

11.1 Confidential Report on Proposed Changes to the Constitution of the Noarlunga Centre Community Recreation Association

This report proposes changes to the Constitution of the Noarlunga Centre Community Recreation Association whereby Council will become the sole member.

This is an update on a previously reported project, concept or issue.

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Contact Number: 83840581
Attachments: 1. Legal Opinion and attached correspondence Cowell Clarke 22 November 2007 (7 pages)
2. Legal Opinion Cowell Clarke 14 January 2008 (1 page)
3. Legal Opinion Cowell Clarke 16 January 2008 (2 pages)
4. Legal Opinion Cowell Clarke 27 December 2007 (2 pages)

1 Executive Summary

1.1 Topic

This report proposes a change to the Constitution of the Noarlunga Centre Community Recreation Association whereby Council will become the sole member.

1.2 Context

On the 20 November 2007 Council resolved in confidence in part:

“That Council endorses the management of the Noarlunga Leisure Centre involving a direct relationship with the recreation management services provider from July 2008.”

The effect of this will be that the Noarlunga Centre Community Recreation Association (NCCRA) will from that date no longer have a role in the management of the Noarlunga Leisure Centre and may then be disbanded.

However a confidential report to Council on 2 October 2007 raised concern over the present involvement of LeisureCo in NCCRA as a member while also operating as the provider of recreation management services to the leisure centre as follows:

“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 appointer.”

Since then some irregularities in relation to the Association Incorporations Act (Act) contained in the NCCRA Constitution and the way the Association undertakes its business have been identified by our solicitors. These are of relevance to our concern over the continuing LeisureCo membership of NCCRA.

This report seeks to inform Council on the matter and to provide a means to resolve our concern over LeisureCo membership of NCCRA under the present arrangements.

1.3 Suggested Outcome

That Council resolve to write to the Chairman of the NCCRA Board proposing that a special general meeting of the members be called to amend the Constitution and Rules of the Association to in effect establish Council as the sole member.

Subject to the agreement of the Board members, that the three current LeisureCo appointees be re-appointed to the Board as Council appointees in addition to the current Council appointees.

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 -**
 - (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**
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been outweighed by the need to keep the information or discussion confidential.

- 2. That Council having considered the legal advice and the offer by LeisureCo to exit from being a member of NCCRA resolves that:**
 - The Chief Executive Officer write to the Chairman of NCCRA proposing the Board call a special general meeting of the members to amend the Constitution and Rules of the Association to in effect establish Council as the sole member.**
 - Subject to Council being established as the sole member of NCCRA, it retain the present quorum requirements of the NCCRA Board and subject to their agreement appoint the three LeisureCo appointees as Council appointees.**
 - The NCCRA Association be wound up following the appointment from July 1 2008 of a new recreation management services provider under a direct relationship with Council.**

- 3. 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

Mayor Rosenberg 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 has been briefed on this matter including Council's Solicitor.

3.3 Others

Rick Davies Senior Associate, Cowell Clarke Commercial Lawyers has been providing legal advice.

Key Factors

4 Discussion

Implementation is now underway of the confidential resolution of Council on the 20 November 2007, to seek expressions of interest from recreation management services providers to enter into a direct relationship with Council to manage Noarlunga Leisure Centre.

The appointment from July 1 2008 of a new recreation management services provider under a direct relationship with Council will mean that the Noarlunga Centre Community Recreation Association (NCCRA) from that date will no longer have a role in the management of the Noarlunga Leisure Centre, although some assets held by NCCRA might continue to be used.

There are presently two members listed in the Noarlunga Centre Community Recreation Association (NCCRA) Constitution, these being Council and the South Australian Community Recreation Association (SACRA). SACRA has been formally disbanded.

However a confidential report to Council on 2 October 2007 raised concern over the present involvement of LeisureCo in NCCRA as a member while operating as the recreation management services provider to the leisure centre and how LeisureCo in fact came to be a member of NCCRA in place of SACRA.

LeisureCo has now provided information to Council that our solicitors advise does substantiate their claim to have replaced SACRA as a member of NCCRA although the Constitution has never been changed to reflect this, nor lodged with the Office of Consumer and Business Affairs as required under the Associations Incorporations Act (Act).

