



**Liverpool City Council
Public Inquiry**

**Final Report
Findings and Recommendations**

Volume 3

July 2004

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Introduction to the Report

Background

On November 5 2003 a Public Inquiry, convened pursuant to Section 740 of the Local Government Act 1993 (the Act), was announced into Liverpool City Council.

Section 740 of the Act empowers the Governor or the Minister to appoint a person as Commissioner, to hold a Public Inquiry and to report to the Governor or the Minister, relevantly, with respect to:

Any matter relating to the carrying out of the provisions of the Act or any other act conferring or imposing functions on a council, and

Any act or omission of a member of a council, any employee of a council or any person elected or appointed to any office or position under the Act or any other act conferring or imposing functions on a council, being an act or omission relating to the carrying out of the provisions of the act concerned, or to the office or position held by the member, employee or person under the act concerned, or to the functions of that office or position.

The Act incorporates certain powers, which are given to commissioners, under the Royal Commissions Act 1923.

Terms of Reference

In announcing the Inquiry, the Minister for Local Government, the Honourable Tony Kelly MLC outlined its terms of reference.

These terms established the parameters for the Inquiry.

The Terms of Reference provided for the conduct of a wide-ranging inquiry into the affairs of the council, involving the conduct of the Councillors as the Elected Body, and also of the council staff and council's operations, as comprising the Corporate Body.

The Terms of Reference are set out below:

To inquire, report and make any appropriate recommendations regarding Liverpool City Council.

The Inquiry will have particular regard but is not limited to the following:

1. *whether the council has exercised prudent financial management regarding the development and management of infrastructure projects such as those within the Woodward Park precinct (the “Oasis” project);*
2. *whether the council exercised appropriate openness and transparency in its decision making for approving and undertaking major infrastructure projects;*
3. *whether the council properly considered what impact major infrastructure projects would have on the ongoing ability of council to provide services to the community;*
4. *Council’s process of appointment and management of senior staff; and*
5. *Any other matter that warrants mention, particularly where it may impact upon the effective administration of the area and/or the working relationships between the Council, Councillors and its administration.*

The Commissioner may make such recommendations as the Commissioner sees fit including whether all civic offices in relation to the Council should be declared vacant so as to ensure that an appropriate structure can be put in place to provide optimum community leadership.

In light of the directions embodied in the Terms of Reference, the Inquiry has directed itself to matters, which it regards as falling within the Terms of Reference, involving both the Elected Body and the Corporate Body.

It is not intended in this report to review or to enlarge on matters contained in the Introduction to the Interim Report, but to provide a concluded view on the matters referred to in Part 2 of that Report and to provide a report on the latter three Terms of Reference. The findings for each section are contained within the section; the recommendations are listed in the next section.

Part 1: The Lands

In order to provide an understanding of the projects and properties that have been referred to in the Interim Report and that will be referred to in this Report the following is provided:

Over the period reviewed by the Inquiry, a number of projects were put forward. They affected some or all of the following properties.

a) Woodward Park

All proposals involved, solely or principally, the re-development of Woodward Park.

1. Oasis Master Plan – Wood Bagot, p.10

Woodward Park is a large area of open space bounded by Memorial Avenue, Copeland Street, Hoxton Park Road and the Liverpool Parramatta Buslink.

The park contains an area of 20.3 ha¹

In about 1981 the council had constructed the E.G Whitlam Recreation Centre towards the middle of the park.

Other facilities that had been constructed on the park included an outdoor swimming complex, the Hillier Oval, playing fields for different sporting users, a roller-skating rink and buildings housing a kindergarten, a childcare centre, the Girl Guides and other users.²

At the time that proposals considered in this Report were being put forward, the council had constructed indoor and outdoor swimming facilities within and adjacent to the Whitlam centre. As a result, the land adjacent to the corner of Copeland Street and Memorial Avenue formerly used as an outdoor swimming complex had become available for re-development.

In 1992 the council had adopted a Master Plan for the re-development of Woodward park.³

The Master Plan anticipated the upgrading of facilities within the park, upgrading the Whitlam Centre and development of the former pool site as a licensed club/hotel complex.

Council's administrative centre had been constructed in the south-western area of the park.

Brickmaker's creek ran north south adjacent to the western boundary of the park, in a formed causeway. The land within the park comprised freehold land owned by the council and Crown land that the council controlled as trustee.

Importantly many of the projects involved construction of facilities on Crown land and, the "panhandle" land, on which part of a basketball arena was to be built under various proposals.

Woodward Park represented a significant parcel of land near the Liverpool CBD. It was used by a range of sporting and recreational users.

b) The TAPP's Land

To the south of Woodward Park lies another area of open space, referred to generally as the TAPP's land (an acronym for Tip and Paciullo Park). As the name suggests, much of this land had been formerly used as a waste landfill site.

A further park, Pearce Park, adjoined the eastern side of Paciullo Park and is now separated from Paciullo Park by the buslink.

2. Woodward Park Master Plan Report – LRM, p.1

3. Minutes of council meeting: 22/12/92, p.8

The TAPP's land occupied an area of 17.26 ha. The whole of the land appears to be owned by the council.

Apart from sporting facilities, the TAPP's land had not been developed. Like Woodward Park the TAPP's land was used by a range of sporting users.

c) The CBD Properties

The Oasis project and Liverpool 2020 contained (or contain) proposals to develop council-owned properties within the Liverpool CBD. These proposals affected:

The Bathurst Street Carpark

A council-owned property bounded by Bathurst Street, Elizabeth Drive and Northumberland Street. This property was developed as a ground level sealed carpark.

The Warren Serviceway Carpark

Another council-owned property comprising a multi-storey carpark accessible from the Dewsbury Serviceway, running between George and Bigge Streets.

The Northumberland Street Carpark

A multi-storey carpark on council owned land fronting Northumberland Street proximate to Memorial Avenue.

d) Other Land

Whether during the course of investigating proposals that did not proceed, or those that did, including Oasis, the Inquiry has been referred to the sale, acquisition or upgrading of other lands. It is not generally relevant to refer to these parcels of land in this report, other than to mention two properties, comprising:

The Collingwood House Land

Collingwood House is an historic property set back from the Hume Highway off Congressional Drive. Following the sale of the Pool site the council moved to acquire land adjoining this property for \$1.5m.

The Casula Powerhouse

The Casula Powerhouse is an art centre off Casula Road operated by the council since 1992.

At the time of the Inquiry the centre was not operating pending the Ministerial approval of fund-raising proposals. The Inquiry heard evidence that council's involvement in the Oasis project had given rise to difficulties for the Powerhouse in pursuing the funding approval.⁴

4. Evidence of Gouriotis: 19/02/04, p.16

Part 2: The Projects

Following the adoption of the Master Plan for Woodward Park, the council embarked upon a number of courses initially aimed at re-developing the Whitlam Centre. Subsequently, under the Oasis and Liverpool 2020 projects the proposal extended beyond both the Whitlam Centre and included the whole Woodward Park Precinct. Council's central aim appears to have always been to provide upgraded facilities of the type provided by the Whitlam Centre.

This part briefly describes each of the projects considered by the council that are the focus of this report.

Accordingly no reference is made to the schemes associated with the council's bid to provide facilities for the Sydney Olympics.

The projects were:

a) Council's re-development of the Whitlam Centre

The council considered re-developing the centre itself, going through the process of costing the upgrading necessary to overcome inherent defects in the building and to upgrade it to provide the accommodation and facilities required by the NBL.

This project preceded the Stardome Project and proceeded in parallel with it during 1997–1998, until the council resolved to commit solely to the Stardome Project.

b) The Stardome Project

In mid 1997 the council was approached by the principals of Stardome Corporation Pty Ltd, Mr Hanna and Mr Constantinidis, who were initially promoting the construction of a stadium for use by the Bulldogs.⁵ Subsequently, at the direction of the Bulldogs the Stardome proposal was changed to a multi-purpose arena with an ice rink, adjacent to council's administrative centre, and for a number of tennis courts.⁶

c) The Oasis Project

As early as March 1997 the Bulldogs had shown interest in developing facilities at Woodward Park. In April 1997 the club had indicated interest in moving its administration and training facilities to the Park.

In mid 1995 or early 1996 the Bulldogs had purchased a controlling interest in the Slammers,⁷ a local basketball team promised support by the council in its bid to join the National Basketball League.

5. Evidence of Constantinidis: 17/02/04, p.68

6. Evidence of Constantinidis: 17/02/04, p.71

7. Evidence of A Looby: 23/02/04, p.65

In June 1999 the council had entered into a MOU with the Bulldogs, Macquarie and Grocon to build a multi-purpose arena on the site formerly proposed in the Stardome Project.

This proposal, at this time, was limited to the provision of an arena.

In January 2000 this MOU was terminated upon the basis that the project had grown substantially.

In March 2000 the council was briefed by representatives of the Bulldogs and Macquarie, who were then proposing the Oasis project.

As ultimately formed, the Oasis project anticipated the following developments:

i) Woodward Park

- a) a waterpark and multi-purpose arena with retail and residential components*
- b) a football stadium*

Associated with this, but not directly within Woodward Park was the construction of a licensed club and hotel on the former pool site. This land had been bought by the Bulldogs in 1998. The council had already granted development consent for the club and hotel.

ii) The TAPP's Land

The project anticipated that this land would be developed to provide for recreational, commercial and residential uses.⁸

The Oasis Master Plan anticipated that the residential development would comprise a mixture of low and high-rise apartments, detached housing lots and a retirement village, providing a total of 720 dwellings.⁹

iii) The CBD Properties

The Commercial Agreement, which was to give effect to the "Oasis Vision", did not differentiate between the various properties, anticipating that development would comprise new council chambers, commercial residential and car parking stations.¹⁰

The Oasis Master Plan provided greater detail, anticipating yields of 240 and 210 apartments, respectively, for the Bathurst Street and Northumberland Street properties. The Master Plan also detailed the anticipated areas of the commercial and retail components and the numerical yield of the car parks.¹¹

8. Commercial Agreement, Clause 3.1

9. Oasis Master Plan, p.42

10. Commercial Agreement, Clause 3.1

11. Oasis Master Plan, p.42

iv) Liverpool 2020

Liverpool 2020 anticipates development on each of the sites anticipated by the Oasis project.¹²

Liverpool 2020 differs from the Oasis project, as it does not anticipate construction of a stadium.¹³

Part 3: Management of Woodward Park

In September 1988 the council resolved to investigate the commercial re-development of the Pool Site.

In late 1992 the council had considered a report by LRM Australia for proposed extensions to the Whitlam Centre and a Master Plan for the Park.

The report anticipated that the Whitlam Centre, which then comprised a three court indoor sports stadium, retractable seating for 2,400, function rooms, four squash courts, meeting rooms, office space and associated facilities. It would be expanded to provide accommodation for 5000+ spectators and more programmable space for team sport activities.¹⁴

The report also provided a Master Plan for the staged development of Woodward Park, providing for the inclusion of a licensed club and motel to attract significant users,¹⁵ the provision of a new grandstand and improved spectators seating at Hillier Oval and upgrading of the playing fields.¹⁶

The Master Plan was adopted at council's meeting on 22 December 1992.

In 1994 and 1995 the council proceeded with the exhibition and subsequent adoption of a local environmental plan for the park.

On 11 December 1998 the council endorsed a Plan of Management for Woodward Park, Hillier Oval and the Whitlam Centre. The plan contained objectives that sought, inter-alia:

- To maintain quality open space
- To encourage and support community use of Woodward Park
- The support of local community, sporting and leisure clubs
- Development of a high profile sporting precinct and the encouragement of elite users
- To extend the range and quality of leisure opportunities

12. Macquarie MOU, Schedule 5

13. Evidence of P Wright: 28/01/04, p.46

14. LRM Report, November 1992

15. LRM Report, November 1992, p.22

16. LRM Report, November 1992, p.17

In November 1996 the Bulldogs had written to the council expressing interest in developing a licensed club at Woodward Park. As time progressed the Bulldog's proposals grew to form the Oasis Project, in turn culminating in council's resolution to enter into the Commercial Agreement at its meeting on 5 February 2001.

At the same time the council appears to have adopted the Oasis Master Vision Plan for Woodward Park as its plan for the management and development of Woodward Park, the TAPP's land and its CBD properties. Woods Baggot had prepared this plan for the Bulldogs and Macquarie Bank as part of the Oasis Project.¹⁷

The Oasis Master Plan emphasised Woodward Park and anticipated the utilisation of the park to provide:

- Hotel, club and apartments on the former pool site in the north eastern part
- Waterpark and apartments in the north western part
- A multi-use arena, retail and residential development in the central part
- Residential, commercial and parking facilities on the site of the current council chambers in the south western part
- A roofed stadium in the central southern part
- The use of Hillier Oval for overflow parking.¹⁸

Part 4: Council's Financial Position

In the mid 1990's there were concerns over council's financial position.

It had a \$15.4m working capital deficit and a debt service ratio of about 12%. This had been a legacy of decisions made by the former council.

Under the former General Manager, Mr Carr, the council had then gone about a process of reducing its deficit.¹⁹

In order to provide for this, the council had sought to increase its rate revenue, to improve its efficiency and to restructure its debt.

As a result of the measures that it had put in place the council was able to provide a financial surplus in 1999.²⁰

While these achievements may have been a major turning point for the council, it had received warnings from its auditors in 1997 about undertaking new projects.²¹

Further, while the council had achieved a substantial turn-around, this achievement merely placed council in a position, which its auditor considered to be marginal.²²

17. Minutes of meeting: 05/02/04, p.4

18. Oasis Vision Plan, p.30

19. Evidence of B Carr: 02/02/04, p.62

20. Evidence of B Carr: 02/02/04, p.62

21. PwC Letter 1997

22. Evidence of D Banisevic: 27/01/04, p.11

While the council had relieved its liquidity problems by extending the term of its loans, the debt remained. Accordingly its long-term financial position did not greatly benefit from this process.²³

Council was generally faced with a position where its expenditure on ordinary activities exceeded its revenue from those activities. In those circumstances other revenue, whether from developer contributions imposed under the EP&A Act or grants, provided council's surplus.²⁴

Importantly, developer contributions are imposed to fund infrastructure needs of councils or to repay funds previously expended.

Councils effectively hold these monies on trust to meet the costs of the particular projects for which they have been imposed.

Overall, the surpluses generated by the council were not large, having regard to its overall income and expenses, as will be seen from the following table. It can be seen that in the five years covered by the table, total expenses exceeded total revenue from ordinary activities in every year. Put simply, the council spent more than it earned from regular revenue sources (rates etc) year after year. When grants and contributions for capital purposes are added, the council can be seen to have recorded a deficit in only one year of the five (2001–2002). The grants and contributions are largely made up of Section 94 contributions: sums paid by developers to provide infrastructure and facilities for the community. It will be noted that the grants and contributions are very large in relation to revenue from ordinary activities. In one year the total grants and contributions were equivalent to more than 50% of the council's ordinary revenue.

Table 1 Liverpool City Council Statement of Financial Performance 1998/99 to 2002/2003 \$million

	2002/2003	2001/2002	2000/2001	1999/2000	1998/1999
Total expenses from Ordinary Activities	88.6	102.2	83.3	74.2	69.3
Total Revenues from Ordinary Activities	81.2	76.8	71.3	71.5	62.0
Surplus (deficit) from Ordinary Activities before capital	(7.4)	(25.4)	(12.0)	(2.8)	(7.3)
Grants and contributions for capital purposes	12.7	22.1	16.4	38.4	35.2
Surplus (deficit) for all activities	5.3	(3.3)	4.4	35.6	27.9

Source: Council's financial statements for each year.

23. Evidence of D Banisevic: 27/01/04, p.11

24. Evidence of D Banisevic: 27/01/04, p.16

Part 5: The Future

The Terms of Reference of the Inquiry call upon the Inquiry to review:

- Whether the council properly considered what impact major infrastructure projects would have on the ongoing ability of the council to provide services to the Community

Councils are called upon to provide various forms of infrastructure for their local communities.

Infrastructure may be in the form of roads, drainage, sewerage, water supply or other essential services, or in the form of community facilities such as swimming pools, playing fields, libraries and the like.

Increasingly councils are being called on to provide more and better quality infrastructure for their communities.

Councils are therefore required to meet the initial cost of providing infrastructure, and subsequent costs of maintaining and upgrading infrastructure.

In circumstances where a council's population was growing it could be expected to be called upon to provide further infrastructure to meet the needs of its community.

In the council's 1999/2000 Annual Report Mayor Paciullo reported:

"The City of Liverpool sustained its rapid rate of population growth during 1999/2000 with its population now nearing the 150,000 mark. Approximately 20 per cent of Sydney's new residential housing development is currently taking place within Liverpool's LGA. Indeed, Liverpool is expected to remain the biggest single destination for Sydney's homebuyers for another two decades."

"Liverpool's population contains a proportion of young people well above the Sydney average. Yet, for far too long, they and other residents have had to travel outside their area in order to have their sporting and entertainment needs satisfied".

In the later half of the 1990's the council had provided community infrastructure in the child care, youth and community centres and new and upgraded library facilities.

Additionally the council had provided essential services enabling the subdivisions necessary to meet the area's population growth.

In order to provide these essential services it was necessary for the council to acquire the requisite land and to carry out the necessary works, prior to, or associated with the subdivision works.

Councils are empowered to impose levies on developers under section 94 of the EP&A Act to provide for, or to recover these costs.

The Inquiry has been provided evidence suggesting the losses on the Oasis Project totalled \$18,758,483. This figure excludes the value of staff costs incurred on the project.²⁵

Council's current General Manager, Mr McCully gave evidence of the effect of the Oasis Project losses, if Oasis in its subsequent form under Liverpool 2020 does not proceed:

MR BROAD: (04/02/04, p.36) As to the use of the 94 contributions in the Oasis project, can you indicate how that has [a]ffected or will [a]ffect Council ability to provide infrastructure in the future?

MR McCULLY: In terms of section 94, if the Oasis project doesn't proceed and therefore the Oasis has to be removed from the section 94 plan then those funds that would have been expended out of section 94 on the Oasis would have to be repaid from the general fund and those funds then would not be available for other general fund purposes.

Put simply, the losses from the Oasis project will directly and adversely impact on the council's ability to provide other infrastructure.

Part 6: The Push for Public Private Partnerships

Given that councils are faced with the task of providing infrastructure to meet the needs of their constituents and given that councils are likely to be able to generate only modest financial surpluses from their activities, councils face a challenge to provide the means by which infrastructure can be provided.

More recently there has been an increase in agreements between the public sector and private sector entities to provide infrastructure, these agreements are commonly referred to as Public Private Partnerships or PPP.

In New South Wales PPP have been more common between State Departments or Agencies, rather than in Local Government.

PPP are being actively promoted as a means by which councils may provide infrastructure to their constituents.

Both the Oasis and Liverpool 2020 Projects have been described as PPP.

²⁵. Interim Report, p.35

It is important to understand that agreements such as Oasis and Liverpool 2020 are commercial agreements aimed at securing outcomes, in the form of infrastructure as well as commercial returns to the proponents. Returns may be in the form of direct financial return or with the form of rights granted to proponents, such as the right to occupy and use facilities.

Accordingly the word “partnership” should not be applied in the legal or social sense, of parties joining together with a common obligation and common share, or in the sense of a mutually similar role.

Parties to a PPP each seek, by joining together, various outcomes. The outcomes being sought by the proponents may be entirely different and, ostensibly, at odds.

It was suggested that councils were often the owners of “lazy assets” that were amenable for utilisation in another developed form to provide the basis for, or the infrastructure being sought.²⁶

In doing so, they may provide the funds that enable councils to fund the capital expenditure necessary to provide infrastructure.

Part 7: External Funding

Councils are entitled to raise income from rates, charges, fees, grants, borrowings and investments.²⁷

As has been indicated previously in this part, the surpluses achieved by councils are not generally sufficient to provide the necessary funds to undertake large-scale infrastructure projects.

Similarly, grants, such as those made through the Local Government Grants Commission, do not provide the level of funds to enable councils to take on infrastructure projects, such as those proposed by Oasis or Liverpool 2020.

Councils are entitled to impose levies on developers to fund infrastructure. While such levies may raise substantial funds, particularly in high growth areas such as Liverpool, the provision of infrastructure will likely be delayed pending the accumulation of sufficient funds generated from these levies.

Of the remaining alternatives, barriers are placed in the way of rate increases, leaving borrowing and asset utilisation as the likely candidates.

The Act enables council’s to borrow at any time for any purpose by overdraft, loan or other means approved by the Minister.²⁸ Importantly, the Minister may impose limitations or restrictions on borrowing by individual councils or councils generally.²⁹

26. Evidence of M Lamond, 29/01/04, p.41

27. Local Government Act, Section 491

28. Local Government Act, Sections 621–622

29. Local Government Act, Section 624

It will be seen that, as councils often own valuable land, again, often in a “lazy” state of development, they will be attracted to PPP as a means to provide infrastructure for their constituents.

Acknowledgements

The Inquiry would like to take the opportunity to express its thanks to the following persons who have assisted in the conduct of the Inquiry:

Anina Johnson, from the Crown Solicitor’s Office, who worked closely with the Inquiry, providing expert legal advice on a broad range of matters. She attended the Public Hearings and assisted with the questioning of the speakers. She helped with the analysis of material, and with the writing and editing of this Report. Her assistance was vital. She has overseen the general approach of the Inquiry, and she has been instrumental in the production of this Report.

Angus Broad, who served as Assistant to the Commissioner during the Inquiry. He handled relationships with the council and the public and press. He helped in analysing and evaluating the Submissions. He assisted with the censoring of Submissions. He attended the Public Hearings and assisted with the questioning of the speakers. He assisted with the compilation of the Report. He worked on the Inquiry from its inception; without his assistance the Inquiry and the Report could never have been completed.

Peter Vincent, who has served as Assistant to the Commissioner during the Inquiry. He worked on the Inquiry from the beginning through to the publication of this Report. He brought the financial expertise to the work of the Inquiry, assisting with questioning of speakers, evaluation of submissions, and a number of special investigations.

Jennifer Hills who has worked as an administrative assistant for the Inquiry, and who is largely responsible for the collation of the material in Reports 2 and 3.

Thanks are also offered to the Council, both the elected representatives and the staff. Their cooperation and provision of material has been extremely helpful.

There are also a number of other people who provided valuable input and support, and their assistance is also recognised.

Dictionary

So far as possible the following definitions contained in the Act, and other Acts and sources which have been referred to, have been followed

the Act	the Local Government Act 1993
the EP&A Act	the Environmental Planning and Assessment Act 1979
the Council	Liverpool City Council
the Elected Body	the Councillors
the Corporate Body	the General Manager and staff of the council, or where appropriate the functions carried out by the council
the Mayor	Councillor Paciullo
the General Manager	Council's current or former General Manager
Mr McCully	Council's current General Manager
Mr Carr	Council's former General Manager
Mr McIntyre	Mr G McIntyre – a representative of the Bulldogs
Mr Moss	Mr W Moss – a representative of Macquarie Bank
Mr Wright	Mr P Wright – a representative of Macquarie Bank
Mr Constantinidis	Mr A Constantinidis – a representative of Stardome and the Bulldogs
the Bulldogs	a collective reference to the Canterbury Bankstown Rugby League Football Club, the Bulldogs Football Club and the Bulldogs Rugby League Football Club
Macquarie	the Macquarie Bank
the Foundation	the Bulldogs Sports & Community Foundation Ltd
ODC	Oasis Development Corporation Pty Ltd a company formed to project manage the developments under the Oasis Project
Liverpool Arena	Liverpool Arena Pty Ltd a company formed to act as owner of the Arena under the Oasis Project

Prestige	Prestige Development Pty Ltd, a company formed to project manage the developments under the Oasis Project
the Commercial Agreement or CA	the agreement facilitating the Oasis Project dated 12 February 2001
the Early Construction Agreement or ECA	the agreement that brought forward the construction of the Arena dated 3 September 2001
the Macquarie MOU	the Memorandum of Understanding that the council entered into with Macquarie on 14 April 2003
the Oasis Project or Oasis	the name given to the proposals for development entered into in 2001 that the council entered into with the Bulldogs and the Macquarie Bank
Liverpool 2020	the name given to the proposals for development entered into in the MOU that the council entered into with the Macquarie Bank in 2003
ADIC or AIC or Stardome	a collective reference to the Australian Development and Investment Corporation, Australian Investment Corporation or Stardome Corporation – a proponent of the Stardome Project, controlled by Mr Constantinidis and Mr Hanna
the Stardome Project	the name given to the proposals for development entered into in the Heads of Agreement that the council entered into with Stardome
PPP	Public Private Partnerships – an arrangement between, relevantly, the council and a private entity
MOU	Memorandum of Understanding
the Arena	the multi-purpose arena proposed in different forms under the Stardome, Oasis and Liverpool 2020 Projects
the CBD Properties	Council owned properties within the Liverpool CBD, being council’s car parks in Bathurst Street, Northumberland Street and the Warren Serviceway

the TAPPS land	an acronym for Tip and Paciullo Park, being land adjacent to Woodward Park bounded by Hoxton Park Road, Calabro Avenue and Rose Street
the Old Swimming Pool Site or Pool Site	land adjacent to Woodward Park being the proposed club/hotel site, sold to the Bulldogs
the Collingwood Land	land adjacent to Collingwood House acquired by the council
the Whitlam Centre	an existing multi-use facility built on Woodward Park
the Palms Resort	the name given by the Bulldogs to their proposed club/hotel
the Plan of Management	a plan for the management of council owned and other land within Woodward Park, required by the Act and adopted by the Council in 1998
the Oasis Master Plan, Oasis or the Oasis Master Vision Plan	a plan of the developments proposed under the Project, prepared on behalf of the Bulldogs and Macquarie
DLWC/DLAWC	the Department of Land and Water Conservation
the DLAWC Land	part of Woodward Park owned by the State of NSW
Crown Land	land owned by the state of NSW
the Arena Trust Account	an account set up under the Commercial Agreement into which council paid the contributions required by the Early Construction Agreement.
the Slammers	the Western Sydney Slammers basketball team who were later renamed the Razorbacks
the Razorbacks	the Western Sydney Razorbacks – the name adopted by the Western Sydney Slammers basketball team following its entry into the NBL
the NBL	the National Basketball League
PwC	Price Waterhouse Coopers – council’s auditors and commercial advisers

Mr Redman	an employee of PwC who provided commercial advice
Mr Banisevic	an employee of PwC who provided financial advice
Ernst & Young	provider of probity advice to the council on the Commercial Agreement
Murray Douglas & Associates	provider of probity advice to the council on the Early Construction Agreement
Abbott Tout Mr Boland	provider of legal advice to the council, relevantly or regarding the Commercial Agreement and Early Construction Agreement
Marsdens or Mr Marsden	provider of general legal advice to the council
Atanaskovic Hartnell or Mr Eyers (sometimes Eyres)	provider of legal advice to the Foundation or to the council on the settlement with the Bulldogs and on the Macquarie MOU
Maddocks	provider of legal advice to the council over possible breaches of law by persons associated with ODC and the Foundation.
the Trustees	a reference to Mr Boland & Mr Livanes (the solicitor representing the Foundation and the Bulldogs) who undertook the role of trustees of the Arena Trust Account

1. Memorandum of Understanding (MOU): Macquarie Bank and Liverpool City Council

Recommendation:

That negotiations between the council and Macquarie be undertaken to provide a speedy, and honourable, resolution of issues in dispute surrounding the Memorandum of Understanding

Relevant Findings: Sections 2.3, 2.7, 3.5, 4.4, 4.7, 4.9, 4.10, 4.11, 4.13, 4.14, 7.3.

Context

In the lead-up to the signing of the Commercial Agreement in February 2001, which bound Macquarie, the Bulldogs, and the council to the Oasis project, Macquarie refused to pass on its financial model to the council. That model was the only document providing an economic rationale for the Oasis project. The council lacked the skills to create its own model. It requested that its advisers (PwC) undertake an analysis of the model and its assumptions, but Macquarie refused to provide the detailed model that would have allowed PwC to do so. The council was left placing its faith in Macquarie when it signed the Agreement. Within a few months of the Agreement being signed, Macquarie stepped away from the Oasis project after disagreements with the Bulldogs. Macquarie was motivated solely by self-interest in doing this. It paid no heed to the consequences for the council. Macquarie's move meant that: (1) the Bulldogs would have sole control over the Bulldogs Sports and Community Foundation, into which the council was to place \$15 million; and (2) Macquarie would no longer perform a trustee role in relation to the Foundation's funds. The result was that the council suffered a direct loss of \$15 million, with at least a further \$7 million lost in associated and contingent funds. The council's trust in Macquarie was sadly misplaced.

Subsequent to the Bulldogs' departure from the Oasis project, the most generous summary of Macquarie's actions is to call them opportunistic. A more appropriate view might be that they were predatory. The council exercised unseemly haste in signing the Memorandum with Macquarie in April 2003. The council was desperate to save face by having a mechanism to drive forward the Oasis project, which it had championed and promoted. In particular, the council was anxious to have a basketball arena built for the Razorbacks, a professional team owned by the Bulldogs. Macquarie seized the opportunity and through the memorandum concluded a "community partnership". In rushing to sign the Memorandum, the council undertook no analyses of its possible social, economic, environmental and

community amenity impacts, and made no moves to market test the proposal. The council had the one asset that was vital to the projects, land, and it ceded its authority over that asset, perhaps for decades to come, when it signed the Memorandum. The evidence before the Inquiry suggests that Macquarie would simply play the role of a broker in relation to the elements of Liverpool 2020 (which replaced the Oasis project), earning substantial fees in the process.

The evidence presented to the Inquiry was ambiguous in terms of the enforceability of the MOU. The Inquiry sought an opinion on the matter from the Solicitor General. The advice was that the MOU was binding. The advice further pointed out that because the council did not own certain land that was part of the MOU, it might not be in breach of the MOU if, after best endeavours to purchase the land, it failed, leaving the projects unachievable.

2. The Bulldogs' Representatives

Recommendation:

That the Minister for Local Government provide Australian Securities and Investment Commission (ASIC) and the Director of Liquor and Gaming with a copy of this report, transcripts and other evidence held by this Inquiry, seeking that they further investigate any breaches of the legislation falling under their jurisdiction.

Relevant Findings: 5.4, 5.6, 9.5, 9.6, 9.8, 9.9

Context

The Terms of Reference of the Inquiry were focussed on a number of matters concerning the governance of Liverpool City Council. The Terms of Reference permit only limited review of governance issues affecting the corporate vehicles and the other participants in the Oasis project. The Inquiry heard evidence that raised serious concerns regarding their conduct, which warrants further investigation.

ASIC is responsible for investigating and prosecuting civil and criminal breaches of the Corporations Act 2001 (sections 13, 49 and 50), the Australian Securities and Investment Commission Act 2001 and the Corporations Act 2000 (section 5B).

Various sections of the Corporations Act deal with the manner in which directors and officers exercise their powers and functions and discharge their duties. Section 180 requires that a director or other officer exhibit a reasonable degree of care and diligence. Section 181 imposes duties on directors to exercise their powers and functions in good faith for the best interests of the company and for proper purposes. Section 182 requires that a director or secretary not improperly use their position to gain an advantage for themselves or others or to cause detriment to a corporation.

Further, directors who are reckless or intentionally dishonest in the way that they breach sections 180–182 may also commit a criminal offence.

The Inquiry has received evidence of various dealings by the Foundation, ODC, Mr G McIntyre, Mr Constantinidis and Mr D McIntyre, or companies associated with them, that may give rise to a breach of any or all of these sections. This evidence includes:

Recommendations

Loan by the Foundation to ODC of \$503,000 that was written off (5.4.5)

Overpayment of fees by the Foundation to ODC (5.4.5)

Pre-payment of fees of \$651,000 that were subsequently written off (5.4.5)

Payment by the Foundation to ODC of a project advisory fee of \$272,250 without any apparent contractual basis and when project advisory services appeared to already be a part of ODC's contract (5.6.3)

Retaining and paying consultants without first entering into contracts (5.6.3)

Failing to ensure that proper accounting and financial records were kept (5.4.3)

ODC's lease of premises in Burwood from a company associated with A Constantinidis with no formal lease agreement (5.6.3)

Making loans by ODC to A Constantinidis which were unsecured and made without any contractual documents (5.6.3)

Overpayment to G McIntyre and no tax invoices to support repayment (even if they were ultimately repaid, as this demonstrates a lack of diligence and appropriate systems) (5.6.3)

Considerable work performed by D McIntyre and J Smith for entities other than ODC and with no tax invoices to support work performed (again demonstrates lack of diligence and appropriate accounting systems) (5.6.3)

Payments/loans to Bulldogs players without any formal contract or loan agreements (5.6.3)

Credit card use may also have been insufficiently regulated and controlled (5.6.3)

The Bulldogs Leagues Club Limited is a registered club for the purposes of the Registered Clubs Act 1976. This Act requires disclosure of material personal interests by members of the governing body (section 41 C) and gifts to a value exceeding \$500 from affiliated bodies (sections 41 E&F).

Given the relationship between the Foundation, ODC, Prestige and Liverpool Arena and the Bulldogs Leagues Club Limited (or persons associated with it) and the payments made by the Foundation, ODC and Liverpool Arena referred to in PwC's report dated 6 November 2002, it is also appropriate for these matters to be referred to the Director of Liquor and Gaming.

3. Negligence of Council

Recommendation:

That neither the Minister nor the Director General, pursue the appointment of a Departmental representative, to consider whether to surcharge on any councillor, or council's former General Manager, or any other member of staff, under Section 435 of the Act, arising from culpable negligence or misconduct on their part.

Relevant Findings: 1.4, 1.5, 1.6, 1.8, 1.9, 1.11, 2.6, 3.4, 3.5, 4.5, 4.6, 4.9, 4.11, 4.12, 4.15, 4.16, 4.17, 5.2, 5.4, 6.5, 6.6, 7.3, 8.3, 9.4, 11.1, 11.2

Context

Section 435 (2) of the Act provides: *A Departmental representative may also surcharge on a councillor, the general manager or any member of staff of the council the amount of:*

(a) any deficiency or loss occurred by the council as a consequence of the culpable negligence or misconduct of the councillor, general manager or member of staff.

Liverpool City Council suffered very substantial losses. When the totality of actions, related to various commercial agreements, is reviewed there are numerous breaches of the Act. These provide very good grounds to suggest culpable negligence or misconduct on behalf of the former Mayor and General Manager, and to a lesser extent of some councillors.

While there may be reasons to pursue Section 435, the recommendation suggests that no surcharging be applied, however, for the following reasons:

- (1) The Oasis project was the largest undertaking by a council in partnership with private sector entities ever attempted in New South Wales. As a result there were no precedents for the council to follow, and there were no regulations or guidelines laying down the structures and processes that the council should follow. If the recommendations made in Report 2 are followed, this excuse cannot apply in the future to any failures of PPP caused by a council's negligence.
- (2) The losses incurred by the council resulted from negligence on behalf of the governing body, and the General Manager, rather than deliberate and corrupt processes.
- (3) The dismissal of the council in March 2004 is considered to be a sufficient penalty for this negligence.

4. Strengthening Council's Processes

A. Probity

Recommendation:

That councils adopt proper and adequate systems to ensure that in conducting their own dealings, and those with the public, they meet the requirements and intent of the Act in respect of transparency, accountability, and due process. Councils engaged in large projects and PPP should consider appointing internal auditors. Further, consideration be given to providing a definition of, or guidelines prescribing, probity standards to be adopted by councils.

Relevant Findings: 1.5, 1.6, 1.8, 1.10, 1.11, 2.2, 2.4, 2.5, 2.6, 3.2, 3.5, 4.2, 4.3, 4.4, 4.6, 4.8, 4.9, 4.10, 4.11, 4.17, 5.1, 9.2, 9.3, 9.4, 9.5, 9.8

Context

Probity issues were poorly managed by the council in relation to the Woodward Park projects. There was no probity plan, no external probity auditor, no continuing surveillance of probity issues, and just two, rather unsatisfactory, probity reports in seven years.

Probity is essential in matters concerning the evaluation and decision-making connected with large projects involving external partners. The community must be assured that councils have acted to protect the public interest, and have acted to provide value for money in the use of community resources. Probity also involves ensuring that the council has preserved competitive neutrality in allowing all potential partners the opportunity to participate in the various commercial arrangements entered into by Liverpool City Council. As a result of instituting a very weak probity regime, the council breached various Sections of the Act by instituting bad processes.

B. Advice from External Advisers

Recommendations:

- 1. That councils considering or entering a PPP obtain independent and unfettered advice from their professional advisers.**
- 2. Such advice should not be confused with professional assistance, or statements given in support of a pre-ordained position that may have been adopted by the council.**
- 3. Councils should not “forum shop” to obtain advice that suits their perceived needs.**
- 4. In order to ensure the independence and reliability of advice councils must put in place clear decision trees, consider what advice should be obtained, and then set appropriate terms of reference for their professional advisers.**

Relevant Findings: 2.2, 2.7, 3.3, 3.5, 4.5, 4.6, 4.7, 4.10, 4.11, 6.5, 8.3, 9.4

Context

Any major commercial arrangement between councils and the private sector should involve assistance from external experts to supplement the human resources available internally. The detailed financial and legal information needed by council prior to its signing the Commercial Agreement was never satisfactorily produced, either through its staff or through council’s advisors.

The council requested PwC to undertake an assessment of the Macquarie financial model. This was certainly one of the most important tasks requested by the council. Macquarie would not provide the detailed model that would have allowed PwC to do so. PwC’s failure to provide an assessment of the Macquarie model robbed the council of vital information. Instead of notifying the council of the dangers of entering a major commercial agreement without detailed knowledge of the assumptions and structures of the financial model, PwC seemed content to issue broad warnings about risk. PwC, as the council’s principal adviser, did not press the council to obtain further advice on the financial projections or to undertake an internal assessment; it accepted Macquarie’s refusal and were prepared to prepare a report that was to be flawed because of it.

The council misrepresented the advice given by its legal advisors and incorrectly chose not to be represented on the Foundation. It was also willing to change advisors; ignoring sound advice in an apparent search for advice that suited their actions.

PwC's 2002 report appears to have been driven by a perceived need to put a good case to support the project. Importantly, it was not a feasibility report but a discussion paper on the potential use of the arena and the income that might derive.

Mr Eyers was retained to mediate settlements with Macquarie and the Bulldogs. His retainer was inappropriate. As a result of Mr Eyers' negotiations and advice, the council entered into Liverpool 2020 with disregard to the provisions of the Act and without first obtaining independent and thorough advice regarding the legal effect and commerciality of the project.

C. Conflicts of Interest affecting Council's role as Planning and Consent Authority

Recommendations: That

- 1. since councils have a principal role as planning authority for their local area, consideration of applications for development consent should only follow the planning process;**
- 2. before entering into PPP councils must undertake the planning process, adopting appropriate planning policies or, preferably, planning instruments. Thereafter, and again prior to entering into a PPP councils should adopt and proceed with a pre-DA process, where the proposals are presented and defined with sufficient certainty that, while the application is not approved, the public processes can be met;**
- 3. where large-scale development is proposed in relation to a PPP pre-planning by the council should determine the broad scope of a project, leaving some flexibility for inclusion of innovative ideas contained in proposals;**
- 4. if councils perceive they have a conflict of interest in acting as the consent authority in a PPP project, they may invite the State or other Local Government bodies to act in their place, and/or make referrals to an independent panel of experts.**

Relevant Findings: 1.3, 1.6, 2.5, 2.6, 3.6, 4.14, 4.15, 5.4, 6.2, 7.1, 7.2 7.3, 8.1, 8.2, 8.3, 9.5, 10.1, 10.2, 11.1, 11.2, 12.1

Context

The council played no part in guiding, formulating or testing the proposals that were put to it, despite its principal role as landowner, planning authority, consent authority and community representative. What ultimately became the vision for Woodward Park was not fashioned by the council, but rather by the Bulldogs and

Macquarie in the Oasis Master Plan. This paid no consideration to the council's adopted Plan of Management for the park. Council adopted the Oasis Master Plan as though it had some force of law. The adoption of the Master Plan, together with the provisions of the Commercial Agreement, constrained the council to approve the projects contemplated by the Master Plan. Council placed itself in a position where it could be in breach of the Commercial Agreement if it exercised its planning and consent powers.

The council demonstrated a willingness to undermine the independence and rigour of its planning and determination powers under the EP&A Act. Importantly, the council failed to undertake any studies to determine the suitability of the lands for the developments sought, or whether there were factors that would render the sites unsuitable for the intended developments. The council did not engage their professional planning staff sufficiently in terms of the planning implications of the Oasis project, either prior, or subsequent, to entering into the Commercial Agreement.

The council elected not to be represented on the Foundation on a premise that being engaged in proposing the developments, while retaining its role as consent authority, would give rise to a conflict of interest. Council's failure to undertake proper planning for the Oasis project was always to give rise to a conflict of interest. Council's withdrawal from representation on the Foundation would not avoid this.

D. Instruction, Guidance and Assistance

Recommendation:

That measures should be put in place to ensure that councillors receive instruction, guidance and assistance in the manner that they carry out their tasks when considering or entering into a PPP.

Relevant Findings: 1.4, 1.5, 1.6, 1.8, 1.9, 1.11, 2.6, 3.4, 3.5, 4.5, 4.6, 4.9, 4.11, 4.12, 4.15, 4.16, 4.17, 5.2, 5.4, 6.5, 6.6, 7.3, 8.3, 9.4, 11.1, 11.2

Context

The councillors were called upon to consider what was most certainly the largest project the council had been called upon to consider. The councillors were unprepared for the responsibilities placed upon them and failed to discharge their responsibilities as councillors under section 232 of the Act.

In pursuing their dream of obtaining a national team, the councillors were to contravene, misapply or fail to meet the intent of many of the provisions of the Act, including those relating to open government, public participation, the management of council-owned lands, tendering, delegation and, most

importantly, council's charter. Additionally, in their pursuit of the outcomes that they were seeking, the councillors adopted meeting and other processes that would effectively prevent them from obtaining a proper understanding of the proposals or a sufficient opportunity to consider them.

In recommending that all civic offices be declared vacant, the Interim Report found that the then current representatives did not have the experience and the skills that were necessary to resolve the issues facing the council, and postured that it was unlikely that a newly elected council would have the requisite skills. This was not a criticism of councillors generally, but recognition of the complexity of the issues facing the council.

As councillors exercise a role as custodians and trustees of public assets, they should receive instruction, guidance and assistance in the manner that they carry out their tasks, and importantly that specialist advice be available to them regarding the manner in which they should discharge their functions in relation to PPP.

5. Safeguarding Council Resources

A. Formation of and participation in Corporations and Trusts – the Act section 358

Recommendation:

That section 358 of the Act be amended to require that councils not form, participate in, fund, or provide assets to (whether by transfer, lease or as security) a corporation, co-operative or trust, unless:

- (i) Councillors or council staff are represented on the board of directors of such corporation or co-operative, or if the trustee is not a corporate entity, as a trustee.**
- (ii) Where it involves a trust, the trustee retains the power to veto acts, based on its opinion whether the intent of any agreement underlying the council's involvement is being met.**
- (iii) The constitution or rules of the corporation, co-operative or trust reflect or adopt the intent of chapters 3, parts 1 and 2 of chapter 4, division 1 of part 3 of chapters 6 and parts 3 and 4 of chapter 13 of the Act.**

Relevant Findings: 3.6, 5.4, 6.1, 6.2, 6.4, 6.5, 7.2, 9.2, 9.3, 9.8, 9.9

Context

Section 358 fails to make adequate provision to ensure that council's activities, conducted through corporations and the like, reflect council's charter to act as custodian and trustee of public assets.

The Oasis project anticipated that a series of corporations would be set up to deliver the overall project, with separate corporations being used to deliver different components or to provide services. This resulted in a complex web of interwoven entities, each of which was outside the operation of the Act. The use of a multitude of corporations served to defeat the intent of the governance provisions contained in the Act.

The council was not represented on any of these entities. The failure to obtain representation on any of the corporations left the council in a position where it had no detailed knowledge of their workings and could not exercise any oversight over the proposals put forward. The council's failures were to allow the Foundation, ODC, and particularly the persons associated with the Bulldogs, to go unchecked and unhindered, allowed the entities to be riven by nepotism, and to enter into contracts that were of questionable benefit to the project. The way that the entities let contracts, while perhaps permissible under Corporations law,

do not accord with the standards that ought to apply to councils. The governance principles applying to councils were not applied to the entities.

B. Auditing major projects

Recommendation:

That councils should undertake regular audits of major projects that they are involved with. Where large sums are involved, it is not sufficient that these be conducted annually. An appropriately qualified external professional adviser should conduct audits. It is important that councils determine and set clear terms for such audit, to ensure that a full and complete picture of the events and processes is provided.

Relevant Findings: 1.10, 2.2, 2.5, 6.6, 7.2

Context

The council paid \$15M to the Foundation between December 2002 and the beginning of June 2002. The Commercial Agreement permitted annual audits of the Arena Trust Fund. It did not permit the conduct of an audit of the Foundation, ODC or any other entity. This was manifestly insufficient, given the large sums that would pass through the Foundation, ODC and the other entities, potentially over a short term.

In the wake of the salary cap breach disclosures, the council sought an audit of the Arena Trust Account. The Commercial Agreement had limited the terms on which the trustees were to exercise their functions and, accordingly, the audit was limited to ensuring that 3 directors of ODC had signed the warrants requesting payments from the \$15M provided by the council.

The audit could not review the underlying transactions.

It was the underlying transactions that were the real issue.

The failure of the council to institute a strong audit program resulted from their extraordinary ignorance of commercial risk, and their hopelessly optimistic faith in their commercial partners. Strong, independent and thorough auditing processes must underlie any PPP involving councils.

C. The use of Section 94 funds

Recommendation:

That clarification be provided regarding the use of funds levied under section 94 of the EP&A Act to assist the construction of major infrastructure projects. To ensure that councils do not apply section 94 funds towards speculative proposals, councils must have in place a plan which has regard to the amount that may be required to meet the costs of its proposals, the amount to be apportioned to section 94 contributions, and the properties to which the plan shall be applied.

Relevant Findings: 1.7, 2.5, 2.6, 4.2, 4.14

Context

In order to assist funding of the Oasis project the council provided \$12M from funds that it had garnered under section 94. The council had not undertaken how Section 94 contributions from the project would be levied and used. It chose, notwithstanding, to apply funds that had been raised for other projects to the project. Should the Oasis project not proceed, the council was to be faced with the need to repay these funds from other sources.

Council's use of these funds was inappropriate, as was its decision to treat the sale of the pool site to the Bulldogs as outside its section 94 plan. It was an inappropriate, unjustified and illegitimate concession to the Bulldogs and was to impose an unfunded liability on the council to carry out substantial and expensive works associated with the approval of the club/hotel.

Councils exercise an important role as planning and consent authority for their local area. These roles require that councils carry out their functions in a proper manner. They should not levy or apply funds for speculative purposes, nor grant substantial and inappropriate concessions.

D. The use of council-owned lands

Recommendation:

That in a period when councils are being pressured to develop the latent potential of their lands, they should, before considering proposals for development, sale, or other dealings affecting their lands, recognise the intrinsic value and amenity of land owned by the community. Whilst considering the commercial possibilities of the land, equal consideration should be given by council to its public utility, and the benefits currently conferred by its users.

