and that the Ex-Officers “had no power to alter” Mr Wily’s conduct – thus no question of fitness and propriety arises.
- 1654.** While the Authority does not accept the submission from the Ex-Officers that Mr Wily was in charge of the Club and this provides an excuse for non-compliance with the monthly meeting requirement, the Authority does accept the Ex-Officers’ contention that the Board sometimes met twice in a month.
- 1655.** Nevertheless, Particular 30.4(c)(3) is factually established on the basis of Article 41 of the Articles of Association for the Club (Complainant Exhibit E085) and the evidence or material referred to in the Authority’s findings on Ground 10 above. Notwithstanding this finding, the Authority notes that this matter does not have a substantial bearing on an issue of fitness and propriety of the secretary or directors. Including Mr Du Chesne, by reason of the number of meetings convened by the Club during the relevant years.
- 1656.** Particular 30.4(c)(4)(A), which attributes to Mr Du Chesne’s fitness and propriety the Club’s failure to ensure that the required quorum of five members of the Board was met for each Board meeting during 2014, is established on the basis of Article 41 of the Articles of Association for the Club (Complainant Exhibit E085); the Club Board meeting minutes for 10 February 2014 (Complainant Exhibit E045); the Club Board meeting minutes for 24 February 2014 (Complainant Exhibit E046); the Club Board meeting minutes for 8 March 2014 (Complainant Exhibit E047); the Club Board meeting minutes for 11 April 2014 (Complainant Exhibit E048); the Club Board meeting minutes for 13 May 2014 (Complainant Exhibit E049) and the Club Board meeting minutes for 23 June 2014 (Complainant Exhibit E050).
- 1657.** In response to Particular 30.4(c)(4)(A), the Authority notes the Ex-Officers’ submission that failure to observe the quorum requirement does not go to the Ex-

Officers' fitness and propriety. The Ex-Officers argue that the law offers a company the opportunity to validate decisions made without a quorum so the lack of a quorum "ought not to be a basis" for the allegation that the Ex-Officers are not fit and proper persons.

- 1658.** The Authority notes the submission made by Mr Kirk dated 29 May 2015 that at the 2004 AGM, there was an amendment to the by-laws reducing the quorum of directors at a Board meeting from five to three, and that all of the matters the subject of Particulars 29.3(c)(5)(A) and 29.3(c)(5)(B) occurred *after* the 2004 resolution and were attended by three or more members of the governing body. Mr Kirk states in his submissions that while he told OLGR investigators in his record of interview dated 5 November 2014 (Complainant Exhibit E181) that he thought the quorum requirement changed from five to three in 2006, on reflection he believes it changed in 2004.
- 1659.** The Authority rejects the Ex-Officers' and Mr Kirk's submissions in this regard. Notwithstanding the ability of a company board to ratify a previously defective board resolution, the repeated failure by the Board of *this* Club to meet the quorum requirements pursuant to the Club's Articles of Association during 2014 is not only an administrative failing, but could also have implications for the corporate governance of the Club – enabling, for example, the potential conduct of secret meetings or the formation of cabals within a club's governing body.
- 1660.** This basic requirement of corporate governance should have been observed by the Club's governing body and it adversely reflects upon the diligence or ability of the Club secretary and the directors at the relevant time, including Mr Du Chesne, who was a Board member from April 2014, that the quorum requirement was not met on the occasions that have been established on the evidence.
- 1661.** Particular 30.4(c)(4) is established.
- 1662.** Particular 30.4(c)(5) attributes to Mr Du Chesne's fitness and propriety the Club's failure to ensure that the Club held an annual general meeting of members each year during 2007, 2009, 2010, 2012 and 2013. The Authority notes that the Ex-Officers repeat their submissions on Ground 12 of the Complaint and argue that Mr Wily was in charge and the Ex-Officers "had no power to alter" Mr Wily's conduct and for this reason, no question of fitness and propriety arises with respect to the Ex-Officers.
- 1663.** The Authority does not accept the Ex-Officers' submissions in this regard. Particular 30.4(c)(5) is factually established on the basis of Article 49 of the Articles of Association for the Club (Complainant Exhibit E085) and the evidence or material referred to in the Authority's findings on Ground 12 above.
- 1664.** The Authority has considered, but rejects, the submission made by the Ex-Officers that the matters alleged in Particular 30.4(c) do not go to a proper consideration of the honesty, knowledge and ability of a director of the Club.
- 1665.** While the secretary and chief executive officer of a registered club has greater operational responsibility over the day to day affairs of a registered club than the members of its governing body, the duty to comply with a club's Articles of Association also falls upon the club's directors. All of the directors should have been aware of this requirement and taken steps to observe it.

Particular 30.4(d)

- 1666.** With respect to Particular 30.4(d) attributing to Mr Du Chesne's fitness and propriety the Club's alleged lack of internal controls and procedures, the Authority rejects the Ex-Officers' submission that the issues the subject of Particular 30.4(d) arose during the administration of the Club and as such, were the responsibility of Mr Wily.
- 1667.** The Authority notes that while the Club was under administration, the powers of the officers of the Club were suspended, pursuant to section 437C(1) of the *Corporations Act 2001*. However, when the Deed of Company Arrangement was signed on 24 March 2003, the Club was no longer under administration, for the purposes of section 435C of the *Corporations Act 2001*. The Ex-Officers resumed their powers and obligations in relation to the Club's governance as of that date, subject to the terms of the Deed of Company Arrangement.
- 1668.** The Authority makes the following findings on the sub-Particulars of Particular 30.4(d).
- 1669.** Particular 30.4(d)(1), attributing to Mr Du Chesne's fitness and propriety the alleged failure to maintain the Club's register of disclosures, is factually established on the basis of the evidence or material referred to in the Authority's findings on Particular 4.3 above.
- 1670.** Particular 30.4(d)(2), attributing to Mr Du Chesne's fitness and propriety the alleged failure to ensure that a current governing body resolution approved the payment of expenses to members of the governing body, is factually established on the basis of the evidence or material referred to in the Authority's findings on Particular 3.4 above.
- 1671.** Particular 30.4(d)(3) attributes to Mr Du Chesne's fitness and propriety the allegation that the Ex-Officers maintained "high risk practices" including Mr Ashton Jnr's paying expenses of directors in cash, directly from the safe. The Authority notes that the Complainant relies upon the statements made by Robert Ashton Jnr at page 28 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182) in support of this contention.
- 1672.** The Authority has reviewed the above evidence or material and is *not* satisfied that this Particular is established. While the practice of paying directors' expenses directly from the safe is not recommended as the most prudent method of payment, the Authority is not satisfied that the evidence or material as to the circumstances in which these payments were made establishes that this practice should be characterised as "high risk".
- 1673.** There is no evidence before the Authority to suggest that the Ex-Officers did not comply with proper accounting practices, and the Authority notes that these payments were reconciled through petty cash, which is a common industry practice.
- 1674.** Particular 30.3(d)(3) is not established.
- 1675.** Particular 30.4(d)(4), attributing to Mr Du Chesne's fitness and propriety the Club's failure to maintain an assets register prior to 18 July 2014, is established on the basis of the statements made by Allan Teale at pages 30 to 31 of the transcript of

his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E183).

- 1676.** The Authority has considered cumulatively the Authority's findings with regard to the Particulars specified in Ground 30. The Authority notes the multiple instances of non-compliance by the Club with legislative requirements established among Grounds 1 to 24. The Authority notes those further instances of non-compliance with the Club's Articles of Association and failings with respect to corporate governance that are established in the Particulars noted above.
- 1677.** The Authority is satisfied that Ground 30 is established and that Mr Chris Du Chesne is not a fit and proper person to be a member of the governing body of the registered club, by reason that the Complainant has established that he did not demonstrate the degree of knowledge, ability, care and diligence that the Authority would expect from a reasonably competent director of a club of this scale. There is no basis for impugning Mr Du Chesne's honesty arising from the Authority's findings on Ground 30.
- 1678.** The Authority notes that, during the time the Club was subject to the Deed of Company Arrangement from 24 March 2003 and the Amended Deed of Company Arrangement from 10 December 2010, these documents imposed certain restrictions upon the discretion of the governing body in that they could not act contrary to those agreements.
- 1679.** While the degree of responsibility for the Club's affairs may *potentially* be reduced to the extent that certain aspects of Club governance required the consent of the Deed Administrator, Mr Wily – the fact that the Club was subject to a deed of company arrangement does not provide a complete excuse for Mr Du Chesne's failure, as a Club director, to ensure that the Club complied with relevant legislation.
- 1680.** Mr Du Chesne and the members of the governing body did have a role to play during the currency of the DOCA and ADOCA during that period. It is certainly no excuse for Mr Du Chesne or any member of the governing body not to have knowledge of the legislative and constitutional requirements to which the Club was subject.

## **GROUND 31**

- 1681.** Ground 31 alleges as follows:

***Section 57F(3)(g) – A member of the governing body of the Club is not a "fit and proper" person to act as such.***

- 1682.** Particular 31.1 of Ground 31 alleges as follows:

*By reason of the conduct of Mr Whitney whilst a member of the governing body of the Club he is not a "fit and proper" person to hold such a position.*

- 1683.** Particular 31.2 of Ground 31 alleges as follows:

*Mr Whitney was elected to the governing body as a Director of the Club for the following periods:*

- (a) 27 August 1995 – 4 November 1995;*

- (b) 25 August 1996 – 4 January 1997;
- (c) 31 August 1997 – 26 August 2001;
- (d) 28 August 2003 – 1 October 2007;
- (e) 28 May 2008 – 30 September 2010; and
- (f) 9 August 2011 – 2 April 2014.

**1684.** Particular 31.3 of Ground 31 alleges as follows:

*During the periods at 31.2 above, Mr Whitney failed to exercise his duties as a member of the governing body with a degree of knowledge, ability, care and diligence, by reason of:*

- (a) *The non-compliance with the legislation outlined in paragraphs 1-24 above.*
- (b) *The non-compliance with ClubsNSW Guidelines:*
  - (1) *Failure to ensure key performance indicators were developed and clearly expressed in the contract of the Secretary.*
  - (2) *Failure to be aware of, and comply with, any legislative requirements that pertain to executive remuneration.*
  - (3) *Failure to ensure the performance of the Secretary is reviewed periodically, at least annually, and assessed against clear KPI's in the employment contract.*
  - (4) *Failure to comply with any relevant legislative, industrial or administrative requirement, and keep up to date with any changes.*
  - (5) *Failure to obtain value for Club money spent and avoid waste and extravagance in the use of Club resources:*
    - (A) *the Club purchased and maintains motor vehicles that are rarely used by the Club;*
    - (B) *the Club reimbursed unapproved expenses of members of the governing body;*
    - (C) *the Club engaged VSM to provide marketing services at a cost of:*
      - i. *\$212,247.00 for the financial year 2009-10;*
      - ii. *\$194,601.00 for the financial year 2010-11;*
      - iii. *\$184,435.00 for the financial year 2011-12;*
      - iv. *\$220,543.00 for the financial year 2012-13; and*
      - v. *\$240,636.00 for the financial year 2013-14.*
    - (D) *the Club purchased \$5,000.00 in MasterCard Gift Cards for staff Christmas bonuses in 2012;*
    - (E) *the Club purchased \$10,000.00 in Woolworths Gift Cards for staff Christmas bonuses in 2013:*
      - i. *there is no minute of a meeting of the governing body approving this purchase in accordance with the Club's Purchasing and Tendering Policy.*
  - (6) *Failure to provide strategic direction to the Club by constructive engagement in the development, execution and modification of the Club's strategy:*
    - (A) *the Club has produced a five year plan for the improvement of the Crown Asset rather than a strategy to further the Club's purpose of providing accommodation for its members and their guests.*
  - (7) *Failure to report to members and ensure all regulatory requirements are met.*
  - (8) *Failure to ensure all appropriate compliance frameworks and controls are in place.*
  - (9) *Failure to ensure the Club obtained value for money when making procurement decisions:*
    - (A) *the Club did not undertake a tender process when engaging accounting and marketing services.*
  - (10) *Failure to ensure the Club benchmarked the core activities of bar, food and gaming.*
- (c) *The non-compliance with the Articles of Association of the Club.*



- (1) *Failure to ensure membership applications were posted on the Notice Board for at least seven days prior to the date of the meeting to consider the application, and at least 14 days lapse between the date of application and the date of election.*
  - (2) *Failure to ensure members who were not financial were removed from membership register.*
  - (3) *Failure to ensure the members of the Board were elected annually.*
  - (4) *Failure to ensure the Board met at least once in every month.*
  - (5) *Failure to ensure the required quorum of five members of the Board was met for each meeting:*
    - (A) *in 2011, on five occasions, meetings held of the governing body did not consist of a quorum of five members as follows;*
      - i. *1 February, 28 February, March, September and October 2011.*
    - (B) *in 2014, on 1 occasion, the meeting held of the governing body did not consist of a quorum of five members as follows;*
      - i. *March 2014.*
  - (6) *Failure to ensure the Club held an annual general meeting of members each year.*
- (d) *The lack of internal controls and procedures.*
- (1) *The Club Auditor was unable to form an unqualified opinion of the Club's financial accounts for the year ending 30 June 2011 due to poor internal controls and systems.*
  - (2) *Failure to maintain the Club's register of disclosures.*
  - (3) *Failure to ensure a current governing body resolution approved the payment of expenses to members of the governing body.*
  - (4) *Maintaining high risk practices including paying expenses of directors in cash directly from the safe and pre-signing cheques.*
  - (5) *Failure to maintain an assets register prior to 18 July 2014.*
  - (6) *Failure to ensure Club auditors provided reports each year:*
    - (A) *the Auditor's Reports for the years ending 30 June 2009 and 30 June 2010 are dated 27 May 2011;*
    - (B) *the Auditor's Report for the year ending 30 June 2011 is dated 2 April 2014; and*
    - (C) *the Auditor's Report for the years ending 30 June 2012 and 30 June 2013 are dated 6 November 2014.*

### **Club's Response to Ground 31**

**1685.** The Club did not provide a response to Ground 31 of the Complaint.

### **Ex-Officers' Response to Ground 31**

**1686.** The Authority notes that Particular 31.2 (specifying the dates of Mr Whitney's employment at the Club as a director) is not disputed by the Ex-Officers.

**1687.** In response to Particular 31.3(a), the Ex-Officers refer to and repeat their submissions on Grounds 1 through 24 of the Complaint.

**1688.** In response to Particulars 31.3(b)(1), (2) and (3) regarding the failure of the Board to determine the remuneration package to the Club secretary, the Ex-Officers refer to and repeat their submissions in relation to Ground 5.2 of the Complaint. The Ex-Officers submit that Mr Wily was responsible for this under the terms of the DOCA and ADOCA and that the Ex-Officers "did not have the power" to achieve the outcome required by the Guidelines.

- 1689.** The Ex-Officers submit that Mr Wily was responsible and that the *ClubsNSW Guidelines* are not enforceable and are best practice guidelines only. The Ex-Officers submit that they did not have any independent power to employ Mr Ashton Jnr and were only permitted to do so if they had received notice that Mr Wily had endorsed Mr Ashton Jnr's employment.
- 1690.** In response to Particular 31.3(b)(4), regarding the alleged failure to comply with legislative, industrial, and administrative requirements, the Ex-Officers submit that the *ClubsNSW Guidelines* are not enforceable – they are best practice guidelines only.
- 1691.** In response to Particular 31.3(b)(5)(A), regarding the alleged failure to obtain value for Club money in relation to Club motor vehicles, the Ex-Officers refer to and repeat their submissions on Ground 3.1 of the Complaint.
- 1692.** In response to Particular 31.3(b)(5)(B), regarding the alleged failure to obtain value for Club money in relation to the reimbursement of unapproved expenses, the Ex-Officers refer to and repeat their submissions on Ground 3.4 of the Complaint.
- 1693.** In response to Particular 31.3(b)(5)(C), regarding the alleged failure to obtain value for Club money in relation to the engagement of VSM to provide marketing services for the Club, the Ex-Officers refer to and repeat their submissions on Ground 6 of the Complaint.
- 1694.** The Ex-Officers contend that engaging VSM represented a “substantial cost saving” for the Club, and refer to the transcript of the 41X inquiry (provided at Tab 64 of the Ex-Officers' Exhibits) which indicates that the marketing fees charged by VSM were significantly lower than those charged by the company previously retained to provide marketing services for the Club.
- 1695.** In response to Particulars 31.3(b)(5)(D) and (E), regarding the alleged failure to obtain value for Club money in relation to the payment of staff Christmas bonuses, the Ex-Officers submit that these bonuses were “not wasteful” and refer to the statements made by Mr Ashton Jnr in his statutory declaration dated 28 May 2015 to the effect that the Christmas bonuses he recommended were always linked to performance, especially in cases where the employee was unlikely to receive any wage increase but worked extremely long hours. Mr Ashton Jnr also states that he received advice from the Federal Secretary of the *Club Managers Association Australia* that the payment of bonuses is industry standard.
- 1696.** The Ex-Officers concede, in relation to the above Particulars, that there was no minute of a meeting of the governing body approving the expenditure for staff Christmas bonuses, but submit that this will change in future. They contend that the staff bonuses paid out in 2014 were minuted and refer to Exhibit RJA4 (attached to Mr Ashton Snr's statutory declaration dated 28 May 2015) which is a copy of the minutes of the Club Board meeting held on 22 December 2014 noting Board approval of Christmas bonuses to certain Club employees.
- 1697.** In response to Particular 31.3(b)(6), regarding the alleged failure by the Board to provide strategic direction to the Club, the Ex-Officers contend that marketing strategies were developed and implemented for increasing Club revenue, and refer to the statements of Mr Ashton Snr in his statutory declaration dated 28 May 2015. Mr Ashton Snr states that some marketing strategies employed by the Club

included the engagement of Paul Kelly Design to redesign the clubhouse, and the implementation of a number of local community initiatives such as “Reading Time”.

- 1698.** In response to Particular 31.3(b)(7), regarding the failure to report to members and ensure that regulatory requirements were met, the Ex-Officers refer to and repeat their submissions on Grounds 1 through 24 of the Complaint.
- 1699.** In response to Particular 31.3(b)(8), regarding the failure to ensure that all appropriate compliance frameworks and controls are in place, the Ex-Officers refer to and repeat their submissions on Grounds 1 through 24 of the Complaint.
- 1700.** In response to Particular 31.3(b)(9), regarding the failure to obtain value for money when making procurement decisions, the Ex-Officers submit that there is no requirement to undertake a tender process. The Ex-Officers refer to the Club’s submission that accounting and marketing services are not “major procurements” but rather “par for the course” in this context. The Club contends that, on a “proper construction” of section 6 of the Guidelines, that tender is “effectively a choice open to the Club to be made”.
- 1701.** In response to Particular 31.3(b)(10), regarding the failure to benchmark the core activities of bar, food and gaming, the Ex-Officers “accept” this allegation, but contend that any obligation to benchmark was the responsibility of Mr Wily during the period of the Club’s administration.
- 1702.** The Ex-Officers further submit that this failure to benchmark, which is not enforceable in any event, has not caused any detriment to the Club and that it is “clear” that the Club is “very competitive and successful in its marketplace”.
- 1703.** In response to Particular 31.3(c)(1), regarding the alleged failure to post membership applications to the Club’s Notice Board, the Ex-Officers submit that the Complainant’s wording is “misleading” in that it suggests multiple breaches where only one has occurred, being a failure with respect to posting Mr McKew’s application.
- 1704.** The Ex-Officers “accept that the expedition of Mr McKew’s application contravened Article 12” of the Club’s Articles of Association, but submit that there are currently 2,460 members in respect of which applications were “appropriately considered and approved”. The Ex-Officers submit that it would be “harsh and draconian” to find the Ex-Officers to be not fit and proper persons on account of “not following protocol in respect of one membership application out of thousands”.
- 1705.** In response to Particular 31.3(c)(2), regarding not removing non-financial members from the members register, the Ex-Officers submit that Article 23 is no longer in force, but that the Ex-Officers had the power and authority and a discretion to remove members. The Ex-Officers submit that there is no “direction” under Article 23 that *compels* the removal of non-financial members. They note the use of the word “may” as opposed to terms such as “shall” or “will”.
- 1706.** In response to Particular 31.3(c)(3), regarding the failure to ensure members of the Board were elected annually, the Ex-Officers refer to and repeat their submissions on Ground 12 of the Complaint.

- 1707.** In response to Particular 31.3(c)(4), regarding the failure to ensure that the Board met at least once every month during Mr Du Chesne's tenure as a director of the Club, the Ex-Officers refer to and repeat their submissions on Ground 10 of the Complaint. The Ex-Officers further contend that Mr Wily was in charge of the Club during administration and that the Ex-Officers "had no power to alter" Mr Wily's conduct and for this reason, no question of the director's fitness and propriety arises from this failure to conduct monthly Board meetings.
- 1708.** In response to Particular 31.3(c)(5), regarding the failure to maintain a quorum of the Club's governing body at Board meetings, the Ex-Officers submit that not meeting the quorum requirement is not a matter that goes to the directors' fitness and propriety. This failure was not a result of a lack of honesty, knowledge, or ability. The Ex-Officers argue that the law offers a company the opportunity to validate decisions made without a quorum and the lack of a quorum "ought not to be a basis" for an allegation that the Ex-Officers are not fit and proper persons.
- 1709.** In response to Particular 31.3(c)(6), regarding the failure to have an AGM each year, the Ex-Officers refer to and repeat their submissions on Ground 12 of the Complaint. The Ex-Officers further contend that Mr Wily was in charge and that the Ex-Officers "had no power to alter" Mr Wily's conduct – thus no question of fitness and propriety arises.
- 1710.** In response to Particular 31.3(d)(1), alleging that the Club's auditor was unable to form an unqualified opinion of the Club's financial accounts for the year ended 30 June 2011 due to poor internal controls and systems, the Ex-Officers submit that all these issues arose during administration and were the responsibility of Mr Wily.
- 1711.** In response to Particular 31.3(d)(2), concerning the failure to maintain the Club's register of disclosure prior to 1 January 2013, the Ex-Officers refer to and repeat their submissions on Grounds 4.3 and 4.4 of the Complaint.
- 1712.** In response to Particular 31.3(d)(3), concerning the failure to ensure a current governing body resolution approved the payment of expenses to members of the governing body between August 2011 and August 2012, the Ex-Officers refer to and repeat their submissions on Ground 3.4 of the Complaint.
- 1713.** In response to Particular 31.3(d)(4), concerning the maintenance of allegedly high risk practices, the Ex-Officers submit that in respect of Mr Ashton Jnr's practice of reimbursing directors' expenses in cash, directly from the safe, there is "nothing" in the Act or the Regulation that prohibits this practice or identifies it as high risk.
- 1714.** Also in response to Particular 31.3(d)(4), the Ex-Officers submit in respect of Mr Levy's practice of pre-signing cheques, that this practice was only in place in the event that cash prizes needed to be paid out and Mr Levy was not available. The Ex-Officers refer to Mr Levy's statutory declaration dated 28 May 2015 which states that this practice ceased once Mr Levy was advised by Mr Michael Bulgin, the Club's Auditor, that it was not appropriate. [The Authority notes that Mr Levy's statutory declaration does not specify when this occurred.]
- 1715.** In response to Particular 31.3(d)(5), concerning the alleged failure to maintain an assets register prior to 18 July 2014, the Ex-Officers submit that it was Mr Wily's responsibility to keep the assets register, but in any event, there is "nothing" in the Act or Regulation that requires any club to keep an assets register.

- 1716.** In response to Particular 31.3(d)(6), concerning the Club's auditors not providing reports each year between 2009 and 2013, the Ex-Officers submit that the reason for the "late" submission of reports is because the Club was under administration and Mr Wily was responsible for all the information which was not provided. The Ex-Officers argue that there is nothing to suggest that these past breaches are continuing or that they will continue, and note that the 2014 Annual Reports were completed.

### **Kirk's Response to Ground 31**

- 1717.** Mr Kirk did not provide a response to Ground 31 of the Complaint.

### **Wily's Response to Ground 31**

- 1718.** Mr Wily did not provide a response to Ground 31 of the Complaint.

### **Authority Findings on Ground 31**

- 1719.** Particular 31.1 alleges that, by reason of the conduct of Mr Leonard Whitney whilst a member of the governing body of the Club, he is not a "fit and proper" person to hold such a position.
- 1720.** Particular 31.2, which specifies the periods of time in which Mr Whitney served as a director, is established. It is contended in the Complaint Letter and is not in dispute that Mr Whitney was elected to the governing body as a director of the Club during the following periods:
- August 1995 and November 1995;
  - August 1996 and January 1997;
  - August 1997 and August 2001;
  - August 2003 and October 2007;
  - May 2008 and September 2010; and
  - August 2011 and April 2014.
- 1721.** Particular 31.3 makes the broad allegation that during the periods specified in Particular 31.2 above, Mr Whitney "failed to exercise his duties as a member of the governing body with a degree of knowledge, ability, care and diligence". This broad allegation is in turn founded upon numerous specific allegations contained within the sub-Particulars of Particular 31.3.
- 1722.** The Authority makes the following findings on those sub-Particulars.

#### **Particular 31.3(a)**

- 1723.** The Authority is satisfied as alleged, and it is not contested, that Mr Leonard Whitney served as a director of the Club from August 1995 to November 1995; August 1996 to January 1997; August 1997 to August 2001; August 2003 to October 2007; May 2008 to September 2010; and August 2011 to April 2014.
- 1724.** The Authority notes that the Complainant repeats the allegations in Grounds 1 to 24 as matters that go to Mr Whitney's fitness and propriety as a director of the Club.

1725. However, the Authority notes that Particular 16.2 and Ground 21 have not been pressed by the Complainant against the Club and therefore have not been taken into account when assessing Mr Whitney's fitness and propriety.
1726. Furthermore, the Authority notes that the following alleged contraventions of the liquor and gaming legislation detailed in Grounds 1 to 24 of the Complaint have not been established against the Club and these allegations have not been taken into account when assessing Mr Whitney's personal fitness and propriety:
- Ground 2
  - Particulars 3.2 and 3.3
  - Ground 6
  - Ground 7
  - Particulars 8.1, 8.5 and 8.8.
1727. Moreover, Grounds 13, 22 and 23 of the Complaint have not been pressed by the Complainant with respect to Mr Whitney and have not been taken into account when assessing Mr Whitney's fitness and propriety.
1728. The Authority is satisfied that the following Grounds include acts or omissions by the Club in respect of minimum statutory requirements that occurred during Mr Whitney's tenure as a director and are matters for which the relevant directors, including Mr Whitney share responsibility with the Club secretary.
1729. The following Grounds support an inference that the governing body, including Mr Whitney were either not aware of the Club's legislative duties or that the Complainant has established that he did not demonstrate the ability to ensure compliance with respect to matters for which the members of the governing body share responsibility. This is either because the legislative requirement involved the Board, or the Club's non-compliance was of such a nature and duration that it supports an inference of systemic failure of compliance, in which the governing body shares responsibility. Some of the following Grounds represent failings of compliance that warrant less weight than others when adverse inferences are drawn against the directors' knowledge and/or ability.
1730. For ease of reference, the Authority repeats below the text of those Grounds 1 to 24 that the Authority is satisfied *have* been established in respect of the Club and also concern matters that the Authority is satisfied are reasonably attributable to the scope and responsibility of a director of a registered club.
1731. The Authority notes in **bold** those Particulars and sub-Particulars that have been established on the evidence and include allegations of non-compliance with legislative requirements that are alleged to have occurred during Mr Whitney's tenure as a director of the Club.
1732. Ground 1:

***Section 57F(3)(a) – The Club failed to meet the requirements of section 10(1)(d) of the Act.***

***Between 31 May 2004 and 30 June 2010, and since 30 July 2014 the Club failed to meet the requirements of section 10(1)(d) of the Act when it failed to maintain the minimum number of ordinary members prescribed by section 12 of the Act.***

**Particular 1.1:**

*The Club is located at Quarry Street, Paddington NSW 2021.*

**Particular 1.2:**

*It is situated within 24 kilometres of the General Post Office in Sydney.*

**Particular 1.3:**

*No application has been made to the Independent Liquor and Gaming Authority (the Authority) for approval of a minimum number of ordinary members less than 200.*

**Particular 1.4:**

***Between 31 May 2004 and 30 June 2010, and since 30 July 2014 the Club's membership was less than 200 members.***

- (a) On 31 May 2004 the Club consisted of 91 ordinary members.***
- (b) On 31 May 2005 the Club consisted of 100 ordinary members.***
- (c) On 31 May 2006 the Club consisted of 97 ordinary members.***
- (d) On 30 June 2007 the Club consisted of 69 ordinary members.***
- (e) On 30 June 2008 the Club consisted of 65 ordinary members.***
- (f) On 30 June 2009 the Club consisted of 53 ordinary members.***
- (g) On 30 June 2010 the Club consisted of 43 ordinary members.***
- (h) On 30 July 2014 the Club had 92 ordinary members.***
- (i) On 11 September 2014 the Club's Membership Register recorded 121 ordinary members.***

**Particular 1.5:**

***At all times since 28 August 2003 the governing body of the Club knew, or ought to have known, that the Act required the Club to have a minimum number of 200 ordinary members and were aware, or were recklessly indifferent, to the fact that the Club did not have the requisite number of members.***

- (a) The Act sets out the minimum number of members required.***
- (b) Mr Kirk had actual knowledge of the requirement to have a minimum number of members.***
- (c) Messrs Roper, Ashton Snr and Ashton Jnr recently became aware of the requirement to have a minimum number of members.***
- (d) Annual financial statements recorded the number of members.***
- (e) Annual financial statements were tabled at Annual General Meetings (AGM).***
- (f) During the period of administration, a "moratorium on accepting full membership" was imposed and the Club permitted its membership to decline.***
  - (1) Between 19 September 2002 and 18 May 2012 the Club was under a form of external administration.***
  - (2) A moratorium on the acceptance of new ordinary members was in place during this period by the governing body of the Club.***
  - (3) Between October 2003 and May 2007 there are 15 applicants recorded in the minutes as being approved for membership by a meeting of the governing body of the Club.***
  - (4) Between June 2007 and June 2008 there are no records evidencing the governing body of the Club approved any applicant for membership of the Club.***

- (5) **Between July 2008 and May 2012** there are 21 applicants recorded in the minutes as being approved for membership by a meeting of the governing body of the Club.
- (6) The acceptance of Mr McKew as a member of the Club during the "moratorium" was not in accordance with the Articles of Association of the Club.
  - (A) **Mr McKew of Rooty Hill NSW made an application for membership signed 28 March 2012.**
  - (B) **Mr McKew of Rooty Hill NSW was known to most directors of the Club at 28 March 2012 and expressed desire to join the Club and be nominated as a director.**
  - (C) **The members of the governing body accepted Mr McKew as a member of the Club on 28 March 2012.**
  - (D) Article 12(a) of the Articles of Association of the Club required membership to be proposed and seconded by a full member of the Club.
  - (E) Article 12(c) of the Articles of Association of the Club required that the nomination be posted on the Notice Board and remain posted for at least 7 days prior to the date of the meeting of the Board at which the application was considered.
  - (F) Article 12(d) of the Articles of Association of the Club required that an interval of at least 14 days must elapse between the date of application and date of election of a candidate to membership.
- (g) The "moratorium on accepting full membership" continued after the administration ceased.
  - (1) **On 18 May 2012** the Club ceased to be under Administration.
  - (2) **On 10 November 2012** the members of the governing body of the Club determined the moratorium would be lifted.

**1733. Ground 3:**

**Section 57F(3)(a) – the Club failed to meet the requirements of section 10(1)(i) of the Act.**

**Between 2010 and 2014** the Club failed to meet the requirements of section 10(1)(i) of the Act when the Club permitted individuals to derive a benefit or advantage from the Club that was not offered equally to all members of the Club.

**Particular 3.1:**

*The Club permitted members of the governing body the personal use of motor vehicles owned by the Club which was not offered equally to all members of the Club.*

- (a) *The Club is the owner of two motor vehicles.*
- (b) *The vehicles were obtained by the Club for the prime purpose of "in-house haulage, disposal of rubbish and refuse, and picking up and delivery of stock without undue delay".*
- (c) *The two vehicles are garaged off-premises at the personal residences of directors Mr Ashton Snr and Mr Teale:*
  - (1) *15 minutes away in Maroubra; and*
  - (2) *40 minutes away in Strathfield.*
- (d) *There is no Club policy or procedure on the use of the vehicles and whether or not they are used for travel unrelated to the Club.*
- (e) *The vehicles are rarely used by the Club.*



- (f) *There is no log book recording the business and private use of the vehicles.*

**Particular 3.4:**

*The Club reimbursed members of the governing body for expenses which were not offered equally to all members of the Club.*

- (a) *Expenses were reimbursed where there was no approval for the payment by a resolution of the governing body.*
- (1) *Between March 2010 and 8 August 2011 26 expense claims were paid to members of the governing body totalling \$2,912.10.*
  - (2) ***Between 9 August 2012 and April 2014 19 expense claims were paid to members of the governing body totalling \$4,968.00.***
  - (3) ***Between 9 August 2011 and 8 August 2012 27 expense claims were paid to members of the governing body, other than Mr Kirk, totalling \$4,275.50.***
- (b) *Expenses were reimbursed where the governing body only provided approval for reasonable expenses.*
- (1) ***Between 9 August 2011 and 8 August 2012 12 expense claims were paid to Mr Kirk totalling \$5,498.40.***
- (c) *The expenses in (a)-(b) above were paid in circumstances where the majority of the claims:*
- (1) *contained little to no detail about the expense;*
  - (2) *contained no supporting documentation despite Club policy for supporting documentation to be provided for any expense over \$80.00;*
  - (3) *in the absence of detail, cannot be said to have been for the benefit of the Club and its members;*
  - (4) *in the absence of detail, cannot be said to have been connected to their duties and responsibilities; and*
  - (5) *in the absence of detail, cannot be said to have been reasonable.*

**1734. Ground 4:**

**Section 57F(3)(a) – The Club failed to meet the requirements of section 10(1)(l) of the Act.**

***Between January 2009 and November 2014 the Club failed to meet the requirements of section 10(1)(l) of the Act when the Club failed to comply with the reporting requirements set out in the Registered Clubs Regulation 2009 (the Regulation) and required by section 38 of the Act.***

**Particular 4.1:**

*The Club failed to provide to members of the governing body financial statements required by Clause 17 of the Regulation on a quarterly basis.*

- (a) *The Club failed to prepare "profit and loss statements" and "balance sheets" on a quarterly basis.*
- (b) ***Between March 2009 and May 2014 the financial year of the club was 1 June to 31 May.***
- (c) ***For 10 quarters between March 2009 and May 2014, there is no minute recording that any financial statements were provided to the governing body.***

**Particular 4.2:**

*The Club failed to display a notice on the Club's website outlining how Club members can access those financial statements.*

**Particular 4.3:**

*As a result of the governing body not approving financial statements on a quarterly basis, these statements could not have been made available to ordinary members within 48 hours of being approved by the governing body.*

**Particular 4.4:**

**Prior to 1 January 2013**, the Club failed to record disclosures made by members of the governing body in a register of disclosures for the relevant financial year as required by Clause 18(1) of the Regulation.

- (a) *The Club failed to maintain a register of disclosures **prior to 1 January 2013**.*
- (b) **Prior to 1 January 2013**, members of the governing body made disclosures that were required to be recorded and maintained in the register of disclosures.
  - (1) *Ms Madeline Kirk:*
    - (A) *Ms Kirk is the daughter of director Mr Kirk;*
    - (B) *Mr Kirk was a member of the governing body **between 28 August 2003 and 2 April 2014**;*
    - (C) **Between 16 November 2010 and 25 December 2011** Ms Kirk was employed by the Club; and
    - (D) *Mr Kirk made a written declaration on 7 January 2011.*
  - (2) *Mr Ashton Jnr:*
    - (A) *Mr Ashton Jnr is the son of director Mr Ashton Snr;*
    - (B) *Mr Ashton Snr became a member of the governing body **on 28 August 2003** and continues to act in that capacity;*
    - (C) *Mr Ashton Jnr was employed with the Club as "bar staff" **between 15 December 2005 and 4 May 2009**;*
    - (D) *Mr Ashton Jnr re-commenced employment with the Club on or about 29 November 2010; and*
    - (E) *Mr Ashton Snr made a written declaration on 10 January 2011.*
  - (3) *Mr Kirk:*
    - (A) **At the 2008 AGM** [the Authority notes that this took place on 10 December 2008] *the ordinary members were asked to consider transferring the Club premises from core to non-core property, and entering a new leasing arrangement;*
    - (B) *Woollahra Gardens Pty Limited is party to the Deed of Company Arrangement;*
    - (C) *Mr Kirk performed remunerated work for Mr Michael Sanchez and his associated group of companies, which includes Woollahra Gardens Pty Limited; and*
    - (D) *Mr Kirk made a disclosure **at the 2008 AGM** identifying his relationship with Mr Sanchez.*
- (c) *The Club's register of disclosures is not maintained for each financial year.*
  - (1) *The Club's financial year was from 1 June to 30 May.*
  - (2) *The Club maintained a register of disclosures for the period **1 January 2013 to 31 December 2013**.*
  - (3) *The Club maintained a register of disclosures for the period **1 September 2013 to 31 August 2014**.*

**Particular 4.5:**

*The Club failed to display a notice on the Club website informing members how they can access the Club's register of disclosures.*

**1735. Ground 5:**

**Section 57F(3)(a) – The Club failed to meet the requirements of section 10(1)(m) of the Act.**

**Between 2007 and 2014** the Club failed to meet the requirements of section 10(1)(m) of the Act when the Club failed to comply with the requirements of Part 4A of the Act.

**Particular 5.1:**

**Between 2009 and 2013** the Club failed to specify the core and non-core property of the Club at the end of the financial year in any of the Club's annual reports, in contravention of section 41J(2) of the Act.

