



Office of the Secretary

**Report of the Independent Review
Into matters associated with the Paddington Bowling Club Limited**

Authorised Proactive Release

This independent review was ordered by the then Deputy Premier on 11 April 2014 in response to concerns raised about PBC.

Over 23,000 pages of documents were provided to Messrs Holding Redlich during the review. As stated on page xiii of the Report, the Independent Reviewer was asked to conduct a desktop review only. No interviews were conducted and there was no power to compel the production of additional documents from other persons or bodies.

The report was delivered by Messrs Holding Redlich Lawyers on 11 August 2014 and referred to the Independent Commission Against Corruption (ICAC) on 14 August 2014. It was not appropriate for the report to be publicly released whilst it was under consideration by ICAC.

The Department is undertaking a number of actions in response to the systemic issues highlighted in the report including staff training provided by ICAC in fraud and corruption prevention and the progressive delivery of training in robust decision making.

A new agency governance structure is also being rolled out which includes revised policies, processes and procedures for dealing in land and exercising delegated legislative powers.

The ICAC has now advised that as a result of the actions taken by this Department in response to issues identified in the report they will not be taking any further action.

In these circumstances I have decided it would be appropriate to release a redacted version of the Report under s7 of the *Government Information (Public Access) Act 2009*.

It was necessary to redact some portions of the Report as there are overriding public interest considerations against the release of that information. Those considerations include legal professional privilege and the need to protect Cabinet related material. In addition, the identity of individuals and conjecture about possible breaches or sanctions has been redacted as the review process could not afford the people involved procedural fairness ahead of any consideration of the Report by ICAC.

Because the Independent Review may not have had access to all relevant information, the Department reserves its rights in relation to some specific conclusions of fact or law in the Independent Review.

Mark I Paterson AO
Secretary

22.6.15



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**Report of the Independent Review
Into matters associated with Paddington
Bowling Club Ltd**

**Prepared for the Department of Trade & Investment,
Regional Infrastructure & Services**

11 August 2014

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Executive Summary and Findings of the Independent Review

Background

- (i) On 11 April 2014 The Hon. Andrew Stoner, MP, Deputy Premier of New South Wales, Minister for Trade and Investment and Minister for Regional Infrastructure and Services, ordered an independent review into certain matters associated with Paddington Bowling Club Ltd (the **Independent Review**). The scope of the Independent Review is set out in the Terms of Reference (**TOR**) (located at **Annexure A**).
- (ii) Paddington Bowling Club Ltd (**PBC**) had occupied the Crown land located at 2 Quarry Street in Paddington, also known as Lots 3 and 5 in Deposited Plan 1156846 (the **Land**),¹ under a perpetual lease (the **Perpetual Lease**) since the 1960s.
- (iii) In 2006 the Department of Lands (as it was known then) was asked to consider an application to purchase the Land then leased by PBC. The Department of Lands declined the application.
- (iv) The Land was the subject of a number of leasehold transactions between 2009 and 2013 (together, the **Transactions**) including the surrender of the Perpetual Lease by PBC and the grant of a fifty year commercial lease (the **Lease**), which was transferred to a property development company, CSKS Holdings Pty Ltd (**CSKS Holdings**). Among other subsequent Transactions, CSKS Holdings sought and obtained landowner's consent for the lodgement of a development application with Woollahra Municipal Council (the **Council**) seeking approval for the construction of a child care centre on part of the Land (the **Development Application**). The local community in Paddington, most notably the group known as Friends of Quarry Street and the Council, have raised concerns in relation to the Transactions and their handling by the government agencies that were responsible for the administration of Crown land throughout the relevant time period.
- (v) The Crown Lands Division within the Department of Lands was responsible for the management of Crown lands and the administration of the *Crown Lands Act 1989 (NSW)* (the **Crown Lands Act**) until 1 July 2009. On 1 July 2009 the Department of Lands was abolished and the Crown Lands Division was replaced with the Land and Property Management Authority (the **LPMA**), which was administered within the Department of Services Technology and Administration (the **Department of Services**). The LPMA was abolished on 4 April 2011 and all responsibility for Crown land was transferred to the Department of Primary Industries, which was established on that day. The Department of Primary Industries later ceased to be a division of the Government Service on 1 July 2011 and was established as an office within the Department of Trade and Investment, Regional Infrastructure and Services (the **DTIRIS**). Since

¹ A copy of the Deposited Plan is at Annexure B.

Executive Summary and Findings of the Independent Review

1 July 2011, the DTIRIS has been the relevant government agency responsible for the management and administration of Crown lands and the Crown Lands Act.

- (vi) The Minister responsible for the administration of the Crown Lands Act was the Minister for Lands until 2 April 2011 and since then, the Minister for Primary Industries.²
- (vii) Where conduct of the Department of Lands, the Department of Services and the DTIRIS is referred to, this is a reference to the conduct of the officers and employees of the Department of Lands, the Department of Services and the DTIRIS respectively.
- (viii) Concerns have also been raised regarding the response by **D19** and the Department of Gaming and Racing to an inquiry commissioned by the Director of Liquor and Gaming under the now repealed section 41X of the *Registered Clubs Act 1976* (NSW) (the *Registered Clubs Act*) into the management and the administration of PBC (the *2007 Inquiry*). The inquiry was conducted during 2007 by Brian Guest of the NSW Bar and a report was delivered by him in March 2008 (the *Report of the 2007 Inquiry*).
- (ix) The OLGR was an office of the Department of Arts, Sport and Recreation until 1 July 2009. Thereafter, the OLGR was an office of the Department of Communities. Since 4 April 2011, it has been an office of the DTIRIS. This Report will refer to the Department of Gaming and Racing and its subsequent iteration, the NSW Office of Liquor, Gaming and Racing, as the OLGR.

Findings of the Independent Review

Crown lands

- (x) Certain of the Transactions (the Proposal) were agreed to in principle in or shortly following a meeting held on 26 September 2008 between **D1 E1 E2**
[REDACTED]
[REDACTED]
[REDACTED]. This was a direct negotiation for the purpose of the Independent Commission Against Corruption's (ICAC) "*Guidelines for Managing Risks In Direct Negotiations*" dated May 2006 (the *ICAC Guidelines*) and was not appropriate.
- (xi) The Proposal comprised the surrender of the Perpetual Lease, the grant of the Lease to PBC, the transfer of the Lease to CSKS Holdings, the sub-lease of part of the Land from CSKS Holdings to PBC and the mortgage of the Lease. The declared context for the Proposal was the

² The Minister for Primary Industries was not responsible for particular Crown reserves that were administered by the Minister for Planning and Infrastructure/Minister for Planning, the Minister for the Environment/Minister for Climate Change and the Environment and the Minister for Sport and Recreation. The Land that is the subject of the Decisions referred to in the Terms of Reference is not one of these Crown reserves.

prospect of establishing a gymnasium and a child care centre on the Land as well as maintaining some of the lawn bowling facilities.

- (xii) No contemporaneous record of the meeting on 26 September 2008 made by any of the attendees of the meeting has been made available for the purpose of the Independent Review. The substance of what was agreed at or shortly following the meeting is recorded in various emails between the officers of the Department of Lands who were apparently tasked with giving effect to the Proposal. To the extent that these emails were copied to **D1**, there is no email from **D1** disputing their contents. The few emails from **D1** in response endorse rather than contradict what was said about the meeting and the Proposal. On this basis it is assumed that the emails correctly record what was agreed at or shortly following the meeting.
- (xiii) Between 2009 and 2013, PBC or CSKS Holdings submitted separate applications in relation to each of the proposed Transactions (together, the Applications), including the Proposal.
- (xiv) The decisions in relation to those Applications are the decisions subject of the Independent Review (paragraphs 1-3 of the TOR, collectively, the Decisions) and took place between 2009 and 2013. The Applications were considered by various delegates of the Minister for Lands and the Minister for Primary Industries, who were also employees of the Crown Lands Division of the Department of Lands and then subsequently employees of the LPMA within the Department of Services, and then the DTIRIS.
- (xv) The approval of each Application was approached from the perspective that the Proposal had been already been agreed by **D1** as a package in 2008, before any formal application was submitted.
- (xvi) The Transactions were not the subject of any transparent competitive tender process, nor were there any negotiations with other interested parties.
- (xvii) The effect of the Transactions is that Crown land has been transferred to a private company and a financial opportunity was provided to a private company in the absence of a competitive process.
- (xviii) In granting landowner's consent to CSKS Holdings for the lodgement of the Development Application with the Council, the delegate of the Minister for Primary Industries, at that point in time, may have allowed the Land, which is a Crown reserve, to be used for a purpose other than the declared purpose. If so, the delegate of the Minister for Primary Industries has not complied with the requirements of the Crown Lands Act.

Paragraph 1 of the TOR

- (xix) Having regard to the documents considered for the purpose of the Independent Review:
- the delegate of the Minister for Lands and the delegate of the Minister for Primary Industries, and the Department of Lands and the Department of Services did not comply with:
 - the relevant legislation in place at the time in relation to the decision to change the use of the Land (see Chapter 3);
 - the relevant legislation, government policies and procedures in place at the time in relation to the decision to convert the Perpetual Lease to the Lease (see Chapter 2); and
 - the delegate of the Minister for Primary Industries and the DTIRIS did not comply with:
 - the relevant government policies and procedures in place at the time in relation to the decision to consent to the transfer of the Lease from PBC to CSKS Holdings (see Chapter 4);
 - the relevant government policies and procedures in place at the time in relation to the decision to consent to the sub-lease of part of the Land from CSKS Holdings to PBC (see Chapter 5);
 - the relevant government policies and procedures in place at the time in relation to the decision to consent to CSKS Holdings mortgaging the Lease (see Chapter 6); and
 - the relevant legislation in place at the time in relation to the decision to consent to the submission of the Development Application (see Chapter 7).³
- (xx) Having regard to the documents considered for the purpose of the Independent Review, it is not possible to conclude whether or not the delegate for the Minister for Primary Industries and the DTIRIS complied with the relevant legislation, government policies and procedures in place at the time in relation to the decision to request the removal of the notification from the title of Lots 3 and 5 (see Chapter 8).
- (xxi) Having regard to the documents considered for the purpose of the Independent Review, there is evidence that **D1** engaged in corrupt conduct falling within section 8(1)(a) of the *Independent Commission Against Corruption Act 1988 (NSW) (ICAC Act)* in relation to his

³ This conclusion is based on the purpose of a child care centre not being within the meaning of “community and sporting club facilities and tourist facilities and services”, which is the declared purpose of the Land.

agreement with the Proposal and his apparent subsequent direction to officers of the Department of Lands and Department of Services to give effect to the Proposal (see Chapter 9). There is no evidence in the documents considered for the purpose of the Independent Review that such corrupt conduct falls within section 9 of the ICAC Act. The Proposal specifically encompassed the decisions referred to at paragraph 1(ii) to (v) of the TOR and, by extension, the balance of the decisions referred to at paragraph 1 of the TOR.

Paragraph 2 of the TOR

(xxii) Having regard to the documents considered for the purpose of the Independent Review, [REDACTED] D1 [REDACTED], did engage in direct negotiations with PBC in relation to the Proposal (see Chapter 10).

Paragraph 3 of the TOR

(xxiii) Having regard to the documents considered for the purpose of the Independent Review, the ICAC Guidelines and the NSW procurement policy framework in place at the time, the direct negotiations that [REDACTED] D1 [REDACTED], engaged in with PBC in 2008 in agreeing with the Proposal were not appropriate (see Chapter 11).

The OLGR

- (xxiv) Following the 2007 Inquiry and the Report of the 2007 Inquiry, the Director of Liquor and Gaming considered and took steps to refer matters arising from the Report of the 2007 Inquiry to law enforcement agencies having an interest in the matter and made orders requiring PBC to provide its members with information about the findings of the Report of the 2007 Inquiry. In addition, the OLGR, as an office of the Department of Arts, Sport and Recreation and an office of the Department of Communities, considered commencing proceedings and making complaints for contraventions of the Registered Clubs Act, considered further investigations and took steps to amend the Registered Clubs Act. None of these additional matters considered by the OLGR were pursued.
- (xxv) Mr Wily was not validly appointed as voluntary administrator of PBC, or Deed Administrator of the Deed of Company Arrangement that PBC entered into with its creditors dated 24 March 2003 (the Deed of Company Arrangement), pursuant to section 41 of the Registered Clubs Act. Rather, Mr Wily was appointed as voluntary administrator of PBC pursuant to section 436A of the *Corporations Act 2001* (Cth) (*Corporations Act*).

Paragraph 4 of the TOR

(xxvi) Having regard to the legislation, government policies and the OLGR procedures in place at the time of the Report of the 2007 Inquiry, and the findings of fact in the Report of the 2007 Inquiry, the OLGR⁴ or **D19** should have undertaken one or more of the following actions:

- having regard to the matters relating to **E3 E4** in the Report of the 2007 Inquiry, **D19** should have been satisfied that this may have related to
- having regard to the factual matters in, and findings of, the Report of the 2007 Inquiry in respect of **E5**, **D19** should have been satisfied that this may have related to a breach of **E5** duties under the Corporations Act and referred the matter to the Australian Securities and Investments Commission (ASIC) under section 41Z(2)(a) of the Registered Clubs Act;
- the **D19** should have made an order under section 41ZA(1)(a) of the Registered Clubs Act, providing each member with information about the findings of the 2007 Inquiry within a specified time;
- the OLGR should have considered if there were any contraventions of the Registered Clubs Act arising from the findings of, or factual matters referred to in, the Report of the 2007 Inquiry, which warranted enforcement;
- **D19** should have concluded that Mr Wily was not validly appointed as the voluntary administrator of PBC and Deed Administrator of the Deed of Company Arrangement in accordance with section 41 of the Registered Clubs Act;
- **D19** should have considered and taken advice on whether Mr Wily should be removed as Deed Administrator of the Deed of Company Arrangement, including making an application under section 41A of the Registered Clubs Act to the Licensing Court for the appointment of another person to administer the affairs of PBC,

(together, discussed in Chapter 12).

⁴ The OLGR was an office of the Department of Arts, Sport and Recreation until 1 July 2009. From 1 July 2009, the OLGR was an office of the Department of Communities until 4 April 2011.

(xxvii) Having regard to the documents considered as part of the Independent Review, the following actions were undertaken by the OLGR following the Report of the 2007 Inquiry:

- the Director of Liquor and Gaming made an order under section 41Z(1)(a) of the Registered Clubs Act, requiring PBC to provide its members with the Report of the 2007 Inquiry by posting an electronic link on PBC's website and by providing a copy of the Report of the 2007 Inquiry to members by prepaid mail within 14 days of the date of the letter giving notice of the order;
- the OLGR, as an office of the Department of Arts, Sport and Recreation, prepared a document titled "Review of 2007 Inquiry into Paddington Bowling Club Limited (subject to Deed of Company Arrangement) conducted under S41X of the Registered Clubs Act and recommendations" summarising the factual matters referred to in, and the findings of, the Report of the 2007 Inquiry (the **OLGR Recommendations Document**). The OLGR Recommendations Document also:
 - suggested questions be put to Mr Wily as Deed Administrator of the Deed of Company Arrangement;
 - considered whether breaches of the Registered Clubs Act and the *Gaming Machines Act 2001 (NSW)* (**Gaming Machines Act**) had occurred;
 - considered possible legal proceedings and complaints in respect of identified breaches of the Registered Clubs Act and the Gaming Machines Act;
 - recommended further investigations be undertaken; and
 - recommended legislative amendments to the Registered Clubs Act and the Gaming Machines Act for the Director of Liquor and Gaming's consideration;
- the complaints and legal proceedings identified in the OLGR Recommendations Document were not progressed by the OLGR neither as an office of the Department of Arts, Sport and Recreation nor as an office of the Department of Communities;
- further steps by the OLGR, as an office of the Department of Arts, Sport and Recreation and as an office of the Department of Communities, were taken to amend the Registered Clubs Act but amendment of the Registered Clubs Act was ultimately not pursued; and
- the Director of Liquor and Gaming referred matters arising out of the Report of the 2007 Inquiry to the ASIC on 4 November 2008 (however the ASIC concluded its investigation on 5 November 2010 and did not take any further action on the basis of the documents it had at that time),

(together, discussed in Chapter 13).

Conduct of the Independent Review and Structure of this Report

Conduct of the Independent Review

- (xxviii) The Independent Review has been conducted on the basis of a “desktop” review of documents; that is, without conducting interviews. No power to compel any person, body or authority to provide documents was associated with the Independent Review.
- (xxix) The documents provided by the DTIRIS and the OLGR and considered for the purpose of the Independent Review are listed at Annexure C. This Report is only based upon a review of those documents and the searches, legislation and case law referred to in this Report. A supplementary report may be provided in the event that further documents relevant to the TOR become available.
- (xxx) A dramatis personae is located at Annexure D and a chronology of the relevant events is located at Annexure E.

Structure of this Report

- (xxxi) This Report is divided into two parts, with Part A addressing paragraphs 1 to 3 of the TOR (the Crown lease) and Part B addressing paragraph 4 of the TOR (the OLGR response to the Report of the 2007 Inquiry).
- (xxxii) Part A is divided into eleven chapters addressing paragraphs 1 to 3 of the TOR in the following order:

- Chapter 1** Relevant events leading up to the decisions referred to in the TOR.
- Chapter 2** The decision to convert the Perpetual Lease to the Lease: did the Department and/or the Minister/Minister’s delegate comply with the relevant legislation, government policies and Department procedures in place at the time? (paragraph 1(a)(ii) of the TOR)⁵
- Chapter 3** The decision to change the use of the Land to “Community and Sporting Club Facilities, Tourist Facilities and Services”: did the Department and/or the Minister/Minister’s delegate comply with the relevant legislation, government policies and Department procedures in place at the time? (paragraph 1(a)(i) of the TOR)
- Chapter 4** The decision to consent to the transfer of the Lease from PBC to CSKS Holdings: did the Department and/or the Minister/Minister’s delegate comply with the relevant legislation, government policies and Department procedures in place at the time? (paragraph 1(a)(iii) of the TOR)

⁵ Chronological order is adopted in this Report, rather than the order of the TOR.

- Chapter 5** The decision to consent to the sub-lease from CSKS Holdings to PBC over part of the Land: did the Department and/or the Minister/Minister's delegate comply with the relevant legislation, government policies and Department procedures in place at the time? (paragraph 1(a)(iv) of the TOR)
- Chapter 6** The decision to consent to the mortgage over the Lease: did the Department and/or the Minister/Minister's delegate comply with the relevant legislation, government policies and Department procedures in place at the time? (paragraph 1(a)(v) of the TOR)
- Chapter 7** The decision to grant landowner's consent to CSKS Holdings for the submission of a development application for the construction of a child care centre on the Land: did the Department and/or the Minister/Minister's delegate comply with the relevant legislation, government policies and Department procedures in place at the time? (paragraph 1(a)(vi) of the TOR)
- Chapter 8** The decision to remove certain notifications from the title of the Land: did the Department and/or the Minister/Minister's delegate comply with the relevant legislation, government policies and Department procedures in place at the time? (paragraph 1(a)(vii) of the TOR)
- Chapter 9** In relation to the decisions referred to, did the Department and/or the Minister/Minister's delegate engage in any corrupt conduct? (paragraphs 1(b)(i) to (vii) of the TOR)
- Chapter 10** In relation to the decisions referred to, were there any direct negotiations between the Department and PBC or CSKS Holdings? (paragraph 2 of the TOR)
- Chapter 11** Were those direct negotiations appropriate with reference to the ICAC Guidelines on Direct Negotiations and the NSW procurement policy framework in place at the time? (paragraph 3 of the TOR)

Conduct of the Independent Review and Structure of this Report

(xxxiii) Part B is divided into two chapters addressing paragraph 4 of the TOR in the following order:

Chapter 12 What actions, referrals and further investigations into PBC should the OLGR or **D19** have undertaken with regard to the legislation, government policies and OLGR procedure in place at the time of the Report of the 2007 Inquiry and the findings of fact set out in the Report of the 2007 Inquiry? (paragraph 4(a) of TOR)

Chapter 13 What actions, referrals and further investigations into PBC did the OLGR or the Director of Liquor and Gaming undertake at the time of the Report of the 2007 Inquiry? (paragraph 4(b) of the TOR)

PART A: THE CROWN LEASE

Chapter 1 Relevant Events to the Decisions and matters referred to in the Terms of Reference

1. The Perpetual Lease previously held over the Land by PBC was held for the purpose of "Erection of Buildings and Recreation".⁶ The Land was and remains Crown land and, until 11 December 2009, was reserved for the public purpose of "recreation activities". Improvements on the Land included the clubhouse, bowling greens, tennis courts, constructed access and parking. Immediately to the west and north of the Land is Trumper Park, which is a dedicated reserve 500267. The Trust Manager of the Crown Reserve is the Council. Trumper Park was dedicated for the purpose of "recreational and community use".⁷
2. For many years, PBC operated bowling greens and a licensed clubhouse on the Land and, from the 1990s, part of the Land was sub-let to the Palms Tennis Centre for the operation of two tennis courts.⁸
3. By 1999, PBC was having difficulty in maintaining its membership and began to struggle financially. In early 1999, Bruce Malouf and Pat Garvey approached PBC with a proposal to open a new restaurant called "St Trinians".⁹ PBC saw this as an opportunity to gain new members and improve revenue and entered into an arrangement with Mr Malouf whereby the St Trinians restaurant and all club activities would be operated under a management and catering agreement between PBC and Sports Marketing Pty Limited (**Sports Marketing**), a company of which Mr Malouf was a director (the **Management and Catering Agreement**).¹⁰
4. Within a few months, the St Trinians restaurant failed and Mr Malouf's involvement with PBC ceased. Phillip Malouf, Mr Malouf's brother, took over the management of PBC. However, PBC's financial struggle continued with PBC recording significant trading losses.¹¹

⁶ The Perpetual Lease registered on 5 April 1961 (Annexure C, 2122).

⁷ The Lease Briefing Memo (Annexure C, 2119).

⁸ The Report of the 2007 Inquiry, page 1.

⁹ The Report of the 2007 Inquiry, page 1.

¹⁰ The Report of the 2007 Inquiry, page 1.

¹¹ The Report of the 2007 Inquiry, page 2.

5. In mid 2000, Phillip Malouf requested that his accountant tally up the amounts that the Maloufs¹² had paid to or on behalf of PBC.¹³ On 11 August 2000, Phillip Malouf's accountant sent PBC a statement of account from B52 Pty Limited (B52) in the sum of \$1,192,204.52, which was the amount said to be owed by PBC to B52. B52 was a company of which Mr Malouf's mother was a director at that time and which provided funds to Sports Marketing for the purpose of the St Trinians restaurant.¹⁴
6. Following cash advances for working capital at PBC, the amount alleged to be owed by PBC increased from \$1,192,204.52 to \$1,270,354. The Report of the 2007 Inquiry found that an amount totalling \$1,270,354 was expended by the Maloufs¹⁵ but that it had not been substantiated that this amount was in the nature of a loan by the Maloufs to PBC.¹⁶
7. The ASIC deregistered PBC on 18 February 2002 as it had failed to lodge annual returns.¹⁷ The directors of PBC applied to the Supreme Court of NSW to reinstate the registration of PBC. That application was heard by his Honour Justice Hamilton on 19 and 20 September 2002. Justice Hamilton made orders reinstating the registration of PBC and appointing Andrew Hugh Jenner Wily of Armstrong Wily & Co as Receiver and Manager of PBC until further order.¹⁸
8. On 16 October 2002, the ATO issued director penalty notices to some of the directors of PBC for outstanding tax liabilities of PBC.¹⁹ At a board meeting on 24 October 2002, the directors resolved to appoint Mr Wily as the voluntary administrator of PBC pursuant to section 436A of the Corporations Act and Mr Wily accepted the appointment.²⁰
9. Mr Wily developed a strategy to improve PBC's position and to pay its creditors whereby PBC would convert the Perpetual Lease to freehold title, and then on-sell the freehold title to a developer, Woollahra Gardens Pty Ltd (later known as Paddington Bowling and Sporting Club Pty Ltd and now known as CSKS Holdings),²¹ with the funds to be received by PBC from the sale to be used to pay out all creditors.²²

¹² See paragraph 335(b) of this Report.

¹³ The Report of the 2007 Inquiry, paragraph 3.19.

¹⁴ The Report of the 2007 Inquiry, paragraph 3.20.

¹⁵ The Report of the 2007 Inquiry, paragraph 5.2(a).

¹⁶ The Report of the 2007 Inquiry, paragraph 5.2(b).

¹⁷ Current and historical ASIC extract for PBC.

¹⁸ *Moon v ASIC* [2002] NSWSC 885.

¹⁹ The Report of the 2007 Inquiry, paragraph 7.4.

²⁰ As to whether this appointment was valid having regard to section 41 of the Registered Clubs Act, see chapter 12.

²¹ For convenience, in this Report the term CSKS Holdings will be used to refer all former names of that entity.

²² Affidavits have been sworn in unrelated proceedings that this deal was put together to settle a debt owed by Mr Wily to Michael Sanchez, a director of CSKS Holdings from 19 August 2009 to 1 March 2010: paragraph 33 of the Affidavit of Owen Salmon sworn 6 September 2006 (Annexure C, 2083) and paragraph 1 of the Affidavit of Steven John Brown made 6 September 2006 (Annexure C, 2082).

