

## 11.1 Confidential - Noarlunga Leisure Centre

*This report outlines legal advice received in relation to the Noarlunga Leisure Centre.*

*This is a new proposal, concept or issue.*

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Attachments: 1. Letter from LeisureCo (16 pages)  
2. Legal advice from Cowell Clarke Commercial Lawyers  
(3 pages)

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## 1 Executive Summary

### 1.1 Topic

This report outlines legal advice received in relation to the Noarlunga Leisure Centre.

### 1.2 Context

The Noarlunga Centre Community Recreation Association (NCCRA) has entered into a lease with Council to manage the Noarlunga Leisure Centre. NCCRA in turn has entered into a management services agreement with LeisureCo for that company to provide on site management of the leisure centre's operations. The business of NCCRA has been conducted by the Board comprising three members from both Council and LeisureCo. Council has become aware that under the NCCRA constitution, LeisureCo's membership of NCCRA might not have been properly granted and that LeisureCo does not have the right to appoint board members. The matter requires rectification.

### 1.3 Suggested Outcome

That Council consider the advice provided by its solicitors, move to rectify the matters with respect to membership of the NCCRA Board and further determine the direction in which it will then proceed.

## 2 Recommendation(s)

1. (a) **That under the provisions of Section 90(2) of the Local Government Act 1999 an order be made that the public be excluded from attendance at the meeting in order to consider in confidence this item.**

- (b) That the Council is satisfied that it is necessary that the public be excluded to enable the Council to consider the report at the meeting on the following grounds:
- Section 90 (3) (g), (h) information the disclosure of which  
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(g) matters that must be considered in confidence in order to ensure that Council does not breach any law, order or direction of a court or tribunal constituted by law, any duty of confidence, or other legal obligation or duty;
  - (h) legal advice;
- (c) That accordingly, on this basis the principle that meetings of Council should be conducted in a place open to the public has been outweighed by the need to keep the information or discussion confidential.
2. That Council having considered the legal advice and the options available to it resolves that the Chief Executive Officer write to the Chairman of NCCRA requesting that all actions and records in respect of NCCRA including any dealings with the accounts and funds be placed in the hands of the Council appointees. Further requesting those arrangements should remain in place until such time as a thorough investigation of the records can properly ascertain the membership of NCCRA and its Board.
3. That in the event it is demonstrated that LeisureCo is not entitled to appoint members of the Board Council resolves to:
- a) Instruct its appointees to the Board to rectify the breach by following due process to amend the Constitution to replace SACRA with LeisureCo.
  - or,
  - b) Instruct its appointees to the Board to exercise their rights under the Constitution to assign to Council NCCRA's interest in the lease of the Noarlunga Leisure Centre and the management services agreement with LeisureCo. Following completion of these assignments to Council instruct its appointees to the Board to wind up NCCRA.
4. That an order be made under the provisions of Section 91(7) and (9) of the Local Government Act 1999 that the abovementioned document (or part of such document) including the minutes and the report of the Council relating to discussion of the subject matter of that document, having been dealt with on a confidential basis under Section 90 of the Act, should be kept confidential on the grounds of information contained in 90(3)(g), 90(3)(h) until the

**expiry of the existing management arrangements for Noarlunga Leisure Centre and the process of entering into a new management arrangement is completed.**

**3 Engagement**

**3.1 Elected Members**

The Mayor has been briefed on this matter. Cr Ferguson and Cr Manson as Council appointees to the NCCRA Board are aware of this situation. All have been involved in discussions with staff and our legal advisers.

**3.2 Staff**

Jeff Tate, Chief Executive Officer and Beth Davidson-Park, General Manager Corporate Services are aware of this matter.

**3.3 Others**

Richard McNeil Partner and Rick Davies Senior Associate, Cowell Clarke Commercial Lawyers have been providing legal advice.

**4 Resource Implications**

**4.1 Operational**

It is anticipated that significant further staff time will be required to bring this matter to a resolution and to ensure effective management of the leisure centre's operations.

**5 Risk Analysis**

<b>Key risks</b>	<b>How it is proposed to be managed</b>
Legal	Continue to receive and act in accordance with legal advice.
Governance	Rectify the matters raised in the legal advice. Provide supportive advice and direction to Council's representatives on NCCRA.