**Particular 5.2:**

*The Club entered into a contract for the remuneration of a "top executive" without the proposed contract having been first approved by the governing body of the Club, contravening section 41M of the Act.*

- (a) *On or about 29 November 2010 Mr Ashton Jnr commenced employment with the Club as Secretary.*
- (b) *There was no written contract between the Club and Mr Ashton Jnr outlining the terms of the employment.*
- (c) *On or about 1 February 2011 the Club appointed Mr Ashton Jnr to the position of Secretary.*
- (d) *The Secretary of the Club is a "top executive" for the purposes of section 41M of the Act.*
- (e) *The register of disclosures states that the governing body of the Club approved the remuneration or employment contract with Mr Ashton Jnr in the position of Secretary in April 2014.*
- (f) *There is no minute of a meeting of the governing body approving Mr Ashton Jnr's remuneration or employment contract in the position of Secretary.*
- (g) *On or about 30 June 2014 the Club entered into a written contract with Mr Ashton Jnr for the position of Secretary commencing on 21 April 2014, in circumstances where:*
  - (1) *Mr Ashton Jnr commenced in the role at a time between November 2010 and February 2011; and*
  - (2) *there is no minute of a meeting of the governing body approving Mr Ashton Jnr's remuneration or contract.*

**Particular 5.3:**

*The Club failed to give written notice, as soon as practicable, to Mr Ashton Jnr that he was a "top executive" of the Club and had responsibilities under Part 4A of the Act in contravention of section 41U of the Act.*

- (a) *There is no record that the Club provided Mr Ashton Jnr with written notice that he was a "top executive".*

**Particular 5.4:**

*The Club lent money to an employee where there that loan was not first approved by the governing body of the Club in contravention of section 41N of the Act.*

- (a) *Mr Matthew Brady was an employee of the Club **between 10 December 2012 and 30 June 2013.***
- (b) ***On 8 March 2013** the Club provided Mr Brady a loan in the sum of \$2,000.*
- (c) *The register of disclosures records that the loan was approved by the members of the governing body **on 9 April 2013.***
- (d) *There is no board minute recording that the proposed loan was first approved by the governing body of the Club.*

**Particular 5.5:**

***On 1 February 2007**, the Club entered into a contract with ML Management (NSW) Pty Limited ACN 104 788 070 (**MLM**), a company in which Mr Levy, the Secretary at that time, had a controlling interest, contravening section 41L of the Act.*

- (a) ***Between 26 October 2004 and 3 October 2007** Mr Levy was the Secretary of the Club.*
- (b) *During this period Mr Levy was the sole director of MLM and had the capacity to determine the outcome of decisions about the financial and operating policies of the company.*
- (c) ***On 1 February 2007** the Club entered into a deed with MLM to provide consultative and administrative services to the Club (the MLM Deed).*
- (d) *The MLM Deed was a commercial arrangement for the provision of services by MLM to the Club.*
- (e) *Before entering into the MLM Deed, the Club did not make reasonable inquiries to ensure that section 41L(1) was complied with.*

**1736. Ground 8:**

**Section 57F(3)(a) – The Club failed to meet the requirements of section 10(1)(a) of the Act.**

***Between 2002 and 2014** the Club failed to meet the requirements of section 10(1)(a) of the Act when the Club was not conducted in good faith as a club.*

**Particular 8.2:**

*The Club failed to meet the minimum number of ordinary members required by Section 10(1)(d) of the Act.*

**Particular 8.3:**

*During the period the Club was under external administration a "moratorium on accepting full membership" was imposed and the Club permitted its membership to decline.*

**Particular 8.4:**

*The Club permitted the "moratorium on accepting full membership" to continue when the Club was no longer under administration.*

**Particular 8.6:**

*The Club admits persons to membership of the Club as "social members" to allow persons who live within a 5km radius of the Club to enter the premises and utilise the facilities without being required to be approved by the members or governing body as "ordinary members".*

- (a) *At all relevant times it was a rule of the Club that it must not admit a person to the Club:*

- (1) as a member of the Club, other than as a "provisional member", "honorary member" or "temporary member", unless the person is elected to membership at a meeting of the full members, the governing body, or the election committee of the Club; or
  - (2) as a "temporary member" if the person resides in New South Wales, and within a 5km radius of the Club.
- (b) Persons who live within a 5km radius of the Club and attend for social and corporate bowling are admitted to the Club incorrectly as "temporary members", or admitted to membership as "social members".
  - (c) The Club introduced "social members" as a membership category in the Club's 2014 constitution, and applicants are approved by Club staff as members of the Club at the Club entrance following the payment of a \$2.00 fee and the completion of a membership application form.
  - (d) As at 16 May 2014 the Club had admitted 7,273 persons to membership of the Club as "social members" who were not approved by a meeting of the full members, governing body or election committee.

**Particular 8.7:**

*The Club was under external administration for an extended period of time (10 years).*

- (a) On or about 19 September 2002 Mr Wily was appointed Receiver Manager by the Supreme Court of NSW and acted in the role **until 8 November 2011**, apart from the period 23 January 2004 and 21 June 2004 when Mr Wily Snr acted in this capacity.
- (b) On 24 October 2002 Mr Wily was purportedly appointed Administrator of the Club and acted in the role until 28 March 2003.
- (c) On 24 March 2003 Mr Wily was purportedly appointed Administrator under a Deed of Company Arrangement and acted in the role **until 18 May 2012**, apart from the period 23 January 2004 and 21 June 2004 when Mr Wily Snr acted in this capacity.

**1737. Ground 9:**

**Section 57F(3)(d) – The Club contravened a provision of the Act.**

**Prior to 1 January 2013** the Club failed to maintain a register of all disclosures made under Part 4A of the Act for the relevant financial year, contravening section 38 of the Act and clause 16 of the Regulation.

**Particular 9(a):**

- (a) Repeat particulars at 4.4 above.

**1738. Ground 10:**

**Section 57F(3)(d) – The Club contravened a provision of the Act.**

**Between January 2009 and June 2014** the Club contravened section 30(1)(c) of the Act.

**Particular 10.1:**

*The Club failed to hold a meeting of the governing body at least once in every month of the year when it failed to hold meetings as follows;*

- (a) **In 2009**, on eight occasions,
  - (1) Governing body meetings were not held in **March, April, May, June, August, September, October and December 2009**.

- (b) **In 2010**, on two occasions,
  - (1) Governing body meetings were not held in **August** and December 2010.
- (c) **In 2011**, on five occasions,
  - (1) Governing body meetings were not held in January, April, June, **August** and **November 2011**.
- (d) **In 2012**, on one occasion,
  - (1) A governing body meeting was not held in **October 2012**.
- (e) **In 2013**, on five occasions,
  - (1) Governing body meetings were not held in **January, March, June, September and December 2013**.
- (f) **In 2014**, on one occasion,
  - (1) A governing body meeting was not held in **January 2014**.

**Particular 10.2:**

*The Club failed to keep minutes of all proceedings and resolutions of the governing body in a book.*

- (a) *There is no minute of proceedings and resolutions in respect of a meeting of the governing body in **January 2010**.*
- (b) *Minutes and resolutions were not recorded in a book.*

**Particular 10.3:**

*The Club failed to retain all documents referred to in the minutes as being tabled at the meeting.*

- (a) *On 9 occasions the minutes of meeting of the governing body record that a Management Report was tabled but the Club has failed to retain a copy with the stored minutes:*
  - (1) **In 2009**, in the meeting of the governing body held in **July**.
  - (2) **In 2010**, in the meetings of the governing body held in **February, March, June, July, September** and October.
  - (3) **In 2011**, in the meetings of the governing body held in July and **October**.

**1739. Ground 11:**

**Section 57F(3)(d) – The Club contravened a provision of the Act.**

**Between August 2013 and April 2014** the Club contravened section 30(2)(k) of the Act.

**Particular 11.1:**

*On 31 occasions the Club failed to ensure the information of a guest of a member was recorded in the "sign-in register" in accordance with section 31(1)(c) of the Act.*

- (a) *On 15 occasions the guest did not complete their full name, or their surname and first initial.*
- (b) *On 16 occasions the guest did not complete their address.*
- (c) *On three occasions the member did not provide their signature.*

**1740. Ground 12:**

**Section 57F(3)(d) – The Club contravened a provision of the Act.**

***In 2007 and between 2009 and 2013 the Club failed to hold annual elections for the appointment of the members of the governing body in contravention of section 30(1)(a) of the Act.***

**Particular 12.1:**

*There was no rule of the Club to provide otherwise than that the governing body of the Club must be elected annually.*

**Particular 12.2:**

***In 2007, 2009 and 2010, the Club:***

- (a) *did not hold an AGM of members; and*
- (b) *did not hold an election by members for the appointment of the governing body.*

**Particular 12.3:**

***In 2011, the Club:***

- (a) *held an AGM of members; but*
- (b) *there is no minute from the AGM of members recording that the Club held an election for the appointment of the governing body.*

**Particular 12.4:**

***In 2012 and 2013, the Club:***

- (a) *did not hold an AGM of members; and*
- (b) *did not hold an election by members for the appointment of the governing body.*

**1741. Ground 14:**

***Section 57F(3)(e) – a rule of the Club referred to in section 30(1) of the Act has been broken or any other rule of the Club has been habitually broken.***

***Between August 2013 and November 2014 it was a rule of the Club, under section 30(2)(m) of the Act, that it maintain a register of "temporary members" who attend the Club each day and record information in accordance with section 31(1)(e) of the Act.***

***Between August 2013 and November 2014 the Club habitually broke this rule.***

**Particular 14.1:**

*The Club kept a "sign-in register" for "temporary members".*

**Particular 14.2:**

*The Club on 1,856 occasions failed to ensure the full name, or the surname and first initial, and the address of the "temporary member" together with his or her signature, was recorded in the "sign-in register" as follows.*

<b><i>Date/Month</i></b>	<b><i>Number of temporary members whose information was not recorded as required by section 31(1)(e)</i></b>
<i>August 2013</i>	<i>90</i>
<i>September 2013</i>	<i>83</i>
<i>October 2013</i>	<i>139</i>
<i>November 2013</i>	<i>223</i>
<i>December 2013</i>	<i>438</i>

January 2014	111
February 2014	123
March 2014	53
April 2014	188
May 2014	78
June 2014	41
July 2014	37
August 2014	35
September 2014	44
October 2014	112
November 2014	61

**1742. Ground 15:**

***Section 57F (3)(e) – A rule of the Club referred to in section 30(1) of the Act has been broken or any other rule of the Club has been habitually broken.***

***Between August 2013 and November 2014*** it was a rule of the Club, under section 30(2)(c) of the Act, that it must not admit a person to the Club as a "temporary member" if the person resides in New South Wales, and within a 5km radius of the Club, unless the person:

- (a) is a member of another registered club with similar objects as the Club; or
- (b) is a member of another registered club and is attending the Club on an invitation to participate in an organised sport or competition.

***Between August 2013 and November 2014*** the Club habitually broke this rule.

**Particular 15.1:**

*On 1,168 occasions the Club admitted persons, whose ordinary residence was within a 5km radius of the Club, as "temporary members" of the Club.*

<b><i>Month/Year</i></b>	<b><i>Number of temporary members who resided in New South Wales and within a 5km radius of the Club</i></b>
August 2013	43
September 2013	32
October 2013	65
November 2013	71
December 2013	222
January 2014	115
February 2014	118
March 2014	60
April 2014	146
May 2014	84
June 2014	41
July 2014	29
August 2014	18
September 2014	45
October 2014	52
November 2014	27

**Particular 15.2:**

*None of the persons entering the Club referred to at paragraph 15.1 above identified themselves in the "sign-in register" as being a member of another club.*

**1743. Ground 16:**



**Section 57F(3)(e) – A rule of the Club referred to in section 30(1) of the Act has been broken or any other rule of the Club has been habitually broken.**

*At all relevant times it was a rule of the Club, under section 30(1)(g) of the Act, that it must not admit a person as a member of the Club, other than as a "provisional member", "honorary member" or "temporary member", unless the person is elected to membership at a meeting of:*

- (a) the full members of the Club;*
- (b) the governing body of the Club; or*
- (c) the election committee of the Club.*

**Between 2013 and 2014** the Club habitually broke this rule.

Particular 16.1:

*As at 16 May 2014 the Club had admitted 7,273 persons to membership of the Club as "social members".*

**Particular 16.3:**

*"Social members" are distinct from "provisional members", "honorary members" or "temporary members" in the Club's 2014 Constitution.*

**Particular 16.4:**

*Article 16.1 of the Club's 2014 Constitution provides:*

*"A person shall not be admitted as a member of the Club other than as a Provisional, Honorary Temporary or a Life Member unless that person is elected to membership at a meeting of the Board of the Club or duly appointed election committee of the Club".*

**Particular 16.5:**

*"Social members" are not "provisional members", "honorary members" or "temporary members" of the Club.*

**Particular 16.6:**

*"Social members" are approved by Club staff as members of the Club at the entrance to the Club following the payment of a \$2.00 fee and the completion of a membership application form.*

**Particular 16.7:**

*"Social members" are issued a membership number and card which provides access to the Club.*

**Particular 16.8:**

*The 7,273 persons admitted to membership as "social members" were not approved by a meeting of the full members, governing body or election committee.*

**1744.** Ground 17:

**Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.**

*The Club contravened clause 14 of the Gaming Machines Regulation 2010.*

**Particular 17.1:**

**Between August 2013 and September 2014** on 623 occasions the Club failed to keep written records with respect to the awarding or payment of each prize and short-pay of an approved gaming machine kept on the premises of the Club that contains:

- (a) the name and signature of the person to whom the award or payment was made; and
- (b) the signature of 2 other persons certifying that each sighted the prize-winning combination or the number of credits and that the record was correct in all its details.

**1745.** Ground 18:

**Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.**

*The Club contravened clause 17 of the Gaming Machines Regulation 2010.*

**Particular 18.1:**

*There is no minute of a meeting of the governing body **between January 2009 and June 2014** recording the production to the governing body, at monthly intervals, of:*

- (a) a cash flow analysis in the form approved by the Director-General; and
- (b) a comparison of cancelled credit and jackpot wins meter readings with the corresponding entries in the Club's payout sheets,

*in respect of each approved gaming machine.*

**1746.** Ground 19:

**Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.**

*The Club contravened clause 18 of the Gaming Machines Regulation 2010.*

**Particular 19.1:**

**Between January 2009 and June 2014** the Club failed to:

- (a) produce a "net analysis report" for the previous months, and that part of the previous 12 months, for each approved gaming machine; and
- (b) ensure the net analysis reports were examined by the Club's board within one month.

**1747.** Ground 20:

**Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.**

*The Club contravened clause 20(2)(d) of the Gaming Machines Regulation 2010.*

**Particular 20.1:**

**Between July 2012 and June 2014** on 34 occasions the Club failed to keep written records with respect to each clearance of an approved gaming machine on the premises of the Club that contained the signatures of two authorised persons [sic] cleared the gaming machine certifying that the record was correct in all its details.

**1748.** Ground 24:

**Section 57F(3)(d) – The Club contravened a provision of the Act.**

***Between 24 October 2002 and 18 May 2012 the Club contravened section 41 of the Act when it purported to appoint Mr Wily to act in the capacity of administrator of the Club.***

**Particulars:**

- (a) *The Club is a company within the meaning of the Corporations Act 2001.*
- (b) *On or about 20 September 2002 Mr Wily was appointed to act as Receiver Manager of the Club by the Supreme Court of New South Wales.*
- (c) *On or about 24 October 2002 Mr Wily was purportedly appointed to act as Administrator of the Club in circumstances where there is no record of Mr Wily being appointed to act in this capacity by:*
  - (1) *the Supreme Court of NSW; or*
  - (2) *the former Licensing Court; or*
  - (3) *the Authority.*

**1749.** The Authority notes that while the Club was under apparent voluntary administration between October 2002 and March 2003, the operation of section 437C(1) of the *Corporations Act 2001* served to limit the powers of the Club's officers to act without the consent of the Club's administrator, Mr Wily.

**1750.** However, this period of administration ended, by the operation of section 435C(2)(a) of the *Corporations Act 2001*, when a deed of company arrangement was executed by the Club on 24 March 2003. This restored the powers of the officers of the Club, in so far as they did not act inconsistently with the terms of the deed of company arrangement.

**1751.** The Authority is satisfied that, as a director of the Club, Mr Whitney was partly responsible for ensuring the Club's compliance with the legislative requirements to which it is subject – notwithstanding the fact that the Club was a party to a deed of company arrangement from 24 March 2003 onward.

**1752.** On the basis of the above findings, in respect of those Grounds 1 to 24 that are also found to be attributable to Mr Whitney's tenure, the Authority is satisfied that Mr Whitney failed to exercise his duties as a director of the Club with a degree of knowledge, ability, care and diligence. There is no basis for impugning Mr Whitney's honesty.

**1753.** Particular 31.3(a) is established.

**Particular 31.3(b)**

**1754.** With respect to Particular 31.3(b), attributing to Mr Whitney's fitness and propriety the Club's alleged failure to comply with *ClubsNSW Guidelines*, the Authority accepts the Ex-Officers' submission that these documents are guidelines that provide advice on *best practice* in the industry. They do not prescribe minimum legal rules in respect of which non-compliance may found an independent ground of complaint.

**1755.** Industry guidelines provide a useful framework for the training of club officers and staff and may, in their terms, provide a plain English guide to minimum statutory requirements.

- 1756.** A good working knowledge of *ClubsNSW Guidelines* on the part of club directors or senior executives may have the collateral benefit of enhancing knowledge and skill and provide a means by which regulated officers become aware of and refresh themselves as to regulatory requirements and avoid managing club premises in a manner that exposes an enterprise to systemic risk and/or regulatory action.
- 1757.** *ClubsNSW Guidelines* may also provide a source of evidence as to what the industry considers to be best practice with regard to the content of a regulatory duty that is the subject of a statutory requirement.
- 1758.** However, the Authority does not need to make findings on the sub-Particulars of Particular 31.3(b) by reason that it is already satisfied as to Mr Whitney's responsibility for those instances of statutory non-compliance found against the Club that are found to be also attributable to Mr Whitney's personal fitness and propriety.
- 1759.** The Authority does not consider that non-compliance with individual *ClubsNSW Guidelines* gives rise to an independent ground for disciplinary action and that any lack of knowledge or skill in respect of the Club's conduct by comparison to these guidelines adds little to identifying a lack of knowledge or skill in respect of the failure to demonstrate knowledge and skill in respect of the relevant statutory minimum requirements that have been found by the Authority.

Particular 31.3(c)

- 1760.** Particular 31.3(c) attributes to Mr Whitney's fitness and propriety as a director certain instances of non-compliance by the Club with the Club's Articles of Association. The Authority makes the following findings to the extent that they occurred during Mr Whitney's tenure as a director.
- 1761.** Particular 31.3(c)(1) attributes to Mr Whitney's fitness and propriety the Club's failure to post a membership application to the Club Notice Board.
- 1762.** The Authority notes the Ex-Officers' submissions in respect of this Particular that the Complainant's wording is "misleading" in that it suggests multiple breaches where only one breach has occurred, being Mr McKew's application. The Authority accepts that one breach occurred with regard to Mr McKew's application.
- 1763.** The Ex-Officers accept that the expedition of Mr McKew's application contravened Article 12 of the Club's Articles of Association, but submit that there are currently 2,460 members in respect of which applications were "appropriately considered and approved". The Authority accepts the Ex-Officers' submissions in this regard but is nevertheless satisfied that Particular 31.3(c)(1) is factually established, on the basis of Article 12 of the Articles of Association for the Club (Complainant Exhibit E085) and the evidence or material referred to in the Authority's findings on Particular 1.5(f)(6) above. The Authority notes that this breach occurred during Mr Whitney's tenure as a Club director.
- 1764.** Particular 31.3(c)(2) attributes to Mr Whitney's fitness and propriety the Club's failure to remove non-financial members from the Club's membership register.
- 1765.** The Authority notes the Ex-Officers' submissions in respect of this Particular that Article 23 is no longer in force, but that the Ex-Officers had the power and authority

and a discretion to remove members. The Ex-Officers submit that there is no direction or order under Article 23 that *compels* the removal of non-financial members and note the use of the word “may” as opposed to terms such as “shall” or “will”.

- 1766.** The Authority has reviewed Article 23 of the Club’s Articles of Association and accepts that there was a discretion provided in that:

*...if such subscription shall be unpaid on the due day the defaulting member may be debarred or suspended from all privileges of membership and his name may be removed from the register of members and he may be disqualified from all Club competitions in which he may be participating [emphasis added].*

- 1767.** Nevertheless, the Authority is satisfied that Particular 31.3(c)(2) is factually established on the basis of Article 23 of the Articles of Association for the Club (Complainant Exhibit E085) and the *Paddington Bowling Club Full Members Register* as of 11 September 2014 (Complainant Exhibit E057).
- 1768.** The Authority is satisfied that the discretion provided to the Club to remove non-financial members from the register was not considered or exercised during the relevant period and this is a matter that further underpins an apparent laxity of control with regard to membership and access to the Club premises. It supports an inference that the Club maintained something akin to an “open door” policy and this provides some cause for an adverse assessment as to the fitness of the secretary and members of the governing body for not exercising more diligence in this regard.
- 1769.** Particular 31.3(c)(3) attributes to Mr Whitney’s fitness and propriety the Club’s failure to ensure that members of the Board were elected annually. The Authority notes that the Ex-Officers refer to and repeat their submissions on Ground 12 of the Complaint in response to this Particular.
- 1770.** The Authority is satisfied that Particular 31.3(c)(3) is established on the basis of Article 28 of the Articles of Association for the Club (Complainant Exhibit E085); the statements made by Robert Ashton Jnr at page 27 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182) and the evidence or material referred to in the Authority’s findings on Ground 12 above.
- 1771.** Particular 31.3(c)(4) attributes to Mr Whitney’s fitness and propriety the Club’s failure to ensure that the Board met at least once in every month. The Authority notes that the Ex-Officers refer to and repeat their submissions on Ground 10 of the Complaint and contend that Mr Wily was in charge and that the Ex-Officers “had no power to alter” Mr Wily’s conduct – thus no question of fitness and propriety arises.
- 1772.** The Authority accepts the Ex-Officers’ submissions in this regard, noting that the Board sometimes met twice in a month. However, Particular 31.3(c)(4) is factually established on the basis of Article 41 of the Articles of Association for the Club (Complainant Exhibit E085) and the evidence or material referred to in the Authority’s findings on Ground 10 above. Notwithstanding this finding, the Authority notes that this matter does not have a substantial bearing on an issue of fitness and propriety of the secretary or directors, including Mr Whitney, by reason of the number of meetings convened by the Club during the relevant years.

- 1773.** Particular 31.3(c)(5)(A), which attributes to Mr Whitney's fitness and propriety the Club's failure to ensure the required quorum of five members of the Board was met for each meeting during 2011, is established on the basis of Article 41 of the Articles of Association for the Club (Complainant Exhibit E085); the Club Board meeting minutes for 1 February 2011 (Complainant Exhibit E015); the Club Board meeting minutes for 28 February 2011 (Complainant Exhibit E016); the Club Board meeting minutes for 30 March 2011 (Complainant Exhibit E017); the Club Board meeting minutes for 27 May 2011 (Complainant Exhibit E018); the Club Board meeting minutes for 1 July 2011 (Complainant Exhibit E019); the Club Board meeting minutes for 29 July 2011 (Complainant Exhibit E020); the Club Board meeting minutes for 2 September 2011 (Complainant Exhibit E021); the Club Board meeting minutes for 28 October 2011 (Complainant Exhibit E022) and the Club Board meeting minutes for 28 December 2011 (Complainant Exhibit E023).
- 1774.** Particular 31.3(c)(5)(B), which attributes to Mr Whitney's fitness and propriety the Club's failure to ensure the required quorum of five members of the Board was met for each meeting during 2014, is established on the basis of Article 41 of the Articles of Association for the Club (Complainant Exhibit E085); the Club Board meeting minutes for 10 February 2014 (Complainant Exhibit E045); the Club Board meeting minutes for 24 February 2014 (Complainant Exhibit E046); the Club Board meeting minutes for 8 March 2014 (Complainant Exhibit E047); the Club Board meeting minutes for 11 April 2014 (Complainant Exhibit E048); the Club Board meeting minutes for 13 May 2014 (Complainant Exhibit E049) and the Club Board meeting minutes for 23 June 2014 (Complainant Exhibit E050).
- 1775.** In response to Particular 31.3(c)(5) generally, the Authority notes the Ex-Officers' contention that not meeting the quorum does not go to the question of fitness and propriety. This failure was not a result of a lack of honesty, knowledge, or ability. The Ex-Officers argue that the law offers a company the opportunity to validate decisions made without a quorum so this matter "ought not to be a basis" for the allegation that the Ex-Officers are not fit and proper persons.
- 1776.** The Authority notes the submission made by Mr Kirk dated 29 May 2015 that at the 2004 AGM, there was an amendment to the by-laws reducing the quorum of directors at a Board meeting from five to three, and that all of the matters the subject of Particulars 29.3(c)(5)(A) and 29.3(c)(5)(B) occurred *after* the 2004 resolution and were attended by three or more members of the governing body. Mr Kirk states in his submissions that while he told OLGR investigators in his record of interview dated 5 November 2014 (Complainant Exhibit E181) that he thought the quorum requirement changed from five to three in 2006, on reflection he believes it changed in 2004.
- 1777.** The Authority rejects the Ex-Officers' and Mr Kirk's submissions in this regard. A failure to meet the quorum requirement is not only a technical or administrative failing, but if not observed could increase the scope for the potential conduct of secret meetings or the formation of cabals within a club's governing body. A resolution to reduce the quorum to three does not remove the duty under the Club's Articles of Association to comply with this requirement.
- 1778.** This basic requirement of corporate governance should have been observed by the Club's governing body and it adversely reflects upon the ability of the relevant members of the governing body and the Club's secretary that the quorum

requirement was not met on the occasions that have been established on the evidence.

- 1779.** Particular 31.3(c)(5) is established.
- 1780.** Particular 31.3(c)(6) attributes to Mr Whitney's fitness and propriety the Club's failure to ensure that the Club held an annual general meeting of members each year. The Authority notes that the Ex-Officers refer to and repeat their submissions on Ground 12 of the Complaint and contend that Mr Wily was in charge of the Club during the period of administration and the Ex-Officers "had no power to alter" Mr Wily's conduct and for this reason, no question of fitness and propriety arises.
- 1781.** The Authority does not accept the Ex-Officers' submissions in this regard. Particular 31.3(c)(6) is established on the basis of Article 49 of the Articles of Association for the Club (Complainant Exhibit E085) and the evidence or material referred to in the Authority's findings on Ground 12 above.
- 1782.** The Authority has considered, but rejects, the submissions made by the Ex-Officers that the matters alleged in Particular 31.3(c) do not properly go to the consideration of the honesty, knowledge and ability of any director of the Club. While the secretary and chief executive officer of a registered club has greater operational responsibility over the day to day affairs of a registered club than the members of its governing body, the duty to comply with a club's Articles of Association also falls upon the club's directors.

#### Particular 31.3(d)

- 1783.** With respect to Particular 31.3(d), attributing to Mr Whitney's fitness and propriety the Club's alleged lack of internal controls and procedures, the Authority rejects the Ex-Officers' submission that the issues the subject of Particular 31.3(d) arose during the administration of the Club and as such, were the responsibility of Mr Wily.
- 1784.** The Authority notes that while the Club was under administration, the powers of the officers of the Club were suspended, pursuant to section 437C(1) of the *Corporations Act 2001*. However, once the Deed of Company Arrangement was signed on 24 March 2003, the Club was no longer under administration, through the operation of section 435C of the *Corporations Act 2001*. The Authority notes that the Ex-Officers resumed their powers and obligations in relation to the Club's governance as of that date, subject to the terms of the Deed of Company Arrangement.
- 1785.** The Authority makes the following findings on the sub-Particulars of Particular 31.3(d).
- 1786.** Particular 31.3(d)(1), attributing to Mr Whitney's fitness and propriety the inability of the Club Auditor to form an unqualified opinion of the Club's financial accounts for the year ended 30 June 2011 due to poor internal controls and systems, is established on the basis of a letter from Michael Bulgin, the Club's Auditor to the Club secretary dated 20 May 2011 (Complainant Exhibit E103); the letter from Domenic Cutrupi of CBC Partners, the Club's Auditor to the Club secretary dated 28 March 2014 (Complainant Exhibit E104) and the statements made by Robert Ashton Jnr at page 12 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182).

- 1787.** Particular 31.3(d)(2), attributing to Mr Whitney's fitness and propriety the alleged failure to maintain the Club's register of disclosures, is established on the basis of the evidence or material referred to in the Authority's findings on Particular 4.3 above.
- 1788.** Particular 31.3(d)(3), attributing to Mr Whitney's fitness and propriety the alleged failure to ensure a current governing body resolution approved the payment of expenses to members of the governing body, is established on the basis of the evidence or material referred to in the Authority's findings on Particular 3.4 above.
- 1789.** Particular 31.3(d)(4) attributes to Mr Whitney's fitness and propriety an allegation that the Ex-Officers maintained high risk practices, including Mr Ashton Jnr's paying expenses of directors in cash, directly from the safe. The Authority notes that the Complainant relies upon the statements made by Robert Ashton Jnr at page 28 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182) in support of this contention.
- 1790.** The Authority has reviewed the above evidence or material and is *not* satisfied that this Particular is established. While the practice of paying directors' expenses directly from the safe is not recommended as the most prudent method of payment, the Authority is not satisfied that the evidence or material as to the circumstances in which these payments were made establishes that this practice should be characterised as "high risk".
- 1791.** There is no evidence before the Authority to suggest that the Ex-Officers did not comply with proper accounting practices, and the Authority notes that these payments were reconciled through petty cash, which is a common industry practice. Particular 31.3(d)(4) is not established.
- 1792.** Particular 31.3(d)(5) attributes to Mr Whitney's fitness and propriety the Club's failure to maintain an assets register prior to 18 July 2014. This Particular is established on the basis of the statements made by Allan Teale at pages 30 to 31 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E183).
- 1793.** Particulars 31.3(d)(6) attributes to Mr Whitney's fitness and propriety the Club's failure to ensure that Club auditors provided reports each year. Particular 25.2(d)(6)(A) alleges that the Auditor's Reports for the years ended 30 June 2009 and 30 June 2010 are dated 27 May 2011. Particular 31.3(d)(6)(B) alleges that the Auditor's Report for the year ended 30 June 2012 is dated 2 April 2014. Particular 31.3(d)(6)(C) alleges that the Auditor's Reports for the years ended 30 June 2012 and 30 June 2013 are dated 6 November 2014.
- 1794.** The Authority is satisfied that these sub-Particulars are established on the basis of the Notes to and Forming Part of the Financial Statements as contained in the Club's Financial Report for the year ended 30 June 2009 (Complainant Exhibit E063); the Notes to and Forming Part of the Financial Statements as contained in the Club's Financial Report for the year ended 30 June 2010 (Complainant Exhibit E064); the Club's Financial Statement for 30 June 2011 (Complainant Exhibit E187) and the minutes for the Club's AGM dated November 2014 (Complainant Exhibit E209).



- 1795.** The Authority has considered cumulatively the Authority's findings with regard to the Particulars specified in Ground 31. The Authority notes the multiple instances of non-compliance by the Club with legislative requirements established among Grounds 1 to 24. The Authority notes those further instances of non-compliance with the Club's Articles of Association and failings with respect to corporate governance that are established in the Particulars noted above.
- 1796.** The Authority is satisfied that Ground 31 is established and that Mr Leonard Whitney is not a fit and proper person to be a member of the governing body of the registered club, by reason that the Complainant has established that he did not demonstrate the degree of knowledge, ability, care and diligence that the Authority would expect from a reasonably competent director of a club of this scale. There is no basis for impugning Mr Whitney's honesty arising from the Authority's findings on Ground 31.
- 1797.** The Authority notes that, during the time the Club was subject to the Deed of Company Arrangement from 24 March 2003 and the Amended Deed of Company Arrangement from 10 December 2010, these documents imposed certain restrictions upon the discretion of the governing body in that they could not act contrary to those agreements.
- 1798.** While the degree of responsibility for the Club's affairs may *potentially* be reduced to the extent that certain aspects of Club governance required the consent of the Deed Administrator, Mr Wily – the fact that the Club was subject to a deed of company arrangement does not provide a complete excuse for Mr Whitney's failure, as a Club director, to ensure that the Club complied with relevant legislation.
- 1799.** Mr Whitney and the members of the governing body did have a role to play during the currency of the DOCA and ADOCA during that period. It is certainly no excuse for Mr Whitney or any member of the governing body not to have knowledge of the legislative and constitutional requirements to which the Club was subject.

## **GROUND 32**

- 1800.** Ground 32 alleges as follows:

***Section 57F(3)(g) – A member of the governing body of the Club is not a "fit and proper" person to act as such.***

- 1801.** Particular 32.1 of Ground 32 alleges as follows:

*By reason of the conduct of Mr McKew whilst a member of the governing body of the Club he is not a "fit and proper" person to hold such a position.*

- 1802.** Particular 32.2 of Ground 32 alleges as follows:

*Mr McKew was elected to the governing body on 30 May 2012 as a Director of the Club and held that position until 2 April 2014.*

- 1803.** Particular 32.3 of Ground 32 alleges as follows:

*Between 30 May 2012 and 2 April 2014 Mr McKew failed to exercise his duties as a member of the governing body with a degree of knowledge, ability, care and diligence, by reason of:*

- (a) *The non-compliance with the legislation outlined in paragraphs 1-24 above.*
- (b) *The non-compliance with ClubsNSW Guidelines:*
  - (1) *Failure to ensure the Board determined, agreed and offered a remuneration package to the Club Secretary.*
  - (2) *Failure to ensure key performance indicators were developed and clearly expressed in the contract of the Secretary.*
  - (3) *Failure to be aware of, and comply with, any legislative requirements that pertain to executive remuneration.*
  - (4) *Failure to ensure the employment contract of the Secretary was approved by the Board.*
  - (5) *Failure to ensure the performance of the Secretary is reviewed periodically, at least annually, and assessed against clear KPI's in the employment contract.*
  - (6) *Failure to comply with any relevant legislative, industrial or administrative requirement, and keep up to date with any changes.*
  - (7) *Failure to obtain value for Club money spent and avoid waste and extravagance in the use of Club resources:*
    - (A) *the Club purchased and maintains motor vehicles that are rarely used by the Club;*
    - (B) *the Club reimbursed unapproved expenses of members of the governing body;*
    - (C) *the Club engaged VSM to provide marketing services at a cost of:*
      - i. *\$184,435.00 for the financial year 2011-12;*
      - ii. *\$220,543.00 for the financial year 2012-13; and*
      - iii. *\$240,636.00 for the financial year 2013-14.*
    - (D) *the Club purchased \$5,000.00 in MasterCard Gift Cards for staff Christmas bonuses in 2012;*
    - (E) *the Club purchased \$10,000.00 in Woolworths Gift Cards for staff Christmas bonuses in 2013:*
      - i. *there is no minute of a meeting of the governing body approving this purchase in accordance with the Club's Purchasing and Tendering Policy.*
  - (8) *Failure to provide strategic direction to the Club by constructive engagement in the development, execution and modification of the Club's strategy:*
    - (A) *the Club has produced a five year plan for the improvement of the Crown Asset rather than a strategy to further the Club's purpose of providing accommodation for its members and their guests.*
  - (9) *Failure to report to members and ensure all regulatory requirements are met.*
  - (10) *Failure to ensure all appropriate compliance frameworks and controls are in place.*
  - (11) *Failure to ensure the Club obtained value for money when making procurement decisions:*
    - (A) *the Club did not undertake a tender process when engaging accounting and marketing services.*
  - (12) *Failure to ensure the Club benchmarked the core activities of bar, food and gaming.*
- (c) *The non-compliance with the Articles of Association of the Club.*
  - (1) *Failure to ensure members who were not financial were removed from membership register.*
  - (2) *Failure to ensure the members of the Board were elected annually.*
  - (3) *Failure to ensure the Board met at least once in every month.*
  - (4) *Failure to ensure the required quorum of five members of the Board was met for each meeting:*

- (A) *in 2014, on one occasion, the meeting held of the governing body did not consist of a quorum of five members as follows;*
    - i. *March 2014.*
- (5) *Failure to ensure the Club held an annual general meeting of members each year.*
- (d) *The lack of internal controls and procedures.*
  - (1) *Failure to maintain the Club's register of disclosures.*
  - (2) *Failure to ensure a current governing body resolution approved the payment of expenses to members of the governing body.*
  - (3) *Maintaining high risk practices including paying expenses of directors in cash directly from the safe and pre-signing cheques.*
  - (4) *Failure to maintain an assets register prior to 18 July 2014.*
  - (5) *Failure to ensure Club auditors provided reports each year:*
    - (A) *The Auditor's Report for the year ending 30 June 2011 is dated 2 April 2014; and*
    - (B) *The Auditor's Report for the years ending 30 June 2012 and 30 June 2013 are dated 6 November 2014.*

### **Club's Response to Ground 32**

**1804.** The Club did not provide a response to Ground 32 of the Complaint.

### **Ex-Officers' Response to Ground 32**

- 1805.** The Authority notes that Particular 32.2 of the Complaint (specifying the dates of Mr McKew's employment at the Club as a director) is not disputed by the Ex-Officers.
- 1806.** In response to Particular 32.3(a), the Ex-Officers refer to and repeat their submissions on Grounds 1 through 24 of the Complaint.
- 1807.** In response to Particular 32.3(b)(1), regarding the failure of the Board to determine the remuneration package to the Club secretary, the Ex-Officers refer to and repeat their submissions on Ground 5.2 of the Complaint. The Ex-Officers submit that Mr Wily was responsible for this under the terms of the DOCA and ADOCA and that the Ex-Officers "did not have the power" to achieve the outcome required by the Guidelines.
- 1808.** In response to Particulars 32.3(b)(2), (3), (4) and (5), regarding the secretary's contract and KPIs, the Ex-Officers refer to and repeat their submissions on Particular 5.2 of the Complaint.
- 1809.** The Ex-Officers submit that Mr Wily was responsible and that the *ClubsNSW Guidelines* are not enforceable and are best practice guidelines only.
- 1810.** The Ex-Officers submit that they did not have any independent power to employ Mr Ashton Jnr and were only permitted to do so if they had received notice that Mr Wily had endorsed Mr Ashton Jnr's employment.
- 1811.** In response to Particular 32.3(b)(6), regarding the alleged failure of the Club to comply with legislative, industrial and administrative requirements, the Ex-Officers submit that *ClubsNSW Guidelines* are not enforceable – they are best practice guidelines only.

- 1812.** In response to Particular 32.3(b)(7)(A), regarding the alleged failure to obtain value for Club money in relation to Club motor vehicles, the Ex-Officers refer to and repeat their submissions on Ground 3.1 of the Complaint.
- 1813.** In response to Particular 32.3(b)(7)(B), regarding the alleged failure to obtain value for Club money in relation to the reimbursement of unapproved expenses, the Ex-Officers refer to and repeat their submissions on Ground 3.4 of the Complaint.
- 1814.** In response to Particular 32.3(b)(7)(C) regarding the alleged failure to obtain value for Club money in relation to the engagement of VSM to provide marketing services for the Club, the Ex-Officers refer to and repeat their submissions on Ground 6 of the Complaint.
- 1815.** The Ex-Officers contend that engaging VSM represented a “substantial cost saving” for the Club, and refer to the transcript of the 41X inquiry (provided at Tab 64 of the Ex-Officers’ Exhibits) which indicates that the marketing fees charged by VSM were significantly lower than those charged by the company previously retained to provide marketing services for the Club.
- 1816.** In response to Particulars 32.3(b)(7)(D) and (E), regarding the alleged failure to obtain value for Club money in relation to the payment of staff Christmas bonuses, the Ex-Officers submit that these bonuses were “not wasteful” and refer to the statement of Mr Ashton Jnr in his statutory declaration dated 28 May 2015 to the effect that the Christmas bonuses he recommended were always linked to performance, especially in cases where the employee was unlikely to receive any wage increase but worked extremely long hours. Mr Ashton Jnr also states that he received advice from the Federal Secretary of the *Club Managers Association Australia* that the payment of bonuses is industry standard.
- 1817.** The Ex-Officers concede, in relation to the above Particulars, that there was no minute of a meeting of the governing body approving the expenditure for staff Christmas bonuses, but submit that this will change in future. They contend that the staff bonuses paid out in 2014 were minuted and refer to Exhibit RJA4 (attached to Mr Ashton Snr’s statutory declaration dated 28 May 2015) which is a copy of the minutes of the Club Board meeting held on 22 December 2014 noting Board approval of Christmas bonuses to certain Club employees.
- 1818.** In response to Particular 32.3(b)(8), regarding the alleged failure by the Board to provide strategic direction to the Club, the Ex-Officers contend that marketing strategies were developed and implemented for increasing Club revenue, and refer to the statements of Mr Ashton Snr in his statutory declaration dated 28 May 2015. Mr Ashton Snr states that some marketing strategies employed by the Club included the engagement of Paul Kelly Design to redesign the clubhouse, and the implementation of a number of local community initiatives such as “Reading Time”.
- 1819.** In response to Particular 32.3(b)(9), regarding the alleged failure to report to members and ensure that regulatory requirements were met, the Ex-Officers refer to and repeat their submissions on Grounds 1 through 24 of the Complaint.
- 1820.** In response to Particular 32.3(b)(10), regarding the failure to ensure all appropriate compliance frameworks and controls are in place, the Ex-Officers refer to and repeat their submissions on Grounds 1 through 24 of the Complaint.