10. This strategy was incorporated into the Deed of Company Arrangement.²³ Mr Wily was the Deed Administrator of the Deed of Company Arrangement. The Deed of Company Arrangement included an option for two years to CSKS Holdings to purchase the Land from PBC after PBC obtained the freehold title (the **Option to Purchase the Land**).²⁴
11. The Deed of Company Arrangement provided that Mr Wily could grant CSKS Holdings, or its nominee (approved by Mr Wily), right to manage the business of PBC.²⁵ Mr Wily appointed Marcus Levy as the manager of PBC.
12. Mr Levy became the manager and company secretary of PBC on 27 May 2003. On the same day, PBC entered into a deed with ML Management (NSW) Pty Limited (**ML Management**) for administrative and consultative services.²⁶ Mr Levy was the sole director and shareholder of ML Management.
13. Also on 27 May 2003, PBC entered into a deed with VS Management Pty Ltd (**VS Management**) for marketing, management and promotional services. Vanessa Sanchez was the sole director and shareholder of VS Management.²⁷ Ms Sanchez was the partner of Mr Levy and the daughter of Mr Sanchez.
14. At the time of entry into the Deed of Company Arrangement, the director and secretary of CSKS Holdings was Anthony Brooks.²⁸ Mr Brooks was also the lawyer who acted for PBC in relation to the proposal to convert the Perpetual Lease to freehold and the later proposal to surrender the Perpetual Lease and obtain a commercial lease over the Land. Mr Brooks also later acted for CSKS Holdings in relation to some of the Transactions.
15. It is relevant to note that Brian Kirk was appointed a director of PBC from 28 August 2003 and resigned as director on 2 April 2014. Mr Kirk was a director of Redmane Pty Ltd (**Redmane**) from 11 August 1998. Redmane was in the business of property development. Mr Kirk was also (at some time) an employee of Benchmark Australia Pty Ltd (**Benchmark Australia**). Mr Sanchez and Christian Sanchez (Mr Sanchez' son, the current sole director and secretary of CSKS Holdings, since 1 March 2010) were directors of Benchmark Australia at various times.²⁹

²³ Clause 8 of the Deed of Company Arrangement (Annexure C, 3698). The Deed of Company Arrangement was amended in 6 September 2006 following the Department of Lands' rejection of the application to purchase the Land (Annexure C, 2209).

²⁴ This was only contained in the Deed of Company Arrangement entered into on 24 March 2003.

²⁵ Clause 8 of the Deed of Company Arrangement (Annexure C, 3698)

²⁶ The Report of the 2007 Inquiry, paragraph 10.6.

²⁷ The Report of the 2007 Inquiry, paragraph 10.10.

²⁸ Tony Brooks was a director of CSKS Holdings and its company secretary from 5 March 2003 to 10 August 2006.

²⁹ Michael Sanchez was a director of Benchmark Australia Pty Ltd from 26 June 1998 to 31 July 1998 and then again from 4 June 2012 to 15 July 2013; Christian Sanchez was a director of Benchmark Australia Pty Ltd from 13 January 2010 to 4 June 2012.

16. The proposal to convert the Perpetual Lease to freehold title was submitted in a formal application to the Department of Lands in 2006 (the **Freehold Conversion Proposal**).³⁰ The Freehold Conversion Proposal was initially agreed in principle by the Department of Lands but eventually refused in September 2006. The Department of Lands' reasons for refusing the Freehold Conversion Proposal included that it was not satisfied that PBC would:

- (a) retain ownership of the Land;
- (b) remain viable for the foreseeable future; or
- (c) remain in occupation of the site for the long term.³¹

17. In refusing the Freehold Conversion Proposal, the Department of Lands also stated the following:

"It is neither in the public interest to proceed with the sale of the land to PBC in these circumstances, nor is it appropriate to permit such a sale of Crown property in a situation where the land is clearly intended to be on sold to a private company."³²

"It is not in the public's interest to sell land, that in all likelihood will not remain available for use by the public;"³³

"It is contrary to ICAC guidelines to sell public land that (apparently) will provide financial opportunity to a private company without competition;"³⁴

"It is contrary to ICAC guidelines to sell land through a process that has been neither transparent nor fully;"³⁵

18. The Council also opposed the Freehold Conversion Proposal.

19. Following numerous complaints to the OLGR, then an office of the Department of Arts, Sport and Recreation, especially in relation to PBC's administration continuing for a lengthy period of time, the then Director of Liquor and Gaming arranged for the holding of the 2007 Inquiry.³⁶ The findings of the Report of the 2007 Inquiry are set out at Annexure F and are discussed in further detail in Part B of this Report.

³⁰ The Report of the 2007 Inquiry, page 57.

³¹ Letter from the Department of Lands to PBC dated 26 September 2007 (Annexure C, 2196).

³² Ibid.

³³ Department of Lands Memorandum GM06/140 dated 22 September 2007 (Annexure C, 55).

³⁴ Ibid.

³⁵ Ibid.

³⁶ The Report of the 2007 Inquiry, page 1.

20. A meeting was held on 26 September 2008 between **D1 E1 E2** at which the Proposal was discussed.³⁷ This was at least the second meeting between PBC and **D1** an earlier meeting having been held prior to 4 September 2008.³⁸
21. Within days of this meeting, an email was sent by **D2** to other officers of the Department of Lands which referred to the meeting and to an agreement in principle to the Proposal.³⁹
22. The Crown Lands Division immediately began developing a strategy to implement the Proposal, which was contained in a document titled "Paddington Bowling Club – lease Project Strategy" (the **Strategy Document**). In developing the Strategy Document, officers of the Department of Lands attended a further meeting with **E1 E6** on 5 November 2008 to discuss the Proposal,⁴⁰ the notes from which were incorporated into a later version of the Strategy Document.
23. PBC formally lodged an application with the Department of Lands in early 2009 to obtain a fifty year commercial lease over the Land and an area adjacent to the Land, being a part of Trumper Park and managed by the Council as the Trust Manager (the **Lease Application**).⁴¹ PBC put forward the Lease Application on the basis that, following the grant of the proposed commercial lease, the lease would be transferred to CSKS Holdings, consideration for which would enable PBC to repay its debts⁴² and discharge the Deed of Company Arrangement.
24. Shortly after the Lease Application was submitted, but before the Department of Lands had commenced its evaluation of the Lease Application, PBC and the Department of Lands commenced negotiating the terms of the proposed commercial lease. The Council was also notified in writing that the Department of Lands had received the Lease Application.⁴³ In response, the Council promptly wrote a letter to the Minister for Lands at the time, The Hon. Tony Kelly MLC, expressing its concerns and objections in relation to granting a commercial lease to PBC.⁴⁴
25. During 2009 the Department of Lands and then its subsequent iteration, the Department of Services, considered PBC's business case and the public interest test response and, where

³⁷ Email from **D2 to D3 D4 D5** dated 29 September 2008 (Annexure C, 307).

³⁸ Email from **D6 to D7 D8** dated 4 September 2008 (Annexure C, 1304).

³⁹ Ibid to 31.

⁴⁰ Email from **D5 to D8 D2 D7** dated 5 November 2008 (Annexure C, 334).

⁴¹ Letter from Club to Department for Lands enclosing the Lease Application dated 29 January 2009 (Annexure C, 85).

⁴² As recorded in the Deed of Company Arrangement, although the findings of the Report of the 2007 Inquiry question the nature and extent of the debt alleged to be owed by PBC to B52 into question.

⁴³ Email from **D2 to D9** dated 3 February 2009 (Annexure C, 364).

⁴⁴ Letter from Woollahra Council to the Minister for Lands dated 11 February 2009 (Annexure C, 2145).

Chapter 1: Relevant Events to the Decisions and matters referred to in the TOR

necessary, sought further information from PBC. During this period, a subdivision was lodged changing the description of the title to Lots 3 and 5 of Deposited Plan 1156846. The reserved purpose use of the Land was also changed to "Community and Sporting Club Facilities, Tourist Facilities and Services" in respect of Lots 3 and 5 and an additional purpose of "Access" in respect of Lot 3. This ultimately reflected the permitted use under the Lease.

26. Following a recommendation to the Minister that the Lease Application be granted,⁴⁵ on 24 December 2009 a delegate of the Minister formally approved the grant of a relevant interest, being a commercial lease, pursuant to section 34A of the Crown Lands Act.⁴⁶
27. On 30 November 2010, the Perpetual Lease was surrendered.⁴⁷ The Lease was for a term of fifty years and commenced on 1 December 2010. The permitted use under the Lease was "Community and Sporting Club Facilities, Tourist Facilities and Services and Access".
28. There is no suggestion in the documents considered for the purpose of the Independent Review that the Department of Lands, the Department of Services or the DTIRIS sought internal or external legal advice in relation to the Proposal, the Lease, or the application to obtain landowner's consent to submit an application from CSKS Holdings to the Council for the development of a child care centre and the demolition of two tennis courts (the **Application for Landowner's Consent**). Any legal advice sought in relation to the Transactions was in relation to peripheral issues.
29. In early 2011, a delegate of the Minister for Lands requested that certain restrictions be placed on the title of the Land.⁴⁸ In late 2011, PBC lodged an application to transfer the Lease to CSKS Holdings.⁴⁹ Also in late 2011, CSKS Holdings submitted an application to sub-lease part of the Land to PBC,⁵⁰ and submitted a request to the DTIRIS to obtain the Minister's consent to mortgage the Lease, the proposed mortgagee being Commonwealth Bank of Australia Ltd (the **Commonwealth Bank**).⁵¹
30. Immediately following the receipt of the Applications, the DTIRIS prepared briefing memorandums in respect of each Application, recommending to the Minister for Primary Industries that consent be granted to transfer the Lease to CSKS Holdings, sub-lease part of the Land to PBC, and mortgage the Lease.

⁴⁵ Briefing memorandum from **D7 to D3** dated 23 December 2009 (Annexure C, 2119).

⁴⁶ Letter from the Department to PBC dated 24 December 2009 (Annexure C, 2118).

⁴⁷ Surrender of Perpetual Lease (Annexure C, 142).

⁴⁸ Historical title searches for Lots 3 and 5 of Deposited Plan 1156846.

⁴⁹ Letter from Surry Partners to Department dated 3 November 2011 (Annexure C, 162).

⁵⁰ *Ibid.*

⁵¹ Letter from Surry Partners to Department dated 24 October 2011 (Annexure C, 825).

31. Subsequently, a delegate of the Minister for Primary Industries granted consent to the transfer of the Lease from PBC to CSKS Holdings,⁵² and granted consent to mortgage the Lease (the **Mortgage**).⁵³ The delegate of the Minister for Primary Industries also granted consent for the transfer of part of the Lease by way of sub-lease from CSKS Holdings to PBC (the **Sub-lease**).⁵⁴ When the delegate of the Minister for Primary Industries granted consent to transfer the Lease to CSKS Holdings, it was noted by the delegate of the Minister for Primary Industries that, upon transfer of the Lease, CSKS Holdings would issue a sub-lease to PBC allowing PBC to stay in occupation of the existing clubhouse building and the two bowling greens on the Land. The Sub-lease did not include the two bowling greens, but did provide PBC, the sub-lessee, with exclusive use of the two bowling greens for the term of the Sub-lease.
32. The Council compulsorily acquired Lots 2, 8 and 9 in Deposited Plan 1156846, being Crown land within Trumper Park, during early 2012.⁵⁵ The DTIRIS agreed to waive the requirement for compensation at market value associated with this compulsory acquisition.⁵⁶
33. In early 2013, Mr Kirk approached the DTIRIS with the Application for Landowner's Consent. On 5 March 2013, the delegate of the Minister for Primary Industries provided landowner's consent.⁵⁷
34. The Development Application for the development of a child care centre and demolition of two tennis courts was subsequently submitted to the Council for determination.⁵⁸ The Council deferred determination of the Development Application pending the findings of the Independent Review.⁵⁹
35. On 3 July 2014, CSKS Holdings commenced proceedings in the Land and Environment Court in the form of a Class 4 Summons seeking orders that the Council determine the Development Application. As at the date of this Report, the Land and Environment Court proceedings have not been determined.
36. The Council has resolved to determine the Development Application and has referred the Development Application to its Development Control Committee for determination on 18 August 2018.⁶⁰

⁵² Letter from Department to Surry Partners dated 19 December 2011 (Annexure C, 2182).

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Gazettal notification dated 17 February 2012 (Annexure C, 3701).

⁵⁶ Letter from Land and Property Management Authority to Woollahra Municipal Council dated 24 December 2009 (Annexure C, 80).

⁵⁷ Letter from Department to Woollahra Council dated 5 March 2013 (Annexure C, 4).

⁵⁸ Annexure C, 966.

⁵⁹ Annexure C, 215.

⁶⁰ Minutes of Council Meeting held 28 July 2014, page 2931 (Annexure C, 3696).

Chapter 2 The decision to convert the Perpetual Lease to the Lease: did the Department and/or the Minister/Minister's delegate comply with the relevant legislation, government policies and Department procedures in place at the time?

Decision Overview

37. A meeting was held on 26 September 2008 between **D1 E1 E2** during which the Proposal was discussed.⁶¹ As stated above, this was at least the second meeting of its type having regard to an email dated 4 September 2008 referencing a meeting between PBC and **D1** which had taken place "recently".⁶² The context and genesis of the Proposal and how long and in what circumstances it had been under consideration by PBC and **D1** before these two meetings is unknown.
38. As stated above, the Proposal comprised the surrender of the Perpetual Lease, the grant of the Lease to PBC, the transfer of the Lease to CSKS Holdings, the sub-lease of part of the Land from CSKS Holdings to PBC and the mortgage of the Lease. The declared context for the Proposal was the establishment of a gym and a child care centre on the Land as well as retaining some of the lawn bowling facilities.
39. The Proposal was agreed at or shortly following the meeting on 26 September 2008.⁶³ Within days of the meeting, emails were circulated amongst officers of the Crown Lands Division of the Department of Lands noting that the Proposal had been agreed.⁶⁴ As stated above, these emails are the only records of the meetings and were not written by any of the known attendees of the meetings. To the extent that the emails were copied to **D1**, there are no emails (provided for the purpose of the Independent Review) from **D1** responding to or disputing what is recorded in these emails.

⁶¹ Email from **D2 to D3 D4 D5** dated 29 September 2008 (Annexure C, 307).

⁶² Email from **D6 to D7 D8** dated 4 September 2008 (Annexure C, 305).

⁶³ Ibid.

⁶⁴ Email from **D2 to D3 D4 D5** dated 29 September 2008 (Annexure C, 307); Email from **D2 to D5 D10 D7 D11** dated 9 October 2008 (Annexure C, 309); Email from **D1 to D2** dated 26 October 2008 (Annexure C, 76).

40. The emails between officers of the Department of Lands in September and October 2008 make reference to the events which occurred prior to the submission of the Lease Application.⁶⁵ The Department of Lands' officers stated the following:

*"Apparently the Club met with D1 recently and they have been offered an additional lease over the car park area."*⁶⁶

*"D1 met with E1 E2 for the Paddo Bowling Club on 26 September. The proposal was put to the representatives that the perpetual lease be handed in and new lease that encompasses the current site and the road and car park for term of 50 years be offered to the Club. The lease will be for community purposes with a view to establishing say a gym, child care and maintain some of the lawn bowls. Whilst they argued strongly for a longer term they have now agreed to a 50 year term."*⁶⁷

*"D1 has agreed that the Club's perpetual lease be handed back in return for 50 year lease of the site which will include part of the adjoining reserve to allow parking and access to the reserve. The new lease will be for community and sporting purposes or for whatever accords with current zoning This will be controversial I propose that we meet and map out how we are going to deal with this and who will be responsible for what task along with time frames."*⁶⁸

41. It is not known whether the Proposal was indeed made by D1 as D2 email of 29 September 2008⁶⁹ suggests, or (and if so) the context in which that Proposal was made by D1; for example, if it was a counter proposal to an earlier proposal made by PBC. D6 email of 4 September 2008 suggests that a course of negotiations with PBC occurred.
42. The Department of Lands developed a strategy to implement the Proposal, which was contained in the Strategy Document. The Strategy Document was first created on 20 October

⁶⁵ There are also emails in later years in which it is noted that D1 had agreed to these Transactions in 2008, for example, email from D7 to D12 dated 5 March 2012 (Annexure C, 188) and email from E6 to D13 dated 29 November 2011 (Annexure C, 1452).

⁶⁶ Email from D6 to D7 D8 dated 4 September 2008 (Annexure C, 305).

⁶⁷ Email from D2 to D3 D4 D5 dated 29 September 2008 (Annexure C, 307).

⁶⁸ Email from D2 to D5 D10 D7 D11 dated 9 October 2008 (Annexure C, 309).

⁶⁹ Email from D2 to D3 D4 D5 dated 29 September 2008 (Annexure C, 307).

Chapter 2: The decision to convert the Perpetual Lease to the Lease

2008⁷⁰ and was subsequently developed following discussions between officers of the Department of Lands. Importantly, the Strategy Document stated the following:

"The proposed lease is to cover the existing perpetual lease site and car park within the Trumper Park The new lease is to be for recreation & community purposes to allow for any activities allowable under the current zoning ...

The Minister has given an undertaking that any proposal for the future of the site will subject to consultation with Council. A POM is seen as the best forum to do this ...

Land Assessment waiver will be undertaken after POM has been undertaken and adopted by the Minister

*Action on granting the proposed lease will commence after the adoption of the POM ...*⁷¹

43. In commenting on the Strategy Document in an email dated 26 October 2008, **D1** stated the following:

*"I share **D3** concern about the plan of management, especially with the council. However your first dot point covers the aspect of their granting of the new lease over the Paddo area plus throat section of Trumper Park needed.*

*The key aspects are that we need to get the ball rolling with the Club as you detail and then take on the council and get involved in their plan of management before it goes to public exhibition – especially if there are aspects QWE are not going to agree with."*⁷²

44. A further meeting was held on 5 November 2008 between **D2 D5** (also from the Department of Lands), **E1 E6** to discuss the Proposal. The Strategy Document was amended to incorporate the following notes in relation to this meeting:

*'**E6** indicated that the Club is seeking a lease for 50 years with immediate assignment to Woollahra Gardens Pty Ltd and immediate sub-lease back to PBC to match the deed of arrangement agreed by the administrator and creditors. Sale of lease will provide repayment of creditors' funds."*

*'**E1** indicated the lease purpose will need to match uses permitted under the zoning to allow a broad range of activities to be undertaken at the premises."*

⁷⁰ Email from **D2 to D5 D11 D14 D4** dated 20 October 2008 (Annexure C, 316).

⁷¹ Document titled "Paddington Bowling Club – lease Project Strategy" created by **D2** and dated 15 October 2008 (Annexure C, 315).

⁷² Email from **D1 to D2** dated 26 October 2008 (Annexure C, 76).

D2 provided E1 with lease application forms and D5 advised that any lease application must be accompanied by concurrence from the administrator.”

45. The Proposal was put to PBC’s members for approval at an annual general meeting held on 10 December 2008. The Explanatory Memorandum that was attached to the Agenda for this AGM stated the following:

“The Crown has agreed in principle to the following:

- to convert the Club’s lease into a fixed term lease on commercial terms;
- to incorporate land beside the Club’s land into the lease for essential access and car parking;
- to allow the Club to transfer the lease to a third party.”

46. This Agenda (and Explanatory Memorandum) was sent by E1 to D2 in draft form for approval on 14 November 2008.⁷³ D2 endorsed the Agenda.⁷⁴

47. The Lease Application was formally lodged by Tony Brooks on behalf of PBC on 29 January 2009, comprising the following documents:

- (a) a plan prepared by Harrison Friedman Surveyors indicating the land to which PBC sought to obtain a commercial lease;
- (b) a statement of intent for future business operations of PBC;
- (c) information from Mr Wily outlining the direction of the administration of PBC;
- (d) the financial reports for PBC’s operation for the years 2007 and 2008; and
- (e) minutes of the 2008 AGM of PBC held on 10 December 2008.

48. Shortly after receiving the Lease Application, the Department of Lands commenced negotiations as to the terms of the proposed lease. These negotiations were conducted by emails and meetings between D2, D7, D5 and E6.⁷⁵

49. The Crown Lands Division approached the Lease Application on the basis that D1 had already approved the Proposal. Members of the Crown Lands Division, particularly

⁷³ Email E1 to D2 dated 14 November 2008 (Annexure C, 72).

⁷⁴ Email D2 to E1 dated 14 November 2008 (Annexure C, 351).

⁷⁵ For example, email D5 to E6 dated 11 February 2009 (Annexure C, 2149); email from D7 to E6 dated 4 June 2009 (Annexure C, 2167); and email from D7 to E6 dated 8 September 2009 (Annexure C, 495).

D9 D2 D3 , then progressed the Lease Application. r
D7 regularly corresponded with E6 ,⁷⁶ and in his emails stated the following:

"in-principle approval to the granting of a 50-year lease has been given by D1 . Nevertheless, to satisfy probity and transparency requirements, we will need to ensure that the Club's application satisfies legislative requirements and our commercial business directive."⁷⁷

"I don't envisage any major hurdles to finalising a commercial lease, provided I can obtain the further information needed to satisfy normal probity and transparency requirements to confirm the Club's sustainability."⁷⁸

50. Prior to the grant of the Lease to PBC, the delegate of the Minister for Lands changed the reserve purpose of the Land, whereby Lots 3 and 5 were reserved for the purpose of "Community and Sporting Club Facilities and Tourist Facilities and Services" and Lot 3 was reserved for the additional purpose of "Access". The change of the reserved purpose of the Land is discussed in further detail in Chapter 3. These changes in the reserved purpose made the permitted use under the Lease consistent with the reserved purpose of the Land.
51. Following a briefing memorandum recommending that the Lease Application be granted, D3 as a delegate for the Minister for Lands, on 24 December 2009 formally approved the grant of a relevant interest, being the Lease, pursuant to section 34A of the Crown Lands Act. On 30 November 2010, the Perpetual Lease was surrendered and the Lease was executed. The Lease commenced on 1 December 2010.

What were the relevant legislative provisions, government policies and Department procedures in place at the time of granting consent to the Lease?

52. Crown land could not be leased unless the lease was authorised by the Crown Lands Act or the *Crown Lands (Continued Tenures) Act 1989* (the *Continued Tenures Act*).⁷⁹ The Crown Lands Act provided the Minister with the power to grant a lease over Crown land on behalf of the Crown in such manner and subject to such terms and conditions as the Minister determined.⁸⁰

⁷⁶ Current and historical ASIC search for CSKS Holdings.

⁷⁷ Email from D7 to E6 dated 2 April 2009 (Annexure C, 393).

⁷⁸ Email from D7 to E6 dated 6 April 2009 (Annexure C, 401).

⁷⁹ Section 6 of the Crown Lands Act.

⁸⁰ Section 34(1)(a) of the Crown Lands Act; Section 34AA of the Crown Lands Act did not apply to any of the Decisions subject of the TOR. It did not come into force until 27 November 2013.

53. The Department of Lands and the LPMA as an office within the Department of Services also had in place a number of policies that were relevant in considering an application for the grant of a lease over Crown land, including:
- (a) Department of Lands – Crown Land Division – Business Directives (2008-2011);⁸¹
 - (b) Crown Lands Division Circular 2009/58 – Inclusion of improvements in determining rent;⁸²
 - (c) Crown Lands Division Circular 2009/32 – Waiving of land assessment requirement;⁸³ and
 - (d) Office Practice Guidelines – Crown Land Management – Chapter 5 of the Crown Lands Act – Administration of Leases and Licences.⁸⁴
54. The relevant requirements contained in the Crown Lands Act and in the above policies are set out below. It is important to note that these policies were merely guidelines to the officers of the Departments in considering an application for the grant of a lease over Crown land. They were not mandatory.

Department's evaluation of the application

55. The policy "Department of Lands – Crown Land Division – Business Directives (2008-2011)" stated that an applicant for a lease of Crown land was responsible for providing a business case substantiating its proposal, which should have addressed the following:
- (a) the commercial viability of the proposed business;
 - (b) the commercial return to the Department;
 - (c) the timetable for implementation of the project;
 - (d) the compatibility of the proposal with the Department's business and policy objectives, including the principles of Crown land management;
 - (e) the capacity of the applicant to:
 - (i) perform lease obligations, including but not limited to the full payment of rent;
 - (ii) fund any proposed/required capital improvements plus ongoing operational maintenance obligations; and

⁸¹ Annexure C, 241.

⁸² Annexure C, 233.

⁸³ Annexure C, 235.

⁸⁴ Annexure C, 240.

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- (iii) operate the business (past and current bona fides, management experience etc.);
 - (f) the suitability of the site for the proposed use, including capability with any declared reserved purpose and statutory planning controls;
 - (g) for a long term lease, the longer term sustainability of the business; and
 - (h) any wider economic, environmental and social benefits.⁸⁵
56. The evaluation of an application for lease of Crown land by the Department of Lands and the Department of Services should have considered the following:
- (a) the viability of the applicant's proposal from a commercial point of view;
 - (b) whether the applicant had identified its current and proposed business entity status (e.g. business registration details including ABN and historic operating details);
 - (c) the compatibility of the proposal in comparison to the land's historic and visual setting;
 - (d) the applicant's ability to deliver the proposal from a technical and financial point of view; and
 - (e) the applicant's experience with respect to environmental and community relations issues.⁸⁶
57. The Lease was also required to be consistent with the principles of Crown land management,⁸⁷ which were as follows:
- (a) that environmental protection principles be observed in relation to the management and administration of Crown land;
 - (b) that the natural resources of Crown land (including water, soil, flora, fauna and scenic quality) be conserved wherever possible;
 - (c) that public use and enjoyment of appropriate Crown land be encouraged;
 - (d) that, where appropriate, multiple use of Crown land be encouraged;
 - (e) that, where appropriate, Crown land should be used and managed in such a way that both the land and its resources were sustained in perpetuity; and

⁸⁵ Department of Lands – Crown Land Division – Business Directives (2008-2011), paragraph 3.1 (Annexure C, 241).

⁸⁶ *Ibid*, paragraph 3.4.

⁸⁷ Section 10 of the Crown Lands Act.