Relevant Findings: 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 1.8, 1.9, 2.6, 4.3, 4.4, 4.5, 5.2, 5.3, 7.3

Context

The proponents of the various projects at Woodward Park placed considerable pressure on the council to make available, or to transfer, its properties so that they could be used directly to provide the infrastructure that the proponents and council sought.

The council had become so committed to its dream of attracting a national team to Liverpool that it was willing to enter into any agreement that it perceived would deliver the infrastructure necessary to secure that team. With limited funds at its disposal, it was willing to either sell parcels of land that it owned, or to contribute other land to become part of the commercial ventures conceived by its private sector partners. The council believed that at the end of the development phase of the projects its net worth in new infrastructure would compensate for the assets that it devoted to the schemes. The council failed to adequately consider the effect of the proposals on the users of its parks.

The council behaved recklessly in being so willing to devote public assets to the schemes. It effectively forfeited its ownership of its most vital asset, its land; an asset that formed the basis of all of its commercial relationships with its private sector partners.

The council has now entered into the Macquarie MOU, under this agreement it may have assigned long-term development rights over very valuable properties owned by it, in its unsecured bid to obtain an arena.

6. The Council's Internal Processes and Responsibilities to the Community

A. Council Meetings

Recommendations:

- 1. That Sections 366 and 367 of the Act be amended so that councils are obliged to notify the public of extraordinary meetings, using the same time-frames and means of advertising used for ordinary meetings; and that agendas for an extraordinary meeting be made available prior to the meeting.**
- 2. That council meetings dealing with major infrastructure projects in which council is engaged (projects which are likely to absorb substantial council resources and have substantial impacts on the council area) should as a general rule be open to the public.**

Relevant Findings: Section 1.6, 1.11, 2.4, 3.2, 3.3, 4.12, 9.4, 9.5, 11.1, 12.1.

Context

In dealing with a number of infrastructure proposals involving private sector participation with the council, between 1997 and 2003, the council chose to exclude the public from meetings where it was discussing the details of the proposals. This was done by calling extraordinary meetings without providing the public with suitable notification as to the time and day of the meetings, or the agenda of the meetings. The council also declared a number of meetings, dealing with key issues related to the proposals, closed to the public.

At other levels of government, State and Federal, debate over major items of investment or major infrastructure projects is conducted in the public forum of the Parliament. Local Government, advertising itself as the level of government closest to the people, should be most transparent in assessing large-scale infrastructure projects, and should be most concerned with engaging the community. Council meetings are the common forum for the public to hear and understand the basis upon which decisions affecting the community are made. With large-scale projects that will absorb significant council resources, the need to be open and transparent is paramount. Section 232 of the Act makes it plain that the Elected Representatives' role is to participate in the optimum allocation of the council's resources for the benefit of the area, and to represent the interests of the residents and ratepayers. If a council were to adopt a strategy of deliberately excluding the community from its meetings and its deliberations (as

Liverpool City Council did) then it is acting against both the letter and the spirit of Section 232. The community, as the ultimate owners of the council's assets, will be the major beneficiaries, or the major losers, in terms of such large-scale developments. Every effort ought to be made to use council meetings as a principal medium for engaging the views of the community.

B. Informing and Involving the Community

Recommendation:

That councils engaging in major infrastructure projects with private sector partners should, with due recognition of intellectual property, make available information to their decision-makers (the Elected Representatives) and to their communities in as full and timely a fashion as possible.

Relevant Findings: Sections 1.6, 1.9, 2.6, 3.4, 4.16, 10.1, 10.2, 12.2.

Context

Liverpool City Council became obsessed with secrecy as it developed its various relationships with private sector partners. This resulted from the intense importance that was placed on the schemes, and the council's huge reliance on the private sector to achieve outcomes. The Mayor and the former General Manager were convinced of the virtues of providing new sporting and recreational facilities, and the significant impacts that having major sporting teams domiciled in Liverpool would have on the area's status, and on its youth. They were equally convinced that their desired outcomes could not be achieved without the help of private sector partners. This latter conviction, in time, caused the private sector parties to dominate the process; thus creating their own vision of what might be built on Woodward Park, extending the projects to include sites beyond Woodward Park, and taking control of both the operations and the budgets of the projects. All of this was aided and abetted by the cloak of secrecy that the former General Manager cast over the processes.

The fetish for secrecy affected the decision-makers (the councillors) by restricting their access to relevant material, and the time that they had to assess material. It had the effect of removing any real opportunity of purposeful input from the community. At the very least the community ought to have been honestly informed about the potential benefits and negative features of the proposals, and been allowed to respond to them. The community tended to be informed only after deals had been signed, and the community was given predominantly positive messages about the probable outcomes. When the projects turned sour, the community was left to pay the bills, and to forego other infrastructure, services and facilities that the money lost might have produced. It is the absolute right of the community to know about, and have input to, decisions that affect it.

To a significant degree the council was encouraged by their private sector partners to maintain a highly secretive system. It heightened the chances of their achieving their goals without the “static” that public debate might bring. There was also a particular political aspect to the secrecy. There was strong opposition to the Bulldogs’ club/hotel project (the Palm’s Resort) within the community. The Mayor and the Bulldogs confused this opposition with any opposition to the unlinked Oasis project, and became convinced that secrecy about the Oasis project was warranted because it stopped political opponents gaining information.

C. Reporting Requirements

Recommendations:

- 1. That reports going before council concerning aspects of a PPP contain full, fair and honest assessments of both the benefits and otherwise of a project.**
- 2. That councillors should not make a determination regarding any report until they have satisfied themselves that they have a competent understanding of the report, and of any subsidiary reports and advice associated with it.**

Relevant Findings: Section 1.6, 2.4, 3.4, 4.8, 4.12, 4.16, 6.5

Context

The former General Manager took control of the reporting systems associated with the various commercial arrangements entered into by Liverpool City Council. The evidence shows that his reports to council, or those of his staff, had the following characteristics: they appeared at the end of a process of negotiations, rather than appearing progressively during such a process; they were heavily biased towards providing positive views of outcomes; they were released in time-frames such that councillors were unable to digest and assess their contents before having to make decisions about them; and the material provided by council’s expert advisers was often effectively withheld from the councillors because of the regime of secrecy and security introduced.

The Mayor relied heavily on these reports, but usually only viewed the executive summaries or the précis of a report. Given the persistently positive tone of the reports, and the scant attention given to their detail by the Mayor and many councillors, the Elected Representatives’ duty to ensure that what they were signing was in the public interest, and provided value for money, was ignored repeatedly. The structures recommended for councils entering a PPP in the Second Report would ensure that more responsible reporting processes are put in place. The message of the Liverpool experience, however, is broader than the rather specialised area of PPP. In general, reports going to council should be

accurate, honest, unbiased, and, most importantly, should not in any way supplant the ultimate responsibility of the governing body to make policy decisions.

D. Delegations

Recommendation:

- 1. That in respect of PPP and other major infrastructure projects of councils, no absolute delegations should be made;**
- 2. That any delegation made by a council should require regular and comprehensive reports back to the governing body; such reports should provide all sides of each issue considered, and such reports should not anticipate the governing body's decisions;**
- 3. That delegations should define specific tasks and set the time period over which the delegation applies.**

Relevant Findings: Section 1.7, 2.2, 2.5, 8.1, 8.2, 12.1, 12.2.

Context

The Mayor and the former General Manager of Liverpool City Council were given delegations to negotiate with prospective private sector partners over the development of infrastructure in the Woodward Park precinct. The delegation extended over more than six years, and was never reviewed. The delegation gave the Mayor and the former General Manager no powers other than to negotiate. Because there was an ever-expanding range of components of the schemes, and a revolving-door of interested private sector entities involved, the negotiations took many twists and turns involving ever-greater levels of complexity, cost, and risks to the council. The Mayor and the former General Manager followed each expansion or deviation of the schemes to their conclusion, and reported to council in any kind of complete way, only when they had decided that a positive outcome had been achieved. By following this process the delegation to negotiate became effectively a delegation to decide. Alongside the distorted reporting systems, and the strenuous efforts made to make it difficult for any councillor to gain a full appreciation of what was happening, the delegation usurped the ability of the governing body to govern. In practice the way in which the delegations used their powers breached the Act.

Delegations are a constant aspect of the operations of councils. Without delegations the multitudinous issues that councils have to resolve could never be dealt with. Delegations in relation to PPP, however, should be considered cautiously, with responsibilities and time-frames clearly articulated. The structures that should be in place for councils entering a PPP, spelt out in Report 2, involve delegation of councillors and/or staff to various committees but within a structure

that contains checks and balances. Beyond PPP, councils should clearly define why a delegation is necessary, and how it should work, when addressing issues that are of significant concern to the council and to the community.

E. Caucus Issues

Recommendations:

That the circumstances in which caucus decisions become mandatory for councillors voting at council meetings be reviewed where council is considering or entering a PPP.

Relevant Findings: Section 11.2

Context

The Mayor of Liverpool City Council considered that a national basketball team located at Liverpool would inspire local youth and lift the profile of the area: both admirable goals. To make this happen he was willing to build a basketball arena for the team. The basketball theme was to lie behind more than seven years in which the council promoted ever-enlarging schemes for the Woodward Park precinct. A sense of urgency in developing the basketball arena pervaded the council's dealings with external parties, and eventually perverted the construction priorities of the biggest, most complicated, scheme that council became involved with: the Oasis project. The need to get the basketball arena built became the central platform in the council's thrust to get new infrastructure built on Woodward Park. From the Mayor's perspective forming a link with the Bulldogs provided the greatest guarantee of getting an arena, and much more besides. The Bulldogs appear to have genuinely desired to have enhanced sporting facilities available to their teams, and to the community, on Woodward Park. Most fundamental, however, was the Bulldogs' ambition to build a grand club, whose operations would be underlaid by a very large number of poker machines, and a hotel, offices and other facilities on the Woodward Park land that it purchased from the council. This ambition provoked great opposition from existing clubs in Liverpool, and the issue became a major political fight. The council sided with the Bulldogs. Its actions over a number of years were dictated by its anxiety about getting the basketball arena built, and maintaining its associations with the Bulldogs. These considerations overrode all else in terms of policy frameworks for Woodward Park projects. It translated into Labor Party policy, and caucus voting patterns were ultimately defined by it. The fact is that the two Liberal Party councillors accepted and followed the lead of the Mayor in these matters. But this does not gainsay the fact that the policy considerations, described above, shaped caucus voting on Woodward Park precinct issues.

The result of this approach was that the detail and complexity of the many stages of developing the Oasis project, or ultimately Liverpool 2020, were not fully considered by the ALP councillors. The overriding ambition of the Mayor to push forward stymied the possibility of individual councillor's concerns about particular matters influencing the outcomes. Since a major project, such as Oasis, fundamentally involves decisions about expenditure of council's money, and the development and approval of infrastructure on council's land, there is a strong argument to support a relaxation of the strict caucusing rules when a project of such dimensions is being assessed.

7. Internal Issues

A. Staff Appointments

Recommendations:

- 1. That councils follow the normal processes of the Act when appointing staff to work on major infrastructure projects and PPP to ensure transparency and fairness.**
- 2. That in particular the Liverpool City Council should revisit the appointment of Mr Murray Douglas, considering whether it had breached the Act in making an appointment in November 2001, and subsequently in July 2002, and exploring its options in respect of such a breach.**

Relevant Findings: Section 8.3, 12.3.

Context

Liverpool City Council made a number of fundamental errors when it was developing the series of commercial arrangements with private sector entities in relation to the Woodward Park precinct. Amongst them was the failure to appoint a project director with the responsibility to manage the development of the project, to interface with private sector parties on the operational aspects of a project, and to lead the council's project control group (see Report 2 p. 34–35). Such a person desirably would have strong experience in managing large projects, a good understanding of commercial structures within the private sector, and appropriate skills and professional qualifications suitable to the tasks. Almost inevitably, such a person's primary background would be in the private sector. Instead of following this path the council gave different staff part-time responsibilities at different stages of project development, without according them special resources or well-defined powers and responsibilities. The one constant was the prominent role played by the former General Manager who, in addition to his numerous regular duties, acted as a kind of de facto project manager. This structure was totally unsatisfactory. The problems that this created were magnified by the singular insistence that staff should abide by his lead, and endeavour to emphasise the positive aspects of each situation. Very late in the history of the Woodward Park precinct story (after the signing of the Commercial Agreement), Mr Carr appointed a manager of major projects. The role of that person was extensive and included a number of other projects as well as the vast Oasis project.

The person appointed to that role, Mr Douglas, had a strong background in Local Government administration but very little in private sector commercial spheres. The particular position and salary were not advertised, and the usual processes of interviews by a selection committee and evaluation were not followed. The Inquiry formed a strong opinion that the appointment, apparently suggested by Mr Douglas himself and agreed over a lunch, had breached the requirements of the Act.

B. Performance Milestones

Recommendations:

- 1. That when councils award bonuses and other rewards to council staff, they should be based on a culmination of defined benchmarks of achievement and not simply on the basis of performance of duty;**
- 2. That benchmarks should be treated as reference points, and should not subsume the proper processes of council;**
- 3. That the salaries, terms and conditions of the senior staff of councils should be made known in the Annual Report of a council, and should be made available to local newspapers at least once a year.**

Relevant Findings: Section 1.10, 12.1, 12.3.

Context

Mr Carr, the former General Manager of Liverpool City Council, was required under his contract to promote the Woodward Park infrastructure developments, and his bonus was related to his success in so doing. Although there were other criteria used to evaluate his performance, progressing the Woodward Park projects was distinctively the most important. When such a criterion is written into a contract there is a danger that the senior officer, in attempting to meet its demands, will lose focus on the quality of the outcomes that are being achieved. The development of the Woodward Park projects can be viewed in this way. Mr Carr was so determined to produce outcomes that he emphasised the positives at every stage of shaping the projects and the council's relationships with its private sector partners. He ignored the risks in general, and especially the particular risk that the private sector parties would fail to deliver on their promises. The Mayor viewed progress in quite simple terms: that whilst the private sector remained engaged with the council, and whilst projects and developments appeared to be going forward, progress was being made. Since the former General Manager certainly put great effort into ensuring these things, he was going to be suitably rewarded. The council, however, had no specific benchmarks by which progress could be measured on the schemes; any progress seemed to be good progress, and

when the schemes got larger and more diversified, the apparent level of progress expanded accordingly. This was a dangerous, and ultimately very harmful, way of assessing senior staff performance.

In the Local Government sector generally there is a danger that the system will reward itself in an unjustified way unless benchmarks, defined by a council's objectives in its Strategic and Management plans, are clearly enunciated and achieved. The salaries and terms and conditions that pertain to senior council staff are paid for out of the resources of the community. The community has a right to know just how much of its resources are being expended in this way, and a right to know the criteria used to reward staff beyond their normal entitlements.

PART

A

Losing Focus

Section 1: Blindly Pursuing a Social Goal

1.1 Introduction

In 1988 the council had resolved to investigate commercial re-development of the pool site at Woodward Park. In 1992 the council adopted master plans for the park, subsequently adopting a Local Environment Plan for the park in 1995.

Earlier, in 1993, the council had adopted a strategic plan for the park expressing council's aspiration that Woodward Park would be used for top sporting competitions. The strategic plan also anticipated the expansion of the Whitlam Centre and its suitability for major entertainment events.

Council's pursuit of these aspirations, kindled by its dream of having a national sporting team, the Razorbacks and subsequently, the Bulldogs, ultimately overtook and devoured its processes.

This part of the Report reviews the process by which council's pursuit of its social goal and its attempts to provide infrastructure, no matter what the cost, played their part in the council's failure in its governance processes.

1.2 The nub of the project—obtaining a national team

1.2.1 Action to re-develop Woodward Park commenced in 1988 with proposals to re-develop the Old Swimming Pool Site. The council meeting of June 20, 1989 resolved “to advertise within selected papers calling for Expressions of Interest from Companies interested in re-developing the Liverpool Memorial Swimming Pool Site, subject to the Regional Manager, Department of Lands given approval, as required.” It also authorised the Town Clerk to direct mail to appropriate firms and organisations, drawing attention to this concept and inviting responses. \$10,000, drawn from the Contingency Fund, was allocated for the advertisements. The ingredients of a 15-year saga were thus laid. The council began to put out its own money to entice the private sector into investing in its dream of developing Woodward Park. And, it was to begin with a development on land it didn't own. The early dreams were modest in relation to what was to come, but in a curious way the elements of the council's later catastrophes were all there in 1989 when Mayor Lucas set the ball rolling with the invitation to the private sector to redevelop the swimming pool site.

In 1992 the council had adopted the Master Plans for the Whitlam Centre, which had been built in 1981, and for Woodward Park¹.

The plans had been drawn by LRM Australia and contained in its report of November 1992².

1. Minutes of Council Meeting: 22/12/1992, p.13

2. Minutes of Council Meeting: 22/12/1992, p.8

1.2.2 So far as the Whitlam Centre was concerned, the Master Plan called for:

E.G. Whitlam Indoor Recreation Centre

- main stadium extensions to either a 6 or 8 court basketball size area.
- new gymnastics hall
- purpose-built martial arts hall
- large Function Room/Club lounge
- increased amenities e.g., change rooms, foyer
- location of new indoor swimming pool adjoining centre with increased parking provision

In its report to the council, LRM made reference to council's consideration of extending the Whitlam Centre to accommodate 5,000+ spectators.³ It also referred to the centre's use by the Slammers Basketball team:⁴

The Sydney Slammers Basketball Club is one of the major users of the stadium in spectator mode. Currently it plays in the Continental Basketball Association (CBA) League but has aspirations to become Sydney's second team in the National Basketball League (NBL) within the next few years. In addition to meeting the possible future spectating needs of the Slammers and other potential high profile teams, there is also a strong demand from the community for additional court space.

The report was to evidence council's support for the Slammers' aspirations to join the National Basketball League.⁵

Council is keen to expand the stadium and its seating capacity to accommodate an increasing demand for recreational court space and the possibility that the Sydney Slammers may successfully be accepted into the National Basketball League within the next few years. It would be a requirement for the Slammers to have a home court venue with a minimum of 5,000 seats as a basis for any formal approach.

1.2.3 This support appears to have been re-enforced by council's adoption of its strategic plan, "The Future for Liverpool: A Regional Centre" that expressed an aspiration that Woodward Park be used for "top sporting competition".

In the years that were to follow, under the stewardship of Mayor Paciullo, what may have been a desire became the edict, both governing and commanding council's actions.

3. LRM Report: November 1992, p.1

4. LRM Report: November 1992, p.1

5. LRM Report: November 1992, p.3

Mayor Paciullo initially provided an abstract view of council's involvement with the Slammers, indicating:

MS JOHNSON: (19/01/04, p.14) *What was the Council's involvement with the Slammers? Were they merely a team that used their stadium— their courts rather at the Whitlam Centre or was there something more to the Council's involvement?*

MR PACIULLO: *No. They were using the courts at that time and naturally as we do with any of our sporting teams, especially the ones in the upper level— but not solely, we try and encourage it and I would, as the Mayor, want to encourage our teams to do well and if I can possibly help them to do better because it is very positive for the area, for our youth to understand that they have successful sporting teams and hopefully they follow their heroes.*

Subsequently, Mayor Paciullo indicated a more passionate view:

MS JOHNSON: (19/01/04, p.25) *So in making your decision to the— I realise your decision and Council's decision are not necessarily the same thing, but in your view you would have preferred to go with a new complex because that would assist the Slammers in— who are now the Razorbacks in making their deals with the National Basketball League, is that right?*

MR PACIULLO: *It was very important to me and I've alluded to the reasons why, and I think it was important to the Council generally that we could secure a national sporting team. I am of the very strong belief that in an area like ours, especially with the huge number and we have a very large proportion of young people, it is important, because we didn't have this ability, we didn't have the situation, we didn't have the opportunity before of being able to provide for a national team, and to give our youth an opportunity to become involved and to keep out of trouble as we know youth normally does.*

So it was important to me to secure that national team, but it was also important to have a complex that could meet our growing demands which I have alluded to and a centre that would be— that we all would be proud of, if it could be accomplished.

1.2.4

Mr Carr also spoke of the importance of the Slammers:

PROF DALY: (03/02/04, p.4–5)... *The other point which I just raise— these are really background points to the route we want to travel down today— is what appears to be almost a fixation by the council of a particular basketball team. It began in that period, and if you trace the history of the various changes and developments of the ideas of what might happen in Woodward Park, somehow you always come back to the basketball team as providing an arena, an area, in which they could play as really dominating the agenda in various ways— the early construction agreement, for example. In hindsight, do you think that the what I've called a fixation on that*

basketball team warped the thinking of the Council in terms of what they chose to do and what priorities they put on different things?

MR CARR: *It was certainly a major driving factor, it was the motivation, it was the— whenever the Mayor or other people talked about this sort of project, the passion was coming through relating to having a national basketball team playing locally, having what they call the basketball players, the icons, the youth that would then be able to relate to those icons. It was really being driving from a social perspective about the importance of lifting the morale of the Liverpool community, and so it had all of those elements, and I think that it sort of had all of those emotional elements, and I think what was really driving it was the emotional elements, and, of course, we are trying to deliver an arena from a rational perspective with a lot of emotional drive. So it certainly did have a significant influence on how the council was travelling with this project to meet those emotional drives.*

1.2.5 In 1997 the Bulldogs commenced to show serious interest in Woodward Park. In July 1997 the Bulldogs formalised their proposals, they were:⁶

- To establish Liverpool as the centre and headquarters of its rugby league influence.
- To establish a second licensed club and hotel complex at Liverpool.
- To relocate the head office of the football club to the club site or within Woodward Park.
- To relocate the football club's operations to Woodward Park.
- To acquire a major shareholding in the Slammers and to support its elevation to the NBL.
- To assist council to establish a stadium at Woodward Park.
- To play its rugby league matches at the stadium as soon as it was contracted.

This proposal was supported by an offer to purchase the pool site for \$4.5m.

1.2.6 Council's vision was now being supported by a major and highly successful sporting club. Additionally, the Slammers' aspirations were now likely to have real force and importantly, they might get the financial backing necessary for their bid to join the NBL.

As Mr Looby, a Board member of the Slammers, put it:

MR LOOBY: (23/02/04, p.65) *We approached Canterbury. It was our way of— professional sport in Australia doesn't even pay and we needed, if you wanted to use the term, a cash cow behind us and they were cumulative in that sport and also because of the demographics around Belmore, were also looking to expand further out even back in the early or mid 1990s to run with.*

6. Bulldogs Letter: 09/07/97, p.3

1.2.7 Council's aspirations were enhanced; it had received a promise that a major team, playing in a national competition would play its games in Liverpool as soon as a stadium was constructed. Council's aspirations were now achievable and in a form far exceeding that contemplated only a few years earlier.

For all this, council was not being called on to do much:

- It had been reviewing proposals to upgrade the Whitlam Centre and had received the LRM Report ⁷ suggesting a capital cost of \$10.758m for the recommended design.⁸ The report had concluded that the design solution was a "feasible" proposition.⁹

Additionally, there were the conditions that the Bulldogs had imposed on the council to:¹⁰

- approve the development application for the club
- remove the heritage order affecting the pool property
- to close certain roads and to provide other access
- to grant approval for construction of covered access from the club to the Whitlam Centre and for extensions for gymnasium facilities that did not appear particularly onerous.

1.2.8 Council's aims had received a further boost by the arrival of Messrs Hanna and Constantinidis and their proposals for the Stardome Stadium.

Council now had two national teams in its sights. It also had plans for their re-development of the Whitlam Centre to accommodate the Slammers and a proposal for a stadium to accommodate the Bulldogs.

1.2.9 On 22 September 1997 council made its commitment to the Slammers in the following terms:¹¹

Liverpool City Council will guarantee the construction of a 5100-seat indoor sports centre at Woodward Park if the West Sydney Slammers win a place in the National Basketball League.

The stadium will be built in time for the start of the 1998/99 NBL season in October 1998.

The Council and the community of Liverpool are fully committed to the Slammers' bid. An NBL franchise would provide Sydney's fastest growing area with a strong sporting focus.

7. LRM Report: August 1997

8. LRM Report: August 1997, p.7

9. LRM Report: August 1997, p.9

10. Bulldogs Letter: 09/07/97, p.4

11. Letter to Mr Ric Charlton AM, Chairman of the National Basketball League from Mr Brian Carr: 22/09/97

I'm confident that the Slammers would command fanatical support among the youth of Sydney's south-west if the team were included in the NBL.

This commitment was to rule council's actions.

It became the tail that wagged the dog.

1.2.10 The perceived importance and needs of the Slammers became the major driving force. By comparison the perceived benefit of having the Bulldogs at Liverpool was not so great, Mayor Paciullo referred to their importance in less passionate terms:

MR BROAD: (19/01/04, p.29) ... *Mayor Paciullo, what did you see as the benefits of the Bulldogs Club moving to Liverpool?*

MR PACIULLO: *Well, that was to be part of the overall sporting activities which would be occurring. I've mentioned the arena with the people that would attract, a stadium later on and of a general area of social and sporting community activity.*

MS JOHNSON: (19/01/04, p.30–31) *Perhaps I can just clarify, arising out of those questions, you talk about the Bulldogs moving in and that club providing sporting facilities for the community. Were you envisaging them providing sporting facilities that the community can use so that, for example, the local basketball team can go and play on the courts, the local badminton team can play on the courts, or were you talking about the provision of sporting facilities for viewing rather than participating in?*

MR PACIULLO: *No, no, what I was alluding to was that they want to establish a club there to supplement all the sporting activities that they propose, such as bringing the rugby league team and bringing their headquarters indeed to the Liverpool complex.*

MS JOHNSON: *Right. So really the facilities that they were bringing and the infrastructure they were bringing were for their own club facilities. A club would offer some facilities to the Liverpool community and the sporting facilities would be accessible by the Liverpool community or only as spectators?*

MR PACIULLO: *Well, it all depends what the sporting facility was. Obviously if it was a rugby league stadium I have no doubt that they would make that as much as possible available for other types of football sports or whatever other types of sports they could and indeed when we viewed some of their master plans and proposals a lot of it, virtually all of it, was intended for multi-purpose use. If I could just emphasise, what attracted me and I think the Council was for the very first time in our history we would be the focus of a major sport, not just basketball but also rugby league and other sporting activities because the facility proposed, as I once described it publicly, was very, very attractive to Liverpool.*

MS JOHNSON: *So the idea was that Liverpool would become the centre of attention in particular sports that have a focus on Liverpool or rugby league and basketball as well and that is what this proposal offered.*

MR PACIULLO: *Well, of course it would be national sport, it would attract people to our area, it would create employment, it would boost our business centre, it would provide for, as I said, for an activity for our youth to take an interest in which otherwise can be very difficult for them.*

1.2.11

By comparison, the importance of the Slammers/Razorbacks provided the foundation for:

- Proceeding with the Stardome arena proposal

MS JOHNSON: (19/01/04, p.101) *The conclusion you reached was that the Stardome arena would be the preferable option?*

MR PACIULLO: *Well, I make reference again to what I think was probably the turning point in terms of opting for the— a separate arena, a new one, was that the National Basketball League had indicated that that was their preferred option, which obviously is code for: we won't licence, we won't approve of the— or they became I think the Razorbacks in 1997— I'm not sure about that, but I think 1997/1998— and that would have meant that we would not have been able to secure the national team for the reasons I gave you before.*

MS JOHNSON: (19/01/04, p.25) *So in making your decision to the— I realise your decision and Council's decision are not necessarily the same thing, but in your view you would have preferred to go with a new complex because that would assist the Slammers in— who are now the Razorbacks in making their deals with the National Basketball League, is that right?*

MR PACIULLO: *It was very important to me and I've alluded to the reasons why, and I think it was important to the Council generally that we could secure a national sporting team. I am of the very strong belief that in an area like ours, especially with the huge number and we have a very large proportion of young people, it is important, because we didn't have this ability, we didn't have the situation, we didn't have the opportunity before of being able to provide for a national team, and to give our youth an opportunity to become involved and to keep out of trouble as we know youth normally does.*

So it was important to me to secure that national team, but it was also important to have a complex that could meet our growing demands which I have alluded to and a centre that would be— that we all would be proud of, if it could be accomplished.

- Not seeking tenders when considering the Oasis proposals

PROF DALY: (20/01/04, p.53) *In that context, and the interest of two substantial commercial entities in forming a partnership with the Council, would it not have been prudent of the Council to think that there are other entities besides Macquarie Bank and the Bulldogs who might have an interest in the same sort of process?*

MR PACIULLO: *Well, in answering that question, Mr Commissioner, I get back to the advice we received as a Council that in considering the proposal for the Bulldogs to move to Liverpool and its undertaking to bring its national teams involving the Razorbacks and I recollect the advice we received at that time was that under these considerations, and when you looked at that there was not likely—or it was not possible for any other entity to match that type of outcome that we wanted for the city.*

- Entering into the Early Construction Agreement

MS JOHNSON: (19/01/04, p.46–47) *And an early construction agreement was signed in September 2001 so 6 months, 7 months later. What was the early construction agreement about and why was that signed?*

MR PACIULLO: *Well the reason that came forward was because of the urgency that had developed into retaining the Razorbacks and building the area, bringing it forward in the sequence of events because during this course of time the National Basketball League had indicated to the Razorbacks that they would no longer accept their old playing centre which was the Whitlam Centre which houses about a maximum of 2500, 3000 at most in rather sort of older conditions if I can put it that way. And they began playing at the Homebush Sports Centre and the necessity to bring the stadium—sorry, the arena forward—became obvious and there was agreement that to bring this forward, an early construction agreement should be put in place and then try and deliver the project by a certain date for the following season. So that was the background.*

- Entering into the Macquarie MOU

MR CARR: (03/02/04, p.26–27) *Well, they—I don't think they were utilising the services. I think they were continuing to hold discussions with both the parties, the Bulldogs and Macquarie Bank, to work out what they do—this is the current situation we're in: what do we do, what are the options—and on the legal advice and on the statements that were coming forward from Mr Eyres was that you are better placed to negotiate yourself forward rather than getting caught up in legal argument.*

MR BROAD: *Was that because Council perceived itself as needing to complete the constructions of the Arena?*

MR CARR: *That certainly was—I think that might have been a separate matter to one side, but that certainly is a matter that needed to be completed.*

MR BROAD: *Even though the costs had blown out to some \$60 million?*

MR CARR: *That had blown out. Once the salary breach was known and we were able to get that environment into the structure of what was happening with the Arena, we were able to determine that, yes, it was much higher than the anticipated number we were thinking; and then there was a process of trying to reduce that back, and I think that the new Foundation, working with McLachlan Lister, were able to get that back to some \$47 million....*

1.2 Findings

- 1. The council became so committed to its dream of attracting a national team to Liverpool that was it willing to enter into any agreement that it perceived would deliver the infrastructure necessary to secure that team.**
- 2. This dream ruled the council's actions when it committed to the Stardome, the initial MOU with the Bulldogs, Macquarie and Grocon, and the Oasis and Liverpool 2020 projects.**

1.3 The Proposals

1.3.1 In the period following the Bulldog's first indications of their interest in the Woodward Park late in 1996, the council received a number of proposals from the Bulldogs, Stardome Corporation and Macquarie Bank for re-development of the park.

It is important to understand that all of these proposals were cross-linked, with Macquarie and the Bulldogs exercising a dominant and often undisclosed role.

1.3.2 In the latter half of 1997 the Bulldogs had put forward their proposal for constructing their new club, shifting their administration, and training, providing a stadium and ultimately playing their games at the park.

Council had earlier entered into a MOU with the Bulldogs, the Slammers and Leighton Properties to advance the implementation of the park's Master Plan.

In June 1997 Messrs Hanna and Constantinidis were proposing the construction of a stadium. This was to change and evolve into the provision of an arena and tennis complex.

Bulldogs' had offered to purchase the pool site, initially offering \$3.5m although this was subsequently increased to \$4.5m.

Intertwined with this were agreements between the Bulldogs and ADIC, anticipating greater exploitation of Woodward Park than appears to have been disclosed to the public, including¹²

- A low rise shopping centre
- A multi-level carpark
- A retirement village
- A civic office building of 20 storeys

1.3.3 Macquarie had been introduced to the Bulldogs by Mr Constantinidis¹³ and with the failure of ADIC to obtain finance Mr Constantinidis, through ISM, was to work with the Bulldogs and Macquarie to put a proposal to the council.

Macquarie was not new to the proposal; Mr Constantinidis had been working with the bank since at least February 1998, on a proposal that would satisfy a financier.¹⁴

Over a period of time these proponents worked on the Woodward Park Master Plan¹⁵ that was to become the Oasis project. No council staff were involved in this process.¹⁶ As Mr Constantinidis put it, the proposal was put to council as a complete package:

MR CONSTANTINIDIS: (17/02/04, p.79–80) The proposition that was put to Council was basically that—to achieve the ultimate which was all stages of the development, it would require certain funding to be generated. It wasn't a case of Council selling assets or just saying: Here are some assets—causes a reaction. The model was worked up over a period of two and a half years. As I have said earlier, the sporting facilities are revenue neutral. At the end of the day, the capital costs or the equity base of any of these construction projects which also included the infrastructure of those projects had to be funded from somewhere.

Over the entire period, from late 1996, when the Bulldogs had first expressed interest in Woodward Park to March 2000, when they were to brief council on the Oasis project, the council had not been a proponent. It was merely a recipient.

1.3.4 Interestingly, the council does not appear at that time to have been actively seeking out proposals from the public sector. It had not set guiding principles for the re-development of the park, other than those contained in the 1992 Master Plan. In the wake of the Stardome and other early proposals, it did not adopt any guidelines of principles for the re-development of the park. Other than the construction of an arena for the Slammers to play at, the council had not seriously considered how the park might be re-developed.

12. Heads of Agreement: Bulldogs–ADIC: 08/06/97, Clause 2

13. Additional material provided by Mr McIntyre, Paragraph 14

14. Evidence of A Constantinidis: 17/02/04, p.76 et seq.

15. Evidence of A Constantinidis: 17/02/04, p.79

16. Evidence of A Constantinidis: 17/02/04, p.79

1.3.5 Despite the council's role as landowner, planning authority, consent authority and representative of the community, it had been excluded from any involvement in the proposals.

Consequently, as of March 2000 council's knowledge of the Oasis proposals was not intimate.

Council's knowledge of the proposals never achieved a sufficient intimacy.

The council was content to maintain this ignorance comforted by its satisfaction that the proposals would provide the means of achieving its dream of a national team.

1.3 Findings

1. **The council played no part in guiding, formulating or testing the proposals that were put to it, despite its principal role as landowner, planning authority, consent authority and community representative.**
2. **The council did not actively seek out proposals from the public sector.**
3. **The council did not obtain a sufficient understanding of the Oasis project, and chose not to do so.**

1.4 Whose Vision Was It

1.4.1 Mr Constantinidis demonstrated a mixture of smugness and disdain for the council in his evidence, particularly when describing:

- The processes that led to the development of the Woodward Park Master Plan
- The financial modelling underlying the Oasis project
- The role and status of the council
- The availability of information to the council
- The role of ISM as development manager under the Oasis project

1.4.2 Conversely, Mr McIntyre, Mr Wright and Mr Moss were, or attempted to be, more generous towards the council in their evidence.

Notwithstanding this, the entirety of the evidence affecting the Bulldogs and Macquarie interests leads to the inevitable conclusion that the proposals were, in their view, virtually the sole property of the Bulldogs and Macquarie. Council was to be led and corralled into giving effect to the proposals, driven by its pursuit of its social goal, a national team.

1.4.3 This attitude has clearly carried over into Liverpool 2020, as evidenced by Mr Wright and Mr Moss:

MS JOHNSON: (28/01/04, p.52) *Yes. The difficulties that have arisen in the past are, for example, the Macquarie Bank had developed a financial model which it declined to provide to Council. Do you see that in the future, everything in your files will be accessible to Council?*

MR WRIGHT: *Absolutely. Well, which includes our MOU which is on a website. I mean, the discussions with Council going forward if the principles are, you need to have somebody to engage with, currently we don't, so we have been engaging with the State Government. But certainly the principles moving forward were to have a very transparent process where financial modelling—I mean, this is where it becomes a true partnership because there is no hidden margins or mark-ups. I mean, we are actually a master partner acting on behalf of Council, so, absolutely.*

MR BROAD: *I think Ms Johnson was not talking about hidden margins. What she was really looking towards was an indication that all documentation would be equally available and that is not just as to costing, it is basically achieving a joint—an equal state of knowledge.*

MR WRIGHT: *So far as Macquarie is concerned, whatever we produce is always available.*

MS JOHNSON: (23/02/04, p.12–13) *Can I just ask—the feasibility studies that you were talking about. The Bulldogs had access to these, is that right?*

MR MOSS: *Definitely. Everyone on the committee had access to them and in fact, a lot of it was prepared with input from people on the committee. The feasibilities were worked up continually, they were continually re-worked and put forward. The feasibilities had best case/worst case scenarios on all components. Mr Constantinidis had a lot of input into it, certainly had access to it. Mr McIntyre did, and Mr Randolph Griffiths was very actively involved from Woods Bagot.*

MS JOHNSON: *So they got access—you say they had input and they got access not only to the final results, but to an understanding of the parameters that had been chosen and the models that had been used?*

MR MOSS: *Well, we relied—you have got to bear in mind that a feasibility can only start if you have access to the land details and the zoning details. We couldn't dream that up, that had to come ultimately from the Council and that was given to us through Mr McIntyre and Mr Constantinidis.*

MS JOHNSON: *Ultimately though, this feasibility study or this model wasn't ever provided to Council was it?*

MR MOSS: *Well, that's not quite true. That is not quite true. In fact - - -*

MS JOHNSON: *Apart from the three hour briefing?*

MR MOSS: *Well, the three hour briefing is what I refer to, and there is a letter—I'm not sure if you have this letter, but there was a letter sent by Clayton Utz to the Council, to Mr John Boland, their solicitor, Mr Garry McIntyre and Mr Geoff Lock, dated 23 August 2000, where Livanes writes:*

We are instructed to note that Price Waterhouse Coopers in its capacity as auditors, attended with you at your offices at Macquarie Bank on 27 July. At that time they were given access to the Macquarie economic model and financial model for the project. They took comprehensive notes of the Macquarie model and asked questions and sought information from Messrs Lock, Wilson and Macquarie.

And he goes on to say:

In short, our clients believe that PWC have had sufficient access to the model. In the circumstances and also having regard of the confidentiality and business related issues, no further access to the model will be provided.

Now, what I would say on the model, very clearly, is that it was the intention of our group right from the start that we wanted Council to do its own feasibility and have its own independent parties sign off on their own model. They knew the land that was going into this, they knew very clearly what was going into this, and it was our view that if we did not insist on an independent party representing Council to work their own model up, that ultimately we would be sitting around in a court somewhere talking about it.

While in September 2003 Macquarie did provide some of its financial model it was clearly insufficient, as suggested by Mr Stalley:

From: Robert Stalley

Sent: Thursday, 25 September 2003 5:34 PM

To: Mitchell Morley

Subject: Macquarie Bank spreadsheet attached

Mitchell,

Please see attached.

Macq Bank vertical

250903.xls

Point of interest from the model:

- 1. 700 units on the Woodward Park site.*
- 2. Carparks in the CBD go from 1340 to 590, a reduction of 750.*
- 3. Interest costs @ 5% of costs would need science.*
- 4. Infrastructure & other costs @ \$100 sq m need science.*
- 5. Fees & other costs @ 15% of construction cost need science.*

6. *The science on 4 & 5 includes all those costs previously high-lighted to MBL.*
7. *Revenue per sq m (eg residential @ \$4,200 etc) would need science.*
8. *Hopefully MBL's model is more than this single page.*

1.4.4 Mr McIntyre portrayed the Bulldogs' engagement with the Oasis proposal as pure altruism:

MR McINTYRE: (28/01/04, p.80) *But they were so frustrated over a long period of time and we said well, look, we put our hand up and said we'll help but we've got to be sure, under the agreement and we made a calculated decision on the clauses and how they inter-react, that we'd get our money back at the end.*

MS JOHNSON: *It was an altruistic effort on your part, to become involved in this development? Is that how you see it? On the Bulldogs' part obviously, not yours.*

MR McINTYRE: *I just thought it was a magnificent idea and magnificent project and you know, I still haven't time to go through—we won't have time to go into the project. I just thought it was the most extraordinary project I'd ever seen and I think it was—I would have been proud to be a part of it. I knew we were going to struggle. What I've had to put up with over the last 6 years by people—I won't go through it—from local people with vested political and financial reasons to stop the project and for various reasons, what I've had to put up with. All we've tried to do is deliver something for the community.*

MS JOHNSON: *So you say - - -*

MR McINTYRE: *We're not about making money. Council's not about making money, we're not about making money, prohibited from making any money out of it. So, you know, we had all good intentions for community purposes and the club is all about that too.*

MS JOHNSON: *Your aim was to bring benefit to the community rather than to bring benefit to your club?*

MR McINTYRE: *That's right. You know, there's parallels there. You know, we're helping Council deliver for the people of Liverpool and Western Sydney. We were going to have the advantage of playing at these wonderful venue, with a licensed club next door.*

1.4.5 This contrasted with his defensive tone when questioned over the Foundation and ODC payments and council's representation on ODC.

MR McINTYRE: (01/03/04, p.51–52) *Did I say that the Bulldogs had to control ODC?*

PROF DALY: *You did.*

MR McINTYRE: *Well, I thought I said I didn't want Macquarie controlling ODC.*

MR BROAD: *No, no. Can I just confirm, your evidence was very clear that the Bulldogs had to control ODC. I asked you questions as to why Council wasn't represented on ODC and your response was that the Bulldogs had to control it.*

MR McINTYRE: *I don't really—that is not really what I'm getting at. The Council has got nothing to do with ODC because it is a subsidiary of the League Club. It does not even crop up. It just—you wouldn't ask the Council would they want to be represented on a developer's board or at an architect's board, it just does not arise.*

PROF DALY: *If I can go back to my point.*

MR McINTYRE: *I'm sorry, I don't want to mislead you Mr Commissioner - - -*

PROF DALY: *The money was coming from the community effectively at Liverpool.*

MR McINTYRE: *Yes, that is correct.*

PROF DALY: *But, you just stated that the Bulldogs had to have control over it. Some of the outcomes were payment to yourself, your son, Mr Constantinidis etcetera, and also - - -*

MR McINTYRE: *That wasn't the reason. Anyway, keep going- - -*

PROF DALY: *Money was expended on a company which effectively was one of the footballer's I believe. Another footballer got money loaned to him. How did those things come out when—I go back, it was community money coming into the system.*

MR McINTYRE: *Well, your Honour, I'm rather surprised at this approach. I can understand the reasoning for it, but you know, if a council makes a contractual commitment and pays something to somebody, and then they pay people that run that company, I just don't understand that. We got Clayton Utz involved in this very early, like—the internal workings of ODC is not a matter of relevance whatever to anybody at all. The question is - - -*

PROF DALY: *Even if it is other people's money?*

MR McINTYRE: *Well, if the Council paid an architect to do something, is that Council's money is it? Like, I mean to say, the question is, whether the money was authorised to come across properly, but once it gets across there, it is no-one's business who they spend it on. If the architect for any project by anybody decides that they want to spend their money XYZ, how is it relevant? I mean to say, I just can't understand why what the Bulldogs paid me through a subsidiary is in any way relevant in this matter, but I've answered the questions because I don't want to sound evasive.*

The fact that we've decided to pay one of our players a fee to promote the Oasis project, we did, one of our players. There was another player that was lent 30,000, but that is all that happened. That is a decision that we made, and that is nobody's business with all the greatest respect. Having said that, going back a step, which I agree with you entirely Mr Commissioner, is this is public money being paid out. Now, was it paid out correctly or wasn't it? But once it—it has got to be looked at right there.

The fact that when it gets to ODC, you or anybody else may have a difference of opinion whether Garry McIntyre should have been paid 2 bob or 200 or whether we should—you know, that is not our business. There is a multitude of expenses that we went through there. We bear a lot of architects' expenses, there's expenses we never claimed, and I just don't understand this. This is a wholly controlled entity of the League Club.

I understand you sir, your concern is, Council money went somewhere, it got to the Foundation, what did they do with it? Now, did they act improperly, criminally, the lack of discretion, yes, I understand that, that has got to be looked at right there, but once the money gets into our organisation, this is one of the great disappointments that I've had, is that people have made a big issue about we paid one player. Well, he was paid a certain amount of money, but our club paid into that same organisation more than that amount of money. There was one - - -

1.4.6 There is no doubt that the council was not, nor was it ever intended to be, or to become, a proponent or an equal partner, by those behind the proposals.

Ultimately what is left, is a view that the council's role in the proposals was little more than a conduit to secure the financial and commercial goals of Macquarie and the Bulldogs.

Despite all of the events that transpired, the Mayor was reluctant to accept this:

MR PACIULLO: (19/01/04, p.57) *Well the events from there of course meant that we had to reassess our relationship with the Bulldogs. Up till then I regarded the Bulldogs as one of the most successful, and it was, clubs and well managed clubs in the country, let alone the state and there was an element of trust in—obviously you have to have in your partners and arrangements but that had to be reassessed. But we still had a legally binding agreement with them under the commercial arrangements and it was obvious that we had to reassess that relationship and that reassessment took place.*

MS JOHNSON: (20/01/04, p.90–92) *You are now in a relationship with Macquarie Bank under the MOU. I realise you have said that it has stalled but it is the next relationship. Do you trust Macquarie Bank?*

MR PACIULLO: *How can I say, in attempting to answer your question honestly, that I don't trust an organisation that has such a prominent part in the banking world in Australia. Before I don't trust anyone, and this can apply to an individual, that person has got to give me reason not to trust them. I am saying, in terms of their standing, I am not aware of any reason why I should not so there is an element of trust, as there is in any relationship. One hopes that trust, of course, is not broken.*

MS JOHNSON: *Macquarie Bank is now, under the MOU, the sole project manager, the exclusive project manager, isn't it?*

MR PACIULLO: *Yes.*

MS JOHNSON: *The provider of advice to Council?*

MR PACIULLO: *Yes.*

MS JOHNSON: *The organisation that has undertaken to provide finance to Council as well?*

MR PACIULLO: *Yes.*

MS JOHNSON: *Do you see that giving rise to any potential conflicts for Macquarie Bank in providing Council with advice as to what should go ahead, as to how the project should be managed but also saying, on the other hand, if you need finance, we can give it to you?*

MR PACIULLO: *Well, in our discussions at the PPP level, which are more recent and obviously therefore, for me, more readily recountable, it is clear that in considering any proposal—my recollection is very clear that there would be individual proposals and they would be considered by Council and all the elements of that proposal are to be assessed by the Council.*

MS JOHNSON: *Do you see there being any safeguards in place against a breach of trust by Macquarie, not in a legal technical term, but if Macquarie does not turn out—the Macquarie Bank don't deal with Council as sweetly as you had hoped, do you think there are safeguards in place to protect Council's interests?*

MR PACIULLO: *Well, I would want to see and I would obviously with hindsight which I talked about I think yesterday, I would want to be absolutely assured that any future direction we took in approving a particular proposal, Council was completely protected.*

MS JOHNSON: *And that Council's assets were protected?*

MR PACIULLO: *Yes.*

MS JOHNSON: *Because Council's assets at the moment are going to go into a PPP entity, aren't they, under this MOU?*

MR PACIULLO: Yes.