**6 Discussion**

Council is the owner of the Noarlunga Leisure Centre (the Centre) and is responsible for the asset management, capital improvements and annual operational funding by endorsing the Annual Business Plan. The Centre is used to provide a broad range of organised, educational and casual recreation and indoor sporting activities focussed around an aquatic centre, court sports and health club activities.

The Centre occupies two major facilities comprising the aquatic centre incorporating also a health club and the recreation centre part of which is leased to ACH for its administration and wellbeing programs. Other tenants in the Centre comprise a physiotherapist and a Fit Kids program. A beach volleyball court has recently been constructed in the aquatic centre grounds.

The projected turnover for 2007/08 is \$2.9million with the budget projecting a small operating profit. The buildings are actively managed by Council's Property Section with a budgeted \$600,000 of capital improvement programs for this year comprising energy reduction works including connecting the cogeneration plant to the recreation centre, completion of the beach volley ball court and upgrades to the aquatic centre entry and kiosk.

Staffing comprises 7 full time permanent staff, 3 part time permanent staff and 98 casuals. Membership of the health club is approximately 1800. With the exception of the centre manager who is a LeisureCo employee all staff are employed by Noarlunga Centre Community Recreation Association (NCCRA).

The Centre has been in operation since opening in 1991 and consistent with practice of the day Noarlunga Council established a Community Recreation Association (NCCRA) to manage the Centre on behalf of the community. The members of NCCRA were Council and the South Australian Community Recreation Association (SACRA).

Council entered into a lease with NCCRA to formalise this arrangement and it would appear that SACRA then entered into a management services agreement with NCCRA to operate the Centre through an entity called Noarlunga Centre Leisure Works.

The object of NCCRA is "to enhance the physical health and general well-being of people of all ages, particularly the residents of the City of Onkaparinga, by the provision of a diverse range of leisure activities".

In July 1999 Council entered into a new lease with NCCRA for a term of four years and a renewal term of five years. That lease is to terminate on 30 June 2008. At the same time and for the same term NCCRA as required by the lease entered into a management services agreement with a service provider, LeisureCo Pty Ltd, to manage the centre. That agreement is also to expire on 30 June 2008.

The seeking of Expressions of Interest for the management of the Noarlunga Leisure Centre after 30 June 2008 will be the subject of a further report to Council in November 2007. At that time Council may want to consider whether it wishes to enter into a direct relationship with a management provider as now occurs with all its recreation centres or whether it wishes to continue an at arms length arrangement by offering a lease to NCCRA (or similar body).

During the preparatory work for arrangements after expiry of the current lease to NCCRA it became evident that there was a problem with the current membership of NCCRA.

The Constitution of NCCRA shows that the Board shall consist of six persons with Council and SACRA each appointing three board members. Officers including the chair are appointed by the Board.

An enquiry to the Office of Consumer and Business Affairs (OCBA) has revealed that SACRA initiated a voluntary winding up which should have resulted in its registration as an association being cancelled in June 2004. That cancellation was not done through an oversight by OCBA but has now been rectified. SACRA no longer exists and is therefore no longer a member of NCCRA.

Appointment of members of the NCCRA Board have been made by LeisureCo even though the Constitution for NCCRA is unchanged and specifies that only Council and SACRA may appoint Board members. Council's representatives as members of the Board are Cr Ferguson, Cr Manson and Robert Pride, Manager Property. Ray Gilbert currently acts as Chair as a purported LeisureCo appointee. The other purported LeisureCo appointees are Tim Flaherty and Mark Wheaton.

LeisureCo Pty Ltd has been represented to Council as a non profit subsidiary of Leisure Australia which itself is a foundation that distributes its income to various programs and to a wide range of groups that promote active lifestyles. Nevertheless, LeisureCo is the commercial arm of Leisure Australia. It generates income through conducting business consistent with the aims of Leisure Australia by providing management services to leisure and recreation centres and through its own involvement in the marketplace through centres and the In Shape Health Clubs it owns. There is presently a women's In Shape Health Club operating at Woodcroft Town Centre.