- (f) that Crown land be occupied, used, sold, leased, licensed or otherwise dealt with in the best interests of the State consistent with the above principles.⁸⁸

Assessment of Crown land

- 58. The Minister could not exercise the power to grant a lease over Crown land unless the Minister was satisfied that the Crown land had been assessed under Part 3 of the Crown Lands Act.⁸⁹
- 59. However, the requirement to assess the land could be waived if the Minister was satisfied that it was in the public interest to grant the lease and, in granting the lease, the Minister had due regard to the principles of Crown land management.⁹⁰ The Department's policy "Crown Lands Division Circular 2009/32 – Waiving of land assessment requirement" included guidelines for reporting on Crown land assessment waivers.

60.

- 61. In addition, the Department's policy was to generally offer leases only for terms of up to twenty years. When identifying an acceptable duration of a lease, the Department was required to consider:

- (a) the need for the applicant to amortise any new and agreed investment; and
- (b) the applicant's financial justification of their requested lease term.⁹²

- 62. The Department should only have departed from the maximum term of twenty years where:

- (a) the Department was satisfied that the nature/use of the property dictated a need for a longer term of lease (e.g. significant public benefit) and determination of asset's residual value (if any) at the end of 20 years was not available or applicable; or
- (b) a longer term of lease was the only means of attracting a suitable tenant.⁹³

⁸⁸ Section 11 of the Crown Lands Act.

⁸⁹ Section 35(1) of the Crown Lands Act.

⁹⁰ Section 35(2) of the Crown Lands Act.

⁹¹ Section 34(3) of the Crown Lands Act.

⁹² Department of Lands – Crown Land Division – Business Directives (2008-2011), paragraph 4.3 (Annexure C, 241).

⁹³ *Ibid*, paragraph 4.1.

Did the Department and/or the Minister/Minister's delegate comply with the relevant legislation, government policies and Department procedures in place at the time?

Summary

63. Having regard to the documents considered for the purpose of the Independent Review, the Department of Lands and the Department of Services:
- (a) did not follow its policies in evaluating the Lease Application;
 - (b) in waiving the requirement to assess the Land, did not satisfy itself that it was in the public interest to surrender the Perpetual Lease, grant the Lease to PBC and change the use of the Land;
 - (c) [REDACTED]
 - (d) In granting a commercial lease for a term of fifty years, did not follow its policy of granting leases to a maximum term of twenty years.

Did the Department correctly evaluate the Lease Application?

64. For the reasons discussed below, the Department of Lands and the Department of Services did not evaluate the Lease Application in accordance with its policy requirements above at paragraphs 55 to 57. It is important to note that the Crown Lands Act did not impose on the Minister for Lands any requirement to consider particular factors prior to granting the Lease. The requirements above are found in the policies of the Department of Lands and Department of Services, which are not mandatory, and merely guidelines for its officers.
65. PBC's business case was submitted to the Department of Lands in a document titled "Statement of intent for Future Business Operations", which was submitted with the Lease Application. This included the following information:

"The Department's approval will facilitate the settlement of the Deed of Company Arrangement by the grant of a new 50 year lease by to PBC and then by a transfer of the same lease by PBC to [CSKS Holdings]. The Deed Administrator will then pay all creditors of the Club in full and final settlement and the Club will be released from administration and receivership."⁹⁴

⁹⁴ Statement of Intent for Future Business Operations of PBC, page 3 (Annexure C, 85).

"[The Club] will enter into a commercial lease with this [CSKS Holdings] and will be able to from time to time and by commercial agreement with the PBC carry out improvements, refurbishments and capital expenditure to the leasehold premises. The Vision of the Club is that this will take the form of a new clubhouse, improved conference services, as well as new facilities such as: childcare, a gymnasium and swimming facility, health/medical & beauty facilities and the possibility of any other facilities and activities allowable under the current land use zoning of the land."⁹⁵

"Indications are that over the next 12 months there will be an increase of 10% to 20% in poker machine revenue due to the community's acceptance of the State Government's stage 2 smoking laws in 2007. This return of lost revenue plus the input of capital from [CSKS Holdings] will enable the Club to move towards a first and major project within the next 2 years. This will be the design of a new function centre as a new first floor level of PBC and after its completion it is estimated revenue of the Club will increase by 25%."⁹⁶

66. The Statement of intent for Future Business Operations was not sufficient to meet the Department's business case requirements. It did not outline the commercial return to the Department, it did not address how the proposal would comply with the principles of Crown land management and it did not address the longer term sustainability of PBC's business.
67. The Department of Lands at this stage knew that the Statement of intent for Future Business Operations did not satisfy its business case requirements and the following was noted in emails between officers of the Crown Lands Division:

"While aspects of its Business Case are weak, if the Administrator can supply some supplementary information to support (unsubstantiated) claims of future profitability, then I think it will suffice."⁹⁷

"The 'Statement' constitutes their 'Business Case' but is insufficient to sustain their application for lease, at face value."⁹⁸

68. Accordingly, further information was requested from Mr Wily on 14 April 2009.⁹⁹ Mr Wily provided this further information by letter dated 17 April 2009.¹⁰⁰ This further information supplemented PBC's business case and stated:

"The Club attracts approximately 30,000 Corporate and Social bowlers per annum. VS Management Pty Ltd has a promotions contract with [PBC] and over the last 5 years has

⁹⁵ Ibid, page 3.

⁹⁶ Ibid, page 4.

⁹⁷ Email from D7 to E6 dated 6 April 2009 (Annexure C, 78).

⁹⁸ Email from D7 to D13 dated 9 April 2009 (Annexure C, 402).

⁹⁹ Email from D13 to E5 dated 14 April 2009 (Annexure C, 407).

¹⁰⁰ Letter from Armstrong Wily to Department dated 17 April 2009 (Annexure C, 109).

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successfully increased the annual number of bowlers through extensive marketing & promotion campaigns. Since the economic downturn the numbers have remained stable or increased slightly as corporate customers seek out more affordable means of social bonding through functions."

"The conference centre would be developed as soon as practical after the signing of the Lease."

69. During the evaluation of the Lease Application, it was also noted by officers of the Department of Lands and the Department of Services that it was not within their interest to grant a lease to PBC, which was subject to a Deed of Company Arrangement, so that it could subsequently transfer a commercial lease to a new entity:

"the suggestion below from the Club's solicitor that a commercial lease be granted to a party currently in administration, for subsequent assignment to a (solvent) new legal entity, is not supported."¹⁰¹

70. As referred to above, this concern was one of the reasons why the Department of Lands refused PBC's Freehold Conversion Proposal in 2006. There is no indication in the documents considered for the purpose of the Independent Review that the Department of Lands or the Department of Services considered this particular issue any further in its evaluation of the Lease Application.

71. The Department of Services was also provided with a letter from CSKS Holdings, as the proposed tenant following the transfer of the Lease,¹⁰² which included the following vague statement:

"[CSKS Holdings] will continue to provide financial support to PBC by way of income generating improvements to the land and premises. Both parties on the basis of commerciality will determine income sharing."

72. On 18 June 2009, PBC provided the following further documents in support of the Lease Application:

- (a) PBC's response to Crown Land's Business directive addressing the public interest requirements (the **Public Interest Test Response**);
- (b) 10 year budget for PBC; and
- (c) PBC's environmental policy.¹⁰³

¹⁰¹ Email from **D7 to D15** dated 13 May 2009 (Annexure C, 113).

¹⁰² Letter from CSKS Holdings dated 20 August 2009 (Annexure C, 2158).

73. The Public Interest Test Response appears to be a document drafted by the Crown Lands Division which it sent to PBC to complete. It included the following relevant information:

"PBC has recently undergone a thorough investigation by Gaming & Racing at the end of which it was clearly established that the current management is doing an excellent job of managing the clubs affairs."

"The proponent, whilst under the Administration of Armstrong Willy over the last 5 years, has successfully improved its trading performance to the point where all that remains for a successful handover of the clubs affairs to its Board is the issuing of a new 50 year lease by Dept of Lands to PBC and/or its nominee."

74. On 25 June 2009, the Department of Services (as it then became known) notified Mr Brooks that the Public Interest Test Response was satisfactory.¹⁰⁴ The grant of the Lease was considered by the Department of Services to be within the public interest as it enabled PBC to discharge the Deed of Company Arrangement and because the proceeds from the rent of the site would be directed to the Crown Lands Reserve Trust.¹⁰⁵
75. On 31 August 2009, PBC provided a "Proposed Business Plan Outline", which included further information about PBC's business case and, in particular, its planning for future activities and facilities on the Land.¹⁰⁶ The Department of Services subsequently advised that PBC's business case had satisfied all requirements.¹⁰⁷ This was despite the fact that PBC had provided no information in relation to:
- (a) the commercial viability of the business proposed;
 - (b) the commercial return to the Department;
 - (c) the compatibility of the Proposal with the Department's business and policy objectives, including the principles of Crown land management;
 - (d) its ability to perform lease obligations, fund the proposed improvements on the Land or operate the proposed business; or
 - (e) the longer term sustainability of the business.
76. **D7** prepared a briefing memorandum on 23 December 2009 to **D3** which recommended that the Lease Application

¹⁰³ Letter from Surry Partners to Department for Lands dated 18 June 2009 (Annexure C, 120).

¹⁰⁴ Email from **D7** to Tony Brooks dated 25 June 2009 (Annexure C, 468).

¹⁰⁵ Letter from Surry Partners to Department for Lands dated 18 June 2009 (Annexure C, 120).

¹⁰⁶ Letter from Club to Department for Lands dated 31 August 2009 (Annexure C, 2133).

¹⁰⁷ Email from **D7** to Tony Brooks dated 8 September 2009 (Annexure C, 495).

be approved (the **Lease Briefing Memo**). The Lease Briefing Memo noted that the "*Minister has agreed in principle to grant a commercial lease*" to PBC and that, upon the grant of the proposed lease, the lease would be transferred to CSKS Holdings.

77. The Lease Briefing Memo also stated that:
- (a) the purpose of the proposed commercial lease was consistent with the purposes for which Lot 5 was reserved and the additional purpose for which Lot 3 was reserved, and that no additional purpose needed to be gazetted under Section 34A of the Crown Lands Act;
 - (b) the proposed actions were considered to be within the public interest and complied with the principles of Crown land management; and
 - (c) a land assessment waiver in connection with the proposed grant of a relevant interest had been approved.
78. Following the recommendation in the Lease Briefing Memo, the delegate of the Minister for Lands on 24 December 2009 approved the grant of the Lease pursuant to section 34A of the Crown Lands Act.
79. The Lease was granted to PBC despite PBC being subject to the Deed of Company Arrangement.
80. Having regard to the documents provided for the purpose of the Independent Review:
- (a) there is no evidence that, during its evaluation of the Lease Application, the Department of Lands or the Department of Services gave proper or genuine consideration¹⁰⁸ to the compatibility of the Proposal with the Land's historic and visual setting; and
 - (b) there was a basis to conclude that the Proposal, which included the future development of a child care centre on the Land, did not comply with the principle of Crown land management that the Crown land be used for a public use. The proposal to allow the transfer of the Lease to CSKS Holdings meant that land for public use was proposed to be passed to a private company for private uses.
81. Although the rent under the Lease was approximately three times the rent under the Perpetual Lease, there was no other commercial return to the Department.

¹⁰⁸ The case of *Turner v Minister for Immigration and Ethnic Affairs* (1981) 35 ALR 388 establishes that consideration by a decision maker requires "proper, genuine and realistic" consideration.

Was it appropriate to waive the requirement to assess the Land?

82. The requirement to assess the Land prior to the grant of the Lease was waived by **D3** as a delegate of the Minister for Lands, on 21 December 2009. The Minister's consent to waive the land assessment requirement was based on an undated memorandum from the Land and Property Management Authority (the LPMA) and a Land Assessment Waiver Report prepared by the Crown Lands Division on 18 November 2009.
83. The Land Assessment Waiver Report was prepared for the purposes of terminating the Perpetual Lease, granting the Lease to PBC and changing the use of the Land (together, the Proposed Actions). The waiver of the land assessment requirement was proposed by **D7** rather than PBC or Mr Brooks.¹⁰⁹
84. The Land Assessment Waiver Report stated that the Proposed Actions were considered to be within the public interest for the following reasons:
- (a) PBC would be able to discharge the Deed of Company Arrangement and formalise existing car parking, access and roadway arrangements;
 - (b) the proceeds from the rent of the site would be directed to the Crown Lands Reserve Trust;
 - (c) the Land would continue to be used for a bowling club, and therefore the purpose and use of the Land would not change generally; and
 - (d) the site would remain as part of the Crown estate.
85. Although the Land Assessment Waiver Report concluded that the proposed actions complied with the principles of Crown land management, in determining whether or not the grant of the lease was in the public interest, the Land Assessment Waiver Report did not consider that:
- (a) the reserved purpose of the Land was not consistent with the permitted use under the proposed Lease (although the use of the Land was changed on 11 December 2009, prior to the grant of consent to the Lease, see Chapter 3 for further detail); and
 - (b) CSKS Holdings would ultimately have possession of the Land, which would limit the public use of Crown land.
86. For this reason, the delegate of the Minister for Lands could not have been satisfied that it was in the public interest to grant consent to the Proposed Actions. Accordingly, the delegate of

¹⁰⁹ Email from **D7** to Tony Brooks dated 21 October 2009 (Annexure C, 510).

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the Minister for Lands did not comply with section 35(1) of the Crown Lands Act in waiving the requirement to assess the Land.

[Redacted]

87. [Redacted]

88. [Redacted]

89. Further, in granting the Lease, the Department of Lands or the Department of Services did not comply with the general rule that the maximum term of a lease shall be for twenty years. There is no indication in the documents considered for the purpose of the Independent Review that the Department of Lands or the Department of Services gave proper consideration to:

- (a) the use of the Land dictated a need for a longer term of lease and determination of the asset's residual value (if any) at the end of 20 years was not available or applicable; or
- (b) a longer term of lease was the only means of attracting a suitable tenant.

[Redacted]

Chapter 3 The decision to change the use of the Land to “Community and Sporting Club Facilities, Tourist Facilities and Services”: did the Department and/or the Minister/Minister’s delegate comply with the relevant legislation, government policies and Department procedures in place at the time?

Decision Overview

90. The permitted use of the Perpetual Lease was the “Erection of Buildings and Recreation”, which enabled PBC to operate bowling greens and a licensed clubhouse on the Land. Other improvements on the Land included the tennis courts, constructed access and parking. The Land had also been reserved for the purpose of “public recreation”.
91. Following the lodgement of the Lease Application, but prior to the Minister for Lands consenting to the grant of the Lease, the Crown, by notification in the Gazette of 11 December 2009, reserved:
- (a) Lots 3 and 5 pursuant to section 87 of the Crown Lands Act for the public purpose of “Community and Sporting Club Facilities and Tourist Facilities and Services”; and
 - (b) Lot 3 pursuant to section 121A of the Crown Lands Act for the additional purpose of “Access”.¹¹¹
92. This meant that the permitted use under the proposed lease would be consistent with the public purpose for which the Land was reserved.

What were the relevant legislative provisions, government policies and Department procedures in place at the time of granting consent to the reservations?

93. The Minister had the power to reserve any Crown land for future public requirements or other public purposes,¹¹² which reservation took effect on publication of the gazetted notice.
94. The Minister could, by order published in the Gazette, authorise a Crown reserve to be used for a purpose that was additional to the declared purpose of the reserve.¹¹³ The “declared purpose” meant the public purpose for which the Crown reserve had been dedicated or

¹¹¹ Gazette Notification dated 11 December 2009 (Annexure C, 3697).

¹¹² Section 87 of the Crown Lands Act.

¹¹³ Section 121A of the Crown Lands Act.

reserved and included any purpose or use permitted under, or in connection with, the declared purpose.¹¹⁴

Reservation for a compatible purpose

95. The Minister could not authorise a Crown reserve to be used for an additional purpose unless the Minister was satisfied that:
- (a) the additional purpose was compatible with the declared purpose of the Crown reserve; and
 - (b) the use of the Crown reserve for the additional purpose was consistent with the principles of Crown land management; and
 - (c) it was in the public interest for the Crown reserve to be used for the additional purpose.¹¹⁵

Consultation with appropriate persons or bodies

96. The Minister was to consult with the following persons or bodies before making an order authorising a Crown reserve to be used for an additional purpose:
- (a) the trustee (if any) appointed to manage the affairs of the Crown reserve; or
 - (b) if the Crown reserve was being used, occupied or administered by a government agency, the Minister to whom that agency was responsible.¹¹⁶

Assessment of land

97. Land could not be reserved unless the Minister was satisfied that the land had been assessed under Part 3 of the Crown Lands Act.¹¹⁷ However, no assessment was required if the Minister was satisfied that it was in the public interest to reserve the land without it being assessed and, in reserving the land, the Minister had due regard to the principles of Crown land management (which are set out above at paragraphs 83 to 86).¹¹⁸

¹¹⁴ Section 112A of the Crown Lands Act.

¹¹⁵ Section 121A(3) of the Crown Lands Act.

¹¹⁶ Section 121A(4) of the Crown Lands Act.

¹¹⁷ Section 85(1) of the Crown Lands Act; Section 91(1) of the Crown Lands Act.

¹¹⁸ Section 85(2) of the Crown Lands Act; Section 91(2) of the Crown Lands Act.

Did the Department and/or the Minister/Minister's delegate comply with the relevant legislation, government policies and Department procedures in place at the time?

Summary

98. The requirements discussed above were required to be satisfied prior to changing the use of the Land. Having regard to the documents considered for the purpose of the Independent Review, the Department of Lands and the Department of Services:

- (a) did not satisfy itself that it was in the public interest for the Crown reserve to be used for the additional purpose;
- (b) did consult with the Council, being the Trust Manager of the Crown reserve, in relation to the reservation of the Land; and
- (c) did not waive the requirement to assess the Land until after the Land had been reserved.

Reservation for a compatible purpose

99. The reserved purpose for part of the Land (the portion of Trumper Park that was included in the Lease) was for "recreational purposes".

100. On 8 December 2009, the LPMA prepared a memorandum to the delegate of the Minister for Lands recommending that Lots 3 and 5 be reserved for the public purpose of "Community and Sporting Club Facilities and Tourist Facilities and Services" and that Lot 3 be reserved for the additional purpose of "Access" (the Change of Use Briefing Memo).

101. The Change of Use Briefing Memo stated the following:

"The purpose of the lease as drafted is consistent with the purposes for which Lot 5 is to be reserved and the additional purpose for which Lot 3 is to be reserved. Therefore no additional purpose for which relevant interest is to be granted needs to be gazetted under section 34A of the Crown Lands Act."

"Woollahra Council has been advised of the intention to notify the respective reservations in the gazette."

"The proposed actions are considered to be within the public interest and comply with the principles of Crown land management under the Crown Lands Act."

102. Despite the statement in the Change of Use Briefing memo that the reservations were "considered to be within the public interest", having regard to the documents considered for the purpose of the Independent Review, there is no evidence that the Minister for Lands, or

the delegate for the Minister for Lands, were satisfied as to whether the reservation of Lots 3 and 5 were in the public interest.

103. Having regard to the documents considered for the purpose of the Independent Review:
- (a) It appears that the Land was reserved so as to ensure that the public purpose for which the Land was reserved would be consistent with the permitted use under the Lease; and
 - (b) there is no evidence that the Department of Lands or the Department of Services gave genuine and proper consideration to whether the reservations were in the public interest.

Consultation with appropriate persons or bodies

104. The Change of Use Briefing Memo noted that the Council, as the Trust Manager of the Crown reserve, was advised of the intention to grant the Lease and of the intention to reserve the Land for the additional purpose. Having regard to the documents considered for the purpose of the Independent Review, there is evidence that the Council was aware of the intention of the Minister for Lands to reserve the Land for the additional purpose.¹¹⁹

Assessment of land

105. A delegate of the Minister for Lands granted consent on 21 December 2009 to waive the requirement for land assessment in relation to the decisions to surrender the Perpetual Lease, grant the Lease and reserve the Land for the purposes of "Community and Sporting Club Facilities and Tourist Facilities and Services and Access".
106. For the reasons set out above at paragraphs 83 to 86, the waiver of the land assessment did not comply with the relevant legislation and policy of the Department of Lands and the Department of Services. In addition, the waiver of land assessment would not have been effective as it was granted on 21 December 2009, which was after the Land was reserved on 11 December 2009. Accordingly, the delegate of the Minister for Lands did not comply with section 91(1) of the Crown Lands Act because the delegate of the Minister for Lands did not satisfy himself, before the reservation, that an assessment of the Land was not required.

¹¹⁹ Letter from Department of Lands to Woollahra Municipal Council dated 11 February 2009 (Annexure C, 92); Letter from Department of Lands to Woollahra Municipal Council dated March 2009 (Annexure C, 98); Letter from Crown Lands Division to Woollahra Municipal Council undated (Annexure C, 129).

Chapter 4 The decision to consent to the transfer of the Lease from PBC to CSKS Holdings: did the Department and/or the Minister/Minister's delegate comply with the relevant legislation, government policies and Department procedures in place at the time?

Decision Overview

107. A further Transaction in the Proposal that was agreed in principle with **D1** in 2008 was that after PBC was granted the Lease, the Lease would immediately be transferred to CSKS Holdings.
108. PBC's Freehold Conversion Proposal, which was rejected, involved on-selling the Land to CSKS Holdings. One of the reasons why the Department of Lands had rejected the Freehold Conversion Proposal was that it was not within the public interest to allow the Land to pass to a private company.
109. Nonetheless, the Proposal that was agreed in principle with **D1** in 2008 included that the Lease would be transferred to CSKS Holdings. To this end, the State of New South Wales entered into a "Deed of Assignment of Lease and Consent of Lessor" with PBC and CSKS Holdings, which stated that the Crown had agreed to transfer the Lease to CSKS Holdings.¹²⁰
110. As there was a restriction on the title that the Lease could not be transferred without the consent of the Minister, PBC submitted an application to obtain consent from the Minister.
111. A delegate of the Minister for Primary Industries formally granted consent for the Lease to be transferred to CSKS Holdings on 19 December 2011. The Lease was transferred from PBC to CSKS Holdings pursuant to registered Transfer of Lease AG752604 dated 30 December 2011 (the Transfer) (being the same date as the Sub-lease and Mortgage, which are discussed at Chapters 5 and 6 respectively).

What were the relevant legislative provisions, government policies and Department procedures in place at the time of granting consent to transfer the Lease?

112. The Crown Lands Act did not impose any requirements on the Minister in relation to granting consent to a transfer of a lease of Crown Land.

¹²⁰ Deed of Assignment of Lease and Consent of Lessor dated 30 November 2011 (Annexure C, 142).

113. The DTIRIS policy "CLIDnet User Guide - Minister's consent to transfer"¹²¹ provided that, in considering an application to transfer a lease of Crown land, the following actions were to have been carried out prior to granting consent:
- (a) receiving the initial application (mandatory step);
 - (b) recording the applicant's details (mandatory step);
 - (c) carrying out arrears and outstanding fees checks (mandatory step);
 - (d) carrying out searches to confirm that the applicant was the holder of the leasehold interest in the Crown land (mandatory step);
 - (e) ensuring all non-transferrable debts were cleared (mandatory step);
 - (f) confirming that the proposed transferee was acceptable/desirable (mandatory step);
 - (g) confirming that the proposed purpose of the transfer was acceptable (mandatory step);
 - (h) confirming that the lease had an adequate period to run (mandatory step);
 - (i) carrying out an onsite inspection of the leased property (optional step);
 - (j) ensuring appropriate security deposit provisions applied (optional step); and
 - (k) checking that no lease conditions had been breached (mandatory step).
114. Whilst the policy characterised the above actions as either mandatory or optional, the policy was merely a guideline to the officers of the DTIRIS in considering an application for the transfer of a lease over Crown land.

¹²¹ Annexure C, 247.

Did the Department and/or the Minister/Minister's delegate comply with the relevant legislation, government policies and Department procedures in place at the time?

Summary

115. Having regard to the documents considered for the purpose of the Independent Review, particularly the briefing memorandum dated 22 November 2011 (the **Transfer Briefing Memo**), the DTIRIS did not specifically have regard to the Department's policy "CLIDnet User Guide - Minister's consent to transfer". Although the DTIRIS carried out a rent arrears check, the DTIRIS:
- (a) did not confirm that CSKS Holdings was a desirable tenant beyond carrying out a company search; and
 - (b) did not check whether any lease conditions had been breached.

Overview

116. PBC submitted an application to transfer the Lease to CSKS Holdings by letter dated 3 November 2011¹²² and, under cover of the same letter, CSKS Holdings submitted its application to sub-lease part of the Land back to PBC (discussed in further detail in Chapter 5).
117. During the period from November and December 2011, **E6** sought an update from the DTIRIS on more than a daily basis as to the outcome of the various applications for consent made by PBC and CSKS Holdings. In one such email to **D13**, which dealt specifically with the application for consent to the transfer of the Lease, **E6** stated the following:

*"It seems **D16** wasn't aware that the transfer and the assignment had previously been considered by Crown lands (over a year ago) and he was thinking that this was a brand new application.*

Can you explain to him that this part of the transaction had already been approved – and really the arrangement with the sub-lease has already been considered as it was integral to the whole arrangement."¹²³

¹²² Annexure C, 162.

¹²³ Email from **E6 to D13** dated 29 November 2011 (Annexure C, 843).

118. A delegate for the Minister for Primary Industries prepared the Transfer Briefing Memo recommending that consent be granted to transfer the Lease from PBC to CSKS Holdings.¹²⁴ This briefing note stated the following:

“granting of the new lease was conditional upon the subsequent transfer of the lease to a private investment company registered as [CSKS Holdings]. [CSKS Holdings] in return for acquiring the head lease would absorb the club’s existing debt, discharge the Deed of Company Arrangement and retire its appointed administrator.”

“Upon transfer of the lease, [CSKS Holdings] will issue a sublease to the club allowing the club to stay in occupation of the existing clubhouse building and two bowling greens.”