MS JOHNSON: *That is going to be jointly controlled by Council and Macquarie, is that right?*

MR PACIULLO: *That is correct, but I have read and I am well aware that PPP entities are favoured by Government including, I understand, the New South Wales Government and have been spoken of as a very desirable way of delivering infrastructure, subject to suitable safeguards and, of course, those last few words to me now with the benefit of experience are absolutely critical. Whereas, in the past, I had a certain amount of trust in a club which I think I mentioned again yesterday, was renowned for being well managed, were very profitable, was very successful. I would from this experience be far, far more guarded before I agreed to anything.*

MS JOHNSON: *What safeguards do you see as being in place at the moment, or would you insist upon there being before you when further - - -*

MR PACIULLO: *Well, as I've said, my clear understanding is that any proposal is subject to Council's agreement, they have the right to put up proposals and there was some consideration and discussion about different issues, about funding, how it would be achieved and so on and so on, whether it would be competitive, that is at the PPP level at the time when the Department said: if we go any further we would like to talk to you.*

1.4 Findings

- 1. What ultimately became the vision for Woodward Park was not fashioned by the council. It was developed by the Bulldogs and by Macquarie, and the council enthusiastically accepted it.**
 - 2. The council convinced itself that it was a joint vision, with its private sector partners sharing the council's dream of making Woodward Park a major sporting venue, with national teams inspiring the youth of Liverpool. Displaying an almost child-like naivety, the council did not understand that its partners would be motivated by other considerations. While they accepted the social benefits that might flow to Liverpool, the private sector partners were always driven by their own separate interests.**
 - 3. In pursuing their interest, the private sector groups saw the council's role as no more than a conduit to secure their financial and commercial goals.**
-

1.5 The Vision for Woodward Park

1.5.1 The Master Plans for Woodward Park adopted at council's meeting on 22 December 1992 contained the following major components:¹⁷

1. *E.G. Whitlam Indoor Recreation Centre*

- *main stadium extensions to either a 6 or 8 court basketball size area.*
- *new gymnastics hall*
- *purpose-built martial arts hall*
- *large Function Room/Club lounge*
- *Increased amenities e.g., change rooms, foyer*
- *Location of new indoor swimming pool adjoining centre with increased parking provision*

2. *Woodward Park*

- *Development of Hillier Oval to provide seating of up to 12,000 spectators*
- *Development of existing pool site as licensed club/hotel complex*
- *Upgrade outside sporting fields for improved usage by a variety of sports*

1.5.2 In December 1998 the council had adopted a plan of management for Woodward Park, Hillier Oval and the Whitlam Centre.

As certain parts had been classified as community land, the council was required to adopt a plan for their management. The plan extended to lands beyond those owned by the council and classified by it as community land, and included other adjoining lands, in recognition of their physical relationship and the strategic management of the whole of the properties within the site.¹⁸

The plan provided specific strategic objectives for Woodward Park, comprising:¹⁹

- *To maintain quality open space for the people of Liverpool.*
- *To encourage and support community usage of Woodward Park.*
- *To support local community, sporting and leisure clubs.*
- *To develop a high profile sporting precinct and encourage the use by elite users as well as the existing users.*
- *To provide leisure facilities that are a source of pride to the residents of Liverpool.*
- *To create an identity for Liverpool that will provide exposure to the rest of Sydney and possibly Australia.*
- *To ensure contract management and lease arrangements provide quality facilities and services in a cost effective manner for the public.*
- *To extend the range and quality of the leisure opportunities available to the community.*

17. Minutes of Meeting: 22/12/98, p.8

18. 1998 Plan of Management, p.9

19. 1998 Plan of Management, p.10

- *To ensure environmental concerns such as flooding, water quality and tree preservation are considered.*
- *To provide improved pedestrian and vehicular access into the park with particular attention to public transport usage.*

1.5.3 Having set out these objects, the plan provided:²⁰

In order to meet the objectives of improving community usage and developing a first class sporting precinct, Council is encouraging interest by the private sector in the development of the Woodward Park Master Plan (1992).

The development of a multi use sporting and entertainment arena which will support Liverpool becoming a centre for elite and national sporting teams such as the National Basketball League (NBL), soccer, tennis and other national league sports competitions is a significant part of the strategic development of Woodward Park.

The proposal under immediate consideration is to provide an 8,000 seat venue for the West Sydney Razorbacks participation in the NBL 1998 Summer Season Competition. This proposal has been exhibited in accordance with normal development application processes.

The current proposal also involves creating new car parking facilities at the rear of the Whitlam Centre to provide special event overflow parking, and for minor realignment of adjacent access roads. Use of this car park by Whitlam Centre patrons will be given priority with other usage arrangements to be negotiated with the arena operators.

In addition, associated with a development proposal on the corner of Memorial Avenue and Copeland Street, new road alignments are planned to provide improved access from Copeland Street, and minor encroachment on Council land to facilitate the interaction of the development with the Whitlam Centre.

1.5.4 The plan then turned to the perceived needs, which included:²¹

General (Precinct):

- *Improvement of Sporting Facilities*
- *Provision of Facilities for National Sporting Competition*
- *Visual amenity, including tree planting*
- *Preservation of environmental quality*
- *Opportunities for unstructured recreation (BBQs, playgrounds, footpaths, bikeways)*

20. 1998 Plan of Management, p.10–11

21. 1998 Plan of Management, p.11–12

- *Car parking and formalising car access*
- *Safety, security and lighting*
- *Accessibility—including disabled access, bike users, pedestrians and public transport*
- *Availability of facilities*
- *Condition of Buildings*
- *Seating*
- *Programs and activities*

Woodward Park and Hillier Oval:

- *Maintenance and quality of playing fields (irrigation, drainage and line marking)*
- *Responsibility for maintenance (clubs, the community and Council)*
- *Levels of usage (maximising usage throughout the year, without lowering quality of fields)*
- *Improvement of amenities*

Whitlam Leisure Centre:

- *Improvement of amenities*
- *Increase of available parking*
- *Upgrade and maintenance of the Whitlam Centre*

1.5.5 The plan contained an action plan that gave “high” priority to components, including:

- Development of a multi-use arena
- Ensuring that future developments were ecologically sustainable
- Installing playground and BBQ’s if required
- Investigating temporary car parking during major events
- Monitoring security and park lighting
- Implementation of recommendation of disabled access audit
- Ensuring that the replacement of open space is considered in any decision affecting existing areas
- “In any consideration of the relocation of infrastructure give preference and consideration to the needs of user groups”
- Consultation with users of Woodward Park and Hillier Oval on priorities for progressive upgrade of facilities.

1.5.6 The Act (Section 35) requires that community land be used and managed in accordance with its plan of management.

In the period prior to, and subsequent to the adoption of the plan, the council entertained significant projects that were neither incorporated into the plan, as adopted, or, subsequently, in accordance with the plan.

1.5.7 As early as 8 June 1997 the Bulldogs and ADIC had entered into heads of agreement providing for:

- a multi-purpose stadium²²
- a club complex
- a 23 storey hotel accommodation
- a family entertainment centre
- retail facilities of 15000m²
- a 20 storey civic office building
- a 200 unit retirement village.

Underlying the project was a vision:²³

E The PARTIES believe that the objectives of the PARTIES will establish Woodward Park in Liverpool as the site of a “state of the art” sports and entertainment centre which will be unrivalled in Australia and be of enormous benefit to the Liverpool and the Western Sydney community.

Which was built on an agreement between the parties, providing:²⁴

1.6 and FINALLY the parties agree that they should work together to secure the total freehold property from the LIVERPOOL CITY COUNCIL and NSW STATE GOVERNMENT so that the BULLDOGS and ADIC or its nominee can each develop independently their respective parts of the total development.

The proposal was little more than an attempt by two entities to secure a large area of council-owned and Crown land, in order to carry out their own developments. They were in no way motivated by the particular priorities of the council. It is clear that they merely saw the council as an owner of land they wanted to develop, and as a means to their obtaining other land that was held by the Crown. There can be no doubts that they would also have considered that council would aid the passage of their development plans. In no sense was council considered as a partner.

This document was obtained from the council after the conclusion of the Public Hearings. Importantly, the proposal involved the Bulldogs and ADIC, a company controlled by Mr Constantinidis and Mr Hanna.

1.5.8 When ADIC was found to be incapable of raising the necessary finance Mr Constantinidis continued with the project, joining with the Bulldogs to promote the Oasis project.

22. Heads of Agreement: 08/06/97

23. Heads of Agreement: 08/06/97, Recital “E”

24. Heads of Agreement: 08/06/97, Clause 1.6

The evidence obtained by the Inquiry, particularly demonstrated by the evidence and demeanour of Mr Constantinidis, Mr McIntyre, Mr Moss and Mr Wright, as referred to earlier in this part, suggests that little changed with Oasis, and eventually Liverpool 2020.

Rather, the entirety of the evidence suggests that a concerted effort was made to gloss over the true aims of what was to be a larger project under which substantially more “free hold property from Liverpool City Council” was to be secured by an ostensibly altruistic owner/developer, the Foundation.

1.5.9 In March 2000 the Oasis Project was unveiled.

Immediately council issued a press statement (02/03/00):

The Mayor of Liverpool, Mr George Paciullo, today described the new draft Woodward Park Masterplan—as proposed by the Canterbury Leagues Club and Macquarie Bank—as “exciting”.

“Liverpool City Council and its residents have already endorsed the concept of establishing a world-class sporting and recreational facility on the site,” Mr Paciullo said. ...

“I have instructed my officers to prepare a report to Liverpool Council so that we can begin dealing with the proposal at once.

1.5.10 Underlying the project was a plan prepared by Woods Bagot²⁵ that gave no heed to the plan of management.

Instead of reviewing the proposal, by reference to the expressed goals in its Plan of Management for the park, the council became swept up in the hype of the proposal and its dream of establishing national and top level sporting teams at Liverpool and more generally to²⁶ “establish Woodward Park as a world class entertainment, sporting and recreation precinct.”

Council’s vision, as contained in its Plan of Management for Woodward Park, was to be ignored.

It should be noted that neither the Plan of Management nor the Heads of Agreement between ADIC and the Bulldogs had been provided to the Inquiry before the conclusion of the Public Hearings. Each was subsequently provided by the council in response to requests made by the Inquiry.

Accordingly no witness has been questioned on any matter directly pertaining to these documents.

25. Woodward Park Master Plan

26. Report to Council meeting: 26/04/00, p.2

1.5 Findings

- 1. The visions for the development of Woodward Park paid no consideration to council's adopted plan for the management of the park.**
 - 2. In its acceptance and adoption of the proposals, the council ignored its plan of management and participated in a breach of Section 35 of the Act.**
 - 3. It is likely that the proposals being put forward under the authorship of Mr Constantinidis, the Bulldogs and Macquarie had the ultimate goal in securing Woodward Park for their own ends.**
-

1.6 Testing the Vision

- 1.6.1** The Oasis Master Plan envisaged diverse development both within, adjacent to and away from Woodward Park.

Importantly the Master Plan envisaged:

- That residential, retail and commercial development would take place
- That there would be a transfer of assets to the Foundation, and the on-sale of some or all of the developments
- That there would be a loss of community facilities such as the kindergarten, the halls and the skateway
- That there would be a displacement of local sporting and community users within Woodward Park.

Separately, the TAPP's land was to provide 720 dwellings and commercial areas exceeding 10,000 square metres and the CBD sites would provide for substantial residential, retail and commercial developments.

- 1.6.2** In the lead-up to its entry into the Commercial Agreement the council failed to test whether the goals embodied in the Oasis Master Plan

- Conformed with its vision for the use and development of:
 - Woodward Park,
 - the TAPP's land, and
 - the CBD properties.
- Conformed with the public's perception for the use and development of the properties
- Were economically achievable.

- 1.6.3** In its dealings with proposals affecting Woodward Park, and subsequently, when under Oasis the proposals extended beyond Woodward Park; the council constrained itself to observing the utmost confidentiality. In so doing it neglected the opportunity of testing the vision for Woodward Park at the most fundamental level: the community.

Details of proposals were “leaked” to the public. With each leak council’s efforts to maintain confidentiality were redoubled, culminating in the process described by Mr Carr:

MR BROAD: (03/02/04, p.64) *I’m not asking you about the quality of the report that you gave. In view of the fact that the reports were not made available, with your report to councillors, did that then cast a higher obligation on you to provide an indication of the nature of the material in the reports so that they could make a decision whether they felt it was appropriate to read those reports in full?*

MR CARR: *What I thought I referred to those reports and covered aspects of it. So in answer to your question, I think those reports were part of this report because they were clearly listed in the list of appendices and available by request and signing a receipt.*

MR BROAD: *What you are saying to me: yes, I believe that is the case, and I believe that I have fulfilled my obligation.*

MR CARR: *I think I have.*

1.6.4 Rather than engaging the public, the council adopted a stance that:

- Avoided public engagement
- Failed to fully inform the public of the Oasis project
- Presented a version of the project
- Was responsive particularly to adverse publicity
- Ignored the public
- Excluded the public.

Principally this came about from:

- Restricting public access to council meetings, and
- Limiting the capacity of the community to have input.

In the Interim Report (Chapter 4) the obligations of the council to inform the community, as laid out in various sections of the Act, were discussed in detail. There is no doubt that the council by its actions in relation to the various commercial arrangements made with private sector groups, transgressed both the letter and the spirit of those Sections of the Act.

1.6.5 An insight into council’s engagement with its community was given by Mayor Paciullo:

(Media release 02/09/00)

“Members of the public will be given every opportunity to indicate their views to the Council before a decision is made,” Mr Paciullo said.

MS JOHNSON: (20/01/04, p.30) *You say that that flyer was about correcting misinformation that was in the public and that it was put around about the Oasis development, is that right?*

MR PACIULLO: *That was one of the purposes.*

MS JOHNSON: *Given that one of the important bits of the Oasis development was the CBD developments and the TAPP's land developments which were then going to fund the rest of the project, would you expect to have included that information in a flyer that was about providing proper balanced information to the public?*

MR PACIULLO: *Well, I don't think I can answer your question adequately unless I could look at the whole flyer and recollect exactly what was in it.*

MS JOHNSON: (20/01/04, p.31–32) *You mentioned earlier on that there had been a fairly strong campaign run against the Oasis development Foundation in the 1999 election. That was the anti-electronic casino campaign, is that right?*

MR PACIULLO: *That is correct.*

MS JOHNSON: *Do you remember if you received any other, in 1999 or afterwards, if Council received any written objections to the Oasis development?*

MR PACIULLO: *There would have been written objections, I imagine, during the process of public exhibition and so on.*

MS JOHNSON: *Was there any petitions lodged with Council objecting to the Oasis development?*

MR PACIULLO: *At that time there could have been.*

MS JOHNSON: *Do you recall a petition of 1700 signatures objecting to the development?*

MR PACIULLO: *Yes, now that you mention that, I do. Yes.*

MS JOHNSON: *Do you know—did Council ever undertake any surveys to gauge the level of support for the development amongst the community?*

MR PACIULLO: *There were surveys undertaken, but not by Council as far as I can recollect.*

MS JOHNSON: *Who undertook them?*

MR PACIULLO: *I think the Bulldogs.*

MS JOHNSON: *Right. They would have had a vested interest in the outcome, though, wouldn't have they if they were, in effect, trying to get the development off the ground?*

MR PACIULLO: *Well, I'm not sure when these things are commissioned if the ones who are commissioned are told: bring me back this result. I just assume that they are authentic.*

MS JOHNSON: *Did you make any inquiries as to the kinds of questions that were asked about in the surveys.*

MR PACIULLO: *No. I had some verbal advice from Mr McIntyre, but I should add to my question that the '99 elections proved beyond any doubt that the community of Liverpool wanted to see this complex occur and I, as I said, 1 day of the week I'm available for all the residents and I speak to many thousands of people over a year and the overwhelming message I was receiving was despite the objections, which were very vocal and very noisy and they are entitled to be, there was overwhelming support for the project.*

1.6.6 The council was not honest with the community in terms of explaining the amount of public open space that would be sacrificed by the schemes for Woodward Park. It failed to test public sentiment about this basic matter as a result.

Both Woodward Park and the TAPP's lands provided significant venues for local sport. The proposals affecting Woodward Park and then TAPP's land would have resulted in a loss of much of this land. It was suggested that council's purchase of the Collingwood land would act as a replacement. This proposition was taken up with Mr Morely:

MR BROAD: (05/02/04, p.37–38) *I have, probably a philosophical question. The Oasis project anticipated that Woodward Park would become an area which had the Arena, had the Water Park, had the Stadium. Currently, on my understanding, domestic sport is, to a large extent, played on that and whether that is touch football or hockey or whatever it might be, if Council was to proceed with the Oasis development, that domestic sport which would involve just simple members of the community could no longer have been played, potentially, to the extent it was? Do you agree with that?*

MR MORLEY: *Yes. I mean, the Council did look at purchasing—well purchased the Collingwood land, and there was some consideration of that. But certainly, if you take away playing fields that are available at Woodward Park, then the people who play there can't play there any more.*

MR BROAD: *The proposal, in respect of Collingwood, was to obtain that 1.5—sorry, an area of land—I think Council was putting \$1 million into that project. Was it ever anticipated that the Collingwood land would be developed to provide the sort of facilities that were then being provided at Woodward Park?*

MR MORLEY: *Not to my knowledge and the typography of the land would make that very difficult.*

MR BROAD: *Now, the TAPPS land was also the subject of proposals for residential and commercial use. Now I know that the proposals did not affect the entirety of the TAPPS land. Again, on my understanding, a substantial portion of the TAPPS land is used for recreational purposes and sporting purposes again, by the community of Liverpool. Is that correct?*

MR MORLEY: *Yes.*

MR BROAD: *Did Council have a process in place which would provide for replacement of that community facility?*

MR MORLEY: *Not that I'm aware of, in terms of replacement. There were certainly negotiations with some of the former users of Paciullo Park, for example, about future relocation but I'm not aware of any proposal to replace the actual field.*

1.6.7 Mr Turissi was questioned over the effect a loss of public recreational space would have:

MR BROAD: (29/01/04, p.74–75) *Can I swap away from that theme? In 1992 the Council adopted a master plan for Woodward Park. In the course of your involvement with Woodward Park I assume you've read that.*

MR TURISSI: *In the early days I did, yes.*

MR BROAD: *On my understanding that document basically anticipated upgrading of the Whitlam Centre. It anticipated upgrading of seating, as I recall it, Hillier Park and a general upgrading of facilities.*

MR TURISSI: *I thought it also extended to potential additional uses on the pool side as well.*

MR BROAD: *It did. I'm sorry, I'm not trying to ignore that. What I was leading to was this. That the Oasis development anticipated that there would be substantial development of Woodward Park, part of which would involve a village and I understand some residential users. Was it a concern to you that from a planner's perspective land which was previously public open space would be lost to private uses?*

MR TURISSI: I saw that there was—if you break it down, you look at it individually, I guess the answer to the question is probably yes, but I was looking at it from a holistic perspective in terms of how that retail was going to work well and work with the other public facilities. It was always foreseen that whatever retailing occurred in that area could not at all compete with the retailing in the CBD because they were seen as being two different animals, so to speak. So you know, in terms of having retailing in that area I certainly, from a planning point of view, didn't see there was any harm as long as it was linked into the operation of the park in terms of the public facilities.

MR BROAD: The park appears to have had a dominant sporting use and it appears to continue to have a dominant sporting use. Is that a fair assessment of it?

MR TURISSI: Yes, I mean, there are playing fields there and cricket pitches and what—not, so yes.

MR BROAD: One of the proposals for replacement of the public open space which was lost was the acquisition of the Collingwood land. In your view, does that acquisition serve to compensate for the loss of the sporting facilities?

MR TURISSI: That land on its own, no.

MR BROAD: Was there other land that would be acquired which would compensate?

MR TURISSI: Well, there was a lot of discussion about other land which could be potentially upgraded so we could get a high use out of them which were currently in a poor state like the soccer field at the end of the Taps Oval and those sort of things. So there was discussion about how else we could potentially upgrade other infrastructure which was in a poor state and obviously intensify those uses which were obviously undermined—well, not undermined but under-utilised at the moment.

1.6.8 At its meeting on 6 July 2000 council resolved to:

“support in principle to Oasis Vision (draft) for Woodward Park put forward by the Bulldogs League Club, in association with others, as prepared by Woods Bagot.”

Council also resolved to support in principle, entering into the Commercial Agreement. The Master Plan acknowledged:

Under the Local Government Act, 1993, all land vested in a council (except a road or land to which the Crown Lands Act 1989 applies) must be classified as either ‘community’ or ‘operational’ land.

Community land, according to the Act:

- *should be kept for general community use;*
- *must not be sold;*

- *must not be leased or licensed for more than 21 years, and the granting of a lease or licence over 5 years can only occur with the consent of the Minister (if anyone objects to the granting of the lease or licence);*
- *is required to be used and managed in accordance with a plan of management applying to the land.*

The Master Plan required:

The Master Plan proposes development across a number of different titles and landowners. Of particular relevance:

- *Development Zones Two and Three are predominantly located on crown land vested in Council and classified as “Community Land”. The classification of the land will need to be converted from “community” to “operational” land as part of the implementation process.*
- *Zone Two encompasses the crown reserve held in trust by the Kindergarten Union. Arrangements will have to be made to find the Kindergarten alternative acceptable accommodation and the land converted as above.*
- *The pedestrian plaza footbridges encroaches over both the creek corridor and the Transitway corridor requiring the support of the Department of Land and Water Conservation and RTA respectively.*
- *The Memorial Avenue Bus Station is proposed to be relocated south. This will require the concurrence of the Department of Transport/RTA.*
- *Zone Three proposes rezoning of Councils’ works depot and privately owned land on the South side of Hoxton Park Road. These proposals will require landowners’ consent.*

11.3 ZONING

Some of the proposed land uses, such as residential and office are prohibited uses under the current zoning of the Park. Furthermore, Development Zone Three incorporates proposals to redevelop the Council Works Depot for residential use and rezone the land to the south of Hoxton Park Road (north of Pearce Street) for commercial uses to support the development of the facilities in Zone three. Significant amendments to the LEP will be required.

- 1.6.9** The combination of council’s support for the Master Plan, in association with its support for the Commercial Agreement (CA) and the pressures placed on council to enter the Commercial Agreement, ultimately led the council into adopting the Oasis Master Plan as its de-facto plan of management for Woodward Park, and the operational plan for the TAPP’s land and the CBD properties.

The council did not test the visions of the Oasis plan against its own plans for these areas, and did not consider the CBD proposals against its planning for the CBD.

As Mr Turissi indicated:

MR BROAD: (29/01/04, p.70–71) *Can I ask you of your involvement in planning issues in the lead up to the commercial agreement? Were you asked to look at planning issues that might arise in the commercial agreement?*

MR TURISSI: *No. My role in that regard was being presented scenarios and then asked questions as to whether or not I felt that would run into particular problems, from a procedural point of view.*

MR BROAD: *Were you presented with any scenarios associated with the CBD developments?*

MR TURISSI: *I was presented, at one stage, some scenarios with the Bathurst Street site, in terms of conceptional plans.*

MR BROAD: *Yes. Do you recall when that was?*

MR TURISSI: *Look, no—it would have been after—it was after my time as the interim position, I think - - -*

MR BROAD: *Would it have been before the commercial agreement was entered into or after?*

MR TURISSI: *No. It was after.*

MR BROAD: *After?*

MR TURISSI: *It was after.*

MR BROAD: *Would it be usual, given your position in Council, for those matters to have been referred to you?*

MR TURISSI: *I mean, certainly—yes. I mean, there was—yes.*

MR BROAD: (29/01/04, p.72–73) *Prior to the receipt of the development application for the Bathurst Street property were you consulted in respect of the possible yield that might come from that site?*

MR TURISSI: *I was by the fact that there was yields recommended or yields identified in the vision document.*

MR BROAD: *Did the vision document embody any of the principles contained in the commercial agreement?*

MR TURISSI: *I'm not sure what you mean, sorry.*

MR BROAD: *I'm sorry. I withdraw it. Did the vision document anticipate that yields such as 80,000 square metres on the three sites that I've spoken about would be anticipated?*

MR TURISSI: *From my perspective I always emphasised that it was visionary and we needed to go through the processes of doing all the relevant studies on the lands to see whether or not that could be facilitated and in my view, you know, it was about ensuring that if that could be justified then there was nothing wrong with the vision but if all the supporting studies demonstrated there were issues and these things can't be physically done well then as far as I was concerned those numbers really, you know, didn't mean much.*

MR BROAD: *What happens from a town planning perspective if a contract requires that a certain yield be obtained and you as a town planner take a view that the site cannot bear that sort of yield?*

MR TURISSI: *Well, my position was—and at different stages I had discussions with the General Manager about this and explained this also to, at the time when the commercial agreement was being prepared—that I wanted to ensure that at no stage going through the planning process that we were forced to make a decision based upon a commercial agreement and that there was appropriate protection or clauses in there which actually ensured that Council's responsibility wasn't fettered at all by this vision document.*

MR BROAD: (29/01/04, p.74) *Before the commercial agreement was entered into had the town planning department of Council conducted any studies of the possible yield of those sites?*

MR TURISSI: *I think there was something done on Bathurst Street many, many years ago but I don't know to what extent.*

1.6.10

The effect of the Commercial Agreement was to cast legal obligation on the council: at one level, to move to adopt the Oasis Master Plan; and on another separate level to require that the council provide the outcomes whether it be:

- The particular use, or
- The density, or
- The transfer of the asset.

To the extent that Mr Turissi thought that the Master Plan was in the nature of a vision amenable to a planning oversight, the Commercial Agreement mandated and prescribed the outcomes and more, if required by the Foundation.

While the Oasis Master Plan envisaged some measure of conformity with the Act and some measure of public participation, the Commercial Agreement mandated that council meet the required outcomes, lest it be in breach of the Agreement.

The overall effect was to supplant any vision held by the council with outcomes mandated by the Commercial Agreement or by the Foundation.

Ultimately the vision was not tested but adopted, without public participation or regard to public objections.

1.6 Findings

- 1. The council failed to test the social and commercial outcomes sought by the Oasis and Liverpool 2020 projects.**
 - 2. Allied to this was an overwhelming desire to maintain the confidentiality of the proposals. The consequence of all of the actions was to prevent public engagement in council's processes when it was undertaking possibly the largest project it had ever considered.**
 - 3. In its desire to maintain confidentiality, the council made inappropriate use of extra-ordinary meetings for which either no notice, or inadequate notice was given.**
 - 4. The conduct of the council did not meet the public participation objectives of the Act.**
 - 5. Council failed to consider the Oasis Master Plan in light of its then adopted plan of management for Woodward Park. Rather, it adopted the plan as though it had some force of Law. This adoption, together with provisions contained in the Commercial Agreement constrained the council to approve the projects anticipated by the Oasis Master Plan**
-

1.7 **The Bulldogs**

1.7.1 One of the vexed issues associated with the proposals affecting Woodward Park is the relationship between the Bulldogs and the council.

The involvement of the Bulldogs existed at a number of levels.

- At one level, the Bulldogs were to be provider of the sporting teams that council's vision so dearly sought.
- At another level the club was taking over effective control of council's assets through the Foundation, ostensibly for the benefit of Liverpool's sporting teams, but most probably to the detriment of local sporting and community users of the park.
- At another level, it and Macquarie were predatory developers utilising council assets and dreams to pursue their commercial ends.
- At another level, the Bulldogs were the proponents for a large Las Vegas style casino development at Liverpool, with Woodward Park providing the outdoor entertainment facilities. It is clear that during the period from 1996, when the Bulldogs had first shown interest in Woodward Park, the council developed a fixation towards them.

Such was council's fixation towards the Bulldogs role in fulfilling council's vision of obtaining a national team that it was willing to abrogate sound and prudent decision-making to ensure the Bulldog's commitment to Liverpool.

1.7.2 In July 1997 the Bulldogs had put their proposal that envisaged construction of the club/hotel, relocation of the training operations and of the head office, acquisition of a major interest in the Slammers, assisting council to provide a stadium at Woodward Park and playing their games at Liverpool when the stadium was completed.

The letter had contained an offer to purchase the pool site for \$4.5m conditional on various matters of a relatively modest nature.

In early 1998 the council resolved to sell the pool for \$4.5m, but in doing so, council contracted away its rights to levy developer contributions under section 94 of the EP&A Act.

Mr Creber spoke of the road works and costs associated with the club developments in the following terms:

MR BROAD: (19/02/04, p.34–35) *Mr Creber, from a traffic planner's perspective, the proposals put by the Bulldogs, in respect of the club and hotel development on the old pool site, would have led to an increase in traffic, wouldn't they?*

MR CREBER: *Certainly. Yes.*

MR BROAD: *Certainly there was a requirement to provide a fairly large number of parking spaces?*

MR CREBER: *That's correct. Yes.*

MR BROAD: *Would the proposals have required an upgrading of the road facilities, to service the site?*

MR CREBER: *There were a range of proposals to upgrade intersections around the site, more so by, I suppose, providing slip lanes and additional turn facilities and those sort of things. Not in terms of overall capacity upgrading. There were some proposals also to upgrade some of the internal roads within the CBD that linked to Memorial Avenue and those sort of areas.*

MR BROAD: *Well, that was directly associated with that proposal for the club?*

MR CREBER: *They were, if I recall rightly, yes.*

MR BROAD: *Now, if those proposals were given effect to, they would have incurred a cost, wouldn't they?*

MR CREBER: *They would have. Yes.*

MR BROAD: *That cost would have been initially borne by Council?*

MR CREBER: *In the normal scheme of things, it would have been the developer who would have paid for those upgrades, unless it could have been argued that there was a capacity issue in the first place, there might have been otherwise a need for either Council or State government to upgrade that.*

MR BROAD: *But the developer would not carry out those works. The Council would carry out those works, wouldn't it?*

MR CREBER: *Generally yes, but with developer funds, unless it was on the State road which would be the RTA.*

MR BROAD: *In other words, what would happen is that the Council would carry out the works but it would seek to recover funds from the developer, to meet those costs?*

MR CREBER: *In the normal scheme of things, that's how it would work. Yes.*

MR BROAD: *Now, the works that you have just talked about: were they substantial?*

MR CREBER: *They were quite substantial in terms of road pavement works, changes to traffic signals, extending length of turn bays, those sort of things. Yes.*

MR BROAD: *In your experience, would the cost of those works have been substantial?*

MR CREBER: *Yes. They would have. Any works on a major road network are very expensive.*

MR BROAD: *It would be usual, in your experience, to recover those costs from a developer?*

MR CREBER: *If there's a direct relationship between the developer and the works. Yes.*

MR BROAD: *Your primary view, as you have just expressed, is that there was, in the circumstances of the Bulldogs Club development?*

MR CREBER: *There was a need because of that development, to upgrade the road networks surrounding the site. Yes.*

Both the councillors and the former General Manager, Mr Carr were unable to provide any lucid or compelling reason for this concession.

1.7.3 Significantly the Bulldogs put forward the only solid proposal that might go toward council's vision of a national team. Directly stemming from the Bulldogs proposal of July 1997, the Bulldogs promised that its football training would be conducted at Woodward Park. As well the council had separately agreed to provide the necessary arena for the Slammers' bid for entry into the NBL.

The magnanimity of this gesture in favour of the basketball team must be contrasted with council's imposition of contributions of \$154,244 for the Liverpool Catholic Club's application for a gymnasium, ice rink and child minding complex.²⁷

Similarly, such was council's involvement with the Bulldogs that it demonstrated an extraordinary willingness to accept liability for costs incurred by the proponents in its attempt to secure the involvement of the Bulldogs.

Towards the end of 1999 the proposals for the arena had grown from 6,000 seats to 8,000. The council had entered into a MOU with the Bulldogs, Macquarie and Grocon on 29 June that year.

The Bulldogs were proposing a larger stadium. Under the MOU Macquarie was to provide a business plan for the project.²⁸ Grocon was to be the preferred tenderer.²⁹

27. Submission Number 24 & Evidence of J Henshaw: 24/02/04, p.60

28. MOU: 29/06/1999, Clause 3.1

29. MOU: 29/06/1999, Recital H (b)

Notwithstanding what was contained in the MOU, despite the express provisions in the Deed of Termination ending the relationship without any claim for damages or otherwise³⁰, the council wrote to Grocon offering to procure payment of \$200,000 to it if it was subsequently unsuccessful in a later tender for the Arena³¹ and agreeing to pay \$74,000 to Macquarie for the business plan.³² The council was remarkably ready to sign agreements that risked its own resources (land) and money. It was a measure of its desperation to fulfil its constantly expanding vision of glory, derived from its association with professional sporting groups.

1.7.4 Over the period of the Oasis project the council demonstrated an overriding reluctance to exercise any resolve when dealing with the Bulldogs.

The evidence suggests that the relationship between the Bulldogs and the council was such that it ignored warnings about the Bulldogs given by Macquarie.³³ Even after the collapse of the Bulldogs' role in Oasis and its resolution to remove the Bulldogs from development aspects of the project³⁴, the council remained willing to provide for the Bulldogs' continuing influence through.³⁵

A new Sporting Association will be established for the Bulldogs League Club to maintain an association with the Liverpool area. The Board of the Association will consist of two nominees from Council, two from Bulldogs League Club and three community representatives including the President or Chair of Liverpool Youth Council.

The Sporting Association will have an advisory role on the sporting facilities at Woodward park, and will also be the way Bulldogs League Club holds rights of first refusal to occupy Woodward Park facilities other than the Arena.

There was a proposed “payment of \$200,000 on behalf of the Bulldogs to the Liverpool Sports and Community Association.”³⁶

Ultimately there was a payment of a settlement sum that reflected:

MR CARR: (02/02/04, p.28) ...*whatever the Bulldogs put in, in value, in cash, the payments that were made that were under suspicion—such things as breaching salary caps and the like—they were to be removed from what the Bulldogs had put in and then there would be a balance.*

30. Deed of Termination: 14/01/00, Clauses 2 & 3

31. Council's letter to Grocon: 14/01/00

32. Council's letter to Macquarie: 14/01/00

33. Evidence of G Paciullo: 01/03/04, p.72 et seq. and B Carr: 26/02/04, p.31 et seq.

34. Evidence of B Carr: 02/02/04, p.28

35. Report of Atanaskovic & Hartnell: 15/01/03, p.28

36. Report of Atanaskovic & Hartnell: 24/04/03, p.7

It got down to a bit of judgment about what that value, once we've sort of worked that out, how much of that balance ought to be returned to the Bulldogs and there were some discussions between the Mayor and Kevin Stewart. The Mayor received information about what the Bulldogs put in, what wasn't going to be accepted, what that balancing figure was—or the residual figure was—and then there were some suggestions about how much ought to be paid and it ranged from zero up to just under a million, from memory. 950,000, I think.

The settlement was premised on:

MR PACIULLO: (19/01/04, p.57) ...discussions between our legal representatives about negotiating a way out for the Bulldogs because of the events. ...

1.7 Findings

- 1. The former General Manager, Mr Carr granted a substantial concession to the Bulldogs, when purchasing the former pool site. The concession involved not requiring the Bulldogs to make Section 94 contributions on its developments planned for the site.**
- 2. It is likely that the significance of the concession was outside the contemplation of the councillors when giving their delegation to Mr Carr to sign the contract of sale. Similarly it was outside the contemplation of the advisory panel when recommending that council proceed with the sale.**
- 3. Throughout its conduct, the council was to favour the claims of the proponents over its own interests, driven by a perceived need to meet their demands in order to obtain the facilities necessary to achieve its dream of having a national team playing at Liverpool.**

1.8 The National Basketball League

- 1.8.1** Council's vision was initially centred around the elevation of the Slammers to the national competition.

Mr Looby gave evidence that the Slammers had been formed in about 1991/1992 and had played about 5 to 6 years attracting crowds of 1500 to 2000³⁷ to their games at the Whitlam Centre.

At that time, the Whitlam Centre had a capacity of 2200, so the centre served their purposes. The Slammers had aspirations to join the NBL.

- 1.8.2** The requirements of the NBL were revealed by Mr Looby:

³⁷. Evidence of A Looby: 23/02/04, p.61 et seq.

MR LOOBY: (23/02/04, p.62) *The National Basketball League were looking for a community-based team, one which had an affiliation with some local associations. They had minimum population demographic criteria, and the main stumbling block, I guess, for us was that in Sydney, with the Sydney Kings, they had virtually a monopoly on the whole of the Sydney scene, the Sydney area. The NBL relaxed this after some 6 or 7 years and they allowed a West Sydney franchise. However, that West Sydney franchise had some geographic limitations and that largely was to be west of Henry Lawson Drive, west of Rookwood Road, through a line drawn in the sand, if you might think, through the western suburbs of Sydney using Henry Lawson Drive, Rookwood Road as a geographical boundary.*

PROF DALY: *You are describing the geography of the system. What did it confine, I mean, once you had drawn those roads and said nothing beyond this point and so forth? If I can go back, in the days when sporting teams were district teams, there were lots of rules about where you had to live and so forth to be able to play for that team. You are not talking about that kind of limited restriction, are you?*

MR LOOBY: *No. The limitation was more geographic more so than personality or team membership. It was just that we were allocated within our franchise an area of western Sydney, because that was perceived by the National Basketball League to be of sufficient size to support one of their franchises as was Sydney City being the more inner south-eastern inner western suburbs.*

MR LOOBY: (23/02/04, p.65–66) *The biggest hurdle that we faced entertaining the National Basketball League entry was the licence fee. There is a licence fee that is payable to any new franchise into the National Basketball League and when our final bid went in, there were two other consortiums and we ended up paying \$2 million to go into the National Basketball League which was funded by Canterbury Leagues Club, to their credit.*

MR LOOBY: (23/02/04, p.66) *One of the major criteria for the entry to the League was the provision of a basketball stadium which had a minimum 5000 to 5200 seats and again, because of the monopoly aspects that the Kings enjoyed for some 10 years, it had to be in western Sydney and I've already explained the geographic territories that have been ruled out or been put in sand in our licence and therefore Council were approached from a reasonably early stage and being part of the Woodward Park master plan was probably part of it, to provide a multi-purpose arena.*

There was various aspects that we went through and I was consulted in the majority of them. The first one was an extension of the Whitlam Centre as it existed – – –

1.8.3

On 22 September 1997 council wrote to the NBL providing its guarantee for the construction of a 5100 seat indoor sports centre to be built in time for the 1998/99 NBL season.

This guarantee was to become an overbearing liability for the council. In the period following, council's commitment to provide an arena was to rule its actions, ultimately requiring its involvement in Liverpool 2020.

In doing so, the council closed its eyes to the folly of the project.

In August 1997 the council had been considering the upgrade of the Whitlam Centre that anticipated extending the facility on 3 sides and the construction of a new lightweight opaque roof at a cost of \$10.8m.³⁸ The report suggested operating surpluses based on incremental increases in the existing user structure, sufficient to support a \$2.5m loan. Such a loan would be dependent on sale of council assets to provide funding.

1.8.4 In October 1997 council had been warned by the council auditor, Mr Banisevic, who was then with Coopers & Lybrand:³⁹

3 *Council's financial position at 30 June 1997 is considered to be difficult. Liquidity ratios are well below industry benchmarks and there is a significant deficiency in Available Working Capital. Council has a strategy in place to restore its financial position over the next 5 years which cannot incorporate any additional funding for projects like the Whitlam Centre extension. Council should therefore only pursue projects of this nature where they are self-funding.*

15 *In terms of the funding for loans required to make up the construction cost shortfall (\$2.4M), the proposal suggests that additional operating profits from the expanded Centre will more than cover the debt service of the loans. Projections in the LRM report show the following increases in operating profits from the expanded Centre above those projected in Council's 1997/98 Budget for the existing Centre:*

		\$'000
Year	1	172
	2	326
	3	464
	4	512
	5	555

38. See Generally LRM Report: August 1997

39. Letter from Coopers & Lybrand: 09/10/97

16 *It is suggested that a \$2.5M loan over 15 years at 10% interest could be supported by the additional operating surplus in year 2 of \$326K. We agree that this is the case with the figure in fact likely to be lower based on recent loans Council has taken up. However, we cannot confirm that the projected operating profits will be achieved or that the base from which they are calculated is accurate (\$201K from existing 1997/98 Centre Operations). Should they not be achieved, then the deficiency will need to be met from Council's general revenue which we have already described as being strained. This is a real risk for Council which needs to be covered by some form of contingency.*

17 *In conclusion, we believe that the Whitlam Centre extensions cannot be undertaken by Council unless they are self-funding because the current financial position of Council is too difficult. The Proposal Costing by LRM provides for a self-funding solution but the solution is questioned on the following grounds:*

- *Proceeds from the sales of sites other than the Old Pool Site are estimated at \$3.93M but are not supported by independent valuations. Valuations need to be undertaken.*
- *Rents currently generated from these other sites are \$318K per annum. The loss of these rents to Council has not been factored into the Proposal Costing.*
- *The funding shortfall in the projected expanded Centre is \$2.5M which must be met from loans. The annual cost of servicing such loans over 15 years is around \$300K. LRM's Report projects additional income from the expanded Centre operations which will cover the debt servicing costs. These projections are uncertain and do not reflect current experience at the Centre which has been of protracted losses.*
- *If Council is to proceed with the project it will need to provide contingency reserves for the above risks as well as the possibility that the capital cost of the project (\$10.8M) may be overrun.*

1.8.5 On 19 December 1997 Mr Hanna wrote to council regarding Stardome's arena proposal:

(c) A Basketball Arena will lose about a million dollars a year because it will only be used about 11 times during the summer months for basketball. It must therefore be multi-use and have at least 2 full time users and hence our need for TENNIS and ICE SKATING. I cannot think of any other uses that could yield a return. Without these it appears we cannot develop an Arena for you.

(d) To build a smaller Arena to fit your site without the required visiting team facilities, corporate boxes, TV set-up and spectator amenities, the SLAMMERS would simply very soon become bankrupt which is a point stressed by Bill Turner last week.

1.8.6 The council pursued the Stardome project until May 1999. It had been advised by LRM that the Whitlam Centre would not have capacity to service debt if it was expanded to 5100 seats at a cost of \$16m.⁴⁰ After the 1999 election the council received PwC's feasibility study,⁴¹ which suggested that a 7,700 seat arena with ice skating would be the best option.⁴²

This might be underpinned by staging⁴³

- Indoor sports, including:
 - Basketball (NBL & WBA)
 - Netball
 - Volley ball
 - Boxing
- Entertainment events, including:
 - Popular music and rock concerts
 - Family/popular concerts
- Family shows
- Functions, including:
 - Conferences
 - Exhibitions/product launches
 - Banquets

Central to the feasibility of the option was the support to be provided by the Razorbacks.

While the report acknowledged that spectator support for NBL games had been dropping, the report ignored the risks that this posed. The report ignored figures that showed individual teams suffering attendance drops of up to 65%, with only one team, the Wollongong Hawks having consistently increased its audience, albeit from a very low base.

1.8.7 The timing of the PwC report is important, as within council, concerns had grown over council's compliance with the tendering requirements of the Act.

In October 1999 Mr Ritchie had written to Mr Carr expressing his concerns:⁴⁴

Having now been involved in the Arena Project for a few days and having had now lengthy discussions with Abbott Tout Solicitors, I am concerned about the process and probity issues surrounding the arena proposal.

40. Timeline: April 1998, p.5

41. PwC Report: 16/12/99

42. PwC Report: 16/12/99, p.4

43. PwC Report: 16/12/99, p.14

44. Memorandum: 27/10/99

It seems to me that the parties to the Memorandum of Understanding and particularly Macquarie Bank Limited who were the project proponents have given no regard to the requirements and process stipulations of the Local Government Act. For example: How did the Memorandum of Understanding signatories intend to have the Arena built on public land with a 21 year lease without either a public tender process. This would be so for both construction and operation.

If the parties were relying on LGA Section 55 (3) extenuative circumstances to obtain Council approval then this has not been documented nor in my mind justified at this stage.

In late December 1999 the council faced a dilemma. It could obtain a release from its obligation to construct the Arena for the Razorbacks, but would risk proceeding with the Arena without them as the anchor tenant,⁴⁵ if it pursued its proposal to call tenders.

Such was the council's commitment to having a national basketball team that it did not ultimately risk tendering the arena.

1.8 Findings

- 1. Step by step, the council agreed to larger and larger concepts for a basketball arena without regard for the risks that this imposed on a financially weak council.**
- 2. The council maintained that its actions in entering into the projects were premised on a need to provide facilities imposed by the NBL. The evidence does not support this assertion.**
- 3. The council failed to consider the likelihood that its support of an arena to meet the strictures imposed by the NBL was not financially sound.**
- 4. The council breached the stipulations of Section 55 of the Act in not putting its plan to build a basketball arena to tender.**

1.9 The Parks

- 1.9.1** The Oasis project considered development and use of Barbara Long, Woodward, Paciullo and Pearce Parks as well as other lands.

These parks represented a large cluster of parkland to the west of the Liverpool CBD that provided for the recreational and sporting needs of the community.

⁴⁵ Memorandum – Mike Ritchie / Eric Heapy: 22/12/99
and Letter from Bulldogs / Abbott Tout: 21/12/99

Council-owned lands were augmented by substantial areas of Crown land that had been placed under the stewardship of the council. With council's resolution to support the Oasis Master Plan⁴⁶ and council's commitment to the Commercial Agreement the council was to significantly alter the character of Woodward, Paciullo and Pearce Parks and, to a less extent Barbara Long Park through its prospective use as overflow carparking.

1.9.2 The Oasis project called upon the council to:

- Acquire the Crown land forming part of Woodward Park
- Change the use of significant portions of the park to operational land to facilitate the development proposals
- Transfer land to a separate entity, the Foundation
- Facilitate the on-sale of much of its land, importantly within Woodward and Paciullo and Pearce Parks
- Facilitate exclusive use rights being granted to the Bulldogs
- Disenfranchise numerous existing sporting and community users.

1.9.3 At all times the council and the Bulldogs emphasised the benefits that Oasis would bring to Liverpool.

Ultimately, the proposals gave rise to an overarching question of whether the totality of the project would result in the public's loss or its gain.

It is not, however, the role of this Inquiry to provide its response to this question.

Rather, having regard to the Terms of Reference, it is appropriate to have regard to council's processes in pursuing the outcomes.

1.9.4 The Inquiry received only relatively few submissions from the public in response to its call for submissions.

Notwithstanding, the Inquiry actively pursued contribution from the public regarding both the openness and transparency of council's decision-making processes and the impact that its decisions had on its ability to provide services to the community.

Large community and sporting facilities represent substantial, though often not acknowledged, services to the community.

1.9.5 On one hand, the council and proponents were saying: look what these projects will bring to Liverpool.

On the other hand, the park's existing users, whether they be sporting groups, the marching girls, the guides, kindergarten, roller-skating rink or others were to be displaced or shut down to make room for Oasis.

46. Minutes of Meeting: 06/07/00

Mr Wilson contrasted the current and proposed use of Woodward Park when giving evidence:

MR WILSON: (26/02/04, p.65) *Well, Woodward Park has always been Woodward Park. It's somewhere where kids played, they had football there, they had all sorts of sporting activities, marching girls and everything. But, then they came up with this idea of building some whiz bang sporting arena which was quickly followed by having a licensed casino and one thing and another there, I didn't think it was going to be any good for the area.*

1.9.6 The information provided to the public portrayed the benefits of the “world class sporting and recreational facility” to be constructed on Woodward Park.