- 1821.** In response to Particular 32.3(b)(11), regarding the failure to obtain value for money when making procurement decisions, the Ex-Officers submit that there is no requirement to undertake a tender process. The Ex-Officers refer to the Club's submission that accounting and marketing services are not "major procurements" but rather "par for the course" in this context. The Club contends that, on a "proper construction" of section 6 of the Guidelines, that tender is "effectively a choice open to the Club to be made".
- 1822.** In response to Particular 32.3(b)(12), regarding the failure to benchmark the core activities of bar, food and gaming, the Ex-Officers "accept" this allegation, but contend that any obligation to benchmark was the responsibility of Mr Wily during the period of the Club's administration.
- 1823.** The Ex-Officers submit that this failure to benchmark, which is not enforceable in any event, has not caused any detriment to the Club and that it is "clear" that the Club is "very competitive and successful in its marketplace".
- 1824.** In response to Particular 32.3(c)(1), regarding the Club not removing non-financial members from the members register, the Ex-Officers submit that Article 23 is no longer in force, but that the Ex-Officers had the power and authority and a discretion to remove members. The Ex-Officers submit that there is no "direction" or order under Article 23 that *compels* the removal of non-financial members. They note the use of the word "may" in Article 23 as opposed to terms such as "shall" or "will".
- 1825.** In response to Particular 32.3(c)(2), regarding the failure to ensure members of the Club's Board were elected annually, the Ex-Officers refer to and repeat their submissions on Ground 12 of the Complaint.
- 1826.** In response to Particular 32.3(c)(3), regarding the failure to ensure that the Board met at least once every month during Mr McKew's tenure as a director of the Club, the Ex-Officers refer to and repeat their submissions on Ground 10 of the Complaint. The Ex-Officers further contend that Mr Wily was in charge of the Club during administration and that the Ex-Officers "had no power to alter" Mr Wily's conduct and for this reason, no question of the directors' fitness and propriety arises from this failure to conduct monthly Board meetings.
- 1827.** In response to Particular 32.3(c)(4), regarding the failure to maintain a quorum of the Club's governing body at Board meetings, the Ex-Officers submit that not meeting the quorum requirement is not a matter that goes to the directors' fitness and propriety. This failure was not a result of a lack of honesty, knowledge, or ability. The Ex-Officers argue that the law offers a company the opportunity to validate decisions made without a quorum and so the lack of a quorum "ought not to be a basis" for an allegation that the Ex-Officers are not fit and proper persons.
- 1828.** In response to Particular 32.3(c)(5), regarding the failure to have an AGM each year, the Ex-Officers refer to and repeat their submissions on Ground 12 of the Complaint. The Ex-Officers further contend that Mr Wily was in charge during the period of administration and that the Ex-Officers "had no power to alter" Mr Wily's conduct – thus no question of fitness and propriety arises.
- 1829.** In response to Particular 32.3(d)(1), concerning the failure to maintain the Club's register of disclosure prior to 1 January 2013, the Ex-Officers refer to and repeat their submissions on Grounds 4.3 and 4.4 of the Complaint.

- 1830.** In response to Particular 32.3(d)(2), concerning the failure to ensure a current governing body resolution approved the payment of expenses to members of the governing body between August 2011 and August 2012, the Ex-Officers refer to and repeat their submissions on Ground 3.4 of the Complaint.
- 1831.** In response to Particular 32.3(d)(3), concerning the maintenance of allegedly high risk practices, the Ex-Officers submit that in respect of Mr Ashton Jnr's practice of reimbursing directors' expenses in cash, directly from the safe, there is "nothing" in the Act or the Regulation that prohibits this practice or identifies it as high risk.
- 1832.** Also in response to Particular 32.3(d)(3), the Ex-Officers submit in respect of Mr Levy's practice of pre-signing cheques, that this practice was only in place in the event that cash prizes needed to be paid out and Mr Levy was not available. The Ex-Officers refer to Mr Levy's statutory declaration dated 28 May 2015 which states that this practice ceased once Mr Levy was advised by Mr Michael Bulgin, the Club's Auditor, that it was not appropriate. [The Authority notes that Mr Levy's statutory declaration does not specify when this occurred.]
- 1833.** In response to Particular 32.3(d)(4), concerning the alleged failure to maintain an assets register prior to 18 July 2014, the Ex-Officers submit that it was Mr Wily's responsibility to keep the assets register, but in any event, there is "nothing" in the Act or Regulation that requires any club to keep an assets register.
- 1834.** In response to Particular 32.3(d)(5), concerning the Club's auditors not providing reports each year between 2009 and 2013, the Ex-Officers submit that the reason for the "late" submission of reports is because the Club was under administration and Mr Wily was responsible for all the information which was not provided. The Ex-Officers argue that there is nothing to suggest that these past breaches are continuing or that they will continue, and note that the 2014 Annual Reports were completed.

### **Kirk's Response to Ground 32**

- 1835.** Mr Kirk did not provide a response to Ground 32 of the Complaint.

### **Wily's Response to Ground 32**

- 1836.** Mr Wily did not provide a response to Ground 32 of the Complaint.

### **Authority Findings on Ground 32**

- 1837.** Particular 32.1 alleges that, by reason of the conduct of Mr Luke McKew whilst a member of the governing body of the Club, he is not a "fit and proper" person to hold such a position.
- 1838.** Particular 32.2, which specifies the period in which Mr McKew served as a director of the Club, is established. It is contended in the Complaint Letter and is not in dispute that Mr McKew was elected to the governing body on **30 May 2012** as a director of the Club and held that position until **2 April 2014**.
- 1839.** Particular 32.3 makes the broad allegation that between 30 May 2012 and 2 April 2014, Mr McKew "failed to exercise his duties as a member of the governing body

with a degree of knowledge, ability, care and diligence". This broad allegation is in turn founded upon numerous specific allegations contained within the sub-Particulars of Particular 32.3.

**1840.** The Authority makes the following findings on those sub-Particulars.

Particular 32.3(a)

**1841.** The Authority is satisfied that Mr Luke McKew served as a director of the Club between May 2012 and April 2014.

**1842.** The Authority notes that the Complainant repeats the allegations in Grounds 1 to 24 as matters that go to Mr McKew's fitness and propriety as a director of the Club.

**1843.** However, the Authority notes that Particular 16.2 and Ground 21 have not been pressed by the Complainant against the Club and therefore have not been taken into account when assessing Mr McKew's fitness and propriety.

**1844.** Furthermore, the Authority notes that the following alleged contraventions of the liquor and gaming legislation detailed in Grounds 1 to 24 of the Complaint have not been established against the Club and these allegations have not been taken into account when assessing Mr McKew's personal fitness and propriety:

- Ground 2
- Particulars 3.2 and 3.3
- Ground 6
- Ground 7
- Particulars 8.1, 8.5 and 8.8.

**1845.** Moreover, Grounds 1, 13, 22 and 23 and Particulars 5.2, 5.3 and 5.5 of the Complaint have not been pressed by the Complainant with respect to Mr McKew and therefore have not been taken into account when assessing Mr McKew's fitness and propriety.

**1846.** The Authority is satisfied that the following Grounds include acts or omissions by the Club in respect of minimum statutory requirements that occurred during Mr McKew's tenure as a director and are matters for which the relevant directors, including Mr McKew share responsibility with the Club secretary.

**1847.** The following Grounds support an inference that the governing body, including Mr McKew were either not aware of the Club's legislative duties or that the Complainant has established that he did not demonstrate the ability to ensure compliance with respect to matters for which the members of the governing body share responsibility. This is either because the legislative requirement involved the Board, or the Club's non-compliance was of such a nature and duration that it supports an inference of systemic failure of compliance, in which the governing body shares responsibility. Some of the following Grounds warrant less weight than others in supporting adverse inferences against the directors' knowledge and/or ability.

**1848.** For ease of reference, the Authority repeats below the text of those Grounds 1 to 24 that the Authority is satisfied *have* been established in respect of the Club and also

concern matters that the Authority is satisfied are reasonably attributable to the scope and responsibility of a director of a registered club.

**1849.** The Authority notes in **bold** those Particulars and sub-Particulars that have been established on the evidence and include allegations of non-compliance with legislative requirements that are alleged to have occurred during Mr McKew's tenure as a director of the Club.

**1850.** Ground 3:

**Section 57F(3)(a) – the Club failed to meet the requirements of section 10(1)(i) of the Act.**

**Between 2010 and 2014** the Club failed to meet the requirements of section 10(1)(i) of the Act when the Club permitted individuals to derive a benefit or advantage from the Club that was not offered equally to all members of the Club.

**Particular 3.1:**

*The Club permitted members of the governing body the personal use of motor vehicles owned by the Club which was not offered equally to all members of the Club.*

- (a) *The Club is the owner of two motor vehicles.*
- (b) *The vehicles were obtained by the Club for the prime purpose of "in-house haulage, disposal of rubbish and refuse, and picking up and delivery of stock without undue delay".*
- (c) *The two vehicles are garaged off-premises at the personal residences of directors Mr Ashton Snr and Mr Teale:*
  - (1) *15 minutes away in Maroubra; and*
  - (2) *40 minutes away in Strathfield.*
- (d) *There is no Club policy or procedure on the use of the vehicles and whether or not they are used for travel unrelated to the Club.*
- (e) *The vehicles are rarely used by the Club.*
- (f) *There is no log book recording the business and private use of the vehicles.*

**Particular 3.4:**

*The Club reimbursed members of the governing body for expenses which were not offered equally to all members of the Club.*

- (a) *Expenses were reimbursed where there was no approval for the payment by a resolution of the governing body.*
  - (1) *Between March 2010 and 8 August 2011 26 expense claims were paid to members of the governing body totalling \$2,912.10.*
  - (2) **Between 9 August 2012 and April 2014** 19 expense claims were paid to members of the governing body totalling \$4,968.00.
  - (3) **Between 9 August 2011 and 8 August 2012** 27 expense claims were paid to members of the governing body, other than Mr Kirk, totalling \$4,275.50.
- (b) *Expenses were reimbursed where the governing body only provided approval for reasonable expenses.*
  - (1) **Between 9 August 2011 and 8 August 2012** 12 expense claims were paid to Mr Kirk totalling \$5,498.40.



- (c) *The expenses in (a)-(b) above were paid in circumstances where the majority of the claims:*
  - (1) *contained little to no detail about the expense;*
  - (2) *contained no supporting documentation despite Club policy for supporting documentation to be provided for any expense over \$80.00;*
  - (3) *in the absence of detail, cannot be said to have been for the benefit of the Club and its members;*
  - (4) *in the absence of detail, cannot be said to have been connected to their duties and responsibilities; and*
  - (5) *in the absence of detail, cannot be said to have been reasonable.*

**1851.** Ground 4:

**Section 57F(3)(a) – The Club failed to meet the requirements of section 10(1)(l) of the Act.**

***Between January 2009 and November 2014 the Club failed to meet the requirements of section 10(1)(l) of the Act when the Club failed to comply with the reporting requirements set out in the Registered Clubs Regulation 2009 (the **Regulation**) and required by section 38 of the Act.***

**Particular 4.1:**

*The Club failed to provide to members of the governing body financial statements required by Clause 17 of the Regulation on a quarterly basis.*

- (a) *The Club failed to prepare "profit and loss statements" and "balance sheets" on a quarterly basis.*
- (b) ***Between March 2009 and May 2014 the financial year of the club was 1 June to 31 May.***
- (c) ***For 10 quarters between March 2009 and May 2014, there is no minute recording that any financial statements were provided to the governing body.***

**Particular 4.2:**

*The Club failed to display a notice on the Club's website outlining how Club members can access those financial statements.*

**Particular 4.3:**

*As a result of the governing body not approving financial statements on a quarterly basis, these statements could not have been made available to ordinary members within 48 hours of being approved by the governing body.*

**Particular 4.4:**

***Prior to 1 January 2013, the Club failed to record disclosures made by members of the governing body in a register of disclosures for the relevant financial year as required by Clause 18(1) of the Regulation.***

- (a) *The Club failed to maintain a register of disclosures **prior to 1 January 2013.***
- (b) ***Prior to 1 January 2013, members of the governing body made disclosures that were required to be recorded and maintained in the register of disclosures.***
  - (1) *Ms Madeline Kirk:*
    - (A) *Ms Kirk is the daughter of director Mr Kirk;*
    - (B) *Mr Kirk was a member of the governing body **between 28 August 2003 and 2 April 2014;***

- (C) *Between 16 November 2010 and 25 December 2011 Ms Kirk was employed by the Club; and*
  - (D) *Mr Kirk made a written declaration on 7 January 2011.*
- (2) *Mr Ashton Jnr:*
- (A) *Mr Ashton Jnr is the son of director Mr Ashton Snr;*
  - (B) *Mr Ashton Snr became a member of the governing body on 28 August 2003 and continues to act in that capacity;*
  - (C) *Mr Ashton Jnr was employed with the Club as "bar staff" between 15 December 2005 and 4 May 2009;*
  - (D) *Mr Ashton Jnr re-commenced employment with the Club on or about 29 November 2010; and*
  - (E) *Mr Ashton Snr made a written declaration on 10 January 2011.*
- (3) *Mr Kirk:*
- (A) *At the 2008 AGM [the Authority notes that this took place on 10 December 2008] the ordinary members were asked to consider transferring the Club premises from core to non-core property, and entering a new leasing arrangement;*
  - (B) *Woollahra Gardens Pty Limited is party to the Deed of Company Arrangement;*
  - (C) *Mr Kirk performed remunerated work for Mr Michael Sanchez and his associated group of companies, which includes Woollahra Gardens Pty Limited; and*
  - (D) *Mr Kirk made a disclosure at the 2008 AGM identifying his relationship with Mr Sanchez.*
- (c) *The Club's register of disclosures is not maintained for each financial year.*
- (1) *The Club's financial year was from 1 June to 30 May.*
  - (2) *The Club maintained a register of disclosures for the period **1 January 2013 to 31 December 2013.***
  - (3) *The Club maintained a register of disclosures for the period **1 September 2013 to 31 August 2014.***

**Particular 4.5:**

*The Club failed to display a notice on the Club website informing members how they can access the Club's register of disclosures.*

**1852. Ground 5:**

**Section 57F(3)(a) – The Club failed to meet the requirements of section 10(1)(m) of the Act.**

**Between 2007 and 2014** the Club failed to meet the requirements of section 10(1)(m) of the Act when the Club failed to comply with the requirements of Part 4A of the Act.

**Particular 5.1:**

**Between 2009 and 2013** the Club failed to specify the core and non-core property of the Club at the end of the financial year in any of the Club's annual reports, in contravention of section 41J(2) of the Act.

**Particular 5.4:**

*The Club lent money to an employee where there that loan was not first approved by the governing body of the Club in contravention of section 41N of the Act.*

- (a) Mr Matthew Brady was an employee of the Club **between 10 December 2012 and 30 June 2013**.
- (b) **On 8 March 2013** the Club provided Mr Brady a loan in the sum of \$2,000.
- (c) The register of disclosures records that the loan was approved by the members of the governing body **on 9 April 2013**.
- (d) There is no board minute recording that the proposed loan was first approved by the governing body of the Club.

**1853. Ground 8:**

**Section 57F(3)(a) – The Club failed to meet the requirements of section 10(1)(a) of the Act.**

**Between 2002 and 2014** the Club failed to meet the requirements of section 10(1)(a) of the Act when the Club was not conducted in good faith as a club.

**Particular 8.2:**

*The Club failed to meet the minimum number of ordinary members required by Section 10(1)(d) of the Act.*

**Particular 8.3:**

*During the period the Club was under external administration a "moratorium on accepting full membership" was imposed and the Club permitted its membership to decline.*

**Particular 8.4:**

*The Club permitted the "moratorium on accepting full membership" to continue when the Club was no longer under administration.*

**Particular 8.6:**

*The Club admits persons to membership of the Club as "social members" to allow persons who live within a 5km radius of the Club to enter the premises and utilise the facilities without being required to be approved by the members or governing body as "ordinary members".*

- (a) At all relevant times it was a rule of the Club that it must not admit a person to the Club:
  - (1) as a member of the Club, other than as a "provisional member", "honorary member" or "temporary member", unless the person is elected to membership at a meeting of the full members, the governing body, or the election committee of the Club; or
  - (2) as a "temporary member" if the person resides in New South Wales, and within a 5km radius of the Club.
- (b) Persons who live within a 5km radius of the Club and attend for social and corporate bowling are admitted to the Club incorrectly as "temporary members", or admitted to membership as "social members".
- (c) The Club introduced "social members" as a membership category in the Club's 2014 constitution, and applicants are approved by Club staff as members of the Club at the Club entrance following the payment of a \$2.00 fee and the completion of a membership application form.
- (d) As at 16 May 2014 the Club had admitted 7,273 persons to membership of the Club as "social members" who were not approved by a meeting of the full members, governing body or election committee.

**Particular 8.7:**

*The Club was under external administration for an extended period of time (10 years).*

- (a) *On or about 19 September 2002 Mr Wily was appointed Receiver Manager by the Supreme Court of NSW and acted in the role **until 8 November 2011**, apart from the period 23 January 2004 and 21 June 2004 when Mr Wily Snr acted in this capacity.*
- (b) *On 24 October 2002 Mr Wily was purportedly appointed Administrator of the Club and acted in the role until 28 March 2003.*
- (c) *On 24 March 2003 Mr Wily was purportedly appointed Administrator under a Deed of Company Arrangement and acted in the role **until 18 May 2012**, apart from the period 23 January 2004 and 21 June 2004 when Mr Wily Snr acted in this capacity.*

**1854. Ground 9:**

**Section 57F(3)(d) – The Club contravened a provision of the Act.**

*Prior to 1 January 2013 the Club failed to maintain a register of all disclosures made under Part 4A of the Act for the relevant financial year, contravening section 38 of the Act and clause 16 of the Regulation.*

**Particular 9(a):**

- (a) *Repeat particulars at 4.4 above.*

**1855. Ground 10:**

**Section 57F(3)(d) – The Club contravened a provision of the Act.**

*Between January 2009 and June 2014 the Club contravened section 30(1)(c) of the Act.*

**Particular 10.1:**

*The Club failed to hold a meeting of the governing body at least once in every month of the year when it failed to hold meetings as follows;*

- (a) *In 2009, on eight occasions,*
  - (1) *Governing body meetings were not held in March, April, May, June, August, September, October and December 2009.*
- (b) *In 2010, on two occasions,*
  - (1) *Governing body meetings were not held in August and December 2010.*
- (c) *In 2011, on five occasions,*
  - (1) *Governing body meetings were not held in January, April, June, August and November 2011.*
- (d) *In 2012, on one occasion,*
  - (1) *A governing body meeting was not held in **October 2012**.*
- (e) *In 2013, on five occasions,*
  - (1) *Governing body meetings were not held in **January, March, June, September and December 2013**.*
- (f) *In 2014, on one occasion,*
  - (1) *A governing body meeting was not held in **January 2014**.*

**Particular 10.2:**

*The Club failed to keep minutes of all proceedings and resolutions of the governing body in a book.*

- (a) *There is no minute of proceedings and resolutions in respect of a meeting of the governing body in January 2010.*
- (b) *Minutes and resolutions were not recorded in a book.*

**Particular 10.3:**

*The Club failed to retain all documents referred to in the minutes as being tabled at the meeting.*

- (a) *On 9 occasions the minutes of meeting of the governing body record that a Management Report was tabled but the Club has failed to retain a copy with the stored minutes:*
  - (1) *In 2009, in the meeting of the governing body held in July.*
  - (2) *In 2010, in the meetings of the governing body held in February, March, June, July, September and October.*
  - (3) *In 2011, in the meetings of the governing body held in July and October.*

**1856. Ground 11:**

***Section 57F(3)(d) – The Club contravened a provision of the Act.***

***Between August 2013 and April 2014 the Club contravened section 30(2)(k) of the Act.***

**Particular 11.1:**

*On 31 occasions the Club failed to ensure the information of a guest of a member was recorded in the "sign-in register" in accordance with section 31(1)(c) of the Act.*

- (a) *On 15 occasions the guest did not complete their full name, or their surname and first initial.*
- (b) *On 16 occasions the guest did not complete their address.*
- (c) *On three occasions the member did not provide their signature.*

**1857. Ground 12:**

***Section 57F(3)(d) – The Club contravened a provision of the Act.***

*In 2007 and **between 2009 and 2013** the Club failed to hold annual elections for the appointment of the members of the governing body in contravention of section 30(1)(a) of the Act.*

**Particular 12.1:**

*There was no rule of the Club to provide otherwise than that the governing body of the Club must be elected annually.*

**Particular 12.2:**

*In 2007, 2009 and 2010, the Club:*

- (a) *did not hold an AGM of members; and*
- (b) *did not hold an election by members for the appointment of the governing body.*

**Particular 12.3:**

*In 2011, the Club:*

- (a) *held an AGM of members; but*

- (b) *there is no minute from the AGM of members recording that the Club held an election for the appointment of the governing body.*

**Particular 12.4:**

*In 2012 and 2013, the Club:*

- (a) *did not hold an AGM of members; and*  
 (b) *did not hold an election by members for the appointment of the governing body.*

**1858. Ground 14:**

***Section 57F(3)(e) – a rule of the Club referred to in section 30(1) of the Act has been broken or any other rule of the Club has been habitually broken.***

***Between August 2013 and November 2014*** it was a rule of the Club, under section 30(2)(m) of the Act, that it maintain a register of "temporary members" who attend the Club each day and record information in accordance with section 31(1)(e) of the Act.

***Between August 2013 and November 2014*** the Club habitually broke this rule.

**Particular 14.1:**

*The Club kept a "sign-in register" for "temporary members".*

**Particular 14.2:**

*The Club on 1,856 occasions failed to ensure the full name, or the surname and first initial, and the address of the "temporary member" together with his or her signature, was recorded in the "sign-in register" as follows.*

<b><i>Date/Month</i></b>	<b><i>Number of temporary members whose information was not recorded as required by section 31(1)(e)</i></b>
<i>August 2013</i>	<i>90</i>
<i>September 2013</i>	<i>83</i>
<i>October 2013</i>	<i>139</i>
<i>November 2013</i>	<i>223</i>
<i>December 2013</i>	<i>438</i>
<i>January 2014</i>	<i>111</i>
<i>February 2014</i>	<i>123</i>
<i>March 2014</i>	<i>53</i>
<i>April 2014</i>	<i>188</i>
<i>May 2014</i>	<i>78</i>
<i>June 2014</i>	<i>41</i>
<i>July 2014</i>	<i>37</i>
<i>August 2014</i>	<i>35</i>
<i>September 2014</i>	<i>44</i>
<i>October 2014</i>	<i>112</i>
<i>November 2014</i>	<i>61</i>

**1859. Ground 15:**

***Section 57F (3)(e) – A rule of the Club referred to in section 30(1) of the Act has been broken or any other rule of the Club has been habitually broken.***

***Between August 2013 and November 2014*** it was a rule of the Club, under section 30(2)(c) of the Act, that it must not admit a person to the Club as a "temporary member" if the person resides in New South Wales, and within a 5km radius of the Club, unless the person:

- (a) *is a member of another registered club with similar objects as the Club; or*
- (b) *is a member of another registered club and is attending the Club on an invitation to participate in an organised sport or competition.*

***Between August 2013 and November 2014 the Club habitually broke this rule.***

**Particular 15.1:**

*On 1,168 occasions the Club admitted persons, whose ordinary residence was within a 5km radius of the Club, as "temporary members" of the Club.*

<b><i>Month/Year</i></b>	<b><i>Number of temporary members who resided in New South Wales and within a 5km radius of the Club</i></b>
<i>August 2013</i>	<i>43</i>
<i>September 2013</i>	<i>32</i>
<i>October 2013</i>	<i>65</i>
<i>November 2013</i>	<i>71</i>
<i>December 2013</i>	<i>222</i>
<i>January 2014</i>	<i>115</i>
<i>February 2014</i>	<i>118</i>
<i>March 2014</i>	<i>60</i>
<i>April 2014</i>	<i>146</i>
<i>May 2014</i>	<i>84</i>
<i>June 2014</i>	<i>41</i>
<i>July 2014</i>	<i>29</i>
<i>August 2014</i>	<i>18</i>
<i>September 2014</i>	<i>45</i>
<i>October 2014</i>	<i>52</i>
<i>November 2014</i>	<i>27</i>

**Particular 15.2:**

*None of the persons entering the Club referred to at paragraph 15.1 above identified themselves in the "sign-in register" as being a member of another club.*

**1860. Ground 16:**

***Section 57F(3)(e) – A rule of the Club referred to in section 30(1) of the Act has been broken or any other rule of the Club has been habitually broken.***

*At all relevant times it was a rule of the Club, under section 30(1)(g) of the Act, that it must not admit a person as a member of the Club, other than as a "provisional member", "honorary member" or "temporary member", unless the person is elected to membership at a meeting of:*

- (a) *the full members of the Club;*
- (b) *the governing body of the Club; or*
- (c) *the election committee of the Club.*

***Between 2013 and 2014 the Club habitually broke this rule.***

**Particular 16.1:**

*As at 16 May 2014 the Club had admitted 7,273 persons to membership of the Club as "social members".*

**Particular 16.3:**

*"Social members" are distinct from "provisional members", "honorary members" or "temporary members" in the Club's 2014 Constitution.*

**Particular 16.4:**

*Article 16.1 of the Club's 2014 Constitution provides:*

*"A person shall not be admitted as a member of the Club other than as a Provisional, Honorary Temporary or a Life Member unless that person is elected to membership at a meeting of the Board of the Club or duly appointed election committee of the Club".*

**Particular 16.5:**

*"Social members" are not "provisional members", "honorary members" or "temporary members" of the Club.*

**Particular 16.6:**

*"Social members" are approved by Club staff as members of the Club at the entrance to the Club following the payment of a \$2.00 fee and the completion of a membership application form.*

**Particular 16.7:**

*"Social members" are issued a membership number and card which provides access to the Club.*

**Particular 16.8:**

*The 7,273 persons admitted to membership as "social members" were not approved by a meeting of the full members, governing body or election committee.*

**1861. Ground 17:**

**Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.**

*The Club contravened clause 14 of the Gaming Machines Regulation 2010.*

**Particular 17.1:**

***Between August 2013 and September 2014*** on 623 occasions the Club failed to keep written records with respect to the awarding or payment of each prize and short-pay of an approved gaming machine kept on the premises of the Club that contains:

- (a) *the name and signature of the person to whom the award or payment was made;*  
*and*
- (b) *the signature of 2 other persons certifying that each sighted the prize-winning combination or the number of credits and that the record was correct in all its details.*

**1862. Ground 18:**

**Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.**

*The Club contravened clause 17 of the Gaming Machines Regulation 2010.*

**Particular 18.1:**

*There is no minute of a meeting of the governing body **between January 2009 and June 2014** recording the production to the governing body, at monthly intervals, of:*



- (a) a cash flow analysis in the form approved by the Director-General; and
- (b) a comparison of cancelled credit and jackpot wins meter readings with the corresponding entries in the Club's payout sheets,

*in respect of each approved gaming machine.*

**1863. Ground 19:**

**Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.**

*The Club contravened clause 18 of the Gaming Machines Regulation 2010.*

**Particular 19.1:**

***Between January 2009 and June 2014 the Club failed to:***

- (a) *produce a "net analysis report" for the previous months, and that part of the previous 12 months, for each approved gaming machine; and*
- (b) *ensure the net analysis reports were examined by the Club's board within one month.*

**1864. Ground 20:**

**Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.**

*The Club contravened clause 20(2)(d) of the Gaming Machines Regulation 2010.*

**Particular 20.1:**

***Between July 2012 and June 2014 on 34 occasions the Club failed to keep written records with respect to each clearance of an approved gaming machine on the premises of the Club that contained the signatures of two authorised persons [sic] cleared the gaming machine certifying that the record was correct in all its details.***

**1865. Ground 24:**

**Section 57F(3)(d) – The Club contravened a provision of the Act.**

***Between 24 October 2002 and 18 May 2012 the Club contravened section 41 of the Act when it purported to appoint Mr Wily to act in the capacity of administrator of the Club.***

**Particulars:**

- (a) *The Club is a company within the meaning of the Corporations Act 2001.*
- (b) *On or about 20 September 2002 Mr Wily was appointed to act as Receiver Manager of the Club by the Supreme Court of New South Wales.*
- (c) *On or about 24 October 2002 Mr Wily was purportedly appointed to act as Administrator of the Club in circumstances where there is no record of Mr Wily being appointed to act in this capacity by:*
  - (1) *the Supreme Court of NSW; or*
  - (2) *the former Licensing Court; or*
  - (3) *the Authority.*

**1866. The Authority notes that while the Club was under apparent voluntary administration between October 2002 and March 2003, the operation of section 437C(1) of the Corporations Act 2001 served to limit the powers of the Club's officers to act without the consent of the Club's administrator, Mr Wily.**

- 1867.** However, this period of administration ended, by the operation of section 435C(2)(a) of the *Corporations Act 2001*, when a deed of company arrangement was executed by the Club on 24 March 2003. This restored the powers of the officers of the Club, in so far as they did not act inconsistently with the terms of the deed of company arrangement.
- 1868.** The Authority is satisfied that, as a director of the Club, Mr McKew was partly responsible for ensuring the Club's compliance with the legislative requirements to which it is subject – notwithstanding the fact that the Club was a party to a deed of company arrangement from 24 March 2003 onward.
- 1869.** On the basis of the above findings, in respect of those Grounds 1 to 24 that are also found to be attributable to Mr McKew's tenure, the Authority is satisfied that Mr McKew failed to exercise his duties as a director of the Club with a degree of knowledge, ability, care and diligence. There is no basis for impugning Mr McKew's honesty.
- 1870.** Particular 32.3(a) is established.

Particular 32.3(b)

- 1871.** With respect to Particular 32.3(b), which attributes to Mr McKew's fitness and propriety the Club's alleged failure to comply with *ClubsNSW Guidelines*, the Authority accepts the Ex-Officers' submission that these documents are guidelines that provide advice on *best practice* in the industry. They do not prescribe minimum legal rules in respect of which non-compliance may found an independent ground of complaint.
- 1872.** Industry guidelines provide a useful framework for the training of club officers and staff and may, in their terms, provide a plain English guide to minimum statutory requirements.
- 1873.** A good working knowledge of *ClubsNSW Guidelines* on the part of club directors or senior executives may have the collateral benefit of enhancing knowledge and skill and provide a means by which regulated officers become aware of and refresh themselves as to regulatory requirements and avoid managing club premises in a manner that exposes an enterprise to systemic risk and/or regulatory action.
- 1874.** *ClubsNSW Guidelines* may also provide a source of evidence as to what the industry considers to be best practice with regard to the content of a regulatory duty that is the subject of a statutory requirement.
- 1875.** However, the Authority does not need to make findings on the sub-Particulars of Particular 32.3(b) by reason that it is already satisfied as to Mr McKew's responsibility for those instances of statutory non-compliance found against the Club that are found to be also attributable to Mr McKew's personal fitness and propriety.
- 1876.** The Authority does not consider that non-compliance with individual *ClubsNSW Guidelines* gives rise to an independent ground for disciplinary action and that any lack of knowledge or skill in respect of the Club's conduct by comparison to these guidelines adds little to identifying a lack of knowledge or skill in respect of the

failure to demonstrate knowledge and skill in respect of the relevant statutory minimum requirements that have been found by the Authority.

Particular 32.3(c)

- 1877.** Particular 32.3(c) attributes to Mr McKew's fitness and propriety as a director certain instances of non-compliance by the Club with the Club's Articles of Association. The Authority makes the following findings to the extent that they occurred during Mr McKew's tenure as a director.
- 1878.** Particular 32.3(c)(1) attributes to Mr McKew's fitness and propriety the Club's failure to remove non-financial members from the Club's membership register.
- 1879.** The Authority notes the Ex-Officers' submissions in respect of this Particular that Article 23 is no longer in force, but that the Ex-Officers had the power and authority and a discretion to remove members. The Ex-Officers submit that there is no direction or order under Article 23 that *compels* the removal of non-financial members and note the use of the word "may" as opposed to terms such as "shall" or "will".
- 1880.** The Authority has reviewed Article 23 of the Club's Articles of Association and accepts that there was a discretion provided in that:
- ...if such subscription shall be unpaid on the due day the defaulting member may be debarred or suspended from all privileges of membership and his name may be removed from the register of members and he may be disqualified from all Club competitions in which he may be participating [emphasis added].*
- 1881.** Nevertheless, the Authority is satisfied that Particular 32.3(c)(1) is established on the basis of Article 23 of the Articles of Association for the Club (Complainant Exhibit E085) and the *Paddington Bowling Club Full Members Register* as of 11 September 2014, as provided by the Complainant (Complainant Exhibit E057).
- 1882.** The Authority is satisfied that the discretion provided to the Club to remove non-financial members from the register was not considered or exercised during the relevant period and this is a matter that further underpins an apparent laxity of control with regard to membership and access to the Club premises. It supports an inference that the Club maintained something akin to an "open door" policy and this provides some cause for an adverse assessment as to the fitness of the secretary and members of the governing body for not exercising more diligence in this regard.
- 1883.** Particular 32.3(c)(2) attributes to Mr McKew's fitness and propriety the Club's failure to ensure that members of the Board were elected annually. The Authority notes that the Ex-Officers refer to and repeat their submissions on Ground 12 of the Complaint in response to this Particular.
- 1884.** The Authority is satisfied that Particular 32.3(c)(2) is established on the basis of Article 28 of the Articles of Association for the Club (Complainant Exhibit E085); the statements made by Robert Ashton Jnr at page 27 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182) and the evidence or material referred to in the Authority's findings on Ground 12 above.

- 1885.** Particular 32.3(c)(3) attributes to Mr McKew's fitness and propriety the Club's failure to ensure that the Board met at least once in every month. The Authority notes that the Ex-Officers refer to and repeat their submissions on Ground 10 of the Complaint and contend that Mr Wily was in charge during the period of administration and that the Ex-Officers "had no power to alter" Mr Wily's conduct – thus no question of fitness and propriety arises.
- 1886.** The Authority accepts the Ex-Officers' submissions in this regard, noting that the Board sometimes met twice in a month. However, Particular 32.3(c)(3) is factually established on the basis of Article 41 of the Articles of Association for the Club (Complainant Exhibit E085) and the evidence or material referred to in the Authority's findings on Ground 10 above. Notwithstanding this finding, the Authority notes that this matter does not have a substantial bearing on an issue of fitness and propriety of the secretary or directors, including Mr McKew, by reason of the number of meetings convened by the Club during the relevant years.
- 1887.** Particular 32.3(c)(4)(A), which attributes to Mr McKew's fitness and propriety the Club's failure to ensure the required quorum of five members of the Board was met for each of the three meetings specified during 2014, is established on the basis of Article 41 of the Articles of Association for the Club (Complainant Exhibit E085); the Club Board meeting minutes for 10 February 2014 (Complainant Exhibit E045); the Club Board meeting minutes for 24 February 2014 (Complainant Exhibit E046); the Club Board meeting minutes for 8 March 2014 (Complainant Exhibit E047); the Club Board meeting minutes for 11 April 2014 (Complainant Exhibit E048); the Club Board meeting minutes for 13 May 2014 (Complainant Exhibit E049) and the Club Board meeting minutes for 23 June 2014 (Complainant Exhibit E050).
- 1888.** In response to Particular 32.3(c)(4) generally, the Authority notes the Ex-Officers' contention that not meeting the quorum does not go to the question of fitness and propriety. This failure was not a result of a lack of honesty, knowledge, or ability. The Ex-Officers argue that the law offers a company the opportunity to validate decisions made without a quorum and so the lack of a quorum "ought not to be a basis" for an allegation that the Ex-Officers are not fit and proper persons.
- 1889.** The Authority notes the submission made by Mr Kirk dated 29 May 2015 that at the 2004 AGM, there was an amendment to the by-laws reducing the quorum of directors at a Board meeting from five to three, and that all of the matters the subject of Particulars 29.3(c)(5)(A) and 29.3(c)(5)(B) occurred *after* the 2004 resolution and were attended by three or more members of the governing body. Mr Kirk states in his submissions that while he told OLGR investigators in his record of interview dated 5 November 2014 (Complainant Exhibit E181) that he thought the quorum requirement changed from five to three in 2006, on reflection he believes it changed in 2004.
- 1890.** The Authority rejects the Ex-Officers' and Mr Kirk's submissions in this regard. A failure to meet the quorum requirement is not only a technical or administrative failing, but if not observed could increase the scope for the potential conduct of secret meetings or the formation of cabals within a club's governing body. A resolution to reduce the quorum to three does not remove the duty under the Club's Articles of Association to comply with this requirement.
- 1891.** This basic requirement of corporate governance should have been observed by the Club's governing body and it adversely reflects upon the ability of the relevant

members of the governing body and the Club's secretary that the quorum requirement was not met on the occasions that have been established on the evidence.

- 1892.** Particular 32.3(c)(4) is established.
- 1893.** Particular 32.3(c)(5) attributes to Mr McKew's fitness and propriety the Club's failure to ensure that the Club held an annual general meeting of members each year. The Authority notes that the Ex-Officers repeat their submissions on Ground 12 of the Complaint and contend that Mr Wily was in charge of the Club during the period of administration and that the Ex-Officers "had no power to alter" Mr Wily's conduct and for this reason, no question of fitness and propriety arises.
- 1894.** The Authority does not accept the Ex-Officers' submissions in this regard. The failure to hold an annual general meeting of the members in the years 2012 and 2013 as alleged by Particular 32.3(c)(5) is established on the basis of Article 49 of the Articles of Association for the Club (Complainant Exhibit E085) and the evidence or material referred to in the Authority's findings on Ground 12 above.
- 1895.** The Authority has considered, but rejects, the submissions made by the Ex-Officers that the matters alleged in Particular 32.3(c) do not properly go to the consideration of the honesty, knowledge and ability of any director of the Club. While the secretary and chief executive officer of a registered club has greater operational responsibility over the day to day affairs of a registered club than the members of its governing body, the duty to comply with a club's Articles of Association also falls upon the club's directors.

Particular 32.3(d)

- 1896.** With respect to Particular 32.3(d) attributing to Mr McKew's fitness and propriety the Club's alleged lack of internal controls and procedures, the Authority rejects the Ex-Officers' submission that the issues that are the subject of Particular 32.3(d) arose during the administration of the Club and as such, were the responsibility of Mr Wily.
- 1897.** The Authority notes that while the Club was under administration, the powers of the officers of the Club were suspended, pursuant to section 437C(1) of the *Corporations Act 2001*. However, once the Deed of Company Arrangement was signed on 24 March 2003, the Club was no longer under administration, through the operation of section 435C of the *Corporations Act 2001*. The Ex-Officers resumed their powers and obligations in relation to the Club's governance as of that date, subject to the terms of the Deed of Company Arrangement.
- 1898.** The Authority makes the following findings on the sub-Particulars of Particular 32.3(d).
- 1899.** Particular 32.3(d)(1), attributing to Mr McKew's fitness and propriety the Club's alleged failure to maintain the Club's register of disclosures, is established on the basis of the evidence or material referred to in the Authority's findings on Particular 4.3 above.
- 1900.** Particular 32.3(d)(2), attributing to Mr McKew's fitness and propriety the alleged failure to ensure that a current governing body resolution approved the payment of

expenses to members of the governing body, is established on the basis of the evidence or material referred to in the Authority's findings on Particular 3.4 above.