“CSKS Holdings Pty Ltd (ACN 103 966 383) was formally known as Paddington Bowling and Sporting Club Pty Limited CSKS [Holdings] remains registered as a proprietary limited company as at 15 November 2011 and there appears to be no evidence on the [ASIC] website of deregistration or bankruptcy listed against either company.”

“A review of the financial records relating to Lease 431606 has revealed that the rent account stands in arrears. The proposed transferee has made arrangements with Land Revenue Branch for payment of outstanding rent and has been requested to commence monthly payments prior to 18 November 2011.”

119. The Transfer Briefing Memo was amended by **D16**, on 9 December 2011 to include the following:

“I am not able to grant a lease for a Term of over 20 years (the exact delegated authority of the parties that executed the aforementioned Deed has not been investigated).”

*“in the knowledge that Bowling Clubs are currently the subject of additional scrutiny, I recommended approval by **D17**.”*

120. On 19 December 2011, a delegate of the Minister for Primary Industries granted consent to the transfer of the Lease from PBC to CSKS Holdings subject to the provisions of the Crown Lands Act.¹²⁵

Rent arrears check

121. It appears that the DTIRIS carried out a rent arrears check, which concluded that the rent account was in arrears, but granted the transfer of the Lease notwithstanding. There is no indication in the Transfer Briefing Memo whether the plan to commence payments to

¹²⁴ Annexure C, 165.

¹²⁵ Letter from the Department to PBC dated 19 December 2011 (Annexure C, 166).

regularise the arrears, which was to commence before 18 November 2011, had been fulfilled by CSKS Holdings.

122. The DTIRIS policy merely required a rent arrears check to be conducted, and did not mandate that consent be withheld if the tenant was in arrears.

CSKS Holdings as a desirable tenant

123. There is no indication in the Transfer Briefing Memo that the DTIRIS confirmed that CSKS Holdings, as a proposed transferee, was a desirable tenant (beyond carrying out an ASIC search to determine its registration status). This is despite the fact that the DTIRIS should have known that CSKS Holdings was the same entity (then known as Woollahra Gardens Pty Ltd) involved in the Freehold Conversion Proposal, as the entity to which PBC would on-sell the freehold in the Land. The DTIRIS policy titled "CLIDnet User Guide - Minister's consent to transfer" noted that:

"where it is known that the proposed transferee has on occasion proved to be an unsatisfactory Crown tenant ... consideration may be given to inviting the applicant to show cause why consent should not be withheld."¹²⁶

124. It does not appear that the DTIRIS had regard to this particular aspect of the policy.

Check for breaches of lease conditions

125. There is no indication in the Transfer Briefing Memo that the DTIRIS checked whether PBC was in breach of any other conditions of the Lease.

Proposed purpose of the transfer was acceptable

126. The DTIRIS policy requirement to confirm that the proposed purpose of the transfer was acceptable specifically related to situations in which the applicant's use of the land conflicted with the purpose for which the lease was granted. Although the DTIRIS did not confirm in the Transfer Briefing Memo that the proposed purpose was acceptable, CSKS Holdings' permitted use of the Land under the Lease was to be identical to the Lease originally granted by the Minister for Primary Industries.

¹²⁶ CLIDnet User Guide - Minister's consent to transfer, page 39 (Annexure C, 247).

Chapter 5 The decision to consent to the sub-lease from CSKS Holdings to PBC over part of the Land: did the Department and/or the Minister/Minister's delegate comply with the relevant legislation, government policies and Department procedures in place at the time?

Decision Overview

127. A further Transaction in the Proposal that was agreed in principle with **D1** in 2008 was the sub-lease from CSKS Holdings to PBC after CSKS Holdings had been transferred the Lease. When the Minister for Primary Industries granted consent to transfer the Lease to CSKS Holdings, it was noted that CSKS Holdings would sub-lease the clubhouse and the two bowling greens to PBC to allow PBC to continue its operations.
128. As there was a restriction on the title that the Lease not be sub-leased without the consent of the Minister, CSKS Holdings submitted an application to obtain consent from the Minister for Primary Industries.
129. The DTIRIS formally granted consent for the proposed sub-lease to PBC. The proposed sub-lease was for a term of five years commencing 23 December 2011 (with 3 five year options) for part of Lot 5 being the "clubhouse building, the two bowling greens and the curtilage of the clubhouse and bowling greens". Due to difficulties with registration of the sub-lease with Land and Property Information (LPI),¹²⁷ the description of the leased premises was amended to remove the "two bowling greens" and the sub-lease amended to grant PBC exclusive use of the two bowling greens during the duration of the sub-lease.
130. The sub-lease that was eventually registered identified the premises as the "Paddington Bowling Club" on the plan annexed to the sub-lease (the Sub-lease). The Sub-lease was recorded on the title for Lot 5 as registered Sub-lease AH565028 and was dated 30 December 2011 (being the same date as the Transfer and Mortgage).

What were the relevant legislative provisions, government policies and Department procedures in place at the time of granting consent to the Sub-lease?

131. The Crown Lands Act did not impose any requirements on the Minister in relation to granting consent to a sub-lease of Crown land.

¹²⁷ Letter from LPI to CSKS dated 19 August 2013 (Annexure C, 180).

132. The DTIRIS policy titled "CLIDnet User Guide - Minister's consent to sub-lease"¹²⁸ stated that, in considering an application to sub-lease Crown land, the Minister for Primary Industries may have, but was not required to have, carried out the following actions prior to granting consent:
- (a) creating a new account for the application for consent to sub-lease (mandatory step);
 - (b) receiving the prescribed application form and fee (mandatory step);
 - (c) confirming that Minister's consent to sub-lease was required (mandatory step);
 - (d) carrying out arrears and outstanding fee checks (mandatory step);
 - (e) carrying out searches to confirm that the applicant was the holder of the leasehold interest in the Crown land (mandatory step);
 - (f) recording details of the proposed sub-lessee (mandatory step);
 - (g) checking the terms of the sub-lease to ensure they were acceptable to the Department (mandatory step);
 - (h) checking that the sub-lease area has been identified (mandatory step);
 - (i) confirming that the proposed purpose of the sub-lease was acceptable to the Department (mandatory step);
 - (j) checking that the proposed term of the sub-lease did not exceed the term of the head lease (mandatory step);
 - (k) carrying out an on-site inspection of the proposed sub-leased area if deemed necessary by the Department (optional step); and
 - (l) checking that no head lease conditions had been breached by the tenant (mandatory step).
133. Whilst the DTIRIS policy characterised the above actions as either mandatory or optional, the policy was merely a guideline to the officers of the DTIRIS in considering an application for the sub-lease of Crown land.

¹²⁸ Annexure C, 248.

Did the Department and/or the Minister/Minister's delegate comply with the relevant legislation, government policies and Department procedures in place at the time?

Summary

134. Having regard to the documents considered for the purpose of the Independent Review, in particular the briefing memorandum dated 20 December 2011 that recommended consent be granted to the Sub-lease (the Sub-lease Briefing Memo),¹²⁹ the DTIRIS did not specifically have regard to the DTIRIS policy "CLIDnet User Guide - Minister's consent to sub-lease" and, in particular, the DTIRIS:
- (a) did not carry out a rent arrears check;
 - (b) did not check that the terms of the Proposed Sub-lease were acceptable;
 - (c) did not check that the purpose of the Proposed Sub-lease was acceptable; and
 - (d) did not check that PBC was in breach of any conditions in the Lease.

Detail

135. On 3 March 2011, CSKS Holdings provided the Department of Services with a copy of the sub-lease that it intended to enter into with PBC after transfer of the Lease from PBC to CSKS Holdings (the Proposed Sub-lease).¹³⁰ At that stage, no formal application was submitted in writing. The Proposed Sub-lease was merely provided to the Department of Services for consideration. Nonetheless, the Department of Services (as it was known then) and CSKS Holdings commenced negotiating the terms of the Proposed Sub-lease.¹³¹
136. **D18** prematurely (as it was before PBC had submitted an application for approval for the transfer of the Lease to CSKS Holdings) granted consent to the Proposed Sub-lease on 4 May 2011.
137. On 3 November 2011, CSKS Holdings formally submitted an application in writing to the DTIRIS for consent to the Proposed Sub-lease. The DTIRIS prepared the Sub-lease Briefing Memo, which recommended that consent be granted to the Proposed Sub-lease. The Sub-lease Briefing Memo stated the following:

"The Club is under administration and subject to a Deed of Company Arrangement that has been in effect since March 2003. Completion of the transfer of the head lease to

¹²⁹ Annexure C, 2258.

¹³⁰ Email from **E6 to D7** dated 3 March 2011 (Annexure C, 767).

¹³¹ Email from **D7 to E1** dated 16 December 2010 (Annexure C, 143).

CSKS Holding Pty Limited will enable the discharge the Deed of Company Arrangement and retire PBC's appointed administrator. All outstanding debts held by PBC will be absorbed by CSKS Holding Pty Ltd."

138. On 21 December 2011, a delegate for the Minister for Primary Industries formally granted consent to the Proposed Sub-lease subject to the provisions of the Crown Lands Act.¹³²
139. There is no record in the Sub-lease Briefing Memo that regard was specifically had to the DTIRIS policy "CLIDnet User Guide - Minister's consent to sub-lease".
140. There is no indication that the DTIRIS carried out a rent arrears check in considering the Proposed Sub-lease. The DTIRIS, at the time of granting the Sub-lease, would have known that PBC was in rent arrears in respect of the Lease.
141. There is no indication, in the Sub-lease Briefing Memo or any other document considered for the purpose of the Independent Review, that the DTIRIS checked that the terms and the purpose of the Proposed Sub-lease were acceptable to the DTIRIS or checked whether any conditions of the Lease had been breached.

¹³² Annexure C, 870.

Chapter 6 The decision to consent to the Mortgage over the Lease: did the Department and/or the Minister/Minister's delegate comply with the relevant legislation, government policies and Department procedures in place at the time?

Decision Overview

142. A further Transaction in the Proposal that was agreed in principle with **D1** in 2008 was the mortgage that CSKS Holdings would give over the Lease once it had been transferred the Lease.
143. As there was a restriction on the title that the Lease not be mortgaged without the consent of the Minister, the CSKS Holdings submitted an application to obtain consent from the Minister for Primary Industries.
144. A delegate of the Minister for Primary Industries formally granted consent for mortgage over the Lease on 19 December 2011. CSKS Holdings gave a mortgage over the Lease to the Commonwealth Bank pursuant to registered Mortgage of Lease AG752605 (the Mortgage). The Mortgage was dated 30 December 2011 (being the same date as the Transfer and Sub-lease).

What were the relevant legislative provisions, government policies and Department procedures in place at the time of granting consent to mortgage the Lease?

145. The Crown Lands Act did not impose any requirements on the Minister in relation to granting consent to a mortgage of a lease of Crown land.
146. The DTIRIS policy titled "CLIDnet User Guide - Minister's consent to mortgage"¹³³ provided that, in considering an application to mortgage a lease of Crown land, the Minister may have, but was not required to have, carried out the following actions prior to granting consent:
- (a) creating a new account for the application for consent to mortgage (mandatory step);
 - (b) receiving the prescribed application form and fee (mandatory step);
 - (c) confirming that Minister's consent to mortgage was required (mandatory step);
 - (d) recording the details of the proposed mortgagee (mandatory step);
 - (e) carrying out arrears and outstanding fee checks (mandatory step);

¹³³ Annexure C, 249.

- (f) checking that the applicant was the holder of the lease over Crown land (mandatory step);
- (g) carrying out an on-site inspection of the leased area if deemed necessary by the Department (optional step); and
- (h) checking that no lease conditions had been breached by the tenant (mandatory step).

147. In addition, the DTIRIS' "Office Practice Guidelines – Crown Land Management – Chapter 5 of the Crown Lands Act – Administration of Leases and Licences"¹³⁴ stated that the application should have been accompanied by a copy of the mortgage for which consent was being sought and a copy of the relevant terms and conditions under which the lease was held. The mortgage would have needed to be examined to ensure that:

- (a) it contained provisions for the Minister to be notified in the event the lessee committed an act of default under the mortgage entitling the mortgagee to enter into possession of the premises or exercise its power of sale;
- (b) the mortgagee was expressly bound by the terms of the lease in circumstances where the mortgagee was entitled to enter possession of the premises due to the lessee's failure to meet its mortgage repayments; and
- (c) the mortgage provided that, in circumstances where the mortgagee was empowered to exercise its power of sale of the lease, it must have obtained the Minister's consent to the proposed assignee of the lease,

(together, the Required Mortgage Conditions).

148. The policy requirements above were merely guidelines to the officers of the DTIRIS in considering an application for a mortgage over a lease of Crown land.

Did the Department and/or the Minister/Minister's delegate comply with the relevant legislation, government policies and Department procedures in place at the time?

Summary

149. Having regard to the documents considered for the purpose of the Independent Review, in particular the briefing memorandum dated 23 November 2011 that recommended that consent be granted to the mortgage of the Lease (the Mortgage Briefing Memo), the DTIRIS

¹³⁴ Annexure C, 240.

Chapter 6: The decision to consent to the Mortgage over the Lease

did not specifically have regard to its policy "CLIDnet User Guide - Minister's consent to mortgage" and, in particular, the DTIRIS:

- (a) did not ensure that the Required Mortgage Conditions were included in the proposed mortgage;
- (b) did not carry out the rent arrears check; and
- (c) did not check that the tenant had not breached any lease conditions.

Detail

150. On 24 October 2011 (that is, before the application for consent to transfer the Lease to CSKS Holdings had been submitted by PBC), CSKS Holdings submitted a written application to obtain the consent of the Minister for Primary Industries to mortgage the Lease.¹³⁵ CSKS Holdings provided the following documents:

- (a) a Business Securities Memorandum setting out the terms of the proposed mortgage;
- (b) a "Mortgage of Lease" registration form; and
- (c) a "Right of Entry (Business and Goods)" deed,
(together, the Proposed Mortgage).

151. On 23 November 2011, the DTIRIS prepared the Mortgage Briefing Memo,¹³⁶ which recommended that the Minister for Primary Industries grant consent to the Proposed Mortgage. The Mortgage Briefing Memo stated the following:

"A recent application by CSKS Holding Pty Limited to transfer Lease 431606 awaits approval ... Upon approval and subsequent transfer of the lease, CSKS [Holdings] propose to issue a sublease to Paddington Bowling Club, subject to the Minister's consent allowing the community club to stay in occupation of the existing clubhouse building and two bowling greens."

"The Commonwealth Bank of Australia as mortgagee requires the Crown, as lessor, to complete the "Right of Entry" deed placing certain restrictions on the Crown with respect to default actions. These conditions primarily require the Crown to notify the bank if a breach of the lease occurs and allow the bank to remedy the default prior to the Crown terminating the lease. Although these conditions are not unreasonable it is considered that it is not in the Crown's interest to bind itself by deed with the lessee's mortgagee."

¹³⁵ Annexure C, 825.

¹³⁶ Annexure C, 2257.

The standard consent letter requires the mortgagee to confirm to the lease conditions should the mortgagee take possession appear to be adequate.”

152. A delegate of the Minister for Primary Industries granted consent to mortgage the Lease on 19 December 2011 subject to the provisions of the Crown Lands Act.¹³⁷

Ensure the Proposed Mortgage contains the Required Mortgage Conditions

153. Although it is apparent from the Mortgage Briefing Memo that the DTIRIS reviewed the terms and conditions of the Proposed Mortgage, there is no indication in the Mortgage Briefing Memo that the DTIRIS took any steps to ensure that the Proposed Mortgage contained the Required Mortgage Conditions (set out above at paragraph 147). The Proposed Mortgage comprised the standard terms and conditions offered by the Commonwealth Bank.
154. Neither the Proposed Mortgage, nor the Mortgage that was registered on the title, contained the Required Mortgage Conditions. However, the consent to the Mortgage was made subject to the Required Mortgage Conditions.
155. The terms of that consent did not bind the Commonwealth Bank, which as the mortgagee was only bound by the terms of the Mortgage.
156. Despite this, if the Commonwealth Bank exercised its power of sale of the Lease, by virtue of the restriction on the title of the Land, the Lease could not be transferred without Minister's consent. The Commonwealth Bank would have to obtain the Minister's consent to the proposed assignee of the Lease. This essentially gives effect to the third Required Mortgage Condition.
157. The Commonwealth Bank would not be legally bound by the first two Required Mortgage Conditions, those conditions not having been incorporated in the Mortgage.

Rent arrears check

158. There is no evidence in the documents considered for the purpose of the Independent Review that the DTIRIS checked whether there were rent arrears in respect of the Lease or gave proper consideration to whether CSKS Holdings would be able to pay rent under the Lease as well as make mortgage repayments. The DTIRIS would have known at that time that there were rent arrears in respect of the Lease.

¹³⁷ Letter from the Department to Surry Partners dated 19 December 2011 (Annexure C, 166).

Chapter 6: The decision to consent to the Mortgage over the Lease

Check for breach of lease conditions

159. There is no indication in the Mortgage Briefing Memo, or any other documents considered for the purpose of the Independent Review, that the DTIRIS checked whether there were any breaches of a condition of the Lease.

Chapter 7 The decision to grant landowner's consent to CSKS Holdings for the submission of a development application for the construction of a child care centre on the Land: did the Department and/or the Minister/Minister's delegate comply with the relevant legislation, government policies and Department procedures in place at the time?

Decision Overview

160. When the Proposal was agreed in principle with **D1** in 2008, and when PBC submitted the Lease Application, the Department of Lands was on notice that the intention of PBC and CSKS Holdings was to carry out commercial activity on the Land. In 2008 this was expressed in terms of "a lease ... for community purposes with a view to establishing say a gym, child care and maintain some of the lawn bowls".¹³⁸ In the context of the Lease Application, this was expressed in terms of "a childcare centre, a gymnasium, swimming facility, health, medical and beauty facilities, and other facilities and activities that are allowable under the zoning of the Land".¹³⁹
161. Prior to the grant of the Lease, the reserved purpose of the Land was changed to the following:
- Lot 5: "community and sporting club facilities and tourist facilities and services"
 - Lot 3: "community and sporting club facilities and tourist facilities and services and access"
162. In early 2013, PBC formally provided the Application for Landowner's Consent.
163. Following a recommendation to the delegate of the Minister for Primary Industries, a delegate of the Minister for Primary Industries granted consent to CSKS Holdings on 5 March 2013 to submit the Development Application.

¹³⁸ Email from **D2 to D3 D4 D5** dated 29 September 2008 (Annexure C, 307)

¹³⁹ Statement of Intent – Future Business Operations dated January 2009 (Annexure C, 86).

What were the relevant legislative provisions, government policies and Department procedures in place at the time of granting landowner's consent?

164. A development application was required to have the written consent of the owner of the land.¹⁴⁰ In the case of Crown land, this consent was required to be given by the LPMA on behalf of the Minister as the landowner.
165. To authorise a Crown reserve to be used for a purpose that was additional to the declared purpose of the Crown reserve, the Minister was required to publish an order in the Gazette.¹⁴¹ The Minister could not authorise a Crown reserve to be used for any such additional purpose unless the Minister was satisfied that:
- (a) the additional purpose was compatible with the declared purpose of the Crown reserve, and
 - (b) the use of the Crown reserve for the additional purpose was consistent with the principles of Crown land management, and
 - (c) it was in the public interest for the Crown reserve to be used for the additional purpose.¹⁴²
166. The granting of the landowner's consent to a development application would have required the Minister to comply with above requirements if the effect of the consent was to allow the land to be used for a purpose that was other than the declared purpose.
167. The DTIRIS' policy titled "LPMA Website Fact Sheet - Development and Crown Land", set out the following factors that the LPMA should have, but was not required to have, considered when considering an application for landowner's consent:
- (a) the proposal for the development application against the principles of Crown land management and environmental or other strategic assessment that had taken place;
 - (b) whether any authorisation for development under the Crown Lands Act existed or would be issued; and
 - (c) any other matters specifically relevant to the site or type of development proposed.¹⁴³

¹⁴⁰ Clause 49 of the *Environmental Planning and Assessment Regulations 2002* (NSW).

¹⁴¹ Section 121A(1) of the Crown Lands Act.

¹⁴² Section 121A(2) of the Crown Lands Act.

¹⁴³ LPMA Website Fact Sheet - Development and Crown Land (Annexure C, 254).

Chapter 7: The decision to grant landowner's consent for the submission of a development application

168. The DTIRIS also had in place a "Guideline for dealing with requests for landowner's consent to lodge applications to other authorities for development on Crown land", which stated that the LPMA needed to review a development application against:
- (a) the objectives of the Crown Lands Act;¹⁴⁴
 - (b) the principles of Crown land management;¹⁴⁵
 - (c) the status of the land in respect to dedications, reservations, tenures or easements;
 - (d) whether any lease or licence conditions required any work or other actions that might then relate to the proposal at hand;
 - (e) consistency with suitable or preferable uses identified in any land assessment carried out for the land;
 - (f) consistency with any plan of management adopted under the Crown Lands Act;
 - (g) consistency with any LPMA policy or practice related to either the land and/or to the particular development type proposed;
 - (h) the appropriateness of and/or impact on any public use or access over the land; and
 - (i) whether the locality was the subject of any current studies by the LPMA or other authorities.¹⁴⁶
169. The policy requirements above were merely guidelines to the officers of the DTIRIS in considering an application for landowner's consent.

Did the Department and/or the Minister/Minister's delegate comply with the relevant legislation, government policies and Department procedures in place at the time?

Summary

170. Having regard to the documents considered for the purpose of the Independent Review, particularly the Investigations report for assessing applications for landowner's consent (the

¹⁴⁴ Contained in section 10 of the Crown Lands Act.

¹⁴⁵ See paragraph 55 above.

¹⁴⁶ Guideline for dealing with requests for landowners consent to lodge applications to other authorities for development on Crown land, pages 8 to 9 (Annexure C, 250).

Landowner's Consent Report),¹⁴⁷ it appears that the DTIRIS had regard to the relevant policy requirements above.

171. However, there is a basis to conclude that the DTIRIS has not authorised the use of the Land as a child care centre in accordance with the Crown Lands Act. This is because the DTIRIS' conclusion that the purpose of a child care centre was within the declared purpose of the Crown reserve may be incorrect. If the purpose was additional to the declared purpose, the Minister for Primary Industries was required to comply with the requirements of section 121A of the Crown Lands Act. One of these requirements was to publish an order in the Gazette whereby the use of the Crown reserve for that additional purpose would be authorised. Having regard to the documents reviewed for the purpose of the Independent Review, there is no indication that this requirement was satisfied. The landowner's consent is not an authorisation for the purpose of section 121A(2) of the Crown Lands Act.

Detail

172. On 10 January 2013, E1, on behalf of CSKS Holdings, provided the DTIRIS with a copy of the Development Application that CSKS Holdings proposed to submit to the Council for the construction of a child care centre on that part of the Land which was then (and remains) occupied by the tennis courts, seeking landowner's consent to the submission of the Development Application.¹⁴⁸
173. Following a review of the Development Application, the DTIRIS raised some concerns with the Preliminary Environmental Site Assessment and the Traffic Report. Consequently, E1 provided a revised Development Application on 5 February 2013.¹⁴⁹
174. The DTIRIS' Department's evaluation of the Application for Landowner's Consent is contained in the "Landowner's Consent Report" which was created in accordance with the DTIRIS' Department's template.¹⁵⁰ This document was essentially a check list of the investigations, considerations and actions carried out by the DTIRIS.
175. In recommending that landowner's consent be granted to the submission of the Development Application, the Landowner's Consent Report made the following conclusions:
- (a) landowner's consent was required;

¹⁴⁷ Undated, but first attached to an email dated 28 February 2013 (Annexure C, 953).

¹⁴⁸ Email from E1 to D7 dated 10 January 2013 (Annexure C, 941).

¹⁴⁹ Email from E1 to D7 dated 5 February 2013 (Annexure C, 944).

¹⁵⁰ Annexure C, 252.

- (b) that the construction of a child care centre was permissible with landowner's consent under the relevant zoning for the Land under the *Woollahra Local Environmental Plan 1995*;
 - (c) that the Development Application was consistent with the objectives under the Crown Lands Act and the principles of Crown land management;
 - (d) the land assessment waiver was approved on 21 December 2009;
 - (e) the proposal was consistent with the nominated public purpose;
 - (f) Native Title had been extinguished by the former Perpetual Lease over the Land; and
 - (g) the proposal was consistent with the Commercial Business Leasing Directive.¹⁵¹
176. Importantly, in considering whether the Development Application was consistent with LPMA policy and guidelines, the Landowner's Consent Report stated:
- "Consistent with Commercial Business Leasing Directive and with negotiations conducted by the applicant/holder with D1 in connection with surrender of the former Perpetual Lease."*
- "the proposed development was flagged by Paddington Bowling Club during negotiations in connection with conferral of the existing Lease, registered in 2011."*
177. On 5 March 2013, a delegate for the Minister for Primary Industries granted landowner's consent to CSKS Holdings for the submission of the Development Application.¹⁵²
178. The DTIRIS concluded in the Landowner's Consent Report that the Development Application was within the nominated public purpose of the Land, which was expressed to be "community and sporting club facilities and tourist facilities and services and access". No reasons for reaching this conclusion are stated in the Landowner's Consent Report or in any of the documents reviewed for the purpose of the Independent Review.
179. Although a "public purpose" was defined in the Crown Lands Act as "any purpose for the time being declared by the Minister, by notification in the Gazette, to be a public purpose",¹⁵³ case law indicates that any such declared purpose must be "open to the public generally as of right, and it must not be a source of private profit".¹⁵⁴

¹⁵¹ This policy does not contain relevant requirements in relation to granting landowner's consent.

¹⁵² Letter from the Department to PBC dated 5 March 2013 (Annexure C, 186).

¹⁵³ Section 3 of the Crown Lands Act.

¹⁵⁴ *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council (Goomallee Claim)* [2012] NSWCA 358; *Randwick Municipal Council v Rutledge* (1959) 102 CLR 54 at [88].