There was no mention of the existing users of the Park in the report to council's meeting on 5 February 2001, when it resolved to enter into the Commercial Agreement. In May 1997, when the Bulldogs had proposed the exclusive use of Woodward Park as a training facility, council staff had costed the relocation of the City Rugby League Club and the Liverpool Little Athletics at \$439,000.⁴⁷ The Oasis Master Plan acknowledged the existing development on Woodward Park but its tone dismissed its importance.⁴⁸

Existing Development within Woodward Park comprises:

- *Whitlam Centre managed by Leisure Australia, comprising indoor leisure pool, outdoor 50.0 metre swimming pool, gymnasium, café, crèche, meeting rooms, 2000 seat multi-use basketball arena and car park.*
- *Disused Child Care Centre.*
- *Roller Skating Rink.*
- *Kindergarten.*
- *Small buildings and meeting rooms accommodating community uses such as the Marching Band, girl guides, meals on wheels, and child minding centre.*
- *Liverpool City Council Chambers and Offices.*
- *Public Transport Corridor reserved for future Bus Transitway.*
- *Disused Swimming Pool.*
- *Hillier Oval, touch football fields and cricket pitches.*

The aquatic component of the Whitlam centre is a modern and popular facility. However, the meeting rooms are rarely used. The gymnasium is popular and could be expanded. The multi-use basketball arena is well used and is the current home of the West Sydney Razorbacks Basketball Team. However the arena is too small for the team and its roof requires significant repairs. The basketball arena could be retained and repaired to compliment a new basketball arena or demolished, its function provided elsewhere, and the land made available for other uses.

47. Memorandum of R Harlor: 05/05/97

48. Oasis Master Plan, p.19

The disused child care centre and roller skating rink are available for redevelopment.

The small buildings containing the community groups can be redeveloped provided acceptable new accommodation in close proximity can be found.

1.9.7 The role of the current users was summarily discarded:⁴⁹

The existing recreation facilities and public places within Woodward Park currently enjoy significant patronage. Furthermore the existing community facilities and meeting places serve in an important role and function within the Liverpool community. Landowners and residents surrounding Woodward Park also have a significant and respected interest in the future use of the Park.

Therefore community involvement in the progression of the Master Plan through the approval and implementation process is vital to ensure that no stakeholder is disadvantaged, all interests are protected and any potential issues addressed.

1.9.8 Despite the wholesale displacement of the sporting and community users of Woodward Park the Master Plan concluded:⁵⁰

Social and Physical benefits that would be enjoyed by local residents in adjoining communities include:

- *Improvement in the range of local sport, recreation, commercial and community facilities to meet day to day needs.*
- *Upgraded parklands and public spaces*
- *Enhancement of the “sense of place” experienced, and resulting enhancement in community pride.*
- *Opportunities to experience Woodward Park within a new and unique public realm that respects the attributes of the site.*
- *Establishment of new community networks, and reinforcing those that exist, engendering community strength and pride.*

1.9.9 While the TAPP’s land was mentioned in the Master Plan its importance was dismissed in the following terms:⁵¹

Furthermore, surrounding the site there are a number of undeveloped or open space areas which may provide opportunities to assist in use and development of the site. They include:

- 1. Barbara Long Park, Memorial Avenue*
- 2. Paciullo Park, Hoxton Park Road*
- 3. Pearce Park, Hoxton Park Road*

49. Oasis Master Plan, p.53

50. Oasis Master Plan, p.55

51. Oasis Master Plan, p.18

4. Liverpool City Council Works Depot, Rose Street
5. Landcom Site, Congressional Drive Casula (the MCTA site)
6. Discovery Park, Atkinson Street, Casula

1.9.10 The Australian Roller Skating Club was one of those to be displaced.

Mr Stevens provided much detail of the history of this club, which had been formed and funded by members who had a handicapped person in their family.⁵² The facility was to provide a “safe haven” for the afflicted children.⁵³

With the Oasis projects it was to be displaced. The club has now been displaced. It has not been re-located.

While the council paid \$50,000 for the loss of the club’s benefit under its licence to occupy its premises,⁵⁴ this only represented the value of the improvements on the land,⁵⁵ not the intrinsic commercial or social value of this enterprise.

1.9.11 Mr Ritchie spoke of the public’s concern over the various proposals, acknowledging the concerns and council’s position.

PROF DALY: (29/01/04, p.19) *Was there public concern about loss of open space?*

MR RITCHIE: *Yes, that was probably one of the major concerns through the constant—there was a—I don’t recall the dates but there was various feedback to Council on the Stardome proposal. At one stage Canterbury Bankstown Leagues Club had posters up and they had on the shirts of the Bulldogs they had the Stardome words and they ran some adds in the local paper and so forth and Council got quite a bit of comment back on that and I guess there was a general view held by some in the community that the alienation of public open space was a problem associated with this development. That was certainly a view that was held by myself and some of the other officers in Council but that is traded off against the benefits of a major sporting facility and that was one of the challenges for Council to balance.*

1.9.12 Mr Turissi, who had formerly been council’s Senior Development Planner, acknowledged that the Collingwood land would not compensate for the loss of public space in Woodward Park.

MR BROAD: (29/01/04, p.74–75) *It did. I’m sorry, I’m not trying to ignore that. What I was leading to was this. That the Oasis development anticipated that there would be substantial development of Woodward Park, part of which would involve a village and I understand some residential users. Was it a concern to you that from a planner’s perspective land which was previously public open space would be lost to private uses?*

52. Mr Stevens’ address to Council: 08/03/04

53. Mr Stevens’ letter to Alan Jones: 23/02/04

54. Deed of Release: 08/12/03, Clause 2 (1)

55. SVO Valuation: 07/07/03, p.6

MR TURISSI: *I saw that there was—if you break it down, you look at it individually, I guess the answer to the question is probably yes, but I was looking at it from a holistic perspective in terms of how that retail was going to work well and work with the other public facilities. It was always foreseen that whatever retailing occurred in that area could not at all compete with the retailing in the CBD because they were seen as being two different animals, so to speak. So you know, in terms of having retailing in that area I certainly, from a planning point of view, didn't see there was any harm as long as it was linked into the operation of the park in terms of the public facilities.*

MR BROAD: *The park appears to have had a dominant sporting use and it appears to continue to have a dominant sporting use. Is that a fair assessment of it?*

MR TURISSI: *Yes, I mean, there are playing fields there and cricket pitches and what-not, so yes.*

MR BROAD: *One of the proposals for replacement of the public open space which was lost was the acquisition of the Collingwood land. In your view, does that acquisition serve to compensate for the loss of the sporting facilities?*

MR TURISSI: *That land on its own, no.*

MR BROAD: *Was there other land that would be acquired which would compensate?*

MR TURISSI: *Well, there was a lot of discussion about other land which could be potentially upgraded so we could get a high use out of them which were currently in a poor state like the soccer field at the end of the Taps Oval and those sort of things. So there was discussion about how else we could potentially upgrade other infrastructure which was in a poor state and obviously intensify those uses which were obviously undermined—well, not undermined but under-utilised at the moment.*

1.9.13 In the end, council's pursuit of its social goal, aiming at the big end of sport, brought with it the public's loss of its sporting, recreational and other uses of Woodward Park.⁵⁶

Similarly, development of the TAPP's land for residential and commercial uses would serve to displace the public use of this land.

While council brochures, press releases and other media highlighted the "benefits" of the project, they ignored and hid the dislocation current users would suffer under the project.

Significantly, the council does not appear to have indicated any development on the TAPP's land.

56. See council brochure.

In the American vernacular, the loss of the public’s amenity, through its use of the parks was merely “collateral damage”, to the process of obtaining a national team.

Council’s processes and its decision-making regarding the effect of its proposals on users of its parks could never become transparent or open, as there was no consultation. Council’s processes were driven by an absolute disregard for the users.

1.9 Findings

- 1. The council failed to adequately consider the effect of the proposal on the users of its parks or to consider adequate compensation for those displaced.**
- 2. The council failed to be open and transparent in its dealings with the users of the park, and took either no steps, or inadequate steps, to measure or understand the value of the services and facilities provided to the members of the community.**

1.10 The Pressure to Achieve Outcomes

1.10.1 Throughout the entire period that the council pursued its dream of having a national team at Liverpool it operated under pressure. This pressure was another element that ultimately led to the failures that are the focus of this Inquiry.

The desire to obtain a national team and to achieve the goal of having this team play at Liverpool led council to place pressure on itself, manifested by pressure placed by the elected body both on the staff and itself and its advisors. In turn, the corporate body was to place pressure on other staff and back on the councillors.

1.10.2 The pressure that council was placing on itself became apparent to the proponents who clearly took the opportunity to place further pressure on the council and exploit it to their advantage.

Councillor Dobell-Brown spoke of the pressure that he felt:

MR DOBELL-BROWN: (16/02/04, p.51) *Yes, I'd often make points during— make notes during their presentation and ask them about it. I again would just like to describe the feeling of pressure there was. There was immense pressure to vote for these things and get them through and the questioning time was curtailed as much as the mayor could possibly curtail it. I had trouble getting a word in right till the very end of the questioning and then the speaker was allowed absolute minimal time to respond to any matters I raised.*

Mr Marsden, who had held a long and intimate association with the councillors and senior staff of the council, spoke of the pressures being applied to the council and its effect on council's bargaining position:

MR BROAD: (18/02/04, p.52–53) *In your dealings with the Council and Macquarie Bank in respect of the MOU, did you regard the Council as being in an even bargaining situation with the Macquarie Bank?*

MR MARSDEN: *No.*

MR BROAD: *Why was that?*

MR MARSDEN: *Because there was pressure from all and sundry—I withdraw that, that is unfair—there was pressure from the caucus of Council and the General Manager and to some extent Michael Evers in not an unfair way, and Macquarie Bank in not an unfair way, for Council to get on with it, and if we tried to sit down and say: hold it, hold it, hold it, hold it, there was enormous pressure coming. I felt the pressure. I felt the pressure greatly. I am sure that others sitting around the table felt the pressure.*

MR BROAD: *You were saying in part that the Councillors were placing themselves in an unequal bargaining position?*

MR MARSDEN: *They allowed it to happen, yes.*

Councillor Harrington described the pressure that Oasis brought:

MR HARRINGTON: (21/02/04, p.92) *Yes, there was enormous pressure. If I could describe the whole project, it was like a runaway train and nothing was going to stop it. It just ploughed on.*

Council's commercial adviser saw pressure being applied both externally and from within.

MR BROAD: (27/01/04, p.37–38) *Was there an underlying feeling in Council that the project needed to go ahead?*

MR REDMAN: *We were - - -*

MR BROAD: *I separate you from that.*

MR REDMAN: *Yes. Certainly.*

MR BROAD: *It is view of Council.*

MR REDMAN: *In meetings I recall having with the proponents very early in the project, they made it very clear and very blunt to Council that Council had supported and before my involvement the securing of the second Sydney basketball licence, and that Council had made a commitment to build an Arena and that, I think, overarching with the potential benefits that Council saw with the project as we reported in our reports, that Council was keen to see the project proceed.*

MR BROAD: *So there was external pressure to proceed and Council within itself also applied that pressure to itself?*

MR REDMAN: *My impression was that the majority of Council were keen for the project to proceed.*

The former General Manager, Mr Carr spoke of the pressure that the council placed him under:

MS JOHNSON: (02/02/04, p.38–39) *Perhaps if I can just stop you there because I think you might have misunderstood my question. I will try and put it more clearly. You say, if I have understood your answer correctly, you didn't think you needed to say to Council: don't proceed. Hypothetically, had the advice been different, would you have felt, given the resolutions of Council in the past and the work that had gone into the project to date, that it was appropriate to go to Council and say: I don't think this project should proceed, or were you trammelled by the past resolutions of Council by the pressure the Council was putting on you?*

MR CARR: *Look, I understand the question. Clearly, there was pressure about the project and there was, you know, significant desire to achieve the project. However, hypothetically, if you take a hypothetical case, if the advices coming forward from the independents, independent consultants, were saying that putting more shadow of doubt on whether they ought to proceed or not on this, and that I became aware of that, then I would have been more inclined to go to the Council and say: I don't think you can proceed with it in its current form. If you still want to pursue this particular project, there would need to be further negotiations.*

So I don't think it is a case of going to the Council and saying: I think you should stop. It is the wrong policy. Your community does not deserve all of these facilities. It is really a case of saying: I know what you want for your community and if the advice that is coming forward saying that this isn't going to be delivered well under these arrangements, then I would have advised the Council of that.

1.10.3 As indicated earlier in this section, the various proponents, particularly the Bulldogs and Macquarie, were to place pressure on the council.

In August 2000, in the lead-up to the Commercial Agreement, Mr Carr wrote on two occasions to the Mayor complaining about the pressure applied by Mr McIntyre of the Bulldogs:⁵⁷

Memo 1

PS: Just received a note from G J McIntyre again placing unreasonable demands about the proposed assessment of this project. See attached notice of date the Final Commercial Agreement received.

Memo 2

*To: George
From: Brian
16/08/2000*

*George—
I note Gary's extremely rude offer of 15/8/2000 which you informed me about yesterday.*

Please find attached a copy of a letter being given to Al and Gary today. Gary's "Dear Brian" letter c.c. to you is another example of their aggressive negotiation tactics. It now becomes clear that Council needs a person to negotiate on your behalf so you and I can set in review of those negotiations.

Regards,

Signed: Brian

1.10.4 Evidence given at the public hearings confirmed and enlarged on this. Mr Redman spoke of the pressure placed on council and the brinkmanship.

MR REDMAN: (27/01/04, p.33) I believe so. There was significant pressure by the consortium to have the commercial agreement signed as the Canterbury's new club facility had attached to it significant licence applications, and as I recall there was significant pressure on the Council to sign a binding agreement to support their applications for their club which in turn supported their role in the total project. So there was significant pressure on Council to sign the agreement and move forward and as you will have seen from the documentation you have read, we attempted many other measures to protect assets or secure assets which were not agreed to and it was really put to that decision, either sign the agreement or we walk away.

1.10.5 Mr Boland wrote advising the demeanour of Mr McIntyre:⁵⁸

57. Memoranda: 16/08/00 & 23/08/00

58. Submission in Reply, J Boland: 27/02/04

To say that the negotiations were “very difficult, very fraught and pressured” is an understatement. Mainly because of the personality of Mr Garry McIntyre, the negotiations were also aggressive with considerable personal abuse of Mr Carr on a number of occasions by Mr McIntyre. Nevertheless, a solicitor’s role in the negotiation of a commercial agreement is to provide his client with competent advice (which may or may not be accepted by his client) and to seek to progress the negotiation to an outcome acceptable to that client. The fact that the negotiation is difficult is not a reason why there is any need for an independent review. If that were the case it would seem to me that every important contract entered into by a client should be the subject of a review.

1.10.6 Separately, the Bulldogs had written to the council, threatening to withdraw from the project:⁵⁹

23 August 2000

*Mr B Carr
General Manager
Liverpool City Council
FAX NO 9821 9198*

Dear Brian,

Liverpool Project

Canterbury is extremely disappointed with the delay in this matter.

Canterbury will be having a meeting with Macquarie Bank on Thursday in order to determine whether it will be proceeding with the project.

Until further notice please ensure that all communications (written or verbal) are directed to the writer and not to Clayton Utz (George Livanes), Al Constantinidis or anyone else.

Yours sincerely

Per G J McIntyre

*G J McIntyre
Chairman*

C.C: George Paciullo

59. Bulldogs Letter: 23/08/00

1.10.7 This was not the first time that Mr McIntyre had used this tactic. In late 1999 the council had demonstrated some resolve in its dealings with the Bulldogs, proposing to put in place measures to ensure that its proposal to tender construction of the Arena would proceed on a level playing field. The Bulldogs' response to this proposal was to threaten the withdrawal of the Razorbacks, thereby undermining the potential viability of the arena.⁶⁰

1.10.8 The pressure exerted on the council was not limited to the Bulldogs.

It is clear that Macquarie perceived the pressure that the council had placed on itself. Mr Marsden described Macquarie's actions.

MR MARSDEN: (18/02/04, p.55) *Maybe I should have simply told Council that you are being bullied into pushing ahead with this and if you do this, maybe you ought to have me round here doing it otherwise we walk away. Maybe that might have put the fear of God in them, I don't know but I think they should have been given much more opportunity. Never, at any stage, did I hear, let us look at some alternative finances from management. I certainly heard it from a number of councillors. Councillor Harrington, Councillor Waller, Councillor Anthony.*

1.10.9 The pressure that council placed on itself had extended beyond its vision of having a national team and a facility for it to play in. It had now entered the political sphere where it needed to reassure the public that it could deliver an arena.

Mayor Paciullo described this pressure:

MR PACIULLO: (20/01/04, p.77) *...I knew that the public image of the project had been tarnished as a result of the Bulldogs episode and I certainly didn't want to proceed as the Mayor, and I'm sure the Council did not, unless it knew it had the imprimatur of government and was satisfied that we were taking a correct approach from there on in.*

1.10.10 The effect of all of the pressure was manifested in:

- Compliance with the demands of the proponents
- Acceptance of advice that failed to meet the terms of reference imposed by the council⁶¹
- The adoption of inappropriate meeting procedures, including:
 - Undue confidentiality
 - Short notice
 - Exclusion of the public
 - Refusal to allow adequate consideration of reports issues
 - Stifling of debate
- Failure to adopt adequate processes to review and test the proposals being put
- Abrogation of decision-making processes.

60. See Memorandum: 08/12/99

61. See PwC Commercial Advice and Report to Council's Meeting: 03/02/01

1.10 Findings

1. In pursuing its dreams for the Woodward Park Precinct, particularly the construction of a basketball arena, council placed enormous pressure on its operations and decision-making mechanisms. This ultimately led to the loss of council funds in relation to the Oasis Project, and distorted the focus of the council in relation to its basic core functions.
2. Council's anxiety to push through various agreements with private sector groups permeated through all levels of the council.
3. Private sector groups deliberately placed huge pressure on the council, realising its frailty and the likelihood of its submitting to the pressure. Mr McIntyre of the Bulldogs, in particular, attempted to threaten and bully the council into accepting his proposals and his way of doing things, and he succeeded.

1.11 Rush Rush Rush

- 1.11.1 In August 2000 the Bulldogs had been expressing concerns over delays in the development of the commercial agreement⁶² and threatening to withdraw.

Mr Carr had been feeling the pressure and had written to the Mayor expressing his concern over the pressure being exerted.⁶³ As Mr Carr pointed out,⁶⁴ it was necessary for the council to obtain its professional advice and to assess it.

The process was made more difficult by the complexity of the negotiations, emphasised by the number of drafts of the Commercial Agreement presented for consideration. Mr Redman spoke of becoming involved in the project and being asked to review draft number 32, with the final agreement being 19 or 20 versions subsequent.⁶⁵ In all there were in the order of 60 drafts of the Agreement. By the end of October 2000 Mr Boland had reviewed version 40.⁶⁶ On 22 November 2000 the council was to acknowledge that it had received the final package,⁶⁷ and council could then obtain its final advice.

- 1.11.2 On 20 December 2000 the council received PwC's review of the Commercial Agreement. Importantly, the review acknowledged:⁶⁸

LCC have indicated that they are keen to proceed in principle, with the Oasis development as the offer brings with it the potential for significant sporting facilities for the Liverpool community.

62. Bulldogs' Letter: 23/08/00

63. See Memoranda: 16/08/00 and 23/08/00

64. See Memorandum: 23/08/00

65. Evidence of W Redman: 27/01/04, p.32

66. Letter Abbott Tout: 30/10/00

67. Council Letter to Abbott Tout: 22/11/00

68. PwC Report: 20/12/00, p.3

Substantial recommendations were contained in the report for amendments to the Commercial Agreement to reduce the risks faced by the council. Another round of negotiations ensued.

On 25 January 2001 PwC were asked to provide their “Final Report”. On Friday 31 January, Ernst & Young were to forward their report.

On 5 February 2001 the council convened an Extraordinary Meeting to consider the Oasis Master Plan and Commercial Agreement.

Councillors Harrington and Dobell-Brown sought a deferral of the matter to enable the public to be made aware of the full implication of the proposal. This was lost, and the motion to proceed forward was carried.

Council had immediately moved to proceed with the proposal as soon as the reports were received. After around 18 months of negotiations, the council rushed into assessing its advisers’ analyses of the outcomes in a few days. This fact underlies the senseless, and almost unbelievable, rush that, of itself, was bound to produce unfortunate outcomes.

1.11.3 The Act requires that three days notice be given of an extraordinary meeting. The critical council meeting of February 5, 2001 had taken place four working days after the date of the Ernst & Young Probity Report. Neither that report, nor others of equal significance, could be analysed and absorbed by the councillors.

In the rush to sign up for Oasis, no regard was had to the fundamental driver, if the project were to provide the infrastructure sought, the financial feasibility of the project.

This rush to execute contracts was more pronounced when council was considering the Early Construction Agreement.

At 4:32 pm on 28 August 2001 council commenced to receive PwC’s report. However, the documents provided to the Inquiry suggest that the final pages of the report may not have been received until 5:24 pm.⁶⁹

On the previous day Walker Douglas had sent its probity report.

On the afternoon of 29 August, the council received Abbott Tout’s legal opinion on the agreement. On the same day, Mr Carr briefed the ALP caucus on the proposal.

Given the evidence regarding the manner in which caucus conducted its deliberations, the matter was resolved at this time.

On 31 August, two days after the reports had been received, another Extraordinary Meeting of council took place.

69. Facsimile transmission note on PwC Report: 28/08/01

Again councillors Harrington and Dobell-Brown sought a deferral of the matter on grounds:⁷⁰

THAT:

- 1. The proposal be presented to the ICAC concerning the proposed early construction agreement as was done for the existing agreement of 5 February, 2001.*
- 2. That a qualified second opinion be obtained from appropriate legal and financial consultants as to the short and long term implications of Council's commitment to this project.*

This motion was lost and council resolved to enter into the Early Construction Agreement.

1.11.4 Similar attempts to avoid council's rush into agreements were made by councillors Harrington and Dobell-Brown, including:

- That the consideration of Macquarie MOU await settlement with the Bulldogs⁷¹
- That council terminate the Commercial Agreement, abandon the proposed PPP, terminate any association with the Bulldogs and replan the Arena⁷²
- That council seek a business plan, obtain a report whether to pursue tender for finance and other advisory roles and obtain advice as to the councillors personal legal liability⁷³
- That council's letter responding to concerns raised by the Department of Local Government be amended, inter-alia, to disclose possible fees payable to Macquarie.⁷⁴

Each motion was lost in council's rush forward with its processes.

It can only be concluded that in its blind pursuit of its social goal, the councillors so rushed council's processes that they failed to carry out their role to direct and control the affairs of the council.

70. Minutes of extraordinary Meeting: 31/08/01

71. Minutes of Meeting: 14/04/03, p.17

72. Minutes of Meeting: 18/03/03, p.5

73. Minutes of Meeting: 30/04/03, p.3

74. Minutes of Meeting: 26/05/03, p.2-3

1.11 Findings

- 1.** The governing body's governance role was perverted by its rush to sign major agreements without providing the councillors with a real opportunity to read, understand, deliberate on, and make considered judgements on the issues.
 - 2.** The Commercial Agreement had been negotiated over some 18 months, and because of delegations of authority to the Mayor and the former General Manager, the councillors had not been privy to the details of the negotiations, nor the extraordinary pressure by the private sector group to force the council to agree with structures that would be to the private sector's advantage.
 - 3.** The impossible time frame given to councillors to assess the various reports associated with the Commercial Agreement points to a conclusion that the Mayor and the former General Manager collaborated to prevent the councillors performing their fundamental duty to the community. There is little doubt that their actions represented a complete capitulation on their parts to the will of their private sector partners.
 - 4.** In relation to the Early Construction Agreement the same processes of restricted access and impossibly short time frames were repeated. The former General Manager connived to prevent the councillors from having an informed and effective view on what was best for the community in relation to the Commercial Agreement and the Early Construction Agreement. The Mayor condoned the process, and is as accountable as the former General Manager, for the disastrous results that ensued for the council.
-

Section 2: Providing Infrastructure—No Matter What the Cost

2.1 Introduction

2.1.1 This section looks at council's role in pursuing its dream of providing infrastructure to support the national teams promised by the Bulldogs. It also looks at council's dealings with the Bulldogs and its support of the Bulldogs' proposal to construct their club / hotel complex on the pool site.

To a large degree this section draws on and reviews matters in Part 2 section 1 of the Interim Report.

2.1.2 Much of what is contained in this section may be contrasted with the overarching view of council's current General Manager, Mr McCully who emphasised (04/02/2004, p.40):

"I would never have not been where my money was".

Quite simply, the council was not where its money was. Further, in some instances it took deliberate steps not to be "where its money was" or failed to have any regard to where its money might be going.

2.2 Assessment of Whether the Council Exercised Prudent Financial Management

2.2.1 The first of the Terms of Reference for the Inquiry focused on whether the council had exercised prudent financial management regarding the development of infrastructure projects such as those within the Woodward Park precinct. The evidence reviewed by the Inquiry suggests that the council generally failed to exercise prudent financial management.

2.2.2 According to the evidence available to the Inquiry the first full accounting of the expenditure made by council on the Woodward Park Precinct was not made until November 2003. The Manager of Financial Services of the council (Mr Stalley) undertook this work. Since the council had not adopted a financial system of reporting that accounted for staff time and costs spent on the projects, the information understates the total costs to council of the projects. Table 1 provides a summary of the information. The accuracy of the information was confirmed by a survey of council records made by an officer assisting the Inquiry. There is little doubt that if all the inputs of council to the various commercial arrangements with private sector groups, and the infrastructure projects connected with those arrangements were capitalised, the full extent of the losses would be over \$22 million.

Table 1. Summary of Expenditure on Woodward Park and Associated Infrastructure Projects November 2003

Whitlam extensions – Kann Finch	1998	\$332,051	
Sub-total			\$332,051
Stardome	1997/98	\$169,285	
	1998/99	265,577	
Sub-total			\$434,862
Oasis	1999/00	\$228,021	
	2000/01	671,974	
	2001/02	714,009	
(Foundation)	2001/02	15,000,000	
	2002/03	575,497	
	2003/04	96,646	
Sub-total			\$17,286,147
Oasis ICAC Inquiry	2002/03	\$228,352	
(Recovered from insurance)	2003/04	-77,067	
Sub-total			\$151,285
Other Liverpool 2020			\$554,138
Total			\$18,758,483

Source: Memo from Manager of Financial Services to Councillors 10 November 2003.

2.2.3 The total amount of money expended to November 2003 can be considered in two parts. 80% of the expenditure (\$15 million) passed through the Foundation, with the intention of supplying funds for the construction of a basketball stadium, called the Arena. Of the remainder a significant amount related to fees for legal, accounting, architectural, technical and other professional advice connected to the various projects that the council considered.

2.2.4 Over the history of planning for the basketball stadium, and within the different schemes that were proposed, the estimated costs multiplied as the concepts took on different forms. In evidence it was suggested that the end-cost of the Arena might have been as high as \$69 million, a considerable growth over the \$4.1 million first estimate of reconstructing the existing Whitlam Centre to provide seating and other facilities for the possible entry of a local team into the NBL competition. The evidence before the Inquiry varies on the cost of the structure that was proposed under the Early Construction Agreement (1.4). What is clear is that the council would contribute \$22.25 million of that cost. The council, in four payments made in 2002, put \$15 million into the Foundation. The bulk of that money came out of the council's Section 94 contributions fund (Section 94 funds are those collected by council from developers in order to provide new infrastructure, generally to support new facilities for the community that might be needed because of the impact of a development).

2.2.5 Work on the construction of the Arena commenced in January early 2002. By mid-year 2002 work had stopped and has never been recommenced. Practically all of the \$15 million provided by the council has been expended. The expenditure capitalised back to Liverpool Arena has been written down to nil. Liverpool Arena is shown on the books of the Foundation as having nil assets. The only physical evidence of expenditure on the Arena is a concrete slab, and some footings, and a car parking area alongside the council headquarters. The slab is estimated to have a value of \$2.7 million. That value only has meaning if the slab and footings become part of the scaled-down Arena now planned for the future. When work commenced on the Arena in 2002 the building needed a substantial base because it was designed to accommodate an ice-skating facility as well as the basketball facilities and other features. The revised plan for the proposed Arena is a greatly modified version of the 2002 design. There is, however, no guarantee that the modified Arena will ever be built. If that were to be the case it is possible that the slab, rather than having a value of \$2.7 million, would represent a substantial further cost to council. If the Arena did not go ahead the council may have to pay the cost of its removal. The Inquiry has not been able to obtain an estimate of the value of the car park built with Foundation (i.e. council) funds. At the most optimistic level, however, the total value of the slab, footings and the car park would not reach over \$3 million.

2.2.6 As at 31 December 2003 total assets of the Foundation were \$1,066,753, with total liabilities of \$1,165,000 including an amount of \$1,150,000 payable to the Bulldogs Leagues Club under the terms of the settlement. If construction of the arena does not proceed, the Foundation will be required to make good the site. A preliminary estimate of the cost of this exercise is \$1,800,000.

The worst-case scenario of the above would be a further liability to council of approximately \$2,558,000

2.2.7 The funding for the construction of the facilities to be built under the CA was to come from two sources. First, residential and commercial developments were to be constructed by the Foundation on land at Bathurst Street, Northumberland Street and the TAPPS land (Tip and Paciullo Park). In addition, new council chambers and commercial facilities were to be constructed on the Warren Serviceway land in the Liverpool CBD. These lands were owned by council. It was expected that these developments would generate profits that the Foundation could then use to construct the Arena, Waterpark and Stadium. Second, council was to provide a total of \$22.25 million towards the cost of the construction of the Arena. The Leagues Club was to provide a grant of \$10.75 million. The Leagues Club also agreed to underwrite any shortfall in the cost of constructing the Waterpark (up to \$10 million) and the Stadium (up to \$50 million).

- 2.2.8** It was anticipated that the developments would be undertaken in the following order: the CBD developments (Bathurst St, Northumberland St and the Warren Serviceway), the Woodward Park residential developments, the Arena, Waterpark, Village, TAPPS land residential, TAPPS land commercial, Stadium, carparking and if there were still surplus funds available, the Stadium would be improved.
- 2.2.9** The role of the council included providing the lands, its contributions to the Arena, its undertaking its planning and consent obligations, and commissioning traffic studies. The Leagues Club's obligations included providing management and operational expertise to the Foundation, providing its funding and providing the Razorbacks basketball team and Rhinos ice hockey team. The Bulldogs were to help administer and manage the Foundation and provide the Bulldogs Rugby League team. Macquarie Bank's role included arranging project funding, providing development management and other skills and expertise, helping administer and manage the Foundation, arranging for the provision of trustee services for funds to be applied towards the construction of the Stadium and other Infrastructure and providing loan facilities to council, if requested. Finally, the Foundation was to carry out the developments, repair and manage the facilities and encourage or promote sport and other charitable or community purposes (Commercial Agreement cls. 2.1, 4, 16.1 to 16.4, 16.9.2, 17.1, 18 and 19.1).
- 2.2.10** It was anticipated that the Arena, Waterpark and Stadium would be constructed within 10 years of the last condition precedent being satisfied. The Inquiry, however, heard evidence that for a project of this magnitude, a 30 year timetable was a more realistic framework for completion. There was evidence before the Inquiry that in the course of such a long agreement it is almost certain that the parties would have some form of dispute. When entering into agreements that have a long life ahead of them, the evidence was that the documents need to be very robust and must document the parties' agreement on potential problems as well as being able to withstand contingencies. As a result, the documents need to be prepared by a very astute legal and financial team, who are relying on substantial financial information. The Inquiry has heard evidence that the Commercial Agreement did not contain sufficient detail for it to be an effective foundation document for such an ambitious project.¹

1. Evidence of Douglas: 30/01/04, p.30-31; Lamond 29/01/04, p.41 - 43; McCully 04/02/04, p.5

- 2.2.11** Although Macquarie Bank had apparently prepared a financial model of the viability of the project, a copy of this model was not provided to council. In terms of the council, only the former General Manager and the council auditor (but not its commercial adviser) were given a briefing on the model by Macquarie Bank. There is a conflict in the evidence as to the extent to which council staff and their advisers sought and were refused greater access to the model. It appears that the assumptions underlying the model were not explained to council. The outcomes predicted by any model will vary depending upon the parameters used in the model. The former General Manager recommended to council that it was appropriate that council rely on Macquarie Bank's integrity as a corporate citizen and assume that its project assessment undertaken with the Bulldogs was commercially sound and achievable.
- 2.2.12** Apparently, Macquarie Bank declined to provide the model to council, in part because it considered it important that council satisfy itself that the Oasis project was viable. Mr Moss from Macquarie Bank suggested that council had the information to allow it to create such a model. There is no evidence before the Inquiry that council or its advisers considered the possibility of developing their own financial model. There is strong evidence that the council lacked any internal capacity to do this. In fact, it would appear that the council's understanding was that Macquarie Bank was part of the consortium specifically to provide expertise, such as financial modelling. The evidence of Mr Moss suggested that after reviewing the Woodward Park project, following one or more presentations provided by the Bulldogs, the Bank was of a mind that the project could only be viable if a cash flow could be generated by developing land beyond Woodward Park. The fact that the council-owned land that might be developed then made the council a lynchpin in the viability of the whole project. The scheme to extend the original Woodward Park project to include council-owned properties beyond Woodward Park was apparently revealed at a meeting between the Bulldogs and Macquarie Bank, at which there were no council representatives. When council was approached about supplying land to the scheme it appears that it became a willing contributor. Its willingness appears to have been based on its faith in Macquarie Bank's financial modelling, although it was only given a brief review of that modelling, and was given no opportunity to take it away and analyse its implications for the council.
- 2.2.13** There was compelling evidence before the Inquiry from a number of experienced participants in commercial matters that council ought not to have entered into the Commercial Agreement without either obtaining a copy of the Macquarie Bank financial model or undertaking its own financial modelling.

- 2.2.14 Council did not have a business plan for any of the developments to be undertaken pursuant to the Commercial Agreement. The State Government recognised the need and required council to produce a sound business case. The Department of Local Government also sought information about aspects of the Agreement that council entered into. The council never produced its own business case, nor did it satisfactorily settle the Department of Local Government concerns about what it was committing to: council was entering into an open-ended agreement, whereby it was obliged to support developments, and it was possible that those developments could generate losses rather than profits.
- 2.2.15 The Inquiry has heard evidence that raises the very real possibility that parts of the Oasis Project would produce losses. The Urbis Report (Report to the Foundation, February 2003, p.38, 41) suggests that the Bathurst Street development was likely to result in a \$10 million loss rather than a profit. A report by Mr Lonie (Report to council, October 16 2003, p. 13–14) raises serious doubts about the ability of the Arena to cover its own costs; that could leave the council liable to subsidise its running costs for an indeterminate period. The merits of these reports can be debated, but they do demonstrate that council ought not to have assumed that each aspect of the project was viable and profit generating. There is also evidence that the Elected Representatives were not given copies of the Urbis Report, or even had its existence made known to them.
- 2.2.16 Council did not undertake any market testing prior to entering into the Commercial Agreement. The rationale for recommending that the components of the Oasis development not be tendered was that there had previously (1992) been a call for expressions of interest for the development of Woodward Park and no positive responses had been received. It was also suggested that the idea of the development of Woodward Park had been in the public domain for some time and that no other developers or financiers had expressed interest in undertaking the development. This analysis was fundamentally flawed because the idea of developing the CBD and TAPPS lands to fund the Woodward Park developments only emerged after Macquarie Bank became involved in the project. The opportunity to develop commercial and residential areas, and to earn fees while doing so, changed the whole complexion of the development of Woodward Park.
- 2.2.17 PwC's advice (Final Report, January 25 2001, p. 14) to council in relation to the Commercial Agreement was that council could not be sure that this was the best offer available to it, without market-testing, but that to market test would risk losing the proponents and delay the development of the facilities. The fact remains that by declining to call for tenders for any part of the Oasis project, council failed to ensure that the proponents were offering it the highest and best use of the Woodward Park precinct.

2.2.18 Market testing has another aspect. The developments that were proposed as part of the Commercial Agreement were novel ones for Liverpool. Yet, the council did not obtain any market testing of any aspects of those developments to see whether there was a market for the products being developed.

2.2.19 The Commercial Agreement contained at least four disparate controls that might have otherwise reduced the risk to be borne by the council under the Oasis Project:

- the Arena construction would have awaited the CBD developments and have benefited from the surpluses generated
- this delay would give time for adequate planning, pricing and contracting measures to have been put in place for construction of the Arena
- the delay would have given the council the opportunity to complete its negotiations over the Crown land, to cost the land, to secure funding for its purchase and to acquire the land, and
- through Macquarie Bank's influence, an appropriate governance regime over the Foundation and ODC may have been put in place before the council was called on to contribute its funds.

2.2.20 The Early Construction Agreement (clauses 11, 9) anticipated that the council and the Bulldogs would contribute \$22.25m and \$10.75m respectively to the cost of construction of the Arena. Council's contribution was to be paid by prescribed instalments commencing on 1 September 2001. Conversely, the Bulldog's contribution was conditional and would depend on council meeting the conditions precedent under the Commercial Agreement. The funding anticipated a construction cost of \$33m. Evidence suggests that alterations to the Arena design had occurred and that its costs may have blown out substantially by this time. Evidence suggests that provision for construction costs exceeding \$33m was not considered although they had been highlighted by PwC in their report. Under the Commercial Agreement council had already lost control of the Arena development to the Foundation. The evidence suggests that the council entered into the Early Construction Agreement without knowing or considering the likely costs of constructing the Arena.

2.2.21 Importantly, the conditions precedent in the Commercial Agreement required council to have:

- acquired the Crown land,
- adopted the Master Plan for Woodward Park,
- given the lands status to permit development and
- have facilitated zonings appropriate to the developments

These conditions had not been put in place when the council entered into the Early Construction Agreement.

These failures appear to have placed the council in a position where it bore the risks solely. The council subsequently paid \$15m to an entity it had no control over, relying on those controlling the Foundation to protect council's interests.

2.2.22 The Foundation was to carry out the developments of the Oasis Project, albeit, through subservient vehicles. It had powers to determine the order of construction for the various parts of the project. Its tax-free status, charitable objects and joint governance were touted as securing the aims of the project.

The Bulldogs had incorporated the Foundation prior to unveiling the project. Beneath the Foundation were other vehicles, including ODC, which was to undertake project management. Persons associated with the Bulldogs also controlled other vehicles, including Liverpool Arena, Prestige and the Foundation.

Evidence suggests that council's failure to ensure its representation on the Foundation was fundamental to the losses sustained by it, leaving it in a position in which it could be exploited. The evidence also suggests that this failure equally applied to the other vehicles.

2.2 Findings

- 1. With audited costs to council of \$18.759 million, and additional costs of around \$4 million not included in the audit, for the construction of a concrete slab and a small car park, the evidence starkly reveals the lack of prudential financial management by the council.**
- 2. There is no guarantee that the Arena that was to be built on the slab will ever be built, leaving the council with potential future liabilities in making good the site.**
- 3. For the council to confidently enter into the type of commercial arrangements within the Commercial Agreement, it needed detailed financial and legal information. This information was never satisfactorily produced within the council, either through its staff or through its advisers. It failed to receive complementary information from its private sector partners; the refusal of Macquarie Bank to provide their financial model left the council with nothing stronger than a hope that it would all work out. The council entered into the largest single commitment it had ever made without a real assessment of the financial risks involved.**

4. **At no stage were the various commercial arrangements presented to council market-tested, and the council could not be sure at any stage that it was considering proposals that would give it best value for money.**
5. **Council, unwisely, poured a substantial amount of money into the first project (the building of the basketball arena) without ensuring that it could exercise some control over how that money would be spent. At the same time the council was willing to contribute substantially to the projects with land that it owned, or land that it was willing to purchase. If the land contributions were properly valued, the total commitment by the council could triple or quadruple the size of its cash infusion. All of this was undertaken by a council that was recovering from years of struggling to right its dangerously overstretched budget, and which had to provide general infrastructure and services to the whole council area. An area that had the fastest growth rate in metropolitan Sydney.**

2.3 The Macquarie Memorandum of Understanding

- 2.3.1 Section 1.7 in the Interim Report discussed the Macquarie MOU, the last of the commercial agreements involving the council in relation to Woodward Park. At the time of writing the Interim Report, the Inquiry was faced with conflicting evidence from the Public Hearings as to whether the MOU was legally binding. The future of the MOU has been a matter of discussion between Macquarie and the council. It is not the role of the Inquiry to form an opinion on how those discussions should be resolved.
- 2.3.2 Because the evidence before the Inquiry, concerning the enforceability of the MOU was ambiguous, an opinion was sought from the Solicitor General on the matter. This was delivered to the Inquiry on 9 June 2004. Having made reference to various Clauses of the MOU (especially 7, 8, 9, 10, 11 and 12) the Solicitor General stated that: “there can be little doubt, in my view, that a document containing the provisions set out above (i.e. the various clauses) is anything other than an agreement intended by the parties to be legally binding”.
- 2.3.3 The opinion, however, raised another matter. The council never purchased the Crown land components of the Woodward Park schemes. This, of itself, would not negate the enforceability of the MOU. But, in the opinion of the Solicitor General, the obligation of the council is only to use best endeavours to acquire the land. If the relevant government authorities did not agree upon the acquisition then it is doubtful that the council would breach the MOU. As background to the issues surrounding the MOU, material that appeared in Section 1.7 of the Interim Report is repeated here.

- 2.3.4 On 14 April 2003, Macquarie Bank and the council entered into a Memorandum of Understanding in relation to Liverpool 2020. Liverpool 2020 is the new brand name for the revised development proposal for Liverpool. The revised development proposal includes the Arena, the CBD lands, the TAPPS land, new council chambers and the Waterpark. The stadium is also included, subject to business case considerations. Liverpool 2020 is therefore effectively the same as the Oasis vision, except that it does not include the Bulldogs' developments.
- 2.3.5 Under the Macquarie MOU, council appointed Macquarie as the exclusive adviser and arranger for Liverpool 2020. This role includes Macquarie advising council in relation to the structure of a development vehicle, the delivery of the project and the scoping and structuring of each of the projects. Council and Macquarie will establish a PPP entity, which will carry out each part of the project or award an outside developer the right to carry out the project. It is foreshadowed that government and community bodies might have some involvement in the PPP Entity structure.
- 2.3.6 Under the Macquarie MOU, the parties agreed to negotiate arrangements, which would grant the PPP Entity long-term rights to undertake the various developments and grant Macquarie the role of advisor, arranger and development manager for the duration of the development. Macquarie's fees are to be negotiated having regard to industry benchmarks. Council will provide the lands, including Crown lands in accordance with the development program agreed to by the parties, provide contributions to the Arena project, capped at \$22.25 million, provide a contribution towards infrastructure and associated facilities as agreed to, and ensure that surpluses from the project are retained for further developments. Macquarie is not taking any equity in Liverpool 2020 or sharing the risks of the project.
- 2.3.7 The MOU was negotiated in circumstances where council was recovering from two significant setbacks to its vision for Woodward Park (the salary cap scandal and the ICAC inquiry) and wanted to get things moving with the Arena. Drafts of the MOU were circulated to and considered by council on 4 March 2003 and amendments were suggested. Council resolved to enter into the MOU on 18 March 2003, subject to certain amendments. These amendments were approved by a committee of council and council voted on the final draft on about 11 April.

- 2.3.8** Again, there appears to have been considerable pressure on council to reach an agreement. The key time pressures were said to be the need to complete the Arena in time for the Razorbacks basketball season of 2004/5 (i.e. 18 months away). This required having the development documents finalised, and initial drawdown in place before the end of the financial year. The evidence suggests however, that the drive to complete the Arena also had a lot to do with avoiding the embarrassment of the idle concrete footings and the need for council to deliver on its promises. In addition, the Bulldogs were pressing for their settlement to be in place by the council meeting on 28 April and the signing of an MOU between Macquarie and the council was expected to increase the likelihood of achieving such a settlement.
- 2.3.9** The evidence suggests that rushing into the MOU was unwise. First, it appears to have been unrealistic to expect that work on the Arena could start in under 6 months, given that it needed to be redesigned, documented, tendered and the question of Macquarie's fees resolved. More importantly, the MOU was again a complex agreement and more than one Councillor felt that the rush towards an agreement hampered their ability to understand it. It was also an agreement that clearly signed council up to a long-term commitment of land and funds in circumstances where the last such commitment had fallen over in a spectacular way only a few months previously. In those circumstances, the rush to enter into another complex agreement without fully understanding it, suggests that council did not learn any lessons from the failure of its earlier agreements with the Bulldogs.
- 2.3.10** The Macquarie MOU provides for the construction of most of the same developments as those proposed under the Commercial Agreement, without any contribution being made towards those developments by the Bulldogs. Again, the success of the MOU will depend up the surpluses that can be generated from the CBD and TAPPS land developments. The aim is that these projects will generate enough money to fund the Arena and a Waterpark and perhaps a stadium. Ownership of the Arena at least will rest with council. Therefore, council faced the same financial risks that it did when entering into the Commercial Agreement.

- 2.3.11** Although council had obtained a detailed commercial review of the Commercial Agreement and the Early Construction Agreement, no commercial review was undertaken before council entered into the Macquarie MOU. It appears from the evidence that the Inquiry has heard that no thought was given to the need to undertake a commercial review of Macquarie's proposal. The need for some kind of detailed review of the MOU was highlighted by the differing views heard by the Inquiry about how the projects would be built under the MOU. It appears that Macquarie is now of the view that the Waterpark will certainly be constructed, while it is unlikely that the Stadium will be constructed. The Arena may be built, if it can be financially viable. The Councillors' view (which differs from that of some council staff) appears to be the Arena will be built.
- 2.3.12** One of the key concerns now being expressed by council staff about the Macquarie MOU is that it requires council to provide council's lands and certain areas of Crown land to the PPP Entity when required. Council cannot now develop any of these parcels of land without first obtaining Macquarie's approval, or breaching the MOU. Importantly, there is no time limit on this obligation. Council has effectively relinquished control over these properties for an indefinite period.
- 2.3.13** There was some evidence before the Inquiry that under the MOU, Macquarie will require council to continue developing the lands set aside by the MOU, even if council has already constructed those projects that it considers important and does not wish to develop further lands. There is also some doubt about whether council can choose to expend any surpluses on projects outside those outlined in the MOU. So, for example, if surpluses have been generated from the development of Northumberland St and council prefers to use those surpluses to extend the Casula powerhouse, rather than build the Waterpark, there is some doubt about whether it would be able to do so. The lack of clarity in the arrangements entails the risk that council has relinquished control of both its land and its power to make decisions about what to do with the surpluses generated by the development of that land.
- 2.3.14** Under clause 8 of the Macquarie MOU, council has agreed that the \$600,000 break fee, which was payable by the Bulldogs to Macquarie Bank, will be carried by the PPP entity as a project cost. Any project costs must be paid for before the projects produce surpluses or profits. Surpluses or profits can be used by council for further developments. The net effect of this clause is that council will pay for Macquarie agreeing to release the Bulldogs from the Commercial Agreement.

2.3.15 Schedule 3 of the Macquarie MOU provides that council's contribution for the Arena project was to be capped at \$22.25 million. This appears to have been a significant selling point for the Councillors, who seem to have formed the view that having put forward this money, the council would be guaranteed an Arena. The capping of council's contribution raises two further issues. First, does the \$22.25 million include the \$15 million already spent by council? The answer to this question appears to be "yes". This leaves the question of how the remainder of the Arena will be financed. The exact price of the Arena is unknown, although one estimate put it at about \$47 – \$50 million. The council only has an obligation to pay a further \$7.5 million towards the construction of the Arena. Given that this \$7.5 million will not be sufficient to construct the Arena, it appears the remaining funds will have to come from the generation of surpluses from the other developments, or from loans. Thus, the construction of the Arena is actually contingent on sufficient surpluses being generated. If surpluses are not generated and council still wishes to have the Arena constructed, other funding options may need to be explored.