- 1901.** Particular 32.3(d)(3) attributes to Mr McKew's fitness and propriety the allegation that the Ex-Officers maintained certain high risk practices including Mr Ashton Jnr's paying expenses of directors in cash, directly from the safe. The Authority notes that the Complainant relies upon the statements made by Robert Ashton Jnr at page 28 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182) in support of this contention.
- 1902.** The Authority has reviewed the above evidence or material and is *not* satisfied that this Particular is established. While the practice of paying directors' expenses directly from the safe is not recommended as the most prudent method of payment, the Authority is not satisfied that the evidence or material as to the circumstances in which these payments were made establishes that this practice should be characterised as "high risk".
- 1903.** There is no evidence before the Authority to suggest that the Ex-Officers did not comply with proper accounting practices, and the Authority notes that these payments were reconciled through petty cash, which is a common industry practice. Particular 32.3(d)(3) is not established.
- 1904.** Particular 32.3(d)(4), attributing to Mr McKew's fitness and propriety the Club's failure to maintain an assets register prior to 18 July 2014, is established on the basis of the statements made by Allan Teale at pages 30 to 31 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E183).
- 1905.** Particular 32.3(d)(5) attributes to Mr McKew's fitness and propriety the Club's failure to ensure that the Club's auditors provided reports each year. Particular 32.3(d)(5)(A) alleges that the Auditor's Report for the year ended 30 June 2012 is dated 2 April 2014. Particular 32.3(d)(5)(B) alleges that the Auditor's Reports for the years ended 30 June 2012 and 30 June 2013 are dated 6 November 2014.
- 1906.** The Authority is satisfied that these sub-Particulars are established on the basis of the Club's Financial Statement for 30 June 2011 (Complainant Exhibit E187) and the minutes for the Club's AGM dated November 2014 (Complainant Exhibit E209).
- 1907.** Particular 32.3(d) is established.
- 1908.** The Authority has considered cumulatively the Authority's findings with regard to the Particulars specified in Ground 32. The Authority notes the multiple instances of non-compliance by the Club with legislative requirements established among Grounds 1 to 24. The Authority notes those further instances of non-compliance with the Club's Articles of Association and failings with respect to corporate governance that are established in the Particulars noted above.
- 1909.** The Authority is satisfied that Ground 32 is established and that Mr Luke McKew is not a fit and proper person to be a member of the governing body of the registered club, by reason that the Complainant has established that he did not demonstrate the degree of knowledge, ability, care and diligence that the Authority would expect from a reasonably competent director of a club of this scale. There is no basis for impugning Mr McKew's honesty arising from the Authority's findings on Ground 32.

1910. The Authority notes that, during the time the Club was subject to the Deed of Company Arrangement from 24 March 2003 and the Amended Deed of Company Arrangement from 10 December 2010, these documents imposed certain restrictions upon the discretion of the governing body in that they could not act contrary to those agreements.
1911. While the degree of responsibility for the Club's affairs may *potentially* be reduced to the extent that certain aspects of Club governance required the consent of the Deed Administrator, Mr Wily – the fact that the Club was subject to a deed of company arrangement does not provide a complete excuse for Mr McKew's failure, as a Club director, to ensure that the Club complied with relevant legislation.
1912. Mr McKew and the members of the governing body did have a role to play during the currency of the DOCA and ADOCA during that period. It is certainly no excuse for Mr McKew or any member of the governing body not to have knowledge of the legislative and constitutional requirements to which the Club was subject.

### GROUND 33

1913. Ground 33 alleges as follows:

***Section 57F(3)(g) – A member of the governing body of the Club is not a "fit and proper" person to act as such.***

1914. Particular 33.1 of Ground 33 alleges as follows:

*By reason of the conduct of Mr Ashton Snr whilst a member of the governing body of the Club he is not a "fit and proper" person to hold such a position.*

1915. Particular 33.2 of Ground 33 alleges as follows:

*Mr Ashton Snr was elected to the governing body on 28 August 2003 as a Director of the Club and continues to hold that position.*

1916. Particular 33.3 of Ground 33 alleges as follows:

*Since 28 August 2003 Mr Ashton Snr failed to exercise his duties as a member of the governing body with a degree of knowledge, ability, care and diligence, by reason of:*

- (a) *The non-compliance with the legislation outlined in paragraphs 1-24 above.*
- (b) *The non-compliance with ClubsNSW Guidelines:*
  - (1) *Failure to ensure the Board determined, agreed and offered a remuneration package to the Club Secretary.*
  - (2) *Failure to ensure key performance indicators were developed and clearly expressed in the contract of the Secretary.*
  - (3) *Failure to be aware of, and comply with, any legislative requirements that pertain to executive remuneration.*
  - (4) *Failure to ensure the employment contract of the Secretary was approved by the Board.*
  - (5) *Failure to ensure the performance of the Secretary is reviewed periodically, at least annually, and assessed against clear KPI's in the employment contract.*
  - (6) *Failure to comply with any relevant legislative, industrial or administrative requirement, and keep up to date with any changes.*

- (7) *Failure to obtain value for Club money spent and avoid waste and extravagance in the use of Club resources:*
    - (A) *the Club purchased and maintains motor vehicles that are rarely used by the Club;*
    - (B) *the Club reimbursed unapproved expenses of members of the governing body;*
    - (C) *the Club engaged VSM to provide marketing services at a cost of:*
      - i. *\$212,247.00 for the financial year 2009-10;*
      - ii. *\$194,601.00 for the financial year 2010-11;*
      - iii. *\$184,435.00 for the financial year 2011-12;*
      - iv. *\$220,543.00 for the financial year 2012-13; and*
      - v. *\$240,636.00 for the financial year 2013-14.*
    - (D) *the Club purchased \$5,000.00 in MasterCard Gift Cards for staff Christmas bonuses in 2012;*
    - (E) *the Club purchased \$10,000.00 in Woolworths Gift Cards for staff Christmas bonuses in 2013:*
      - i. *there is no minute of a meeting of the governing body approving this purchase in accordance with the Club's Purchasing and Tendering Policy.*
  - (8) *Failure to provide strategic direction to the Club by constructive engagement in the development, execution and modification of the Club's strategy:*
    - (A) *the Club has produced a five year plan for the improvement of the Crown Asset rather than a strategy to further the Club's purpose of providing accommodation for its members and their guests.*
  - (9) *Failure to report to members and ensure all regulatory requirements are met.*
  - (10) *Failure to ensure all appropriate compliance frameworks and controls are in place.*
  - (11) *Failure to ensure the Club obtained value for money when making procurement decisions:*
    - (A) *the Club did not undertake a tender process when engaging accounting and marketing services.*
  - (12) *Failure to ensure the Club benchmarked the core activities of bar, food and gaming.*
- (c) *The non-compliance with the Articles of Association of the Club.*
- (1) *Failure to ensure membership applications were posted on the Notice Board for at least seven days prior to the date of the meeting to consider the application, and at least 14 days lapse between the date of application and the date of election.*
  - (2) *Failure to ensure members who were not financial were removed from membership register.*
  - (3) *Failure to ensure the members of the Board were elected annually.*
  - (4) *Failure to ensure the Board met at least once in every month.*
  - (5) *Failure to ensure the required quorum of five members of the Board was met for each meeting:*
    - (A) *in 2011, on five occasions, meetings held of the governing body did not consist of a quorum of five members as follows:*
      - i. *1 February, 28 February, March, September and October 2011.*
    - (B) *in 2014, on three occasions, meetings held of the governing body did not consist of a quorum of five members as follows:*
      - i. *March, April and June 2014.*
  - (6) *Failure to ensure the Club held an annual general meeting of members each year.*
- (d) *The lack of internal controls and procedures.*



- (1) *The Club Auditor was unable to form an unqualified opinion of the Club's financial accounts for the year ending 30 June 2011 due to poor internal controls and systems.*
- (2) *Failure to maintain the Club's register of disclosures.*
- (3) *Failure to ensure a current governing body resolution approved the payment of expenses to members of the governing body.*
- (4) *Maintaining high risk practices including paying expenses of directors in cash directly from the safe and pre-signing cheques.*
- (5) *Failure to maintain an assets register prior to 18 July 2014.*
- (6) *Failure to ensure Club auditors provided reports each year:*
  - (A) *the Auditor's Reports for the years ending 30 June 2009 and 30 June 2010 are dated 27 May 2011;*
  - (B) *the Auditor's Report for the year ending 30 June 2011 is dated 2 April 2014; and*
  - (C) *the Auditor's Report for the years ending 30 June 2012 and 30 June 2013 are dated 6 November 2014.*

### **Club's Response to Ground 33**

**1917.** The Club did not provide a response to Ground 33 of the Complaint.

### **Ex-Officers' Response to Ground 33**

- 1918.** The Authority notes that Particular 33.2 of the Complaint (specifying the dates of Mr Ashton Snr's employment at the Club as a director) is not disputed by the Ex-Officers.
- 1919.** In response to Particular 33.3(a), the Ex-Officers refer to and repeat their submissions on Grounds 1 through 24 of the Complaint.
- 1920.** In response to Particular 33.3(b)(1), regarding the failure of the Board to determine the remuneration package to the secretary, the Ex-Officers refer to and repeat their submissions on Ground 5.2 of the Complaint. The Ex-Officers submit that Mr Wily was responsible for this under the terms of the DOCA and ADOCA and that the Ex-Officers "did not have the power" to achieve the outcome required by the Guidelines.
- 1921.** In response to Particulars 33.3(b)(2), (3), (4) and (5), regarding the secretary's contract and KPIs, the Ex-Officers refer to and repeat their submissions on Particular 5.2 of the Complaint.
- 1922.** The Ex-Officers submit that Mr Wily was responsible and that the *ClubsNSW Guidelines* are not enforceable and are best practice guidelines only.
- 1923.** The Ex-Officers submit that they did not have any independent power to employ Mr Ashton Jnr and were only permitted to do so if they had received notice that Mr Wily had endorsed Mr Ashton Jnr's employment.
- 1924.** In response to Particular 33.3(b)(6), regarding the alleged failure to comply with legislative, industrial and administrative requirements, the Ex-Officers submit that the *ClubsNSW Guidelines* are not enforceable – they are best practice guidelines only.

- 1925.** In response to Particular 33.3(b)(7)(A), regarding the alleged failure to obtain value for Club money in relation to Club motor vehicles, the Ex-Officers refer to and repeat their submissions on Ground 3.1 of the Complaint.
- 1926.** In response to Particular 33.3(b)(7)(B), regarding the alleged failure to obtain value for Club money in relation to the reimbursement of unapproved expenses, the Ex-Officers refer to and repeat their submissions on Ground 3.4 of the Complaint.
- 1927.** In response to Particular 33.3(b)(7)(C), regarding the alleged failure to obtain value for Club money in relation to the engagement of VSM to provide marketing services for the Club, the Ex-Officers refer to and repeat their submissions on Ground 6 of the Complaint.
- 1928.** The Ex-Officers contend that engaging VSM represented a “substantial cost saving” for the Club, and refer to the transcript of the 41X inquiry (provided at Tab 64 of the Ex-Officers’ Exhibits) which indicates that the marketing fees charged by VSM were significantly lower than those charged by the company previously retained to provide marketing services for the Club.
- 1929.** In response to Particulars 33.3(b)(7)(D) and (E), regarding the alleged failure to obtain value for Club money in relation to the payment of staff Christmas bonuses, the Ex-Officers submit that these bonuses were “not wasteful” and refer to the statement of Mr Ashton Jnr in his statutory declaration dated 28 May 2015 to the effect that the Christmas bonuses he recommended were always linked to performance, especially in cases where the employee was unlikely to receive any wage increase but worked extremely long hours. Mr Ashton Jnr also states that he received advice from the Federal Secretary of the *Club Managers Association Australia* that the payment of bonuses is industry standard.
- 1930.** The Ex-Officers concede, in relation to the above Particulars, that there was no minute of a meeting of the governing body approving the expenditure for staff Christmas bonuses, but submit that this will change in future. They contend that the staff bonuses paid out in 2014 were minuted and refer to Exhibit RJA4 (attached to Mr Ashton Snr’s statutory declaration dated 28 May 2015) which is a copy of the minutes of the Club Board meeting held on 22 December 2014 noting Board approval of Christmas bonuses to certain Club employees.
- 1931.** In response to Particular 33.3(b)(8), regarding the alleged failure to provide strategic direction to the Club, the Ex-Officers contend that marketing strategies were developed and implemented for increasing Club revenue, and refer to the statements of Mr Ashton Snr in his statutory declaration dated 28 May 2015. Mr Ashton Snr states that some marketing strategies employed by the Club included the engagement of Paul Kelly Design to redesign the clubhouse, and the implementation of a number of local community initiatives such as “Reading Time”.
- 1932.** In response to Particular 33.3(b)(9), regarding the alleged failure to report to members and ensure that regulatory requirements were met, the Ex-Officers refer to and repeat their submissions on Grounds 1 through 24 of the Complaint.
- 1933.** In response to Particular 33.3(b)(10), regarding the failure to ensure that all appropriate compliance frameworks and controls are in place, the Ex-Officers refer to and repeat their submissions on Grounds 1 through 24 of the Complaint.

- 1934.** In response to Particular 33.3(b)(11), regarding the failure to obtain value for money when making procurement decisions, the Ex-Officers submit that there is no requirement to undertake a tender process. The Ex-Officers refer to the Club's submission that accounting and marketing services are not "major procurements" but rather "par for the course" in this context. The Club submits that, on a "proper construction" of section 6 of the Guidelines, that tender is "effectively a choice open to the Club to be made".
- 1935.** In response to Particular 33.3(b)(12), regarding the failure to benchmark the core activities of bar, food and gaming, the Ex-Officers "accept" this allegation, but contend that any obligation to benchmark was the responsibility of Mr Wily during the period of the Club's administration.
- 1936.** The Ex-Officers further submit that this failure to benchmark, which is not enforceable in any event, has not caused any detriment to the Club and that it is "clear" that the Club is "very competitive and successful in its marketplace".
- 1937.** In response to Particular 33.3(c)(1), regarding the alleged failure to post membership applications to the Club's Notice Board, the Ex-Officers submit that the Complainant's wording is "misleading" in that it suggests multiple breaches where only one has occurred, being a failure with respect to posting Mr McKew's application.
- 1938.** The Ex-Officers "accept that the expedition of Mr McKew's application contravened Article 12" of the Club's Articles of Association, but submit that there are currently 2,460 members in respect of which applications were "appropriately considered and approved". The Ex-Officers submit that it would be "harsh and draconian" to find the Ex-Officers to be not fit and proper persons on account of "not following protocol in respect of one membership application out of thousands".
- 1939.** In response to Particular 33.3(c)(2), regarding not removing non-financial members from the members register, the Ex-Officers submit that Article 23 of the Club's Articles of Association is no longer in force, but the Ex-Officers had the power and authority and a discretion to remove members. The Ex-Officers submit that there is no "direction" or order under Article 23 that *compels* the removal of non-financial members. They note the use of the word "may" in Article 23 as opposed to terms such as "shall" or "will".
- 1940.** In response to Particular 33.3(c)(3), regarding the failure to ensure that members of the Club's Board were elected annually, the Ex-Officers refer to and repeat their submissions on Ground 12 of the Complaint.
- 1941.** In response to Particular 33.3(c)(4), regarding the failure to ensure that the Board met at least once every month during Mr Ashton Snr's tenure as a director of the Club, the Ex-Officers refer to and repeat their submissions on Ground 10 of the Complaint. The Ex-Officers further contend that Mr Wily was in charge of the Club during administration and that the Ex-Officers "had no power to alter" Mr Wily's conduct and for this reason, no question of the directors' fitness and propriety arises from this failure to conduct monthly Board meetings.
- 1942.** In response to Particular 33.3(c)(5), regarding the failure to maintain a quorum of the Club's governing body at Board meetings, the Ex-Officers submit that not meeting the quorum requirement is not a matter that goes to the directors' fitness

and propriety. This failure was not a result of a lack of honesty, knowledge, or ability. The Ex-Officers argue that the law offers a company the opportunity to validate decisions made without a quorum and so the lack of a quorum “ought not to be a basis” for an allegation that the Ex-Officers are not fit and proper persons.

- 1943.** In response to Particular 33.3(c)(6), regarding the failure to have an AGM each year, the Ex-Officers refer to and repeat their submissions on Ground 12 of the Complaint. The Ex-Officers contend that Mr Wily was in charge and that the Ex-Officers “had no power to alter” Mr Wily’s conduct – thus no question of fitness and propriety arises.
- 1944.** In response to Particular 33.3(d)(1), alleging that the Club’s auditor was unable to form an unqualified opinion of the Club’s financial accounts for the year ended 30 June 2011 due to poor internal controls and systems, the Ex-Officers submit that all these issues arose during administration and were the responsibility of Mr Wily.
- 1945.** In response to Particular 33.3(d)(2), concerning the failure to maintain the Club’s register of disclosure prior to 1 January 2013, the Ex-Officers refer to and repeat their submissions on Grounds 4.3 and 4.4 of the Complaint.
- 1946.** In response to Particular 33.3(d)(3), concerning the failure to ensure that a current governing body resolution approved the payment of expenses to members of the governing body between August 2011 and August 2012, the Ex-Officers refer to and repeat their submissions on Ground 3.4 of the Complaint.
- 1947.** In response to Particular 33.3(d)(4), concerning the maintenance of allegedly high risk practices, the Ex-Officers submit that in respect of Mr Ashton Jnr’s practice of reimbursing directors’ expenses in cash, directly from the safe, there is “nothing” in the Act or the Regulation that prohibits this practice or identifies it as high risk.
- 1948.** Also in response to Particular 33.3(d)(4), the Ex-Officers submit in respect of Mr Levy’s practice of pre-signing cheques, that this practice was only in place in the event that cash prizes needed to be paid out and Mr Levy was not available. The Ex-Officers refer to Mr Levy’s statutory declaration dated 28 May 2015 which states that this practice ceased once Mr Levy was advised by Mr Michael Bulgin, the Club’s Auditor, that it was not appropriate. [The Authority notes that Mr Levy’s statutory declaration does not specify when this occurred.]
- 1949.** In response to Particular 33.3(d)(5), concerning the Club’s alleged failure to maintain an assets register prior to 18 July 2014, the Ex-Officers submit that it was Mr Wily’s responsibility to keep the assets register, but in any event, there is “nothing” in the Act or Regulation that requires any club to keep an assets register.
- 1950.** In response to Particular 33.3(d)(6), concerning Club’s auditors not providing reports each year between 2009 and 2013, the Ex-Officers submit that the reason for the “late” submission of reports is because the Club was under administration and Mr Wily was responsible for all the information which was not provided. The Ex-Officers argue that there is nothing to suggest that these past breaches are continuing or that they will continue, and note that the 2014 Annual Reports were completed.

### **Kirk's Response to Ground 33**

**1951.** Mr Kirk did not provide a response to Ground 33 of the Complaint.

### **Wily's Response to Ground 33**

**1952.** Mr Wily did not provide a response to Ground 33 of the Complaint.

### **Authority Findings on Ground 33**

- 1953.** Particular 33.1 alleges that, by reason of the conduct of Mr Robert Ashton Snr whilst a member of the governing body of the Club, he is not a "fit and proper" person to hold such a position.
- 1954.** Particular 33.2, which specifies the period of time in which Mr Ashton Snr served as a director of the Club, is established. It is contended in the Complaint Letter and is not in dispute that Mr Ashton Snr was elected to the governing body on **28 August 2003** as a director of the Club and held that position until the Club entered into receivership in June 2015.
- 1955.** Particular 33.3 makes the broad allegation that since 28 August 2003, Mr Ashton Snr "failed to exercise his duties as a member of the governing body with a degree of knowledge, ability, care and diligence". This broad allegation is in turn founded upon numerous specific allegations contained within the sub-Particulars of Particular 33.3.
- 1956.** The Authority makes the following findings on those sub-Particulars.

#### Particular 33.3(a)

- 1957.** The Authority is satisfied that Mr Robert Ashton Snr served as a director of the Club from **28 August 2003** until the Club entered into receivership in **June 2015**.
- 1958.** The Authority notes that the Complainant repeats the allegations in Grounds 1 to 24 as matters that go to Mr Robert Ashton Snr's fitness and propriety as a director of the Club.
- 1959.** However, the Authority notes that Particular 16.2 and Ground 21 have not been pressed by the Complainant against the Club and therefore have not been taken into account when assessing Mr Ashton Snr's fitness and propriety.
- 1960.** Furthermore, the Authority notes that the following alleged contraventions of the liquor and gaming legislation detailed in Grounds 1 to 24 of the Complaint have not been established against the Club and these allegations have not been taken into account when assessing Mr Ashton Snr's personal fitness and propriety:
- Ground 2
  - Particulars 3.2 and 3.3
  - Ground 6
  - Ground 7
  - Particulars 8.1, 8.5 and 8.8.

- 1961.** The Authority is satisfied that the following Grounds include acts or omissions by the Club in respect of minimum statutory requirements that occurred during Mr Ashton Snr's tenure as a director and are matters for which the relevant directors, including Mr Ashton Snr share responsibility with the Club secretary.
- 1962.** The following Grounds support an inference that the governing body, including Mr Ashton Snr were either not aware of the Club's legislative duties or that the Complainant has established that he did not demonstrate the ability to ensure compliance with respect to matters for which the members of the governing body share responsibility. This is either because the legislative requirement involved the Board, or the Club's non-compliance was of such a nature and duration that it supports an inference of systemic failure of compliance, in which the governing body shares responsibility. Some of the following Grounds warrant less weight than others in supporting adverse inferences against the directors' knowledge and/or ability.
- 1963.** For ease of reference, the Authority repeats below the text of those Grounds 1 to 24 that the Authority is satisfied *have* been established in respect of the Club and also concern matters that the Authority is satisfied are reasonably attributable to the scope and responsibility of a director of a registered club.
- 1964.** The Authority notes in **bold** those Particulars and sub-Particulars that have been established on the evidence and include allegations of non-compliance with legislative requirements that are alleged to have occurred during Mr Ashton Snr's tenure as a director of the Club.
- 1965.** Ground 1:

***Section 57F(3)(a) – The Club failed to meet the requirements of section 10(1)(d) of the Act.***

***Between 31 May 2004 and 30 June 2010, and since 30 July 2014 the Club failed to meet the requirements of section 10(1)(d) of the Act when it failed to maintain the minimum number of ordinary members prescribed by section 12 of the Act.***

**Particular 1.1:**

*The Club is located at Quarry Street, Paddington NSW 2021.*

**Particular 1.2:**

*It is situated within 24 kilometres of the General Post Office in Sydney.*

**Particular 1.3:**

*No application has been made to the Independent Liquor and Gaming Authority (the Authority) for approval of a minimum number of ordinary members less than 200.*

**Particular 1.4:**

***Between 31 May 2004 and 30 June 2010, and since 30 July 2014 the Club's membership was less than 200 members.***

- (a) On 31 May 2004 the Club consisted of 91 ordinary members.***
- (b) On 31 May 2005 the Club consisted of 100 ordinary members.***
- (c) On 31 May 2006 the Club consisted of 97 ordinary members.***
- (d) On 30 June 2007 the Club consisted of 69 ordinary members.***
- (e) On 30 June 2008 the Club consisted of 65 ordinary members.***

- (f) *On 30 June 2009 the Club consisted of 53 ordinary members.*
- (g) *On 30 June 2010 the Club consisted of 43 ordinary members.*
- (h) *On 30 July 2014 the Club had 92 ordinary members.*
- (i) *On 11 September 2014 the Club's Membership Register recorded 121 ordinary members.*

**Particular 1.5:**

*At all times since 28 August 2003 the governing body of the Club knew, or ought to have known, that the Act required the Club to have a minimum number of 200 ordinary members and were aware, or were recklessly indifferent, to the fact that the Club did not have the requisite number of members.*

- (a) *The Act sets out the minimum number of members required.*
  - (b) *Mr Kirk had actual knowledge of the requirement to have a minimum number of members.*
  - (c) *Messrs Roper, Ashton Snr and Ashton Jnr recently became aware of the requirement to have a minimum number of members.*
  - (d) *Annual financial statements recorded the number of members.*
  - (e) *Annual financial statements were tabled at Annual General Meetings (AGM).*
  - (f) *During the period of administration, a "moratorium on accepting full membership" was imposed and the Club permitted its membership to decline.*
- 
- (1) ***Between 19 September 2002 and 18 May 2012 the Club was under a form of external administration.***
  - (2) *A moratorium on the acceptance of new ordinary members was in place during this period by the governing body of the Club.*
  - (3) ***Between October 2003 and May 2007 there are 15 applicants recorded in the minutes as being approved for membership by a meeting of the governing body of the Club.***
  - (4) ***Between June 2007 and June 2008 there are no records evidencing the governing body of the Club approved any applicant for membership of the Club.***
  - (5) ***Between July 2008 and May 2012 there are 21 applicants recorded in the minutes as being approved for membership by a meeting of the governing body of the Club.***
  - (6) *The acceptance of Mr McKew as a member of the Club during the "moratorium" was not in accordance with the Articles of Association of the Club.*
- 
- (A) ***Mr McKew of Rooty Hill NSW made an application for membership signed 28 March 2012.***
  - (B) ***Mr McKew of Rooty Hill NSW was known to most directors of the Club at 28 March 2012 and expressed desire to join the Club and be nominated as a director.***
  - (C) ***The members of the governing body accepted Mr McKew as a member of the Club on 28 March 2012.***
  - (D) *Article 12(a) of the Articles of Association of the Club required membership to be proposed and seconded by a full member of the Club.*
  - (E) *Article 12(c) of the Articles of Association of the Club required that the nomination be posted on the Notice Board and remain posted for at least 7 days prior to the date of the meeting of the Board at which the application was considered.*

- (F) *Article 12(d) of the Articles of Association of the Club required that an interval of at least 14 days must elapse between the date of application and date of election of a candidate to membership.*
- (g) *The "moratorium on accepting full membership" continued after the administration ceased.*
- (1) **On 18 May 2012** the Club ceased to be under Administration.
- (2) **On 10 November 2012** the members of the governing body of the Club determined the moratorium would be lifted.

**1966. Ground 3:**

**Section 57F(3)(a) – the Club failed to meet the requirements of section 10(1)(i) of the Act.**

**Between 2010 and 2014** the Club failed to meet the requirements of section 10(1)(i) of the Act when the Club permitted individuals to derive a benefit or advantage from the Club that was not offered equally to all members of the Club.

**Particular 3.1:**

*The Club permitted members of the governing body the personal use of motor vehicles owned by the Club which was not offered equally to all members of the Club.*

- (a) *The Club is the owner of two motor vehicles.*
- (b) *The vehicles were obtained by the Club for the prime purpose of "in-house haulage, disposal of rubbish and refuse, and picking up and delivery of stock without undue delay".*
- (c) *The two vehicles are garaged off-premises at the personal residences of directors Mr Ashton Snr and Mr Teale:*
  - (1) *15 minutes away in Maroubra; and*
  - (2) *40 minutes away in Strathfield.*
- (d) *There is no Club policy or procedure on the use of the vehicles and whether or not they are used for travel unrelated to the Club.*
- (e) *The vehicles are rarely used by the Club.*
- (f) *There is no log book recording the business and private use of the vehicles.*

**Particular 3.4:**

*The Club reimbursed members of the governing body for expenses which were not offered equally to all members of the Club.*

- (a) *Expenses were reimbursed where there was no approval for the payment by a resolution of the governing body.*
  - (1) **Between March 2010 and 8 August 2011** 26 expense claims were paid to members of the governing body totalling \$2,912.10.
  - (2) **Between 9 August 2012 and April 2014** 19 expense claims were paid to members of the governing body totalling \$4,968.00.
  - (3) **Between 9 August 2011 and 8 August 2012** 27 expense claims were paid to members of the governing body, other than Mr Kirk, totalling \$4,275.50.
- (b) *Expenses were reimbursed where the governing body only provided approval for reasonable expenses.*



- (1) **Between 9 August 2011 and 8 August 2012** 12 expense claims were paid to Mr Kirk totalling \$5,498.40.
- (c) The expenses in (a)-(b) above were paid in circumstances where the majority of the claims:
  - (1) contained little to no detail about the expense;
  - (2) contained no supporting documentation despite Club policy for supporting documentation to be provided for any expense over \$80.00;
  - (3) in the absence of detail, cannot be said to have been for the benefit of the Club and its members;
  - (4) in the absence of detail, cannot be said to have been connected to their duties and responsibilities; and
  - (5) in the absence of detail, cannot be said to have been reasonable.

**1967. Ground 4:**

**Section 57F(3)(a) – The Club failed to meet the requirements of section 10(1)(l) of the Act.**

**Between January 2009 and November 2014** the Club failed to meet the requirements of section 10(1)(l) of the Act when the Club failed to comply with the reporting requirements set out in the Registered Clubs Regulation 2009 (the **Regulation**) and required by section 38 of the Act.

**Particular 4.1:**

*The Club failed to provide to members of the governing body financial statements required by Clause 17 of the Regulation on a quarterly basis.*

- (a) The Club failed to prepare "profit and loss statements" and "balance sheets" on a quarterly basis.
- (b) **Between March 2009 and May 2014** the financial year of the club was 1 June to 31 May.
- (c) **For 10 quarters between March 2009 and May 2014**, there is no minute recording that any financial statements were provided to the governing body.

**Particular 4.2:**

*The Club failed to display a notice on the Club's website outlining how Club members can access those financial statements.*

**Particular 4.3:**

*As a result of the governing body not approving financial statements on a quarterly basis, these statements could not have been made available to ordinary members within 48 hours of being approved by the governing body.*

**Particular 4.4:**

**Prior to 1 January 2013**, the Club failed to record disclosures made by members of the governing body in a register of disclosures for the relevant financial year as required by Clause 18(1) of the Regulation.

- (a) The Club failed to maintain a register of disclosures **prior to 1 January 2013**.
- (b) **Prior to 1 January 2013**, members of the governing body made disclosures that were required to be recorded and maintained in the register of disclosures.
  - (1) Ms Madeline Kirk:
    - (A) Ms Kirk is the daughter of director Mr Kirk;

- (B) *Mr Kirk was a member of the governing body **between 28 August 2003 and 2 April 2014**;*
  - (C) ***Between 16 November 2010 and 25 December 2011** Ms Kirk was employed by the Club; and*
  - (D) *Mr Kirk made a written declaration **on 7 January 2011**.*
- (2) *Mr Ashton Jnr:*
- (A) *Mr Ashton Jnr is the son of director Mr Ashton Snr;*
  - (B) ***Mr Ashton Snr became a member of the governing body on 28 August 2003 and continues to act in that capacity;***
  - (C) ***Mr Ashton Jnr was employed with the Club as "bar staff" between 15 December 2005 and 4 May 2009;***
  - (D) ***Mr Ashton Jnr re-commenced employment with the Club on or about 29 November 2010; and***
  - (E) ***Mr Ashton Snr made a written declaration on 10 January 2011.***
- (3) *Mr Kirk:*
- (A) ***At the 2008 AGM** [the Authority notes that this took place on 10 December 2008] *the ordinary members were asked to consider transferring the Club premises from core to non-core property, and entering a new leasing arrangement;**
  - (B) *Woollahra Gardens Pty Limited is party to the Deed of Company Arrangement;*
  - (C) *Mr Kirk performed remunerated work for Mr Michael Sanchez and his associated group of companies, which includes Woollahra Gardens Pty Limited; and*
  - (D) *Mr Kirk made a disclosure **at the 2008 AGM** identifying his relationship with Mr Sanchez.*
- (c) *The Club's register of disclosures is not maintained for each financial year.*
- (1) *The Club's financial year was from 1 June to 30 May.*
  - (2) *The Club maintained a register of disclosures for the period **1 January 2013 to 31 December 2013**.*
  - (3) *The Club maintained a register of disclosures for the period **1 September 2013 to 31 August 2014**.*

**Particular 4.5:**

*The Club failed to display a notice on the Club website informing members how they can access the Club's register of disclosures.*

**1968. Ground 5:**

**Section 57F(3)(a) – The Club failed to meet the requirements of section 10(1)(m) of the Act.**

**Between 2007 and 2014** the Club failed to meet the requirements of section 10(1)(m) of the Act when the Club failed to comply with the requirements of Part 4A of the Act.

**Particular 5.1:**

**Between 2009 and 2013** the Club failed to specify the core and non-core property of the Club at the end of the financial year in any of the Club's annual reports, in contravention of section 41J(2) of the Act.

**Particular 5.2:**

*The Club entered into a contract for the remuneration of a "top executive" without the proposed contract having been first approved by the governing body of the Club, contravening section 41M of the Act.*

- (a) **On or about 29 November 2010** Mr Ashton Jnr commenced employment with the Club as Secretary.
- (b) There was no written contract between the Club and Mr Ashton Jnr outlining the terms of the employment.
- (c) **On or about 1 February 2011** the Club appointed Mr Ashton Jnr to the position of Secretary.
- (d) The Secretary of the Club is a "top executive" for the purposes of section 41M of the Act.
- (e) The register of disclosures states that the governing body of the Club approved the remuneration or employment contract with Mr Ashton Jnr in the position of Secretary in April 2014.
- (f) There is no minute of a meeting of the governing body approving Mr Ashton Jnr's remuneration or employment contract in the position of Secretary.
- (g) **On or about 30 June 2014** the Club entered into a written contract with Mr Ashton Jnr for the position of Secretary commencing on 21 April 2014, in circumstances where:
  - (1) Mr Ashton Jnr commenced in the role at a time **between November 2010 and February 2011**; and
  - (2) there is no minute of a meeting of the governing body approving Mr Ashton Jnr's remuneration or contract.

**Particular 5.3:**

*The Club failed to give written notice, as soon as practicable, to Mr Ashton Jnr that he was a "top executive" of the Club and had responsibilities under Part 4A of the Act in contravention of section 41U of the Act.*

- (a) There is no record that the Club provided Mr Ashton Jnr with written notice that he was a "top executive".

**Particular 5.4:**

*The Club lent money to an employee where there that loan was not first approved by the governing body of the Club in contravention of section 41N of the Act.*

- (a) Mr Matthew Brady was an employee of the Club **between 10 December 2012 and 30 June 2013**.
- (b) **On 8 March 2013** the Club provided Mr Brady a loan in the sum of \$2,000.
- (c) The register of disclosures records that the loan was approved by the members of the governing body **on 9 April 2013**.
- (d) There is no board minute recording that the proposed loan was first approved by the governing body of the Club.

**Particular 5.5:**

**On 1 February 2007**, the Club entered into a contract with ML Management (NSW) Pty Limited ACN 104 788 070 (**MLM**), a company in which Mr Levy, the Secretary at that time, had a controlling interest, contravening section 41L of the Act.

- (a) **Between 26 October 2004 and 3 October 2007** Mr Levy was the Secretary of the Club.
- (b) During this period Mr Levy was the sole director of MLM and had the capacity to determine the outcome of decisions about the financial and operating policies of the company.
- (c) **On 1 February 2007** the Club entered into a deed with MLM to provide consultative and administrative services to the Club (the MLM Deed).
- (d) The MLM Deed was a commercial arrangement for the provision of services by MLM to the Club.
- (e) Before entering into the MLM Deed, the Club did not make reasonable inquiries to ensure that section 41L(1) was complied with.

**1969. Ground 8:**

**Section 57F(3)(a) – The Club failed to meet the requirements of section 10(1)(a) of the Act.**

**Between 2002 and 2014** the Club failed to meet the requirements of section 10(1)(a) of the Act when the Club was not conducted in good faith as a club.

**Particular 8.2:**

*The Club failed to meet the minimum number of ordinary members required by Section 10(1)(d) of the Act.*

**Particular 8.3:**

*During the period the Club was under external administration a "moratorium on accepting full membership" was imposed and the Club permitted its membership to decline.*

**Particular 8.4:**

*The Club permitted the "moratorium on accepting full membership" to continue when the Club was no longer under administration.*

**Particular 8.6:**

*The Club admits persons to membership of the Club as "social members" to allow persons who live within a 5km radius of the Club to enter the premises and utilise the facilities without being required to be approved by the members or governing body as "ordinary members".*

- (a) At all relevant times it was a rule of the Club that it must not admit a person to the Club:
  - (1) as a member of the Club, other than as a "provisional member", "honorary member" or "temporary member", unless the person is elected to membership at a meeting of the full members, the governing body, or the election committee of the Club; or
  - (2) as a "temporary member" if the person resides in New South Wales, and within a 5km radius of the Club.
- (b) Persons who live within a 5km radius of the Club and attend for social and corporate bowling are admitted to the Club incorrectly as "temporary members", or admitted to membership as "social members".
- (c) The Club introduced "social members" as a membership category in the Club's 2014 constitution, and applicants are approved by Club staff as members of the Club at the Club entrance following the payment of a \$2.00 fee and the completion of a membership application form.

- (d) **As at 16 May 2014** the Club had admitted 7,273 persons to membership of the Club as “social members” who were not approved by a meeting of the full members, governing body or election committee.

**Particular 8.7:**

*The Club was under external administration for an extended period of time (10 years).*

- (a) On or about 19 September 2002 Mr Wily was appointed Receiver Manager by the Supreme Court of NSW and acted in the role **until 8 November 2011**, apart from the period 23 January 2004 and 21 June 2004 when Mr Wily Snr acted in this capacity.
- (b) On 24 October 2002 Mr Wily was purportedly appointed Administrator of the Club and acted in the role until 28 March 2003.
- (c) On 24 March 2003 Mr Wily was purportedly appointed Administrator under a Deed of Company Arrangement and acted in the role **until 18 May 2012**, apart from the period 23 January 2004 and 21 June 2004 when Mr Wily Snr acted in this capacity.

**1970. Ground 9:**

**Section 57F(3)(d) – The Club contravened a provision of the Act.**

**Prior to 1 January 2013** the Club failed to maintain a register of all disclosures made under Part 4A of the Act for the relevant financial year, contravening section 38 of the Act and clause 16 of the Regulation.

**Particular 9(a):**

- (a) Repeat particulars at 4.4 above.