180. Having regard to the documents reviewed for the purpose of the Independent Review, it is not clear how the DTIRIS could have concluded that a child care centre, operated for private profit, was within the nominated public purpose.
181. It is also not evident on what basis the DTIRIS concluded that a child care centre was within the meaning of "community and sporting club facility and tourist facilities and services". Although these words are not defined for the purposes of the Crown Lands Act, the *Woollahra Local Environmental Plan 1995 (as amended)* (the LEP), which adopted the *Standard Instrument (Local Environmental Plans) Order 2006 (Standard Instrument)*, contained the following definitions which provide useful guidance as to the ordinary meaning of these words:

"Community facility means a building or place:

- (a) owned or controlled by a public authority or non-profit community organisation, and*
- (b) used for the physical, social, cultural or intellectual development or welfare of the community,*

but does not include an educational establishment, hospital, retail premises, place of public worship or residential accommodation."

"Tourist facility means an establishment providing for holiday accommodation or recreation and may include a boat shed, boat landing facilities, camping ground, caravan park, holiday cabins, hotel, house boat, marine, motel, playground, refreshment room, water sport facilities or a club used in conjunction with any such activities."

182. Indeed, the Standard Instrument and the LEP contain a specific definition of child care centre, as follows:

"Child care centre means a building or place which is used (whether or not for profit) for the purpose of educating, minding or caring for children (whether or not any of the children are related to the owner or operator), but only if the following conditions are satisfied:

- (a) the children number 6 or more, are under 6 years of age, and do not attend a government school, or a registered non-government school, within the meaning of the Education Reform Act 1990; and*
- (b) the building or place does not provide residential care for any of the children (other than those related to the owner of the operator)."*

183. Having regard to the definitions in the Standard Instrument and the LEP and case law which provides a fetter on the discretion to deem a purpose to be a public purpose, a child care centre does not appear to fall within the ordinary meaning of "community facility" or "tourist

facility". Accordingly, it is not evident how the DTIRIS could have concluded that a child care centre was within the meaning of the nominated public purpose, namely "community and sporting club facilities and tourist facilities and services and access". It appears that the Landowner's Consent Report was predicated on the assumption that the use of the Crown land as a child care centre was consistent with the reserved purpose. If it was not, the effect of granting landowner's consent to the Development Application was to allow the Land, being a Crown reserve, to be used for a purpose other than its reserved purpose and accordingly, the Minister for Primary Industries was required to comply with section 121A of the Crown Lands Act.

184. Although the Landowner's Consent Report considered matters which would fall within section 121A(3) of Crown Lands Act,¹⁵⁵ it made no specific reference to section 121A or that this section was relevant to the consideration of whether to grant landowner's consent to the Development Application. In addition, there is no indication in the documents reviewed for purpose the Independent Review that the Minister for Primary Industries published an order in the Gazette authorising the Crown reserve to be used for an additional purpose, namely for a child-care centre.¹⁵⁶ On the basis that a child care centre is an additional purpose to the reserved purpose of the Land, as no order has been published in the Gazette, the use of the Land for the purpose of a child care centre has not been authorised under the Crown Lands Act. The landowner's consent for the submission of the Development Application is not an authorisation for the purpose of section 121A of the Crown Lands Act.

¹⁵⁵ See paragraph 173 above.

¹⁵⁶ The Minister for Lands also did not publish a Gazette notice when granting the Lease pursuant to section 34A of the Crown Lands Act (see paragraph 58 above).

Chapter 8 The decision to remove certain notifications from the title of the Land: did the Department and/or the Minister/Minister's delegate comply with the relevant legislation, government policies and Department procedures in place at the time?

Decision Overview

185. The State of New South Wales (being the registered proprietor of Lots 3 and 5) made a request on 31 March 2011 that the following restriction be recorded on the title of the Land:¹⁵⁷

"This folio cannot be dealt with separately from the balance of the above holding which comprises Lots 3 and 5 in DP1156846". (the Restriction)

186. During early 2013 issues arose during the registration of the Sub-lease. The LPI suggested in a letter to CSKS Holdings dated 11 March 2013 that these issues would be overcome if the Restriction was removed from the title.¹⁵⁸
187. This letter was forwarded to the DTIRIS, following which a request was made by the State of New South Wales to the LPI to remove the Restriction. The Restriction was removed on 30 April 2013.

What were the relevant legislative provisions, government policies and Department procedures in place at the time of removing the Restriction?

188. The Minister may have required the Registrar-General to record on title that a lease of Crown land was held subject to the restriction that the lease could not be transferred, or subleased, or dealt with in any other specified manner without the Minister's consent.¹⁵⁹ Similarly, the Minister may have made a request that such a restriction on title cease to have effect.¹⁶⁰
189. The Crown Lands Act also provided that if the Minister was satisfied that a condition or provision was no longer applicable to Crown land, the Minister may have informed the Registrar-General accordingly and the Registrar-General may have amended the register in accordance with that information.¹⁶¹

¹⁵⁷ There was also a request for a restriction on the title that the Lease may not be transferred, mortgaged, sub-leased or dealt with in any other specified manner without consent of the Minister.

¹⁵⁸ Letter from the LPI to CSKS Holdings dated 11 March 2013 (Annexure C, 3700).

¹⁵⁹ Section 44(1) of the Crown Lands Act.

¹⁶⁰ Section 44(2) of the Crown Lands Act.

¹⁶¹ Section 179 of the Crown Lands Act.

190. The Crown Lands Act and DTIRIS procedures did not impose any requirements on the Minister in relation to what factors were required to be considered in removing notifications from the title of Crown land.

Did the Department and/or the Minister/Minister's delegate comply with the relevant legislation, government policies and Department procedures in place at the time?

191. There is no indication in the documents considered for the purpose of the Independent Review as to the reasons for which the Minister for Primary Industries requested that the Restriction be recorded on the title on 30 March 2011. This Restriction was recorded along with another restriction that the Lease not be subleased, leased or mortgaged without the consent of the Minister for Primary Industries.

192. During the registration of the Sub-lease with the LPI, requisitions were raised by the LPI in relation to the Sub-lease. The requisition stated that:

*"Please note that there is a notification on both folio identifiers 5/1156846 and 3/1156846 that neither folio can be dealt with separately from the other. Accordingly, a Request Form 11R is required to remove this notification."*¹⁶²

193. The Crown submitted the Request Form 11R on 23 April 2013, which requested that the Restriction be removed from the title of the Land on the basis of section 179 of the Crown Lands Act.¹⁶³
194. No briefing memorandum in relation to the removal of the Restriction has been provided for the purpose of the Independent Review. Accordingly, it is not possible to establish whether the Minister for Primary Industries was satisfied that the Restriction was no longer applicable to the Land (which is the basis for exercising the power under section 179 of the Crown Lands Act).
195. Further, as stated above, no information has been provided for the purpose of the Independent Review that indicates why the Restriction was applicable to the Land when it was recorded on the title on 30 March 2011. Accordingly, it is not possible to answer this aspect of the TOR.

¹⁶² Letter from the LPI to CSKS Holdings dated 11 March 2013 (Annexure C, 3700).

¹⁶³ Annexure C, 198.

Chapter 9 In relation to the decisions referred to, did the Department and/or the Minister/Minister's delegate engage in any corrupt conduct?

What constitutes "corrupt" conduct?

196. Corrupt conduct is defined in section 7 of the ICAC Act as any conduct which falls within the description of corrupt conduct in either or both section 8(1) or section 8(2) and which is not excluded by section 9.

197. Section 8(1) defines the general nature of corrupt conduct:

Corrupt conduct is:

- (a) *any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or*
- (b) *any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or*
- (c) *any conduct of a public official or former public official that constitutes or involves a breach of public trust, or*
- (d) *any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.*

198. Section 8(2) also provides:

Corrupt conduct is also any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority and which could involve any of the following matters:

- (i) *official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition),*
- (ii) *bribery,*
- (iii) *blackmail,*
- (iv) *obtaining or offering secret commissions,*

Chapter 9: Did the Department and/or the Minister/Minister's delegate engage in any corrupt conduct?

- (v) *fraud,*
- (vi) *theft,*
- (vii) *perverting the course of justice,*
- (viii) *embezzlement,*
- (ix) *election bribery,*
- (x) *election funding offences,*
- (xi) *election fraud,*
- (xii) *treating,*
- (xiii) *tax evasion,*
- (xiv) *revenue evasion,*
- (xv) *currency violations,*
- (xvi) *illegal drug dealings,*
- (xvii) *illegal gambling,*
- (xviii) *obtaining financial benefit by vice engaged in by others,*
- (xix) *bankruptcy and company violations,*
- (xx) *harbouring criminals,*
- (xxi) *forgery,*
- (xxii) *treason or other offences against the Sovereign,*
- (xxiii) *homicide or violence,*
- (xxiv) *matters of the same or a similar nature to any listed above,*
- (xxv) *any conspiracy or attempt in relation to any of the above.*

199. Despite the above definition of corrupt conduct, section 9 of the ICAC Act states that conduct does not amount to corrupt conduct unless it would constitute or involve:
- (a) a criminal offence, or
 - (b) a disciplinary offence, or
 - (c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or
 - (d) in the case of conduct of a Minister of the Crown or a member of a House of Parliament, a substantial breach of an applicable code of conduct.
200. Section 13(3A) of the ICAC Act provides that the ICAC may make a finding that a person has engaged or is engaged in corrupt conduct of a kind described in paragraphs (a), (b), (c), or (d) of s 9(1) only if satisfied that a person has engaged or is engaging in conduct that constitutes or involves an offence or thing of the kind described in that paragraph.

ICAC's approach in determining whether corrupt conduct has occurred

201. The ICAC's approach is to:
- (a) make findings of relevant facts on the balance of probabilities; and
 - (b) determine whether those facts come within the terms of section 8(1) or section 8(2) of the ICAC Act; and
 - (c) if they do, the ICAC then considers section 9 and the jurisdictional requirements of section 13(3A) and, in the case of a Minister of the Crown or a member of a House of Parliament, the jurisdictional requirements of section 9(5).
202. In making findings of fact and corrupt conduct, the ICAC applies the civil standard of proof on the balance of probabilities, which requires facts to be provided to a reasonable satisfaction taking into account the decisions in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362 and *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171.
203. For the purposes of sections 9(1)(a) and 9(5) of the ICAC Act, the ICAC considers whether, if the facts as found were to be proved on admissible evidence to the criminal standard beyond reasonable doubt, they would be grounds on which the person would be found to have committed a particular criminal offence.
204. Section 13(3A) of the ICAC Act requires that the ICAC be satisfied that the conduct has occurred and that it is conduct of a kind which constitutes a criminal offence: *D'Amore v ICAC* [2013] NSWCA 187 at [221].
205. For the purposes of s 9(1)(a) of the ICAC Act, it is relevant to consider the common law offence of misconduct in public office. The common law offence of misconduct in public office is part of the criminal law of NSW. The elements of the offence have been considered in *R v Huy Vinh Quach* (2010) 201 A Crim R 522. Redlich JA (with whom Ashley JA and Hansen AJA agreed) stated that the elements were as follows:
- (a) a public official;
 - (b) in the course of or connected to his public office;
 - (c) wilfully misconducts himself, by act or omission, for example, by wilfully neglecting or failing to perform his duty;
 - (d) without reasonable excuse or justification; and
 - (e) where such misconduct is serious and meriting criminal punishment having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those objects.

Did the Department and/or the Minister/Minister's delegate engage in corrupt behaviour?

Summary

206. Although the conduct of **D1** may fall within the scope of section 8(1)(a) of the ICAC Act, there is no evidence in the documents considered for the purpose of the Independent Review that **D1** engaged in conduct within the meaning of section 9 of the ICAC Act. Accordingly, based on the documents considered for purpose of the Independent Review, there is no evidence **D1** engaged in corrupt conduct.¹⁶⁴

Was there any corrupt conduct within the meaning of section 8 of the ICAC Act?

207. The conduct of **D1**, in agreeing with the Proposal in 2008, may fall within the scope of section 8(1)(a) of the ICAC Act.

208. In particular, **D1** conduct could have adversely affected, either directly or indirectly, the impartial exercise of official functions by public officials, namely **D7 D13 D3 D2**. **D1's** agreement with the Proposal appears to have influenced the exercise of official functions by the officers in the Crown Lands Division. This is on the basis that the officers, in considering each of the Applications, started from the proposition that **D1** had already agreed to the Proposal.

209. Based on the documents considered for the purpose of the Independent Review, **D1** conduct may constitute a "partial exercise of any of his or her official functions". This is on the basis that he agreed with the Proposal without receiving any formal application and without any proper consideration of an application. As a delegate for the Minister for Lands, he did not satisfy himself that the relevant legislative requirements and the policies of the Department of Lands and Department of Services had been complied with prior to agreeing with the Proposal.

210. Having regard to the documents considered for the purpose of the Independent Review, there is no evidence that **D1** conduct constituted a "breach of public trust".

211. There is no evidence in the documents considered for the purpose of the Independent Review that **D1** engaged in the types of conduct set out in sections 8(1)(c) and (d) of the ICAC Act.

212. There is no evidence in the documents considered for the purpose of the Independent Review that **D1** engaged in the types of conduct set out in section 8(2) of the ICAC Act.

¹⁶⁴ No compulsive powers were associated with the Independent Review.

Does the corrupt conduct fall within the meaning of section 9 of the ICAC Act?

213. A finding of corrupt conduct requires that, in addition to falling within the definition in section 8 of the ICAC Act, the conduct must also constitute a criminal offence, a disciplinary offence, a reasonable ground for terminating the public official, or in the case of a member for Parliament a substantial breach of an applicable code of conduct.
214. As stated in paragraph (xxvi) above, the Independent Review has been conducted on a "desktop" review basis and in the absence of compulsive powers. There is no evidence in the documents considered for the purpose of the Independent Review that the conduct of **D1** would constitute a criminal offence, a disciplinary offence, or a ground for terminating his employment.

Chapter 10 In relation to the decisions referred to, were there any direct negotiations between the Department and PBC or CSKS Holdings?

Overview

215. Having regard to the documents considered for the purpose of the Independent Review, it is evident that **D1** did engage in direct negotiations with PBC in relation to the Proposal, which comprised the Decisions referred to at paragraph 1(ii) to (v) of the TOR.

What are direct negotiations?

216. The ICAC Guidelines provide the following definition of “direct negotiations”:

“Exclusive negotiations between an agency and a proponent without first undergoing a genuine competitive process. Direct negotiations are sometimes referred to as directly sourced, single-invited or non-competed contracts.”¹⁶⁵

217. The ICAC Guidelines state that, as a general rule, direct negotiations should be avoided because of the risks that accompany the process.¹⁶⁶ This general rule is also consistent with the Department of Lands’ policies and procedures in place at the time, including the “Department of Lands – Crown Land Division – Business Directives (2008-2011)”,¹⁶⁷ which contains a section in relation to direct negotiations.
218. The ICAC Guidelines and the Department’s policy referred to above were current at the time that **D1** agreed in principle to the Proposal and at the time the Department of Lands, the Department of Services, the Department of Primary Industries and the DTIRIS considered the Applications.

Were there any direct negotiations between the Department and PBC or CSKS Holdings?

219. There is no evidence that a “genuine competitive process” was engaged in, in relation to the Proposal (which specifically relates to the Decisions referred to in paragraph 1(ii) to (v) of the TOR) agreed with **D1** in 2008. Rather, it is clear that the Proposal was directly negotiated between **D1** and PBC.

¹⁶⁵ ICAC Guidelines, page 7.

¹⁶⁶ ICAC Guidelines, page 8.

¹⁶⁷ Department of Lands – Crown Lands Division – Business Directives (2008 – 2011), paragraph 2.1 (Annexure C, 241).

220. The Report of the 2007 Inquiry also stated that there was evidence from Mr Kirk, who was a witness in the 2007 Inquiry, that:

“since the refusal by the Minister on 26 September 2006, there have been continuing negotiations with the Department of Lands to achieve the land purchase. The negotiations have been conducted by consultants. There was no evidence of the details of the negotiations conducted by the consultants.”¹⁶⁸

221. The Report of the 2007 Inquiry, in relation to a letter from the Minister for Lands to the Council dated 13 February 2008 in relation to the rejection of the Freehold Conversion Proposal, stated the following:

“there is a formidable barrier to any future application, unless the required assurances can be given.”¹⁶⁹

“It is a matter for the Administrator to determine if the information being provided to him in relation to the status of any continuing negotiations for purchase of land is complete.”¹⁷⁰

222. Although PBC already held the Perpetual Lease over the Land, there is no evidence that the Department of Lands was considering changing the Perpetual Lease to a commercial lease at the time that D1 agreed in principle with the Proposal. No expressions of interest had been sought from the public regarding a suitable tenant for a commercial lease over the Land. The circumstances in which the meeting on 26 September 2008 was requested and by whom it was requested are unknown. The same can be said of the meeting which preceded the meeting on 26 September 2008. The emails in September to December 2008 between various officers in the Crowns Lands Division indicate that the agreement to grant the Lease was arrived at between D1 and PBC.¹⁷¹ D1, on behalf of the Department of Lands, directly negotiated with PBC regarding the Proposal.
223. It is also important to note that members of the public would not have been aware that the Minister for Lands was intending to grant a lease over the Land, as the Department of Lands did not comply with the requirement to publish a public notice (discussed above at paragraph 87).

¹⁶⁸ The Report of the 2007 Inquiry, paragraph 9.28.

¹⁶⁹ The Report of the 2007 Inquiry, paragraph 9.32.

¹⁷⁰ The Report of the 2007 Inquiry, paragraph 9.33.

¹⁷¹ Email from D6 to D7 D8 dated 4 September 2008 (Annexure C, 305), Email from D2 to D3 D11 dated 19 September 2008 (Annexure C, 306), Email from D2 to D3 D4 D5 dated 29 September 2008 (Annexure C, 307), Email from D2 to D7 dated 10 October 2008 (Annexure C, 312), Email from D2 to D1 dated 23 October 2008 (Annexure C, 317).

224. No other parties were invited to submit a business case or application for the grant of a commercial lease, or were notified that the Department for Lands was considering the grant of a commercial lease over the Land.

225. This is illustrated in an email exchange between **D7 D13**, officers of the Crown Lands Division, in which the following was stated:

E7 rang about the Paddington Bowling Club and inquired whether it was up for lease.

D7 "PBC is not up for lease! Would you please call **E7** and explain that we are negotiating terms of a new lease to PBC? The site is not available to any third party."

226. It would be of little utility to examine the Decisions beyond those specifically comprised in the Proposal. Once the Proposal was agreed, the remaining Decisions naturally followed and were each approached on the basis that **D1** had agreed with the Proposal.

Chapter 11 Were those direct negotiations appropriate with reference to the ICAC Guidelines on Direct Negotiations and the NSW procurement policy framework in place at the time?

Overview

227. As explained in Chapter 10, **DI** engaged in direct negotiations with PBC in 2008 in relation to the Proposal. These direct negotiations were not in accordance with the ICAC Guidelines.

When are direct negotiations considered appropriate?

228. The ICAC Guidelines contain a number of principles that should be considered when an agency is deciding whether to enter into direct negotiations, namely:

- (a) obtaining the best value for money;
- (b) providing a fair chance to do business with government;
- (c) demonstrating accountability and transparency; and
- (d) dealing with conflicts of interest.¹⁷²

229. The ICAC Guidelines make it clear that any decision or project should be based on the agency's own business case and should be congruent with its overall strategic direction. The agency should be under no obligation to agree to direct negotiations or an unsolicited proposal without undertaking the proper planning and budgeting.¹⁷³

230. Agencies should ensure that the decision to enter into direct negotiations is made at a senior level within the organisation. The decision to negotiate directly should not be made by the person(s) or team who will be performing the negotiations or managing the project.¹⁷⁴

231. To avoid suggestions of impropriety, the agency should record the reasons it has chosen to enter into direct negotiations. In order to maintain transparency, it should, where appropriate,

¹⁷² ICAC Guidelines, page 7.

¹⁷³ ICAC Guidelines, page 25.

¹⁷⁴ ICAC Guidelines, page 26.

make the decision and supporting reasons public, possibly by placing a notice on the agency website.¹⁷⁵

Obtaining the best value for money

232. When it is known that there are proponents who could feasibly compete for a contract, agreeing to direct negotiations with a single proponent increases the risk that the agency may not obtain the best value for money.¹⁷⁶
233. When a proponent does not have to compete for contracts there is a higher risk that the proponent may unjustifiably increase profit margins, exaggerate expenses or otherwise boost returns on the contract.¹⁷⁷
234. When conducting direct negotiations, it is standard practice to engage an independent expert to provide an estimate of the market or fair price of the transaction being considered. While this estimate will not necessarily be equivalent to the price that would be obtained under open bidding, it should help the agency guard against paying too much or receiving too little.¹⁷⁸

Providing a fair chance to do business with government

235. Doing business with government is a key driver of economic activity and many private firms and not-for-profit organisations rely on access to government contracts in order to stay in business. Direct negotiations can unfairly exclude capable firms that employ staff, pay taxes and contribute to the economy.¹⁷⁹

Demonstrating accountability and transparency

236. Accountability involves agencies being able to demonstrate and justify to an appropriate authority how public resources are used, which involves allocating and taking responsibility for past and expected future performance.¹⁸⁰ Transparency means an agency must be prepared to open a project and its processes to scrutiny and possible criticism, which involves providing reasons for all decisions that are taken and providing appropriate information to relevant stakeholders.¹⁸¹

¹⁷⁵ ICAC Guidelines, page 26.

¹⁷⁶ ICAC Guidelines, page 12.

¹⁷⁷ ICAC Guidelines, page 12.

¹⁷⁸ ICAC Guidelines, page 12.

¹⁷⁹ ICAC Guidelines, page 13.

¹⁸⁰ ICAC Guidelines, page 13.

¹⁸¹ ICAC Guidelines, page 13.

Chapter 11: Were the Direct Negotiations In accordance with ICAC Guidelines?

237. The selective and closed nature of direct negotiations can create suspicions of favouritism and bias, consequently making it difficult for public agencies to justify the decisions they make.¹⁸²
238. When a single member of staff is responsible for all aspects and phases of the project, the opportunities for corrupt conduct are expanded. To the extent possible, the different aspects of the project should be performed by different staff and key project decisions should not be made unilaterally. Segregating duties is good practice for all contracting situations, not just direct negotiations.¹⁸³

Dealing with conflicts of interest

239. Direct negotiations (or the possibility of direct negotiations) can create an environment where private interests could influence or be seen to influence the outcome of the contract.¹⁸⁴

Examples of circumstances where direct negotiations may be appropriate

240. The ICAC Guidelines identify a number of circumstances where direct negotiations may be appropriate, however recommends that agencies nonetheless fully examine the most suitable course of action. These circumstances include:
- (a) exemption by statute or government policy;
 - (b) monopolies;
 - (c) intellectual property rights;
 - (d) real property rights;
 - (e) joint ventures and relationship contracting;
 - (f) interface with an existing facility or product; and
 - (g) sponsorships.¹⁸⁵

Department policies in relation to direct negotiations

241. In addition to the ICAC guidelines, there were a number of policies in place at the time the Department of Lands engaged in direct negotiations with PBC that were relevant to the issue

¹⁸² ICAC Guidelines, page 13.

¹⁸³ ICAC Guidelines, page 13.

¹⁸⁴ ICAC Guidelines, page 13.

¹⁸⁵ ICAC Guidelines, pages 14 to 21.

of direct negotiations. It is important to note that these policies were merely guidelines, and not mandatory.

242. The LPMA Website Fact Sheet – Leases of Crown Lands stated:

*“Leases of Crown land should generally be subject to a transparent and publically competitive process, and **applications for a private treaty lease over Crown land are not encouraged**, without the proposal first being considered by the Crown Lands Division of the LPMA.”* (emphasis added)

243. The Department of Lands – Crown Lands Division – Business Directives (2008 – 2011) stated the following:

*“As a general position, the Department of Lands requires competitive selection processes for the leasing of Crown land and all leasing opportunities to be suitably advertised. This may be conducted through a formal lease tender process, expression of interest process or other advertised/identified means.”*¹⁸⁶

*“There is, and must be, a general presumption that business between the Department of Lands and the private sector is conducted in an open and transparent manner to ensure requirements regarding probity, integrity and impartiality are achieved. Various state laws, regulations and guidelines provide details as to when direct negotiations are appropriate. The Department of Lands may consider direct negotiations if, after an assessment of the site and the likely competitive interests in development of the site, direct negotiation would not conflict with other competitive and/or alternative interests plus the applicant, premium to be paid, business plan and social and economic benefits, are likely to lead to an equal or better outcome for the State than a competitive process.”*¹⁸⁷

244. The Department of Lands – Crown Lands Division – Business Directives (2008 – 2011) also outlined the following special circumstances in which direct negotiations could be considered:

- (a) when the current market rental value of the property was low relative to the cost of conducting a competitive process;
- (b) if there was a genuine and objectively supportable belief that the conducting of a competitive process could place a project at risk, where an appropriate competitive process had not produced a satisfactory lease outcome and the better option in the circumstances was to negotiate with a party who made the best offer or any party who had expressed serious interest if no best offer was made;

¹⁸⁶ Department of Lands – Crown Lands Division – Business Directives (2008 – 2011), paragraph 2.1 (Annexure C, 241).

¹⁸⁷ Ibid, paragraph 2.2.

Chapter 11: Were the Direct Negotiations in accordance with ICAC Guidelines?

- (c) when it was clear beyond reasonable doubt (with recent market testing to backup the conclusion) that there was only one prospective tenant for a particular property (e.g. where the proponent owned a freehold component);
 - (d) where the lease of a property led to significant economic development for the State (e.g. through investment, employment etc.);
 - (e) a good business case was presented by a credible proponent that was in line with the Department's strategic policy objectives; or
 - (f) if an appropriate development on the particular site could be considered a catalyst for future developments (and income opportunities) on adjoining land.¹⁸⁸
245. Both the ICAC Guidelines and the policies of the Department of Lands referred to above were current at the time that **D1** agreed in principle to the Proposal.