2.3 Findings

1. **The future of the Macquarie MOU is being negotiated by the council and the Bank. The Inquiry has no opinion as to the proper outcomes of those negotiations.**
2. **In the evidence presented to the Public Hearings the enforceability of the MOU was discussed by various speakers, but the issue remained ambiguous.**
3. **In the light of the conflicting opinions presented at the Public Hearings the Inquiry sought an opinion from the Solicitor General. His opinion is that the MOU is enforceable, although if the NSW Government were not to proceed with the sale of the Crown land needed to complete the projects, and the council had used best endeavours to purchase the Crown land, it would not be in breach of the MOU.**

2.4 Council's review of the costs and feasibility of the proposals

- 2.4.1 In each of the major commercial projects that the council considered (Stardome, Oasis, Liverpool 2020), it adopted a broad and simplistic approach to its review of cost structures.
- 2.4.2 As private sector entities became involved with each of these proposals, the council appears to have concerned itself only partially with the financial viability of the proposals.

In 1997 the council was considering the upgrade of the Whitlam Centre. It retained LRM Australia to:²

- *assemble an experienced project team to devise a means of economically expanding the Whitlam Leisure Centre to accommodate spectator seating for a minimum of 5,000 people;*
- *examine any opportunities as part of an expansion program that will assist in achieving a feasible solution;*
- *provide estimates of capital cost for proposed stages of development;*
- *provide a financial operating forecast of the expanded facility and assess its future capacity to service borrowings and assist with capital formation; and*
- *make any other recommendations which will assist council achieve its long term objectives and vision for the development of the Woodward Park Precinct.*

2.4.3 According to an internal memorandum, council was faced with a potential cost of between \$11m to \$18m.³ It had a choice:

- Find this money, or
- Proceed with the private sector funded arena then being proposed by Stardome

The latter would require that the council provide seed money of \$6m to be funded from the sale of “idle” assets, including the pool site.

2.4.4 Proceeding with this proposal would:

- Remove construction and other risks from the council
- Provide the infrastructure that the council so dearly sought
- Return the asset to council when the BOOT scheme ended.

On face value, the council determined that this was a good deal.

The private sector would bear the risk. The council would provide the land and some funds it had already generated, or would generate from land sales.

The council would achieve its vision of:⁴

- *putting Liverpool in the “national league” of cities which have major leisure and recreation facilities and successfully host their national team*

2.4.5 Additionally the Stardome project would be:

- *a major contribution to the ability of Liverpool residents to attend major sporting and entertainment events in their own City, and to Liverpool’s increased capacity to allow its citizens to “work, rest and play” in Liverpool*
- *acknowledgement of Liverpool’s growing stature as a City and a regional centre through proponents choosing Liverpool as the site of the Arena*

2. LRM Report: August 1997, p.2

4. Report to Council's meeting: 11/12/98, p.12

3. Undated memo: File E 91175, Pt. 15

- *an economic and employment boost to the City, both in direct Arena jobs and through the creation of a significant leisure sector which will attract further investment.*

2.4.6 Council convinced itself that from that point its role would be quite simple.

On 5 February 1999 Mr Carr met with Mike Ellis and Mr Hanna. Mr Ellis had been council's project manager for Woodward Park. He had been retained as a consultant after leaving council in February 1998.

The meeting was to address the decisions necessary to progress Stardome's arena and hotel proposal.⁵

It was agreed that:

- Stardome would purchase the necessary land at Woodward Park
- the valuation would be based on a 6 (b) zoning – recreational private
- that council's due diligence processes would require that AIC provide:
 - a project cost summary
 - financing schedules
 - debt service analysis
 - revenue guarantees
- council funding was to be:
 - \$4.5m (cash)
 - \$1.3m represented by the value of council owned land.

The council believed that this would not present problems.

All that remained was to purchase the Crown land for \$3m on a deferred settlement of 8–12 weeks.

2.4.7 Council's subsequent actions demonstrated similar superficial thinking, with council maintaining a view that the private sector would provide the infrastructure and undertake the risk, all that council had to do was to provide or to secure the land.

Council's review of the possible cost and possible difficulties in securing the Crown's approval for the purchase does not appear to have been considered.

Problems that might be associated with carrying out the project likewise appear not to have been considered.

A similar approach was taken with the Oasis project. Even though it had been warned that its independent advisors could not be satisfied that the proposal had a sound commercial base, the council chose to proceed with the proposal.

5. Minutes of meeting: 5/2/99

2.4 Findings

- 1. The council failed to review either the costs likely to be incurred in the provision of the infrastructure or the overall viability of what was being proposed for them with the Stardome proposal.**
 - 2. The council was content to rely on the proponents to have satisfied themselves of the cost and viability of the projects, demonstrating a simple faith in the private sector body to manage the detail of the commercial issues, in the process abdicating its own responsibilities to protect and manage community assets.**
 - 3. Such was council's willingness to proceed with proposals that it was willing to waive the probity procedures it had put in place intended to ensure the viability of the Oasis Project.**
-

2.5 The Old Pool Site

2.5.1 Council's sale of the pool site would give it the \$4.5m required by the Stardome project.

Completion of the sale would provide the funds.

Council had effective control over this as completion depended on council's

- approval of the club's development application
- removal of the heritage order affecting the site⁶

2.5.2 Council, at this point, had demonstrated a willingness to meet with what it perceived to be the Bulldogs needs.

In its letter of 9 July 1997 the Bulldogs had formalised a proposal to the council. It proposed:

- to establish a club and hotel complex at Liverpool
- to relocate the training operations of its football club to Hillier Oval
- to relocate its administration to the club or the arena
- to acquire a major interest in the Slammers
- to assist the council to establish a stadium at Woodward Park and to play its football matches at the stadium when built.

The Palms Resort was to be a major leisure and entertainment facility providing a valuable community facility and a significant employer in the district, according to the Bulldogs.

2.5.3 The proposal contained an offer to purchase the pool site in the following terms:⁷

6. Contract of Sale: 29/1/98 clauses 3 & 4

7. Letter from Bulldogs: 9/7/97, p.4

12. *The League Club hereby offers to purchase from Council the land known as Portion 383 comprised in Certificate of Title Folio Identifier 383/999576 (area 2.9718 hectares) situated on the corner of Copeland Street (Hume Highway) and Memorial Avenue in the City of Liverpool (hereinafter referred to as “the pool property”) for the sum of \$4.5 million*

2.5.4

The offer, however, was conditional on a number of matters, within and outside the control of the council. Those falling under the control of the council comprised:⁸

14. *The purchase, referred to in No 12 above is to be subject to and conditional upon the following matters occurring by 30 September 1997 or within such further period or periods of extension granted by the League Club but not extending beyond 31 December 1997: –*

a) Council granting approval to a Development Application by the League Club for the erection upon the pool property of the licensed club complex described in the plan herewith upon terms and conditions satisfactory to the League Club.

b) Removal of the Heritage Order affecting the pool property.

c) Closing of the road access and extinguishment of any legal rights with regard to the section of road between the proposed licensed club complex and the Whitlam Centre.

d) Council granting approval to the League Club constructing at its cost: –

i. a covered access from the proposed rear entrance of the licensed club complex to the Whitlam Centre so as to enable persons to move between the Whitlam Centre and the licensed club complex, and

ii. extensions to the aerobics and gymnasium sections of the Whitlam Centre in order to cater for the increased usage of the Whitlam Centre.

e) Club/hotel complex to have access along the road to the south of the pool property

In November 1996 the Bulldogs had given an indication of their “strong interest” in developing a new licensed facility on the site⁹. Now the Bulldogs were formalising this interest.

8. Letter from Bulldogs: 09/7/97, p.4

9. Letter from Bulldogs: 04/11/96

2.5.5 An earlier letter dated 17 June 1997 endorsed “Draft Only” had contained somewhat different proposals, including:¹⁰

- an offer to purchase the pool site for \$3.5m
- an offer to carry out alterations and additions to the Whitlam Centre at an estimated cost of \$4.5m
- a suggestion that the money received from the pool sale be applied to the provision of a basketball stadium to seat at least 6,000.

2.5.6 By this time the Bulldogs and Stardome had entered into a Heads of Agreement that provided, amongst other things, that they should work together to secure the total freehold of the “property”, query Woodward Park, from the council and State Government.

2.5.7 Shortly after the offer was received from the Bulldogs, council staff were anticipating that a sale of the pool site to the Bulldogs could proceed without going to tender on the basis that the final offer, when received, would fall “within the extenuating circumstances and requirements of the Local Government Act”.¹¹

The report sought a delegation to the General Manager, Mr Carr to negotiate with the Bulldogs.¹²

Additionally, the report sought a resolution that the council not oppose either the Bulldogs or Stardome proposals until they had become integrated.¹³

2.5.8 On 20 January 1998 the council resolved to sell the pool site to the Bulldogs for \$4.5m.¹⁴ It had sought advice from a committee comprising Mr Marsden (council solicitor), Ms Murrell and Mr Newsome (council staff). They had relied on valuations from Knight Frank dated 1 February 1996, Stanton Hillier Parker dated 3 April 1997 and Collier Jardine dated April 1997.

Mr Marsden described the process:

MR MARSDEN (18/02/04 p.6)... *Valuations were called from three valuers in relation to the pool and I was asked to sit in on this committee which had Roy Newsome and Jan Murrell on it. Brian was not on it.*

I realise that contradicts what is his evidence but he wasn't on it and the committee reported back to Brian having looked at these three valuations and they were sealed, Mr Commissioner, when they arrived at the room so no one had seen them beforehand. They were added up and divided by three and that was the offer made to Canterbury and then the process came for the contract. . . .

10. Letter from Bulldogs: 17/6/97, p.4

11. Report to meeting: 4/8/97, p.19 et seq.

12. Report to meeting: 4/8/97, p.20

13. Report to meeting: 4/8/97, p.20

14. Timeline: p.15

2.5.9 At the time that the council resolved to sell the old pool site, Mr Marsden had formalised the terms of a special condition that read:¹⁵

1. *This contract is subject to and conditional upon the approval of the Council of the City of Liverpool and any other consenting authority to the construction of a club or a Club/Hotel complex upon the subject property (the Development) upon such terms and conditions as may be imposed by the Council of the City of Liverpool or any other consenting authority provided those terms and conditions are reasonable for a development of the nature contemplated herein.*

2.5.10 On 25 January 1998 the Bulldogs' Mr McIntyre wrote to Mr Marsden advising:¹⁶

4. *Special Condition 3 (a) should be amended so as to make the sale subject to development approval being granted upon terms and conditions satisfactory to the Club. This has always been stipulated as a condition of the purchase of the property since the Club's original offer dated 9 July 1997. The main reasons for such stipulation are as follows: –*

a) *The Club's offer of \$4.5 million was well above its valuation of \$3.225 million*

b) *The Club made it clear to Council that it was not prepared to pay any relocation expenses or to make any other cash contribution on top of the \$4.5 million*

c) *The Club has always required agreement upon the following additional matters: –*

i) *the closure of the road access and the extinguishment of any legal rights with regard to the section of road between the Whitlam Centre and the proposed club complex*

ii) *the Club constructing at its cost a covered access from the proposed rear entrance the proposed club complex to the Whitlam Centre so as to enable persons to move between the Whitlam Centre and the proposed club complex*

iii) *the Club constructing at its cost extensions to the aerobics and gymnasium sections of the Whitlam Centre in order to cater for the anticipated increased usage of the Whitlam Centre*

iv) *The Club being granted legal access along the road adjacent to the southern side of the subject property.*

The Club would probably need to advise within a period of seven days whether the terms and conditions upon which the development application has been granted is acceptable to the Club.

2.5.11 Subsequently, this was to change.

15. Marsden letter: 19/1/98, p.2

16. G McIntyre letter: 25/1/98, p.2

On 27 January 1998 Mr Marsden delivered a letter to Mr Carr attaching a handwritten note of a clause that Mr McIntyre had requested.

Mr Marsden wrote:¹⁷

BY HAND DELIVERY TO BRIAN CARR

*Mr B. Carr,
General Manager,
Liverpool City Council,
DX 5030 LIVERPOOL*

27th January, 1998.

Dear Brian,

*RE; LIVERPOOL CITY COUNCIL sale to CANTERBURY BANKSTOWN
LEAGUE CLUB LIMITED*

PPTY; CNR. MEMORIAL AVENUE AND COPELAND STREET, LIVERPOOL

I refer to numerous telephone calls this morning. I understand the pressure that you want to exchange Contracts. I understand that you want the Contract finalised. I understand that you want it done as soon as possible as you are getting lots of pressure.

I also understand that Gary McIntyre has re-written the whole thing and put his additional clauses into it.

I said in an earlier letter that I have got no great problems with that, so long as the clauses are okay with the Council.

However, he has now rung me and wanted to add a clause which I have taken down in handwriting, a photocopy of the handwriting is attached.

I said to you in my telephone call that I have got a problem with this. I know that you have said that the Planning Department, and I think that you said Gerard, has said it is okay.

I have got some doubts and I really think that we should get Adam Seton to do an opinion on it.

There is a real question of making this decision when you don't know what is going to happen with the DA

I know Brian that you said that it is okay and I know Brian you said that you were going to go ahead with it, well it is a matter for you, we will do whatever you say.

However, you have to look at whether you can do it or not.

The pressure of trying to exchange is very big and I understand that.

¹⁷. Marsden letter & note: 27/1/98

I don't understand after all this time why there is all this rush, rush, rush.

Brian, as I said to you personally, and this is very personal, just be careful with this whole thing. It is a real problem and I know that you are upset about the way the McIntyre is ringing you up, abusing you, shouting about getting things done and that is why I have made this personal. At the end of the day you have get to make sure that it is okay.

*Yours faithfully,
MARSDENS*

Per;

*JOHN R. MARSDEN
Senior Partner*

2.5.12 The hand written note read:

the vendor acknowledges that a sec 94 contribution is not relevant to this development & as such the Vendor in its capacity as a approving authority shall not required any sec 94 contribution or impose any conditions which require the developer to expend monies outside the normal requirements of the development itself.

This was to be incorporated into the contract, or exchanged, in the following form:¹⁸

This contract is subject to and conditional upon the approval by the Council of the City of Liverpool and any other consenting authority to the construction of a club or a club/hotel complex upon the subject property (the Development) upon such terms and conditions as may be imposed by the Council of the City of Liverpool or any other consenting authority provided those terms and conditions are reasonable for a development of the nature contemplated herein and the vendor acknowledges that a Section 94 contribution is not relevant to this development under the present Law and as such the Vendor in its capacity as an approving authority shall not require any Section 94 contribution or impose any conditions which require monies outside the normal requirements of the development itself.

2.5.13 Mr Marsden gave evidence of his attending the council to discuss the clause, and that he expressed his concerns over it to Mr Carr.¹⁹

The Inquiry did not hear evidence that would indicate the amount of the contributions that the council would forego.

Mr Creber, a former staff member, gave evidence that substantial works including the provision of slip lanes, additional turn facilities and upgrading some roads was anticipated, indicating:

18. Contract of Sale: 29/1/98, Clause 3 (a)

19. Evidence of J Marsden: 18/2/04, p.30 et seq.

MR BROAD: (19/02/04, p. 34) *Now, the works that you have just talked about: were they substantial?*

MR CREBER: *They were quite substantial in terms of road pavement works, changes to traffic signals, extending length of turn bays, those sorts of things. Yes.*

MR BROAD: *In your experience, would the cost of those works have been substantial?*

MR CREBER: *Yes. They would have. Any works on a major road network are very expensive.*

MR BROAD: *It would be usual, in your experience, to recover those costs from a developer?*

MR CREBER: *If there's a direct relationship between the developer and the works. Yes.*

MR BROAD: *Your primary view, as you have just expressed, is that there was, in the circumstances of the Bulldogs Club development?*

MR CREBER: *There was a need because of that development, to upgrade the road networks surrounding the site. Yes.*

2.5.14 The council had resolved to sell the pool site without going to tender. It had supported its decision by reference to three valuations.

One of those valuations was dated 1 February 1996, almost two years earlier.

2.5.15 Clause 3 (a) (2.3.10) represented a major change to the basis of the sale. The insertion of the clause would potentially grant major savings to the developer of the club and hotel.

It was to:

- undermine the basis of the comparability of the sales underlying the valuations, thereby undermining their value as a benchmark for negotiations
- place the Bulldogs in a preferred position
- undermine the authority given to Mr Carr to negotiate the terms of the sale
- undermine the integrity of council's determination powers under the EP&A Act
- cost the council a substantial amount of money for the traffic and other works associated with the project.

2.5.16 There could be no sound basis for the concession.

- The Bulldogs had only shown limited interest in committing their football team to Liverpool at the time.

- The arena project, which was to provide facilities for the Razorbacks had been proceeding independently, significantly, with limited involvement by the Bulldogs at that time.
- The Bulldogs had not contemplated the concession when the deal was struck.

2.5.17

The concession was granted in January, a time of recess for the council. Councillor Harrington, who was a critic of the club's proposal gave evidence that he was not aware of the concession until the development application was received.²⁰

Mayor Paciullo was asked what he saw the benefits of receiving the club were and gave the following evidence:

MR BROAD: (19/01/04, p.29)...*Mayor Paciullo, what did you see as the benefits of the Bulldogs Club moving to Liverpool?*

MR PACIULLO: *Well, that was to be part of the overall sporting activities which would be occurring. I've mentioned the arena with the people that would attract, a stadium later on and of a general area of social and sporting community activity.*

MR BROAD: *At the time that the old pool site was sold did you see any particular benefit in having the Bulldogs Club there as against other sporting facilities?*

MR PACIULLO: *Well, I go back to the original decisions of Council and the fact that it was seen as opportunity to service sporting activities that would take around and again it was all associated with the general community activity of that whole area.*

MR BROAD: *So the club would provide sporting activities for the community?*

MR PACIULLO: *Well, the club itself would have the normal club facilities obviously and would have adjunct activities to all the other intended future uses of Woodward Park by their teams and by the public and by crowds that obviously would come to Woodward Park.*

Mr Carr was asked about the importance and effect of the clause and gave the following evidence:

MR BROAD: (03/02/04, p. 13–15) ... *Can I take you to clause 3(a). Now that clause commences by saying:*

That the contract is subject to and conditional on approval by the Council and any other consenting body, to the construction of a club or club/hotel complex.

MR CARR: *Do you want me to comment on that?*

²⁰. Evidence of C Harrington: 22/01/04, p.49–50

MR BROAD: *No, there's no need. It deals with what I've already put to you about the acceptability of the conditions and it also raises another point and that is this – it contains further provisions which are as follows:*

And the vendor acknowledges that a section 94 contribution is not relevant to this development under the present law and then provides the vendor ...(reads)... to expend moneys outside the normal requirements of the development itself.

Can you tell the Inquiry to your knowledge, how that clause came to be inserted in that contract?

MR CARR: *No, I can't recall how the clause was written into that contract. I know that the discussions were about the Bulldogs being about to buy the land for the particular purpose that they wanted to purchase the land for, which was the club, but the details of that particular contract, that has been drafted up. The only thing that I can recall that probably would have been drafted up by our solicitor.*

MR BROAD: *You agree it is a very important part of that clause?*

MR CARR: *Being able to use the facility?*

MR BROAD: *No, being able to obtain an approval and not pay section 94 contributions?*

MR CARR: *That is a fairly important element to buy land and then be able to do with that land that you are buying the land for, otherwise the vendor wouldn't want the land.*

MR BROAD: *Well, it is a very important clause because you have a purchaser/developer anticipating a very major development. The anticipated development at that stage as I understand it was a club and 150-room hotel. And what Council has done hasn't it, is simply said: we will enter into a contract where we will not exercise our discretions in requiring 94 contributions when any development application comes before us.*

MR CARR: *I thought the clause said that it was, when you read it out, the vendor acknowledges that a section 94 is not relevant to this development under the present law, and as such, the vendor is in its capacity as improvement, shall not require section 94. May be I'm misinterpreting, does that – I thought that meant that under the law, the section 94 couldn't be applied to that development.*

MR BROAD: *Well, that is your view on the clause, yes. Does not Council consider whether section 94 payments are applicable when it receives a development application as part of the consideration process?*

MR CARR: *Yes, it does.*

MR BROAD: *Yes. And to your knowledge, would an application for development consent for a hotel, leaving aside a club, normally anticipate that there would be demands on infrastructure?*

MR CARR: *Well, yes, I think in the normal course of business it would.*

MR BROAD: *At that time, the Oasis Project was not on foot was it?*

MR CARR: *No.*

MR BROAD: *At that time, the proposal by the Bulldogs was in accordance with what LRM had stated in its report of August '97, that is, some use of Hillier Oval and some potential linking of the club to an arena?*

MR CARR: *Yes, that is what would have been contemplated at the time.*

MR BROAD: *Yes.*

PROF DALY: *Just a supplementary question. Can you recall any other commercial application in your many years at Liverpool City Council where section 94 contributions were waived?*

MR CARR: *Not to my recollection.*

PROF DALY: *So this is quite a significant departure from normal procedure and a significant loss to Council of income related to the section 94 contributions that normally would have come to it.*

MR CARR: *Under this arrangement, there appears – it certainly says that section 94 contributions are not going to be imposed, but may be I'm misinterpreting, but my reading of it says that it was outside the law to raise it.*

PROF DALY: *Well, no. I think that is your interpretation of it, and I think that is probably a wrong interpretation, but you said a little earlier that you don't recall ever reading that or knowing about it, is that right?*

MR CARR: *I can't recall the specifics of the section 94 matter.*

PROF DALY: *But you would agree that it is a very significant aspect of the contract?*

MR CARR: *It is a significant aspect, yes.*

2.5.18

At the time the council was clearly motivated to secure the sale. Only through this could the council provide the \$4.5m needed to secure the Stardome project.

The inclusion of the clause was yet another indication that the council would do whatever it thought was necessary to secure the infrastructure – no matter what it would cost or no matter what council may have to forego.

2.5 Findings

- 1. The insertion of condition 3 (a) into the contract for sale of the pool site represented:**
 - **A fundamental change to the basis upon which council’s advisory panel had recommended acceptance of the Bulldogs offer.**
 - **A substantial and inappropriate concession granted to the Bulldogs.**
 - **A fundamental change to the nature of the authority delegated by the council to the former General Manager, Mr Carr.**
 - **A willingness on the part of the council to undermine the independence and rigour of its planning and determination powers under the EP&A Act.**
 - **An inappropriate, unjustified and illegitimate concession to the Bulldogs.**

 - 2. It was to impose an unfunded liability on the council to carry out substantial and expensive works associated with the approval of the club/hotel subsequently approved by it.**
-

2.6 Obtaining the Land

2.6.1 Both the Stardome and Oasis projects anticipated development of facilities on land owned by the Crown.

The agreements entered into by the council, facilitating these projects, called upon the council to acquire the Crown land.

The council ignored the major risks associated with the Crown land, namely:

- that it might not be able to acquire the land, or
- the expense of acquiring the land, or
- that the acquisition would take a considerable period of time to complete.

2.6.2 Having previously resolved to enter into the Stardome Heads of Agreement, the council resolved to acquire part of the Crown land, known as the “Panhandle land” in December 1998.²¹

Mayor Paciullo had previously raised the prospect of council acquiring the land with Minister Yeadon in June 1997.²²

On 6 November 1998 the council wrote to DLWC indicating its desire to acquire the panhandle land, indicating:

2. Council has received the consent of DLWC to acquire the land under the Land Acquisition (Just Terms) Compensation Act 1991.

This application does not appear to have proceeded.

21. Minutes of Meeting: 11/12/98

22. Departmental Memorandum: 16/08/00, p.1

2.6.3 The Oasis project called for council to provide the “Project Lands”,²³ relevantly Woodward Park and the TAPP’S land.²⁴

Under the Commercial Agreement the council was constrained only to make such offers to purchase the Crown land approved by the Foundation²⁵ and was bound to

- endeavour to acquire the water park and stadium land at no cost, and
- to purchase the rest of the Crown land on terms providing for payment by instalments over 20 years.²⁶

2.6.4 When the council entered into the Commercial Agreement it had not obtained unequivocal agreement to its acquisition of the Crown Land. Rather, the Minister had endorsed a recommendation:²⁷

4.6 Subject to the legal advice being obtained by OCA the most practical option to further the proposal may be for council to acquire the land at full market value – see Tag “A”.

Importantly, more than six months prior to the Commercial Agreement the council was aware that DLWC would be seeking the full market value of the land.

2.6.5 On 5 February 2001 council considered whether it should enter into the Commercial Agreement.

The General Manager’s report referred to the need to obtain the Crown land in the following terms:²⁸

Discussions with NSW Government on accessing Crown land for the project

Under the Commercial Agreement, Council is required to secure land which it does not own but which is needed for the project. All such land is owned by the Crown. The land owned by the RTA and Department of Urban Affairs and Planning within Woodward Park relates to Parramatta to Liverpool Transitway and does not require any change to its current status.

Council officers have engaged in a process of clarification with the NSW Government on ways to secure the land on mutually agreeable terms, Meetings have been held with the Department of Land and Water Conservation (DLWC) regarding the Crown land. The Mayor and Council management met with Hon Richard Amery, Minister for Lands and Hon Craig Knowles, Minister for Health and Member for Macquarie Fields on 9 November 2000. The purpose of the meeting was to clarify the NSW Government position on the access to Crown land by the Council for the purpose of advancing the Oasis Master Plan.

23. Commercial Agreement Clauses 4.4 & 8 (a)

24. Commercial Agreement Clause 1

25. Commercial Agreement Clause 8.4

26. Commercial Agreement Clause 8.4

27. DLAWC Memorandum: 16/8/00, p.2

28. Report to Council Meeting: 5/2/01, p.44

Two primary options pursued:

- 1. purchase of the needed land either by compulsory acquisition or by agreement, and*
- 2. securing the land and enable it to be used by Council for public purposes.*

The Commercial Agreement stipulates that most of the Woodward Park site will remain in public ownership, with the only parts for freehold sale will be the commercial and residential components.

A detailed proposal will be put to the NSW Government to secure the land as described in Commercial Agreement and according to the second option described above.

Reference had been made to the estimated costs of \$1.5m for the “Panhandle land” earlier in the report.²⁹

No reference was made to the earlier advice that the Crown expected to be paid full market value.

Council’s financial assessment was based on an additional amount of \$1.5m “if State Government insists on payment for specific part of land [“Pan Handle”]”.³⁰

2.6.6 Council’s position under the Commercial Agreement may not have been as risky as it was later to become, had the council adopted more realistic strategies.

Council’s obligation to acquire the Crown land could have been delayed as development on Woodward Park was to follow after the CBD developments, by which time the Foundation should have generated profits of \$13m³¹ and possibly the residential component of Woodward Park.

2.6.7 The position of council became critical when it entered into the Early Construction Agreement.

In March 2001 the council had pursued the purchase of the panhandle section of the Crown land following its approval of the arena.³²

On 7 May 2001 the council wrote to DLWC seeking to acquire the land. The letter attached a submission prepared by Price Waterhouse Coopers.

On 17 May 2001 the council received DLWC’s advice that in the absence of the Treasurer’s approval a realistic market value would be expected. On 28 May 2001 DLWC advised that it had given consideration to the council’s application and suggested that council’s application proceed at market value.

29. Report to Council Meeting: 5/2/01, p.29

30. Report to Council Meeting: 5/2/01, p.54

31. Report to Council Meeting: 5/2/01, p.12

32. Council Letter to DLWC: 1/3/01

In mid June DLWC had written to the council acknowledging that development consent had been granted for the arena. It advised that its consent as owner for commencement of construction was dependent upon, inter – alia council undertaking to acquire the lands.³³

2.6.8 On 4 July 2001 the State’s valuer³⁴ was to value the land component of the Crown land comprising the childcare centre, the hall and Meals on Wheels facility and the playing fields and amenities block on a number of bases.

One of the bases put forward was to disregard the current zoning, adopt a business zoning and to assume that the land was unserviced and land locked. This gave a value of \$1.6m.

Other bases, under the Valuation of Land Act and Land Acquisition (Just Terms Compensation) Act (under which the council was proposing to acquire the land) gave a value of \$12.3m.

2.6.9 The Early Construction Agreement provided for the immediate construction of the Arena.³⁵ Funding for the Arena’s estimated \$33m cost was to be provided by council’s contribution of \$22.25m and a loan \$10.75m from the Bulldogs³⁶ when the council had satisfied the conditions precedent.

The cost of acquiring the Crown land, in accordance with council’s undertaking to DLWC was unfunded.

The Foundation, which may have held funds towards the costs of acquiring the Crown land, would not have the surpluses from the CBD developments since the construction of the Arena would precede the development of the CBD sites.

2.6.10 On 31 August 2001 the council considered whether it should enter into the Early Construction Agreement. The General Manager’s report to council noted that council’s acquisition of the Crown (DLWC) land was a condition precedent to the Commercial Agreement. It reported council’s progress with implementation of the acquisition:³⁷

2 *Council obtaining Ministerial approval to increase its loan borrowings – the Minister for Local Government has approved the \$7.25 m loan*

3 *Council obtaining ownership of all the Project lands not already owned – formal offer made to Department of Land and Water Conservation (DLWC) in July;*

– offer made on the basis of State Valuation Office valuation (to a brief agreed to by DLWC) – valuation method 1

33. DLWC letter: 13/6/01

34. Valuation of State Valuation Office: 4/7/01

35. Early Construction Agreement Clause 4

36. Early Construction Agreement Clauses 6 & 11

37. Report to Meeting: 31/8/01, p.11

valuation method 1: peppercorn for public spaces and market rate for land to be sold for residential and commercial uses

valuation method 2: market value for all Crown land at open spaces prices

- Council is awaiting acceptance of offer from DLWC. The Department has also informed Council that it is waiting for Olympic Co-ordination Authority's approval which may be subject to decisions by NSW Government, potentially including the Cabinet or a Cabinet Sub-Committee*
- Submission forwarded to Department of Local Government to acquire Crown land as Section 38 of the Local Government Act requires Ministerial approval for such purchase; expecting resolution in 4 to 6 months according to Departmental advice before proceeding with the formal purchase process*

The Ministerial approval to increase borrowings was important, as this would provide \$1.5m towards the purchase of the “Panhandle land”.³⁸

2.6.11 The report simply ignored DLWC’s letter of 6 August 2001 advising:

In respect to the valuation it is unlikely that the Department will be able to offer significantly less than the market valuation for the land without Treasury approval.

Mayor Paciullo had been apprised of the matter and had already written to the local member, Mr Knowles, seeking support for council’s purchase at less than market value.³⁹

2.6.12 PricewaterhouseCooper appears not to have considered the costs of acquiring the Crown (DLWC) land in their report on the Early Construction Agreement stating:

DLAWC Land Acquisition

Council have made application to DLAWC for the required lands. However, we understand that Council is yet to formally acquire the lands from DLAWC. Notwithstanding this we are advised that Council have in fact already been advised of DLAWCs agreement to sell the section of required land needed for the Arena. In any event, the lands are already in Council’s care and control as we understand, are able to be used for the Arena development under it’s (sic) present stewardship.

38. Report to Meeting: 5/2/01, p.29

39. Letter to Craig Knowles, MP: 22/8/01

In regards to the remaining DLAWC lands for the Project as a whole, we are advised by Council, that the status of this procurement is such that there is no indication from the owners that Council will not get such lands. The mechanism of acquisition is however an issue yet to be clarified but at this stage we are advised by Council and it's (sic) legal advisors, that it does not have any more bearing on the lands required for the Arena under the ECA than under the CA.

Council remains exposed to the \$1.5m land for Collingwood House (to be funded from it's (sic) borrowings), however, from a Balance Sheet perspective, Council's assets shall remain in tact with such land thereafter belonging to Council (notwithstanding the Project may cease prematurely).

and concluding:

Overall Commercial Risk – Opinion

Council's position appears to be no worse than under the CA providing access to surpluses is limited to CBD surpluses as discussed above, and in some degree, Council might be seen as being better protected with the potential to own the Arena, and greater security over the CBD section of development.

Council has sought from the Proponents acting in the spirit of cooperation, letters of commitment from:

- (i) operators/advisors to the Foundation and Club regarding the effectiveness and functionality of the Arena and skating facilities as proposed*
- (ii) an appropriate Project Development Manager with undoubted delivery capabilities, and*
- (iii) The quantity surveyor's cost report for the Arena*

in order to provide assurance to Council of deliverables.

Assuming these letters and reports are provided to Council's satisfaction, with the market risk of Project delivery in the ECA essentially the same as in the CA, PricewaterhouseCoopers is of the opinion that Council may be satisfied in entering into the Early Construction Agreement on the basis that it allows for the progression of the intentions of the Commercial Agreement without any unreasonable or undue new risk to Council.

2.6.13

Despite what PricewaterhouseCoopers may have opined, the council, in entering into the Early Construction Agreement did add new and potentially unreasonable and undue risk, a liability to meet payment of \$12.3m to purchase the Crown land that was unfunded.

The council was again entering into contracts to provide infrastructure no matter what the cost.

On 29 January 2002 the Premier's Department wrote to the council, relevantly, advising:

This potential land transfer can only be considered on the basis that:

- i) Liverpool Council produces a sound business case for the development,*
- ii) Liverpool Council must demonstrate to the NSW Government that the entire project is funded and a timetable to complete the project has been accepted,...*
- iv) Consideration of the transfer of Crown Land must be subject to the payment of market rates for the entire lands transferred to Liverpool Council, and...*

2.6.14 When the council entered into the Macquarie MOU it could not ensure that it could

...assist the PPP Entity in relation to procuring such other land, including Crown lands and land held by the Department of Land and Water Conservation referred to in the Annexures to this document, required for the Development in accordance with the development programme agreed to by the parties;

as required by schedule 3.

2.6 Findings

- 1. Council took on obligations under the Stardome, Oasis and Liverpool 2020 projects to acquire land, importantly, to pay for Crown land, which was uncosted, unfunded and for which the owner's consent had not been obtained.**
 - 2. The council ignored the risks associated with either:**
 - The successful acquisition**
 - Delays in acquisition**
 - The failure to acquire the land.**
-

2.7 Council's Land

2.7.1 During the period considered by the Inquiry, particularly when the council was considering the Oasis and Liverpool 2020 projects, the council demonstrated an almost unseemly desire to provide its lands to ensure that the proposal moved forward.

Council's stance was met and absorbed by the proponent's, and particularly Macquarie's, stance that council's land was there to be applied to their development purposes.

2.7.2 In the mid-nineties the council faced budgetary constraints.

In October 1997 the council was considering whether to proceed with its proposal to extend the Whitlam Centre, or to pursue the Stardome proposal. The council had sought the advice of its auditors on its proposal. They advised:⁴⁰

3 *Council's financial position at 30 June 1997 is considered to be difficult. Liquidity ratios are below industry benchmarks and there is a significant deficiency in Available Working Capital. Council has a strategy in place to restore its financial position over the next 3 years which cannot incorporate any additional funding for projects like the Whitlam Centre extension. Council should therefore only pursue projects of this nature where they are self-funding.*

2.7.3 At this time the council was proposing to sell other land owned by it to assist the project's funding.

Again, Coopers and Lybrand cautioned against this approach emphasising:⁴¹

5 *In terms of the land to be sold, we understand that a solid offer of \$4.5M has been made for the Old Pool site which is in line with Council valuations for the site. Other sites immediately available for sale have been estimated to yield a further \$3.93M. We are concerned that these 'other' sites do not appear to have been formally valued and may not therefore yield the amounts anticipated. Further, the income that these sites currently generate for Council (approximately \$318K p.a.) does not appear to have been considered in the Project Appraisal. We therefore suggest that a more accurate appraisal be undertaken of the net proceeds to Council flowing from the disposal of these sites.*

and subsequently:

- *Proceeds from the sales of sites other than the Old Pool Site are estimated at \$3.93M but are not supported by independent valuations. Valuations need to be undertaken.*
- *Rents currently generated from these other sites are \$318K per annum. The loss of these rents to Council has not been factored into the Proposal Costing.*

2.7.4 In March 2000 the council was briefed by representatives of the Bulldogs and Macquarie over the Oasis project.

The project by then consumed all of Woodward Park for various sporting, recreational, residential and commercial uses.

Additionally, the project envisaged utilisation of three of council's commercial properties in the Liverpool CBD together with its recreational and industrial facilities making up the TAPP's land and works depot.

40. Coopers & Lybrand Letter: 9/10/97

41. Coopers & Lybrand Letter: 9/10/97

Underlying the project was the Foundation, a special purpose “vehicle” that would act as landowner, developer and subsequently manager and maintainer of the facilities.

The council would have to provide its land to enable the project to proceed.

It would also have to obtain the Crown land making up the balance of Woodward Park.

2.7.5 When considering whether it should enter into the Commercial Agreement the council adopted a simplistic approach, adopting a balance sheet to ensure its land assets bore value.⁴² It looked at the value of the land brought to the bargain, based on valuations it had received, and the value of assets that would be received.

This analysis provided a notional positive outcome of \$1.21m.

In August 2000 the council had obtained a valuation for its properties.⁴³ Each of the properties was valued on:

- an “as is” basis,
- highest and best use basis, and
- on the basis of the current proposals for Woodward Park.

The valuations for the CBD lands were as follows:

Bathurst Street Carpark:

“as is”	\$5.7m
“replacement value”	\$5.7m
“proposed use”	\$5.7m

Northumberland Street Carpark:

“as is”	\$3.1m
“replacement value”	\$3.1m
“proposed use”	\$3.1m

Warren Serviceway – Carpark Component:

“proposed use”	\$6.8m
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The Valuation made no comment on the nature of the proposed use and, accordingly, the underlying premises supporting the valuation.

When reviewing the “proposed use” of other sites within Woodward Park, the valuation refers to the use as “Parking Areas and/or Stadium Development”.

It does not refer to the specific uses proposed under the Oasis Master Plan.

42. Report to Meeting: 5/2/01, p.28

43. Valuation of Gerton Pty Ltd: 28/8/00

There is a simple explanation for this; the council didn't know what the proponents anticipated.

Despite its requests, the council had been denied access to the Macquarie Model.

2.7.6

The council had not defined the extent of the development proposed for the CBD by the time that it entered into the Commercial Agreement.⁴⁴

The council had not resolved this issue before it entered into the ECA, as is evident from Mr Douglas' memorandum in early 2002⁴⁵ when he wrote to the General Manager and Mayor:

A NOTE OF THE CBD DEVELOPMENTS GENERALLY

The MasterPlan and the CA are in some dispute. The CA talks (Clause 14) about a

- *Mediterranean Piazza style development being built on Bathurst street comprising of restaurants on the ground floor and commercial residential on the remaining levels;*
- *Residential and/ commercial facilities on Northumberland street*
- *New Council Chambers and associated commercial facilities upon the Warren Serviceway land*

The Interpretation section of the CA defines the three sites by reference to Part C of the MasterPlan. This Plan in turn, outlines the development concepts as follows:

Bathurst street— u-shaped 9 story building, 450 public carspaces; 240 private car spaces; 5 levels of office;

<i>Commercial office</i>	<i>20500</i>	<i>GFAm2</i>	
<i>Private car park</i>	<i>8600</i>	<i>GFAm2</i>	
<i>Public car park</i>	<i>15600</i>	<i>GFAm2</i>	
<i>Retail</i>	<i>3400</i>	<i>GFAm2</i>	
<i>Public Park</i>	<i>1500</i>	<i>GFAm2</i>	<i>TOTAL 49600 m2</i>

Warren Serviceway—a 9 story rectangular office tower with 280 private carparks;

<i>Council Chambers</i>	<i>12000</i>	<i>GFAm2</i>	
<i>Commercial Office</i>	<i>3000</i>	<i>GFAm2</i>	
<i>Private Carpark</i>	<i>10000</i>	<i>GFAm2</i>	<i>TOTAL 25000 m2</i>

Northumberland Street—9 story block—1 level retail; 220 private carparks; 6 levels of residential

<i>Residential</i>	<i>20200</i>	<i>GFAm2</i>	
<i>Retail</i>	<i>3500</i>	<i>GFAm2</i>	
<i>Private Carpark</i>	<i>7700</i>	<i>GFAm2</i>	<i>TOTAL 31400 m2</i>

44. Evidence of B. Carr: 3/2/04, p.27–28

45. Undated memorandum of M Douglas

Council negotiators should keep these heights and yield outcomes in mind as the discussions continue. These should have been the basis of the Macquarie Financial model.

On 13 May 2002 the council was to learn part of what was proposed when it received an application for a 24-storey development on the Bathurst Street site.⁴⁶

2.7.7 Despite what had been suggested by Mr Banisevic in his letter written October 1997,⁴⁷ the council did not consider the income then being received from the sites and its effect on council's cash flow.

The fallout from the Bulldogs salary cap breaches provided an opportunity for the council to pause, consider and hopefully learn from their earlier mistakes and failures.

By this stage there had been a sufficient number of warnings, both internally and externally to emphasise this need.

2.7.8 Council did not pause and consider their options.

On 14 April 2003 the council resolved to enter into the Macquarie MOU.

No probity or commercial advice had been sought or received regarding the proposal. Rather, council's reasons for entry into the Macquarie MOU were premised on:

- settlement of claims between it and Macquarie
- avoiding a delay in the completion of the Arena and other projects contemplated under Oasis
- council being unable to undertake the development program without a co-venturer

Council's willingness to provide its land, to ensure that yet another proposal went forward, continued.

Macquarie, who had been awaiting "a position of leverage to re-emerge",⁴⁸ then stepped in to save the day after the salary cap revelations.

Despite all that had happened, the council had taken no steps to:

- ascertain the nature and extent of the development anticipated by its "partner"
- value the potential worth of the lands it was bringing to the project
- weigh up what benefits that would flow from the provision of its land

46. Timeline – schedule of major Development Application

47. Coopers & Lybrand Letter: 9/10/97

48. Memorandum Macquarie bank – Jeff Locke to Bill Moss 14 May 2002

2.7 Findings

1. Council, with limited funds at its disposal, was willing to either sell parcels of land that it owned, or to contribute other land to become part of the commercial ventures conceived by its private sector partners. The council believed that at the end of the development phase of the projects its net worth in new infrastructure would compensate for the assets that it devoted to the schemes. Its financial analysis that led to such a conclusion was shallow, and its trust in its private sector partners misplaced. The council behaved recklessly in being so willing to devote public assets to the schemes.
2. The council, at the bidding of its commercial partners, quickly acceded to their request to include CBD lands, as well as the Woodward Park lands, to the projects. In so doing the council moved into what was essentially a set of standard development proposals that were unrelated in use terms to the original idea of providing sporting and recreational facilities for the community. The council appeared to scarcely notice that it had been led into the world of pure commercial development, rather than the provision of community assets, and it was ill-equipped to enter such a world.

2.8 Conclusion

- 2.8.1 So great was council's desire to provide infrastructure that it ignored the importance of its own requirements that PwC:⁴⁹

“Undertake a high level assessment of the reasonableness of the Macquarie Bank Ltd (MBL) financial model and conclusions.”

As has been indicated elsewhere in this report, PwC did not undertake this assessment. By not doing the assessment they abrogated their responsibilities. They chose to cover over this deficit by disaggregating the project, and discussing the quarantining and minimising of risk.⁵⁰

- 2.8.2 PwC attempted to bolster their position by suggesting:⁵¹

We have not been requested to review the viability of the Project (or any component therein) as we have not been provided with the information from the Proponents to enable this assessment. We have also been instructed not to alter negotiations as they have transpired. We have relied on valuations provided by other parties (Gerton Pty Limited and LCC) which we have been specifically asked to rely on and not to test underlying assumptions.

This suggestion is spurious.

49. PwC Report: 20/12/00, p.16

50. PwC Report: 20/12/00, p.3–4

51. PwC Report: 20/12/00, p.3

Council was considering entering into what Mr Redman described as:

MR REDMAN: (27/01/04, p.34) *Particularly in the scale of this project it is—I mean it was proposed as being—I mean it arguably is one of the largest projects of its type in Australia ...*

It would involve the provision of substantial council owned land, the acquisition by council of a large area of Crown land and substantial council funding.

The provision of the infrastructure that council sought was dependant on sufficient surpluses being generated from the developments on council-owned land, and the Crown land it was bound to acquire.

2.8.3 Mr Redman was to acknowledge that provision of a business plan would be expected prior to entry into the Commercial Agreement was signed:

MR REDMAN: (27/01/04, p.41–42) *Yes. In the normal sequence of events with major projects, there is normally a preliminary feasibility study which then gets a level of commitment to a full business plan. A business plan would normally go into much more detail and would seek, for example, to secure heads of agreement with potential operating groups—would outline in much more detail, the marketing strategy for the project, would seek to get a level of underwriting in terms of finance and would become the basis for implementing the project.*

MS JOHNSON: (27/01/04, p.42–43) *What would be the ordinary process in terms of these kind of commercial agreements? I mean really what I am wondering is would you expect to enter into a binding contract of, for example, 22.25 million without having undertaken a business plan, or would you normally have undertaken a business plan before entering into that kind of contract?*

MR REDMAN: *We wouldn't normally expect to have a business plan supporting—a commercial agreement normally comes off the back of feasibility study, business plans, detailed negotiations with a range of stakeholders to secure heads of agreement as a minimum.*

MS JOHNSON: *Right.*

MR REDMAN: *And secure a level of finance and then sign commercial agreements on the back of that.*

MS JOHNSON: *So ordinarily, in your experience, there's a much more detailed process and a much firmer commercial grounding for entering into these arrangements than was the case in entering into this commercial agreement, is that fair?*

MR REDMAN: *It is fair qualified by the fact that Council believe that others have prepared that level of detail which was not forthcoming.*

MR BROAD: (27/01/04, p.29–30) *Yes. Now, in your view, would it have been appropriate for Council to have obtained a feasibility report on the proposals affecting the CBD properties?*

MR REDMAN: *I think—I mean, I know Council believe that those reports had been done by Macquarie Bank and I think, just reflecting back on that time, certain levels of surpluses were indicated to Council, that would be generated by the total project. I believe Council relied on the expertise of Macquarie Bank, that those sites would generate appropriate surpluses to fund the sporting facilities.*

MR BROAD: *That was contained in a financial model which was never fully disclosed to Council.*

MR REDMAN: *Correct.*

MR BROAD: *Is it your view that it would have been prudent, in those circumstances, for Council to have obtained its own advices?*

MR REDMAN: *It was unusual from our position—from which we see many projects, acting for both the public and private sectors—not to see a feasibility study of a project and have the opportunity to review that. So it was unusual circumstances and we would normally have seen feasibility studies for that style of project.*

2.8.4 Council was seeking both the business plan and PwC's expert review.

Mr Redman acknowledged the appropriateness of this course:

MR REDMAN: (27/01/04, p.30–31) *It was a most unusual project from my experience, over many years on big projects. It was basically an offer proposed or put to Council and it wasn't a typical joint venture project of which we're involved in a number of, where there is a true joint venture relationship between the proponent, if you like, and the public authority. It was more, in many ways, an arm's length commercial agreement whereby the Foundation and the members of the Foundation would have significant authority over the project.*

MR BROAD: *Given that approach, does that emphasise Council's need to be separately advised?*

MR REDMAN: *Well, certainly from attempting to protect assets, Council was, from our point of view but I think it's only a matter you can ask Council in terms of the feasibility work. We were not party to that.*

MR BROAD: *But in your view as a professional adviser—leaving aside what role you had with Council—is that your view?*

MR REDMAN: *It would have been wise for Council to either insist on seeing that feasibility study before proceeding or seeking separate advice. I think that's right.*

2.8.5 The advice given by PwC did not meet this standard; rather the advice was irresolute, as was again acknowledged by Mr Redman:

MR BROAD: (27/01/04, p.39–40) *In my reading of the advice you didn't appear to draw a line in the sand and say, if Council does not obtain this, this, this or this in the agreement, in our view it should not proceed. Is that your view?*

MR REDMAN: *We didn't say to Council not to proceed with the project but we did outline to Council that there were absolutely no guarantees of deliver of the things that were being proposed and we outline to Council that there were certain ongoing matters we expected that Council would implement to protect those assets but we were not engaged to comment on overall project viability. Therefore with the project work - - -*

MR BROAD: *I'm not asking you to comment on viability. What I was talking about was the advice on the commercial agreement appeared to be more in the nature of an advice given that Council should look to obtaining these elements in the agreement but it did not conversely say that at some point, if this was not obtained, in your opinion—and that, I mean the corporate sense—the Council should not proceed. In other words, it did not simply stipulate, you know, these matters were fundamental, in your opinion.*

MR REDMAN: *Well it did stipulate a number of things that were fundamental and had been agreed by the proponents before we concluded that Council assets were reasonably protected, but that went back to our terms of reference which was about reviewing and attempting to de-segregate the project back to the individual elements, to protect the assets. That was in the way of advice.*

MR BROAD: *So the nature of your advice was limited by your terms of reference?*

MR REDMAN: *Correct.*

MR BROAD: *Yes. You simply weren't called upon to advise whether Council should or should not enter into the agreement?*

MR REDMAN: *Only to the extent of us being as satisfied as we can be that Council assets are protected, within the limitations of our ability to negotiate with the proponents.*

MR BROAD: *So it was never an absolute proposition? It was always really a mediated result that you were looking to achieve?*

MR REDMAN: *Correct.*

2.8.6

PwC saw themselves in a position where they could not halt the project. They attempted to warn the council.