**1971. Ground 10:**

**Section 57F(3)(d) – The Club contravened a provision of the Act.**

**Between January 2009 and June 2014** the Club contravened section 30(1)(c) of the Act.

**Particular 10.1:**

*The Club failed to hold a meeting of the governing body at least once in every month of the year when it failed to hold meetings as follows;*

- (a) **In 2009**, on eight occasions,
- (1) Governing body meetings were not held in **March, April, May, June, August, September, October and December 2009**.
- (b) **In 2010**, on two occasions,
- (1) Governing body meetings were not held in **August and December 2010**.
- (c) **In 2011**, on five occasions,
- (1) Governing body meetings were not held in **January, April, June, August and November 2011**.
- (d) **In 2012**, on one occasion,
- (1) A governing body meeting was not held in **October 2012**.
- (e) **In 2013**, on five occasions,

(1) *Governing body meetings were not held in **January, March, June, September and December 2013.***

(f) ***In 2014**, on one occasion,*

(1) *A governing body meeting was not held in **January 2014.***

**Particular 10.2:**

*The Club failed to keep minutes of all proceedings and resolutions of the governing body in a book.*

(a) *There is no minute of proceedings and resolutions in respect of a meeting of the governing body in **January 2010.***

(b) *Minutes and resolutions were not recorded in a book.*

**Particular 10.3:**

*The Club failed to retain all documents referred to in the minutes as being tabled at the meeting.*

(a) *On 9 occasions the minutes of meeting of the governing body record that a Management Report was tabled but the Club has failed to retain a copy with the stored minutes:*

(1) ***In 2009**, in the meeting of the governing body held in July.*

(2) ***In 2010**, in the meetings of the governing body held in February, March, June, July, September and October.*

(3) ***In 2011**, in the meetings of the governing body held in July and October.*

**1972. Ground 11:**

**Section 57F(3)(d) – The Club contravened a provision of the Act.**

***Between August 2013 and April 2014 the Club contravened section 30(2)(k) of the Act.***

**Particular 11.1:**

*On 31 occasions the Club failed to ensure the information of a guest of a member was recorded in the "sign-in register" in accordance with section 31(1)(c) of the Act.*

(a) *On 15 occasions the guest did not complete their full name, or their surname and first initial.*

(b) *On 16 occasions the guest did not complete their address.*

(c) *On three occasions the member did not provide their signature.*

**1973. Ground 12:**

**Section 57F(3)(d) – The Club contravened a provision of the Act.**

***In 2007 and between 2009 and 2013 the Club failed to hold annual elections for the appointment of the members of the governing body in contravention of section 30(1)(a) of the Act.***

**Particular 12.1:**

*There was no rule of the Club to provide otherwise than that the governing body of the Club must be elected annually.*

**Particular 12.2:**

***In 2007, 2009 and 2010, the Club:***

- (a) *did not hold an AGM of members; and*
- (b) *did not hold an election by members for the appointment of the governing body.*

**Particular 12.3:**

***In 2011, the Club:***

- (a) *held an AGM of members; but*
- (b) *there is no minute from the AGM of members recording that the Club held an election for the appointment of the governing body.*

**Particular 12.4:**

***In 2012 and 2013, the Club:***

- (a) *did not hold an AGM of members; and*
- (b) *did not hold an election by members for the appointment of the governing body.*

**1974. Ground 13:**

***Section 57F(3)(d) – the Club contravened a provision of the Act.***

***On 11 September 2014 the Club contravened section 30(2)(i) of the Act, in that the Club failed to ensure the register of persons who are full members of the Club was kept in accordance with section 31(1)(a) of the Act.***

**Particular 13.1:**

***On 11 September 2014 the Club's membership register recorded 249 entries, however contained only 121 ordinary members.***

- (a) *On one occasion the membership register did not record the member's full name.*
- (b) *On 135 occasions the membership register did not record the member's occupation.*
- (c) *On eight occasions the membership register did not record the member's address.*
- (d) *On 85 occasions the membership register did not record the date on which the member last paid the annual fee for membership of the Club.*

**1975. Ground 14:**

***Section 57F(3)(e) – a rule of the Club referred to in section 30(1) of the Act has been broken or any other rule of the Club has been habitually broken.***

***Between August 2013 and November 2014 it was a rule of the Club, under section 30(2)(m) of the Act, that it maintain a register of "temporary members" who attend the Club each day and record information in accordance with section 31(1)(e) of the Act.***

***Between August 2013 and November 2014 the Club habitually broke this rule.***

**Particular 14.1:**

***The Club kept a "sign-in register" for "temporary members".***

**Particular 14.2:**

***The Club on 1,856 occasions failed to ensure the full name, or the surname and first initial, and the address of the "temporary member" together with his or her signature, was recorded in the "sign-in register" as follows.***

<b>Date/Month</b>	<b>Number of temporary members whose information was not recorded as required by section 31(1)(e)</b>
August 2013	90
September 2013	83
October 2013	139
November 2013	223
December 2013	438
January 2014	111
February 2014	123
March 2014	53
April 2014	188
May 2014	78
June 2014	41
July 2014	37
August 2014	35
September 2014	44
October 2014	112
November 2014	61

**1976.** Ground 15:

**Section 57F (3)(e) – A rule of the Club referred to in section 30(1) of the Act has been broken or any other rule of the Club has been habitually broken.**

**Between August 2013 and November 2014** it was a rule of the Club, under section 30(2)(c) of the Act, that it must not admit a person to the Club as a "temporary member" if the person resides in New South Wales, and within a 5km radius of the Club, unless the person:

- (a) is a member of another registered club with similar objects as the Club; or
- (b) is a member of another registered club and is attending the Club on an invitation to participate in an organised sport or competition.

**Between August 2013 and November 2014** the Club habitually broke this rule.

**Particular 15.1:**

On 1,168 occasions the Club admitted persons, whose ordinary residence was within a 5km radius of the Club, as "temporary members" of the Club.

<b>Month/Year</b>	<b>Number of temporary members who resided in New South Wales and within a 5km radius of the Club</b>
August 2013	43
September 2013	32
October 2013	65
November 2013	71
December 2013	222
January 2014	115
February 2014	118
March 2014	60
April 2014	146
May 2014	84
June 2014	41
July 2014	29
August 2014	18
September 2014	45
October 2014	52



**Particular 15.2:**

*None of the persons entering the Club referred to at paragraph 15.1 above identified themselves in the "sign-in register" as being a member of another club.*

**1977. Ground 16:**

**Section 57F(3)(e) – A rule of the Club referred to in section 30(1) of the Act has been broken or any other rule of the Club has been habitually broken.**

*At all relevant times it was a rule of the Club, under section 30(1)(g) of the Act, that it must not admit a person as a member of the Club, other than as a "provisional member", "honorary member" or "temporary member", unless the person is elected to membership at a meeting of:*

- (a) the full members of the Club;*
- (b) the governing body of the Club; or*
- (c) the election committee of the Club.*

**Between 2013 and 2014 the Club habitually broke this rule.**

**Particular 16.1:**

**As at 16 May 2014 the Club had admitted 7,273 persons to membership of the Club as "social members".**

**Particular 16.3:**

*"Social members" are distinct from "provisional members", "honorary members" or "temporary members" in the Club's 2014 Constitution.*

**Particular 16.4:**

*Article 16.1 of the Club's 2014 Constitution provides:*

*"A person shall not be admitted as a member of the Club other than as a Provisional, Honorary Temporary or a Life Member unless that person is elected to membership at a meeting of the Board of the Club or duly appointed election committee of the Club".*

**Particular 16.5:**

*"Social members" are not "provisional members", "honorary members" or "temporary members" of the Club.*

**Particular 16.6:**

*"Social members" are approved by Club staff as members of the Club at the entrance to the Club following the payment of a \$2.00 fee and the completion of a membership application form.*

**Particular 16.7:**

*"Social members" are issued a membership number and card which provides access to the Club.*

**Particular 16.8:**

*The 7,273 persons admitted to membership as "social members" were not approved by a meeting of the full members, governing body or election committee.*

**1978.** Ground 17:

**Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.**

*The Club contravened clause 14 of the Gaming Machines Regulation 2010.*

**Particular 17.1:**

**Between August 2013 and September 2014** on 623 occasions the Club failed to keep written records with respect to the awarding or payment of each prize and short-pay of an approved gaming machine kept on the premises of the Club that contains:

- (a) the name and signature of the person to whom the award or payment was made; and
- (b) the signature of 2 other persons certifying that each sighted the prize-winning combination or the number of credits and that the record was correct in all its details.

**1979.** Ground 18:

**Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.**

*The Club contravened clause 17 of the Gaming Machines Regulation 2010.*

**Particular 18.1:**

There is no minute of a meeting of the governing body **between January 2009 and June 2014** recording the production to the governing body, at monthly intervals, of:

- (a) a cash flow analysis in the form approved by the Director-General; and
- (b) a comparison of cancelled credit and jackpot wins meter readings with the corresponding entries in the Club's payout sheets,

*in respect of each approved gaming machine.*

**1980.** Ground 19:

**Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.**

*The Club contravened clause 18 of the Gaming Machines Regulation 2010.*

**Particular 19.1:**

**Between January 2009 and June 2014** the Club failed to:

- (a) produce a "net analysis report" for the previous months, and that part of the previous 12 months, for each approved gaming machine; and
- (b) ensure the net analysis reports were examined by the Club's board within one month.

**1981.** Ground 20:

**Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.**

*The Club contravened clause 20(2)(d) of the Gaming Machines Regulation 2010.*

**Particular 20.1:**

***Between July 2012 and June 2014 on 34 occasions the Club failed to keep written records with respect to each clearance of an approved gaming machine on the premises of the Club that contained the signatures of two authorised persons [sic] cleared the gaming machine certifying that the record was correct in all its details.***

**1982. Ground 22:**

***Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.***

*The Club contravened clause 91(1) of the Gaming Machines Regulation 2010.*

**Particular 22.1:**

***At no time since the installation of the first authorised progressive machine on 6 March 2014 has the Club:***

- (a) *recorded the amount shown on the progressive meter of any authorised progressive machine at the time the progressive jackpot has been won (progressive jackpot report); and*
- (b) *ensured the progressive jackpot report was examined by the Club's board each month.*

**1983. Ground 23:**

***Section 57F(3)(j) – Any other ground that the complainant considers appropriate for the taking of disciplinary action against the Club.***

***On 18 August 2011, it became a condition of the Club's liquor licence that on NRL Grand Final Day that two nominated staff of the Club maintain a count of persons on the licensed premises (condition 3410).***

**Particular 23.1:**

***On 5 October 2014 the Club failed to ensure two nominated staff maintained a count of persons on the licensed premises in circumstances where:***

- (a) *Inspectors from OLGR conducted a covert inspection;*
- (b) *Ms Natalie Turner, an employee of the Club, and Mr Jason Loveday, a security guard contracted by the Club, were stationed at the entrance of the Club; and*
- (c) *Neither Ms Turner nor Mr Loveday were instructed to, and subsequently did not, maintain a count of persons on the licensed premises.*

**1984. Ground 24:**

***Section 57F(3)(d) – The Club contravened a provision of the Act.***

***Between 24 October 2002 and 18 May 2012 the Club contravened section 41 of the Act when it purported to appoint Mr Wily to act in the capacity of administrator of the Club.***

**Particulars:**

- (a) *The Club is a company within the meaning of the Corporations Act 2001.*
- (b) *On or about 20 September 2002 Mr Wily was appointed to act as Receiver Manager of the Club by the Supreme Court of New South Wales.*
- (c) *On or about 24 October 2002 Mr Wily was purportedly appointed to act as Administrator of the Club in circumstances where there is no record of Mr Wily being appointed to act in this capacity by:*
  - (1) *the Supreme Court of NSW; or*

- (2) the former Licensing Court; or
- (3) the Authority.

- 1985. The Authority notes that while the Club was under apparent voluntary administration between October 2002 and March 2003, the operation of section 437C(1) of the *Corporations Act 2001* served to limit the powers of the Club's officers to act without the consent of the Club's administrator, Mr Wily.
- 1986. However, this period of administration ended, by the operation of section 435C(2)(a) of the *Corporations Act 2001*, when a deed of company arrangement was executed by the Club on 24 March 2003. This restored the powers of the officers of the Club, in so far as they did not act inconsistently with the terms of the deed of company arrangement.
- 1987. The Authority is satisfied that, as a director of the Club, Mr Ashton Snr was partly responsible for ensuring the Club's compliance with the legislative requirements to which it is subject – notwithstanding the fact that the Club was a party to a deed of company arrangement from 24 March 2003 onward.
- 1988. On the basis of the above findings, in respect of those Grounds 1 to 24 that are also found to be attributable to Mr Ashton Snr's tenure, the Authority is satisfied that Mr Ashton Snr failed to exercise his duties as a director of the Club with a degree of knowledge, ability, care and diligence. There is no basis for impugning Mr Ashton Snr's honesty.
- 1989. Particular 33.3(a) is established.

Particular 33.3(b)

- 1990. With respect to Particular 33.3(b), which attributes to Mr Ashton Snr's fitness and propriety the Club's alleged failure to comply with *ClubsNSW Guidelines*, the Authority accepts the Ex-Officers' submission that these documents are guidelines that provide advice on *best practice* in the industry. They do not prescribe minimum legal rules in respect of which non-compliance may found an independent ground of complaint.
- 1991. Industry guidelines provide a useful framework for the training of club officers and staff and may, in their terms, provide a plain English guide to minimum statutory requirements.
- 1992. A good working knowledge of *ClubsNSW Guidelines* on the part of club directors or senior executives may have the collateral benefit of enhancing knowledge and skill and provide a means by which regulated officers become aware of and refresh themselves as to regulatory requirements and avoid managing club premises in a manner that exposes an enterprise to systemic risk and/or regulatory action.
- 1993. *ClubsNSW Guidelines* may also provide a source of evidence as to what the industry considers to be best practice with regard to the content of a regulatory duty that is the subject of a statutory requirement.
- 1994. However, the Authority does not need to make findings on the sub-Particulars of Particular 33.3(b) by reason that it is already satisfied as to Mr Ashton Snr's responsibility for those instances of statutory non-compliance found against the

Club that are found to be also attributable to Mr Ashton Snr's personal fitness and propriety.

- 1995.** The Authority does not consider that non-compliance with individual *ClubsNSW Guidelines* gives rise to an independent ground for disciplinary action and that any lack of knowledge or skill in respect of the Club's conduct by comparison to these guidelines adds little to identifying a lack of knowledge or skill in respect of the failure to demonstrate knowledge and skill in respect of the relevant statutory minimum requirements that have been found by the Authority.

Particular 33.3(c)

- 1996.** Particular 33.3(c) attributes to Mr Ashton Snr's fitness and propriety as a director certain instances of non-compliance by the Club with the Club's Articles of Association. The Authority makes the following findings to the extent that they occurred during Mr Ashton Snr's tenure as a director.
- 1997.** Particular 33.3(c)(1) attributes to Mr Ashton Snr's fitness and propriety the Club's alleged failure to post a membership application to the Club Notice Board.
- 1998.** The Authority notes the Ex-Officers' submissions in respect of this Particular that the Complainant's wording is "misleading" in that it suggests multiple breaches where only one breach has occurred, being Mr McKew's application. The Authority accepts that one breach occurred with regard to Mr McKew's application.
- 1999.** The Ex-Officers accept that the expedition of Mr McKew's application contravened Article 12 of the Club's Articles of Association, but submit that there are currently 2,460 members in respect of which applications were "appropriately considered and approved". The Authority accepts the Ex-Officers' submissions in this regard but is nevertheless satisfied that Particular 33.3(c)(1) is factually established, on the basis of Article 12 of the Articles of Association of the Club (Complainant Exhibit E085) and the evidence or material referred to in the Authority's findings on Particular 1.5(f)(6) above. The Authority notes that this breach occurred during Mr Ashton Snr's tenure as a Club director.
- 2000.** Particular 33.3(c)(2) attributes to Mr Ashton Snr's fitness and propriety the Club's failure to remove non-financial members from the Club's membership register.
- 2001.** The Authority notes the Ex-Officers' submissions in respect of this Particular that Article 23 is no longer in force, but that the Ex-Officers had the power and authority and a discretion to remove members. The Ex-Officers submit that there is no direction or order under Article 23 that *compels* the removal of non-financial members and note the use of the word "may" as opposed to terms such as "shall" or "will".
- 2002.** The Authority has reviewed Article 23 of the Club's Articles of Association and accepts that there was a discretion provided in that:

*...if such subscription shall be unpaid on the due day the defaulting member may be debarred or suspended from all privileges of membership and his name may be removed from the register of members and he may be disqualified from all Club competitions in which he may be participating [emphasis added].*

- 2003.** Nevertheless, the Authority is satisfied that Particular 33.3(c)(2) is established on the basis of Article 23 of the Articles of Association for the Club (Complainant Exhibit E085) and the *Paddington Bowling Club Full Members Register* as of 11 September 2014, as provided by the Complainant (Complainant Exhibit E057).
- 2004.** The Authority is satisfied that the discretion provided to the Club to remove non-financial members from the register was not considered or exercised during the relevant period and this is a matter that further underpins an apparent laxity of control with regard to membership and access to the Club premises. It supports an inference that the Club maintained something akin to an “open door” policy and this provides some cause for an adverse assessment as to the fitness of the secretary and members of the governing body for not exercising more diligence in this regard.
- 2005.** Particular 33.3(c)(3) attributes to Mr Ashton Snr’s fitness and propriety the failure to ensure that members of the Board were elected annually. The Authority notes that the Ex-Officers refer to and repeat their submissions on Ground 12 of the Complaint in response to this Particular.
- 2006.** The Authority is satisfied that Particular 33.3(c)(3) is established on the basis of Article 28 of the Articles of Association for the Club (Complainant Exhibit E085); the statements made by Robert Ashton Jnr at page 27 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182) and the evidence or material referred to in the Authority’s findings on Ground 12 above.
- 2007.** Particular 33.3(c)(4) attributes to Mr Ashton Snr’s fitness and propriety the Club’s failure to ensure that the Board met at least once in every month. The Authority notes that the Ex-Officers refer to and repeat their submissions on Ground 10 of the Complaint and contend that Mr Wily was in charge and that the Ex-Officers “had no power to alter” Mr Wily’s conduct – thus no question of fitness and propriety arises.
- 2008.** The Authority accepts the Ex-Officers’ submissions in this regard, noting that the Board sometimes met twice in a month. However, Particular 33.3(c)(4) is factually established on the basis of Article 41 of the Articles of Association for the Club (Complainant Exhibit E085) and the evidence or material referred to in the Authority’s findings on Ground 10 above. Notwithstanding this finding, the Authority notes that this matter does not have a substantial bearing on an issue of fitness and propriety of the secretary or directors, including Mr Ashton Snr, by reason of the number of meetings convened by the Club during the relevant years.
- 2009.** Particular 33.3(c)(5)(A), which attributes to Mr Ashton Snr’s fitness and propriety the alleged failure to ensure the required quorum of five members of the Board was met for each of the five meetings specified during 2011, is established on the basis of Article 41 of the Articles of Association for the Club (Complainant Exhibit E085); the Club Board meeting minutes for 1 February 2011 (Complainant Exhibit E015); the Club Board meeting minutes for 28 February 2011 (Complainant Exhibit E016); the Club Board meeting minutes for 30 March 2011 (Complainant Exhibit E017); the Club Board meeting minutes for 27 May 2011 (Complainant Exhibit E018); the Club Board meeting minutes for 1 July 2011 (Complainant Exhibit E019); the Club Board meeting minutes for 29 July 2011 (Complainant Exhibit E020); the Club Board meeting minutes for 2 September 2011 (Complainant Exhibit E021); the Club Board meeting minutes for 28 October 2011 (Complainant Exhibit E022) and the Club Board meeting minutes for 28 December 2011 (Complainant Exhibit E023).

- 2010.** Particular 33.3(c)(5)(B), which attributes to Mr Ashton Snr's fitness and propriety the Club's failure to ensure that the required quorum of five members of the Board was met for each of the three meetings specified during 2014, is established on the basis of Article 41 of the Articles of Association for the Club (Complainant Exhibit E085); the Club Board meeting minutes for 10 February 2014 (Complainant Exhibit E045); the Club Board meeting minutes for 24 February 2014 (Complainant Exhibit E046); the Club Board meeting minutes for 8 March 2014 (Complainant Exhibit E047); the Club Board meeting minutes for 11 April 2014 (Complainant Exhibit E048); the Club Board meeting minutes for 13 May 2014 (Complainant Exhibit E049) and the Club Board meeting minutes for 23 June 2014 (Complainant Exhibit E050).
- 2011.** In response to Particular 33.3(c)(5) generally, the Authority notes the Ex-Officers' contention that not meeting the quorum does not go to the question of fitness and propriety. This failure was not a result of a lack of honesty, knowledge, or ability. The Ex-Officers argue that the law offers a company the opportunity to validate decisions made without a quorum and so the lack of a quorum "ought not to be a basis" for an allegation that the Ex-Officers are not fit and proper persons.
- 2012.** The Authority notes the submission made by Mr Kirk dated 29 May 2015 that at the 2004 AGM, there was an amendment to the by-laws reducing the quorum of directors at a Board meeting from five to three, and that all of the matters the subject of Particulars 29.3(c)(5)(A) and 29.3(c)(5)(B) occurred *after* the 2004 resolution and were attended by three or more members of the governing body. Mr Kirk states in his submissions that while he told OLGR investigators in his record of interview dated 5 November 2014 (Complainant Exhibit E181) that he thought the quorum requirement changed from five to three in 2006, on reflection he believes it changed in 2004.
- 2013.** The Authority rejects the Ex-Officers' and Mr Kirk's submissions in this regard. A failure to meet the quorum requirement is not only a technical or administrative failing, but if not observed could increase the scope for the potential conduct of secret meetings or the formation of cabals within a club's governing body. A resolution to reduce the quorum to three does not remove the duty under the Club's Articles of Association to comply with this requirement.
- 2014.** This basic requirement of corporate governance should have been observed by the Club's governing body and it adversely reflects upon the ability of the relevant members of the governing body and the Club's secretary that the quorum requirement was not met on the occasions that have been established on the evidence.
- 2015.** Particular 33.3(c)(5) is established.
- 2016.** Particular 33.3(c)(6) attributes to Mr Ashton Snr's fitness and propriety the Club's failure to ensure that the Club held an annual general meeting of members each year. The Authority notes that the Ex-Officers refer to and repeat their submissions on Ground 12 of the Complaint and contend that Mr Wily was in charge and the Ex-Officers "had no power to alter" Mr Wily's conduct and for this reason, no question of fitness and propriety arises.

- 2017.** The Authority does not accept the Ex-Officers' submissions in this regard. The failure to hold an annual general meeting of the members in the years of 2007, 2009, 2010, 2012 and 2013 as alleged by Particular 33.3(c)(6) is established on the basis of Article 49 of the Articles of Association for the Club (Complainant Exhibit E085) and the evidence or material referred to in the Authority's findings on Ground 12 above.
- 2018.** The Authority has considered, but rejects, the submissions made by the Ex-Officers that the matters alleged in Particular 33.3(c) do not properly go to the consideration of the honesty, knowledge and ability of any director of the Club. While the secretary and chief executive officer of a registered club has greater operational responsibility over the day to day affairs of a registered club than the members of its governing body, the duty to comply with a club's Articles of Association also falls upon the club's directors.

Particular 33.3(d)

- 2019.** With respect to Particular 33.3(d), attributing to Mr Ashton Snr the Club's alleged lack of internal controls and procedures, the Authority rejects the Ex-Officers' submission that the issues that are the subject of Particular 33.3(d) arose during the administration of the Club and as such, were the responsibility of Mr Wily.
- 2020.** The Authority notes that while the Club was under administration, the powers of the officers of the Club were suspended, pursuant to section 437C(1) of the *Corporations Act 2001*. However, once the Deed of Company Arrangement was signed on 24 March 2003, the Club was no longer under administration, through the operation of section 435C of the *Corporations Act 2001*. The Authority notes that the Ex-Officers resumed their powers and obligations in relation to the Club's governance as of that date, subject to the terms of the Deed of Company Arrangement.
- 2021.** The Authority makes the following findings on the sub-Particulars of Particular 33.3(d).
- 2022.** Particular 33.3(d)(1), which attributes to Mr Ashton Snr's fitness and propriety the inability of the Club's Auditor to form an unqualified opinion of the Club's financial accounts for the year ended 30 June 2011 due to poor internal controls and systems, is established on the basis of a letter from Michael Bulgin, the Club's Auditor to the Club Secretary dated 20 May 2011 (Complainant Exhibit E103); the letter from Domenic Cutrupi of CBC Partners, the Club's Auditor to the Club Secretary dated 28 March 2014 (Complainant Exhibit E104) and the statements made by Robert Ashton Jnr at page 12 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182).
- 2023.** Particular 33.3(d)(2), which attributes to Mr Ashton Snr's fitness and propriety the alleged failure to maintain the Club's register of disclosures, is established on the basis of the evidence or material referred to in the Authority's findings on Particular 4.3 above.
- 2024.** Particular 33.3(d)(3), which attributes to Mr Ashton Snr's fitness and propriety the alleged failure to ensure that a current governing body resolution approved the payment of expenses to members of the governing body, is established on the



basis of the evidence or material referred to in the Authority's findings on Particular 3.4 above.

- 2025.** Particular 33.3(d)(4) attributes to Mr Ashton Snr's fitness and propriety an allegation that the Ex-Officers maintained "high risk practices" including Mr Ashton Jnr's paying expenses of directors in cash directly from the safe. The Authority notes that the Complainant relies upon the statements made by Robert Ashton Jnr at page 28 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E182) in support of this contention.
- 2026.** The Authority has reviewed the above evidence or material and is *not* satisfied that this Particular is established. While the practice of paying directors' expenses directly from the safe is not recommended as the most prudent method of payment, the Authority is not satisfied that the evidence or material as to the circumstances in which these payments were made establishes that this practice should be characterised as "high risk".
- 2027.** There is no evidence before the Authority to suggest that the Ex-Officers did not comply with proper accounting practices, and the Authority notes that these payments were reconciled through petty cash, which is a common industry practice. Particular 33.3(d)(4) is not established.
- 2028.** Particular 33.3(d)(5), which attributes to Mr Ashton Snr's fitness and propriety the failure to maintain an assets register prior to 18 July 2014, is established on the basis of the statements made by Allan Teale at pages 30 to 31 of the transcript of his record of interview with OLGR inspectors dated 31 October 2014 (Complainant Exhibit E183).
- 2029.** Particular 33.3(d)(6) attributes to Mr Ashton Snr's fitness and propriety the Club's failure to ensure that Club auditors provided reports each year. Particular 33.3(d)(6)(A) alleges that the Auditor's Reports for the years ended 30 June 2009 and 30 June 2010 are dated 27 May 2011. Particular 33.3(d)(6)(B) alleges that the Auditor's Report for the year ended 30 June 2012 is dated 2 April 2014. Particular 33.3(d)(6)(C) alleges that the Auditor's Reports for the years ended 30 June 2012 and 30 June 2013 are dated 6 November 2014.
- 2030.** The Authority is satisfied that these sub-Particulars are established on the basis of the Notes to and Forming Part of the Financial Statements as contained in the Club's Financial Report for the year ended 30 June 2009 (Complainant Exhibit E063); the Notes to and Forming Part of the Financial Statements as contained in the Club's Financial Report for the year ended 30 June 2010 (Complainant Exhibit E064); the Club's Financial Statement for 30 June 2011 (Complainant Exhibit E187) and the minutes for the Club's AGM dated November 2014 (Complainant Exhibit E209).
- 2031.** Particular 33.3(d) is established.
- 2032.** The Authority has considered cumulatively the Authority's findings with regard to the Particulars specified in Ground 33. The Authority notes the multiple instances of non-compliance by the Club with legislative requirements established among Grounds 1 to 24. The Authority notes those further instances of non-compliance with the Club's Articles of Association and failings with respect to corporate governance that are established in the Particulars noted above.

- 2033.** The Authority is satisfied that Ground 33 is established and that Mr Robert Ashton Snr is not a fit and proper person to be a member of the governing body of the registered club, by reason that the Complainant has established that he did not demonstrate the degree of knowledge, ability, care and diligence that the Authority would expect from a reasonably competent director of a club of this scale. There is no basis for impugning Mr Ashton Snr's honesty arising from the Authority's findings on Ground 33.
- 2034.** The Authority notes that, during the time the Club was subject to the Deed of Company Arrangement from 24 March 2003 and the Amended Deed of Company Arrangement from 10 December 2010, these documents imposed certain restrictions upon the discretion of the governing body in that they could not act contrary to those agreements.
- 2035.** While the degree of responsibility for the Club's affairs may *potentially* be reduced to the extent that certain aspects of Club governance required the consent of the Deed Administrator, Mr Wily – the fact that the Club was subject to a deed of company arrangement does not provide a complete excuse for Mr Ashton Snr's failure, as a Club director, to ensure that the Club complied with relevant legislation.
- 2036.** Mr Ashton Snr and the members of the governing body did have a role to play during the currency of the DOCA and ADOCA during that period. It is certainly no excuse for Mr Ashton Snr or any member of the governing body not to have knowledge of the legislative and constitutional requirements to which the Club was subject.

#### **FINAL SUBMISSIONS ON DISCIPLINARY ACTION**

- 2037.** On 13 November 2015, the Authority provided a detailed letter to the parties (**Decision on Grounds**) advising its findings on the Ground of Complaint and inviting final submissions on the question of what, if any, disciplinary action should be taken against the Club, the Ex-Officers, Mr Kirk and Mr Wily on the basis of those findings.
- 2038.** The Complainant was requested to provide any final submissions by 20 November 2015, copying in the other parties. Final submissions from the Club's receiver, the Ex-Officers, Mr Kirk and Mr Wily were requested by 27 November 2015.
- 2039.** The Complainant provided a final submission to the Authority on 20 November 2015, in accordance with the Authority's timetable.
- 2040.** However, on the afternoon before the respondents' submissions were due, the Club's receiver sought an extension of time to make its submissions on the basis of illness of a person who was important to the preparation of the club's submissions (documentation was provided verifying this illness).
- 2041.** On 27 November 2015 (the date that final submissions were due), the Authority informed all of the parties that in light of this illness and in the interest of parity, submissions from all of the respondents would now be required by 11 December 2015.

## Final Submission from the Complainant dated 20 November 2015

**2042.** On 20 November 2015, the Complainant provided a final submission to the Authority addressing the question of disciplinary action. Briefly, the key points of this submission may be summarised as follows:

- (i) The Particulars of the Complaint have “largely been accepted” by the Club, including those Grounds which represent the “most significant failures” that were alleged against the Club and members of its governing body.
- (ii) In particular, the Authority has found Grounds 1, 4, 5, 8 through 20, 22 and 23 established, and that the members of the Club’s governing body the subject of Grounds 25, 26 and 28 through 33 were not “fit and proper”.
- (iii) The Complainant submits that it is “significant” that many of the breaches “either occurred repeatedly, or were allowed to extend over a number of years” – for example, the “inadequacy of membership” between 31 May 2004 and 30 June 2010 and since 30 July 2014, as alleged by Particular 1.4 of Ground 1 of the Complaint.
- (iv) The Complainant submits that it is also significant that the breaches that have been proven “go to the substance of what it is to be a registered club and/or represent systemic failure to maintain proper corporate governance” – such as the number of members, entry controls to the Club premises, maintenance of membership registers, admission to membership, holding AGMs and monthly Board meetings, and the management of poker machines.
- (v) The Complainant contends that the effect of the Authority’s findings as notified in the Decision on Grounds is that there has been “very significant maladministration” of the Club over the course of several years. The Complainant submits that this is demonstrated particularly:
  - (a) by the Authority’s finding in relation to Ground 8 of the Complaint that the Club has not been acting “*in good faith as a registered club*” which is a result of the “*laxity of the Club’s administration of membership and entry controls*” and that the Club was engaging in something akin to an “*open door policy*”; and
  - (b) by the Authority’s findings in relation to Grounds 14 and 15 of the Complaint where a large number of contraventions were detected over a “*substantial period*” and substantial “*error rates*” were demonstrated.
- (vi) The Complainant submits that the current status of the Club, being in liquidation and its “apparent impecuniosity” (as demonstrated by the appointment of a liquidator and the Club’s failure to pay fines and professional costs ordered by the Local Court), is that the Club “cannot act as a properly functioning club”.
- (vii) The Complainant submits that in light of the Authority’s findings, and in the absence of evidence that the control of the Club will be handed to a governing body or to return to a position where it can act as a properly functioning club, the licence should be cancelled. In the circumstances, there is “no utility” in

the Club maintaining a licence, or the Authority ordering the appointment of a person to administer the affairs of the Club.

- (viii) The Complainant notes that the recent criminal convictions (evidence of which is attached to the Complainant's submission) included offences of breaching the Club's licence conditions. The Complainant notes that the Club entered pleas of "guilty" to those offences on 26 August 2015, and submits that those additional offences support a finding that "as late as January 2015" the Club was continuing to operate in breach of its licence obligations.
- (ix) Further, in respect of the current and former directors and secretaries the subject of Grounds 25, 26 and 28 through 33 of the Complaint, the Complainant states that the Authority has found that they were "not fit and proper" and that the evidence demonstrated that they "did not have the degree of knowledge, ability, care and diligence that the Authority would expect from a reasonably competent director or secretary".
- (x) The Complainant submits that these findings relate to conduct that lasted "over an extended period of time, and in some cases, years", and that:
  - (a) these individuals failed to take responsibility during the currency of the DOCA and ADOCA;
  - (b) they did not have knowledge of the legislative and constitutional requirements to which the Club was subject, despite their involvement in the Board for a substantial period. They had in fact "failed to take care to familiarise themselves with the requirements of legislation", including the requirements to operate a registered club and manage gaming machines; and
  - (c) in the written submissions put forward on the Ex-Officers' and Mr Kirk's behalf, there was often "little appreciation or acknowledgement of their failings".
- (xi) The Complainant submits that, in the absence of any evidence that the Ex-Officers and Mr Kirk are now "*fit and proper*", those individuals ought to be specified as persons who are ineligible to stand for election, or to be appointed to, or hold office in, the position of secretary or member of the governing body of the Club or any other registered club.

#### Recommended Disciplinary Action

**2043.** The Complainant submits that the Authority should make the following Orders:

- (i) Pursuant to section 57H(2)(c) of the *Registered Clubs Act 1976*, the Club's licence be cancelled; and
- (ii) Pursuant to section 57H(2)(a) of the Act, the Club pay a significant monetary penalty which reflects the gravity of its conduct, with numerous breaches relating to a number of regulatory requirements extending over a significant period of time during which it was trading in breach of its legislative obligations; and

- (iii) Pursuant to section 57H(2)(g) of the Act, declaring Messrs Marcus Levy, Robert Ashton Jnr, Robert Ashton Snr, Allan Teale, Chris Du Chesne, Leonard Whitney, Brian Kirk and Luke McKew ineligible to stand for election, or to be appointed to, or to hold office in, the position of secretary or member of a governing body of the Club and any other registered club for the maximum period of three (3) years; and
- (iv) Pursuant to section 57H(2)(i) of the Act, that the Club pay the amount of **\$176,616.70**, being the costs incurred by the Complainant in connection with the investigation and the taking of disciplinary action against the Club.

**2044.** Attached to the Complainant's submission is an ASIC Current and Historical Extract for Paddington Bowling Club Ltd (ACN 000 151 146), recording that the Club has been in liquidation pursuant to a creditors' voluntary winding up since **20 July 2015**.

**2045.** Also attached to the Complainant's submission are copies of Certificates of Conviction issued by Downing Centre Local Court dated 10 September 2015, recording convictions against the Club in respect of forty (40) charges involving alleged contraventions of the *Liquor Act 2007 (LA)*, the *Gaming Machines Regulation 2010 (GMR)* and the *Registered Clubs Act 1976 (RCA)*.

**2046.** The outcomes of those charges, heard by Local Court Magistrate Greenwood on 26 August 2015, are summarised in the following table:

#	DATE	LEGISLATION	OFFENCE	PLEA	PENALTY
1	31/03/14	GMR, s.17(1)	Fail to record prescribed information re gaming machines	Guilty	Fine \$1,630
2	23/05/14	GMR, s.14	Fail to keep prescribed record of prizes	No plea recorded	Fine \$1,630
3	30/06/14	GMR, s.17(1)	Fail to record prescribed information re gaming machines	Guilty	Fine \$1,630
4	29/10/14	RCA, s.47(a)	Registered club breach rules under sections 30(1)/(2)/(2A)	Guilty	Fine \$380
5	12/04/14	RCA, s.47(a)	Registered club breach rules under sections 30(1)/(2)/(2A)	Guilty	Fine \$380
6	30/08/14	RCA, s.47(a)	Registered club breach rules under sections 30(1)/(2)/(2A)	Guilty	Fine \$380
7	31/03/14	RCA, s.47(a)	Registered club breach rules under sections 30(1)/(2)/(2A)	Guilty	Fine \$380
8	31/05/14	GMR, s.17(1)	Fail to record prescribed information re gaming machines	Guilty	Fine \$1,630
9	03/02/14	GMR, s.14	Fail to keep prescribed record of prizes	Guilty	Fine \$1,630
10	30/09/14	GMR, s.17(1)	Fail to record prescribed information re gaming machines	Guilty	Fine \$1,630
11	31/01/14	GMR, s.17(1)	Fail to record prescribed information re gaming machines	Guilty	Fine \$1,630

12	01/09/14	RCA, s.47(a)	Registered club breach rules under sections 30(1)/(2)/(2A)	Guilty	Fine \$380
13	05/07/14	RCA, s.47(a)	Registered club breach rules under sections 30(1)/(2)/(2A)	Guilty	Fine \$380
14	15/06/14	RCA, s.47(a)	Registered club breach rules under sections 30(1)/(2)/(2A)	Guilty	Fine \$380
15	01/11/14	RCA, s.47(a)	Registered club breach rules under sections 30(1)/(2)/(2A)	Guilty	Fine \$380
16	28/02/14	GMR, s.17(1)	Fail to record prescribed information re gaming machines	Guilty	Fine \$1,630
17	30/08/14	GMR, s.14	Fail to keep prescribed record of prizes	Guilty	Fine \$1,630
18	30/04/14	GMR, s.17(1)	Fail to record prescribed information re gaming machines	Guilty	Fine \$1,630
19	06/09/14	GMR, s.14	Fail to keep prescribed record of prizes	Guilty	Fine \$1,630
20	14/06/14	GMR, s.14	Fail to keep prescribed record of prizes	Guilty	Fine \$1,630
21	22/03/14	GMR, s.14	Fail to keep prescribed record of prizes	Guilty	Fine \$1,630
22	06/12/14	RCA, s.47(a)	Registered club breach rules under sections 30(1)/(2)/(2A)	Guilty	Fine \$380
23	19/04/14	GMR, s.14	Fail to keep prescribed record of prizes	Guilty	Fine \$1,630
24	21/06/14	RCA, s.47(a)	Registered club breach rules under sections 30(1)/(2)/(2A)	Guilty	Fine \$380
25	31/08/14	GMR, s.17(1)	Fail to record prescribed information re gaming machines	Guilty	Fine \$1,630
26	26/01/14	GMR, s.14	Fail to keep prescribed record of prizes	Guilty	Fine \$1,630
27	29/03/14	RCA, s.47(a)	Registered club breach rules under sections 30(1)/(2)/(2A)	Guilty	Fine \$380
28	10/02/14	RCA, s.47(a)	Registered club breach rules under sections 30(1)/(2)/(2A)	Guilty	Fine \$380
29	01/02/14	RCA, s.47(a)	Registered club breach rules under sections 30(1)/(2)/(2A)	Guilty	Fine \$380
30	31/01/14	RCA, s.47(a)	Registered club breach rules under sections 30(1)/(2)/(2A)	Guilty	Fine \$380
31	31/07/14	GMR, s.17(1)	Fail to record prescribed information re gaming machines	Guilty	Fine \$1,630
32	05/07/14	GMR, s.14	Fail to keep prescribed record of prizes	Guilty	Fine \$1,630
33	31/01/14	RCA, s.47(a)	Registered club breach rules under sections 30(1)/(2)/(2A)	Guilty	Fine \$380

34	12/04/14	RCA, s.47(a)	Registered club breach rules under sections 30(1)/(2)/(2A)	Guilty	Fine \$380
35	01/05/14	RCA, s.47(a)	Registered club breach rules under sections 30(1)/(2)/(2A)	Guilty	Fine \$380
36	05/12/14	LA, s.11(2)	Licensee fail to comply with conditions of licence	Guilty	Fine \$3,800
37	31/05/14	RCA, s.47(a)	Registered club breach rules under sections 30(1)/(2)/(2A)	Guilty	Fine \$380
38	12/12/14	LA, s.11(2)	Licensee fail to comply with conditions of licence	Guilty	Fine \$3,800
39	10/01/15	LA, s.11(2)	Licensee fail to comply with conditions of licence	Guilty	Fine \$3,800
40	31/01/15	LA, s.11(2)	Licensee fail to comply with conditions of licence	Guilty	Fine \$3,800

**2047.** The Authority notes that the total of the monetary penalties received by the Club is **\$51,380**.

**2048.** The Complainant also attaches to its submission a schedule itemising the costs incurred by OLGR in respect of the investigation into the Club's operations which gave rise to the Complaint, which amount to **\$176,616.70**.