Were the direct negotiations with PBC appropriate?

246. Having regard to the documents considered for the purpose of the Independent Review and the ICAC Guidelines, it was not appropriate for **D1** to engage in direct negotiations with PBC in 2008 for the purposes of agreeing to the Proposal.
247. This is because the circumstances associated with PBC did not fall within one of the special circumstances in the ICAC Guidelines that would warrant direct negotiations.
248. It is also noted that there is no indication in the documents considered for the purpose of the Independent Review that the Department of Lands considered the principles set out in the ICAC Guidelines that should be followed in determining whether or not direct negotiations were appropriate.
249. Whilst, as noted in Chapter 10, there would be little utility in examining the Decisions which followed **D1** agreement with the Proposal, it is noted that following the grant of the Lease to PBC, the direct negotiations that the Department of Lands engaged in with either PBC or CSKS Holdings were not inappropriate. This is on the basis that each of the Transactions were specifically in relation to the Lease, which had already been granted to PBC, and the Department of Lands was entitled to negotiate directly with the tenant, either PBC or CSKS Holdings at the relevant times, in relation to the proposed transfer of the Lease, the Sub-lease, the Mortgage and the landowner's consent.

¹⁸⁸ *ibid*, paragraph 2.5.

PART B: THE OLGR RESPONSE TO REPORT OF THE 2007 INQUIRY

Chapter 12 What actions, referrals and further investigations into PBC should the OLGR or **D19** have undertaken with regard to the legislation, government policies and the OLGR procedure in place at the time of the Report of the 2007 Inquiry and the findings of fact set out in the Report of the 2007 Inquiry?

Background

250. By an Instrument of Appointment dated 29 June 2007¹⁸⁹ the Director of Liquor and Gaming, appointed Mr Guest to conduct the 2007 Inquiry, under section 41X of the Registered Clubs Act.

251. Section 41X of the Registered Clubs Act at the relevant time stated:

Inquiry may be held

- (1) *For the purposes of investigating an allegation about any corrupt or other improper conduct in relation to a registered club, the Director may arrange for the holding of an inquiry to be presided over by a person appointed by the Director.*
- (2) *The Director is to determine the following:*
 - (a) *the matters that are the subject of an inquiry,*
 - (b) *the procedures to be adopted at an inquiry (including whether the inquiry is to be held in public or in private),*

¹⁸⁹ Amended 22 October 2007.

Chapter 12: What actions, referrals and further investigations into PBC should the OLGR have undertaken?

- (c) *the time within the person presiding at the inquiry is required to report to the Director on the findings of an inquiry.*
- (3) *The matters that may be the subject of an inquiry may include matters relating to the termination of employment of members of staff of a registered club.*
- (4) *Evidence may be taken on oath or affirmation at an inquiry, and for that purpose:*
 - (a) *the person presiding at the inquiry may require a person appearing at the inquiry who wishes to give evidence to take an oath or to make an affirmation in a form approved by the person presiding, and*
 - (b) *member of staff of the Department of Gaming and Racing may administer an oath or affirmation to a person so appearing at the inquiry.*
- (5) *The person presiding at an inquiry is not bound by the rules or practice of evidence and may inform himself or herself on any matter in such manner as the person considers appropriate.*

252. The matters which were the subject of the 2007 Inquiry¹⁹⁰ included:

- (a) Mr Malouf's dealings with PBC;
 - (i) the terms of engagement and the consideration given to Mr Malouf and the Malouf family;
 - (ii) whether the loan owing to B52 had been substantiated;
- (b) various issues relating to the ongoing administration of PBC, including;
 - (i) the facts and circumstances leading to the appointment of a receiver and manager and a voluntary administrator;
 - (ii) whether Mr Wily was conducting the administration in accordance with the timeframe and arrangements stipulated in the Deed of Company Arrangement;
 - (iii) the basis of calculating, and the level of, the fees paid to Mr Wily since his appointment as receiver and manager and voluntary administrator;
 - (iv) the terms of the disposal or transfer of any of PBC's gaming machines and any consideration received for such disposal or transfer;

¹⁹⁰ To paraphrase the Instrument of Appointment, as amended.

Chapter 12: What actions, referrals and further investigations into PBC should the OLGR have undertaken?

- (v) the basis on which it was determined and agreed that \$50,000 should be the price payable by CSKS Holdings for the Option to Purchase the Land;
 - (vi) whether there had been a determination of the price equal to the freehold conversion price of the Perpetual Lease;
 - (vii) whether PBC or the Mr Wily or any other related party or individual had made any payments relating to the proposed purchase of the Land by CSKS Holdings;
- (c) the terms of appointment and remuneration package for the secretary of PBC, Mr Levy and fees paid to Mr Levy and/or ML Management; and
- (d) the terms of engagement and the fees and benefits paid to Ms Sanchez and/or VS Management for services to PBC since 27 May 2003.¹⁹¹
253. The 2007 Inquiry was to be held in public and the findings of the 2007 Inquiry were to be made no later than 3 December 2007, or by such later date as determined by the Director of Liquor and Gaming.¹⁹²
254. The 2007 Inquiry was conducted over 37 hearing days commencing on 5 September 2007 with the last hearing day on 7 March 2008.¹⁹³
255. The Report of the 2007 Inquiry was published on 31 March 2008 and the findings are set out at Annexure F.
256. Shortly after, on 27 June 2008 and following a 16 month review, the Independent Pricing and Regulatory Tribunal (IPART) Report was handed down. The IPART Report was related to the review of the club industry including issues such as improving clubs' financial viability, strengthening corporate governance particularly within the Registered Clubs Act and improving clubs' financial reporting and performance.

Requirements under the Registered Clubs Act

257. The Registered Clubs Act provided the Director of Liquor and Gaming with various powers relating to registered clubs in NSW. Broadly speaking, these included powers which arose upon receipt of a report of an inquiry held under section 41X of the Registered Clubs Act and other powers which the Director of Liquor and Gaming generally had under the Registered Clubs Act.

¹⁹¹ The Report of the 2007 Inquiry, pages 10 – 11.

¹⁹² Instrument of Appointment dated 22 October 2007.

¹⁹³ The Report of the 2007 Inquiry, page 14.

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258. Relevantly, these powers included the ability to:

- (a) refer matters contained in a report of a section 41X inquiry to a law enforcement agency or to any other person or body that may have an interest in the matter if the Director of Liquor and Gaming was satisfied that any matter contained in the report related to or could relate to a breach of a law of the State or another State or Territory or the Commonwealth, or constituted or could constitute grounds for taking proceedings of any kind against a registered club;¹⁹⁴
- (b) make orders requiring the registered club to provide its members with information about the section 41X inquiry, if the Director of Liquor and Gaming was satisfied that the findings of the inquiry justified doing so;¹⁹⁵
- (c) make orders that the registered club hold elections of its governing body, if the Director of Liquor and Gaming was satisfied that the findings of the section 41X inquiry justified doing so;¹⁹⁶
- (d) terminate contracts that breached the accountability provisions contained in Division 4 of Part 4A of the Registered Clubs Act;¹⁹⁷
- (e) commence proceedings against a secretary of a registered club, a member of the governing body of the registered club or a close associate of the registered club for a breach of the accountability provisions contained in Division 4 of Part 4A of the Registered Clubs Act;¹⁹⁸
- (f) make a complaint to the Licensing Court against a registered club;¹⁹⁹
- (g) appoint a temporary administrator to a registered club if an administrator had not been validly appointed under section 41 of the Registered Clubs Act;²⁰⁰ and
- (h) commence a prosecution against a registered club for not keeping records as required under section 40 of the Registered Clubs Act, as in force in 2002.²⁰¹

259. Each of these powers is considered below in the context of the Report of the 2007 Inquiry.

¹⁹⁴ Section 41Z(2) of the Registered Clubs Act.

¹⁹⁵ Section 41ZA(1)(a) of the Registered Clubs Act.

¹⁹⁶ Section 41ZA(1)(b) of the Registered Clubs Act.

¹⁹⁷ Section 41R of the Registered Clubs Act.

¹⁹⁸ Section 41V of the Registered Clubs Act.

¹⁹⁹ Section 17 of the Registered Clubs Act.

²⁰⁰ Section 41A of the Registered Clubs Act.

²⁰¹ Section 65 of the Registered Clubs Act.

Section 41Z Registered Clubs Act

260. The Registered Clubs Act allowed the Director of Liquor and Gaming to refer any matter contained in the Report of the 2007 Inquiry to a law enforcement agency or to any other person or body that may have an interest in the matter,²⁰² if the Director of Liquor and Gaming was satisfied that such matter:

- (a) related or may have related to a breach of any State or Commonwealth law (including the Registered Clubs Act); or
- (b) constituted or may have constituted grounds for taking proceedings against a registered club (defined in the Registered Clubs Act as a club which was registered under Part 2 of the Registered Clubs Act).

Payments to Mr Levy and Ms Sanchez

261. The Report of the 2007 Inquiry considered various transactions between PBC and Mr Levy and associated entities. The Report of the 2007 Inquiry found that:

- (a) Mr Levy had received payment for services to PBC under:
 - (i) the deed between PBC and Mr Levy dated 27 May 2003 (the **Levy Deed**);
 - (ii) the deed between PBC and ML Management dated 27 May 2003 (the **2003 ML Management Deed**);
 - (iii) the deed between PBC and ML Management dated 1 February 2007 (the **2007 ML Management Deed**);²⁰³ and
- (b) Ms Sanchez had received payment for services under a deed between PBC and VS Management dated 27 May 2003 (the **VS Management Deed**).²⁰⁴

262. The 2003 ML Management Deed, the 2007 ML Management Deed and the VS Management Deed, under which Mr Levy and Ms Sanchez received the payments referred to above, are discussed below under the heading *Accountability provisions – Part 4A of the Registered Clubs Act*.

263. 

²⁰² Section 41Z(2) of the Registered Clubs Act.

²⁰³ The Report of the 2007 Inquiry, paragraphs 11.14 – 11.16.

²⁰⁴ The Report of the 2007 Inquiry, paragraph 11.20.

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[REDACTED]

264. [REDACTED]

265. It is unclear from the documents provided for the purpose of the Independent Review whether the Director of Liquor and Gaming referred this or any matter relating to the Report of the 2007 Inquiry to [REDACTED]

Mr Wily's administration of PBC

266. The Report of the 2007 Inquiry set out various factual matters regarding Mr Wily's administration of PBC, including:

- (a) the relationship between Mr Wily and Mr Sanchez, which was a relationship of some years;²⁰⁵
- (b) that Mr Sanchez provided Mr Wily with an indemnity on the basis that he would have a say in the management of PBC;²⁰⁶ and
- (c) that Mr Sanchez held discussions with Mr Wily which led to the appointment of Ms Sanchez and Mr Levy to positions within PBC and of Mr Levy as company secretary of PBC.²⁰⁷

267. In the context of the duties imposed on [REDACTED] **E5** [REDACTED] under the Corporations Act, for example under sections 180 to 182 inclusive and section 184, these matters provided a basis for the Director of Liquor and Gaming to be satisfied that breaches of a Commonwealth law for the purposes of section 41Z(2)(a) of the Registered Clubs Act may have occurred and to have referred the matter to the ASIC.

268. The Director of Liquor and Gaming provided a copy of the Report of the 2007 Inquiry to the ASIC for its consideration.

²⁰⁵ The Report of the 2007 Inquiry, paragraph 9.3.

²⁰⁶ The Report of the 2007 Inquiry, paragraph 9.4.

²⁰⁷ The Report of the 2007 Inquiry, paragraph 10.4.

Section 41ZA Registered Clubs Act

269. The Registered Clubs Act allowed the Director of Liquor and Gaming, if satisfied that the findings of the 2007 Inquiry justified doing so, to make any one or more of the following orders:
- (a) an order that required PBC to provide each member with information about the findings of the 2007 Inquiry within a specified time; and
 - (b) an order that required PBC to hold an election of the governing body of PBC within a specified time.²⁰⁸
270. From 1 July 2008, the Registered Clubs Act was amended to add "(c) an order requiring the club to publish, in a manner determined by the Authority, a report on the findings of the inquiry, but only if, in the opinion of the Minister, it is in the public interest for the report to be published".
271. A registered club was required to comply with any order made by the Director of Liquor and Gaming and there was a maximum penalty of 100 penalty units for non-compliance with the above orders.²⁰⁹

Provision of information regarding the Report of the 2007 Inquiry to Members of PBC

272. Based upon the findings in the Report of the 2007 Inquiry, the Director of Liquor and Gaming should have been satisfied that the findings of the 2007 Inquiry justified ordering PBC to provide each member with information about the findings of the 2007 Inquiry. This was for the following reasons:
- (a) the media attention which surrounded the Report of the 2007 Inquiry; and
 - (b) the Report of the 2007 Inquiry dealt with matters and made findings which were of significance to PBC's members, particularly as the purpose of registered clubs is to deliver benefits to club members and the wider community.
273. The Director of Liquor and Gaming made orders under section 41ZA of the Registered Clubs Act, requiring PBC to:
- (a) post an electronic link to the Report of the 2007 Inquiry on PBC's website; and
 - (b) forward to each member of PBC a copy of the Report of the 2007 Inquiry by prepaid mail within 14 days of the date of the making of the order.

²⁰⁸ Section 41ZA(1) of the Registered Clubs Act.

²⁰⁹ Section 41ZA(2) of the Registered Clubs Act.

Election of Governing Body of PBC

274. The findings of the Report of the 2007 Inquiry would not have justified the Director of Liquor and Gaming being satisfied that an order, requiring PBC to hold an election of its governing body, should be made under section 41ZA(1)(b) of the Registered Clubs Act. The Report of the 2007 Inquiry did not make any adverse findings against the directors of PBC at the time of the Report of the 2007 Inquiry.
275. Further, the terms of the Deed of Company Arrangement provided that Mr Wily would continue to manage the business and affairs of PBC.²¹⁰ The Deed of Company Arrangement also provided that Mr Wily could grant to CSKS Holdings, or its nominee (approved by him), the right to manage the business of "the Club".²¹¹ Accordingly, the directors of PBC were not responsible for the management of the business and affairs of PBC. In those circumstances, there would have been no utility in the Director of Liquor and Gaming making an order under section 41ZA(1)(b).

Accountability provisions – Part 4A of the Registered Clubs Act

276. Part 4A of the Registered Clubs Act, relating to accountability of registered clubs, was passed by both Houses of Parliament in the *Registered Clubs Amendment Bill 2003* (NSW) and commenced on 9 April 2004. Annexure G sets out the relevant provisions.
277. The insertion of Part 4A into the Registered Clubs Act was aimed at increasing accountability and transparency in relation to registered clubs. Part 4A contained provisions which, *inter alia*, dealt with:
- (a) disclosure obligations on members of governing bodies (including disclosure of interests in contracts, financial interests in hotels, gifts and remuneration from affiliated bodies and gifts and remuneration from organisations contracting with registered clubs);
 - (b) prohibitions on entering into contracts in which a member of a governing body or top executive had an interest;
 - (c) prohibitions on a registered club entering into contracts with people or companies who were not at arm's length (i.e. the secretary, manager, close relatives and others); and
 - (d) prohibitions on a registered club entering into a contract for the remuneration by the club of a top executive, unless the proposed contract was first approved by the registered club's governing body.

²¹⁰ Clause 2 of the Deed of Company Arrangement.

²¹¹ Clause 8 of the Deed of Company Arrangement.

Offences by secretary and members of governing body in relation to contracts

278. Section 41V of the Registered Clubs Act provided that if a registered club breached, *inter alia*, Division 4 of Part 4A, the registered club would not be guilty of an offence, however each person who was the secretary, a member of the governing body or a close associate was guilty of an offence punishable on conviction by a maximum penalty of 100 penalty units,²¹² unless the person satisfied 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 registered 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.

The power for the Director of Liquor and Gaming to terminate contracts

279. Section 41R of the Registered Clubs Act allowed the Director of Liquor and Gaming to terminate contracts entered into in contravention of Division 4 of Part 4A. Unlike the other provisions in Part 4A, section 41R had retrospective operation.²¹³ The procedural requirements that enabled the Director of Liquor and Gaming to terminate a contract under section 41R are set out at Annexure G.

Contracts with members of governing body or top executive

280. Section 41K of the Registered Clubs Act dealt with contracts in which members of the governing body or top executive had an interest. In particular, section 41K(1) provided that a registered club could not enter into a contract with a member of the governing body of the club or a top executive, or with any company in which such a member or top executive had a pecuniary interest, unless the proposed contract was first approved by the governing body of the registered club.²¹⁴ Section 41K(3) provided a separate obligation upon a registered club to make all reasonable inquiries to ensure that the provisions of section 41K(1) were not contravened. Further information on the requirements of section 41K are set out at Annexure G.

281. The Report of the 2007 Inquiry made findings that, on 27 May 2003:

²¹² Section 41V of the Registered Clubs Act.

²¹³ Section 41R(9) of the Registered Clubs Act.

²¹⁴ Section 41K(1) of the Registered Clubs Act.

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- (a) PBC entered into the Levy Deed for Mr Levy's employment as Club secretary and manager;²¹⁵ and
 - (b) PBC entered into the 2003 ML Management Deed for the provision of administrative and consultative services.²¹⁶
282. A breach of section 41K(1) would have required that:
- (a) Mr Levy was secretary of PBC prior to PBC entering into 2003 ML Management Deed; and
 - (b) the governing body of PBC did not first approve the 2003 ML Management Deed.
283. The Report of the 2007 Inquiry did not provide sufficient information so as to establish that a breach of section 41K(1) had occurred. Although it was open to the Director of Liquor and Gaming to further investigate this matter so as to ascertain whether section 41K(1) (or indeed section 41K(3)) had been breached, it was noted in the Report of the 2007 Inquiry that Mr Levy had resigned as secretary and manager of PBC during the 2007 Inquiry,²¹⁷ and that PBC entered into the 2007 ML Management Deed on 1 February 2007.²¹⁸
284. In relation to the 2007 ML Management Deed, again the Report of the 2007 Inquiry did not provide sufficient information so as to establish that a breach of section 41K(1) had occurred. It was open to the Director of Liquor and Gaming to further investigate this matter as to ascertain whether a breach had occurred. Section 35A of the Registered Clubs Act allowed the Director of Liquor and Gaming the power to investigate any breach of Part 4A. The procedure for an investigation conducted by the Director of Liquor and Gaming's under section 35A is set out at Annexure H.
285. The Report of the 2007 Inquiry did not make clear whether the 2007 ML Management Deed remained on foot. If so, and if there had been a breach of section 41K(1), it would have been open to the Director of Liquor and Gaming to take steps to terminate the 2007 ML Management Deed under section 41R of the Registered Clubs Act.
286. Any proceedings for an offence under section 41V of the Registered Clubs Act for a breach of section 41K(1) (and similarly, for sections 41L or 41M of the Registered Clubs Act, which are discussed below at paragraphs 287 and 296, respectively) relating to the 2007 ML Management Deed, would have been statute-barred under section 65(1) of the Registered

²¹⁵ The Report of the 2007 Inquiry, paragraphs 11.14 and 10.6.

²¹⁶ The Report of the 2007 Inquiry, paragraph 11.15 and 10.7.

²¹⁷ The Report of the 2007 Inquiry, paragraph 10.17.

²¹⁸ The Report of the 2007 Inquiry, paragraph 11.16.

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Clubs Act as such proceedings were required to be commenced within 12 months of the act or omission on which it was based.²¹⁹

Section 41L Registered Clubs Act – Contracts with secretary or manager

287. Section 41L(1) of the Registered Clubs Act provided that a registered club could not enter into a contract with any of the following:

- (a) the secretary, a manager appointed under section 34A of the Registered Clubs Act or any other person prescribed by the *Registered Club Regulations 1996* (NSW);
- (b) any close relative of a person referred to in paragraph (a); or
- (c) a company in which a person referred to in paragraph (a) or (b) had a controlling interest.²²⁰

288. For the purposes of Part 4A of the Registered Clubs Act, a close relative of a person was defined as:²²¹

- (a) a parent, child, brother or sister of the person, or
- (b) a spouse of the person or of a person referred to in paragraph (a), or a person with whom the person or a person referred to in paragraph (a) had a de facto relationship (within the meaning of the *Property (Relationships) Act 1984* (NSW)).

289. Further information on section 41L is set out at **Annexure G**.

290. During the 2007 Inquiry, a proposition was put by Mr Guest to Mr Wily and Mr Levy that the 2007 ML Management Deed could be in breach of section 41L of the Registered Clubs Act.²²² Mr Guest was not required to make a finding as to whether section 41L had been breached.

291. However, it is apparent from the factual matters referred to in the Report of the 2007 Inquiry that, by entering into the 2007 ML Management Deed, PBC had entered into a contract with a company in which the secretary and manager of PBC had a controlling interest (i.e. Mr Levy was the sole director/secretary and shareholder of ML Management). Therefore, the Director of Liquor and Gaming would have had the power under section 41R of the Registered Clubs Act to take steps to terminate the 2007 ML Management Deed, if it remained on foot.

²¹⁹ Section 65(1) of the Registered Clubs Act.

²²⁰ Section 41L(1) of the Registered Clubs Act.

²²¹ Section 41B(1) of the Registered Clubs Act.

²²² The Report of the 2007 Inquiry, paragraph 10.16.

292. Further, it is apparent from the factual matters referred to in the Report of the 2007 Inquiry that, by entering into the VS Management Deed, PBC may have entered into a contract with a company in which a close relative of a secretary or manager of PBC had a controlling interest (i.e. Ms Sanchez was the sole director and shareholder of VS Management). It is unclear from the Report of the 2007 Inquiry whether Mr Levy was appointed as secretary and manager of PBC before PBC entered into the deed with VS Management. The Levy Deed, the 2003 ML Management Deed and the VS Management Deed were entered into on the same day (i.e. 27 May 2003). Further, it is unclear from the Report of the 2007 Inquiry whether the VS Management Deed remained on foot.
293. Therefore, it was open to the Director of Liquor and Gaming to investigate whether there had been a breach of section 41L when PBC entered into the VS Management Deed. If there had been a breach of section 41L, the Director of Liquor and Gaming had the power under section 41R to take steps to terminate the VS Management Deed, if it remained on foot.
294. Following receipt of the Report of the 2007 Inquiry, the OLGR, as an office of the Department of Arts, Sport and Recreation, considered whether a prosecution should be brought under section 41V for a breach of section 41L. This was considered in the context of the 2003 ML Management Deed and the 2007 ML Management Deed, however it was concluded that any proceedings would have been statute-barred under section 65(1) of the Registered Clubs Act.
295. The OLGR, as an office of the Department of Arts, Sport and Recreation, did not, however, consider sections 41M and 41K of the Registered Clubs Act and whether the Director of Liquor and Gaming had the power to terminate the 2007 ML Management Deed or the VS Management Deed.

Remuneration of top executives

296. Section 41M of the Registered Clubs Act provided that a registered club could not enter into a contract for the remuneration of a top executive of the club unless the proposed contract had first been approved by the governing body of the club.
297. For the purposes of Part 4A of the Registered Clubs Act, the definition of a "top executive" was extended to include a person appointed under section 34A(3) of the Registered Clubs Act to act as a manager of a club.²²³ It also included a person (other than the secretary of the registered club, or any manager appointed) who was one of the 5 highest paid employees of the club or any person who was nominated by the club as a top executive.²²⁴ It did not include a person if their total remuneration package did not exceed \$100,000 per year or where the

²²³ Section 47FA(1)(a) of the *Registered Club Regulations 1996* (NSW) in force from 21 December 2007 to 30 June 2008.

²²⁴ Section 47FA(1)(b) of the *Registered Club Regulations 1996* (NSW) in force from 21 December 2007 to 30 June 2008.

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person was not involved in the general administration of the registered club or with its liquor and gaming business.²²⁵

298. The Report of the 2007 Inquiry noted the following:
- (a) PBC entered into the 2007 ML Management Deed for the provision of consultative and administrative services to PBC,²²⁶ and
 - (b) the 2007 ML Management Deed provided for a monthly payment of \$40,000 to ML Management.
299. The Report of the 2007 Inquiry made a finding that Mr Levy was paid pursuant to the Levy Deed, the 2003 ML Management Deed and the 2007 ML Management Deed.²²⁷
300. Given that Mr Levy resigned as secretary and manager of PBC during the 2007 Inquiry and the 2003 ML Management Deed was superseded by the 2007 ML Management Deed, it was open to the Director of Liquor and Gaming to have undertaken further investigations under section 35A of the Registered Clubs Act as to whether the 2007 ML Management Deed had first been approved by the governing body of PBC.
301. If the 2007 ML Management Deed had not been approved by the governing body of PBC, and remained on foot, it was open to the Director of Liquor and Gaming to have taken steps to declare that the 2007 ML Management Deed be terminated under section 41R of the Registered Clubs Act.

Disciplinary Action

302. Section 17(1AA) of the Registered Clubs Act, which was in force in 2003, allowed the Director of Liquor and Gaming to make a complaint to the Licensing Court, requesting it to issue a summons under section 17(1) calling on a registered club to show cause why its certificate of registration should not be cancelled.
303. Section 17(1AA) specified various grounds upon which the Director of Liquor and Gaming could make the complaint, including that the requirements specified in section 10(1) of the Registered Clubs Act were not being met, or had not been met, in relation to the club.²²⁸ A number of the requirements specified in section 10(1) were relevant in the context of PBC, including:

²²⁵ Section 47FA(2) of the *Registered Club Regulations 1996* (NSW) in force from 21 December 2007 to 30 June 2008.

²²⁶ The Report of the 2007 Inquiry, paragraph 10.15.