MS JOHNSON: (27/01/04, p.44–45) *The process [h]as been described in evidence by other people who have spoken before you as a runaway train. Did you feel you were in a position to apply the brakes?*

MR REDMAN: *I think within the terms of reference we did. I think the first commercial agreement we saw—I think, I went back and looked at the notes was number 32. We ended up with I think 20 later. In our opinion, signing the first commercial agreement would have been absolute disaster for Council. So we went about a very long and arduous process of attempting to put in place many, many guarantees, security, more equity, all means and manner to try and underwrite the project. And I believe we did apply the brakes, certainly in terms of trying to protect Council assets.*

MS JOHNSON: *I'm not sure I can make the train analogies string out here. I was going to suggest was it more a case of in fact putting barriers alongside the train line, bear with me while I try the train analogy, putting sort of barriers or protective mechanisms in place, rather than actually ever bringing the train to a full stop, you are slowing it down to allow the construction of some safeguards, is that right? Were you in a position to call the train to a halt?*

MR REDMAN: *Only to the extent that we held out that we were not satisfied that assets were being protected until we had those subsequent meetings. But it wasn't - - -*

MS JOHNSON: *That is a negotiating tactic though is it not?*

MR REDMAN: *Correct, correct.*

MS JOHNSON: *Was to say: well, we will call the whole deal off and walk away, but I mean was that bluff really, were you ever in a position to call, to advise Council? Did you feel you could have advised Council to call the whole deal off?*

MR REDMAN: *Well, in a sense, I think our very detailed report outlined sufficient risks with the project that we believed at that point the project wouldn't proceed.*

MR BROAD: *Did you ever apprehend that the driver of the train may not have understood your signals?*

MR REDMAN: *No. I think the signals were very clear to all because, depends who you call a driver, but certainly - - -*

MR BROAD: *I'm talking about the Councillors.*

MR REDMAN: *The Councillors? Again it is very hard for me to answer that question in the sense that attending a small number of meetings and by and large being there for question and answers, and our reports being provided to Councils really limited my knowledge of Councils in the sense of understanding the project.*

Their warning was to be contained in speculation over the reasons for Macquarie's refusal to provide its model.⁵² This response was entirely inadequate. PwC neither drew a line in the sand, nor provided a sufficiently clear indication of the need for the council to undertake its own feasibility study or for the council to stop and give most serious consideration to its involvement in the project, rather as Mr Redman put it:

MR REDMAN: (27/01/04, p.28) *We sought at some length, the feasibility study for the total project. You will again see in our reports that Macquarie Bank had, we understood, quite extensive work on the total project. We requested numerous times, the feasibility study from Macquarie Bank, to review, to provide Council with a view. That request was not forthcoming so we outlined in our report that we couldn't comply with one of the terms of reference which was to report on the commerciality of the total project.*

This response, and the reference that PwC then invested itself with, that is disaggregating the project served to distract the council from the real issue—whether the model demonstrated the viability of the project.

After all, the viability of the project was its lynchpin.

2.8 Findings

- 1. The council requested PwC to undertake an assessment of the Macquarie financial model. They did not do this because Macquarie would not provide them with the information. This was certainly one of the most important tasks requested by the council. PwC's failure to provide an assessment of the Macquarie model robbed the council of vital information. Instead of notifying the council of the dangers of entering a major commercial agreement without detailed knowledge of the assumptions and structures of the financial model, PwC seemed content to issue broad warnings about risk, but also appeared to be content with the council's apparent faith in Macquarie.**
- 2. PwC, as the council's principal adviser on these matters, did not press the council to obtain further advice on the financial projections, or to undertake an internal assessment of where the council stood when Macquarie refused to provide their financial model. It accepted the situation (that is, that Macquarie would not provide its model) and was content to prepare a report that had to be flawed because of it.**

52. PwC Report: 20/12/00, p.16

PART

B

Ensuring the Outcome

Section 3: Ignoring the Warnings

3.1 Background

3.1.1 By the time that the council came to consider the Oasis project it had already been through processes associated with the Stardome project, the Bulldogs MOU and the sale of the pool site to the Bulldogs.

Evidence given by Mr Marsden suggests that the capacity and credibility of many of the proponents or persons associated with the various proposals had been questioned well before the council entered into either the Stardome or Oasis projects.¹

3.1.2 Essentially, the warnings comprised:

- Warnings given by others, principally by or through Mr Marsden, affecting the character of the proponents or persons associated with them
- Conduct, contrary to the course of action represented by them or anticipated by the council
- Warnings given by proponents regarding the conduct of the other proponents, while the Oasis was proceeding.

The council, in its desire to obtain a national sporting team and its desire to provide an arena, chose to ignore such warnings.

This section explores some of the warnings referred to, council's dismissal of them, and the consequences that followed.

3.2 The Macquarie Financial Model

3.2.1 In March 2000 council was briefed by representatives of the Bulldogs and Macquarie.² The council had previously entered into a MOU with the Bulldogs, Macquarie and Grocon in June 1999³ that anticipated development of a 6000 seat stadium.

This agreement provided:

The Bank must:

3.1 Not later than 30 September 1999 provide to the Council a business plan and design in relation to the Project and associated developments (the "Project Business Plan"). Such plan and study must provide the parties with a detailed analysis of the Project venture sufficient to enable the parties to decide whether to proceed with such venture.

1. Evidence of J Marsden: 18/02/04, p.4–5 and B Carr: 26/02/04, p.22–24

2. Report to council's meeting: 13/03/00, p.1

3. Bulldogs MOU: 26/06/99

3.2.2 Subsequently, when a larger arena was proposed, the MOU with the Bulldogs, Macquarie and Grocon was terminated.⁴ Collaterally, the council wrote to Macquarie agreeing to pay \$74,000 to PwC so that the business plan relevant to that proposal became the property of the council.⁵

It is important to emphasise that the Oasis project which followed was entirely different to the Bulldogs—Macquarie—Grocon proposal, that simply envisaged the construction of a multi-use arena on Woodward Park. The earlier financial model that council purchased could not serve as a model for Oasis. Council was to enter the Commercial Agreement without a financial model.

3.2.3 There is some suggestion that the Commercial Agreement anticipated the provision of Macquarie’s financial model. The later versions of the Commercial Agreement did not require the provision of the model, instead council was meant to have access to, and receive its own commercial advice on the model, before entering into the Commercial Agreement.

It was left to the council to satisfy itself that the project was commercially viable.

The evidence available to the Inquiry is clear that:

- Council anticipated that the model would be made available by Macquarie
- Subsequently when council access had been refused, that PwC would be give access to it
- Despite the suggestion of Mr Moss, Macquarie’s refusal was not premised on a view that the council should undertake its own feasibility study
- Likewise, the concerns raised by Mr Moss over the information being leaked are not credible, given the collateral refusal to provide the model to PwC
- While Macquarie gave some information regarding its model in its discussions with the council,⁶ the model was never made fully available to the council
- Similarly, despite efforts made by and on behalf of PwC, Macquarie consistently refused to provide its financial model.⁷
- The council had not been involved in the planning of the Oasis Project. Contrary to the suggestions of Mr Constantinidis,⁸ the council was at least an equal party in the project and should have been entitled to access to the model
- Having not been involved in the planning of the Oasis project, the detail of the information, as will be seen from the following extract of Macquarie’s modelling, would not have been known to them.

4. Deed of Termination: 14/01/00

5. Council letter to Macquarie: 14/01/00

6. Material provided by W Moss – note endorsed by facsimile: 03/08/00

7. Evidence of W Redman: 27/01/04, p.28–29

8. Evidence of A Constantinidis: 17/02/04, p.94 et seq.

Building Number	Use	Cost \$	Base Case Scenario		Best Case Scenario	
			Sale Value \$	Net Revenue \$	Sale Value \$	Net Revenue \$
Part A –Zone 2						
1	Residential	19,000,000	27,000,000	8,000,000	30,681,818	11,681,818
2a	Existing Aquatic Cntr	0	0	0	0	0
2b	Water Park	10,365,000	14,496,082	4,131,082	17,395,298	7,030,298
3	Residential	36,100,000	51,300,000	15,200,000	58,295,455	22,195,455
4	Lakeside site area incl ponds	1,560,000		(1,560,000)		(1,560,000)
4a	Restaurant	3,024,000	3,886,364	862,364	6,650,000	3,626,000
4b	Upper level night club	1,560,000	1,295,455	(264,545)	2,111,111	551,111
5	Retail	636,480	834,545	198,065	1,428,000	791,520
6a	Retail (ground)	1,180,920	1,548,409	367,489	2,649,500	1,468,580
6b	Low cost accommodation	0	0	0	450,000	450,000
7	Arena	34,474,113	23,750,000	(10,724,113)	23,750,000	(10,724,113)
8	Retail (ground)	0	0	0	0	0
9	Retail (ground)	1,845,480	2,419,773	574,293	4,140,500	2,295,020
10a	Retail (ground)	2,787,720	3,655,227	867,507	6,254,500	3,466,780
10b	Motel 1 (above)	0	0	0	1,200,000	1,200,000
11a	Retail (ground)	1,747,200	2,290,909	543,709	3,920,000	2,172,800
11b	Motel 2 (above)	0	0	0	700,000	700,000
12	Pedestrian Plaza	2,700,000		(2,700,000)		(2,700,000)
13	Basement car park	0		0		0
17	Riparian Zone	1,080,000		(1,080,000)		(1,080,000)
18a	Road North South	2,484,000		(2,484,000)		(2,484,000)
18b	Road Club and Residential	1,286,400		(1,286,400)		(1,286,400)
19	Buffer Zone landscaping	2,058,000		(2,058,000)		(2,058,000)
Total–Zone 2		123,889,313	132,476,764	8,587,451	159,626,182	35,736,869

Residential

Building Number	Area sqm GFA	Net Area Apartment	Base Case Scenario		Best Case Scenario	
			Develpm't Cost per sqm	Develpm't Cost	Develpm't Cost per sqm	Develpm't Cost
1	10,000	9,000	\$1,900	\$19,000,000	\$1,900	\$19,000,000
3	19,000	17,100	\$1,900	\$36,100,000	\$1,900	\$36,100,000
	29,000	26,100		\$55,100,000		\$55,100,000

Such knowledge would be the kernel of any financial model. Without such knowledge any model that the council might have tried to construct could only be speculative.

3.2.4 In the latter part of 2000 PwC had reported its inability to obtain access to the Macquarie model.⁹ Council had been involved in attempts to negotiate its and PwC's access, and was aware that only limited access had been made available.¹⁰

Macquarie's refusal to provide a copy of, or free access to, its financial model to the council or to PwC must surely have been a warning to the council as to:

- Macquarie's disregard to the equality of council's bargaining position.
- Possible weaknesses in the model, as suggested by PwC.¹¹

9. Evidence of W Redman: 27/01/04, p.28

10. See Generally: Council's letter to Mr Livanos: 22/08/00

11. PwC Report: 20/12/00, p.16

3.2.5 While Mr Carr did not regard the failure to provide the model as a breach of the agreement, it was a matter of concern to him.¹²

Mayor Paciullo would have preferred that council had access to the model,¹³ but relied on council's advisers to assess its significance.

Macquarie's action should have served to warn council that Macquarie was driven by its own commercial agenda, and could not be relied upon to provide information extending beyond such agenda.

PwC had warned the council that the model might be unreliable, suggesting in its report of 20 December 2000:

Macquarie's refusal may suggest the following:

- (i) that the Macquarie model is lacking in sufficient detail to not withstand sufficient due diligence, and/or*
- (ii) that there are aspects about the development and its relationship with other parties that Macquarie may not wish to disclose. This could be in regards to fees, underlying assumptions regarding potential development surpluses, or proposed operating and asset sale arrangements. It may also be to protect external or other arrangements collateral to the Project, or possibly intended as a consequence of the Project.*

3.2.6 Despite these clear warnings, the council chose to enter into the Commercial Agreement. One basis for their decision was:

Note that all the independent reports have concluded that the final offer from the proponents should be supported and accordingly they recommend that Council enter into the Commercial Agreement. (Minutes of council meeting: 05/02/01, p.2)

The council made its decision whilst accepting the report from PricewaterhouseCoopers on 05/02/01, p.17:

Therefore, Price-waterhouseCoopers could not advise Council on the model's commercial integrity and confined its focus on protecting Council assets and ensuring that specific developments will be delivered. Consequently, Council needs to rely on Macquarie Bank's integrity as a corporate citizen and assume that its project assessment undertaken with the Bulldogs is commercially sound and achievable.

Of course this and subsequent warnings were disregarded by the council when entering into the Early Construction Agreement, facilitating payments to the Foundation, settling its claim with the Bulldogs and Macquarie, and entering into the Macquarie MOU.

12. Evidence of B Carr: 03/02/04, p.18

13. Evidence of G Paciullo: 19/01/04, p.19–20

3.2 Findings

1. Council failed to take adequate steps in response to Macquarie's refusal to make its financial model, available to either council or PwC.
 2. Macquarie's reasons for refusal, as put forward by Mr Moss, are not credible.
 3. PwC failed to provide an adequate response to the council following Macquarie's refusal to provide its financial model.
 4. Macquarie's refusal to provide its financial model should have given sufficient warning to the council not to enter into the Commercial Agreement.
-

3.3 The Conflict Between the Other Partners

3.3.1 In the period leading up to the Early Construction Agreement the council was approached by representatives of both the Bulldogs and Macquarie. Each made serious allegations regarding the conduct of the other party.

3.3.2 The Bulldogs were asserting that Macquarie was seeking side deals under which it and others would receive dividends through ODC¹⁴

Mr McIntyre gave evidence that he had spoken to the Mayor, and the General Manager regarding the concern before the Commercial Agreement was signed.¹⁵

Given that it was intended that surpluses generated by ODC would have been used by the Foundation to provide the infrastructure sought by the council, these were very serious concerns.

Their seriousness should have magnified the concerns that the council had at the time, resulting from Macquarie's refusal to provide its financial model.

These concerns appear to have been ignored by the council.

3.3.3 On the other hand Mr Moss spoke of Macquarie's concerns over proposals for payment of fees and salaries to the Bulldog's representatives, and over construction and other contracts.¹⁶

On 29 May 2001, after the Commercial Agreement had been signed, Mr Moss attended a meeting with Mr Paciullo and Mr Carr at which he outlined Macquarie's concerns.¹⁷

3.3.4 While the council was aware of the dispute between the Bulldogs and Macquarie it chose to take no action. Mr Paciullo gave the following evidence:

14. Evidence of G McIntyre: 28/01/04, p.90

15. Evidence of G McIntyre: 01/03/04, p.20–22

16. Evidence of W Moss: 23/02/04, p.30

17. Evidence of W Moss: 23/02/04, p.30–31; B Carr: 26/02/04, p.30–32; B Paciullo: 01/03/04, p.67–70

MS JOHNSON: (1/3/04, p.71–72) *What action did you take in that situation?*

MR PACIULLO: *I wasn't asked to take any action. The GM was present. We knew that there was a falling out. I wasn't sure what the outcome of that was going to be and at that time, none of us had any idea of the—well, I didn't have any idea of the implications immediately for the Council.*

MS JOHNSON: *But not long after that, Mr Paciullo, well, 3 or 4 months after that, in September 2001, Council went ahead to sign an early construction agreement exclusively with the Bulldogs leaving Macquarie Bank out of it. That is right, isn't it?*

MR PACIULLO: *Yes.*

MS JOHNSON: *In circumstances where you have just said: The party that was supposed to be providing commercial rigour had warned you that they didn't think the Bulldogs were capable of delivering?*

MR PACIULLO: *Well, when that matter came before the Council at that time you mentioned, all those matters were known and we had recommendations and advice from all the people who were paid to give us advice to take a particular course.*

MS JOHNSON: *Did you raise these concerns of Macquarie Bank with any of your advisers?*

MR PACIULLO: *I assume they would have known them. It was common knowledge.*

MS JOHNSON: *What, the issues that Macquarie—but Macquarie Bank physically asked for a meeting with you, Mr Paciullo, to raise these issues and you didn't ask - - -*

MR PACIULLO: *No, they did not ask me to raise any issues, I will correct you there.*

MS JOHNSON: *Sorry, no, they asked for a meeting with you and at which they raised significant concerns. You then sought advice from your professional advisers about entering into a further agreement with the party that they were concerned about, the Bulldogs?*

MR PACIULLO: *Yes.*

3.3.5 What the dispute had made clear was that the Bulldogs and Macquarie were taking steps to:

- Potentially secure greater benefits to themselves than had been anticipated
- Acting without reference to the council
- Failing to adopt transparent processes.

The culmination of which was to risk the outcomes of the project and, thereby to enlarge council's risk.

These actions must surely have cast doubt on the integrity of them as “partners” in the project.

3.3.6 Despite these clear warnings, council:

- Entered into the Commercial Agreement
- Entered into the Early Construction Agreement
- Paid \$15m into a Foundation controlled by the Bulldogs
- Facilitated control of construction by ODC, a company dominated by Mr McIntyre and Mr Constantinidis
- Permitted the Foundation and ODC to operate in an uncontrolled and unsupervised manner
- Subsequently entered into an open-ended and unclear development agreement with Macquarie Bank
- Made settlement with the Bulldogs ignoring their substantial defaults and compensating them for their expenditure
- Agreed to potentially take over the Bulldogs liability to Macquarie.¹⁸

3.3 Findings

1. **Both the Bulldogs and Macquarie had raised concerns that should have provided a warning (whether alone or with other matters) not to proceed with the Oasis project, the ECA, or subsequently Liverpool 2020.**
2. **Council failed to heed these warnings, and foolishly pushed ahead with the project without any assessment of the potential risks.**
3. **The disagreements between the Bulldogs and Macquarie really concerned their desire to gain better benefits within the Commercial Agreement for themselves; neither party was especially concerned with the outcomes for the council of these disputes.**

3.4 Negotiating the Settlement

3.4.1 On 17 August 2002 the Sydney Morning Herald ran an article alleging breaches of the NRL salary cap by the Bulldogs.

By Friday 23 August the newspaper was alleging that the Bulldogs had taken nearly \$900,000 from funds provided by the council to the Oasis project.

Following these revelations the council took urgent steps to (Minutes of Meeting: 26/08/02):

- re-structure the Foundation
- nominate Mr Carr as the Foundation’s interim manager
- appoint its representatives to the Foundation’s Board, and
- re-constitute its consulting team.

18. Macquarie MOU, Clause 8

3.4.2 Some weeks earlier, council's Project Control Group had exercised the power reserved in the Commercial Agreement to require an audit of the Arena Trust account (report to Meeting: 26/08/02, p.2), although this audit had not yet been carried out.

On 8 September, over two weeks after the allegations of the use of Oasis funds, the terms of the audit were clarified and the audit proceeded (See Letters of PwC: 08/09/02).

The audit was to disclose an overcharge of \$754,616 by ODC, of which \$651,491 had been paid from the Arena Trust account.

3.4.3 ODC had been entitled to a Development Management Fee of 5% on construction cost. It had been paid \$1,103,125 on actual construction costs of \$9,032,671, i.e. 12.2%.

Council had to make a fundamental decision whether this represented more than a simple mistake made by Mr David McIntyre. Mr G McIntyre had described his son in the following terms:

MR McINTYRE: (01/03/04, p.26) ... *he is a lawyer and an accountant. He is a very qualified person. I thought he could bring good qualities - - -*

3.4.4 Soon after this there was an announcement of an ICAC Inquiry into allegations affecting a Minister of Parliament.

3.4.5 On 19 September 2002 council's three representatives were appointed to the Foundation.

Importantly, the council did not secure control of the Foundation by these appointments, nor did it move closer to ascertaining whether its funds had been misused by ODC.

It was not until 6 November 2002 that the salary cap payments were confirmed, when PwC provided its report of its review of the Foundation, ODC and Liverpool Arena (PwC Letter: 06/11/02).

This process had been substantially delayed by the confidentiality arrangements entered into between the council, the Foundation and ODC.

3.4.6 Mr Stalley, council's Financial Services Manager, was one of the appointees to the board of the Foundation. He gave the following evidence of the accounting concern affecting the Foundation's records and the Arena Trust account, indicating the time that it took to become aware of them:

MR BROAD: (22/01/04, p.67–68) *You were appointed a director as I recall—I will just get it in front of me, on 19 September 2002. How long after your appointment did you become aware of these accounting problems?*

MR STALLEY: *We were aware of some of them prior to that due to the audit commissioned on the arena trust account by Council’s auditor, Dennis Banicevic. So we had some preliminary advice that there were issues that needed attention.*

MR BROAD: *As to the balance that you are now talking about, when roughly did you become aware of them?*

MR STALLEY: *Between September 2002 and October 2002.*

MR BROAD: *So within a month?*

MR STALLEY: *Correct, yes.*

3.4.7 Even though the council had obtained what it perceived was an effective control of the Foundation, it did not have control of, or direct access to the records of ODC, which had made the payments, nor Prestige, to whom the contracts had been assigned when the salary cap breaches had become known.

While the Foundation held a share in ODC, the share did not provide voting rights to control (Additional material provided by G McIntyre: 01/03/04, p.2), as Mr Stalley was to emphasise:

MR STALLEY: (22/01/04, p.69) *Even though we had the one ordinary share, they effectively had control.*

MS JOHNSON: *Okay.*

MR STALLEY: *So they had the cheque books, they had the bank accounts, they had the official company documents and they wouldn’t give them to Liverpool City Council. – – –*

3.4.8 On 4 September, the council was attempting to play down the concerns, issuing a press release including the following statements (Media Release: 04/09/02):

The \$843 million Woodward Park project is on track, with Liverpool City Council resolving at an extra-ordinary meeting on Tuesday, 3 September to “move forward in a positive and productive way”.

“Whilst there has been some significant operational and delivery aspects of the project raising concerns, it is now an opportunity to eliminate any weaknesses and move forward in a positive and productive way,” Interim Foundation Manager, Mr Brian Carr, said.

Despite what the council may have been suggesting, the concerns were extremely serious.

Through council's failure to secure adequate processes, its funds had been misapplied and, as a result, the delivery of the project was jeopardised.

3.4.9 At council's meeting on 3 September 2002, Councillors Harrington and Dobell-Brown proposed a motion that council obtain "new legal advice regarding termination at the earliest possible date of all agreements which at present bind council, the Bulldogs club and the Oasis Foundation" (Evidence of R Stalley: 22/01/04, p.69).

This motion was not carried. Instead the council resolved to proceed with the project through its representation on the project.

3.4.10 Mr Carr described the effect of the salary cap revelations:

MR CARR: (02/02/04, p.43) When the Bulldogs salary cap issue was first known, and the project ceased, then we went through a process of how we actually get control of what has actually happened. I was appointed the interim Foundation Manager, and we went through a process of determining the way forward. Michael Eyres was then engaged, came on board. He prepared reports and those reports all went to Council.

This evidence is, at least in part, incorrect.

Importantly:

- the project did not cease, it did even not stop. It went on unabated.
- council did not undergo a process of getting control of what had actually happened
- while Mr Carr was appointed interim manager, his role was limited and his views were tainted by his pre-disposition to obtaining the infrastructure that the council so dearly sought.
- there was no process to determine the way forward; rather, the existing processes continued, albeit with consideration to building a smaller and less costly arena
- Mr Eyres did come on board; however, the value of his assistance is questionable

3.4.11 In September 2002 the council was fighting battles on many fronts, it was discovering the extent to which its funds had been misapplied and the extent to which the arena's costings had blown out. It was also having to deal with ICAC's inquiry into allegations of bribery. Lastly it was having to deal with the public's perception that it had wasted its constituents' money.

Each of these issues was substantial. Together they must have signalled that it was necessary to stop and to consider the totality of the project. Put simply, the project was in crisis.

This proposition was put to Mr Carr:

MR BROAD: (03/02/04, p.24–25) *At that stage Council was probably in a position where it had to make a choice whether it should proceed or stop with this project. Did you see it as such at that stage?*

MR CARR: *I didn't view it as a case of proceeding or stopping as clear-cut as that. I saw the necessity to actually get into that Foundation. That's why I suggested to Council that I be made the interim Foundation manager for a short period. I recommended those officers to go on that Foundation. I suggested that we needed to get some legal advice. There were discussions with Premier's Department about who would be appropriate and Michael Eyres name was made available and I contacted that person. I saw it as a process of really finding out what's happening within that organisation and also what's the potential of moving forward.*

MR BROAD: *So you didn't see it as a circumstance where you had to decide whether the voyage should be stopped, but rather that of dusting off the deckchairs?*

MR CARR: *Well, more about finding out what the current state of play is and to get some facts. There were at that time a lot of issues being raised, there was a lot of media attention - - -*

Interestingly, as indicated by Mr Carr, the Mayor and many of the councillors who gave evidence said that they did not regard the council as having breached its obligations. Conversely, they regarded both the Bulldogs and Macquarie as having breached their obligations imposed under the Commercial Agreement and/or ECA (Evidence of G Paciullo: 19/01/04, p.55–58, 86; Evidence of W Waller: 21/01/04, p.71–72; Evidence of T Glavich: 16/02/04, p.14–15; Evidence of A Pascale: 16/02/04, p.72).

3.4.12 Council adopted a three-pronged response to the problems.

- The Foundation retained Mr Eyers as its legal advisor.
- The council obtained representation on the Foundation.
- The council remained committed to construction of the arena and the other elements of the projects and sought out Macquarie as its partner.

In turn, Macquarie had been awaiting just such an opportunity (Memorandum Locke to Moss: 14/05/02), and had been agitating following the salary cap revelations (Letter Minter Ellison: 20/08/02).

Each of these responses was to contain flaws.

Together, they would not provide the response that was needed.

3.4 Findings

1. Council's negotiations with the Bulldogs and with Macquarie were driven by a perceived need to put the events behind them, to limit adverse publicity and to provide a politically sustainable outcome.
2. In adopting this course the council adopted approaches that covered over its errors, and prevented independent scrutiny of the processes of its partners.
3. The council failed to explore what rights it might have against the Bulldogs and what might flow from there.
4. In entering into the Macquarie MOU council took on obligations for which it had never previously been bound, and unmeasured obligations affecting its assets. The whole of council's dealings associated with the Macquarie MOU demonstrate no in depth consideration of the nature of the project. Council's consideration was limited to its perceived need to terminate the Oasis Project and commence its replacement.
5. Overriding all of the settlement negotiations was a view that a new agreement would supplant any concerns over the Oasis project.

3.5 The Role of Mr Eyers

- 3.5.1 Council was faced with, potentially, very serious breaches of its agreements. Mr Eyers was to describe his initial role as:

MR EY[ER]S: (27/01/04, p.76) *I suppose the immediate and most noticeable preliminary had been the Sydney Morning Herald investigation into player payments and some of the entities involved in the player payments for the Bulldog's Football Club lead to the Foundation and in particular to a subsidiary company of the Foundation, Oasis Development Corporation Pty Limited. So what we were initially asked to do was to advise the Foundation on issues concerned with that company. Secondly, advise the Foundation in relation to its own membership, and I will come back to that in a moment, and thirdly, to advise the Foundation in relation to what you might call the status at that time of the commercial agreement.*

- 3.5.2 Surprisingly, Mr Eyers was not called upon to advise the council on whether the Bulldogs or Macquarie had breached the Commercial Agreement (Evidence of M Eyers: 27/01/04, p.76).

MR EY[ER]S: (27/01/04, p.78) *... We were dealing with a situation which rapidly became, how do you move forward from a position of deadlock and what is the way to extricate the parties from that deadlock? ...*

MS JOHNSON: (27/01/04, p.78–79) *Did you ever have the reason to advise the Foundation or later the Council on whether Macquarie Bank had been in breach of any of its duties under its obligations under the commercial agreement?*

MR EY[ER]S: *No.*

MS JOHNSON: *Did you consider that to be part of your brief?*

MR EY[ER]S: *Again as I have said the situation was one where the three principals were by the time we arrived, to put it at its lowest, parties to an agreement that wasn't functioning. It wasn't at any stage necessary for us to say—and in fact we were not in a position to give advice; we obviously weren't in a position to give advice to the Bulldogs, nor were we really in a position to give advice to Council on Council's rights vis-a-vis Macquarie Bank. Council were represented throughout the time that we were involved by I suppose a panel of solicitors but the only solicitors with whom we ever dealt who were acting for the Council were Marsdens.*

MS JOHNSON: *So that you didn't consider an assessment of liabilities, breaches, on the part of parties to the agreement to be part of your brief, is that fair? Rather, it was to get the deadlock moving and get it going forward in your view, is that right?*

MR EY[ER]S: *Yes, as I said a moment or two ago, the position of all the parties was that each of the others had enough of a claim or was asserting a claim vigorously enough to mean that you had to deal with them, otherwise there would be litigation. And from the perspective of what we were seeking to do that was as far as you needed to go.*

MS JOHNSON: *And why didn't you think litigation was worth considering or pursuing?*

MR EY[ER]S: *Because the commercial agreement was complex, many things had happened before the commercial agreement, between the commercial agreement and the early construction agreement and after the early construction agreement, and to me it was quite clear that even litigating in a two-way context would have taken a long time and been very expensive, and litigating in a three-way context would have been worse.*

3.5.3 Mr Marsden described his firm's role as being:

MR MARSDEN: (18/02/04, p.38) *To advise the Council as to the desire to enter into a legal document of this nature and the settlement with the Bulldogs and the Macquarie Bank.*

Mr Marsden, having been retained by the council, was asked to advise whether, in his view, there were breaches by Macquarie and/or the Bulldogs that might give rise to legal rights. Mr Marsden recalled his advice:

MR BROAD: (18/02/04, p.45) *So far as the Council was concerned did the Council raise with you whether it should—sorry, I will cut that back. Did Council raise with you questions as to whether there were actionable breaches on the part of the Macquarie Bank or the Bulldogs interests?*

MR MARSDEN: *Yes.*

MR BROAD: *Did you advise in respect of that?*

MR MARSDEN: *Yes.*

MR BROAD: *What was your advice?*

MR MARSDEN: *My advice was that in relation to the Macquarie Bank—they had pulled out, they had made a decision to pull out. I didn't think that they could take litigious action to enforce themselves to get back in and that was an issue that we ought to canvas. I also accepted what Michael Ey[er]s said that it's going to be a long, hard, drawn-out battle if they decide to litigate and Macquarie have got a lot of power, a lot of money, maybe it's not worth the battle. Michael said that and I don't disagree with that.*

In relation to the Bulldogs I had a lot stronger feeling. I felt that the Bulldogs had acted fraudulently. Their senior officers were fraudulent. I said so. I thought that if they litigated their only witness was McIntyre and I had to say that I didn't think McIntyre would have a lot of credibility in any Court of law and I thought they would lose miserably. But again Michael Ey[er]s pointed out that it could be a long, drawn-out process and there was this urgency, you had to get it done, you had to get it done, always had to get it done, had to be ready for the season.

Mr Marsden commented on his instructions:

MR BROAD: (18/02/04, p.46) *Were you instructed to pursue a settlement?*

MR MARSDEN: *Yes.*

MR BROAD: *Right. Now, could I just jump backwards - - - ?*

MR MARSDEN: *We were clearly instructed not to go elsewhere and look for alternative opinions, but to pursue with Michael Ey[er]s, a settlement, and get it signed up. ...*

3.5.4

It is clear that Mr Eyers undertook the role of resolving the matter.

Mr Eyers' view of the matter appears to have been predicated by a need to avoid litigation and, in order to do so, negotiate a settlement:

MR EY[ER]S: (27/01/04, p.82) ... *So the only sensible way to negotiate out, as opposed to litigate out, was to reduce the number of parties from three to two. That didn't actually happen conclusively until May 2003. Once you get there, then the form of the PPP between Council and Macquarie Bank was, again, a Memorandum of Understanding about a partnership. If the terms of the partnership didn't work then the partnership could have been dissolved and I don't know—I don't whether it ever arose.*

MR BROAD: (27/01/04, p.91–93) *Isn't there an alternative way of settling a matter and that is this? For there to be a legitimate assessment of each and every claim for there to be a quantification of each claim and for there to be an individual assessment of each claim regarding the prospects of success or otherwise and in those circumstances, isn't the negotiator put in a position where he can say: yes as to this claim we estimate the value of that claim to be so much, our prospects of success to be so much and that there to be some form of science attached to it.*

MR EY[ER]S: *In theory yes, but what happens—a number of the amounts that went into the balance here were reasonably hard to certify. This was not a situation in which accounting practice had been perfect, where contractual structures had been followed to the letter. The closer you are to that situation the closer the model that you refer to can be used. The other thing to say about it is that you—because what you are really saying is couldn't the issue have been arbitrated.*

MR BROAD: *No, well that's if it is binding it is an arbitration.*

MR EY[ER]S: *No, I'm not—if you are asking, could an expert have said, well this is how much and if I had known - - -*

MR BROAD: *Perhaps if I interrupt you and perhaps if I can ask the question.*

MR EY[ER]S: *Sorry.*

MR BROAD: *If either the Foundation or the Council had gone about the process of ascertaining the possible claims that might be brought and obtained advice in respect of the prospects of success of those claims, wouldn't Council therefore be in a position where it could itemise each claim and come to a figure which had some relevance to what their possible loss or win might be if the alternative course of litigation were to be adopted? Now, I'm not saying that you should have advised them that because we've discussed that previously.*

MR EY[ER]S: *I'm sorry, I still think you are asking a compound question. If - - -*

MR BROAD: *Well, perhaps I'll shorten it. The circumstance that you seem to be presenting to this inquiry is that a figure was as it were horse-traded, that this figure was derived from basically a claim made by one party and an assessment of the extent to which that claim would be met by the other party and ultimately whether it would be half, a third or whatever it was, some compromise was reached in the figure.*

What I'm suggesting to you is, in light of your earlier evidence that there appears to have been no analysis of the prospects of success of any identified claim, that you were in a position where you could not simply say: yes these are the claims these are the prospects of success I can advise you that this is the amount you should be paying.

MR EY[ER]S: I think you have drawn too extensive a conclusion from the fact that we were not asked to give a detailed analysis of the prospects of success in litigation. Of course, as you would well know any such advice has a pretty substantial range to it. That's true but it wouldn't be a valid inference from that that we had no opinion about who should have worn each of the items that made up the total amount that had gone out of the Bulldogs and Council books. A lot of work had been done by Council officers, by advisers, including the accountants at both Merchant and Partners and PWC as far as I know and we generated lists of the amounts and how they had been spent and yes, we had a very clear view as to what we thought should have been the outcome.

However, I guess where you get to in a situation where you are about to consider settling a claim is something like this. The question is—let me put it hypothetically—we think that the Bulldogs should wear X dollars of these costs. They are only offering to wear X minus half a million of those costs, hypothetically. At that point the question becomes is it worth chasing the difference? You don't usually find yourself, if you are in the position of advising someone who is contemplating whether to settle what would otherwise be litigation—maybe you don't put the question in quite such extended terms as that but in effect that is what you do. I would say two things about the amount that was paid.

Obviously from a Foundation and Council point of view we would have preferred it to be lower and we thought there were arguments to make it lower. On the other hand we also felt that in order to get to the end point it was the better advice to Council to accept that figure rather than unwind and contest and go back to square one.

MR BROAD: To what extent was your ability to freely negotiate hampered by the continuing indications from Council that it wished to move forward with the construction of the Arena? Now, in that respect you have of course spoken about the re-design of the Arena proceeding during the course of the negotiations.

MR EY[ER]S: I really don't see a very close connection. I think that it was always a slightly larger question: do we go ahead or don't we? If we go ahead then we certainly continue with the work being done on the Arena. I might make this comment that at the time of the settlement with the Bulldogs in May the work on the Arena was still preliminary, not cost free but there had not been any commitment to a recommencement contract. If you like we were still at the stage of incurring preliminaries.

If the negotiations had been completed and then in the context of a PPP with Macquarie Bank or some other context the decision had been taken not to proceed with the Arena, then more costs would have been thrown away because of the work that continued between December and May but in the scheme of things those costs would have been—were a relatively small insurance premium for being able to continue with the Arena on time which in a sense was an underlying premise of at least one of the reasons for seeking to settle in the first place.

3.5.5 While such an approach may have been pragmatic, it ignored the earlier failure of Macquarie to provide the financial model and served to overlook the breaches by the Bulldogs' representatives.

Mr Evers had been retained by the Foundation. He was ultimately advising both the council and the Foundation.

At this time the Foundation continued to represent the interests of both the council and the Bulldogs. Their goals were not joined, but opposed.

With the audit of the Arena Trust account and PwC's review of the Foundation, ODC and Liverpool Arena, it was clear that the breaches of faith demonstrated by the Bulldogs' representatives were of such magnitude that the council could proceed no further with them.

Put simply, the council had already lost a significant sum, the contracts between ODC and the various contractors were not arms-length, and council could not be assured that they were either transparent or that it had received best value for money. If this latter scenario was correct, then it was set to lose further money pursuing construction of the Arena.

3.5.6 The Bulldogs appear to have initially intended to pursue the Oasis project although later this view changed, perhaps the result of their failure to obtain the licence for their gaming machines. The Bulldogs shifted to a desire to secure future rights for their team to use the facilities that might be constructed.

Against this background Mr Evers was:

- negotiating a settlement between the council and the Bulldogs for the removal of the Bulldogs from the project
- negotiating a MOU with Macquarie, which would provide the basis for a further PPP to provide the infrastructure sought by the council
- advising the Foundation.

Given the makeup of the board of the Foundation and the separate interests that they represented, Mr Evers was placed in a position where there was a conflict of interest.

Mr Eyers' role became blurred.

On the one hand he became the Foundation's reporter to the council. On the other, he was negotiating arrangements with Macquarie and a settlement with the Bulldogs on behalf of the council.

3.5.7

There is no doubt that Mr Eyers had all but total control over council's negotiations between the Bulldogs and Macquarie. Clearly the settlement terms and the provisions of the Macquarie MOU reflected his views. When giving evidence Mr Eyers was at pains to protect his views.

As has been indicated earlier in this part, he was motivated to find a resolution to what he saw as an impasse between the parties.

He did not:

- review the actions the council or the other parties might be able to bring in possible court proceedings,
- the possible damages that might follow a successful claim,
- the likelihood of success of such claims.

Surprisingly, Mr Eyers had difficulty in accepting the validity of this approach:

MS JOHNSON: (27/01/04, p.88) *Do you recall how you came to the figure of, I think it is \$1.15 million was the amount settled, plus the project costs were to cover the \$600,000 break fee. Do you remember the basis on which you negotiated that?*

MR EY[ER]S: *Well, first of all it is a negotiated figure. It is about half-way between where I opened the bidding for the—as far as I'm aware, I was the person who first nominated a figure, which was in a telephone conversation, which as it happened, I was in Hong Kong, but joined in a telephone conversation with both Council and Bulldogs representatives and half-way between that number and the number that the Bulldogs asserted had been their entitlement to recover was where it finished up.*

MS JOHNSON: *In their entitlement to recover was based on what?*

MR EY[ER]S: *It was really on what they had contributed or spent.*

3.5.8

The approach taken by Mr Eyers in looking at securing a means to overcome the impasse was to place the council in the weakest position at the table.

It had to secure a deal with both Macquarie and the Bulldogs. It could cut neither adrift. Eventually the council was to:

- effectively take over the Bulldogs obligation to pay Macquarie \$600, 000
- pay \$1.15m (plus GST) to the Bulldogs
- ignore its own losses
- waive its rights against both Macquarie and the Bulldogs

- enter into Liverpool 2020 without obtaining any probity advice
- cast aside the transparency and financial security that might come through a tendering process in proceeding with the Macquarie MOU and Liverpool 2020.

3.5.9 Mr Eyers' role reflected council's posture to continue with the project and to minimise the public's concern over council's processes.

Mr Eyers was to become council's negotiator. Ultimately he was neither the council's nor the Foundation's legal advisor, although he purported to be so.

In adopting his role of negotiator he focussed on the results unwisely sought by the council.

In his advice of 17 March 2003 he focussed on the question (amongst others) of whether the council could stop and call for tenders, he advised:

A number of Councillors have asked whether it is feasible to seek tenders at this stage for a co-venturer in the development program. As pointed out in my second report of 18 February and discussed at the Council meeting on 4 March, this is not practicable:

- *Council cannot undertake the development program without a co-venturer;*
- *Macquarie Bank is entitled to object to any attempt by Council to substitute another financier or developer for Macquarie Bank in the Woodward Park development program;*
- *going to tender is therefore likely to be an expensive and possibly litigious way to get to much the same place.*

3.5.10 In evidence, Mr Stalley had said:

MR STALLEY: (22/01/04, p.68) *Because ODC—when we got control of the foundation, which we did in September 2002, we also got control of Liverpool Arena Pty Limited but the Bulldogs refused us control of ODC.*

While Mr Stalley may have held this view, Mr Eyers clearly saw reasons why the council should not have control of ODC.

On 11 October 2002 the Bulldogs had resolved to:
(Bulldogs letter to council 11/10/02)

- cause ownership of ODC and Prestige Development Corporation to be transferred so as to facilitate the participation of that other party in the Oasis Project;*
- negotiate in good faith with a view to reviewing/terminating the Commercial Agreement and the Early Works Construction Agreement.*

On 21 February 2003 Mr Eyers wrote to Mr Stewart, who was leading the negotiations on behalf of the Bulldogs, in the following terms:

ATANASKOVIC HARTNELL
LAWYERS—CORPORATE, FINANCE & TAXATION

Atanaskovic Hartnell House
75–85 Elizabeth Street
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Our reference: E02206
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FACSIMILE TRANSMISSION

TO: Kevin Stewart
FROM: Michael Eyers
Bulldogs League Club
FAX: 9570 9715
DATE: 21 February 2003
PAGES: (including this one)

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Dear Kevin,

OASIS DEVELOPMENT CORPORATION

In George Livanes' absence overseas this week, I called you on Wednesday afternoon to discuss the future of Oasis Development Corporation Pty Limited ("ODC").

Having obtained the financial information that the Foundation and Liverpool City Council wanted (the original motivation for wanting to transfer of ODC shares to the Foundation), the alternative of transfer to the Bulldogs League Club now has attractions.

The choice is the Bulldogs'. The financial arrangements between the Bulldogs and the Foundation/Council will treat ODC assets and liabilities at book value, so the choice will make no financial difference.

I think there are good reasons for Bulldogs to take ODC.

The Foundation retains ODC:

- *ODC goes immediately into liquidation (one reason why the Foundation wants employees, rental agreements, motor vehicle leases and fixed assets transferred out beforehand if it takes ODC);*
- *Possible prosecutions in relation to GST offences will be conducted by the liquidator at Bulldogs' cost and with penalties met by the Bulldogs;*
- *ODC records are available for production under Freedom of Information legislation, apart from documents protected by legal privilege.*

Bulldogs retain ODC:

- *better access to Bulldogs' documents in relation to any tax issues;*
- *no need to liquidate ODC immediately;*
- *ODC books not subject to FOI.*

A little more detail on the FOI aspect may be helpful.

If the Foundation as a wholly-owned subsidiary of Liverpool City Council holds ODC's shares, the company's books will certainly be sought under FOI legislation.

Very little of the primary books—minute books, correspondence, tax and accounting records—would be subject to legal professional privilege. The only basis to refuse production would perhaps be paragraph 7(1)(c) of Schedule 1 to the Freedom of Information Act 1989. That paragraph would allow exemption to be claimed for documents which contain “matter the disclosure of which would disclose information concerning the business...commercial or financial affairs of...any...person, and could reasonably be expected to have an unreasonable adverse effect on those affairs.”

There may not be huge enthusiasm on the part of all Councillors (after the event) for that ground for exemption to be pressed, particularly if a newspaper seeking ODC material activates the appeal provisions under the FOI legislation.

On the other hand, if ODC is transferred wholly to the Bulldogs, all original records would be returned. The only papers kept by the Council or the Foundation would be working papers retained by this firm and by Mitchell & Partners. These were all generated for the purpose of settling the dispute arising out of the Commercial Agreement and hence are subject to legal professional privilege and exempt from production under paragraph 10 of Schedule 1 to the Act.

If ODC is to be transferred to the Foundation, the consent of the Minister for Local Government will need to be obtained under Section 358 of the Local Government Act. It is likely that no such approval can be obtained after the Government goes into 'caretaker' mode this coming Friday, 28 February. If the Foundation is going to seek the necessary Ministerial consent, your decision on the destination of ODC as soon as possible would be welcome.

I have sent copies of this fax by email to Peter Morris and George Livanes.

Kind Regards,

Michael Eyers

Mr Eyers' approach would prevent public scrutiny of ODC's dealings and allow the concerns raised by Maddocks to go unanswered.

In the circumstances this advice was entirely inappropriate, as it would

- prevent any opportunity for the council or the Foundation to explore its rights against ODC
- avoid the Act's requirements for open government
- facilitate a cover up

Subsequently, the concerns over FOI access to ODC records arose when the Bulldogs again proposed that ODC be transferred to the Foundation. It was to lead Mr Carr to remind Mayor Paciullo of the settlement principles that had been adopted by the council, comprising:

(Memorandum 10 March 2003)

George, I draw your attention to key settlement drivers as follows:

LCC

- *No player payments*
- *No G McIntyre payments*
- *No Al payments*
- *LCC exposure to be cap-ed to \$22.25m*
- *Sharing of residual project cost responsibility with BLCL*
- *Financial settlement with BLCL to be paid by PPP by December 2004*
- *To restore community faith in the vision*
- *Freedom of information (FOI) relating to ODC if with LCC (emphasis added)*
- *Any net payments to BCL should be PPP costs*

In the end, Mr Eyers negotiated both a fresh MOU with Macquarie and a settlement with the Bulldogs.