#### **Final Submission from Mr Kirk dated 8 December 2015**

**2049.** On 8 December 2015, Mr Nick Read (Mr Kirk's barrister) and Mr Simon Mitchell of *Mitchell Lawyers* provided a final submission to the Authority on behalf of Mr Kirk addressing the question of disciplinary action. Briefly, the key points of this submission may be summarised as follows:

**2050.** Mr Kirk submits that the public interest will not be served by the Authority taking disciplinary action against him and the Authority should decide not to take any action in relation to the Complaint, by reason that:

- (i) Mr Kirk is a person of good character and high standing in the community (see *Appeal of Trevor James Pye* DC (NSW) 19 August 1976 (unreported)).
- (ii) Mr Kirk did not deliberately ignore or avoid his obligations as a member of the governing body of the Club. Rather, it was his understanding that during the period of the Club's administration (up until November 2012), responsibility for compliance primarily rested with the Club's administrator and the contracted third party manager. Once Mr Kirk saw that the Club would "survive", he took appropriate steps to familiarise himself with the Club's obligations and his responsibilities as a director.
- (iii) The Authority's finding that Mr Kirk is not a fit and proper person to be a member of the governing body of a registered club is a "sufficient penalty on Mr Kirk".
- (iv) Mr Kirk is no longer a member of the governing body of the Club, having resigned from the Board on 2 April 2014 (over 19 months ago).

- (v) The Club has “rectified” the majority of the practices that led to the statutory breaches substantiated in Grounds 1 through 24 of the Complaint.
  - (vi) The substantiated complaints are “historical” and some have been found by the Authority to be “trivial”. When considering the substantiated complaints in totality, they do not justify the Authority making a declaration under section 57H(g) of the Act.
  - (vii) The “significant delay” in bringing the Complaint and the “lack of consultation” between the Complainant and the Club (particularly in light of the 41X Inquiry) meant that the Club and Mr Kirk were not provided with an opportunity to improve the Club’s compliance with the legislation at the relevant time.
  - (viii) Mr Kirk submits that he “does not wish to be a member of the board of a registered club in the foreseeable future”. Mr Kirk notes that on 29 May 2015, he provided an undertaking addressed to the Complainant that he would not serve as a member of the governing body of a registered club. Mr Kirk now provides a further undertaking to the Complainant (discussed in more detail below).
  - (ix) Mr Kirk submits that the Authority found that there was “no identifiable basis for impugning Mr Kirk’s honesty” (paragraph 1557 of the Decision on Grounds) and that there is no basis to suggest that Mr Kirk will not comply with the terms of the undertaking. The undertaking “satisfies the public protection considerations and is a factor that strongly militates against” making the declaration sought against Mr Kirk.
- 2051.** Mr Kirk submits that when considering whether a declaration under section 57H(g) should be made, the Authority should take into account all relevant matters, including the background to the substantiated complaints and the context in which they occurred.
- 2052.** Mr Kirk submits that the Authority should not impose “harsh disciplinary sanctions” that discourage “community-minded individuals” such as Mr Kirk from volunteering their time and effort to the governance of registered clubs.
- 2053.** Contrary to the Complainant’s submissions on penalty at paragraph 10, Mr Kirk submits that he is not required to provide “positive evidence” that he is now a fit and proper person. The Authority must make an assessment considering all relevant matters and the core objective of Part 6A of the Act, which Mr Kirk submits is to provide protection to the public. Further, Mr Kirk submits that any evidence would only be relevant if Mr Kirk intended to apply to be a member of the governing body of a registered club.
- 2054.** Mr Kirk submits that the Authority’s findings against him are premised on the finding that he was unable to place complete reliance upon Mr Wily, MLM and others (including the Club secretary) to ensure compliance. Mr Kirk’s reliance upon the administrator and others did not provide a “complete excuse” for his failure to ensure the Club complied with its obligations (paragraph 1560 of the Decision on Grounds).
- 2055.** Mr Kirk relies upon and repeats paragraphs 6 to 8 of his written submission dated 29 May 2015. Mr Kirk maintains that at all times “up until November 2010” [the



Authority notes that this is an apparent reference to November 2012] he understood that the Board's role was to oversee the operation of the management of the Club by MLM, under the overall control of Mr Wily. Further, Mr Kirk understood that he had a statutory obligation to assist Mr Wily with his corporate recovery tasks. Mr Kirk submits that his assistance to Mr Wily was "critical to the Club's survival" at that point in time; however, had Mr Wily or MLM (or any other person) told him that during the administration period he was responsible for ensuring compliance, Mr Kirk "would have taken steps" to increase his understanding of the relevant legislation with a view to improving compliance.

- 2056.** Once it became apparent that the Club would "survive", it was identified that significant effort was required to improve the Club's compliance. Mr Kirk submits that he "took a number of steps to inform himself of the Club's obligations and to attempt to improve compliance", as set out at paragraph 33 of Mr Kirk's submissions dated 29 May 2015, which Mr Kirk now reiterates.
- 2057.** At the end of the Club's administration, Mr Kirk sensed a "lack of urgency" from the other Board members to work together to improve the Club's compliance. Mr Kirk submits that he relied on the Board members to take steps to improve their own knowledge so that they could assist with improving compliance. Mr Kirk submits that he reminded the secretary manager at that time, Mr Robert Ashton Jnr, of his obligations under the Act and encouraged him to take responsibility on a number of occasions. Mr Kirk refers to paragraph 1562 of the Decision on Grounds and submits that the Authority has "acknowledged the effort Mr Kirk made and the positive steps taken by him to correct deficiencies in the Club's compliance with relevant legislation".
- 2058.** To the extent that the Authority found that Mr Kirk had a "stronger duty" than the other directors because he was President and Chairman of the Club, Mr Kirk notes that the Complainant did not make this specific allegation against Mr Kirk.
- 2059.** Mr Kirk submits that "there is no evidence, expert or otherwise", to support the finding that the responsibilities ordinarily undertaken by the President of a registered club are greater than those of any other member of the board (a position which is to be contrasted with the position of Mr Greaves in *ASIC v Rich* [2003] NSWSC 85 (24 February 2003) at [51]-[72]).
- 2060.** Mr Kirk further submits that there is nothing in the Club's Articles of Association that provides "additional (or stronger) duties" on the President or Chairman in respect of compliance. Mr Kirk was of the view that once the period of administration had ended, each director was *individually* responsible for improving their knowledge so that they could assist with improving the Club's compliance.
- 2061.** Mr Kirk notes that the Authority found that the Club secretary, Mr Ashton Jnr, was "ultimately responsible" for the Club's compliance with the licensing legislation and had "more direct responsibility" for compliance with the Articles of Association and operational matters. In any event, Mr Kirk submits that as President and Chairman, once it "became known that the Club would survive", he did take "positive and appropriate steps" to improve his knowledge of the Club's obligations and encouraged the other directors to do the same.
- 2062.** Up until the end of the Club's administration around November 2012, Mr Kirk submits that the substantiated complaints were "not a result of any deliberate

disobedience or ignorance” by him of the Club’s obligations. Mr Kirk acted “in good faith” and in accordance with his understanding of his role during the Club’s administration.

**2063.** Mr Kirk submits that the Club’s compliance has improved “significantly” and many of the matters relevant to the substantiated complaints have been rectified. There has been a “material change” in the Club’s circumstances which may, to some extent, be attributable to the steps taken by Mr Kirk prior to his resignation from the Board. Prior to resigning, Mr Kirk recommended that the Club employ a specialist compliance manager, which he felt would assist other directors to focus on the importance of compliance.

**2064.** In respect of various parts of the substantiated complaints, Mr Kirk submits that the following matters demonstrate that he acted “in the best interests of the Club and did not deliberately ignore his duties”:

Particular 29.3(a)

- (i) *Ground 1.* The Authority noted and accepted Mr Kirk’s submission that he was responsible for the motion that the moratorium on membership be lifted after administration and that there were greater than 2,000 full members of the Club as at 17 May 2015. Mr Kirk was “keen” to increase the number of members.
- (ii) *Ground 3.* Sub-Particulars 3.1(d) and 3.1(e) were not established. Mr Kirk repeats and relies on his previous written submissions dated 29 May 2015 at paragraph 19 in mitigation. Sub-Particular 3.4(a) was not established. Mr Kirk acknowledged that the documentation “may not have been complete” but maintains that “all expenses were reasonably incurred” by him.
- (iii) *Ground 4.* In respect of Particulars 4.1 to 4.3, the Authority accepted that Mr Kirk took steps in 2011 to improve compliance with the reporting obligations.
- (iv) *Grounds 17 to 20.* Mr Kirk submits that as a “volunteer director” it was reasonable for him to place some degree of reliance upon the secretary manager (and MLM and Club staff) to ensure compliance with the legislation in respect of producing financial and gaming reports, particularly in circumstances where the secretary manager had the primary responsibility for operational matters. Mr Kirk submits that he reviewed the gaming reports during his time as a director of the Club.
- (v) *Ground 24.* Mr Kirk notes that no adverse finding was made against the Club in respect of Ground 24.

Particular 29.3(b)

- (vi) Mr Kirk notes that the Authority did not make findings in respect of Particular 29.3(b) because of the overlap of the matters alleged and the instances of substantiated statutory non-compliance that were found to be attributable to Mr Kirk’s personal fitness and propriety (paragraph 1508 of the Decision on Grounds).

Particular 29.3(c)

- (vii) The Authority accepted that responsibility for membership set out in sub-Particulars 29.3(c)(1) and (2) had been delegated to another director (paragraph 1515 of the Decision on Grounds).
- (viii) The Authority accepted that there was a “general continued disinterest” from other persons to become a member of the Board (paragraph 1523 of the Decision on Grounds).
- (ix) The Authority found that the failure to ensure the Board met at least once in every month “did not have a substantial bearing” on the issue of fitness and propriety of Mr Kirk by reason of the number of meetings actually convened during the years (paragraph 1527 of the Decision on Grounds).
- (x) In respect of Particular 29.3(c) concerning compliance with the Club’s Articles of Association, the Authority found that in practice, the Club secretary has more direct responsibility for these matters, and further, that Mr Teale had been delegated responsibility for membership matters (paragraphs 1513 to 1515 of the Decision on Grounds).

- 2065.** In light of the above, Mr Kirk submits that his involvement in the instances of the Club’s non-compliance should be seen as being “less serious” and, in the circumstances, the Authority should not make the declaration sought against him. Further, Mr Kirk submits that the assistance he provided Mr Wily was “critical” to the removal of the Club from administration and setting the Club on a course where it could focus on its future, including improving compliance.
- 2066.** Mr Kirk submits that the “historical nature” of the complaints, the number of “trivial matters” (which have been identified by the Authority – for example, matters of “manner and form”) and the “degree of overlap” between the substantiated complaints further reduces the level of seriousness.
- 2067.** Mr Kirk submits that the substantiated complaints must also be considered in light of the 41X Inquiry in 2006. A number of the matters that were the subject of substantiated complaints were raised during the conduct of that Inquiry – however, at the conclusion of the 41X Inquiry, the Complainant did not inform Mr Kirk that the Club needed to take substantial steps to improve compliance.
- 2068.** Mr Kirk contends that, had the Complainant consulted with the Club and directed Mr Kirk’s attention to his personal responsibility, Mr Kirk “would have taken action” to improve his knowledge and increase the Club’s level of compliance at that time.
- 2069.** Mr Kirk submits that it was open to the Complainant to initiate regulatory action at any time. Had the Complainant perceived the compliance issues to be “serious and requiring immediate attention”, it was open to it to exercise “more drastic” powers under the Act (for example, to seek that the Club’s licence be cancelled). Rather, the course adopted by the Complainant “resulted in the further contraventions over an extended period of time”. Mr Kirk submits that “the unexplained inaction by the Complainant to initiate regulatory action sooner strongly militates against the seriousness of the substantiated complaints”.

- 2070.** Further, there has been “significant delay” in bringing the Complaint. Mr Kirk submits that the Complainant has elected to bring a complaint in relation to historical matters, as opposed to consulting with the Club at an early stage about how it may improve compliance.
- 2071.** Mr Kirk contends that had the Complainant consulted with the Club about alleged “systemic” failures at an early stage, the Club would have been given an opportunity to improve compliance and disciplinary action pursuant to Part 6A of the Act may have been avoided. Mr Kirk would have been “on notice” of his responsibilities as a member of the Club’s governing body.
- 2072.** In all the circumstances, Mr Kirk submits that the Complainant’s contention that Mr Kirk offered “little appreciation or acknowledgment of his failings” is “unfair”. Mr Kirk repeats his earlier submissions that he acted in the Club’s best interests and that as a “volunteer director” he performed his role in accordance with his understanding. Once Mr Kirk observed that the Club would cease to be in administration, he “took appropriate steps” to improve his knowledge of the Club’s obligations.
- 2073.** Mr Kirk submits that even when viewed cumulatively, the substantiated contraventions “should be viewed as being at a lower end of spectrum of seriousness”. Mr Kirk submits that comparative cases where the Authority has made declarations have involved “far more serious” complaints in circumstances where directors remain on the board of governing bodies (see, for example, *Notice of Decision and Disciplinary Action – Complaint in relation to Cabra Vale Ex-Active Servicemen’s Club Ltd*).
- 2074.** Mr Kirk submits that the Authority’s finding that Mr Kirk is not a fit and proper person and that he failed to exercise his duties with a degree of knowledge, ability, care and diligence is “a matter of public record” and the decision published on the Authority website is “available to the world at large”.
- 2075.** Mr Kirk submits that the finding that Mr Kirk is not a fit and proper person to act as a member of the governing body of a registered club is a “sufficient penalty”. Mr Kirk submits that such a finding has a “significant reputational (and therefore financial) impact” for Mr Kirk and it is “likely to affect” his position as a volunteer director of the Healing Ministry, his Local Council panel memberships and his ability to act as an expert witness in the Land and Environment Court of NSW.
- 2076.** Further, Mr Kirk submits that the investigation and disciplinary proceedings have been a “source of stress and anxiety” for him. The experience of the disciplinary process and the Authority’s adverse findings in relation to the Complaint are “sufficient punishment” for Mr Kirk.
- 2077.** Mr Kirk concludes that:

*...the Authority should take no further action in relation to Mr Kirk. No further action is required to protect the public. The substantiated complaints of the past will not be replicated in the future. Further, there is no utility in making such a declaration in light of the further undertaking.*

- 2078.** Attached as an annexure to Mr Kirk’s final submission is a signed undertaking from Mr Kirk dated 25 November 2015, the full text of which states as follows:

*I, Brian Kirk, undertake as follows:*

1. *I will not stand for election or be appointed, or hold office in, the position of secretary or member of a governing body of the Club or any other registered club from the date of signing this undertaking for a period of three (3) years.*
2. *I further undertake that I will not stand for election or be appointed, or hold office in, the position of secretary or member of a governing body of the Club or any other registered club without first obtaining the approval of the Independent Liquor and Gaming Authority to do so.*

### **Final Submission from the Club dated 11 December 2015**

**2079.** On 11 December 2015, Mr Tony Hatzis of *Hatzis Cusack Lawyers* provided a final submission on disciplinary action to the Authority on behalf of the Club (in liquidation).

#### Current position of the Club

- 2080.** Mr Hatzis notes that the Club ceased to trade in May 2015 and that the Club is presently in the course of being wound up by the appointed liquidators, Messrs Brian Silvia and Peter Krejci of *BRI Ferrier*. The liquidators have advised that it is “unlikely” that creditors will receive any dividend.
- 2081.** Further, the liquidators have requested that the Club bring to the Authority’s attention that “fines, penalties and costs would not be provable debts in the liquidation of the Club” pursuant to section 553B of the *Corporations Act 2001* and *Central Queensland Development Corporation Pty Limited v Sunstruct Pty Limited* [2015] FCAFC 63.
- 2082.** Mr Hatzis states that the liquidators “have not familiarised themselves” with the full history of all the matters raised in the Complaint and have little or no personal knowledge of those matters, as those matters pre-date the liquidators’ appointment. Accordingly, the Club’s submissions are made on the basis of the author’s knowledge of the matters raised in the Complaint, the Club’s submissions in reply and the Authority’s findings in the Decision on Grounds. Mr Hatzis advises that the liquidators “do not object” to the Club making these submissions.

#### The Relevant Principles

- 2083.** The Club submits that disciplinary provisions such as those found in Part 6A of the Act “have been held not to be penal in nature and should not be retributive in character”: *Quinn v Law Institute of Victoria* [2007] VSCA 122. Rather, such provisions are “*sui-generis*”, designed to protect the community or the welfare and reputation of the organisation concerned: *NSW Bar Association v Evatt* (1968) 117 CLR 177.
- 2084.** The Club submits that any disciplinary sanction imposed “must be consistent with the protective purposes underlying the conferral of power”. Further, in imposing disciplinary sanctions, long past matters will be “of lesser weight” than current matters. The Club submits that if breaches have occurred in the past, but are unlikely, on the evidence, to occur again in future, there would be “little or no need” for the imposition of disciplinary sanctions, particularly if there has been a material change of circumstances rendering a re-offence unlikely.

### What Sanctions should be applied in the Present Case?

- 2085.** The Club submits that there is “no prospect” of the Club being returned to an autonomous governing body, or even to an administrator, so as to enable the operation of a fully functioning and trading club. The Club submits that the condition of “no liquor on the greens” (which was imposed by the Secretary on 31 March 2015 and confirmed by the Authority upon review) has rendered the Club “wholly unviable”.
- 2086.** There is therefore “no utility” in the Club’s licence being maintained, and the Club therefore does not oppose the cancellation of its licence. The Club submits that the cancellation of the Club’s licence will “amply achieve” the protective purpose underlying the Authority’s disciplinary powers. Upon cancellation of the licence, there can be no prospect of the matters found against the Club being repeated in future.

### Matters for Consideration if a Monetary Penalty is to be Considered

- 2087.** However, if the Authority is minded to order payment of a monetary penalty in addition to cancelling the licence, the Club submits that the following matters should be taken into account in determining the quantum of any monetary penalty:
- 2088.** Several of the matters found against the Club involved “historical” breaches only. The Club submits that there is “no need” to impose a monetary penalty to encourage future compliance in respect of these matters, which include the following:
- (i) *Grounds 1 and 8.2* (failure to maintain required numbers of members). The Authority noted and accepted at paragraph 205 of the Decision on Grounds that the Club had over 2,000 full members as at 1 May 2015.
  - (ii) *Ground 5.5* (entering into a contract with MLM in 2007 without complying with section 41L of the Act). The Club submits that that contract applied while Mr Levy was the secretary of the Club until his role ceased on 3 October 2007.
  - (iii) *Grounds 8.3 and 8.4* (past moratorium on new members).
  - (iv) *Ground 8.7* (the Club being in administration for 10 years until 2012).
  - (v) *Ground 12* (the Club not holding annual elections in some past years, up to 2013).
- 2089.** Some of the matters found against the Club were “fully rectified” by the Club itself, such that there is “no need” to impose a monetary penalty to encourage future compliance. These include:
- (i) *Ground 4* (relating to preparing and reporting financial statements).
  - (ii) *Grounds 8.6 and 16* (incorrectly admitting as “social members” at the Club persons who resided within a 5km radius and whose membership applications were not approved by the Board). The Club submits that this matter was rectified by ensuring that all membership applications are submitted to the Board or to a membership subcommittee for approval. As a further safeguard,

the Club ceased to accept social members from late 2014, even though its Constitution permitted that category of members.

- (iii) *Grounds 13, 14 and 15* (in relation to ensuring that particulars were entered in all members' registers and that all temporary members reside outside a 5km radius of the Club). The Club submits that at paragraph 883 of the Decision on Grounds, the Authority noted that the Club had installed (at a cost of \$9,000) an automatic scanning/register system which enabled the Club to capture the required particulars of people entering and to automatically ensure that temporary members reside outside the 5km radius.
- (iv) *Grounds 10.1 and 10.3* (concerning monthly meetings of the governing body and keeping records of meetings).

**2090.** As part of its efforts to rectify past breaches the Club, in early 2015, appointed a new secretary manager, Mr Jason Webb. Further, the Club "subjected itself to external scrutiny" by commissioning a report from Lawler Partners (now PKF Australia), which was provided to the Authority in respect of the current Complaint and which reported on various issues raised by the Complainant. The Club submits that this report assisted the Club to identify areas of improvement and to rectify some of the matters found against the Club.

**2091.** The Club submits that several of the grounds proven against the Club were found by the Authority to be "technical" and/or "minor" in nature, including:

- (i) *Ground 5.1* (not distinguish between core and non-core property in the annual reports, after the Club had resolved to declare all of its premises non-core) at paragraph 502 of the Decision on Grounds.
- (ii) *Ground 9* (not keeping a separate register of disclosures made to the Board prior to 1 January 2013) at paragraph 745 of the Decision on Grounds.
- (iii) *Ground 10.2* (not keeping minutes of directors' meetings in a "book", but in a Lever Arch folder) at paragraph 786 of the Decision on Grounds.
- (iv) *Ground 11* (full particulars of guests not recorded in the guest books in 0.31% of cases) at paragraph 802 of the Decision on Grounds.

**2092.** A number of the matters found against the Club involved "inappropriate conduct to a limited or minor degree". Those matters include:

- (i) *Ground 3.1* (use of two Club vehicles for private purposes by two directors) which the Authority found, at paragraph 338 of the Decision on Grounds, established only to a "limited extent".
- (ii) *Ground 3.3* (whereby members of the Board were invited to the "Chairman's Lounge" at *Waratahs* rugby games), whereas Club members generally obtained general admission to the same games.
- (iii) *Ground 3.4* (reimbursement of some directors' expenses not covered by a 2011 resolution) described by the Authority as being "minor" in amount at paragraph 382 of the Decision on Grounds.

- (iv) *Ground 23* (not comply with licence conditions by not maintaining a head count on one occasion in October 2014). The Authority found, at paragraph 1010 of the Decision on Grounds, that there was “no evidence of any repeated or systemic failure in this regard”.
- 2093.** The Club submits that a number of other matters were raised against the Club (Grounds 17, 18, 19, 20 and 22) relating to a failure to comply with record keeping requirements under the *Gaming Machines Regulation* and reporting requirements to the Board in respect of gaming matters. The Authority found that there had been a “significant failing” by the Board in not sufficiently overseeing the gaming operations (paragraph 943 of the Decision on Grounds).
- 2094.** However, the Club submits that these matters were rectified by the Club shortly after appointing Mr Webb as its new secretary manager in early 2015. The Club reiterates its earlier submissions that Mr Webb instituted automated software systems to ensure that the reporting and record keeping requirements were met.
- 2095.** In addition, these same past gaming breaches were the subject of recent prosecutions in the Local Court on 26 August 2015. The Court imposed fines totalling \$29,340 in respect of these matters. Under section 3 of the *Crimes (Sentencing Procedure) Act 1999*, the Club submits that the Court was required to have regard to the following matters in arriving at an appropriate penalty:
- Adequate punishment
  - Deterrence
  - Protecting the community from the offender
  - Promoting rehabilitation
  - Ensuring accountability of the offender
  - Denunciation
  - Recognising the harm caused.
- 2096.** The Club submits that while the imposition of those penalties by the Local Court does not preclude the Authority from imposing a monetary penalty for the same conduct, it is nevertheless relevant to consider that:
- (i) Any protective purpose underlying the Authority's jurisdiction will have been “amply served” by cancelling the Club’s licence; and
  - (ii) Any “remaining deterrent or denunciatory purpose” has already been served and is reflected in the Local Court’s penalties.
- 2097.** For these reasons, the Club submits that the appropriate order, in the circumstances of this case, is to cancel the Club’s licence and to make no further order in relation to the payment of a monetary penalty.
- 2098.** The Club notes that the Complainant’s submissions include reference to Certificates of Conviction for four occasions when noise emissions exceeded that permissible under the LA10 noise restriction condition. Those matters arose in December 2014 and January 2015. The Club submits that they are not the subject of the current disciplinary complaint and must not be taken into account by the Authority as they fall outside the scope of the current Complaint.



## Costs

- 2099.** In relation to costs, the Club submits that the Complainant has sought payment of a “very substantial amount” of costs in connection with the investigation preceding the making of the Complaint.
- 2100.** The Club notes that, pursuant to section 57H(i) of the Act, the Authority has power to order a club to pay the amount of costs incurred by the Secretary in carrying out an investigation or inquiry under section 35A in relation to a registered club. The Club submits that this power may be regarded as a “beneficial adjunct” to the Authority’s power as this power is intended to protect the community from bearing an unreasonable burden of enforcement costs.
- 2101.** The Club submits that there is a public interest in ensuring that investigations are focussed only on “substantial matters warranting discipline” and that complaints only be taken on grounds which are “reasonably arguable, based on law”. The Club submits that this is particularly important in the context of disciplinary complaints, because cogent proof is generally required to satisfy a decision maker in cases where disciplinary sanctions are sought: see *Briginshaw v Briginshaw* (1938) 60 CLR 336.
- 2102.** The Club contends that the Complainant “failed to adduce evidence capable of meeting the high evidentiary standard that the Complainant was required to meet” in relation to several of the Grounds of Complaint, including the following:
- (i) *Ground 2*, which alleged that the Club ceased to be established for the purpose of providing accommodation for its members. At paragraphs 286 to 288 of the Decision on Grounds, the Authority found that:
    - 1. It was open to ordinary members to reserve and pay for bowling greens in a similar manner to social and temporary members;
    - 2. There was no evidence that ordinary members had complained about limitations on access to the bowling greens at times that they wished to use them; and
    - 3. The Complainant’s framing of the Complaint was “misconceived” in that “accommodation” of a bowling club’s members and guests is a concept that encompasses more than just the bowling greens and includes liquor, gaming and other hospitality services.
  - (ii) *Ground 6*, which alleged that the Club was “effectively controlled” by Ms Sanchez-Levy. At paragraph 607 of the Decision on Grounds, the Authority found that it was not satisfied that there is any evidence to suggest that Ms Sanchez-Levy was acting in the capacity of a director of the Club and, at paragraph 609, noted that the Complainant’s view of section 41O of the Act was “misconceived”.
  - (iii) *Ground 7*, which alleged that the Club allowed an “unreasonable and improper rent” to be paid to the freehold owner of the Club premises. The Club submits that it is clear from “well-established case law” that in determining a “reasonable” rent, it is relevant and necessary to ascertain the “market” rent. Further, the expression “reasonable” is wider in scope and requires a

consideration of the facts and circumstances at the time that a lease arrangement was entered into. In order to establish this Ground, it was therefore incumbent upon the Complainant to adduce evidence of current “market” rent. At paragraph 667 of the Decision on Grounds, the Authority found that the Complainant did not adduce any evidence showing that the rent payable by the Club under the sub-lease was outside of market rates or was otherwise improper. As a result of that deficiency in evidence, Ground 7 of the Complaint was not established to the satisfaction of the Authority. The Club also notes that pleading this Ground resulted in the Club incurring an expense of \$13,000 in respect of obtaining a market valuation.

- (iv) *Ground 21* which, although ultimately not pressed, regarded a “chance of gaming” sticker on a gaming machine.
- (v) *Ground 24*, regarding Mr Wily not having his appointment as administrator approved in 2002. The Authority found that the matters as pleaded were “misconceived” and the Authority drew no adverse inference against the Club.

- 2103.** The Club submits that the Complainant had regarded these “failed” Grounds 2, 6 and 7 as central to the Complaint. The Complainant had alleged that the payment of “*unreasonable and improper rent by the Club*”, the alleged “*ongoing management of the Club by...Ms Sanchez-Levy*” and the “*failure to provide accommodation for the Club’s members*” were all so “grievous” as to justify the immediate appointment of a temporary administrator (page 56 of the Complaint Letter). However, the Club submits that the Complainant failed to adduce evidence capable of satisfying the Authority of these essential grounds of complaint, to the required standard.
- 2104.** The Club submits that the other two Grounds mentioned in the Complaint Letter as being “grievous” and as requiring the immediate appointment of an administrator – namely, failure to meet minimum numbers of members and failure to comply with certain gaming requirements – were “in the course of being rectified” at the time the Complaint was served.
- 2105.** The Club submits that the total or partial denial of a costs order in this case will serve the important public interest of ensuring that investigators “limit their complaints to grounds which are reasonably supportable on the evidence submitted by the Complainant, which are reasonably arguable as pleaded and which, if established, would warrant discipline”.
- 2106.** Otherwise, the Authority will find that complaints become “unnecessarily lengthy and complex”, consuming more and more scarce resources of Authority Members and others assisting the Authority, in dealing with grounds of complaint that are misconceived (such as Ground 24 as pleaded), lacking in evidence to the requisite standard (such as Grounds 6 and 7) or which simply do not warrant discipline (such as Ground 21).
- 2107.** The Club acknowledges that costs might properly be awarded to enable a complainant to recover the costs of a forensic accountant or other expert – where the complainant has identified particular issues requiring the engagement of an expert, has defined those issues and has sought an expert opinion on an issue requiring particular expertise. In such a case, it may be appropriate to order recovery of the professional costs of the expert so retained.

- 2108.** The Club submits, however, that is not what has happened in the present case. Attachment 1 to the Club's submissions dated 11 December 2015 is a copy of the letter of instruction given by the Complainant to Russell Corporate Advisory. The Club submits that, instead of identifying specific factual issues and providing the expert with the factual material upon which to base an expert opinion, the Complainant has instead "effectively delegated its investigative function" to Russell Corporate Advisory.
- 2109.** The Club submits that the scope of the instructions given by the Complainant to Russell Corporate Advisory (which appears to charge rates "approaching \$400 per hour") were "extraordinarily wide-ranging", as follows:
- (i) *Identification, nature and extent of any sensitive priority issues or matters that indicate more serious criminality requiring timely regulatory intervention or referral to NSW Police or other appropriate body.* The Club submits that, on its face, this first point in the letter of instruction "goes well beyond" the scope and purpose of the Act.
  - (ii) *Matters that you consider may offend gaming and liquor legislation that demonstrates efficient materiality to consider regulatory action and have reasonable prospects for obtaining necessary evidentiary material.*
  - (iii) *Identification of matters that should be excluded from further regulatory investigation and reasons why.*
  - (iv) *Whether there is a proper basis to consider disciplinary action under the Registered Clubs Act 1976, the Gaming Machines Act 2001 or the Liquor Act 2007.*
  - (v) *Whether there is a proper basis to consider prosecution action under gaming and liquor legislation.*
  - (vi) *Advice on general compliance issues or systemic failures that may inform our risk-based planning and be beneficial for advice to industry, e.g. ClubsNSW.*
  - (vii) *Recommendations for dealing with any identified issues including nature, extent and avenues of inquiry, evidentiary issues, identified risks and constraints and proposed action and anticipated timeframe.*
  - (viii) *Any benefit in referring the matter for advice to the Commissioner of Police as contemplated by section 35A(2) of the Registered Clubs Act 1976.*
- 2110.** The Club submits that in effect, Russell Corporate Advisory were "left to sift through voluminous materials and to identify potential issues". Moreover, this was to be undertaken at external professional rates, rather than having these tasks determined by trained Compliance Officers, who are "meant to be experts" in the administration of gaming and liquor legislation.
- 2111.** The Club submits that there is a public interest in minimising the costs and expenses of such investigations and that a complainant who simply "devolves" his functions to an external professional firm in this way should not have his costs reimbursed. Conversely, respondents "ought not have to foot the bill" for such a

wide-ranging examination by an external professional firm (at professional forensic accounting rates).

- 2112.** The Club refers to Attachment 1 to its submissions dated 11 December 2015 and notes that the instruction to Russell Corporate Advisory referred to an agreed rate of \$30,000 (inclusive of GST), yet the expenses sheet provided by the Complainant to the Authority states an amount of \$100,000.
- 2113.** The Club queried this discrepancy with the Complainant (copies of emails between the Club and the Complainant are provided at Attachment 2 to the Club's submissions). The Club submits that the "significant" cost overrun is sought to be justified by the Complainant on the alleged grounds that materials provided by the Club were somehow deficient (the Club submits that the Complainant response does not say how or why). The Complainant alleges that it was that deficiency which prompted a further round of forensic examination by Russell Corporate Advisory. The Club submits that "no indication" is provided as to what the alleged deficiency was, or why it prompted such a substantial cost overrun.
- 2114.** The Club submits that the "more natural inference" to be drawn from the facts is that the substantial cost overrun was more likely to have been caused by the "extremely wide ranging nature" of the instructions given by the Complainant to the forensic accountants. By way of comparison, the Club submits that the report undertaken by Lawler Partners in February 2015 and provided to the Authority in May 2015 cost the Club \$25,000.
- 2115.** As a result of the overly broad-ranging instructions given to the forensic accountants by the Complainant, the forensic accountants "appear to have spent much time reviewing the transcript and findings of the 41X Inquiry and then restating much of that material" in their report. The Club submits that that material is "quite old" and therefore "of questionable utility" in determining an appropriate disciplinary sanction in 2015.
- 2116.** Further, significant parts of the report relate to grounds of complaint in respect of which the Complainant "failed to adduce evidence to the requisite standard". The Club refers to pages 55 through 67 and in particular, paragraph 607 of the Decision on Grounds and submits that the Authority found that there was no evidence to suggest that Ms Sanchez-Levy was acting in the capacity of a director of the Club. The Club also submits that the Authority held that compliance with *ClubsNSW Guidelines* is "not an independent ground for disciplinary action" (paragraph 1136 of the Decision on Grounds).
- 2117.** The Club submits that the "unduly wide-ranging nature" of the instructions given to Russell Corporate Advisory warranted a second round of investigations and interviews with many of the Club directors, and caused the incurring of "very substantial and unnecessary costs".
- 2118.** The Club takes issue with the "seemingly arbitrary" attribution of "on-costs at 30%" and states that this appears to be a "profit component". The Club submits that costs are intended to be compensatory only and ought not include any element of profit. Further, it appears that there may have been "an element of double-counting" in the hourly rates charged by the Complainant and it is unclear whether the hourly rates already include an element of "on-costs".

**2119.** In light of the above arguments, the Club submits that:

*...in these circumstances, no costs order should be made [against the Club]. The withholding of a costs order is in the wider public interest of encouraging efficient and economic use of scarce resources, in only prosecuting matters for which there is a proper legal and factual basis and in thereby minimising the costs to the Authority, to respondents and to the wider community. Alternatively, any costs order should be minimal.*

**2120.** The Club concludes with a submission that the appropriate orders are:

1. That the Club's licence be cancelled.
2. That no or a minimal order be made as to payment of costs or other monetary penalty.

**2121. Attachment 1 to the Club's submissions dated 11 December 2015** – letter from the Complainant to Russell Corporate Advisory dated 10 July 2014 enclosing the Terms of Reference for the conduct of a preliminary assessment, for the purposes of section 35A of the Act, into the affairs of the Club.

**2122. Attachment 2 to the Club's submissions dated 11 December 2015** – email correspondence between Mr Hatzis and the Complainant in relation to the amount of costs sought by the Complainant, attaching tax invoices issued by Russell Corporate Advisory in respect of the assessment of the Club's affairs on 7 August 2014 (invoice number 00002766), 2 September 2014 (invoice number 00002783), 7 October 2014 (invoice number 00002839) and 18 June 2015 (invoice number 00003000).

#### **Final Submission from the Ex-Officers dated 11 December 2015**

**2123.** On 27 November 2015, *Lee and Lyons* emailed the Authority on behalf of the Ex-Officers, requesting an extension of time to make final submissions on disciplinary action until 18 December 2015. The full text of that email states:

*Our clients will not be in a position to lodge their submissions on any disciplinary action and penalties by 27 November 2015.*

*We have taken considerable steps in an effort to provide ILGA with submissions by 27 November 2015, but have been unable to provide those submissions to ILGA by that date for the following reasons:*

1. *The size of the decision. In this respect:*
  - a. *The decision is 330 pages in length and has taken considerable time for us and the 7 directors and officers we represent to digest.*
  - b. *We require time to consider a number of the primary documents in conjunction with the decision in order to address the issue of any disciplinary actions and penalties.*
2. *The number of directors and officers we represent (ie: 7). Although we have obtained instructions from a number of the directors and officers comprising our clients, we have not been able to obtain the instructions of all of our clients.*

3. *Our counsel, Patrick Saidi, has been involved in a number of week-long trials back-to-back, and we have only had limited opportunity to confer with him on these matters.*

*Given the above matters, the seriousness of any disciplinary action and/or penalties, we request that ILGA, in the interest of procedural fairness, provide us with an extension until 18 December 2015 to lodge our clients' submissions.*

*Please contact us should you have any queries.*

*We look forward to your reply.*

- 2124.** The Authority's General Counsel noted in an email to the Complainant and all the respondents dated 27 November 2015 that the Chief Executive had that morning granted an extension to the Club's receiver by reason of the documented illness of a person who was important to the preparation of the Club's submissions. General Counsel advised that while the Ex-Officers' request for an extension until 18 December 2015 is declined, as a matter of parity, the Ex-Officers and the other respondents may file any final submissions on disciplinary action by 4:00pm on 11 December 2015.
- 2125.** On 11 December 2015, Ms Katherine Czoch of Lee and Lyons provided a final submission on disciplinary action to the Authority on behalf of the Ex-Officers.
- 2126.** Briefly, the Ex-Officers submit that no disciplinary action or declaration under section 57H(g) ought to be made against any of them due to the following reasons:

#### Good Character

- 2127.** The Ex-Officers have made submissions and provided evidence of their good character from various persons, including recipients of the Order of Australia. The Ex-Officers submit that it is not in question or doubt that each of the Ex-Officers are known to be persons of "excellent character and unblemished record" and these are factors that ought to weigh on the mind of the Authority when considering the Ex-Officers' submissions on disciplinary action or penalties.

#### Exceptional Circumstances

- 2128.** The Ex-Officers submit that it is "accepted" within all of the parties' submissions that before the Ex-Officers joined the Club, the Club was already in financial and membership decline, had a poor compliance record and was in external administration.
- 2129.** The Ex-Officers further submit that:
- (i) They had "no role to play" in any compliance issues, or financial or membership decline prior to them attaining their positions.
  - (ii) They "slowly but surely" steered the Club into financial health before the conditions on its liquor licence were altered such that its operations were "no longer viable".
  - (iii) After the end of the period of administration, the Ex-Officers "began implementing compliance procedures" for the closing of the abovementioned

gaps in compliance (albeit that the gaps in compliance were not entirely closed off by the time of the Complaint).