²²⁷ The Report of the 2007 Inquiry, paragraph 11.17.

²²⁸ Section 17(1AA) of the Registered Clubs Act.

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"(a) The club shall be conducted in good faith as a club;²²⁹

(i) 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;²³⁰

(j) 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:

(i) the fact that the club has applied for registration, or

(ii) the registration of the club, or

(iii) any added value that may accrue to the premises of the club because the club has applied for, or is granted, registration;²³¹

unless it is a profit, benefit or advantage derived from dealings reasonably carried out, or contracts reasonably made, with the club in the ordinary course of its lawful business.²³²

304. Further, section 17(1AA)(e) of the Registered Clubs Act also allowed the Director of Liquor and Gaming to make a complaint on any other ground that the Licensing Court was satisfied was not frivolous or vexatious.²³³
305. At the time the 2007 ML Management Deed was entered into, section 10(1)(m) of the Registered Clubs Act had been recently introduced, so that a complaint could also have been made to the Licensing Court on the basis that PBC had not complied with any requirements imposed by Part 4A of the Registered Clubs Act.
306. The orders which the Licensing Court was allowed to make in 2003 and 2007 respectively, (i.e. when the Levy Deed, the 2003 ML Management Deed, the VS Management Deed and the 2007 ML Management Deed were entered into) were contained in section 17(2)²³⁴ of the Registered Clubs Act, as extracted below:

"(2) Subject to subsection (3), the Licensing Court constituted as provided by section 9 (1) (a) or (b) of the Liquor Act 1982 shall hear and determine the matter of the complaint

²²⁹ Section 10(1)(a) of the Registered Clubs Act.

²³⁰ Section 10(1)(i) of the Registered Clubs Act.

²³¹ Section 10(1)(j) of the Registered Clubs Act.

²³² Section 10(1)(j) of the Registered Clubs Act.

²³³ Section 17(1AA)(e) of the Registered Clubs Act.

²³⁴ Section 17 was repealed on 30 June 2008 and the powers of the equivalent to the Licensing Court, the Authority, were contained in section 57H of the Registered Clubs Act from 1 July 2008.

and, if it is satisfied that the ground upon which the complaint was made has been made out, may do any one or more of the following:

(a) cancel the certificate of registration or functions authority of the club or an approval under section 22A relating to the premises of the club,

(b) suspend the functions authority of the club or an approval under section 22A relating to the premises of the club,

(c) order the club to pay a penalty not exceeding 2,500 penalty units, or 5,000 penalty units if circumstances of aggravation exist in relation to the complaint, within such time as may be specified in the order,

(d) subject the certificate of registration or functions authority of the club or an approval under section 22A relating to the premises of the club to a specified condition,

(e) appoint a person to administer the affairs of the club who, on appointment and until the Licensing Court orders otherwise, has, to the exclusion of any other person or body of persons, the functions of the governing body of the club,

(f) declare (subject to section 17AAA) that each person specified in the declaration is, for such period as is specified in the declaration, 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 Licensing Court so declares—all other registered clubs or such other registered clubs as are specified or as are of a class specified in the declaration,

(g) (Repealed)

or may take no action.”

307. Given the comments in the Report of the 2007 Inquiry about the close relationship between Mr Sanchez and Mr Wily and the appointment of Mr Levy and Ms Sanchez to PBC, there may have been grounds for the Director of Liquor and Gaming to have made a complaint to the Licensing Court pursuant to section 17(1AA). However, as referred to above, the orders that the Licensing Court could make under section 17(2) of the Registered Clubs Act in relation to a complaint pursuant to section 17(1AA) were limited.
308. Section 17(2)(f)(i) would not have been of any utility as Mr Levy had already resigned as the secretary and manager of PBC. The Director of Liquor and Gaming would have been unlikely to make a complaint seeking orders under section 17(2)(f)(ii) because the Report of the 2007 Inquiry did not make any findings as to improper conduct which would justify Mr Levy being

declared to be ineligible to be the secretary or member of the governing body of any other registered club. The other orders in section 17(2) were directed at sanctions against PBC (e.g. cancellation of the certificate of registration, ordering PBC to pay a penalty and appointing a person to administer PBC's affairs). Given PBC's circumstances, in particular that PBC was subject to the Deed of Company Arrangement, it would not have been appropriate for the Director of Liquor and Gaming to take such a course.

309. Although the OLGR, as an office of the Department of Arts, Sport and Recreation, considered making a complaint under section 17(1AA), this did not occur. The documents considered for the purposes of the Independent Review do not explain the reason why a complaint to the Licensing Court was not pursued.

Registered clubs under administration or receivership

310. Section 41 of the Registered Clubs Act, which was in force as at the date of Mr Wily's appointment as the voluntary administrator of PBC, stated as follows:

"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."

311. Section 41A of the Registered Clubs Act, which was in force as at the date of the Report of the 2007 Inquiry until it was amended on 1 July 2008, stated as follows:

"41A Appointment of temporary administrator

(1) Where an appointment referred to in section 41 has not been made but the governing body of a registered club has, in the opinion of the Licensing Court, ceased to be effective as a governing body, the Licensing Court may appoint a person to administer the affairs of the club.

(2) A person appointed under subsection (1) has, to the exclusion of any other person or body of persons, the functions of the governing body of the club until:

- (a) an appointment referred to in section 41 is made, or
(b) the Licensing Court orders otherwise,*

whichever first occurs.

(3) An application for the making of an appointment under subsection (1) may be made by a member of the club, the Director or the Commissioner of Police."²³⁵

312. In its recent decision in *Correa v Whittingham* [2013] NSWCA 263, the NSW Court of Appeal held that an administrator's appointment which is not made pursuant to section 41 of the Registered Clubs Act is invalid. In its decision, the NSW Court of Appeal emphasised that for a person to be validly appointed to act in the capacity of the administrator of a registered club, that person has to be appointed by the Supreme Court of NSW or approved by the Licensing Court to act in that capacity.²³⁶
313. Importantly, such appointment or approval has to be given *before* a person is capable of being appointed and acting as an administrator and that *"there is no warrant... for giving s 41 an interpretation that late compliance is sufficient"*.²³⁷ This is because the language of section 41 of the Registered Clubs Act *"speaks both as at the date of the administrator's appointment ('a person is not capable of being appointed') and thereafter ('a person is not capable... of acting in any such capacity')"*.²³⁸

²³⁵ Section 41A(3) was repealed on 1 July 2008.

²³⁶ Section 41A of the Registered Clubs Act now refers to Casino Control and Gaming Authority (the Authority), which is the body that has replaced the Licensing Court for the purposes of the Registered Clubs Act.

²³⁷ *Correa v Whittingham* [2013] NSWCA 263 at [90].

²³⁸ *Correa v Whittingham* [2013] NSWCA 263 at [78].

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314. The NSW Court of Appeal also held that there was no power under section 447A of the Corporations Act to validate an invalidity under section 41 of the Registered Clubs Act.²³⁹
315. The Report of the 2007 Inquiry set out various factual matters relating to the appointment of Mr Wily as receiver and manager of PBC on 19 and 20 September 2002, as voluntary administrator of PBC on 24 October 2002 and as Deed Administrator of the Deed of Company Arrangement on 24 March 2003.

Appointment of Mr Wily as receiver and manager of PBC

316. The Report of the 2007 Inquiry referred to the fact that PBC had been deregistered on 18 February 2002 and, following an application by a director of PBC to the Supreme Court of NSW, his Honour Justice Hamilton made orders on 19 and 20 September 2002 to reinstate the registration of PBC and to appoint Mr Wily as the receiver and manager of PBC.²⁴⁰
317. Based upon the factual matters referred to in the Report of the 2007 Inquiry, the appointment of Mr Wily as the receiver and manager of PBC was validly made under section 41 of the Registered Clubs Act.

Appointment of Mr Wily as voluntary administrator of PBC

318. The Report of the 2007 Inquiry referred to a number of factual matters regarding the appointment of Mr Wily as the voluntary administrator of PBC. Relevantly, a meeting of directors of PBC resolved to appoint Mr Wily as administrator of PBC pursuant to section 436A of the Corporations Act.²⁴¹ The Report of the 2007 Inquiry also referred to Mr Wily's appointment as voluntary administrator being ratified by the first meeting of creditors of PBC.²⁴² The Report of the 2007 Inquiry made a finding that Mr Wily was appointed as voluntary administrator of PBC:

*"after the directors of the Club received Penalty Notices from the Australian Taxation Office because of non-payment of a taxation liability by the Club, and the appointment of an Administrator was one option by which personal liability was avoided."*²⁴³

Appointment of Mr Wily as Deed Administrator of the Deed of Company Arrangement

319. The Report of the 2007 Inquiry referred to a number of factual matters regarding the appointment of Mr Wily as Deed Administrator of the Deed of Company Arrangement. For

²³⁹ *Correa v Whittingham* [2013] NSWCA 263 at [105].

²⁴⁰ *Moon v ASIC* [2002] NSWSC 885.

²⁴¹ The Report of the 2007 Inquiry, paragraph 7.8.

²⁴² The Report of the 2007 Inquiry, paragraph 8.1.

²⁴³ The Report of the 2007 Inquiry, paragraphs 11.1 to 11.2.

present purposes, it is sufficient to note that at a meeting of creditors on 11 February 2003,²⁴⁴ the creditors of PBC resolved that PBC be required to execute the Deed of Company Arrangement.²⁴⁵

320. The Report of the 2007 Inquiry also referred to steps which were taken by Mr Wily in furtherance of the Deed of Company Arrangement.

Matters which D19 should have considered

321. Given the factual matters referred to above, D19 should have:

- (a) concluded that Mr Wily was not appointed as the voluntary administrator of PBC and Deed Administrator of the Deed of Company Arrangement in accordance with section 41 of the Registered Clubs Act;
- (b) considered and taken advice as to whether Mr Wily's appointment as voluntary administrator of PBC, and as Deed Administrator of the Deed of Company Arrangement, was accordingly invalid; and
- (c) considered and taken advice as to whether Mr Wily should be removed as Deed Administrator of the Deed of Company Arrangement (including as to the ability to make an application under section 41A of the Registered Clubs Act to the Licensing Court²⁴⁶ for the appointment of another person to administer the affairs of PBC).

322. Given the breadth of section 41Z of the Registered Clubs Act, D19 should also have considered referring the breach of section 41 of the Registered Clubs Act, including the possibility that Mr Wily had been invalidly appointed as the voluntary administrator of PBC and the Deed Administrator of the Deed of Company Arrangement, to the ASIC.

323. The actions in paragraphs 321 and 322 above were not taken by D19

Records of PBC

324. The Report of the 2007 Inquiry noted that *"the books and records of the Club were not retained by Sports Marketing in accordance with the MACA [Management and Catering Agreement executed by Deed between Paddington Bowling Club Limited and Sports Marketing*

²⁴⁴ The Report of the 2007 Inquiry, paragraph 9.5.

²⁴⁵ The Report of the 2007 Inquiry, paragraph 9.6.

²⁴⁶ The Licensing Court was replaced with the Casino, Liquor and Gaming Control Authority on 1 July 2008.

*Pty Limited*²⁴⁷ and further noted that, during the 2007 Inquiry, evidence had been given that *"the Club's reporting was deficient from 2000 to 2002."*²⁴⁸

325. Section 40(1) of the Registered Clubs Act, which was in force in 2002 until it was repealed in 2006, provided that a registered club shall:

"(a) cause to be prepared and submitted to a meeting of the governing body of the club at intervals of not more than 3 months a statement of income and expenditure in relation to each aspect of the club's activities during the period commencing on the date up to which the next previous such statement was so submitted (whether before or after the commencement of this paragraph) and ending on a date not earlier than 42 days before the date the statement is so submitted,

(b) within 48 hours after the meeting of the governing body of the club to which any such statement is submitted, cause a copy of that statement and of any resolution passed by the governing body of the club in relation to that statement to be exhibited in a conspicuous position on the premises of the club, and

*(c) cause the copy of the statement and that resolution, if any, to be so exhibited for a continuous period of not less than 28 days."*²⁵¹

326. Under section 40(2A) of the Registered Clubs Act, a registered club was required to keep every statement for 3 years after it had been submitted.²⁵² If a registered club did not prepare the statement of income as required under section 40(1) or keep the statement for 3 years after it was submitted, the registered club was guilty of an offence and liable for a penalty not exceeding 10 penalty units.²⁵³
327. However, proceedings for a breach of section 40 of the Registered Clubs Act were required to have been commenced within 3 years of the offence.²⁵⁴ As the Report of the 2007 Inquiry only referred to PBC's failures to keep books and records, and reporting failures, for the period between 2000 and 2002, there was no basis for the Director of Liquor and Gaming to conclude that such failures had continued after that period, or were continuing at the time of the Report of the 2007 Inquiry. Any proceedings for a breach of section 40, as disclosed in the Report of the 2007 Inquiry, would have accordingly been statute-barred at the time of the Report of the 2007 Inquiry.²⁵⁵

²⁴⁷ The Report of the 2007 Inquiry, paragraph 4.28.

²⁴⁸ The Report of the 2007 Inquiry, paragraph 4.23.

²⁵¹ Section 40(1) of the Registered Clubs Act.

²⁵² Section 40(2A) of the Registered Clubs Act.

²⁵³ Section 40(3) of the Registered Clubs Act.

²⁵⁴ Section 65(3) of the Registered Clubs Act.

²⁵⁵ Section 65(3) of the Registered Clubs Act.

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328. The OLGR, as an office of the Department of Arts, Sport and Recreation, considered whether the Director of Liquor and Gaming could prosecute PBC for breaches of section 40, however it was concluded that such a prosecution would be statute-barred.

Chapter 13 What actions, referrals and further investigations into PBC did the OLGR or the Director of Liquor and Gaming undertake at the time of the Report of the 2007 Inquiry?

329. The findings set out below are made on the basis of the documents considered for the purpose of the Independent Review. The documents provided for the purpose of paragraph 4 of the TOR are limited, and it is possible that further actions were taken by the OLGR or the Director of Liquor and Gaming.

Orders under section 41Z(1)(a) of the Registered Clubs Act

330. Following the Report of the 2007 Inquiry, on or about 2 July 2008, the Director of Liquor and Gaming made orders under section 41Z(1)(a) of the Registered Clubs Act, requiring PBC to provide club members with the Report of the 2007 Inquiry by:

- (a) posting an electronic link to the Report of the 2007 Inquiry on PBC's website; and
- (b) forwarding to each member of PBC a copy of the Report of the 2007 Inquiry by prepaid mail within 14 days of the date of the order.²⁵⁶

The OLGR Recommendations Document

331. Commencing in or about July 2008, the OLGR, as an office of the Department of Arts, Sport and Recreation, began to prepare a set of recommendations arising from the factual matters referred to in, and findings of, the Report of the 2007 Inquiry.

332. **D20** as an office of the Department of Arts, Sport and Recreation, prepared the OLGR Recommendations Document²⁵⁷ which summarised the factual matters referred to in, and findings of, the Report of the 2007 Inquiry. The OLGR Recommendations Document also:

- (a) suggested questions to be put to **E5**
- (b) considered whether breaches of the Registered Clubs Act and the *Gaming Machines Act 2001 (NSW)* (*Gaming Machines Act*) had occurred;
- (c) considered possible legal proceedings and complaints in respect of breaches of the Registered Clubs Act and the *Gaming Machines Act* Identified;

²⁵⁶ OLGR fax to PBC providing Director's orders in response to report dated 2 July 2008 (Annexure C, 287).

²⁵⁷ Annexure C, 1209.

- (d) recommended further investigations to be undertaken; and
 - (e) recommended legislative amendments to the Registered Clubs Act and the Gaming Machines Act for the Director of Liquor and Gaming's consideration.
333. Specifically, in relation to **E5** the OLGR Recommendations Document stated that there was:
- "a significant concern with the conduct of **E5** and the apparent conflict that arises under Commonwealth and State Law regarding his duty to act in the interest of creditors under the Corporations Act and his apparent lack of accountability to the existing members of the registered club under the Registered Clubs Act."²⁵⁸*
334. A draft of the OLGR Recommendations Document was provided to Mr Guest on 14 August 2008 for his comments. Mr Guest provided comments to OLGR, as an office of the Department of Arts, Sport and Recreation, on 20 August 2008,²⁵⁹ which were incorporated into the finalised version of the OLGR Recommendations Document.
335. By way of background to the OLGR Recommendations Document, the Report of the 2007 Inquiry referred to a number of factual matters during the period that Bruce Malouf and Phillip Malouf were managing PBC. Those matters included that:
- (a) Sports Marketing entered into the Management and Catering Agreement with PBC on or about 12 September 1999, to provide catering and management services to PBC;²⁶⁰
 - (b) as PBC had no funds, the Maloufs²⁶¹ expended the money required for renovations, capital works and gaming machines for PBC;²⁶²
 - (c) the original scope of the works for renovations and capital works was estimated to be \$30,000-\$50,000 but costs quickly increased to \$624,221.76;²⁶³
 - (d) further expenses were incurred by the Maloufs;
 - (e) following the failure of the St Trinian's venture, Phillip Malouf took over the management of PBC and, in mid-2000, requested his accountant to prepare a tally of all payments made by the Maloufs to PBC. A tallying exercise was conducted by the

²⁵⁸ OLGR Recommendations Document, page 1 (Annexure C, 1209).

²⁵⁹ Email from Brian Guest to **D22** dated 20 August 2008 (Annexure C, 1208).

²⁶⁰ The Report of the 2007 Inquiry, paragraphs 3.6 to 3.7.

²⁶¹ Defined in the Report of the 2007 Inquiry as encompassing B52, Sports Marketing, Camp Ella Pty Limited, Mavis Joyce Malouf, Lewis William Malouf, Bruce Elias Malouf and Phillip William Malouf.

²⁶² The Report of the 2007 Inquiry, page 1.

²⁶³ The Report of the 2007 Inquiry, paragraph 3.28.

Chapter 13: What actions, referrals and further investigations into PBC did the OLGR undertake?

accountant and this amount was determined to be \$1,192,204.52, without regard to whether PBC was legally obliged to repay the payments made by the Maloufs to PBC;²⁶⁴

- (f) the \$1,192,204.52 figure, which was said to be owed by PBC to the Maloufs, was then increased to \$1,270,354.00 to include cash advances for working capital at PBC;²⁶⁵
- (g) the amount of \$1,270,354.00 represented expenditures by Sports Marketing from funds provided by the Maloufs, which were in turn substantially provided by B52;²⁶⁶
- (h) included within the \$1,270,354.00 was the cost of the twenty eight new gaming machines purchased for PBC in November 1999 and funded from monies provided by B52;²⁶⁷
- (i) there was evidence that some expenditures totalling \$139,446.00 (which had been included within the \$1,270,354.00) were not expended by Sports Marketing in relation to operating expenses under the Management and Catering Agreement but instead included personal expenses of Mr Malouf;²⁶⁸ and
- (j) there was evidence that a sponsorship payment of \$70,000.00 made by Tooheys Limited to PBC on or about May 2000 was deposited into Sports Marketing's accounts.²⁶⁹

336. The Report of the 2007 Inquiry made a number of findings in relation to the sums allegedly owed by PBC to the Maloufs, namely that:²⁷⁰

- (a) \$1,270,354.00 represented the expenditures by Sports Marketing and/or the Maloufs, but it was not substantiated that the \$1,270,354.00 was in the nature of a loan by Sports Marketing and/or the Maloufs to PBC;
- (b) within the amount of \$1,270,354.00:
 - (i) the Maloufs incurred expenditures of \$624,221.76 for renovations and capital works at PBC;
 - (ii) the Maloufs provided \$376,574.92, which was applied by PBC to pay for twenty eight new gaming machines in November 1999;

²⁶⁴ The Report of the 2007 Inquiry, paragraph 3.19.

²⁶⁵ The Report of the 2007 Inquiry, paragraph 3.21.

²⁶⁶ The Report of the 2007 Inquiry, paragraph 3.23.

²⁶⁷ The Report of the 2007 Inquiry, paragraph 3.36.

²⁶⁸ The Report of the 2007 Inquiry, paragraph 3.45.

²⁶⁹ The Report of the 2007 Inquiry, paragraph 3.55.

²⁷⁰ The Report of the 2007 Inquiry, paragraph 5.2.

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- (iii) certain expenses totalling \$139,446.00 had not been examined to be determined if they are expenses properly borne by PBC;
 - (iv) the Maloufs provided amounts totalling \$163,250.00 in the nature of cash floats and working capital;
 - (v) the Maloufs drew down from PBC amounts totalling \$3,110.00, which had been offset in the amount of \$1,270,354.00;
- (c) advances totalling \$32,000.00 were made to PBC by the Maloufs in September 1999, which have not been included in the analysis determining the total expenditures of \$1,270,354.00;
 - (d) the directors of PBC signed an all moneys mortgage for \$32,000.00 on 15 September 1999, which was subsequently registered; and
 - (e) the advances of \$32,000.00 in September 1999 were secured by the mortgage for \$32,000.00 dated 15 September 1999.
337. The Report of the 2007 Inquiry also referred to a number of factual matters regarding the administration of PBC. Those matters included:
- (a) following PBC being placed into voluntary administration, B52 lodged a proof of debt for \$1,600,000.00;²⁷¹
 - (b) Mr Wily was not informed of the initial determination by Phillip Malouf's accountant that the Maloufs expended \$1,192,204.52;²⁷²
 - (c) a meeting of creditors was held on 11 February 2003;²⁷³
 - (d) Mr Wily gave evidence that the proof of debts were admitted at the meetings of creditors for voting purposes only;²⁷⁴
 - (e) the \$1,600,000.00 debt was assigned from B52 to CSKS Holdings on 24 March 2003;²⁷⁵
 - (f) the \$1,600,000.00 was then admitted in full in the Deed of Company Arrangement;²⁷⁶ and

²⁷¹ The Report of the 2007 Inquiry, paragraph 8.2.

²⁷² The Report of the 2007 Inquiry, paragraph 8.4.

²⁷³ The Report of the 2007 Inquiry, paragraph 9.5.

²⁷⁴ The Report of the 2007 Inquiry, paragraph 8.5.

²⁷⁵ The Report of the 2007 Inquiry, paragraph 9.7.

²⁷⁶ The Report of the 2007 Inquiry, paragraphs 9.10.

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(g) Mr Wily gave evidence that, following his appointment as receiver and manager, and then as voluntary administrator of PBC, PBC was in a dire financial situation and the only viable option to provide funds to creditors was to purchase the freehold title of the Land and on-sell the Land to CSKS Holdings, with the proceeds being used to pay the creditors (i.e. the Freehold Conversion Proposal).²⁷⁷

338. The Report of the 2007 Inquiry found that \$92,797 was paid in relation to PBC's Freehold Conversion Proposal,²⁷⁸ which included fees for valuers, surveyors, lawyers, accountants, corporate advisors, consultants and an architect.

Questions for administrator

339. The OLGR Recommendations Document identified the following questions or issues for Mr Wily:

- (a) [Redacted]
- (b) [Redacted]
- (c) [Redacted]
- (d) [Redacted]
- (e) [Redacted]
- (f) [Redacted]
- (g) [Redacted]
- (h) [Redacted]

²⁷⁷ The Report of the 2007 Inquiry, paragraph 9.1.

²⁷⁸ The Report of the 2007 Inquiry, paragraph 11.12(b).

Chapter 13: What actions, referrals and further investigations into PBC did the OLGR undertake?

(i) [Redacted]

(j) [Redacted]

(k) [Redacted]

(l) [Redacted]

340. There is no indication in any of the documents considered for the purpose of the Independent Review that the OLGR as both an office of the Department of Arts, Sport and Recreation and an office of the Department of Communities, was put the above matters to [Redacted]

341. The OLGR Recommendations Document also noted that if [Redacted]

Legal action

342. The OLGR Recommendations Document suggested that consideration be given by the Director of Liquor and Gaming to the following potential legal actions:

(a) the Report of the 2007 Inquiry made findings that the books and records of PBC were not retained by Sports Marketing in accordance with the Management and Catering Agreement.²⁸⁰ [Redacted]

[Redacted] However, the OLGR, as an office of the Department of Arts, Sport and

²⁷⁹ The Report of the 2007 Inquiry, paragraph 11.22.

²⁸⁰ The Report of the 2007 Inquiry, paragraph 4.28.

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Recreation, concluded if there was such a breach of section [redacted] the action was statute-barred as it was required to be commenced within three years of the breach²⁸¹

- (b) the Report of the 2007 Inquiry referred to the factual matter that PBC acquired twenty eight new gaming machines funded by monies provided to PBC by B52.²⁸² The Report of the 2007 Inquiry also referred to the fact that the directors denied agreeing to the purchase of twenty eight new gaming machines and denied agreeing to a loan to that amount.²⁸³ [redacted]

[redacted] The OLGR, as an office of the Department of Arts, Sport and Recreation, concluded that any actions for breaches of sections [redacted] would have been statute-barred under section 197(1) of the Gaming Machines Act; and

- (c) as discussed in Chapter 12:
- (i) in relation to PBC's failure to keep books, the Director of Liquor and Gaming could have [redacted] however the OLGR, as an office of the Department of Arts, Sport and Recreation, concluded that such an action was statute-barred under section 65(1) of the Registered Clubs Act; and
- (ii) in relation to the deeds with ML Management and Mr Levy (and bonuses paid to Mr Levy), the Director of Liquor and Gaming could have [redacted] however the OLGR, as an office of the Department of Arts, Sport and Recreation, concluded that such an action would be statute-barred.

Disciplinary proceedings

343. In relation to paragraph 342(c)(i) above, the OLGR Recommendations Document noted that the Director of Liquor and Gaming could have [redacted]

²⁸¹ Section 65(1) of the Registered Clubs Act.

²⁸² The Report of the 2007 Inquiry, paragraph 3.36.

²⁸³ The Report of the 2007 Inquiry, paragraph 3.36.