In so doing there appears to have been a substantial disregard for council's real position, particularly the losses that it had sustained, any rights that it may have against its other "partners", the conduct of individuals, and governance issues associated with the new PPP.

Ultimately, whether a product of council's desires or the negotiation process, the council accepted its own losses, took on a liability to pay a substantial sum to the Bulldogs, and took over a liability owed by the Bulldogs to Macquarie, to further the project.

It was not a wise settlement.

3.5 Findings

- 1. Mr Evers was retained by council to mediate settlements with the Bulldogs and Macquarie. This retainer was inappropriate both in its formation and in the manner that it was carried out.**
- 2. The council failed to take advice on or to explore its rights against the other parties. The approach taken by the council was weak and played into the hands of both the Bulldogs and Macquarie, each of whom were eager to obtain their commercial or political ends.**
- 3. Mr Evers was to act both for the council and the Foundation, whose interests were not joined. Mr Evers role was blurred and was conflicted.**
- 4. Mr Evers was instrumental in obtaining a settlement which, when viewed in the light of what had occurred, was not in the council's interests.**
- 5. As a result of Mr Evers negotiations, the council entered into Liverpool 2020 without obtaining independent and thorough advice regarding the legal effect and commerciality of the project and with disregard to the particular restrictions imposed by Section 55 of the Act.**

3.6 Council's Role on the Foundation

3.6.1 Mr Stalley spoke of council's "getting" control of the Foundation. While this may ultimately have occurred through the settlement process, the council did not obtain control of the Foundation through its representation on the Board.

The Bulldogs had remained on the board, although their earlier representatives were replaced.

3.6.2 With the Bulldogs and the council each represented on the Foundation's Board of directors, there were two sharply opposed perspectives.

The Bulldogs had previously had sole effective control of the project. This had involved to this stage:

- the design, costing and construction of the Arena,
- the design for the Bathurst Street development,
- control of funds in the Arena Trust account, albeit effected through directions given to the trustees,
- control over ODC, and relevantly, its processes.

While the Bulldogs had been caught out with the salary cap payments and the excessive claims made by ODC, they were not about to walk away from the project.

The council, on the other hand, was treating the matters as being more in the nature of bad publicity, than as being an indication of fundamental and serious breaches, if not possibly criminal breaches.

So, in this light the interests were joined, at least on the council's part to move forward with the construction of an arena.

3.6.3 In the background Macquarie was ramping up the pressure on the Foundation alleging breaches of the Commercial Agreement.

Surrounding all of this were negotiations between the council and Macquarie intending to create a new PPP, and negotiations between the council and the Bulldogs, initially aimed at reducing the public's perception of the future involvement of the Bulldogs, although subsequently to remove the Bulldogs from the project.

3.6.4 While the Foundation continued to operate, the council's position continued to erode.

Council's decision to be represented on the Foundation's board ultimately weakened its negotiating position, as:

- the Foundation continued to pursue the construction of the Arena—albeit in a smaller less costly form,
- as a direct consequence of this process, the council signalled that its intent was not to stop and deal with the issues,
- the Foundation meetings were open to observers,
- any attempt by the council to enforce its views could be, and were, rebutted by the Foundation. This is evidenced when Mr Carr raised concerns over parking associated with the Bathurst Street Development (Minutes of Foundation Meeting: 26/09/02, p.4),
- legal advisors representing the two camps attended and took an active part in the proceedings,

- attempts to obtain information from ODC were made through the Foundation, despite a very obvious interest on the part of the Bulldogs to protect this information,
- confidential advice given by Mr Evers to the council was provided to the Foundation (See: Meeting: 20/03/03, Attachment 2 and Agenda item 5a; Meeting: 30/01/03, Attachment 6 and Agenda item 7b; Meeting: 06/03/03, Item 7bi.

Council's decision to be represented on the Foundation, not to halt the work on the arena through court process if necessary, not to require access to all of the records of ODC and Liverpool Arena (again through court process if necessary), linked to its decision to pursue avenues for the construction of the Arena was to provide a poor and costly settlement that did not secure the outcomes sought by the council.

3.6 Findings

1. **Council's decision to be represented on the Foundation following the salary cap breaches disclosure was to weaken its bargaining position.**
2. **Council evinced a position where it demonstrated it was indecisive and lacked resolve.**
3. **Despite its predilection for confidentiality, the council was to make its confidential legal advice available to the Foundation and thereby to the Bulldogs.**

3.7 Conclusion

- 3.7.1 While this part has dealt with council's failure to heed various warnings, it would be inappropriate to limit the Inquiry's attention solely to council's actions.

Mr Moss who had conduct of the Oasis Project for Macquarie gave the following evidence regarding the access given to the Macquarie Financial Model:

MS JOHNSON: (23/02/04, p.12–16) *Can I just ask—the feasibility studies that you were talking about. The Bulldogs had access to these, is that right?*

MR MOSS: *Definitely. Everyone on the committee had access to them and in fact, a lot of it was prepared with input from people on the committee. The feasibilities were worked up continually, they were continually re-worked and put forward. The feasibilities had best case/worst case scenarios on all components. Mr Constantinidis had a lot of input into it, certainly had access to it. Mr McIntyre did, and Mr Randolph Griffiths was very actively involved from Woods Bagot.*

MS JOHNSON: *So they got access—you say they had input and they got access not only to the final results, but to an understanding of the parameters that had been chosen and the models that had been used?*

MR MOSS: *Well, we relied—you have got to bear in mind that a feasibility can only start if you have access to the land details and the zoning details. We couldn't dream that up, that had to come ultimately from the Council and that was given to us through Mr McIntyre and Mr Constantinidis.*

MS JOHNSON: *Ultimately though, this feasibility study or this model wasn't ever provided to Council was it?*

MR MOSS: *Well, that's not quite true. That is not quite true. In fact - - -*

MS JOHNSON: *Apart from the three hour briefing?*

MR MOSS: *Well, the three hour briefing is what I refer to, and there is a letter—I'm not sure if you have this letter, but there was a letter sent by Clayton Utz to the Council, to Mr John Boland, their solicitor, Mr Garry McIntyre and Mr Geoff Lock, dated 23 August 2000, where George Livanes writes:*

We are instructed to note that Price Waterhouse Coopers in its capacity as auditors, attended with you at your offices at Macquarie Bank on 27 July. At that time they were given access to the Macquarie economic model and financial model for the project. They took comprehensive notes of the Macquarie model and asked questions and sought information from Messrs Lock, Wilson and Macquarie.

And he goes on to say:

In short, our clients believe that PWC have had sufficient access to the model. In the circumstances and also having regard of the confidentiality and business related issues, no further access to the model will be provided.

Now, what I would say on the model, very clearly, is that it was the intention of our group right from the start that we wanted Council to do its own feasibility and have its own independent parties sign off on their own model. They knew the land that was going into this, they knew very clearly what was going into this, and it was our view that if we did not insist on an independent party representing Council to work their own model up, that ultimately we would be sitting around in a court somewhere talking about it.

MS JOHNSON: *So the aim of denying Council access to your model was to - - -*

MR MOSS: *We didn't deny them access to it. We - - -*

MS JOHNSON: *- - - limit access to your model?*

MR MOSS: *We gave their auditors sufficient time to access that model.*

MS JOHNSON: *Is it right to say that you refused Mr Redman from PWC access to that model?*

MR MOSS: *That's a lie.*

MS JOHNSON: *Mr Redman is not the auditor.*

MR MOSS: *My understanding from the notes that I had from my office is that Mr Redman attended that meeting.*

MR BROAD: *It's been suggested by Mr Redman that he didn't receive all the documents, but rather something in the nature of a precis.*

MR MOSS: *Well, I can't answer that. You would need to ask Mr Lock that question, but that - - -*

MR BROAD: *I'm sorry.*

MS JOHNSON: *Sorry. My recollection was that Council's auditors, which was Mr Banicevic, attended at the meeting but Mr Redman, who undertook Price Waterhouse Coopers commercial review and is from a different part of PWC, didn't attend. The evidence that's been provided to us suggests that PWC—that only the auditors were allowed to attend and not Mr Redman. Does that - - -*

MR MOSS: *I can't answer that. My briefing of my staff on this issue subsequent to this is that Mr Redman attended.*

MS JOHNSON: *So you certainly wouldn't have excluded the person from PWC - - -*

MR MOSS: *Not at all.*

MS JOHNSON: *- - - with the most ability to properly assess your financial model?*

MR MOSS: *I know for a fact there were many discussions with Mr Redman and the staff of Macquarie Bank.*

MS JOHNSON: *And can you—was there any other reason, apart from encouraging the Council to undertake its own financial modelling, was there any other reason why a copy of your model wasn't provided to PWC?*

MR MOSS: *There were other reasons that we made this decision. We believed that if we gave Council a hard copy of our model it would be on the front page of the newspaper the next day.*

MS JOHNSON: *What about if it was provided to PWC?*

MR MOSS: *Well, I can't comment on that. We - - -*

MS JOHNSON: Under arrangements, would they not provide a copy to their client but only their client to review or things of that nature?

MR MOSS: We did, as I said, allow PWC access to the model.

MS JOHNSON: But I think that access was fairly limited, wasn't it, Mr Moss?

MR MOSS: Well, I don't think so.

MS JOHNSON: There was no time frame or constraint set on them?

MR MOSS: I did not have a letter on my file from Price Waterhouse asking for more information on this model.

MS JOHNSON: And your recollection of your discussions with Price Waterhouse was that they were happy with that amount of access?

MR MOSS: I wasn't at that meeting.

MS JOHNSON: What about what your staff told you?

MR MOSS: Well, I don't have any notes relating to that other than the fact that a meeting took place.

MS JOHNSON: You don't have any recollection—but perhaps, Mr Moss, we should make it clear that the evidence that we've received is that there was considerable disquiet on the part of Price Waterhouse Coopers and Mr Carr from the Council about the lack of access. I'm wondering if you recollect that disquiet at the time or whether – – –

MR MOSS: I certainly don't. There was also a second report that was done, as I understand, by BIS Shrapnel.

MS JOHNSON: For the Council?

MR MOSS: Yes. The Council wrote to us around this time, around this same time, asking that an independent report—on 26 July '00 the Council requested an independent report by BIS Shrapnel on the project. That was undertaken, and that would be in the Council's records as well.

MS JOHNSON: Perhaps I can just make sure that I've got your answer clear. You don't—is it your evidence that you don't remember there being disquiet, disputes between you and Price Waterhouse or you and the Council about access to this financial model?

MR MOSS: *Not that I know of. You could ask that question of Mr Lock who was intimately involved in all the meetings on this, but my recollection was that we had provided access to the model and people were happy with that. I mean there was a report also—I note from our records that there was a report from Price Waterhouse subsequent that was sent on to the New South Wales Government that included comments on feasibility.*

MS JOHNSON: *Can I just ask as well, the input that the Bulldogs had into your model, did that include discussions about the likely profitability of sporting fixtures and sporting teams: is that the nature of their input, is that right?*

MR MOSS: *That's right. We needed to know what it would cost for ongoing provision of services, and they were able to help us in that regard. You know, the details on construction costs, real estate prices and interest rate parameters would have come from Macquarie and we would give them the parameters on the land planning which came from discussions between Mr Constantinidis, Mr Randolph Griffiths from Woods Bagot and Council.*

MS JOHNSON: *So if I am understanding, Council on your view ought to have been able to obtain its own model—it knew about the land in the same way in fact arguably, it had better knowledge than you did?*

MR MOSS: *Sure, and it all came back - - -*

MS JOHNSON: *It didn't know about sporting things, but it would need to get someone else to have an input into that?*

MR MOSS: *At that stage it had a price for an Arena, because that had been agreed prior to us arriving on the scene. There was an independent report that had been commissioned from one of the—I can't remember the name of the company, but from an independent company that had put a price on the Arena, so that was a known factor at that stage. The only thing Council would have had difficulty putting a price on, or any independent party would have had difficulty putting a price on, would have been the design ultimately of the stadium.*

MS JOHNSON: *And otherwise Council was in much the same situation as you were?*

MR MOSS: *Certainly, yes. Certainly Council, if they knew what residential land was going in, it would have been very easy for Council to actually work out, you know, the value of that land and the profit it would have derived out of that land on a commercial basis and hence the profit that would have gone into the Foundation that could have been used for community facilities.*

3.7.2 On 3 August 2000, the council had sought a copy of the financial model,¹⁹ having earlier sought to arrange an independent economic assessment of it.²⁰

A copy of council's fax of 3 August 2000²¹ was attached to material provided by Mr Moss, it contains the following notation:

Jeff,

I tried to phone Al to see what (if any) the issues are regarding giving the council these numbers—surprise! No answer. Attached is a set of numbers as discussed with Council. I see the Agreement is now referring to MBL's estimated surplus...

I haven't sent these to Council.

Graeme

None of the evidence seen by the Inquiry suggests that it was ever Macquarie's intent that the council undertake its own feasibility study. Even if this was so, such intent was clearly never communicated to the council.

The evidence given by Mr Moss reflects adversely on his credibility and on the commercial integrity of Macquarie.

3.7 Findings

- 1. Macquarie did not intend to make its financial model available to the council nor did it intend that the council should formulate its own model.**
 - 2. The suggestions made by Mr Moss in his evidence are incorrect and reflect adversely on the credibility of Mr Moss and the commercial integrity of Macquarie.**
-

19. Fax, Council to Macquarie: 03/08/00

20. Council letter to Macquarie: 26/07/00

21. Fax, Council to Macquarie: 03/08/00

Section 4: Prudential Decision Making

4.1 Introduction

4.1.1 This section looks at various failures by the council to take steps, or to take sufficient steps, to ensure that the outcomes sought by it were achieved.

This part principally focuses on the Oasis project, where council's failures are directly demonstrable.

Part of this section also looks at Liverpool 2020 where failings are apparent, and at processes associated with the earlier Stardome project.

4.1.2 All of the evidence available to the Inquiry leads to the inevitable conclusions:

- The council failed, in its dealings under the Oasis project and Liverpool 2020, to:
 - Identify and characterise the risks involved with each project.
 - Take suitable steps to obtain an agreement that appropriately apportioned the risks between the council and the proponents.
 - Obtain appropriate advice regarding the risks that it was to be wholly or partially responsible for.
 - Consider the risks.
- The council abdicated its functions to fully and adequately consider the projects, in favour of the recommendations of its advisers.
- In turn council's commercial advisers abdicated their role, under their terms of reference, recommending that council enter into the commercial agreement notwithstanding that their terms of reference had not been met.
- When it became aware of breaches by its partners, whether Stardome, Oasis or Liverpool 2020, the council failed to act promptly and decisively to deal with them.
- Council entered into the Commercial Agreement, the Early Construction Agreement and the Macquarie MOU without having secured adequate control over:
 - The projects
 - The developments
 - The works contracts
 - Funding

4.1.3 Ultimately, the consequence of these failures has been the delivery of an unfinished concrete slab for construction of an arena, payment or a liability to pay in excess of \$18m, an uncosted amount of staff time and a contract, questionably valid, assigning undetermined development rights to Macquarie Bank.

Council's position is more vexed, as it must decide whether to seek to proceed with the Arena, in circumstances where its "capped" liability to contribute under Liverpool 2020 will not provide anywhere near that required to construct the arena.

Fundamental to the position that the council now faces are a series of failures comprising:

- Ignoring warnings of breaches
- A failure to exercise prudence in its decision-making
- A failure to take and to maintain control over the projects
- A failure to secure performance

4.2 Risk Analysis

4.2.1 Councils operate under a charter, which emphasises their role as custodians and trustees of public assets. It calls upon them to effectively account for and manage these assets.

Over the period reviewed by the Inquiry, particularly when council was considering its involvement in the Oasis and Liverpool 2020 projects, the council was called upon to make decisions affecting its role as custodian and trustee of very valuable assets.

The value of the assets lay both in the commercial value associated with their existing or potential use, as well as their community value, as sporting or existing infrastructure facilities.

In pursuing the various proposals, the council potentially put at risk the commercial value of the properties in which its constituents shared, as well as the community benefits then being, or potentially able to be derived from them.

4.2.2 Given that pursuit of the various proposals each brought these potential risks, adequate analysis of these risks was required. The commercial or community risks were not the only risks faced by the council when pursuing the proposals. The Oasis and Liverpool 2020 projects, the sale of the swimming pool site and to a lesser extent the Stardome Project required considerations, potentially risking the independence and adequacy of council's planning and development processes.

4.2.3 PPP potentially provide means by which risks in proposed developments may be apportioned between the public and private sectors in a manner reflecting the ability of each to absorb, manage or control better the particular risk. Before the council could determine a suitable apportionment of risk, it was necessary for it to have first identified the risks.

4.2.4 In March 2000 the Bulldogs briefed the council on the Oasis master vision plan. On 6 July 2000 “in principle” support was sought for council to enter into an agreement to provide a framework, management structure and strategy for the project, on the basis:

“Council support will be subject to a probity assessment, due diligence review of commercial agreements, the ability to fund and acquire land owned by the Crown and obtaining all relevant consents for land of any part and release of restriction of use where applicable”. (Report to council meeting: 06/07/00)

4.2.5 This report followed council’s earlier resolution of 24 April 2000 in which it had resolved to receive a report addressing:

- Land status and ownership
- Planning processes and planning matters
- Commercial arrangements
- Probity assessment
- Management structure
- Economic and community benefit issues, and importantly:
- Policy options, market analyses, and due process in relation to the sites outside Woodward Park (Report to council: 06/07/02, p.2).

4.2.6 At an early stage the council had been made aware of signs that there were risks associated with the Oasis project.

At its meeting on 6 July 2000 the council considered a report prepared by the acting General Manager, Nick Hubble. The report recommended:

- A probity review be undertaken assessing council’s processes to date, seeking an opinion whether the council should proceed further and the legitimacy of proceeding without tendering.
- A due diligence review of the commercial arrangements, to ensure that its interests as far as they related to public funds, public risks and commercial and social return were protected.
- In light of the potential evidence of land ownership and classification to the project, that council seek valuation for the DLWC lands and thereafter to determine a structure and strategy for acquisition.

- The preparation of planning instruments to support the proposals and the retention of an independent consultant.
- That development applications be referred to an IHAP.

All of the foregoing was premised upon the need to ensure the independence of the project and the need for the council to demonstrate that it had met due diligence principles.

To this extent council, or at least its staff, was signalling the risks that it saw in council pursuing the project.

4.2.7 Importantly, conventional wisdom would anticipate that before council entered into any agreement, it would identify, analyse and deal with the risks that ran with the projects.

The concept of undertaking risk analysis was not foreign to council's processes. Certainly it was not foreign to Mr Hubble, the author of the 6 July 2000 report.

In 22 August 2000 Mr Carr provided a memorandum to the Mayor, reporting the various risk analyses being undertaken, including discussion with Mr Robert Johnston from the then NSW Department of Public Works and Services (DPWS) attaching a document reviewing the proposed agreement for the Oasis Project (Report to Mayor: 22/08/00). The attachment highlighted the risks associated with the project and made various recommendations, including risk analysis processes. Subsequently Mr Johnston wrote to council identifying the risks that he perceived and making recommendations (Letter DPWS 4 September 2000).

4.2.8 The memorandum submitted by Mr Johnston titled "Major Issues" highlighted the perceived risks, including:

- That council may be contracting away its role as planning authority
- That council was to acquire certain lands but was not receiving a collateral guarantee of funding
- That the commercial benefit was questionable
- That inadequate security was being provided to secure the private sector obligations
- That council did not have control over construction works

It is clear that by early September 2000 risks associated with the project had been highlighted, both internally and externally.

Additionally, at this time, the need to take steps to put appropriate measures in place had also been highlighted.

Despite this, the councillors appear to have done little to review or address the perceived risks. Further, the actions of the council, whether through the General Manager or Councillors appears to have been directed to risks arising from the terms of the Commercial Agreement or the necessity to demonstrate ostensible probity compliance.

This approach was myopic.

4.2 Findings

1. **Council failed to adequately consider, review and address the risks attending the Oasis Project.**
 2. **The council's failure was not because it was ignorant of the risks. It had been apprised of various risks, internally by staff and externally by other parties. It wilfully ignored the warnings.**
-

4.3 The Risks in the Lands: The Crown Land

4.3.1 When dealing with the Stardome, Oasis and Liverpool 2020 projects, the council was called on to consider developments affecting land owned by itself as well as that owned by the Crown.

While the council (as trustee) effectively managed the Crown land, the Crown's consent was required for any development on its land and, importantly, for any sale. More than half of Woodward Park is Crown land (Plan of Management, Woodward Park: 11/12/98, Schedule 5.3.2).

Stardome, Oasis and Liverpool 2020 anticipated, or anticipate, development on the Crown Land.

While the Stardome project sought the acquisition of part of the Crown land within Woodward Park, its acquisition does not appear to have been fundamental to the project. Rather, Stardome anticipated the grant of long-term rights, through a 99 year lease.

Obviously, this would require the Crown's consent to that part of its land affected by the project.

4.3.2

Conversely, a fundamental element to each of the Oasis and Liverpool 2020 projects was, and is, the acquisition of Crown land within Woodward Park and its transfer to either the Foundation or the project structure vehicle (Commercial Agreement, Cl.8A, 10; Macquarie MOU, Schedule 3).

Each project carried risk that the Crown would not grant consent, or that its consent was not in accordance with that anticipated by the agreement.

Additionally, so far as the Oasis and Liverpool 2020 projects were concerned, the council was required to acquire the Crown land and meet the acquisition costs.

At the time that the council entered into the Commercial Agreement the Crown's consent to the acquisition had not been obtained nor had the council obtained an indication of the value that the Crown put on the property.

Despite this, the council entered into an agreement requiring acquisition of the Crown land as a condition precedent. The Foundation's obligations did not arise until the conditions precedent were met (Commercial Agreement Clause 3).

By the end of the Oasis project the council had still not acquired the Crown land.

4.3.3

When providing owner's consent for the initial development application by the Bulldogs for construction of an arena in May 2000 (prior to Oasis), DLWC had provided its consent upon conditions requiring that the council acquire the panhandle land at full market value (DLWC Letter: 03/05/01).

Subsequently, in July 2000, when the council was considering entry into the Oasis project, council and DLWC representatives met. In August 2000 Minister Amery endorsed an in principle recommendation for acquisition of the Crown land in Woodward Park at full market value. This approval was subsequently confirmed in DLWC's letter of 17 May 2001. Valuation provided by the State Valuation office suggested that the value of the Crown land exceeded \$12.3m (DLWC submission: 13/07/02).

Mr Carr gave the following evidence regarding the source of funds for the purchase:

MR VINCENT: (02/02/04, p.68) *What was your understanding about where the money was going to come from to buy that land?*

MR CARR: *The land purchase was under the commercial agreement whilst the Council itself was the body that, for legal reasons, needed to acquire the land. It was a back to back arrangement that would have been funded by the Foundation. So the Council legally was relating to the Government to secure the land on the understanding that it wouldn't pay money over until the Foundation had money back to back to cover it.*

Importantly, the council was required to acquire the Crown land at a time before the Foundation was obliged to proceed under the Commercial Agreement.¹ Given this, the council, in entering into the Commercial Agreement, placed itself in a position where it bore an unfunded obligation to acquire the Crown lands at full market value.

4.3.4 On 28 August 2001 the council entered into the Early Construction Agreement. This Agreement brought forward the construction of the Arena, which was to be built partly on the Crown land. One effect of this agreement was to bind the council to the Crown land in a manner that it could not retreat from, as inevitably construction would take place on the Crown land.

Co-incidentally, that day, council's valuers Gerton Pty Limited provided their valuation of the Crown land at:

\$2,550,000 for the panhandle, and
\$9,300,000 for the entirety of the Crown land within Woodward Park

4.3.5 At 14 April 2003, when council entered into the Macquarie MOU, the position had not improved.

The council remained bound to acquire the land.

In the absence of a financial model, which had not been forthcoming from Macquarie Bank,² the council could not be assured that its liability to acquire the Crown land would now have been funded. The probability was that council's position had not changed and the liability remained unfunded.

4.3 Findings

- 1. Council entered into agreements that required it to acquire and make available Crown land. In doing so it took on the risks that:**
 - it could not obtain the land,
 - that if approved, acquisition might be delayed,
 - the costs of the acquisition were unknown.
 - 2. Following the ECA, the council took on additional risk as the acquisition cost of the land was unfunded.**
-

1. Commercial Agreement, Clause 8A and 10

2. Evidence of B Carr: 03/02/04, p.18, Evidence of W Redman: 27/01/04, p.29 and Evidence of W Moss: 23/02/04, p.12

4.4 Forfeiting Land

4.4.1 Under the Commercial Agreement the council was required to vest substantial tracts of land in the Foundation. The Foundation would act as developer.

Neither the Commercial Agreement nor the Oasis Master Plan contain precise details of the developments that were proposed to be carried out on the various sites.

Rather, they identify and position the nature of the developments in Woodward Park, through schematic representation. Alternatively, they provide numerical outcomes specifying dwelling or floor space yields sought from the CBD properties and the TAPP's land. In that sense their value may be greater for planning purposes than as a basis upon which to enter into a binding contract.

Neither provides a sufficient basis for the council to have divested its assets, particularly in light of council's charter obligation, under the Act, to account for and manage its public assets as custodian and trustee.

4.4.2 Council, when entering into the Commercial Agreement, in the absence of detailed development outcomes and in the absence of appropriate financial modelling, risked forfeiting its assets.

This risk was heightened by the proposals contained in the Oasis project for the development and on-sale of the residential, and possibly the commercial components, within Woodward Park, the TAPP's land and the CBD properties.

Additionally, council's knowledge of Macquarie's financial model was limited, with a briefing session of about 3 hours being provided to PwC (Public Hearings W Redman: 27/01/04, p.28–40).

The council did not undertake its own feasibility study nor did it market-test the proposals.

Mr Redman, council's Commercial Adviser emphasised at the Public Hearings:

MR REDMAN: (27/01/04, p.30–31) *It would have been wise for Council to either insist on seeing that feasibility study before proceeding or seeking separate advice. I think that's right.*

4.4.3 The untested nature of the Oasis proposals to provide high-rise residential and commercial developments on the CBD properties was taken up with Mr McCully, council's current General Manager.

Mr McCully emphasised the need for the council to have conducted its own feasibility study and market testing:

MR BROAD: (04/02/04, p.6–7) *Again, given that Council was the major stakeholder and the major risk taker, would it have been appropriate to have investigated the feasibility of the project?*

MR McCULLY: *Well I certainly would have had two things you would have done. Firstly, some discussion, consultation with the community to—sorry, firstly the technical planning assessment to see whether it could be done, then some consultation with community to see whether you could move the community along with whatever you are proposing, and then you would do the initial financial feasibility, so that all those three things were done before you would step off the first step.*

MS JOHNSON: *What would the financial feasibility involve? What are you talking about—what type of research or reporting are you talking about there?*

MR McCULLY: *You would probably look at a market analysis. Is the product that you are wanting to put on the ground, whether it be residential or commercial, whether it was feasible, where there was a market for it, over what period of time and, were the funds that were going to be derived and cash-flow from that, would they be sufficient to meet the objective they were going to go to, or were you going to end up at some stage in some large deficit, in which case you would have to put some financial mechanism in place to fund that until the source of funds from the project were sufficient to pay for it.*

4.4.4

Ultimately, the council entered into the Commercial Agreement without having taken adequate steps to detail:

- the nature, extent and make up of the proposals, particularly the CBD developments;
- the overall feasibility of the project, nor the individual feasibility of facets of the project (other than perhaps, the Arena);
- identify whether there was a market for the various projects, (other than, perhaps, the Arena), particularly the novel developments on the CBD properties.

In this way the council forfeited:

- Its ownership of Woodward Park,
- Its prospective interest in the Crown Land in Woodward Park (that it had become bound to acquire),
- The TAPP's land, and
- The CBD Properties

4.4 Findings

1. **The lack of detail in the proposals affecting council's lands did not provide a sufficient basis for the council to have entered into the Commercial Agreement, nor subsequently, the Macquarie MOU.**
 2. **As a result the council effectively forfeited its ownership of its most vital asset, its land; an asset that formed the basis of all of its commercial relationships with its private sector partners.**
-

4.5 The Suitability of the Land for Development

4.5.1 During the public hearings the Inquiry heard evidence of concerns over the suitability of the TAPP's land, Woodward Park and the CBD properties for the development that was anticipated under the Oasis Project.

Three principal issues were enunciated:

- Possible pollution of the former waste depot on the TAPP's land³
- Drainage issues affecting the TAPP's land and Woodward Park⁴
- Planning issues, particularly involving traffic and parking affecting the CBD properties.⁵

4.5.2 The Oasis Master Plan vision document anticipated the following yields from the TAPP's and CBD properties:

TAPP's Land:

720 Residential dwelling made up of:
70 retirement units
300 units in 3 storey developments
300 units in high rise developments
70 units in detached 2 storey townhouses
30 separate lots

And, in addition, a total of 10,630m² of commercial space.

CBD Properties:

450 residential apartments, comprising:

240 apartments on the Bathurst Street property, and
210 residential apartments on the Northumberland St property

3. See generally the evidence of P Fraser: 26/02/04, G Turissi: 29/01/04, p.61&75, M Ritchie: 29/01/04, p.17 and B Carr: 03/02/04, p.84

4. See generally the evidence of P Fraser: 26/02/04 and M Ritchie: 29/01/04, p.16 et seq.

5. See generally the evidence of P Murray: 30/01/04, T McGuire: 30/01/04, G Turissi: 29/02/04, P Adams: 29/02/04 and G Creber: 29/02/04

And, in addition, 12,300m² of commercial and retail space spread over the properties.

4.5.3 Significantly, when presented with the Oasis project, the council did not undertake studies to ascertain the extent or type of pollution of the former waste-depot on the TAPP's land, nor the prospective costs that might be associated with its removal.

Rather, as Mr Ritchie stated:

MR RITCHIE: (29/01/04, p.17)... *The issue of the contamination was regarded as a cost to the project and we certainly commented. There is an old report which showed some bull (sic. bore) hole results for Paciullo Park and it is certainly recognised as a contaminated site, there's no question about that.*

The scale of the land filling operations were known so the extent to which the developers factored it in, they would have factored it in as a cost to the project. I would imagine, and it was never discussed, I would imagine the simplest and cheapest way to remove it would have been to excavate it and take it to a contaminated soil land fill in Western Sydney. We were never asked to advise on what the most cost-effective way of remediating or removing the material would be.

Mr Carr confirmed this view, giving the following evidence:

MR VINCENT: (03/02/04, p.84–85) *The TAPPS land was valued by Gertons, \$17 million, what it has been quoted as, was there consideration taken there into the contamination of that land, it is an old tip site, isn't it?*

MR CARR: *Yes, it is. I think that - - -*

MR VINCENT: *Was that factored into the project at any stage, remediation works?*

MR CARR: *I think it was recognised that the—from what I saw from documents from officers at the time that the contamination issue wasn't—it was an issue and it was disclosed but it wasn't such a major issue that it was going to - - -*

MR VINCENT: *You think it was in Macquarie Bank's plan? Do you think that when you had the briefing, was there any mention of money spent on that land to develop it?*

MR CARR: *In the what, sorry?*

MR VINCENT: *In the Macquarie Bank financial model?*

MR CARR: *No, I think the onus on correcting the land is with the land owner. My advice was that it wasn't - - -*

MR VINCENT: *So your understanding on the agreement, if work was required that would have been an extra cost to Council?*

MR CARR: *Yes, but I understand it was a fairly minor cost, is what I've been informed.*

4.5.4 Similarly, the council does not appear to have considered the cost of the flooding and drainage issues, notwithstanding that a large substantial portion of the TAPP's and Woodward Park was flood affected.⁶ Mr Ritchie expanded on this at the Public Hearings.

MR RITCHIE: (29/01/04, p.16–17): *... There was a fairly large requirement for cut and fill and draining that area to move the storm water away, to get the facility above the one in a hundred flood line and that involved significantly remediating the Paciullo Park land and taking a lot of fill out and putting in engineered culverts to make that happen. In terms of the contaminated land of Paciullo Park, I don't believe that was ever a major concern, it was one that was manageable by experts and whether that involved excavating the material and depositing it in an engineered land fill or remediating on site, they were all possible and probable. It certainly wasn't a constraint on the development.*

Even if Mr Ritchie was correct that the possible pollution of the site was not a constraint on development, it certainly represented a cost, possibly substantial, to be borne by the project.

4.5.5 No consideration appeared to have been undertaken of the suitability of the proposed CBD developments.

Mr Turissi, council's then Senior Development Planner, gave evidence:

MR BROAD: (29/01/04, p.70–71) *Can I ask you of your involvement in planning issues in the lead up to the commercial agreement? Were you asked to look at planning issues that might arise in the commercial agreement?*

MR TURISSI: *No. My role in that regard was being presented scenarios and then asked questions as to whether or not I felt that would run into particular problems, from a procedural point of view.*

MR BROAD: *Were you presented with any scenarios associated with the CBD developments?*

MR TURISSI: *I was presented, at one stage, some scenarios with the Bathurst Street site, in terms of conceptional plans.*

MR BROAD: *Yes. Do you recall when that was?*

6. See generally evidence of P Fraser: 26/02/04

MR TURISSI: *Look, no—it would have been after—it was after my time as the interim position, I think - - -*

MR BROAD: *Would it have been before the commercial agreement was entered into or after?*

MR TURISSI: *No. It was after.*

MR BROAD: *After?*

MR TURISSI: *It was after.*

MR BROAD: *Would it be usual, given your position in Council, for those matters to have been referred to you?*

MR TURISSI: *I mean, certainly—yes. I mean, there was—yes.*

MR BROAD: *Okay. So if the Council was looking to enter into an agreement which provided that it make available a large area of development opportunity, then you would normally expect that to be taken up with you before anything was done on that?*

MR TURISSI: *Certainly ask questions of it, yes, in terms of what my views were.*

The lack of consideration of the proposals affecting the CBD was confirmed by the former General Manager, Mr Carr in the following evidence:

MR BROAD: (03/02/04, p.28–29)... *If I can move forward, at the time the Council entered into the commercial agreement, had it undertaken any pre-planning for the sort of development that would be required to meet the 80,000 square metre requirement contained in the commercial agreement?*

MR CARR: *I don't think it undertook its own assessment other than responding to the master plan and knowing that the Council would have to go through the LEP, DCP exercise. I have now found the master plan on page 42. It says:*

Bathurst Street, commercial office, private car park, public car park, and retail for the commercial office, 2400 square metres, private car park 8600 square metres. The public car park 15,600 square metres, retail 3400 square metres, providing 240 apartments, 240 spaces in the private car park and 450 spaces in the public car park. So that was how it was outlined in the master plan.

4.5.6 The developments to be carried out on the CBD properties and the TAPP's land underpinned the ability to finance the infrastructure promised by the Oasis project.

They were to generate the majority of the funds necessary for the construction of the Arena and Stadium.

In signing the Commercial Agreement, the council specifically accepted the risk of remediating the former tip site, notwithstanding that no studies had been carried out to determine the nature, extent or cost of remediation (Commercial Agreement, Clause 31.4.4).

Indeed, the council does not appear to have considered whether the TAPP's land was suitable for any re-development.

Despite this, the council agreed to provide for stipulated outcomes in the Commercial Agreement.

4.5 Findings

1. **The council failed to undertake any studies to determine:**
 - the suitability of the lands for the developments being sought,
 - factors such as flooding or toxicity of the land that might render the sites unsuitable for, or otherwise constrain, development, or which might significantly add to the costs of development.
2. **The council so disregarded matters such as these that it abrogated its role as manager and custodian of community assets**

4.6 The Risks in the Outcomes

4.6.1 The Oasis project anticipated the provision of substantial infrastructure being built on Woodward Park.

In order to achieve these outcomes it would be necessary for a special purpose vehicle, the Foundation, to develop and sell the CBD lands and the TAPP's land and part of Woodward Park, principally for residential uses.

At the time that the council entered into the Commercial Agreement these outcomes were "pie in the sky".

4.6.2 At the time of the Commercial Agreement:

- Council had received PwC's draft feasibility study of 16 December 1999. This related to a previous proposal. The construction costs of this arena, in its then largest form, at \$24.7m (p.4), were substantially less than the \$33m anticipated under Oasis (Report to council meeting: 05/02/01, p.29).
- Council had not been provided with a copy of the Macquarie Bank financial model
- Council had not undertaken its own financial modelling (Carr: 03/02/04, p.48-49).
- Plans for construction of the project elements were not complete, and had not been provided to the council.

Building/ Area Number	Use	GFA/Site Area	Number of Stories	Number of Apartments/ Carparking
Masterplan A (Continued)				
14	Stadium <i>Seating Capacity: Concourse Areas incl. Retail Carparking Commercial/corporate suites and/or residential Convention and other facilities</i>	Approx 35, 000 seats 25, 000 m ²		180suites/ apartments 1500 cars
15a	Residential and Associated Parking		5 & 10	300 apart 400cars
15b	Public car park plus commercial		7	1300 cars
16a	Hillier Gardens			
16b	Hoxton Park Corner	4.6 ha		
17	Riparian Zone/BrickmakersCreek	1.2 ha		
18a	Road North South	2.3 ha		
18b	Road	0.67 ha		
19	Buffer Zone landscaping	0.98 ha		
Masterplan Part B				
20	Paciullo Park/Council Works Depot Site <i>Commercial site 1 Commercial site 2 Retirement Village 3 storey walk-ups High rise apartments 2 storey town houses Detached housing lots</i>	4,130 m ² 6,500 m ² 7,000 m ² 2,500 m ² 3000 m ² 8000 m ² 300 m ² each		70 units 250 units 300 units 70 units 30 lots Total 720 dwellings
21	Barbara Long Park	3.1 ha		0/320
Masterplan Part C				
22	Bathurst Street <i>Commercial Office Private Car Park Public Car Park Retail</i>	2,400 m ² 8,600 m ² 15,600 m ² 3,400 m ²		240 apartments 240 spaces 450 spaces
23	Warren Serviceway <i>Council Chambers Commercial Office Private car park</i>	12,000 m ² 3,000 m ² 10,000 m ²		
24	Northumberland Street <i>Residential Retail Private car park</i>	20, 200 m ² 3, 500 m ² 7, 700 m ²		210 apartments 220 cars

4.6.3 In the circumstances, the council could not have satisfied itself that the outcomes sought were:

- Appropriate, or
- Achievable, or
- Viable

Accordingly, the council had not measured the risks associated with the outcomes.

Regrettably, when the Oasis project fell through, the council entered into the Macquarie MOU.

The Macquarie MOU anticipates outcomes of the nature of those proposed by the Oasis project, other than construction of the stadium (P Wright: 28/01/04, p.46; Macquarie MOU Schedule 5).

At the time that the council entered into this agreement it had quantified its losses on the Oasis project, and it had ascertained the prospective costs of construction of the Arena had escalated to \$69m (Transcript, M Douglas: 30/01/04, p.15).

Whilst construction plans for the arena had been prepared, no other studies had been undertaken to resolve the issues associated with the outcomes affecting the Oasis project. To that extent, given the greater lack of certainty in Liverpool 2020, council faced greater risks regarding the possible outcomes.

4.6 Findings

1. **Council entered into the Oasis Project, and subsequently Liverpool 2020, without having obtained sufficient information, including financial models and feasibility studies.**
 2. **It could not be assured that the project could be carried out and that the infrastructure provided would not constitute a continuing financial burden on the council.**
-

4.7 The Feasibility of the Arena Project

4.7.1 Following the disclosure of the salary cap breaches, the council had an opportunity to stop and to consider whether it should proceed with construction of the arena and whether it should pursue the other aspects of the Oasis project.

At this time the conduct of the Bulldogs had demonstrated that they were an unreliable “partner”.

Similarly, the conduct of Macquarie, whether by its refusal to provide its financial model, or by its attempt to obtain what Mr McIntyre was to describe as “side deals”, had demonstrated that they were also an unreliable “partner”.

The council had relied on its partners up to this time, relying on their commercial integrity when entering into the Commercial Agreement.⁷

4.7.2 In 1999 the council had obtained feasibility advice from PwC, which PwC described as a “Interim Report”. It had stemmed from the Stardome proposal and did not reflect fully what was being proposed under the Oasis project.⁸

In November 2002 PwC provided its final report. This report was based on the post-Oasis scaled-down arena.

Importantly, PwC paid no regard to the capital cost of the arena in its report.⁹

The feasibility was therefore limited to consideration of whether the operations could provide a surplus.

4.7.3 The PwC report would not be able to review whether, if there were a surplus, this would provide a return on capital. Similarly, the report would not factor in allowance for depreciation, and most importantly, maintenance.

After a hefty disclaimer, PwC’s feasibility report was to indicate, that of the two alternatives they received, the arena would generate a surplus.

PwC’s report was based on multiple use of the arena for:

- Indoor sports, including:
 - men’s and women’s basketball
 - netball
 - volleyball
 - boxing

7. Report to Meeting, generally and 05/02/01, p.17

8. PwC Report: 11/11/02, p.2

9. See coversheet to PwC Report: 11/11/02

- Entertainment events, including:
 - popular music and rock concerts
 - musicals/popular concerts
 - family shows
- Functions, including:
 - conferences
 - exhibitions/product launches
 - banquets

and also suggested possible use for community sports and events.¹⁰

4.7.4 Mr Redman, who had been responsible for the report gave evidence of the status of such a report and the processes undertaken to prepare such a report.

MR BROAD: (27/01/04, p.26–28) *Can I turn now to the feasibility studies undertaken by PWC, and in that respect you have provided an interim report and a final report. Can you give me an indication of exactly what the status is of a feasibility report? In other words, what reliance, what processes are undertaken in preparing such a report, those sort of matters that might be able to assist the inquiry?*

MR REDMAN: *Certainly. We undertook an initial report following our review of the very first commercial agreement presented to Council, effectively as a contingency plan should the broader project not proceed. During the course of that report, we undertook as required by our terms of reference quite extensive research with potential operators for the centre, event promoters and indeed, benchmarked the facility against other similar facilities around Australia.*

We highlighted in our report nonetheless that our projections were clearly dependent upon further work that we expected if that particular project had have proceeded that Council would have undertaken in terms of a full business plan and would have entered into preliminary agreements with potential users of the centre and indeed, would have undertaken a full business plan which would have dealt with the financing of the project.

So in a sense, the feasibility study is a starting point for a project. To understand: does a project have some potential to be commercially viable?

MR BROAD: *What sort of depth do you go into? Do you go to a stage where you, say approach potential operators and you go beyond getting a recognition that yes, they might be interested? Do you then go to a stage of saying: well look, if you are interested, what sort of figures would we be talking about? What sort of detail do you go to in assessing that?*

MR REDMAN: *In both of our reports, the earlier report which I believe is about '99 and the more recent report for the Foundation – – –*

10. PwC Report: 11/11/02, p.16

MR BROAD: *Could I interrupt you?*

MR REDMAN: *Sorry.*

MR BROAD: *Could I steer you away from what you physically did in these reports but into generalities - - -*

MR REDMAN: *Certainly.*

MR BROAD: *- - - as to what PWC does as a general approach?*

MR REDMAN: *It is often difficult to generalise because each project is quite different but in general terms, we would normally approach people involved in the industry to ascertain their views on the project, the location, the likelihood of success, the likely event mix for centres, which we did with this particular project.*

MR BROAD: *And the depth of that approach, you say the likelihood of success—do you look for traps, do you look for problems that might arise?*

MR REDMAN: *Certainly. I mean, we have been involved, for example, in the Sydney Olympic project and other similar projects in Australia so we have—the Wollongong Centre, for example. So we have worked on similar projects throughout Australia. But at the end of the day I think the operators who are active in the industry are full time at this and have a considered view and so we respect that view. But nonetheless, as you will have read in our reports, we sought out opinions of a wide range of people.*

4.7.5 The purpose of the study was:

MR REDMAN: (27/01/04, p.29) *... To give the State Government some level of comfort, the project might deliver the sorts of surpluses that Council were looking for - - -*

Given the complexity of the report's disclaimer it is surprising that this point was not made in the report.

Mr Redman was at pains to emphasise that feasibility was not equivalent to viability.

MS JOHNSON: (27/01/04, p.42) *Is it possible that a feasibility study might be undertaken which suggests that a project is viable but that once a business plan is developed, or in the course of developing a business plan, trying to say, enter into those heads of agreement or things of that kind, that you form the view that, in fact, this is not going to work in practice although the feasibility study has suggested that it might. Is that - - -*

MR REDMAN: *That is always a possibility. When we talk about viability I think we need to be careful. Arenas typically never repay capital and so our experience with whether it's a congress centres, Arenas or entertainment centres, is that typically they might make a small profit but they never repay capital. So when we're talking—our word on viability normally means that a project can repay capital or return shareholders' funds on capital employed. So therefore, when we talk viability we are talking being able at least to break even.*

MS JOHNSON: *Right. So to cover operating costs is what - - -*

MR REDMAN: *Correct.*

MS JOHNSON: *- - - for Arenas and those - - -*

MR REDMAN: *It is what is meant to be viable. Yes.*

MS JOHNSON: *Is what is meant to be viable. So you might say we developed a feasibility study that says we think that once constructed, this Arena can at least rent out enough of its space and time and enter into sufficient agreements that it will be able to recoup its operating cost, perhaps with a bit extra?*

MR REDMAN: *That's the idea.*

Despite this, PwC identified their assignment as equivalent to that in their 1999 report, to:

As identified in our revised proposal of July 1999, the purpose of the assignment was to undertake an assessment of the commercial viability of the Woodward Park Arena and associated Precinct development.

4.7.6 PwC's report was premised on:

- the ability of the arena to generate a niche market in Western Sydney for the entertainment market
- the ability to cater for a range of indoor sports and an ability to attract senior teams and their supporters
- the ability to attract other international sports such as netball, volleyball and boxing away from other venues
- the ability to attract various classes of musical performers and their fans
- the ability to attract other events, including conferences, exhibitions and functions.

4.7.7 In the end, PwC's feasibility study suggested extensive use of the arena, culminating in its use ninety-three events in each year,¹¹ involving its use for 181.5 days per annum.¹²

11. PwC Report: 11/11/02, p.50

12. PwC Report: 11/11/02, p.51

Based on the nature and frequency of the uses, and costings contained in the report, PwC was to demonstrate a return to the council.

4.7.8 The premises and methodology of the PwC report were to be questioned by Mr Lonie in a subsequent report.

The PwC report and the design of the arena were also to be criticised by Mr Fraser, with Mr Fraser moved to comment:¹³

“There is currently no firm base in place to underpin the planning for this project”.

4.7.9 It had always been council’s, as it was PwC’s, premise that the involvement of the Razorbacks would underpin the feasibility of the arena.

Mr Fraser was to debunk this notion:¹⁴

*Unlike America where UMAs typically thrive on indoor sports, leaving entertainment as the fill-in; the reverse is true in Australia. Typically the economic viability of Australian venues is underpinned by entertainment with sport playing a relative minor fill-in role, if at all. **This is well illustrated by the accepted wisdom around the Australian circuit that the yield to a venue from a season of Basketball is equivalent to the yield from one full house rock concert (emphasis added).***

He was to provide more detailed comments on the various uses,¹⁵ suggesting that many of the expectations were unlikely to be realised.