While undertaking due diligence in preparation to go out to the market to seek a new recreation management services provider for the Noarlunga Leisure Centre, our solicitor has identified issues concerning the Constitution and operations of NCCRA that appear to be in contravention of the Act (Attachment 1).

The primary issue relates to clauses in the Management Services Agreement between NCCRA and LeisureCo whereby LeisureCo as the management services provider to the leisure centre is entitled to fees that likely include a pecuniary profit. This appears to be in contravention of Section 55 of the Act that prohibits members of an association receiving a profit from the activities of that association. The specific fees include a management fee in the order of \$60,000 per annum and branding fees for particular brands owned by LeisureCo and used for promoting the leisure centre activities.

As the management services provider to the leisure centre, LeisureCo would not be in contravention of the Act in receiving a profit if it was not a member of NCCRA or if there was a direct management relationship with Council.

Even though this issue is able to be resolved with the establishment of a direct management relationship between Council and the recreation

management services provider from July 1 2008, our solicitor advises we nevertheless now have a duty to inform the Board and LeisureCo of the advice we have been given and to seek that the matters are rectified.

The other breach of the Act relates to failure by the CEO of LeisureCo and the nominated Public Officer for NCCRA, to lodge each year with the Corporate Affairs Commission the financial statements of the Association.

These purported breaches of the Act have now been communicated to LeisureCo and the NCCRA Board and were discussed at the NCCRA Board meeting on 18 December 2007. At that meeting LeisureCo tabled counter legal advice from their solicitor Lipman Karas that disputes that there is a breach of Section 55 of the Act with respect to fees. In order to resolve the matter the NCCRA Board at that meeting passed a resolution to refer the matter to the Corporate Affairs Commissioner for determination. The LeisureCo CEO has undertaken to rectify the breach with respect to the lodgement of financial statements.

Since the meeting with LeisureCo's CEO who has advised us verbally that LeisureCo would be willing to exit as a member of NCCRA rather than pursue resolution via the Corporate Affairs Commissioner, but is not willing to initiate the move. Based on his advice, LeisureCo's preference is for Council to propose a resolution to the NCCRA Board.

Our solicitor has advised that an application to the Corporate Affairs Commission is likely to be an extended process with the potential for an uncertain outcome (Attachment 2). He has advised that Council rather should move as quickly as possible to have full control of NCCRA by taking up the LeisureCo offer to resign from membership of NCCRA (Attachment 3).

The process outlined by our solicitor is as follows (Attachment 4):

1. We write to the Chairman of the NCCRA Board proposing that a special general meeting of the members be called (will require 14 days notice) to amend the Constitution and Rules of the Association to delete all references that grant LeisureCo member rights and in effect establishing Council as the sole member.
 2. Once the Constitution and Rules changes have been approved by the members, LeisureCo may resign by providing written notice to the Secretary of the Association.
 3. Following rectification of the breach over lodgement of financial statements to the Commission, the Board may accept the resignation of the Public Officer and appoint a replacement.
 4. The Office of Consumer and Business Affairs is notified within one month of the revised Constitution and Rules and change of the Public Officer.
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The Board presently has three appointees each from the two members. The LeisureCo appointees are Ray Gilbert, Tim Flaherty and Mark Wheaton, each of whom have had a long association with Noarlunga Leisure Centre as appointees and it is understood have provided a dedicated commitment to the functioning and well being of the leisure centre.

With the proposed changes to the Constitution and Rules to establish Council as the sole member, the LeisureCo appointees would no longer hold office. One option would be to merely reduce the number of board members to three, being the existing Council nominees. An alternative is that the present six member board be retained and the three existing LeisureCo appointees become additional Council appointees. This should result in council being seen as being appreciative of the efforts made by all of the current board members and might help ease the passage of the necessary resolutions. This may be particularly important as all three LeisureCo appointees at the 18 December 2007 Board meeting expressed a strong desire for a continuing association with the leisure centre while also acknowledging that this would come to an end on 30 June 2008.