- 2130.** The Ex-Officers submit that even though they “found themselves in a difficult operating environment”, they ultimately undertook action and presided over a period of relative prosperity for the Club during which compliance matters were given “serious and considerable thought” and attempts were made to close gaps in compliance.
- 2131.** The Ex-Officers note that a large number of them held their positions at the Club during a long period of administration of some 10 years and submit that even if the Authority does not agree with the Ex-Officers’ submissions that the DOCA and ADOCA curtailed their ability to manage and control the Club, there is “no doubt” that each of the Ex-Officers “laboured under a *bona fide* impression” that the DOCA and ADOCA conferred “wide and plenary powers” on Mr Wily in relation to the management and control of the Club (and which powers supplanted their own).
- 2132.** Moreover, the Ex-Officers did not have the privilege of legal advice on the matter of their powers or obligations during the period of administration as, by the time they had joined the Club, the Club was already in one form of external administration or another.
- 2133.** The Ex-Officers submit that Mr Wily did not inform them of their powers or duties and they held the *bona fide* belief that it was Mr Wily who had power and control over the Club.
- 2134.** The Ex-Officers submit that they were never once informed about the impact of any of the types of Mr Wily’s external administration of the Club on their own duties and obligations, notwithstanding the conduct of the 41X Inquiry and the number of inspections by OLGR during the period of the Club’s administration.
- 2135.** Additionally, by the time Mr Wily ended his affiliation with the Club at the conclusion of the ADOCA on 18 May 2012, the Ex-Officers “had not had the day to day management of the Club” for approximately 10 years. As a consequence, it took some time to adjust to the regulatory environment and the requirements of the Act and Regulation following the end of the Club’s administration. However, the Ex-Officers submit that this “ought to be an appreciable and understandable consequence” of the considerable period of administration and the time required to adjust to managing the Club after 10 years of one form of external administration or another.
- 2136.** The Ex-Officers submit that, in the absence of receiving legal advice, being informed by Mr Wily or being warned by “the very government body that was created to assist clubs with regulatory matters about their obligations, powers and duties and directors and/or officers during the administration period” [the Authority notes that this is an apparent reference to OLGR], it would be “unfair” to levy any penalty or disciplinary action against the Ex-Officers.
- 2137.** The Ex-Officers did not deliberately ignore or avoid their obligations as either members of the governing body or secretaries of the Club. The Ex-Officers submit that once the Club came out of administration, they “took appropriate steps to familiarise themselves with the Club’s obligations and their own responsibilities”.

## OLGR's "Contribution" to the Ex-Officers' Failures

- 2138.** The Ex-Officers note the description provided by OLGR about itself on its website, which states as follows:

*The NSW Office of Liquor, Gaming and Racing (OLGR) is a branch within the Department of Justice and is accountable for the development, implementation and integrity of the overall regulatory framework across liquor, registered clubs and gambling activities in NSW.*

*Our role includes overall policy direction and advice (including advising the Government on legislative change) in relation to all regulated activities; conduct of licensing, compliance and enforcement functions; and early intervention and awareness activities in key areas [emphasis added].*

- 2139.** The Ex-Officers submit that OLGR and its predecessor inspected the Club over the course of a number of years and not once during those inspections or during the conduct of the 41X Inquiry highlighted its concerns as to management and operational arrangements and beliefs held by the Ex-Officers during the period of administration. The Ex-Officers contend that some of the comments made in the report on the 41X Inquiry "suggested that the Ex-Officers were correct in their understanding that Mr Wily had managerial and operational control of the Club".
- 2140.** The Ex-Officers submit that the lack of "early intervention and awareness" in accordance with its own publicly stated role by OLGR and/or its predecessor, together with the contents of the 41X Inquiry, provided the Ex-Officers with a "sense of comfort" that leaving the management and control of the Club to Mr Wily was the correct course of conduct.
- 2141.** The Ex-Officers consider it "highly unfair" that the very government body, which on its own representations, is tasked with compliance, early intervention and awareness, should by its own failure to intervene and raise awareness, "cause further ongoing breaches (by giving comfort to the Ex-Officers), but then bring a complaint several years after investigations and a 41X Inquiry".
- 2142.** The Ex-Officers submit that the considerable delay by OLGR in bringing the Complaint has "raised issues of unfairness associated with the decay of evidence over time" in that many of the matters raised in the Complaint occurred some 10 years ago, are complex, and factually dense – all factors which result in a decay of memory and therefore, evidence. As stated in the Ex-Officers' previous submissions, such delays and decay in evidence have made it difficult for the Ex-Officers to explore in detail the alleged circumstances or to adduce evidence which might cast doubt upon OLGR's version of events: *Longman v The Queen* (1989) 168 CLR 79; *Hewett v Medical Board of Western Australia* [2004] WASCA 170.
- 2143.** Moreover, the Ex-Officers submit that the compliance failures found by the Authority in the Decision on Grounds were not by way of any "contumelious or insolent disregard" for the importance of complying with the Act or Regulation, but rather, a *bona fide* belief of their lack of power and control over the Club while it was under administration.



- 2144.** The Ex-Officers contend that had the issues of management and control of the Club been raised with them by OLGR, there would have been an opportunity for the Ex-Officers to rectify the situation and “entirely avoid every single ground the subject of the Complaint”. To state the case differently, the Ex-Officers submit that OLGR’s “complacency” created comfort in the Ex-Officers, which resulted in “mounting conduct that the Authority considered offensive as a function of mounting instances of non-compliance over time”.
- 2145.** The Ex-Officers request that the Authority give considerable weight to OLGR’s role (or lack thereof) in creating the situation now before the Authority. The Ex-Officers submit that OLGR’s failures to act over the course of several years were “the primary cause, or alternatively, a significant contributor” to the situation now before the Authority. They submit that the above matters ought, in fairness and justice, result in there being no disciplinary action being taken by the Authority against the Ex-Officers.

### Nature of Breaches

- 2146.** The Ex-Officers submit that in the Decision on Grounds, the Authority found that many of the breaches established were either minor or were “form over substance” breaches. For example:
- (i) *Ground 1.* The Authority found that some of the Ex-Officers had not dealt with Mr McKew’s membership application in the manner required by the Club’s then Articles of Association, but that this was “the only incorrect dealing amongst thousands of membership applications” (paragraphs 1140, 1344, 1760 and 1994 of the Decision on Grounds).
  - (ii) *Ground 3.* The Authority found that Ground 3.1 concerning the use of motor vehicles was only established to a limited extent (paragraph 338 of the Decision on Grounds).
  - (iii) In relation to the incidental benefit conferred by the Club’s marketing agreement with the *Waratahs*, the Authority found that in respect of all but one sub-Particular of Ground 3.3, the Complaint was not made out (paragraph 358 of the Decision on Grounds). The “only” criticism of the Ex-Officers in relation to the *Waratahs* tickets and marketing program is that the Ex-Officers should have negotiated alternate terms to the Waratahs Sponsorship Agreement, such that the Chairman’s Lounge Tickets were not conferred on the Ex-Officers (paragraphs 353 to 356 of the Decision on Grounds).
  - (iv) As for the Ground concerning the Ex-Officers’ claims for reasonable expenses, the Authority found that Ground 3.4 was established. However, this decision was made not because the Authority considered that the items claimed were unreasonable or that there were some fraudulent grounds, but rather that the expenses were not documented correctly (paragraphs 396, 1167, 1429, 1668, 1785, 1896 and 2019 of the Decision on Grounds).
  - (v) *Ground 4.* The Authority accepted Particular 4.3 as being established “in the form in which it is alleged”, namely that there were no financial statements prepared on a quarterly basis but that financial statements were prepared on a monthly basis, which is a “more stringent and higher standard of reporting” than the Act and the Regulations require (paragraph 443 of the Decision on

Grounds). The Authority further accepted that Particular 4.4 (in respect of keeping registers of disclosure in accordance with the Club's financial year) was a "manner and form" breach (paragraphs 462 to 465, 1166, 1428, 1667, 1784, 1895 and 2018 of the Decision on Grounds).

- (vi) *Ground 9*. This Ground repeats Particular 4.4 and accordingly, the Ex-Officers repeat the above submissions in respect of Ground 9 (paragraphs 749 to 751 of the Decision on Grounds).
- (vii) *Ground 10*, concerning an allegation that the Ex-Officers did not conduct monthly meetings or keep minutes of meetings in a book in accordance with the requirements of section 30(1)(c) of the Act. While the Authority was satisfied that the Ground was technically established, in a number of months, meetings occurred bi-monthly (paragraphs 772 to 781, 1077, 1412 to 1413, 1651 to 1652, 1768 to 1769 and 1881 to 1882 of the Decision on Grounds) and the failure to keep minutes of meetings in a book is a "very minor and technical breach" (paragraph 786 of the Decision on Grounds).
- (viii) In relation to *Ground 10*, the Authority also found that not having a quorum of members of the governing body at meetings was not appropriate conduct despite the availability of remedial measures in the *Corporations Act*, given the risk for "cabal" type behaviour to occur. The Ex-Officers submit that in circumstances where "no such cabal type behaviour occurred", there was no lack of honesty (with which the Authority has agreed) and the *Corporations Act* permits ratification of decisions made without quorum (which the Authority has noted and which the Ex-Officers submit is evidence itself of the "minor" nature of the non-compliance).
- (ix) *Ground 11*. The Authority has agreed that an error rate of 0.31% in respect of failing to require guests to sign in with their first name, surname and address was a "very minor breach" (paragraph 802 of the Decision on Grounds).
- (x) *Grounds 25 to 33*. The Authority found that it was inappropriate not to remove non-financial members from the register of members. However, the Authority also found that the Club's Constitution provides the Ex-Officers with discretion not to remove non-financial members from the register of members, but they ought to have exercised that discretion (paragraphs 1142 to 1145, 1402 to 1408, 1642 to 1648, 1761 to 1765 and 1873 to 1878 of the Decision on Grounds). The Ex-Officers submit that there was no obligation to exercise this discretion.

**2147.** The Ex-Officers also observe that the Authority has stated in the Decision on Grounds that:

- The maintenance of a register of assets is not required in any provision within the Act or Regulation.
- The Authority has explained in the Decision on Grounds that its role includes "*making findings on a disciplinary complaint...shaped by the grounds available under the Act*" (paragraph 145 of the Decision on Grounds).

- Notwithstanding there being no requirement to keep a register of assets in the Act or Regulation, the Authority considers there to have been non-compliance on the basis that keeping a register is industry practice.

**2148.** Given the extent and number of the minor breaches referred to above, the Ex-Officers contend that these do not warrant any orders by the Authority for disciplinary action or penalties.

**2149.** The Ex-Officers submit that the “stress and considerable costs” associated with defending this Complaint are disciplinary action and penalty enough for the purposes of the Complaint and the Authority's Decision on Grounds.

### Historical Breaches

**2150.** The Ex-Officers submit that many of the findings in the Decision on Grounds are in respect of historical matters, which have since been rectified by the Ex-Officers. For instance (but not exhaustively):

- The minimum number of members at the Club was rectified;
- One of the utility vehicles was sold, leaving no vehicle capable of being utilised by Mr Teale;
- The *Waratahs* sponsorship agreement was not renewed;
- Members of the governing body were no longer reimbursed for expenses;
- The membership register was rectified;
- Entry of social members to the Club was no longer permitted;
- The class of membership known as “social membership” was no longer utilised or offered;
- Appropriate regimes and electronic entry protocols were put in place to prevent persons living within a 5km radius of the Club from being admitted inappropriately;
- Financial reporting became compliant;
- Non-financial members were removed from the membership register; and
- Gaming machine breaches were rectified.

**2151.** The Ex-Officers further submit that as Marcus Levy ended his affiliation with the Club more than eight years ago in October 2007, each and every single one of the findings made against him are of historical nature and accordingly have all been rectified or “have no relevance or import” as to the matters in existence as at the date of the Complaint and the Decision on Grounds. Mr Levy refers to and otherwise repeats paragraphs 38.2 and 38.3 of the Ex-Officers’ previous submissions.

**2152.** The Ex-Officers submit that where the Authority has found non-compliances with the Act and Regulation that are of a historical nature, there is “consistent authority” to the effect that non-compliance of a historical nature or which has or was being rectified ought not to result in any disciplinary action and/or penalty.

**2153.** The Ex-Officers refer to *Sydney Aussie Rules Social Club Ltd v Superintendent of Licences* (Grove J, unreported, 1 July 1991) and *Australian Broadcasting Tribunal v Bond* (1990) 94 ALR 11 and submit that these cases are cogent authority for the proposition that historical breaches which have been rectified or were being rectified:

- (i) Ought not to be considered for the purposes of any disciplinary action or penalty as given the historical nature of the issues (that is, that they no longer exist), there is, in the spirit of *Australian Broadcasting Tribunal v Bond*, no conduct that is likely to occur or which can be assumed will re-occur in the future, or whether the general community will have confidence that it will not occur. The Club is now in external administration and is “likely to be shut down permanently”. There is, in the circumstances, no chance, and the community can be confident that no further non-compliance with the Act or the Regulation will occur.
- (ii) Ought not to be considered for the purposes of any disciplinary action or penalty as, pursuant to *Sydney Aussie Rules Social Club Ltd v Superintendent of Licences*, any such disciplinary action and/or penalty will be punishment in respect of “events not currently affecting orderly conduct and would inevitably acquire a flavour of penalty”, which penalty is not the nature of the Authority’s jurisdiction.

#### No Finding of Dishonesty

- 2154.** The Ex-Officers submit that none of the Grounds of the Complaint are of a “criminal, fraudulent, morally corrupt, or dishonest nature” and that none of the complaints are in respect of a deliberate breach of the Act. The Ex-Officers note that at no point did the Authority find any evidence identifying a previous adverse reputation, bad character or a lack of integrity and that throughout the Decision on Grounds, the Authority has made findings that nothing in the decision impugns the honesty of the Ex-Officers.
- 2155.** The Ex-Officers submit that this lack of impingement of the Ex-Officers’ honesty, together with all of the submissions made above, form cogent reasons for the Authority to withhold from making any orders for disciplinary action and/or penalties against the Ex-Officers.

#### The Authority's Disciplinary Powers and Part 6A of the Act

- 2156.** The Ex-Officers submit that disciplinary provisions and powers have been held not to be of penal nature and should not be retributive in character: *Quinn v Law Institute of Victoria* [2007] VSCA 122. Rather, disciplinary proceedings have been held to be designed to protect the community, or the welfare and reputation of the organisation concerned: *NSW Bar Association v Evatt* (1968) 117 CLR 177. The Ex-Officers submit that, given the emphasis on the protective nature of disciplinary proceedings, the Authority should apply a “forward-looking” test. That is, the consideration for the Authority is whether, going forward, the Club is likely to be operated according to law and in conformity with the objects of registered clubs legislation.
- 2157.** The Ex-Officers submit that a “very large” number of the instances of non-compliance found by the Authority in the Decision on Grounds are of a historical nature. In the circumstances of this case, the Ex-Officers submit that there is “no subsisting conduct to discipline” and accordingly, no disciplinary action and/or penalty ought to be made as against the Ex-Officers. Ultimately, the public can be confident that repetition of the conduct found offensive by the Authority will not be repeated for the above reasons.

**2158.** The Ex-Officers submit that to hold otherwise would be to hand down disciplinary action and/or penalty on a penal basis, which is not the jurisdiction of the Authority or the purpose of Part 6A of the Act in accordance with the *Sydney Aussie Rules* case.

OLGR's Basis for Recommendations Not Made Out

**2159.** The Ex-Officers submit that on page 56 of the Complaint Letter, OLGR conceded that a "large portion" of the Complaint was in respect of historical conduct. The most serious matters were expressed as being:

- (i) The failure to meet minimum number of members – the Ex-Officers submit that this was found to be historical and created by reason of the moratorium imposed during the Club's administration, which the Authority understood.
- (ii) The failure to comply with gaming requirements – the Ex-Officers submit that this was also found to be historical and the Ex-Officers repeat their submissions in respect of the *Sydney Aussie Rules* case and the *Bond* case.
- (iii) The allegation that the Club paid unreasonable and improper rent – the Ex-Officers submit that this allegation was not established.
- (iv) The allegation that the Club was managed by an external party, being Ms Sanchez-Levy – the Ex-Officers submit that this allegation was not established.
- (v) The allegation that the Club failed to provide accommodation to its members and guests – the Ex-Officers submit that this allegation was not established.

**2160.** Having regard to the above in light of the Authority's findings in the Decision on Grounds, the Ex-Officers submit that two of the alleged "grievous" non-compliances [being the Authority's findings in respect of (i) and (ii) above] were of a purely historical nature, and the balance of each of the "grievous" non-compliances [being the Authority's findings in respect of (iii), (iv) and (v) above] were found not have been established or entirely rejected. Given that the most "grievous" of the conduct the subject of the Complaint has either been rectified or alternatively, not established or rejected by the Authority, the Ex-Officers submit that the Authority ought not take any disciplinary action or order any penalty.

**2161.** In light of all of the matters discussed in these submissions, the Ex-Officers submit that the Authority ought not to impose "harsh disciplinary sanctions" that "discourage people who have volunteered their time and effort in resuscitating a club in a dire situation".

**2162.** Having regard to all of the matters discussed in these submissions generally, the Ex-Officers submit that when viewed cumulatively, the non-compliances are "on the lower order of magnitude and seriousness and do not warrant disciplinary action or penalty".

**2163.** The Ex-Officers submit that the Authority's findings in the Decision on Grounds will, once finalised, be matters of public record and this, together with the stress and considerable costs associated with defending the Complaint, are disciplinary action and penalty enough as against the Ex-Officers.

- 2164.** Finally, the Ex-Officers submit that as a “sign of the Ex-Officers’ regret and contrition” in relation to the non-compliances found by the Authority in the Decision on Grounds, the Ex-Officers offer to provide an undertaking not to stand for any position, or be elected to any position, for a period of three (3) years from the finalisation of the Authority's decision.

### **No Submission on behalf of Mr Wily**

- 2165.** Mr Wily did not provide a final submission on disciplinary action to the Authority in response to the Decision on Grounds.

### **DISCIPLINARY ACTION**

- 2166.** The Authority has given further consideration to this matter with the benefit of a final round of submissions from the Complainant, the Club and the Ex-Officers.
- 2167.** Section 57H of the Act provides the powers of the Authority to take disciplinary action in the event that a complaint is established. The section states:

#### **57H Disciplinary powers of Authority**

- (1) *The Authority may deal with and determine a complaint that is made to it under this Part.*
- (2) *If the Authority is satisfied that any of the grounds on which the complaint was made apply in relation to the registered club or a person who is the secretary or member of the governing body of the club, the Authority may decide not to take any action or may decide to do any one or more of the following:*
  - (a) *order the club to pay a monetary penalty not exceeding 2,500 penalty units within such time as is specified in the order,*
  - (b) *suspend the club’s licence for such period as the Authority thinks fit,*
  - (c) *cancel the club’s licence,*
  - (d) *suspend or cancel any authorisation held by the registered club under this Act,*
  - (e) *impose a condition on the club’s licence or on any authorisation held by the club under this Act,*
  - (f) *remove from office the secretary of the club or a member of the governing body of the club,*
  - (g) *declare that a specified person is, for such period (not exceeding 3 years) as is specified by the Authority, ineligible to stand for election or to be appointed to, or to hold office in, the position of secretary or member of the governing body (or both of those positions) of:*
    - (i) *the club, and*
    - (ii) *if the Authority so determines – all other registered clubs or such other registered clubs as are specified (or as are of a class specified) by the Authority,*

- (h) *appoint a person to administer the affairs of the club who, on appointment and until the Authority orders otherwise, has, to the exclusion of any other person or body of persons, the functions of the governing body of the club,*
- (i) *order the registered club to pay the amount of any costs incurred by:*
  - (i) *the Director-General in carrying out any investigation or inquiry under section 35A in relation to the club, or*
  - (ii) *by the Authority in connection with the taking of disciplinary action against the club or any other person under this section.*

**2168.** The Authority’s disciplinary jurisdiction provided by Part 6A of the Act is protective, rather than punitive in nature. As held by the New South Wales Supreme Court in *Seagulls Rugby League Football Club Ltd v Superintendent of Licences* (1992) 29 NSWLR 357 (at paragraph 373):

*The over-riding purpose of the jurisdiction is the protection of the public, and of members of clubs by the maintenance of standards as laid down in the Act.*

**2169.** Nevertheless, as observed by Basten JA of the New South Wales Court of Appeal in *Director General, Department of Ageing, Disability and Home Care v Lambert* (2009) 74 NSWLR 523 (**Lambert**), while disciplinary proceedings are protective, that is not to deny that orders made by disciplinary bodies may nonetheless have a *punitive effect*. His Honour observed that a Court (and hence a regulatory decision maker such as the Authority) should be mindful that a protective order is reasonably necessary to provide the required level of public protection.

**2170.** At paragraph 83 of the judgment in *Lambert*, Basten JA states that the “punitive effects” may be relevant to the need for protection in that:

*...in a particular case, there may be a factual finding that the harrowing experience of disciplinary proceedings, together with the real threat of loss of livelihood may have opened the eyes of the individual concerned to the seriousness of his or her conduct, so as to diminish significantly the likelihood of repetition. Often such a finding will be accompanied by a high level of insight into his own character or misconduct, which did not previously exist.*

**2171.** At paragraph 85 of the judgment, Basten JA observes that:

*...the specific message of the disciplinary cases explaining that the jurisdiction is entirely protective is to make clear that the scope of the protective order must be defined by the reasonable needs of protection, as assessed in the circumstances of the case.*

**2172.** The Authority further notes that when determining the nature of the appropriate disciplinary action, the conduct of the respondents to a complaint *up until its final determination* is relevant and should be taken into account: *Sydney Aussie Rules Social Club Ltd v Superintendent of Licences* (SC (NSW) Grove J, No. 16845 of 1990, unreported BC9101830).

## **Disciplinary Action against the Club**

### Cancellation of the licence pursuant to section 57H(2)(c)

**2173.** With respect to the Club, the Authority is satisfied that it should order, pursuant to section 57H(2)(c) of the Act, the **cancellation** of the Club’s licence number

LIQC300229327, noting that this course of action has been sought by the Complainant and is accepted by the Club's liquidator.

- 2174.** This action is warranted in light of the cumulative adverse findings made by the Authority on the Complaint.
- 2175.** The Authority is satisfied, on the basis of the submissions from the Club's liquidator, that the Club is now in liquidation and there is little apparent prospect of the Club operating again. In the present circumstances, there is no apparent public interest in the licence being maintained on the Premises.
- 2176.** The Authority is satisfied that the fines incurred by the Club in respect of the recent convictions against the Club (most of which arise from similar conduct to that specified in the Grounds of Complaint) will serve as an appropriate signal to any others in the industry of the consequences of sustained non-compliance with the liquor and gaming legislation.
- 2177.** In making this decision, the Authority has not had regard to any of the Local Court convictions secured against the Club that did not arise from matters specified in the Grounds of the Complaint.
- 2178.** That is, the Authority accepts the submission made by the Club's liquidators that the Certificates of Conviction provided in relation to four occasions when noise emissions from the Club exceeded those permissible under the LA10 noise condition of the licence concern incidents that occurred during December 2014 and January 2015 and fall outside the scope of this Complaint.

Costs order against the Club pursuant to section 57H(2)(i)(i)

- 2179.** The Authority notes that the Complainant has also sought an order that the Club pay the amount of costs incurred by the Secretary of the Department of Justice in carrying out any investigation or inquiry under section 35A in relation to the Club. The Complainant has specified its costs on the investigation at **\$176,616.70**. The Authority is satisfied, on the basis of the Complainant's breakdown of its costs accompanying its final submissions, that these were the actual costs of the Secretary on the investigation that preceded this Complaint.
- 2180.** The Club's liquidators have submitted that no costs should be ordered at all. They argue that withholding a costs order is in the wider public interest of encouraging the efficient and economic use of scarce resources, in only prosecuting matters for which there is a proper legal and factual basis and in thereby minimising the costs to the Authority, to respondents and to the wider community. In the alternative, the Club's liquidators submit that any costs order should be minimal.
- 2181.** Having considered the submissions from the Complainant and the Club's liquidators on the issue of a costs order, the Authority is satisfied that it is in the public interest in respect of the due administration of the Act that the Authority order, pursuant to section 57H(2)(i)(i) of the Act, that the Club pay a portion of the Secretary's costs in carrying out the investigation under section 35A in relation to the Club that preceded this Complaint.
- 2182.** While the Authority accepts that the Complainant may face practical difficulties in recovering those costs by reason that the Club is currently in liquidation, the



Authority is nevertheless satisfied, in light of the multiple contraventions of the liquor and gaming legislation attributable to the Club over a substantial period of time, that it is appropriate to issue a costs order against the Club.

- 2183.** The Authority is satisfied that of the 33 Grounds specified in the Complaint as initially framed, all of these Grounds were established, either in whole or in part, save for Grounds 2, 6, 7 and 27. Ground 21 was ultimately not pressed by the Complainant.
- 2184.** Usually the Authority would approach the apportionment of costs as a ratio of grounds established against grounds pleaded.
- 2185.** However, noting that some Grounds of this Complaint were only established in part and many of the allegations established were minor and technical in nature, the Authority agrees with the Club's submission that some reflection of this should be indicated in the costs order.
- 2186.** It is not in the public interest for considerable resources to be expended investigating and responding to relatively minor instances of statutory non-compliance.
- 2187.** A more judicious approach by the Complainant to the framing of this extensive Complaint could have greatly reduced the scope of the matter from the outset, with a focus on those more substantial instances of non-compliance, such as contraventions of gaming machines legislation, Mr Levy's practice of pre-signing cheques for paying out cash prizes associated with gaming machines, failures of corporate governance with regard to annual elections, the club's "open door" policy with regard to controls over membership and access to the Premises and non-compliance with the regulations surrounding the Club's entry into a transaction with Mr Levy's corporate entity, MLM.
- 2188.** The Authority further notes that the Club did not actively contest the allegations against the former directors, although it did contest many of the matters alleged against the Club that also formed part of the case against the individual officers.
- 2189.** In all the circumstances of this particular case, the Authority considers it appropriate to order, pursuant to section 57H(2)(i)(i) of the Act, that the Club pay **50%** of the Complainant's costs in carrying out the investigation under section 35A in relation to the Club that preceded this Complaint. That is, the Club shall pay **\$88,305.35** within 28 days of the date of this decision letter.

No imposition of monetary penalty pursuant to section 57H(2)(a)

- 2190.** The Complainant has also sought that the Club be ordered to pay, pursuant to section 57H(2)(a) of the Act, a "significant monetary penalty" which "reflects the gravity of its conduct", with numerous breaches relating to a number of regulatory requirements extending over a significant period of time during which it was trading in breach of its legislative obligations.
- 2191.** The Complainant has drawn particular attention to the **\$29,340** of the total of **\$51,380** in fines ordered by Magistrate Greenwood of the Downing Centre Local Court in Sydney on 26 August 2015. The Complainant submits that these fines were attributable to the Board's failings with respect to the Club's compliance with the

*Gaming Machines Regulation 2010* (formerly the *Gaming Machines Regulation 2002*).

- 2192.** The Club's liquidators submit that in light of the Club's conduct in rectifying the breaches that are the subject of this Complaint and in the current circumstances of the Club (including the proposed cancellation of the licence), there is now "no need" for a monetary penalty to be ordered against the Club under the Act for the protection of the community.
- 2193.** The Club's liquidators further submit that a monetary penalty issued by the Authority against the Club in respect of this Complaint will not constitute a "provable debt" for the purposes of section 553B of the *Corporations Act*.
- 2194.** Having considered the submissions of the Complainant and the Club, and accepting advice from the Club's liquidator that the Club is unlikely to recommence trading on the Premises and further noting that the Authority has now determined to cancel the licence, the Authority is satisfied that in this case, imposing a monetary penalty against the Club under section 57H(2)(a) of the Act would not serve any additional protective purpose by way of remedying the Club's conduct.
- 2195.** The Authority has had regard to the fines that the Club has been ordered to pay by the Local Court during August 2015 in respect of convictions secured by OLGR on the basis of (in the most part) conduct that was similar to conduct specified in the Grounds of Complaint. Those fines will, in the Authority's view, serve as an appropriate signal to any others in the industry, or the wider community, who might engage in similar non-compliance with the liquor and gaming legislation that has been established in this case. The Authority is not satisfied that imposing a monetary penalty would serve any substantial further protective purpose at this time.

Disciplinary Action against Mr Robert Ashton Jnr (secretary)

- 2196.** The Authority is satisfied, as alleged by the Complainant, that Mr Robert Ashton Jnr was appointed as Club secretary:
- between about **3 October 2007** and about **10 December 2008**; and
  - from **2 December 2010** until at least **3 December 2014** (the date of Complaint).
- 2197.** That is, Mr Ashton Jnr served as secretary for a substantial portion of the relevant period that is the subject of this Complaint.
- 2198.** The Authority is satisfied, on the basis of its findings as set out above on Particular 25.2(a) of the Complaint, that:
- Ground 1 (club membership);
  - Ground 3 (permitting benefits or advantages);
  - Ground 4 (club reporting requirements);
  - Ground 5 (Part 4A controls);
  - Ground 8 (good faith requirements for membership);
  - Ground 9 (register of disclosures);
  - Ground 10 (governing body meetings);
  - Ground 11 (guest records);

- Ground 12 (annual governing body elections);
- Ground 13 (register of full members);
- Ground 14 (register of temporary members);
- Ground 15 (admission of residents within 5km);
- Ground 16 (membership procedural requirements);
- Ground 17 (records of gaming machine prizes);
- Ground 18 (gaming machine cash flow reports to board);
- Ground 19 (gaming machine net analysis reports to board);
- Ground 20 (gaming machine clearance records);
- Ground 22 (progressive jackpot records);
- Ground 23 (licence condition for NRL Grand Final); and
- Ground 24 (section 41 Registered Clubs Act),

have been established in whole or part.

- 2199.** The Authority is further satisfied that all of those Grounds, save for Ground 23, concern matters of non-compliance that the Authority is satisfied are reasonably attributable to the scope of responsibility of the Club and are *also* attributable to Mr Ashton Jnr to the extent that they occurred during his tenure as the Club's secretary and chief executive officer.
- 2200.** The Authority is satisfied, on the basis of its findings above, that *none* of the sub-Particulars of Particular 25.2(b) of the Complaint are established against Mr Ashton Jnr.
- 2201.** The Authority is satisfied, on the basis of its findings as set out above, that *all* of the sub-Particulars of Particular 25.2(c) are established against Mr Ashton Jnr.
- 2202.** The Authority is satisfied, on the basis of its findings as set out above, that all of the sub-Particulars of Particular 25.2(d) are established against Mr Ashton Jnr, save for sub-Particular 25.2(d)(4) in relation to the "high risk" practice of pre-signing cheques instituted by Mr Levy and sub-Particular 25.2(d)(8) in relation to the allegation that Mr Ashton Jnr failed to have an adequate understanding of the Club's licence conditions.
- 2203.** Having considered the above findings, the Authority found that Mr Robert Ashton Jnr is not a fit and proper person to be a secretary of the registered club, by reason that he did not demonstrate the degree of knowledge, ability, care and diligence that the Authority would expect from a reasonably competent secretary of a club of this scale.
- 2204.** The Authority accepts that Mr Ashton Jnr, along with the other Ex-Officers, genuinely believed that the administrator Mr Wily was in control of the Club, but that was a mistaken belief while the Club operated pursuant to a Deed of Company Arrangement and it reflects adversely upon the degree of knowledge and ability that may be expected of directors and secretaries of a registered club, as the case may be.
- 2205.** The findings against the Club in respect of Grounds 1 through 24 of the Complaint have been considered on a cumulative basis and it is of some considerable concern that during Mr Ashton Jnr's tenure as secretary, the Club did not observe minimum legislative requirements as to membership and access to the Premises and adopted something akin to an "open door" policy, as found by the Authority in relation to

Grounds 1, 8 and 16. These are legislative requirements that are not merely minor and technical but underpin whether or not an enterprise is actually operating as a *bona fide club*. They are operational requirements in respect of which the secretary is ultimately responsible, yet were not observed throughout the first and second period in which Mr Ashton Jnr was secretary.

- 2206.** It is of particular concern that the Club failed to comply, during Mr Ashton Jnr's tenure, with legislative requirements as to the Club's gaming machine operations contrary to clauses 14, 17, 18, 20 and 91 of the *Gaming Machines Regulation 2010* as alleged in Grounds 17, 18, 19, 20 and 22 respectively. These are compliance requirements requiring reporting to and oversight by the board and the secretary is responsible for ensuring that the board was placed in a position to receive the required reports. They were not observed throughout the second period during which Mr Ashton Jnr was secretary.
- 2207.** The liquor and gaming industries are closely regulated areas of commerce. This is for good reason, given the considerable scope for social and economic harm that may arise from the unregulated supply of those services to the community.
- 2208.** Depending upon the location and circumstances of the business in question, gaming machines offer a potentially lucrative source of revenue. In New South Wales, only registered clubs, hotels and The Star Casino may lawfully operate gaming machines.
- 2209.** Furthermore, registered clubs are in a relatively privileged position compared to hotels in that they are not constrained by the statutory maximum gaming machine threshold of 30 machines that the *Gaming Machines Act* applies to hotels.
- 2210.** By virtue of the considerable amount of cash that gaming machines may generate within a short period of time and the attendant risk of theft, fraud, corruption, embezzlement, and other forms of illegal conduct pertaining to their operation, the *Gaming Machines Act* and *Regulation* prescribe a number of key requirements with regard to gaming machine clearance, maintenance, record keeping and reporting. A club board cannot provide oversight of this important aspect of a club's operations if it does not receive and consider the required reports in the required format.
- 2211.** These requirements play an important role in preserving the integrity of the gaming machines industry, which is one of the objects of the *Gaming Machines Act 2001* pursuant to section 3(1)(d) of the Act. Their importance is underscored by Parliament having prescribed a substantial maximum penalty (50 penalty units) in the event that a club is successfully prosecuted in a Local Court for non-compliance with clauses 14, 17, 18, 20 and 91 (the last of which has since been repealed) of the *Gaming Machines Regulation*.
- 2212.** It is the chief executive's ultimate responsibility to ensure day to day compliance with the legislation and to support the board in ensuring it has sufficient oversight of the club to ensure compliance at a systemic level.
- 2213.** The Authority accepts the submission made by the Ex-Officers that many of the matters found against the Club arise from matters of an historical nature. The Authority has taken into account the age of the matters detected by OLGR and the technical nature of some of the incidents of non-compliance that have been established against the Club.

- 2214.** However, the Authority does not accept, as an excuse for the Ex-Officers' conduct, the submission that OLGR was aware of issues of non-compliance raised in this Complaint some time ago and that OLGR delayed in bringing this Complaint and should have been more proactive to remedy the Club's protracted non-compliance at an earlier time.
- 2215.** It is ultimately the duty of club secretaries and members of club governing bodies to have knowledge of their statutory duties and obligations and to demonstrate an appropriate level of honesty, knowledge and ability to ensure their club's compliance with the minimum requirements of legislation while they hold those regulated positions.
- 2216.** While no shortcomings as to the honesty of the Ex-Officers have been established on the findings made in this Complaint, the Ex-Officers, including Mr Ashton Jnr, demonstrated serious shortcomings as to their knowledge and ability over a prolonged period of time, some longer than others.
- 2217.** The Authority notes that a professional administrator was involved in the administration of the Club and this may have given the directors and secretaries a false sense of security as to their responsibility for compliance matters. The Authority notes that it does not have the power under the Act to consider Mr Wily's fitness as an insolvency practitioner. While this does not absolve the Ex-Officers' respective responsibility for the Club's compliance during periods when the Club was subject to the DOCA and the ADOCA (as the case may be), it has been taken into account as a factor when assessing the appropriate period of disqualification.
- 2218.** Having considered the cumulative extent of the Club's non-compliance that occurred during Mr Ashton Jnr's tenure, the Authority is satisfied that a substantial period of disqualification is warranted, notwithstanding the time that has elapsed since Mr Ashton Jnr's tenure as Club secretary.
- 2219.** This will serve a protective purpose by sending a signal to other club secretaries that failing to ensure a club's compliance with basic requirements of corporate governance, requirements as to club membership and the control of gaming machine operations will have regulatory consequences for those with the responsibility of ensuring compliance.
- 2220.** While the Authority would otherwise have considered that a period of 3 years disqualification to be appropriate for Mr Ashton Jnr, by reason of the numerous and prolonged occurrence of non-compliance by the Club the Authority has reduced this period to **2 years** in light of the mitigating factors that are noted above.

Disciplinary Action against Mr Marcus Levy (former secretary)

- 2221.** The Authority is satisfied, as alleged by the Complainant, that Mr Marcus Levy served as secretary of the Club from about **26 October 2004** until **3 October 2007**.
- 2222.** That is, Mr Levy served as Club secretary for only three years of the relevant period covered by this Complaint.

- 2223.** The Club's failure to ensure that it maintained the statutory minimum number of ordinary members, required by section 12 of the Act, was a form of non-compliance that extended across Mr Levy's tenure as secretary of the Club.
- 2224.** This is a basic legislative requirement that should not be dismissed as a technical matter. It is one of the statutory underpinnings of a *bona fide* club. It is a form of non-compliance in respect of which it is appropriate to attribute responsibility to the Club's secretary. Mr Levy should have been aware of the Club's non-compliance with minimum membership requirements and taken steps to remedy the non-compliance.
- 2225.** Of greater concern with respect to Mr Levy is the Club's failure to ensure that it complied with section 41L of the Act in relation to a contractual relationship with an entity of which Mr Levy was the sole director (MLM). This reflects adversely upon the knowledge and ability of his duties demonstrated by Mr Levy during his tenure as secretary.
- 2226.** Section 41L is an important regulatory control designed to ensure the integrity, and the *appearance* of integrity, of a registered club's dealings with entities controlled by a club's senior officers. As a secretary of the Club, Mr Levy was well placed to ensure that the Club complied with the Act in respect of this contractual arrangement but failed to do so.
- 2227.** As Club secretary, Mr Levy was well placed to ensure that the Club complied with the requirement of the rule prescribed by section 30(1)(a)(i) of the Act and Article 28 of the Club's Articles of Association to hold annual elections for appointment of its governing body. That did not occur during 2007.
- 2228.** Mr Levy was well placed to ensure the Club's compliance with the requirement of Article 49 of the Club's Articles of Association to hold an annual general meeting of members. That did not occur during 2007.
- 2229.** The Club's failure to observe these fundamental requirements of corporate governance are matters for which Mr Levy shares responsibility, along with the then directors. It reflects adversely upon his demonstration of the requisite knowledge and ability to serve as a club secretary during his tenure.
- 2230.** Mr Levy was also the Club's secretary while the Club engaged in certain "high risk" practices including pre-signing cheques for paying out cash prizes associated with gaming machines (as noted in the Authority's findings on Particular 26.2(h)(2)). This is a further adverse factor on the assessment of Mr Levy's demonstration of knowledge and ability in executing his responsibilities as the secretary of a registered club.
- 2231.** The Authority repeats the observations that it has made above with respect to Mr Ashton Jnr as to the importance of liquor and gaming regulation.
- 2232.** The Authority repeats the observations that it has made above with respect to Mr Ashton Jnr as to the role of Mr Wily as deed administrator and the false sense of security this may have given the Ex-Officers.