Consideration of the NCCRA situation against the current standards of corporate governance has highlighted what appears to be an unusual if not irregular arrangement. The Board of NCCRA purportedly comprises LeisureCo appointees with voting rights equal to those of the only other appointees (Council). The Board is responsible for overseeing the contractual obligations of LeisureCo to NCCRA as managers of the Centre. The LeisureCo appointees therefore oversee their appointor.

At times LeisureCo has purported to appoint its CEO as a member of the Board. This has occurred at certain times when there has been an interrogation of finances and other matters by the Board relating to management of the leisure centre. Together with the membership and Board appointment issues, this has heightened the concern of the Council appointees to the Board with respect to their duties as directors under the *Associations Incorporations Act 1985*.

A response to an enquiry by us to LeisureCo as to how it came into membership of the NCCRA Board has revealed the following (Attachment 1):

- It is not clear if LeisureCo was ever properly admitted to membership of NCCRA
- It is not clear when LeisureCo commenced the practice of purporting to appoint members of the Board

- LeisureCo wrote to the Chairman of NCCRA on 7 April 2003 requesting that at the next general meeting it be resolved that any reference in the constitution to SACRA be replaced with LeisureCo. That letter was written at the time LeisureCo was in process of exercising its rights to an extension of the management services agreement
- Minutes of the NCCRA Board Meeting dated 14 April 2003 indicate that the Board resolved in favour of these changes to the Constitution

Legal advice from Cowell Clarke (Attachment 2) has concluded that the attempt to alter the Constitution was ineffective. The matter was not resolved at a properly constituted General Meeting as required under the NCCRA Constitution. Neither the NCCRA Constitution nor the *Associations Incorporations Act 1985* have any saving provisions by which those deficiencies might be rectified. The conclusion of the legal advice is that references to SACRA remain unaltered and that the current Board might only comprise the three Council appointed members. The membership of NCCRA is also unclear and might only comprise Council.

Cowell Clarke recommends that in order to provide proper protection to Council's appointees to the Board it is necessary to write to the Chairman requesting that all actions and records in respect of NCCRA including any dealings with the accounts and funds be placed in the hands of the Council appointees. Further those arrangements should remain in place until such time as a thorough investigation of the records can properly ascertain the membership of NCCRA and its Board.

In the event that it is demonstrated, as expected, that LeisureCo is not entitled to appoint members of the Board, the Board cannot reach quorum and the business of the NCCRA cannot be properly conducted Council must determine what course of action to take.

Our solicitors Cowell Clarke have advised that Council should not leave the matter unresolved by taking no action as the NCCRA Board and therefore Council's appointees are placed in a position of knowingly contravening the Act. Options put forward by Cowell Clarke for consideration are as follows:

- Council appointees to the Board rectify the breach by following due process to amend the Constitution to replace SACRA with LeisureCo. This action would enable the Board to recommence to continue to conduct its business with its present membership. However it would continue the present probity concerns and mean that LeisureCo would have ongoing membership rights on NCCRA. Those concerns would come into sharp focus in the NCCRA Board deliberations with respect to the post 30 June 2008 management services provider if Council resolves to offer a new lease to NCCRA from 1 July 2008.

- Council instruct its appointees to the Board to amend the Constitution to a quorum of two or three Board members and then exercise its rights in the Constitution under Section 41 of the Act to wind up NCCRA by passing a special resolution. This relies upon either a finding that LeisureCo is not a member of NCCRA or LeisureCo's co-operation which is probably unlikely.

This course of action would break the contractual relationship links between Council and LeisureCo via NCCRA as the management services agreement is between NCCRA and LeisureCo. The effect would be a termination of the management services agreement through Council's direct action which could lead to a claim for damages by LeisureCo.

- Council instruct its appointees to the Board to exercise their rights under the Constitution to assign to Council NCCRA's interest in the lease of the Noarlunga Leisure Centre (thereby making Council both lessor and lessee) and the management services agreement with LeisureCo. This also relies upon a finding that LeisureCo is not a member of NCCRA or LeisureCo's co-operation which is probably unlikely.

This would create a direct contractual relationship between Council and LeisureCo for the remainder of the management services agreement similar to that which occurs with Council's recreation centres. In this circumstance the Association could continue to exist and could perform such ongoing role as Council determines. The Board at this point could also choose to wind up NCCRA.