Chapter 13: What actions, referrals and further investigations into PBC did the OLGR undertake?

344. In relation to paragraph 342(b) above, the OLGR Recommendations Document noted that the Director of Liquor and Gaming could have [redacted] on the following grounds:

- (a) [redacted] 284
- (b) [redacted]
- (c) [redacted]

Investigations or referrals

345. The OLGR Recommendations Document also suggested that the following investigations or referrals be considered by the Director of Liquor and Gaming:

- (a) [redacted]
- (b) [redacted]
- (c) [redacted]
- (d) [redacted]

²⁸⁴ Section [redacted] of the Registered Clubs Act was repealed on 1 July 2008. Whilst the date of the OLGR Recommendations Document is unclear, there was in any event an equivalent section in effect after 1 July 2008, being section [redacted] of the Registered Clubs Act.

(e)

[REDACTED]

346. There is no indication in any of the documents considered for the purpose of the Independent Review that the OLGR as an office of the Department of Arts, Sport and Recreation, or an office of the Department of Communities, pursued the above investigations or referrals.

Legislative reform

347. Finally, the OLGR Recommendations Document suggested a number of legislative amendments to the Registered Clubs Act, the Gaming Machines Act and the Corporations Act. The following amendments were suggested:

- (a) amending section 41Z of the Registered Clubs Act, so that a person presiding at an inquiry under section 41X of the Registered Clubs Act could make recommendations to the Director of Liquor and Gaming (i.e. section 41Z(1) allowed the person presiding at the inquiry to report to the Director of Liquor and Gaming on the findings of the inquiry, including any information obtained in the course of the inquiry, but not to make any recommendations);
- (b) amending either the Registered Clubs Act or the Corporations Act for the Director of Liquor and Gaming to be co-appointed as an administrator, where a registered club was being administered or wound up, so that the Director of Liquor and Gaming could oversee the proceeds in relation to "community assets";
- (c) amending the Registered Clubs Act:
 - (i) to place an automatic escrow on club assets on the prospect for realisation of the assets within the industry;
 - (ii) to limit the extent to which a registered club's functions and services could be sub-contracted to people;
 - (iii) so to require a club to report brief particulars of all specified sub contract agreements or arrangements within 7 days of entering into an agreement;
 - (iv) so that only qualified persons were on the board of a registered club;
 - (v) so that on the appointment of an administrator, the existing gaming machine licence expired and was simultaneously granted to the administrator, on the basis

that the administrator was to provide to the Director of Liquor and Gaming, all gaming machine duty payments on the due dates;²⁸⁵

- (vi) so that people such as [REDACTED] were personally liable for participating, directly or indirectly, in a breach of legislation by a registered club;
- (vii) to enable the board of directors of a registered club to appoint to the board one additional person for 12 months, that person being a member of the club and who would be required to stand for re-election at the next AGM (this would allow the board of directors to appoint someone with appropriate qualifications, for example in finance or accountancy, if the board and the club were currently facing a financial issue);
- (d) amending the Gaming Machines Act so that the supplier of approved gaming machines had an obligation to report sales or leasing of gaming machines;
- (e) amending section 73 of the Gaming Machines Act so that the sharing of net profits or net proceeds from the Gaming Machines Act was prohibited; and
- (f) establishing a procedure whereby the Director of Liquor and Gaming could be advised of reporting default notices in respect of a registered club.

Other reform

348. The OLGR Recommendations Document expressed concern that the directors of PBC had sought assistance from the Police and Legal Aid some time between 1999 and 2002, but were not given advice as it was considered by the Police and Legal Aid to be commercial in nature. The OLGR Recommendations Document did not suggest that Police or Legal Aid acted improperly, although noted that if advice had been received by PBC, subsequent events concerning PBC could have been avoided.
349. The OLGR Recommendations Document suggested the Director of Liquor and Gaming to consider providing a means of financial, commercial and legal advice for clubs that could justify the need for such assistance. It was recommended that the provision of this advice should not be on an "open door" basis but should depend on registered clubs' current financial membership.
350. It was recommended that this reform could be achieved through non-legislative mechanisms recommended by the IPART Report. For example, the IPART Report recommended the establishment of the "Club Viability Panel", which would have the capacity to advise clubs on financial matters. However, the OLGR, as an office of the Department of Arts, Sport and

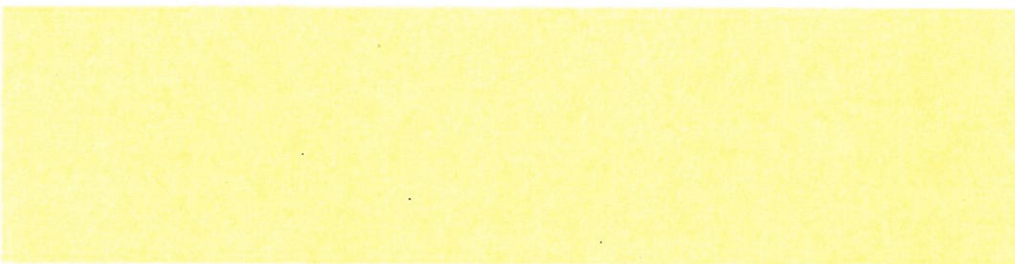
²⁸⁵ The Gaming Machines Act at that time provided that the approved licensee was liable for gaming machine duty.

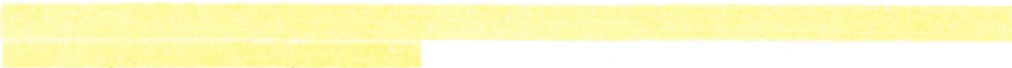
Chapter 13: What actions, referrals and further investigations into PBC did the OLGR undertake?

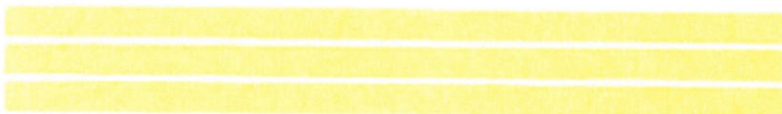
Recreation, identified that commercial and legal matters would unlikely be within the Club Viability Panel's scope. The documents provided for the purposes of the Independent Review do not suggest that the Club Viability Panel was progressed as part of the recommendations arising from the IPART Report.

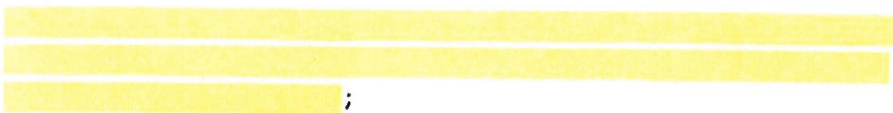
Legislative reform and legal proceedings following the OLGR Recommendations Document

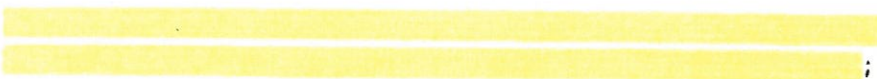
351. The OLGR, as an office of the Department of Arts, Sport and Recreation, in a table of significant projects and initiatives for the OLGR, as an office of the Department of Arts, Sport and Recreation, which was prepared in or about February 2009, noted that the 2007 Inquiry was *"Completed – recommendations forwarded to Policy for consideration of legislative actions. Appropriate agencies notified. No legal proceedings to be commenced"*.

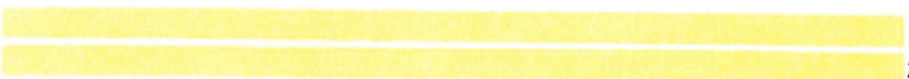
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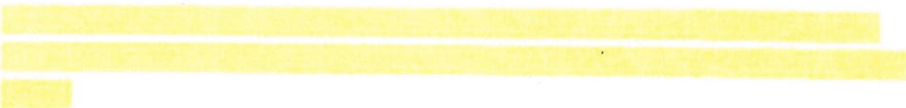
(a) 

(b)  ;

(c)  ;

(d)  ;

(e) 

(f) 

354. It was proposed with the recommendations that required notification to the Director General of the Department of Communities that it be delegated to the Director of Compliance of the OLGR for practical reasons.

355.

356. **D23** reviewed materials provided by the OLGR as an office of the Department of Communities on the proposed amendments to the Registered Clubs Act. It is unclear from the documents provided for the purposes of the independent review what documents were provided to **D23**; **D23** commented, in an email dated 17 August 2009, as follows:²⁸⁶

"... the Paddington 2007 Inquiry points to problems with the activities of the Administrator, Club Management and commercial proponent – however, even with improved regulation, I suspect many of these problems would not have been picked up";

"I agree that OLGR should be notified about the appointment of an administrator. However, I would like further advice on the scope and range of penalty notices that may be issued under the Corporations Law before agreeing that all such notices should be advised to DG. It may be sensible to limit this requirement to a small relevant class";

"I do not agree that it is necessary to require additional information about meetings etc being provided to the DG if the club is in administration- (sic) Administrators have a range of duties and obligations on which OLGR should be able to rely. I do not see the benefit of obtaining additional information that will not (sic) reviewed by OLGR and indeed see risks with this approach";

"I do not agree with the recommendation that clubs be able to appoint temporary directors so as to "retrofit" (sic) skills deficiencies within the board. (sic) Directors should be appointed having regard to the necessary skills and experience for clubs operations- any supplementation of the skills of the Board, if necessary, should be via purchase of the necessary skills via contracts/ or pro bono work. I note IPARTs funding on the skills deficiency simply don't see (sic) how making a person a temporary board member will solve this problem"; and

Regarding the prohibition on contracting out core club functions – "Given the current provisions of the registered (sic) Clubs Act that provide that the governing body is responsible for the control and management of the Club I don't agree further prohibition is necessary. As I understand it, (sic) the (sic) Act already requires that the governing

²⁸⁶ Email from **D23 to D24** dated 17 August 2009 (Annexure C, 1217).

body have proper processes for the management and safeguard of the club members interests."

357. It appears that a meeting was held to discuss the proposed amendments to the Registered Clubs Act on 24 August 2009. Following this meeting, a Senior Policy Officer at the OLGR, as an office of the Department of Communities, sent an email dated 1 September 2009 to **D20**, in which the following was noted:

*"As mentioned in our meeting last week **D23** was generally not supportive of most of the 41X-related recommendations. Also, **D23** has since spoken with **D25** who does not agree that a 41X inquiry presiding should have powers to make recommendations. Consequently, the proposed Cabinet Minute will not be further progressed".*

358. It appears from the email dated 1 September 2009²⁸⁷ that the Senior Policy Officer had sought views from **D20** on alternative ways for the Director of Liquor and Gaming to be advised of when an administrator is appointed to manage the affairs of a club. However, there are no documents provided for the purposes of the Independent Review to indicate whether any views or advice was given or whether this was progressed.
359. On 11 December 2009, the OLGR Media Calendar removed the progress of "draft media release prepared to accompany the Cabinet Minute. Need to review draft media release once Cabinet Minute is finalised" and replaced it with "Cabinet Minute not required. Outcome of the 41X inquiry will be dealt with via communication with club industry".

Referral of matters to the ASIC

360. On 4 November 2008, the Director of Liquor and Gaming wrote to the ASIC, attaching a copy of the Report of the 2007 Inquiry.²⁸⁸
361. On 30 July 2009, the ASIC commenced an investigation into the matters raised in the Report of the 2007 Inquiry.²⁸⁹
362. An officer of the OLGR, as an office of the Department of Communities, met with officers of the ASIC on 5 August 2009. The agenda of this meeting stated that the parties were to discuss matters including:
- (a) the status of the ASIC investigation;

²⁸⁷ Annexure C, 1273.

²⁸⁸ The date of this letter is referred to in a letter from the ASIC to Senator John Williams dated 9 April 2014 (Annexure C, 266).

²⁸⁹ The date of the commencement of this investigation is referred to in a letter from the ASIC to Senator John Williams dated 9 April 2014 (Annexure C, 266).

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- (b) the status of the administration of PBC;
 - (c) points not covered in the OLGR written report;
 - (d) any policy considerations for the OLGR and the ASIC; and
 - (e) means of continuing liaison between the OLGR and the ASIC.²⁹⁰
363. No documents have been provided for the purpose the Independent Review as to the matters discussed at the meeting on 5 August 2009, or what actions (if any) were taken by the OLGR and/or the ASIC arising from the meeting or more broadly in respect of the ASIC investigation into the matters raised in the Report of the 2007 Inquiry. It appears that the ASIC concluded its investigation on 5 November 2010, stating that it would not take further action on the basis of the information that it had at that time.²⁹¹
364. On 27 June 2011, a Senior Policy Officer at the OLGR wrote to the Department of Primary Industries, raising concerns about the length of time PBC had been in administration.²⁹² The Senior Policy Officer flagged the possibility of the Minister for Gaming and Racing raising the issue with the ASIC. The Senior Policy Officer sought information about any commercial lease for PBC, particularly the terms of the commercial lease, any conditions of the commercial lease, when it was or would be converted and who the new leaseholder was.²⁹³
365. The Department of Primary Industries prepared the answers to the information sought by the Senior Policy Officer on 30 June 2011.²⁹⁴ There is no indication in the documents that have been provided for the purpose of the Independent Review suggesting that the Department of Primary Industries provided the answers to the Senior Policy Officer at the OLGR.²⁹⁵
366. On 30 June 2011, the Senior Policy Officer prepared a draft OLGR Ministerial Brief to the Minister for Tourism, Major Events, Hospitality and Racing and Minister for the Arts. In the Ministerial Brief, it was noted that the Minister had requested a letter to be prepared to the ASIC raising concerns about the length of time PBC had been under administration.²⁹⁶

²⁹⁰ Email from D26 to D30 dated 4 August 2009 (Annexure C, 1215).

²⁹¹ This was included in a letter from the ASIC to Senator John Williams dated 9 April 2014 (Annexure C, 266).

²⁹² Email from D28 to D29 dated 27 June 2011 (Annexure C, 801).

²⁹³ Email from D28 to D29 dated 27 June 2011 (Annexure C, 801).

²⁹⁴ Email from D13 to D29 dated 30 June 2011 (Annexure C, 804).

²⁹⁵ Email from D13 to D29 dated 30 June 2011 (Annexure C, 804).

²⁹⁶ Draft Ministerial Briefing note dated 30 June 2011 (Annexure C, 201).

Chapter 13: What actions, referrals and further investigations into PBC did the OLGR undertake?

367. On 20 July 2011, the Hon. George Souris, MP, the Minister for Tourism, Major Events, Hospitality and Racing and Minister for Arts wrote to the ASIC regarding the administration of PBC.²⁹⁷

368. A briefing note dated 12 August 2011 was prepared by a Policy Officer at the OLGR, as an office of the DTIRIS, for a meeting between the Director General of the DTIRIS²⁹⁸ and the Chairperson and Chief Executive of the Casino, Liquor and Gaming Authority. In respect of PBC, the briefing note stated the following:

"... CLGCA [the Casino, Liquor and Gaming Control Authority] has previously raised concerns regarding this situation [i.e. the PBC being under administration for a number of years] and requested that Compliance officers investigate the conduct of the Administrator. This issue was raised at a regular Departmental meeting with the Minister where it was determined that the Minister correspond with ACIS (sic) seeking advice of the role of the Administrator. A response to the correspondence has not yet been received."²⁹⁹

369. On 6 September 2011, the ASIC wrote to The Hon. George Souris, MP. The letter stated the following:

"Based on the documents lodged with ASIC and information provided by the lawyers acting for Mr Wily, ASIC does not, at this time, intend to take any action to have Mr Wily finalise the receivership and administration of the Club. I am of the view that it is currently reasonable for the Club to continue to remain in receivership and administration pending the finalisation of all outstanding matters related to the receivership and administration of the Club."³⁰⁰

370. A ministerial brief dated 16 November 2011 prepared by the Senior Policy Officer referred to the letter from the ASIC and advised The Hon. George Souris, MP of the following:

"ASIC advises that it is not uncommon for companies to be administration for a number of years. ASIC considers it reasonable for the Club to continue to remain in administration, and that it intended to take no action to have the administrator finalise the administration of the Club.

It is understood the Administrator is taking action to satisfy the terms of the Deed of Company Arrangement, with the aim of finalising the administration by the end of 2011."

²⁹⁷ Letter from ASIC to the Minister George Souris dated 6 September 2011 (Annexure C, 206).

²⁹⁸ Mark Paterson was the Director General of Department at that point in time.

²⁹⁹ Office of Liquor, Gaming and Racing Director General Briefing dated 12 August 2011 (Annexure C, 202).

³⁰⁰ Letter from ASIC to the Minister George Souris dated 6 September 2011 (Annexure C, 206).

"Given the circumstances additional intervention by OLGR does not appear warranted and may give rise to claims by the administrator. The advice has been provide to Compliance, which will continue to monitor of the situation at the Club and the end of the administration."³⁰¹

Referral of matters to [REDACTED]

371. [REDACTED]
[REDACTED]
both stated that matters arising from the 2007 Inquiry had been referred to [REDACTED] and to the ASIC.
372. No documents have been provided for the purpose of the Independent Review which indicate that the OLGR, as an office of the Department of Arts, Sports and Recreation and an office of the Department of Communities, made a reference to [REDACTED]. The OLGR is unable to confirm whether a reference was made to [REDACTED].

³⁰¹ Ministerial Brief dated 16 November 2011 (Annexure C, 207).

Glossary

2003 ML Management Deed	the deed between PBC and ML Management dated 27 May 2003
2007 Inquiry	the inquiry commissioned by the Director of Liquor and Gaming under the now repealed section 41X of the <i>Registered Clubs Act 1976 (NSW)</i> into the management and the administration of PBC
2007 ML Management Deed	the deed between PBC and ML Management dated 1 February 2007
Annexure	an annexure to this Report
Application for Landowner's Consent	CSKS Holdings' application to the DTIRIS to obtain landowner's consent to submit the Development Application to the Council
Applications	the separate applications submitted by either PBC or CSKS Holdings between 2009 and 2013 in relation to each of the proposed Transactions
ASIC	the Australian Securities and Investments Commission
ATO	the Australian Taxation Office
B52	B52 Pty Limited
Benchmark Australia	Benchmark Australia Pty Ltd
Change of Use Briefing Memo	the memorandum prepared by the LPMA on 8 December 2009 to the Minister for Lands recommending that Lot 5 be reserved for the purpose of "Community and Sporting Club Facilities and Tourist Facilities and Services" and Lot 3 be reserved for the additional purpose of "Access"
Commonwealth Bank	the Commonwealth Bank of Australia Ltd, also the mortgagee under the Mortgage
Continued Tenures Act	<i>Crown Lands (Continued Tenures) Act 1989 (NSW)</i>
Corporations Act	<i>Corporations Act 2001 (Cth)</i>
Council	Woollahra Municipal Council

<i>Crown Lands Act</i>	<i>Crown Lands Act 1989 (NSW)</i>
<i>CSKS Holdings</i>	CSKS Holdings Pty Ltd, formerly known as Paddington Bowling and Sporting Pty Ltd and Woollahra Gardens Pty Ltd
<i>Decisions</i>	the decisions referred to in paragraph 1 of the TOR
<i>Deed of Company Arrangement</i>	the Deed of Company Arrangement that PBC entered into with its creditors on 24 March 2003, as amended
<i>Development Application</i>	the development application that CSKS Holdings submitted to the Council in March 2013 for the development of a child care centre and the demolition of two tennis courts
<i>Director General</i>	the Director General for Lands (subsequently known as the Chief Executive Officer of the LPMA)
<i>Director of Liquor and Gaming</i>	the Director of Liquor and Gaming at the relevant time
<i>Freehold Conversion Proposal</i>	PBC's proposal in 2006 to convert the Perpetual Lease to freehold title
<i>Gaming Machines Act</i>	<i>Gaming Machines Act 2001 (NSW)</i>
<i>ICAC</i>	Independent Commission Against Corruption
<i>ICAC Act</i>	<i>Independent Commission Against Corruption Act 1988 (NSW)</i>
<i>ICAC Guidelines</i>	ICAC's " <i>Guidelines for Managing Risks in Direct Negotiations</i> " dated May 2006
<i>Independent Review</i>	the independent review into certain matters associated with Paddington Bowling Club Ltd ordered by The Hon. Andrew Stoner, MP on 11 April 2014
<i>IPART</i>	the Independent Pricing and Regulatory Tribunal
<i>IPART Report</i>	the report published by IPART on 27 June 2008
<i>Land</i>	the Crown land located at 2 Quarry Street in Paddington, also known as Lots 3 and 5 in Deposited Plan 1156846
<i>Land Assessment Waiver</i>	the Land Assessment Waiver Report prepared by the Department of

Glossary

Report	Lands on 18 November 2009 for the purposes of terminating the Perpetual Lease, granting the Lease to PBC and changing the use of the Land
Landowner's Consent Report	the document titled "Investigations report for assessing applications for land owners consent" and created by the DTIRIS Department for the purposes of evaluating the Development Application
Lease	the registered lease AG180224 between the State of New South Wales and PBC commencing on 1 December 2010
Lease Application	PBC's application dated 29 January 2009 to the Department of Lands to obtain a fifty year commercial lease over the Land and an area adjacent to the Land, being a part of Trumper Park
Lease Briefing Memo	the memorandum prepared by LPMA on 23 December 2009 to the Minister for Lands recommending that the Lease Application be granted
LEP	the <i>Woollahra Local Environmental Plan 1995 (as amended)</i>
Levy Deed	the deed between PBC and Mr Levy dated 27 May 2003
Licensing Court	Licensing Court of New South Wales constituted in accordance with the <i>Liquor Act 1982 (NSW)</i>
LPI	Land and Property Information
LPMA	Land and Property Management Authority
Maloufs	defined in the Report of the 2007 Inquiry as encompassing B52, Sports Marketing, Camp Ella Pty Limited, Mavis Joyce Malouf, Lewis William Malouf, Bruce Elias Malouf and Phillip William Malouf
Management and Catering Agreement	the management and catering agreement entered into between PBC and Sports Marketing on or about 12 September 1999 for the operation of the St Trinlans restaurant and all PBC activities
ML Management	ML Management (NSW) Pty Limited
Mortgage	the mortgage of the Lease to the Commonwealth Bank pursuant to registered Mortgage of Lease AG752605
Mortgage Briefing Memo	the memorandum prepared by the DTIRIS on 23 November 2011 recommending that the Minister of Primary Industries grant consent

	to the Mortgage
OLGR	the Department of Gaming and Racing and its subsequent iteration, the Office of Liquor, Gaming and Racing
OLGR Recommendations Document	the document titled "Review of Inquiry into Paddington Bowling Club Limited (subject to Deed of Company Arrangement) conducted under S41X of the <i>Registered Clubs Act</i> and recommendations"
Option to Purchase the Land	the option for two years to CSKS Holdings to purchase the Land from PBC after PBC obtained the freehold title contained in the Deed of Company Arrangement entered into on 24 March 2003
PBC	the Paddington Bowling Club Ltd
Perpetual Lease	the perpetual lease that PBC held from the Crown over the Land
Proposal	the proposal agreed between PBC and Mr Watkins on or about 26 September 2008, which comprised the surrender of the Perpetual Lease, the grant of the Lease to PBC, the transfer of the Lease to CSKS Holdings, the sub-lease of part of the Land from CSKS Holdings to PBC, the mortgage of the Lease and the potential development of a childcare centre on the Land, amongst other possible commercial uses
Proposed Actions	the proposed actions in the Land Assessment Waiver Report, namely the termination of the Perpetual Lease, granting of the Lease and changing the use of the Land
Proposed Mortgage	the application submitted by CSKS Holdings to obtain Minister for Primary Industries' consent to mortgage the Lease, which included a Business Securities Memorandum setting out the terms of the mortgage, a "Mortgage of Lease" registration form and a "Right of Entry (Business and Goods)" deed
Proposed Sub-lease	The sub-lease that CSKS Holdings provided to the Department of Services on 3 March 2011 for consideration
Public Interest Test Response	the document titled "PBC's response to Crown Land's Business directive addressing the public interest requirements" and provided to the Department of Lands on 18 June 2009
Redmane	Redmane Pty Ltd
Registered Clubs Act	<i>Registered Clubs Act 1976 (NSW)</i>

Glossary

Report of the 2007 Inquiry	the report of the Inquiry prepared by Brian Guest in March 2008
Required Mortgage Conditions	the three conditions that must be in the mortgage according to the DTIRIS' policy titled "Office Practice Guidelines – Crown Land Management – Chapter 5 of the Crown Lands Act – Administration of Leases and Licences"
Restriction	the restriction recorded on the title of the Land that Lots 3 and 5 of DP1156846 cannot be dealt with separately from each other
Sports Marketing	Sports Marketing Pty Limited
Standard Instrument	the <i>Standard Instrument (Local Environmental Plans) Order 2006</i>
Strategy Document	the strategy developed by the Department of Lands in late 2008 in relation to the Proposal and contained in a document titled "Paddington Bowling Club – lease Project Strategy"
Sub-Lease	the registered sub-lease AH565028 from CSKS Holdings to PBC over part of Lot 5 in Deposited Plan 1156846
Sub-Lease Briefing Memo	the memorandum prepared by the DTIRIS on 22 December 2011 to the Minister for Primary Industries recommending that consent be granted to the Sub-Lease
TOR	the Terms of Reference
Transactions	the Transactions listed at paragraph 1(b) of the TOR that took place between 2009 and 2013
Transfer	the transfer of lease AG752604 dated 30 December 2011 from PBC to CSKS Holdings
Transfer Briefing Memo	the memorandum prepared by the DTIRIS on 22 November 2011 to the Minister for Primary Industries recommending that consent be granted to the Transfer the Lease from PBC to CSKS Holdings
Trumper Park	the dedicated reserve 500267 for the purpose of "recreational and community use" and adjacent to the Land with the Trust Manager being the Council
VS Management	VS Management Pty Ltd
VS Management Deed	the deed between PBC and VS Management dated 27 May 2003