- 2233.** The Authority repeats the observations that it has made above with respect to Mr Ashton Jnr as to the age and technical nature of some of the incidents of non-compliance that have been established against the Club.
- 2234.** The Authority repeats the observations that it has made above with respect to Mr Ashton Jnr as to the contended delay by OLGR in commencing this Complaint and the duty of club officers to demonstrate the requisite honesty, knowledge and ability when ensuring a club's compliance.
- 2235.** The Authority repeats the observations that it has made above with respect to Mr Ashton Jnr as to the responsibilities of club secretaries for ultimate operational oversight of club compliance.
- 2236.** The Authority notes that, unlike Mr Ashton Jnr, Mr Levy's tenure was not marked by adverse findings as to the Club's non-compliance with reporting requirements imposed by the *Gaming Machines Regulation 2010*.
- 2237.** Nevertheless, during Mr Levy's tenure, there were substantial and obvious failings by the Club to observe basic requirements of corporate governance and to observe important integrity controls with respect to dealings with an entity of which Mr Levy himself was director. The Club also failed to maintain minimum membership requirements. A further adverse factor was Mr Levy's practice of pre-signing cheques for paying out cash prizes associated with gaming machines.
- 2238.** The Authority is satisfied that some substantial period of disqualification is warranted, notwithstanding the time that has now elapsed since Mr Levy's tenure as Club secretary. This will serve a protective purpose by sending a signal to other club secretaries that failing to ensure a club's compliance with basic requirements of corporate governance will have regulatory consequences for those with the responsibility of ensuring compliance.
- 2239.** While the Authority would otherwise have considered that a period of 3 years disqualification is appropriate, the Authority is satisfied, having had regard to the mitigating factors noted above (including the age of the matters and the Ex-Officers' mistaken reliance on Mr Wily) that it is appropriate, to send a signal to others in the industry as to the regulatory consequence of non-compliance of the kind demonstrated in this Complaint, to reduce this period while maintaining a substantial period of disqualification.
- 2240.** The Authority orders, pursuant to section 57H(2)(g) of the Act, that Mr Marcus Levy be disqualified from holding a regulated position within the registered clubs industry for **2 years**.

Disciplinary Action against Mr Allan Teale (director)

- 2241.** The Authority is satisfied, as alleged by the Complainant, that Mr Allan Teale was appointed as a director of the Club on **12 December 2006** until the date of the Complaint.
- 2242.** That is, Mr Teale was a director of the Club throughout the majority of the relevant period of this Complaint.

**2243.** The Authority is satisfied, on the basis of its findings as set out above on Particular 28.3(a) of the Complaint, that:

- Ground 1 (club membership);
- Ground 3 (permitting benefits or advantages);
- Ground 4 (club reporting requirements);
- Ground 5 (Part 4A controls);
- Ground 8 (good faith requirements for membership);
- Ground 9 (register of disclosures);
- Ground 10 (governing body meetings);
- Ground 11 (guest records);
- Ground 12 (annual governing body elections);
- Ground 13 (register of full members);
- Ground 14 (register of temporary members);
- Ground 15 (admission of residents within 5km);
- Ground 16 (membership procedural requirements);
- Ground 17 (records of gaming machine prizes);
- Ground 18 (gaming machine cash flow reports to board);
- Ground 19 (gaming machine net analysis reports to board);
- Ground 20 (gaming machine clearance records);
- Ground 22 (progressive jackpot records);
- Ground 23 (licence condition for NRL Grand Final); and
- Ground 24 (section 41 Registered Clubs Act),

have been established in whole or part.

**2244.** The Authority is further satisfied that all of those Grounds, save for Ground 23, concern matters of non-compliance that the Authority is satisfied are reasonably attributable to the scope of responsibility of the Club's directors and are *also* attributable to Mr Teale to the extent that they occurred during his tenure as a director. They are matters that either involved board functions or involve statutory non-compliance over a sustained period such that they indicate systemic failure in which the board should share in responsibility with the relevant secretaries.

**2245.** The Authority is satisfied, on the basis of its findings as set out above, that *none* of the sub-Particulars of Particular 28.3(b) of the Complaint are established against Mr Teale.

**2246.** The Authority is satisfied, on the basis of its findings as set out above, that *all* of the sub-Particulars of Particular 28.3(c) in relation to the Club's non-compliance with its Articles of Association are established against Mr Teale.

**2247.** The Authority is satisfied, on the basis of its findings as set out above, that all of the sub-Particulars of Particular 28.3(d) in relation to the Club's lack of internal controls are established against Mr Teale, save for sub-Particular 28.3(d)(4) in relation to the "high risk" practice of pre-signing cheques instituted by Mr Levy.

**2248.** As noted above, the Authority is satisfied that Mr Allan Teale is not a fit and proper person to be a director of the registered club, by reason that the Complainant has established that he did not demonstrate the degree of knowledge, ability, care and diligence that the Authority would expect from a reasonably competent director of a club of this scale. There is no basis for impugning Mr Teale's honesty.



- 2249.** The Authority is satisfied that the Ex-Officers, including Mr Teale, genuinely believed that the administrator Mr Wily was in control of the Club, but that was a mistaken belief and this reflects adversely upon Mr Teale's knowledge and ability as a director of a registered club during the DOCA and ADOCA.
- 2250.** The Authority repeats the observations that it has made above with respect to Mr Ashton Jnr as to the age and technical nature of some of the incidents of non-compliance that have been established against the Club.
- 2251.** The Authority repeats the observations that it has made above with respect to Mr Ashton Jnr as to the contended "delay" in OLGR commencing this Complaint and the duty of club officers to demonstrate the requisite honesty, knowledge and ability when ensuring a club's compliance.
- 2252.** While the adverse findings against the Club in respect of Grounds 1 through 24 of the Complaint have been considered on a cumulative basis, the Authority is particularly concerned with findings indicating that the Club operated something akin to an "open door" policy in terms of access to the Club and non-observance of statutory membership requirements.
- 2253.** The Authority is particularly concerned with the Authority's findings as to non-compliance with requirements for gaming machine operations contrary to clauses 14, 17, 18, 20 and 91 of the *Gaming Machines Regulation 2010* as alleged in Grounds 17, 18, 19, 20 and 22 respectively.
- 2254.** The Authority repeats the observations that it has made above with respect to Mr Ashton Jnr as to the importance of liquor and gaming regulation, particularly with respect to the control of gaming machine operations.
- 2255.** Members of a club governing body are responsible to ensure that they provide systemic oversight of a club's compliance with minimum regulatory requirements, with particular compliance responsibilities arising from those functions conferred upon the board itself under the legislation.
- 2256.** Club directors should be aware, for example, of the type of gaming machine reports that the legislation requires be presented to the board at the relevant intervals.
- 2257.** While a club secretary is primarily responsible for day to day legislative compliance, if a club's directors are aware of some other form of systemic non-compliance (such as, for example, the "open door" policy) and do not take steps to monitor and rectify that non-compliance (by, for example, directing a secretary to take action), the directors may share in that responsibility for ongoing, systemic non-compliance. The Authority is satisfied, given the length of non-compliance with respect to legislative requirements regarding club membership and access to the Club premises, that the directors share responsibility for the Club's systemic failure to comply with these requirements.
- 2258.** Having assessed the Club's non-compliance during Mr Teale's tenure on a cumulative basis, the Authority would otherwise have considered that a period of 3 years disqualification is appropriate, in order to send a signal to other members of governing bodies as to the regulatory consequence of prolonged non-compliance of this nature.

**2259.** Nevertheless, the Authority has reduced this period in light of the mitigating factors noted above and orders, pursuant to section 57H(2)(g) of the Act, that Mr Allan Teale be disqualified from holding a regulated position within the registered clubs industry for **2 years**.

Disciplinary Action against Mr Chris Du Chesne (director)

**2260.** The Authority is satisfied, as alleged by the Complainant, that Mr Chris Du Chesne was appointed as a director of the Club on **28 March 2006** and held that position until **19 June 2007**. He was then reappointed as a Club director on **2 April 2014** until the date of the Complaint (3 December 2014).

**2261.** That is, Mr Du Chesne has served during a minority of the relevant period that is the subject of this Complaint.

**2262.** The Authority is satisfied, on the basis of its findings as set out above on Particular 30.4(a) of the Complaint, that:

- Ground 1 (club membership);
- Ground 3 (permitting benefits or advantages);
- Ground 4 (club reporting requirements);
- Ground 5 (Part 4A controls);
- Ground 8 (good faith requirements for membership);
- Ground 9 (register of disclosures);
- Ground 11 (guest records);
- Ground 13 (register of full members);
- Ground 14 (register of temporary members);
- Ground 15 (admission of residents within 5km);
- Ground 16 (membership procedural requirements);
- Ground 17 (records of gaming machine prizes);
- Ground 18 (gaming machine cash flow reports to board);
- Ground 19 (gaming machine net analysis reports to board);
- Ground 20 (gaming machine clearance records);
- Ground 22 (progressive jackpot records);
- Ground 23 (licence condition for NRL Grand Final); and
- Ground 24 (section 41 Registered Clubs Act),

have been established in whole or part.

**2263.** The Authority is further satisfied that all of those Grounds, save for Ground 23, concern matters of non-compliance that the Authority is satisfied are reasonably attributable to the scope of responsibility of the Club's directors and are *a/so* attributable to Mr Du Chesne to the extent that they occurred during his tenure as a director. They are matters that either involved board functions or involve statutory non-compliance over a sustained period such that they indicate systemic failure in which the board should share in responsibility with the relevant secretaries.

**2264.** The Authority is satisfied, on the basis of its findings as set out above, that *none* of the sub-Particulars of Particular 30.4(b) of the Complaint are established against Mr Du Chesne.

- 2265.** The Authority is satisfied, on the basis of its findings as set out above, that *all* of the sub-Particulars of Particular 30.4(c) in relation to non-compliance with the Club's Articles of Association are established against Mr Du Chesne.
- 2266.** The Authority is satisfied, on the basis of its findings as set out above, that all of the sub-Particulars of Particular 30.4(d) in relation to the Club's lack of internal controls are established against Mr Du Chesne, save for sub-Particular 30.4(d)(3) in relation to the "high risk" practice of pre-signing cheques instituted by Mr Levy.
- 2267.** As noted above, the Authority is satisfied that Mr Chris Du Chesne is not a fit and proper person to be a director of the registered club, by reason that the Complainant has established that he did not demonstrate the degree of knowledge, ability, care and diligence that the Authority would expect from a reasonably competent director of a club of this scale. There is no basis for impugning Mr Du Chesne's honesty.
- 2268.** While the adverse findings against the Club in respect of Grounds 1 through 24 of the Complaint have been considered on a cumulative basis and notwithstanding Mr Du Chesne's relatively shorter period of service as a director, the Authority is particularly concerned with findings indicating that the Club operated something akin to an "open door" policy in terms of access to the Club (which was evident during his first and second period of tenure), and non-observance of statutory membership requirements.
- 2269.** The Authority is particularly concerned with the Authority's findings as to non-compliance with requirements for the reporting of gaming machine operations to the Board contrary to clauses 14, 17, 18, 20 and 91 of the *Gaming Machines Regulation 2010* as alleged in Grounds 17, 18, 19, 20 and 22 respectively.
- 2270.** The Authority repeats the observations that it has made above with respect to Mr Ashton Jnr as to the importance of liquor and gaming regulation, particularly with respect to gaming machine operations.
- 2271.** The Authority repeats the observations that it has made above with respect to Mr Ashton Jnr as to the role of Mr Wily as deed administrator and the false sense of security this may have given the Ex-Officers.
- 2272.** The Authority repeats the observations that it has made above with respect to Mr Ashton Jnr as to the age and technical nature of some of the incidents of non-compliance that have been established against the Club.
- 2273.** The Authority repeats the observations that it has made above with respect to Mr Ashton Jnr as to the contended "delay" in OLGR commencing this Complaint and the duty of club officers to demonstrate the requisite honesty, knowledge and ability when ensuring a club's compliance.
- 2274.** The Authority repeats the observations that it has made above with respect to Mr Teale as to the responsibilities of club directors for operational oversight of club compliance.
- 2275.** Having assessed the Club's non-compliance during Mr Du Chesne's two periods of tenure, on a cumulative basis, the Authority would otherwise have considered that a period of 3 years disqualification is appropriate, in order to send a signal to other

members of governing bodies as to the regulatory consequence of prolonged non-compliance of this nature.

- 2276.** Nevertheless, the Authority has reduced this period in light of the mitigating factors noted above and orders, pursuant to section 57H(2)(g) of the Act, that Mr Chris Du Chesne be disqualified from holding a regulated position within the registered clubs industry for **2 years**.

Disciplinary Action against Mr Leonard Whitney (former director)

- 2277.** The Authority is satisfied, as alleged by the Complainant, that Mr Leonard Whitney served as a director of the Club between the following periods:

- 27 August 1995 – 4 November 1995;
- 25 August 1996 – 4 January 1997;
- 31 August 1997 – 26 August 2001;
- 28 August 2003 – 1 October 2007;
- 28 May 2008 – 30 September 2010; and
- 9 August 2011 – 2 April 2014.

- 2278.** That is, Mr Whitney served during a substantial proportion of the relevant period of this Complaint.

- 2279.** The Authority is satisfied, on the basis of its findings as set out above on Particular 31.3(a) of the Complaint, that:

- Ground 1 (club membership);
- Ground 3 (permitting benefits or advantages);
- Ground 4 (club reporting requirements);
- Ground 5 (Part 4A controls);
- Ground 8 (good faith requirements for membership);
- Ground 9 (register of disclosures);
- Ground 10 (governing body meetings);
- Ground 11 (guest records);
- Ground 12 (annual governing body elections);
- Ground 14 (register of temporary members);
- Ground 15 (admission of residents within 5km);
- Ground 16 (membership procedural requirements);
- Ground 17 (records of gaming machine prizes);
- Ground 18 (gaming machine cash flow reports to board);
- Ground 19 (gaming machine net analysis reports to board);
- Ground 20 (gaming machine clearance records);
- Ground 24 (section 41 Registered Clubs Act),

have been established in whole or part.

- 2280.** The Authority is further satisfied that all of those Grounds concern matters of non-compliance that the Authority is satisfied are reasonably attributable to the scope of responsibility of the Club's directors and are *also* attributable to Mr Whitney to the extent that they occurred during his tenure as a director. They are matters that either involved board functions or involve statutory non-compliance over a sustained period such that they indicate systemic failure in which the board should share in responsibility with the relevant secretaries.

- 2281.** The Authority is satisfied, on the basis of its findings as set out above, that *none* of the sub-Particulars of Particular 31.3(b) of the Complaint are established against Mr Whitney.
- 2282.** The Authority is satisfied, on the basis of its findings as set out above, that *all* of the sub-Particulars of Particular 31.3(c) in relation to non-compliance with the Club's Articles of Association are established against Mr Whitney.
- 2283.** The Authority is satisfied, on the basis of its findings as set out above, that all of the sub-Particulars of Particular 31.3(d) in relation to the Club's lack of internal controls are established against Mr Whitney, save for sub-Particular 31.3(d)(4) in relation to the "high risk" practice of pre-signing cheques instituted by Mr Levy.
- 2284.** As noted above, the Authority is satisfied that Mr Leonard Whitney is not a fit and proper person to be a director of the registered club, by reason that the Complainant has established that he did not demonstrate the degree of knowledge, ability, care and diligence that the Authority would expect from a reasonably competent director of a club of this scale. There is no basis for impugning Mr Whitney's honesty.
- 2285.** While the adverse findings against the Club in respect of Grounds 1 through 24 of the Complaint have been considered on a cumulative basis, the Authority is particularly concerned with findings indicating that the Club operated something akin to an "open door" policy in terms of access to the Club and non-observance of statutory membership requirements.
- 2286.** The Authority is particularly concerned with the Authority's findings as to non-compliance with requirements for gaming machine operations contrary to clauses 14, 17, 18 and 20 of the *Gaming Machines Regulation 2010* as alleged in Grounds 17, 18, 19 and 20 respectively.
- 2287.** The Authority repeats the observations that it has made above with respect to Mr Ashton Jnr as to the importance of liquor and gaming regulation, particularly with respect to gaming machine operations.
- 2288.** The Authority repeats the observations that it has made above with respect to Mr Ashton Jnr as to the role of Mr Wily as deed administrator and the false sense of security this may have given the Ex-Officers.
- 2289.** The Authority repeats the observations that it has made above with respect to Mr Ashton Jnr as to the age and technical nature of some of the incidents of non-compliance that have been established against the Club.
- 2290.** The Authority repeats the observations that it has made above with respect to Mr Ashton Jnr as to the contended "delay" in OLGR commencing this Complaint and the duty of club officers to demonstrate the requisite honesty, knowledge and ability when ensuring a club's compliance.
- 2291.** The Authority repeats the observations that it has made above with respect to Mr Teale as to the responsibilities of Club directors for operational oversight of Club compliance.

- 2292.** Having assessed the Club's non-compliance during Mr Whitney's various periods of tenure on a cumulative basis, the Authority would otherwise have considered that a period of 3 years disqualification is appropriate, in order to send a signal to other members of governing bodies as to the regulatory consequence of prolonged non-compliance of this nature.
- 2293.** Nevertheless, the Authority has reduced this period in light of the mitigating factors noted above and orders, pursuant to section 57H(2)(g) of the Act, that Mr Leonard Whitney be disqualified from holding a regulated position within the registered clubs industry for **2 years**.

Disciplinary Action against Mr Luke McKew (former director)

- 2294.** The Authority is satisfied, as alleged by the Complainant, that Mr Luke McKew was appointed as a director of the Club on **30 May 2012** and held that position until **2 April 2014**.
- 2295.** That is, Mr McKew served as a director for a relatively limited portion of the relevant period of this Complaint.
- 2296.** The Authority is satisfied, on the basis of its findings as set out above on Particular 32.3(a) of the Complaint, that:
- Ground 3 (permitting benefits or advantages);
  - Ground 4 (club reporting requirements);
  - Ground 5 (Part 4A controls);
  - Ground 8 (good faith requirements for membership);
  - Ground 9 (register of disclosures);
  - Ground 10 (governing body meetings);
  - Ground 11 (guest records);
  - Ground 12 (annual governing body elections);
  - Ground 14 (register of temporary members);
  - Ground 15 (admission of residents within 5km);
  - Ground 16 (membership procedural requirements);
  - Ground 17 (records of gaming machine prizes);
  - Ground 18 (gaming machine cash flow reports to board);
  - Ground 19 (gaming machine net analysis reports to board);
  - Ground 20 (gaming machine clearance records); and
  - Ground 24 (section 41 Registered Clubs Act),

have been established in whole or part.

- 2297.** The Authority is further satisfied that all of those Grounds concern matters of non-compliance that the Authority is satisfied are reasonably attributable to the scope of responsibility of the Club's directors and are *also* attributable to Mr McKew to the extent that they occurred during his tenure as a director. They are matters that either involved board functions or involve statutory non-compliance over a sustained period such that they indicate systemic failure in which the board should share in responsibility with the relevant secretaries.
- 2298.** The Authority is satisfied, on the basis of its findings as set out above, that *none* of the sub-Particulars of Particular 32.3(b) of the Complaint are established against Mr McKew.

- 2299.** The Authority is satisfied, on the basis of its findings as set out above, that *all* of the sub-Particulars of Particular 32.3(c) in relation to the Club's non-compliance with its Articles of Association are established against Mr McKew.
- 2300.** The Authority is satisfied, on the basis of its findings as set out above, that all of the sub-Particulars of Particular 32.3(d) in relation to the Club's lack of internal controls are established against Mr McKew, save for sub-Particular 32.3(d)(3) in relation to the "high risk" practice of pre-signing cheques instituted by Mr Levy.
- 2301.** As noted above, the Authority is satisfied that Mr Luke McKew is not a fit and proper person to be a director of the registered club, by reason that the Complainant has established that he did not demonstrate the degree of knowledge, ability, care and diligence that the Authority would expect from a reasonably competent director of a club of this scale. There is no basis for impugning Mr McKew's honesty.
- 2302.** While the adverse findings against the Club in respect of Grounds 1 through 24 of the Complaint have been considered on a cumulative basis and notwithstanding Mr McKew's relatively shorter period of service as a director, the Authority is particularly concerned with findings indicating that the Club operated something akin to an "open door" policy in terms of access to the Club and non-observance of statutory membership requirements.
- 2303.** The Authority is particularly concerned with the Authority's findings as to non-compliance with requirements for the reporting of gaming machine operations to the Board contrary to clauses 14, 17, 18 and 20 of the *Gaming Machines Regulation 2010* as alleged in Grounds 17, 18, 19 and 20 respectively.
- 2304.** The Authority repeats the observations that it has made above with respect to Mr Ashton Jnr as to the importance of liquor and gaming regulation, particularly with respect to gaming machine operations.
- 2305.** The Authority repeats the observations that it has made above with respect to Mr Ashton Jnr as to the role of Mr Wily as deed administrator and the false sense of security this may have given the Ex-Officers.
- 2306.** The Authority repeats the observations that it has made above with respect to Mr Ashton Jnr as to the age and technical nature of some of the incidents of non-compliance that have been established against the Club.
- 2307.** The Authority repeats the observations that it has made above with respect to Mr Ashton Jnr as to the contended "delay" in OLGR commencing this Complaint and the duty of club officers to demonstrate the requisite honesty, knowledge and ability when ensuring a club's compliance.
- 2308.** The Authority repeats the observations that it has made above with respect to Mr Teale as to the responsibilities of Club directors for operational oversight of Club compliance.
- 2309.** Having assessed the Club's non-compliance during Mr McKew's tenure on a cumulative basis, the Authority would otherwise have considered that a period of 3 years disqualification is appropriate, in order to send a signal to other members of

governing bodies as to the regulatory consequence of prolonged non-compliance of this nature.

- 2310.** Nevertheless, the Authority has reduced this period in light of the mitigating factors noted above and orders, pursuant to section 57H(2)(g) of the Act, that Mr Luke McKew be disqualified from holding a regulated position within the registered clubs industry for **2 years**.

Disciplinary Action against Mr Robert Ashton Snr (director)

- 2311.** The Authority is satisfied, as alleged by the Complainant, that Mr Robert Ashton Snr was appointed as a director of the Club on **28 August 2003** until the date of the Complaint.
- 2312.** That is, Mr Ashton Snr served as a director across the gamut of the relevant period of this Complaint.
- 2313.** The Authority is satisfied, on the basis of its findings as set out above on Particular 33.3(a) of the Complaint, that:
- Ground 1 (club membership);
  - Ground 3 (permitting benefits or advantages);
  - Ground 4 (club reporting requirements);
  - Ground 5 (Part 4A controls);
  - Ground 8 (good faith requirements for membership);
  - Ground 9 (register of disclosures);
  - Ground 10 (governing body meetings);
  - Ground 11 (guest records);
  - Ground 12 (annual governing body elections);
  - Ground 13 (register of full members);
  - Ground 14 (register of temporary members);
  - Ground 15 (admission of residents within 5km);
  - Ground 16 (membership procedural requirements);
  - Ground 17 (records of gaming machine prizes);
  - Ground 18 (gaming machine cash flow reports to board);
  - Ground 19 (gaming machine net analysis reports to board);
  - Ground 20 (gaming machine clearance records);
  - Ground 22 (progressive jackpot records);
  - Ground 23 (licence condition for NRL Grand Final); and
  - Ground 24 (section 41 Registered Clubs Act),

have been established in whole or part.

- 2314.** The Authority is further satisfied that all of those Grounds, save for Ground 23, concern matters of non-compliance that the Authority is satisfied are reasonably attributable to the scope of responsibility of the Club's directors and are *also* attributable to Mr Ashton Snr to the extent that they occurred during his tenure as a director. They are matters that either involved board functions or involve statutory non-compliance over a sustained period such that they indicate systemic failure in which the board should share in responsibility with the relevant secretaries.



- 2315.** The Authority is satisfied, on the basis of its findings as set out above, that *none* of the sub-Particulars of Particular 33.3(b) of the Complaint are established against Mr Ashton Snr.
- 2316.** The Authority is satisfied, on the basis of its findings as set out above, that *all* of the sub-Particulars of Particular 33.3(c) in relation to the Club's non-compliance with its Articles of Association are established against Mr Ashton Snr.
- 2317.** The Authority is satisfied, on the basis of its findings as set out above, that all of the sub-Particulars of Particular 33.3(d) in relation to the Club's lack of internal controls are established against Mr Ashton Snr, save for sub-Particular 33.3(d)(4) in relation to the "high risk" practice of pre-signing cheques instituted by Mr Levy.
- 2318.** As noted above, the Authority is satisfied that Mr Robert Ashton Snr is not a fit and proper person to be a director of the registered club, by reason that the Complainant has established that he did not demonstrate the degree of knowledge, ability, care and diligence that the Authority would expect from a reasonably competent director of a club of this scale. There is no basis for impugning Mr Ashton Snr's honesty.
- 2319.** While the adverse findings against the Club in respect of Grounds 1 through 24 of the Complaint have been considered on a cumulative basis, the Authority is particularly concerned with findings indicating that the Club operated something akin to an "open door" policy in terms of access to the Club (which was evident during Mr Ashton Snr's tenure), and non-observance of statutory membership requirements.
- 2320.** The Authority is particularly concerned with the Authority's findings as to non-compliance with requirements for the reporting of gaming machine operations to the Board contrary to clauses 14, 17, 18, 20 and 91 of the *Gaming Machines Regulation 2010* as alleged in Grounds 17, 18, 19, 20 and 22 respectively.
- 2321.** The Authority repeats the observations that it has made above with respect to Mr Ashton Jnr as to the importance of liquor and gaming regulation, particularly with respect to gaming machine operations.
- 2322.** The Authority repeats the observations that it has made above with respect to Mr Ashton Jnr as to the role of Mr Wily as deed administrator and the false sense of security this may have given the Ex-Officers.
- 2323.** The Authority repeats the observations that it has made above with respect to Mr Ashton Jnr as to the age and technical nature of some of the incidents of non-compliance that have been established against the Club.
- 2324.** The Authority repeats the observations that it has made above with respect to Mr Ashton Jnr as to the contended "delay" in OLGR commencing this Complaint and the duty of club officers to demonstrate the requisite honesty, knowledge and ability when ensuring a club's compliance.
- 2325.** The Authority repeats the observations that it has made above with respect to Mr Teale as to the responsibilities of Club directors for operational oversight of Club compliance.

- 2326.** Having assessed the Club's non-compliance during Mr Ashton Snr's period of tenure on a cumulative basis, the Authority would otherwise have considered that a period of 3 years disqualification is appropriate, in order to send a signal to other members of governing bodies as to the regulatory consequence of prolonged non-compliance of this nature.
- 2327.** Nevertheless, the Authority has reduced this period in light of the mitigating factors noted above and orders, pursuant to section 57H(2)(g) of the Act, that Mr Robert Ashton Snr be disqualified from holding a regulated position within the registered clubs industry for **2 years**.

#### **Disciplinary Action against Mr Brian Kirk (former director and Club President)**

- 2328.** The Authority is satisfied, as alleged by the Complainant, that Mr Brian Kirk was appointed as a director of the Club and its President on **28 August 2003** and held that position until **2 April 2014**.
- 2329.** That is, Mr Kirk held that position across most of the relevant period that is the subject of this Complaint.
- 2330.** The Authority is satisfied, on the basis of its findings as set out above on Particular 29.3(a) of the Complaint, that:
- Ground 1 (club membership);
  - Ground 3 (permitting benefits or advantages);
  - Ground 4 (club reporting requirements);
  - Ground 5 (Part 4A controls);
  - Ground 8 (good faith requirements for membership);
  - Ground 9 (register of disclosures);
  - Ground 10 (governing body meetings);
  - Ground 11 (guest records);
  - Ground 12 (annual governing body elections);
  - Ground 14 (register of temporary members);
  - Ground 15 (admission of residents within 5km);
  - Ground 16 (membership procedural requirements);
  - Ground 17 (records of gaming machine prizes);
  - Ground 18 (gaming machine cash flow reports to board);
  - Ground 19 (gaming machine net analysis reports to board);
  - Ground 20 (gaming machine clearance records); and
  - Ground 24 (section 41 Registered Clubs Act),

have been established in whole or part.

- 2331.** The Authority is further satisfied that all of those Grounds concern matters of non-compliance that the Authority is satisfied are reasonably attributable to the scope of responsibility of the Club's directors and are *also* attributable to Mr Kirk to the extent that they occurred during his tenure as a director and President of the Club. They are matters that either involved board functions or involve statutory non-compliance over a sustained period such that they indicate systemic failure in which the board should share in responsibility with the relevant secretaries.

- 2332.** The Authority is satisfied, on the basis of its findings as set out above, that *none* of the sub-Particulars of Particular 29.3(b) of the Complaint are established against Mr Kirk.
- 2333.** The Authority is satisfied, on the basis of its findings as set out above, that *all* of the sub-Particulars of Particular 29.3(c) are established against Mr Kirk.
- 2334.** The Authority is satisfied, on the basis of its findings as set out above, that all of the sub-Particulars of Particular 29.3(d) are established against Mr Kirk, save for sub-Particular 29.3(d)(4) in relation to the “high risk” practice of pre-signing cheques instituted by Mr Levy.
- 2335.** As noted above, the Authority is satisfied that Mr Brian Kirk is not a fit and proper person to be a director and President of the registered club, by reason that the Complainant has established that he did not demonstrate the degree of knowledge, ability, care and diligence that the Authority would expect from a reasonably competent director of a club of this scale. There is no basis for impugning Mr Kirk’s honesty.
- 2336.** While the adverse findings against the Club in respect of Grounds 1 through 24 of the Complaint have been considered on a cumulative basis, the Authority is particularly concerned with findings indicating that the Club operated something akin to an “open door” policy in terms of access to the Club and non-observance of statutory membership requirements.
- 2337.** The Authority is particularly concerned with the Authority’s findings as to non-compliance with requirements for gaming machine operations contrary to clauses 14, 17, 18 and 20 of the *Gaming Machines Regulation 2010* as alleged in Grounds 17, 18, 19 and 20 respectively.
- 2338.** The Authority repeats the observations that it has made above with respect to Mr Ashton Jnr as to the importance of liquor and gaming regulation, particularly with respect to gaming machine operations.
- 2339.** The Authority repeats the observations that it has made above with respect to Mr Teale as to the responsibilities of Club directors for operational oversight of Club compliance.
- 2340.** However, the Authority notes and accepts Mr Kirk’s submissions of 29 May 2015 that he made efforts to introduce greater rigour with regard to the Club’s fulfilment of its compliance obligations, including:
- Reviewing information available on the *ClubsNSW* website about governance;
  - Reviewing *ClubsNSW* circulars and bringing them to the attention of other directors during board meetings;
  - Mr Kirk became a director of the *Club Directors’ Institute*. He received circulars from the Institute, which helped him keep abreast of developments in the law and compliance issues.
  - On or around 14 August 2012, Mr Kirk completed *ClubsNSW* training in Legal and Financial Risk Management.

- When mandatory director training was introduced, Mr Kirk consulted with ClubsNSW, attended mandatory training days and encouraged other members of the Board to do the same. Mr Kirk monitored and reviewed training requirements.
- Mr Kirk completed training in Responsible Service of Alcohol and Responsible Conduct of Gambling to familiarise himself with Club and staff obligations.

**2341.** Notwithstanding Mr Kirk's efforts to undergo training and improve compliance, the Authority is satisfied that Mr Kirk's position as Club President brings with it additional rights and duties with respect to the performance of the board.

**2342.** The Authority notes the observations of Austin J in *ASIC v Rich* [2003] NSWSC 85 (24 February 2003) at paragraphs 58 and 59, which state as follows:

*In Woolworths Ltd v Kelly, Mahoney JA found that a person who is chairman of a board of directors has "additional rights and duties and additional opportunities" (4 ACSR at 445). He continued:*

*"Ordinarily it is the function of a chairman to settle the agenda of the meetings of the board: at least he exercises a significant influence upon it. He is in a position, in the sense here relevant, to ensure that proposals are brought forward for consideration by the directors at their meetings. And this, in a particular case, may affect the content of fiduciary duties which he owes to his company."*

*Mahoney JA's observations dealt with the content of the fiduciary duties of a person who is both a director and chairman of the board. The case was not about the duty of care. The chairman's non-procedural functions were considered by Rogers J in AWA Ltd v Daniels (1992) 7 ACSR 759, where the duty of care was in issue. He said (at 867):*

*"The third division of function is between the directors and the chairman of the board of directors. The chairman is responsible to a greater extent than any other director for the performance of the board as a whole and each member of it. The chairman has the primary responsibility of selecting matters and documents to be brought to the board's attention, in formulating the policy of the board and in promoting the position of the company. In discharging his or her responsibilities the chairman would co-operate with the managing director if the two positions are separate or otherwise with senior management: cf Brown & Grogan Company Directors, 3rd ed 1974, pp 97, 99, 100; United Kingdom Company Affairs Committee Report 1972."*

*Nothing said by the Court of Appeal on appeal from Rogers J's judgment (Daniels v Anderson (1995) 37 NSWLR 438) calls these observations into question.*

**2343.** Further, paragraph 70 of that judgment indicates that a Chairperson or President is subject to greater responsibilities than the other directors:

*The Commission's evidence does not purport to establish, directly, that Mr Greaves had specific duties on particular occasions. It seeks to establish his "responsibilities" by reference to usual practice. Much of the literature of corporate governance is in the form of exhortations and voluntary codes of conduct, not suitable to constitute legal duties. It is sometimes vague and less than compelling, and must always be used with caution. Nevertheless, in my opinion this literature is relevant to the ascertainment of the responsibilities to which Mr Greaves was subject during the period from January to March 2001. Taken as a whole, the Commission's evidence appears to me to provide a*

*reasonably arguable case for the view that Mr Greaves had the responsibilities pleaded in paragraph 9 of the SFASC.*

- 2344.** The Authority repeats the observations that it has made above with respect to Mr Ashton Jnr as to the age and technical nature of some of the incidents of non-compliance that have been established against the Club.
- 2345.** The Authority repeats the observations that it has made above with respect to Mr Ashton Jnr as to the contended “delay” in OLGR commencing this Complaint and the duty of club officers to demonstrate the requisite honesty, knowledge and ability when ensuring a club’s compliance.
- 2346.** The Authority notes and accepts Mr Kirk’s submission that he relied upon Mr Wily to ensure compliance with the Club’s obligations and minimum statutory requirements, but that was a mistaken belief while the Club operated pursuant to a Deed of Company Arrangement and Amended Deed of Company Arrangement and it reflects adversely upon the degree of knowledge and ability that may be expected of a director and President of a registered club.
- 2347.** Having assessed the Club’s non-compliance during Mr Kirk’s tenure, on a cumulative basis, the Authority would otherwise have considered that a period of 3 years disqualification is appropriate, in order to send a signal to other members of governing bodies as to the regulatory consequence of prolonged non-compliance of this nature.
- 2348.** Nevertheless, the Authority has reduced this period in light of the mitigating factors noted above and orders, pursuant to section 57H(2)(g) of the Act, that Mr Brian Kirk be disqualified from holding a regulated position within the registered clubs industry for **2 years**.

#### **No Disciplinary Action Available for Mr Wily (administrator)**

- 2349.** The Authority notes that the allegations made by the Complainant in Ground 27 of the Complaint in relation to Mr Wily were not established. Mr Wily did not act in the capacity of either secretary or member of the governing body of the Club and the Authority does not have the jurisdiction under section 57F(3)(g) of the Act to consider his fitness as an administrator, or a deed administrator in relation to a registered club.
- 2350.** The scope and purpose of the Act does not extend to dealing with persons acting in the capacity of administrator or deed administrator, within the meaning of the *Corporations Act*. No disciplinary action is to be taken against Mr Wily pursuant to section 57H of the Act.

#### **ORDER**

- 2351.** In light of the fact that the Club is now in liquidation, the Authority does not consider it necessary to formally order the removal from office of any of the Ex-Officers who were still serving as at the date of the Complaint.

**2352.** In conclusion, the Authority has decided to take the following disciplinary action:

- (i) In respect of Grounds 1 through 24 of the Complaint, the Authority **cancels** the Club's licence pursuant to section 57H(2)(c) of the Act with effect from the date of the decision.
- (ii) In respect of Ground 25, the Authority **declares**, under section 57H(2)(g) of the Act, that the former secretary, Mr Robert Ashton Jnr, is ineligible to stand for election or to be appointed to, or to hold office in, the position of secretary or member of the governing body of the Club and all other registered clubs in New South Wales, for a period of two (2) years from the date of this decision.
- (iii) In respect of Ground 26, the Authority **declares**, under section 57H(2)(g) of the Act, that the former secretary, Mr Marcus Levy, is ineligible to stand for election or to be appointed to, or to hold office in, the position of secretary or member of the governing body of the Club and all other registered clubs in New South Wales, for a period of two (2) years from the date of this decision.
- (iv) In respect of Ground 28, the Authority **declares**, under section 57H(2)(g) of the Act, that the former director, Mr Allan Teale, is ineligible to stand for election or to be appointed to, or to hold office in, the position of secretary or member of the governing body of the Club and all other registered clubs in New South Wales, for a period of two (2) years from the date of this decision.
- (v) In respect of Ground 29, the Authority **declares**, under section 57H(2)(g) of the Act, that the former director and President, Mr Brian Kirk, is ineligible to stand for election or to be appointed to, or to hold office in, the position of secretary or member of the governing body of the Club and all other registered clubs in New South Wales, for a period of two (2) years from the date of this decision.
- (vi) In respect of Ground 30, the Authority **declares**, under section 57H(2)(g) of the Act, that the former director, Mr Chris Du Chesne, is ineligible to stand for election or to be appointed to, or to hold office in, the position of secretary or member of the governing body of the Club and all other registered clubs in New South Wales, for a period of two (2) years from the date of this decision.
- (vii) In respect of Ground 31, the Authority **declares**, under section 57H(2)(g) of the Act, that the former director, Mr Leonard Whitney, is ineligible to stand for election or to be appointed to, or to hold office in, the position of secretary or member of the governing body of the Club and all other registered clubs in New South Wales, for a period of two (2) years from the date of this decision.
- (viii) In respect of Ground 32, the Authority **declares**, under section 57H(2)(g) of the Act, that the former director, Mr Luke McKew, is ineligible to stand for election or to be appointed to, or to hold office in, the position of secretary or member of the governing body of the Club and all other registered clubs in New South Wales, for a period of two (2) years from the date of this decision.
- (ix) In respect of Ground 33, the Authority **declares**, under section 57H(2)(g) of the Act, that the former director, Mr Robert Ashton Snr, is ineligible to stand for election or to be appointed to, or to hold office in, the position of secretary

or member of the governing body of the Club and all other registered clubs in New South Wales, for a period of two (2) years from the date of this decision.

- (x) The Authority **orders** the Club, under section 57H(2)(i)(i) of the Act, to pay to the NSW Department of Justice part of the costs incurred by the (then) Secretary of the Department of Trade and Investment on the investigation or inquiry in relation to the Club under section 35A of the Act, being **\$88,305.35**, to be paid to the Department of Justice within 28 days of the date of this decision.

## REVIEW RIGHTS

**2353.** Pursuant to section 57L of the Act, an application for review of this decision may be made to the New South Wales Civil and Administrative Tribunal (**NCAT**) by the Complainant, the Club or any person against whom disciplinary action is taken by the Authority under Part 6A of the Act. An application for review should be made within 28 days of the date of notification of this decision.

**2354.** Please visit the NCAT website at [www.ncat.nsw.gov.au](http://www.ncat.nsw.gov.au) or contact the NCAT Registry at Level 9, John Maddison Tower, 86-90 Goulburn Street, Sydney for further information.

Yours sincerely



DB Armati

**Deputy Chairperson**

for and on behalf of the **Independent Liquor and Gaming Authority**

**30 March 2016**