4.7.10 Mr Lonie was also to be critical of PwC’s report, suggesting:¹⁶

My observation from that sequence of events is that the PwC Woodward Park Arena Feasibility Study Report seems to have been prepared to support the project’s development as a multi purpose entertainment arena rather than to consider the commercial options to deliver an NBL basketball arena for the Liverpool City Council at a level of commercial risk acceptable to the Liverpool City Council.

Mr Lonie was also to debunk the drawing capacity, and consequently the ability of basketball, netball and volleyball to pay the commercial rents anticipated by PwC. Mr Lonie was able to raise issues that questioned PwC’s assumptions regarding boxing, rock concerts and others, as well as questioning the ability of the arena to provide facilities required by conventions.

4.7.11 When reviewed as a whole the two reports leave residual concerns that the arena may be little more than a white elephant, with substantial risks in attracting a sufficient number of users to provide a positive cash flow.

13. Report of Ian H Fraser: 27/08/03, p.24

14. Report of Ian H Fraser: 27/08/03, p.25

15. Report of Ian H Fraser: 27/08/03, see generally p.28–33

16. Report of S Lonie: 16/10/03, p.9

Mr Lonie reported:¹⁷

In my experience, most entertainment centres struggle to produce a consistent positive earnings before depreciation, amortisation and interest result—that is to return a cash positive operating result before taking to account depreciation, amortisation and interest expenses. If this facility does not generate the level of events that PwC project, which I consider unlikely, then it also follows that the facility would probably not cover its cash operating expenses from its revenue base. The consequence is that the facility owner, the Liverpool City Council, would have to underwrite this operating loss.

The size of and extent of that operating deficiency is difficult to predict, but the probability that it will exist is high as:

- *The revenue base is highly dependent upon the attraction of high quality entertainment events, a scenario that I consider most improbable;*
- *No matter how few events that the facility attracts, the management company will be obligated to attempt to attract events and incur the cost of a core management team and support infrastructure to support its operations, at least in the short term; and*
- *The building will require a minimum of ongoing preventative maintenance and technology upgrades over its useful life.*

Finally, if the facility proved to be unsuccessful in the ownership of the Liverpool City Council, the realisable value of a special purpose building like the Woodward Park Arena is likely to be as low as it is unlikely to be an attractive investment opportunity for a private sector purchaser if the Liverpool City Council wanted to sell it at a later date, as, even putting aside the public policy issues associated with the disposal of a public asset on Woodward Park, it would have no commercial value as an entertainment centre as it would not be generating operating profits sufficient to warrant any commercially based investment.

4.7.12 When the PwC feasibility was undertaken the council was in the throes of coming to grips with the disclosure of the salary cap breaches.

It was:

- negotiating to end its relationship with the Bulldogs
- moving towards a new relationship with Macquarie
- trying to deal with a blow-out in the cost of the arena from \$33M to \$69M
- attempting to convince the State Government that the project was sound
- seeking external support for its ambition to complete construction of the arena
- seeking to deflect the adverse publicity of the misuse of its funds and the ICAC inquiry.

¹⁷. Report of S Lonie: 16/10/03, p.14–15

Importantly, the PwC report would not cause the council to stop and to consider whether it should pursue construction of the arena. Rather it was to suggest that there were sound grounds to continue with the project, importantly, the construction of the arena, underpinned by support from the Razorbacks.

This, despite a record showing long-term serious decline in overall NBL patronage, and individual losses of up to 63%.¹⁸

4.7 Findings

1. **The PwC report of 2002 was not a feasibility report; rather it was a discussion paper on the potential use that might be made of the arena and the income that might derive.**
2. **The PwC report appears to have been driven by a perceived need to put a good case to support the project.**
3. **The PwC report served to engender further support within the council, for construction of an arena, the cost of which has now blown out to at least \$50M.**
4. **After the departure of the Bulldogs, the risk associated with construction of the Arena well and truly lay at council's feet, as Macquarie's role under Liverpool 2020 did not extend to the risks associated with the construction, operation, management or maintenance of the arena.**

4.8 Impossible Timeframes

- 4.8.1 The council's involvement in the various projects appears to have stemmed from its initial decision to support the Slammers in their bid to gain acceptance into the National Basketball League.

In September 1997 the council wrote to the Slammers expressing its support for their bid for inclusion in the NBL.

Underlying council's support was Mayor Paciullo's perception:

MR PACIULLO: (19/01/04, p.14) ... *I would, as the Mayor, want to encourage our teams to do well and if I can possibly help them to do better because it is very positive for the area, for our youth to understand that they have successful sporting teams and hopefully they follow their heroes.*

MS JOHNSON: (19/01/04, p.15) *That was a positive from the Council's point of view?*

18. PwC Report: 11/11/02, p.40

MR PACIULLO: *Well, it was a positive from my point of view and I imagine, if I can speak on behalf of the Council, it was a positive in terms of having for the very first time, a national team representing our area.*

Later in his evidence, Mayor Paciullo emphasised the importance of council's support for a national team:

MR PACIULLO: (19/01/04, p.25) *It was very important to me and I've alluded to the reasons why, and I think it was important to the Council generally that we could secure a national sporting team. I am of the very strong belief that in an area like ours, especially with the huge number and we have a very large proportion of young people, it is important, because we didn't have this ability, we didn't have the situation, we didn't have the opportunity before of being able to provide for a national team, and to give our youth an opportunity to become involved and to keep out of trouble as we know youth normally does.*

So it was important to me to secure that national team, but it was also important to have a complex that could meet our growing demands which I have alluded to and a centre that would be—that we all would be proud of, if it could be accomplished.

MS JOHNSON: (19/01/04, p.31) *So the idea was that Liverpool would become the centre of attention in particular sports that have a focus on Liverpool or rugby league and basketball as well and that is what this proposal offered.*

MR PACIULLO: *Well, of course it would be national sport, it would attract people to our area, it would create employment, it would boost our business centre, it would provide for, as I said, for an activity for our youth to take an interest in which otherwise can be very difficult for them.*

4.8.2 This view was confirmed by Mr Carr, in the following terms:

PROF DALY: (03/02/04, p.4–5) *... The other point which I just raise—these are really background points to the route we want to travel down today—is what appears to be almost a fixation by the council of a particular basketball team. It began in that period, and if you trace the history of the various changes and developments of the ideas of what might happen in Woodward Park, somehow you always come back to the basketball team as providing an arena, an area, in which they could play as really dominating the agenda in various ways—the early construction agreement, for example. In hindsight, do you think that the what I've called a fixation on that basketball team warped the thinking of the Council in terms of what they chose to do and what priorities they put on different things?*

MR CARR: *It was certainly a major driving factor, it was the motivation, it was the—whenever the Mayor or other people talked about this sort of project, the passion was coming through relating to having a national basketball team playing locally, having what they call the basketball players, the icons, the youth that would then be able to relate to those icons. It was really being driving from a social perspective about the importance of lifting the morale of the Liverpool community, and so it had all of those elements, and I think that it sort of had all of those emotional elements, and I think what was really driving it was the emotional elements, and, of course, we are trying to deliver an arena from a rational perspective with a lot of emotional drive. So it certainly did have a significant influence on how the council was travelling with this project to meet those emotional drives.*

- 4.8.3 The perceived value in supporting a national team subsequently took on the aura of a definite and urgent need to provide facilities to meet a requirement thought to have been imposed by the NBL.

MR PACIULLO: (19/01/04, p.45–46) *Well the reason that came forward was because of the urgency that had developed into retaining the Razorbacks and building the area, bringing it forward in the sequence of events because during this course of time the National Basketball League had indicated to the Razorbacks that they would no longer accept their old playing centre which was the Whitlam Centre which houses about a maximum of 2500, 3000 at most in rather sort of older conditions if I can put it that way. And they began playing at the Homebush Sports Centre and the necessity to bring the stadium—sorry, the arena forward—became obvious and there was agreement that to bring this forward, an early construction agreement should be put in place and then try and deliver the project by a certain date for the following season. So that was the background.*

- 4.8.4 There is little doubt that this perception aided the Bulldogs and Macquarie Bank in their push to have the council enter into the Commercial Agreement and subsequently the Macquarie MOU.

Mr Carr described the sense of urgency associated with the Commercial Agreement.

MS JOHNSON: (03/02/04, p.61) *So when you're receiving reports up to 5 days prior to the meeting, was there any reason why it had to be held on 5 February as opposed to 14 February as opposed to 5 March? Where was the fire, why the urgency?*

MR CARR: *Well, there was always urgency on this project. The urgency was being generated in terms of getting decisions about moving forward. The urgency was always being pushed in terms of getting the Arena into construction at some stage for the NBL requirements.*

Such was the perceived urgency that the council entered into the Early Construction Agreement. This agreement was based upon the immediate construction of the Arena.

4.8.5 Subsequently, when the Bulldogs salary cap breaches had become public, entry into the Macquarie MOU to facilitate construction of the Arena was seen as necessary both in terms of the NBL requirements and to restore public faith in the council (evidence, B Carr: 03/02/04, p.34).

Council's perceptions of its need to provide an arena for the Slammers, or Razorbacks as they became, led the council to enter into agreements containing what were, and are, impossible time frames.

The various agreements that the council entered into contained:

- Impossible time frames, or alternatively
- No time frames

Clause 31 of the Commercial Agreement imposed conditions precedent that the council was required to meet before the Foundation was obliged to undertake any work under the agreement.

Relevantly, the conditions that the council was required to meet comprised:

31.2 The Conditions Precedent are:

(a) Council:

- (i) agreeing terms and conditions of the loan, banking and credit facility referred to in clause 7;*
- (ii) obtaining approval by the Minister for Local Government to Council increasing its borrowing limit to accommodate the loan facility to the extent referred to in clauses 7.1 and 7.2;*
- (iii) acquiring DLAWC Lands in the manner contemplated by clause 8A and in the case of the Balance of the Bus Link Land, sufficient control to enable the same to be incorporated for the purposes of a Section 3A Certificate;*
- (iv) causing all of the Project Lands to be classified as operational land;*
- (v) causing the Project Lands to have the prescribed zoning; and*
- (vi) removing any restrictions on the Project Lands inconsistent with the development.*

(b) Approval by Council of the Master Plan and adoption of a Development Control Plan on terms and conditions satisfactory to the Foundation.

(c) The Foundation obtaining:

- (i) confirmation of its tax exempt status;*

- (ii) *a ruling that the Project Lands are not liable to land tax;*
- (iii) *a ruling that input tax credits are to be claimed with regard to GST payable on the construction of the building, acquisition of equipment and other expenditure incurred in relation to the development;*
- (iv) *geotechnical and environmental reports satisfactory to it in respect of the Project Lands; and*
- (v) *confirmation from all relevant authorities on terms and conditions acceptable to the Foundation that the M5 Link may be constructed.*

Collateral to this, the council was seeking to build an Arena for use by the Razorbacks in 2002. The importance that the council placed on this has previously been emphasised.

4.8.6 In entering into the Commercial Agreement the council accepted impossible timeframes. The council was to:

- Obtain Ministerial consent to increase its borrowing limits.
- Acquire the Crown land in Woodward Park, necessarily involving:
 - Discussions with the State Government
 - Obtaining State Government approval for the acquisitions
 - Valuing the land
 - Processing the acquisition
 - Paying for the land

At the time that the council entered into the Commercial Agreement it could not be assured that the Government would accede its application to acquire the Crown land.

4.8.7 The council contracted the responsibility to undertake re-classification, re-zoning and removal of inconsistent restrictions on the project lands.

In part, these processes required both public consultation and no secure time frames for completing this could be assured.

Similarly, the need to obtain ministerial approval for re-zoning brought an inability to provide a timeframe when the process could be completed.

4.8.8 On the other hand, the council bound itself to an agreement where the Foundation and the Bulldogs were not obliged to fulfil their obligations to build the Arena, Waterpark or Stadium unless the Bulldogs obtained Licensing Court approvals for:

Schedule 2
(Licensing Court Approvals)

The required Licensing Court approvals are as follows:

- (a) approval of the Licensing Court to the extension of the Certificate of Registration of the Bulldogs so as to include the Liverpool Club premises and without restricting the current right of the League Club to trade (liquor and poker machines) 24 hours per day;*
- (b) grant of authority by the Licensing Court or the Liquor Administration Board for the Bulldogs to operate the number of poker machines specified in the League Club development application approved by Council on 26 June 2000;*
- (c) grant of a hoteliers license by the Licensing Court in respect of the Liverpool Hotel;*
- (d) the authority to operate the poker machines referred to in (b) must enable the League Club to operate the same type of poker machines (style, configuration, maximum bet, rate of play and bill validators) as were able to be operated by the League Club at the Belmore Club as at 31 December 2000.*

An approval referred to above shall be deemed never to have been obtained if the legal position or effect of such approval is subsequently revoked or changed in a material way (in the written opinion of the auditor of the League Club) as a result of any decision or ruling of the Licensing Court, Liquor Administration Board, New South Wales Government or other authority or as a result of any Law made at any time prior to the expiration of the period referred to in clause 34 (a).

4.8.9 The Commercial Agreement contained a “sunset clause” in the terms set out below, which limited the time for satisfying the condition precedent. Subsequently, the agreement imposed no timeframe for construction of the Arena, which had become council’s principal focus.

34. Sunset Clause

Either the Foundation (with the approval of the League Club) or Council may terminate this Agreement if:

- (a) all of the Conditions Precedent and the Conditions Subsequent are not satisfied or waived within five (5) years of the date of this Agreement; or*
- (b) if construction of the Arena has not been commenced within three (3) years of the prescribed date;*

AND at any time thereafter they give not less than three (3) months written notice to the other of their intention to terminate at the end of that period of notice.

4.8.10

Conversely, the Macquarie MOU, which imposes obligations on the council to provide the Crown land, facilitate re-zoning, facilitate a special purpose entity to undertake the development, amongst others,¹⁹ does not contain any sunset clause.

Mr Douglas was critical, both of the rush to go from one agreement to the next and the failure of the Macquarie MOU to contain a sunset clause, giving the following evidence.

MR DOUGLAS: (30/01/04, p.29–30) *My opinion, and certainly my judgment of the period I was there—my opinion of the whole thing and my judgment in the period I have been there is that there was a mad orchestrated concerted scramble to do this at any cost in any way possible. So this process, or this project, would immediately go from one situation which had halted for whatever reason, quickly into another one without pause, because it seemed to have that urgency about it, and I don't think people sat back and thought about it.*

I am on the record many times as saying I don't think anybody on the commercial agreement sat back and looked at the consultant reports, just put them on the table, looked at them, and then stared at a blank wall and said "my gut—my head tells me this, despite what my heart is telling me about this lovely vision". I don't believe anybody actually did that. If they did I would be amazed, because in those reports there is a lot of signals being given. If you take the ECA—and I keep cautioning by saying I only did the probity part, I wasn't commenting on any other issues, and I was only just new into the role—if you look at what Mr Redman said, he was right.

He said if you sign this—he said it slightly better than the commercial agreement in many ways, but—if you sign this and the cost blows out you may not get your other facilities for some time and then he says, and these are his words: "or at all". Part of the premise behind the supplementary agreement that we were trying to get to was to try and wrestle with the or/at all position, so the people who were dealing with it were scrambling to get the Arena up for the Razorbacks, because public commitments had been made. What they weren't sitting back and seeing the implications of this.

If you take the commercial agreement or the MOU, and I am just talking in principle here, both of them give rights to third parties. In the first case very specific ones, and with some sunset clauses. In the second one non-specific agreement to agree, but no sunset clause. So for example I have funds in the budget approved by Council to build more car-parking in the CBD, but I can't actually put anything on top of the Northumberland car-park except with approval of Macquarie, because it is linked, and I pleaded with them—even though I was excluded, I pleaded with the mayor, Councillor Beuk, Brian Carr—for goodness sake leave those ones out because you have already created significant problems in the CBD with what you did with the commercial agreement.

¹⁹. Macquarie MOU, Schedule 3

So when you say “what were we looking at”, we were desperate to bundle things together to finish the Arena and probably the Woodward Park as the two priority ones. I don't think the stadium excited people too much.

4.8 Findings

1. **The council entered into agreements, where it was bound by timeframes that it could not meet, driven largely by its perceived need to build an arena for the Razorbacks.**
2. **The council had bound itself to time frames but it did not require other parties to meet time frames. It did not require the infrastructure that it sought to be built within a specified time frame.**
3. **The council entered into agreed time frames, whether or not there had been any performance standards or goals set by the agreement, and where there were no sunset provisions to bring the agreement to an end.**
4. **The effect of all of this was to place a disproportionate level of liability on the council.**

4.9 The Ability of the Council to Fulfil its Obligations

4.9.1 The Stardome, Oasis, and Liverpool 2020 projects required the council to bring about a number of results.

These included obtaining the Crown land, providing planning regimes, granting development consent, obtaining borrowing consent and providing finance. Each was largely dependent upon consent or approval by the Crown.

Much of the earlier material in this section has been directed to the problems associated with these matters.

In the lead-up to the Commercial Agreement, PwC, council's commercial advisors, gave particular consideration to council's position should other parties, principally the Bulldogs, default on their obligations.

PwC's primary report of 20 December 2000 devoted great efforts to the drafting of clawback arrangements arising from such non-performance, particularly relating to the various trust accounts into which funds were to be placed.

Little, if any, regard appears to have been given to protection of the council, if it was unable to meet the conditions precedent, and perhaps most relevantly, the provision of the Crown land for development.

In summarising the “deal” in their report of 25 January 2001, PwC only obliquely referred to the risk of not obtaining the Crown land.

Similarly, PwC classified the potential remediation costs of the TAPP’s land as a “minor” issue, suggesting:

- *Land remediation costs (particularly for the TAPPS Lands) will be borne by Council but arguably could be met by the Proponents as part of their approval to proceed.*
- *Costs will remain with Council, however, as an alternative, Council may satisfy this obligation by negotiating with the Proponents to increase the yield proposed by the Masterplan (Cl.31.4.4).*

4.9.2 In its earlier report of 20 December 2000, p.4, PwC had noted council’s role as contributing “lands and money towards the development”.

The report (p.27) contains the following analysis of the Arena proposal.²⁰

<i>Arena</i>	<i>Deal Summary</i>	
● Council acquires/provides land at present value (part Lot 405 ‘Pan Handle DLAWC, Lot 107).		Cl.16.5.–16.6.
● No payment shall be made to Council for this land.		Cl.16.6.
● Foundation to undertake construction of an Arena.		
● Club provides	\$10.75m	Cl.16.2
● Council provides cash Grant of	\$10.25m	Cl.16.3
● Council provides Grant of	\$12.00m	Cl.16.4
● Arena to Cost	\$33.00m	Cl.16.1.1
● Council provides pan-h/land	\$1.50m	Cl.16.6
● Club to provide Razorbacks team. (The term needs to be established)		
● Foundation to own Arena until sold at which case the Foundation Lease is extinguished. This point requires amendment as it is the intention for Council that the lands beneath the sporting facilities remain in the public domain.		
● Club to be reimbursed \$10.75m for the initial investment upon sale.		

The Protection

- *Arena to be commenced within 3 years of the Prescribed Date or Agreement shall be at an end or 5 years after the Commercial Agreement Cl.34. Three months written notice is also required. **(Need a more definite start date–ie. 1 year after Prescribed Date)***
- *Clawback Provision Cl.22—If Arena only built—refer to 1/3 Delivery Scenario below.*

²⁰. PwC Report: 20/12/00, p.27

4.9.3 While PwC explored the other sporting facilities to be constructed on Woodward Park, no consideration appears to have been given to the residential development proposed on the park and of the contractual requirement to purchase the Crown land, and the consequent need to obtain it if for no other reason to provide for saleable residential development of the park. While PwC reported on the risk that Government would not provide the Crown lands,²¹ no regard appears to have been given to:

- What protections should be enshrined in the agreement if consent was not forthcoming.
- The cost of acquisition of the Crown land.

This lack of regard appears to have been premised on a view that the project would not then proceed.²²

4.9.4 The report to council's meeting on 5 February 2001 reported:

Land is critical to the overall project both as the site for the project and as an asset exchangeable for other benefits. Council officers have received independent valuations of all key sites to ensure current valuations are used as the basis for commercial decisions. Assessment has also been carried out on the status of council's land relative to a need for reclassification, rezoning or managing encumbrances. That assessment has shown all relevant parcels are either free of any such encumbrances or that encumbrances can be managed so that all land can be included into the project. The normal due process will apply to rezoning and reclassification of affected land.

Discussions and exchange of letters with the Department of Land and Water Conservation have advanced our understanding of the key issues relating to the Crown land. A meeting with Ministers Amery and Knowles has canvassed issues on securing relevant Crown land for the project.

While acknowledging that the provision of land was critical to the project, the report ignored the potential risk faced by the council if it could not obtain the Crown land and ignored the cost of, and funding required for, the purchase of the land, making a provision of \$1.5m for the purchase of the panhandle land only, reporting:

Council would be required to borrow \$7.25m if the Department of Land and Water Conservation (DLWC) insists on payment of \$1.5m for specified land ("Pan Handle")....

The report referred to discussions that had already taken place with DLWC and the Minister.

21. PwC Report: 20/12/00, p.50

22. PwC Report: 20/12/00, p.56

While the Minister had endorsed a recommendation for council's proposed acquisition of the Crown land, such an acquisition would be at full market value (DLWC Memorandum: 16/08/00).

The report, while acknowledging the value of the Crown land (p.45), appears to have assumed that consent to acquisition would be forthcoming. It does not report on how prospective acquisition costs of \$11.3m for Hillier Oval, the Meals on Wheels, Band Hall, Guides Hall and pre-school would be funded. Council entered into the Commercial Agreement taking an obligation that it was potentially unable to fulfil.

4.9.5 On 31 August 2001 the council resolved to enter into the Early Construction Agreement. The effect of this agreement was to:

- Waive the conditions precedent, including the acquisition of the Crown land
- Bring forward construction of the arena.
- Require council to contribute funds totalling \$22.25m within a period of 8 months from 1 September 2001 to 1 May 2002.
- Obviate profits that may have come from the CBD.

The report to council's meeting on 31 August 2001 (p.3), acknowledged that the condition requiring acquisition of the Crown land remained unfulfilled.

Despite clear advice that the Minister required that acquisition be at full market value (DLWC letter to council: 17/05/01), the report ignored the impact that this requirement may have on its ability to fulfil its requirements under the Commercial Agreement, as modified by the Early Construction Agreement.

This failure became more signified as the change in the order of the development created by the Early Construction Agreement, meant that the development of the CBD properties (Commercial Agreement, Schedule 4) would not have occurred. Accordingly there would not be a reserve that might otherwise be available to meet acquisition costs.

4.9 Findings

- 1. Council willingly took on risks that it could perform its obligations under the Commercial Agreement, the ECA and the Macquarie MOU.**
 - 2. Its commercial partners did not assume a corresponding level of risk in terms of their obligations to the council.**
 - 3. Council rendered itself potentially liable to its "partners" if it was unable to meet its obligations.**
-

4.10 The Product

4.10.1 In March 2000 the Bulldogs announced the Master Plan vision for the Oasis project.

At council's subsequent meeting on 26 April 2000 (p.2), the Oasis project was reported in the following terms:

THE DRAFT OASIS VISION FOR WOODWARD PARK

The proposal encompassed by the draft Oasis Vision Master Plan is for an extensive development of Woodward Park as a leisure, entertainment and sporting precinct. Bulldogs League Club is seeking a broad in-principle agreement on the draft Oasis Vision. Projected expenditure is \$1 billion. The major objects or facilities proposed include:

- *an 8,000 seat indoor Arena,*
- *Bulldogs League Club "Palms" club,*
- *a stadium seating up to 50,000 spectators,*
- *a water park and*
- *associated infrastructure.*

The proposal also includes residential, commercial and retailing developments as a necessary means of funding the leisure, entertainment and sporting facilities.

The report glossed over the major residential and commercial developments which would provide the substantive funding for the recreational elements. The commercial and residential components were:

Woodward Park:

- 110 residential apartments contained in 10 storey building(s) adjacent to the Waterpark
- 200 residential apartments contained in 12 storey building(s) between the club and stadium
- 60 residential apartments with ground floor retail outlets contained in building of unspecified height in buildings adjacent to the waterpark or to the transitway
- 180 suites/apartments associated with the stadium
- 300 apartments contained in a development of unspecified height, on the site currently occupied by council's administrative centre

TAPPs Land:

- 720 dwellings comprised, variously in:
 - high rise apartments
 - 3 storey walk ups

- 2 storey town houses
- detached housing lots
- a retirement village
- unspecified commercial development

CBD Properties

- 240 residential apartments associated with commercial office space and car parking on the Bathurst Street site
- Council chamber, commercial office space and private car parking on the Warren Serviceway Site
- 210 residential apartments associated with retail and private car parking on the Northumberland Street site

In all the plans provided for 850 residences within Woodland Park, 720 within the TAPP's land and 450 on the two sites in the CBD.

4.10.2

Importantly, much of this development was to be contained in high rise developments, of a type not previously developed in the area. These differences were emphasised subsequently in the Urbis Report (p.6) as follows:

- *The residential “hinterland” immediately surrounding the CBD is developed by older style dwellings on large allotments which is interspersed by older style, “walk up” flat buildings developed from the 1960's onwards. There is evidence of a higher density residential developments emerging, most of which have been completed are only up to 30 units. No larger projects have commenced construction in recent times, although are being marketed at present as set out later in our report.*

The importance of generating profits from the residential and commercial developments was emphasised in the report to council's meeting on 5 February 2001 (p.17).

The council does not appear to have considered the marketability of the developments in the lead-up to its entry into the Commercial Agreement.

In its report of 20 December 2000 (p.16) PwC, who had been asked to undertake a high level assessment of the reasonableness of the Macquarie Bank financial model, reported Macquarie refused to provide their model.

Earlier in the report (p.14) PwC had emphasised the importance of the commercial and residential developments stating:

The purpose of the residential and commercial development is to generate development profits (surpluses) to be used to enable all of the sporting facilities to be constructed over time and to provide an environment which enhances and supports safe functional use of the sporting facilities.

Subsequently, the report specifically addressed PwC's concern that the project had not been market-tested, indicating:

The Project has Not Been Market Tested

The development surpluses projected by Macquarie remain untested. The Proponent's perception of the facilities to be developed may not be in line with market demands. Market testing allows for some degree of comfort to be gained by seeking expressions of interest from market participants who are in a better position to say what is deliverable. Unfortunately where we have suggested market testing as the way for Council to assess the commerciality of the project (and the proposed deal), the Proponents threaten to walk away. We are advised on each such occasion that Council is happy to proceed on the basis of a deal being offered by the Proponents, providing they get, a sports Arena, Waterpark and Stadium as community sporting facilities.

The report to council's meeting on 26 April 2000 had anticipated a further report outlining matters including market analyses for the sites outside Woodward Park.

Ultimately, the council joined in the Oasis project without testing the product and without it, or its commercial advisers, being able to view all relevant parts of the Macquarie financial model.

The report to council's meeting on 5 February 2001 (p.17):

... Consequently, Council needs to rely on Macquarie Bank's integrity as a corporate citizen and assume that its project assessment undertaken with the Bulldogs is commercially sound and achievable.

This evinces a fundamental abrogation of council's duty to exercise appropriate standards of governance.

4.10.3 This abrogation contrasts with the emphasis placed on council taking the steps to ascertain the feasibility of the project by council's current General Manager.

MR BROAD: (04/02/04, p.6–9) *Again, given that Council was the major stakeholder and the major risk taker, would it have been appropriate to have investigated the feasibility of the project?*

MR McCULLY: *Well I certainly would have had two things you would have done. Firstly, some discussion, consultation with the community to—sorry, firstly the technical planning assessment to see whether it could be done, then some consultation with community to see whether you could move the community along with whatever you are proposing, and then you would do the initial financial feasibility, so that all those three things were done before you would step off the first step.*

MS JOHNSON: *What would the financial feasibility involve? What are you talking about—what type of research or reporting are you talking about there?*

MR McCULLY: *You would probably look at a market analysis. Is the product that you are wanting to put on the ground, whether it be residential or commercial, whether it was feasible, where there was a market for it, over what period of time and, were the funds that were going to be derived and cash-flow from that, would they be sufficient to meet the objective they were going to go to, or were you going to end up at some stage in some large deficit, in which case you would have to put some financial mechanism in place to fund that until the source of funds from the project were sufficient to pay for it....*

MR BROAD: *Yes. The Bathurst Street development application followed early in the piece. It provided for a number of buildings on the site, including one to 24 stories, it provided for commercial uses, residential uses, car parking uses. The building proposed was significantly higher than any other building within the Liverpool area. Would it be usual, given that Council was involved in that project as a land-owner, for there to have been feasibility studies to have been undertaken prior to that stage being reached?*

MR McCULLY: *Yes.*

MR BROAD: *To what extent would you anticipate, sorry—can you give me an indication of what you would anticipate a feasibility study to have covered and considered if there was a market for the product that you were going to put out there, particularly in this case, since it was a new market?*

MR McCULLY: *Whether you were going to saturate the market, over what period of time because it is pretty difficult to build such a large building in stages—once you are committed to it you have to build the lot, you can't come back and keep putting stories on top, so you have to assess whether—yes, there was a market, what the market was, what sort of likely returns there were and how they would meeting the cash-flows of your building that building?*

MR BROAD: *From what you are really saying, would you undertake a feasibility study in respect of each and every unit or stage of the development, so in other words for say the Bathurst Street property, the Warren Serviceway when that came on line, for the TAPPS land subsequently, or would you do an overall feasibility study for all of the project at the initial stage?*

MR McCULLY: *You would have to do. You do an overall preliminary for the whole of the project, but initially where you were providing for a new market and as you indicated a large tower building in the centre of Liverpool which doesn't exist, you would certainly be quite specific about that. Once you had established and there was some maturity, if there was a mature market there, then you would be very much limited in any future feasibility you would have to do. For instance, if you were going to build a new residential estate in anywhere in Liverpool, then you wouldn't have to do much of a feasibility because there is a mature market out there, that says there is a demand for land.*

There is no doubt that the council viewed the feasibility of the project as fundamental to its involvement. Ultimately it proceeded without adequate knowledge of the Macquarie model and without establishing perhaps the most fundamental aspect underlying the project's feasibility—the market for the development products.

The council could not be assured that there was either a buyer or user of the commercial developments that were being contemplated.

4.10 Findings

1. **The council entered into the Oasis and Liverpool 2020 Projects without knowing whether the developments that would flow were acceptable to the market.**
2. **The council had no way of knowing whether the return suggested by Macquarie would flow from the developments.**

4.11 Financial Risks

4.11.1 The various projects that the council pursued with the private sector proponents brought with them financial risks to the council.

These financial risks are easily demonstrated by the losses that the council sustained under the Oasis project.

4.11.2 Stardome, Oasis and Liverpool 2020 each involve a “partnership” between the council and entities within the private sector.

Each agreement was characterised by, or anticipates, the grant of long-term rights by the council.

Under Stardome it was the grant of long-term leases and other rights.

Similar rights were anticipated under Oasis. It is reasonable to expect such rights, although not spelt out, under the Macquarie MOU.

4.11.3 Given the prospective longevity of the projects, the nature of the developments anticipated and the funds or property to be provided by the council, each project brought or, in the case of Liverpool 2020 may bring, financial risks to the council.

The conduct of the council in considering these projects was based on an unwarranted willingness to enter into agreements. The council was essentially driven by their need to provide an arena for the Razorbacks or sporting facilities for a national team.

This approach contrasts sharply with council's stance regarding the Casula Powerhouse.

Council's decision-making, at different times, appears to have been driven by:

- The need to provide a basketball arena for the Razorbacks.
- The later need to provide facilities for the Bulldogs under Oasis.
- The need to end a relationship with the Bulldogs.
- The need to be seen as providing a good outcome following the Bulldogs debacle.
- The need to provide a national sporting team to lift the aspirations of the local community, particularly the youth.

It chose to disregard:

- Advice given by Mr Marsden regarding the credit worthiness of companies associated with the Stardome project.²³
- Advice given by Mr Marsden regarding the character of the direction of the company associated with the Stardome project.²⁴
- Advice given by Mr Marsden regarding the integrity of Mr McIntyre.

4.11.4 Regrettably, in all of this the council failed to give detached consideration of the immediate, medium-term or long-term financial risks to be borne by the council.

This disregard was evidenced by:

- A failure to properly take on board the cost of acquisition of the Crown land despite:
 - Government indications that it required full market value
 - The values provided by council's own valuers
- A proper accounting of the actual costs likely to be incurred in the construction of the arena, particularly when the council was required to provide \$22.25m towards its costs under the Early Construction Agreement
- The effects of interposing a special purpose vehicle, the Foundation, which exercised independent discretion to carry out the developments

23. Evidence of J Marsden: 18/02/04, p.24

24. Evidence of J Marsden: 18/02/04, p.3

- The facilitating the use of other companies such as ODC and Liverpool Arena as administrators of the developments.
- The handing-over of monetary control in the Oasis project
- The impacts of permitting the trustees to exercise the role of stakeholders, rather than of trustees.

4.11.5 In considering whether it should enter into any of the projects the council does not appear to have had regard to the duty imposed on it. Council was reminded, prior to entering into the Commercial Agreement that the standard of duty owed by the council was:

(PwC Report: 20/12/00, p.17)

Advice provided by Council's legal advisor, Abbott Tout Solicitors, as to the standard of risk applicable in relation to Council's participation in the Oasis Project is the common law duty as required of a trustee, to exercise reasonable care in carrying out its duty, and that it should "exercise the same diligence and prudence as an ordinary prudent man of business would exercise in conducting business as if it were his own". In addition to exercising its functions as a trustee, it must also exercise functions as a Council, amongst other things, to "exercise community leadership", "provide adequate, equitable and appropriate services and facilities for the community", "to promote and to provide and plan for the needs of children" and "provide goods, services and facilities, and carry out activities appropriate to the current and future needs within its local community and of the wider public".

Rather than adopting this standard when considering the Oasis project, the council appears to have accepted that the deal represented the best offer that they were likely to achieve (Report to council meeting: 05/02/01 Recommendation 2, p.56).

Council's regard to the financial risks centred on the value of the assets it brought to the bargain and the value of the onsets it would be likely to take away. The report to council's meeting on 5 February 2001 contained the following (Report to council meeting: 05/02/01 Recommendation 2, p.28–29):

Council assets used**CBD sites**

Bathurst Street	\$5.7 m	
Northumberland Street	\$3.1 m	
Warren Serviceway	<u>\$6.8 m</u>	\$15.6 m

Arena

Infrastructure—Section 94	\$12.0 m	Grant
Cash	\$4.5 m	
Loan	\$5.75 m	
State Govt land (est.)	<u>\$1.50 m</u>	\$23.75 m

Land (excluding CBD sites)

TAPPS including old Depot	\$17.0 m	
Brickmakers Creek	\$3.30 m	
Whitlam Centre	\$16.50 m	
Lot 106 (Council site)	<u>\$8.0 m</u>	\$44.80 m

Less Council grant (expense) \$10.25

TOTAL Net assets used **\$73.90 m**

Council assets returned**CBD sites**

New car park	\$3.50 m	
New Council Chambers	\$22.0 m	\$25.5 m
		\$34.83m

Infrastructure

Roadworks
Footpaths
Bridges
Public lighting
Parks, Gardens

Land (excluding CBD sites)

Unused land (returned)	\$11.28m	
Open space (Collingwood House)	\$1.50m	\$12.78m

Depot \$2.0m

TOTAL Council assets returned **\$75.11m**

Overall net community benefit (rounded to the nearest \$m)

<i>Assets used</i>	– \$ 74 m	
<i>Assets returned</i>	+ \$ 75 m	
<i>Minimum sporting facilities</i>	+ \$ 93 m	
<i>Council grant</i>	– \$ 11 m	
<u>NET BENEFIT</u>	+ \$ 83 m	
<i>Ultimate NET BENEFIT</i>	+ \$ 383 m	<i>(ie with Ultimate Stadium)</i>

Essentially this process followed a similar approach in the PwC report of 20 December 2000, which provided the following tables (p.20–22):

The three sporting facilities:

<i>1 Sports Arena (of a minimum 8,000 seat capacity)</i>	\$33.00
<i>2 Waterpark leisure centre</i>	\$10.00
<i>3 Minimum Stadium (of a minimum 34,000 seat capacity)</i>	\$50.00
Total Minimum Value of Community Sporting Facilities Created:	\$93.00

The other ‘possible’ components:

<i>4 Village Development</i>	<i>Undisclosed</i>
<i>5 CBD commercial/retail/residential development</i>	<i>Undisclosed</i>
<i>6 Woodward Park Residential Development</i>	<i>Undisclosed</i>
<i>7 Residential development on the TAPPS Land</i>	<i>Undisclosed</i>
<i>8 Commercial development on the TAPPS Land</i>	<i>Undisclosed</i>
<i>9 New Council Chambers & carpark (s) within the CBD</i>	\$25.50
<i>10 Ultimate Stadium (estimate up to)</i>	\$300.00

Council’s Asset Contribution to support the above is as follows:

<i>11 Council Lands</i>	\$61.90
<i>12 Infrastructure Grant</i>	\$12.00
<i>13 Cash Grant for the Arena (\$10.25 treated as an expense)</i>	\$0.00
Total (excluding cash grant):	\$73.90
Total (including cash grant):	\$85.65

Upon completion of the above, the expected contribution outcomes would be as follows:

Council’s Asset Receipts:

● <i>New CBD Council Chambers</i>	\$22.00
● <i>New CBD Carpark(s) (approx. 380 bays at cost)</i>	\$ 3.50
● <i>Infrastructure Assets (\$12.00m + \$22.83m land investment)</i>	\$34.83
● <i>Open Space (Collingwood House)</i>	\$ 1.50

- *New Council Depot* \$2.00
- *DLAWC & other Land (unused redevelopment residual)* \$11.28
- Total: \$75.11**

Foundation to Receive the following Assets:

- *Sporting Arena* \$33.00
- *Waterpark* \$10.00
- Sub Total:** **\$43.00**
- *Stadium (Minimum)* \$50.00
- Sub Total:** **\$93.00**
- *Stadium (Ultimate)* \$300.00
- **Sub Total:** **\$393.00**

	Assets IN \$m	Assets OUT \$m	Community Sport Assets Generated	Total Assets OUT
Cash	12	–	–	–
Land & Buildings	62	40	93	133
Infrastructure	–	35	–	35
Total	74	75	93	168

4.11 Findings

1. The council did not measure all the financial risks associated with carrying out the Oasis project, whether they be:
 - A breach of obligations
 - Cost blow-outs
 - Lack of financial oversight
 - Inability or refusal of a “partner” to perform
2. When considering whether to enter into any agreements underlying any of the projects, the council does not appear to have considered the long-term financial risks associated with the projects.
3. Council’s review of the financial risks that it perceived was monocular and superficial.
4. The council demonstrated an unwarranted willingness to enter into the various projects, in so doing it ignored, underestimated or failed to consider the financial risks associated with the projects.

4.12 The Reports and Advice

4.12.1 In considering whether it should enter into any of the agreements giving rise to or varying the Stardome, Oasis or Liverpool 2020 projects the councillors ostensibly relied on reports and advice provided to them.

The reliance placed by individual councillors on the reports varied.

The reports and advice may not have been of utility to the councillors' understanding of the project, as many simply did not read them, either at all, or if they read them they did not read them fully.

During the Public Hearings the councillors were asked the extent to which they read the meeting reports or the advice provided by the various consultants.

4.12.2 The Stardome, Oasis, and Liverpool 2020 projects were each complex projects, involving the use of council's assets, requiring the acquisition of Crown land, the exercise of planning and development powers and the granting of long-term rights affecting the assets to be constructed.

These facets brought separate and definable risks to the council, which are outlined in section 5 of the Interim Report. In order to obtain the best deal for the council, whether in terms of return, risk minimisation or apportionment, and the ensuring of probity in its dealings, the council sought a number of reports and advices.

Given the size and importance of the projects and the duty to the community placed on the councillors to direct and control the affairs of the council, it is surprising that many of the councillors paid little regard to the advice and the reports.

The evidence provided to the Inquiry suggests a lackadaisical approach.

When referring to the Macquarie MOU, the Mayor gave the following evidence:

MR BROAD (19/01/04, p.74): *Is it your usual role, that if you are signing a document on behalf of Council, to read through it carefully yourself and to acquaint yourself with what is in it?*

MR PACIULLO: *Well that document will have already been through the Council process. I would not read every line of it, no, and I'm sure people in my position would not read every line, under those circumstances.*

MR BROAD: *Did you review the document—read it generally?*

MR PACIULLO: *No, I can't say that I did.*

MR BROAD: *Do you generally review documents before you sign them?*

MR PACIULLO: *No. I don't.*

MR BROAD: *You leave that for others?*

MR PACIULLO: *I leave it for the expertise of those who present them to me and the trust I have in them.*

Councillor Glavich gave similar evidence:

MR BROAD (16/02/04, p.16): *Before the Council entered into the Memorandum of Understanding with the Macquarie Bank, did you read that document?*

MR GLAVICH: *Look, I would have to say I think I did but I'm not sure unless I sight the document.*

MR BROAD: *Did you similarly read the commercial agreement with the Bulldogs and the Macquarie Bank before it was signed?*

MR GLAVICH: *I don't think I read the full report. I think I might have just relied on the summary.*

MR BROAD: *Similarly, did you read the early construction agreement before it was signed?*

MR GLAVICH: *No.*

Councillor Bowman gave evidence suggesting a greater, although limited review :

MR BROAD (17/02/04, p.16): *Before the construction agreement was entered into, did you read the document?*

MR BOWMAN: *Not the full document, no.*

MR BROAD: *Did you read any part of the document?*

MR BOWMAN: *Yes, I did.*

MR BROAD: *What parts of the document did you read?*

MR BOWMAN: *Just bits and pieces through, mainly the headings, as in a general summary of each area, the executive summaries and also the consultant summaries on the actual document.*

Councillors Beuk (17/02/04, p.46) and Waller (21/01/04, p.16) gave evidence suggesting that they read the agreements:

MS WALLER: *I had taken the MOU away and read it quite completely. We had been given notice of the MOU and I had gone through it fairly thoroughly and while I don't pretend to have any legal expertise, I was able to read the document and be concerned about—there were areas in it that I didn't feel were clear enough, that there was room to negotiate for a better position for Council. Just generally, I felt that the document was giving Macquarie Bank permission to do a whole lot of things which may have been able to be done in a different way and benefit people of Liverpool in a better way.*

I'm not saying the document was an absolute disaster, I'm just saying I felt there needed to be more time to discuss a document and the contents of it, which we had to give that back as well, so I don't have a copy of that unfortunately with me, but the situation is that my memory it was also a contract. I noticed that the Mayor made reference to the MOU not being legally binding, I was of the opinion that it was, it was a contractual arrangement we were entering into with Macquarie, so it was most serious.

Surprising evidence was given by Councillor Pascale, suggesting a disinterest, at least, in the Macquarie MOU:

MR BROAD: (16/02/04, p.72) *All right. Now, what is your current understanding of the relationship between the Council and the Macquarie Bank under the MOU, memorandum of understanding? Do you know what that binds Council to doing?*

MR PASCALE: *No.*

MR BROAD: *Is that—have you attempted to find out what exactly Council is bound to do under that agreement?*

MR PASCALE: *No, I haven't.*

4.12.3 The General Manager, Mr Carr took a view that “in confidence” material received by the council should remain confidential.²⁵

Ultimately the supposed confidentiality of the agreements, advice and reports received by the council overtook its processes. This led to bizarre controls being exercised over access, even by councillors, to these documents. Further, at times, even though the documents were not current, access was refused (03/02/04, p.69–70):

PROF DALY: *Question number 14 says:*

Would you please let me have copies of any relevant documents that I would be permitted to have, excluding the 5 February 2001 briefing and the questions and answers you supplied me at an earlier date?

This memorandum is dated 14 August 2001.

²⁵. Evidence of B Carr: 03/02/04, p.69–70

MR CARR: *Yes.*

PROF DALY: *So it is many months after the signing of the commercial agreement.*

MR CARR: *Yes.*

PROF DALY: *Your answer is:*

As you know, the commercial agreement is a confidential document and therefore not available. You have much of the general information and accordingly there is no additional documents which I can provide you at this stage.

MR CARR: *Yes.*

PROF DALY: *How can you argue that? The elected representatives, who are partners in this agreement, surely have the right to at least have copies of the agreement. What is confidential about it?*

MR CARR: *Well, that was certainly an issue that was placed in the commercial agreement itself where it talked about confidentiality. I'm just trying to refer to where that is in the commercial agreement. There were always discussions about documents being leaked to the media and - - -*

PROF DALY: *Hang on, this is many months after the signing of the agreement?*

MR CARR: *Yes, I accept that.*

PROF DALY: *Councillor Waller, I believe, was Deputy Mayor. Why would the papers of that agreement be withheld from a person of such a prominent position within the Council?*

MR CARR: *It just simply says in the commercial agreement about confidentiality, and maybe I took a fairly general view that it actually says in there that Council—clause 29.1 and 29.2 where it says that this agreement is not to be released. It also talks about: The Council and officers of the Council must not disclose the confidential information or provide a copy of this agreement to any person.*

MS JOHNSON: *But surely that is outside of Council, Mr Carr, not within Council?*

MR CARR: *Yes, I accept that, but that was my understanding of it at the time. Whether in fact that was correct or not, I will stand corrected, but I thought that was the position, that the confidential agreement was to remain confidential. I think councillors had the ability to come in and look at confidential agreements as we set up under that arrangement, but copies weren't distributed.*

MR BROAD: *Even to the extent of excluding the decision makers from direct access to that document?*

MR CARR: *No. They had direct access to it if they wanted to come in and go through it, but to issue copies—there was an issue about copies being released and leaked. It was always about documents being leaked and there were suspicions about leaking documents.*

PROF DALY: *This is after the event. This is after the agreement had been signed. What are you protecting?*

MR CARR: *Well, I don't think I'm protecting or attempting to protect anything other than what the Council's attitude was in terms of confidential documents.*

The absurdity of this position was demonstrated in the following exchanges:

MR BROAD: (26/02/04, p.15) *So the councillors could not even break their previous resolution not to provide documents?*

MR CARR: *No, I think they could.*

MR BROAD: *But they have attempted to, haven't they?*

MR CARR: *In what—I'm not sure whether they did.*

MR BROAD: *In requesting copies of the document.*

MR CARR: *In that request?*

MR BROAD: *Yes.*

MR CARR: *As I've said earlier, I can't recall what the resolution was when the commercial agreement was adopted, but I think it refers to that it be dealt with in confidential session and then I think it goes on and says that the documents are to remain confidential.*

MR BROAD: *But here we have councillors surely saying: whilst we may have resolved that in the past, we now want this to be changed and to have access. Aren't they seeking to simply set aside their resolution so that they can in turn exercise their right to access?*

MR CARR: *Well, I think it is just a question: can they have the copies? rather than whether there's a change in Council attitude towards it. I think what I probably ought to have said in item number 14 to this line of questioning is to say that this is the current situation; however, if you want this commercial agreement released, then there would need to be a resolution that varies the minute on the Council records, and that is what would have had to have been followed.*

- 4.12.4 In pursuing this aura of confidentiality, the council imposed severe restrictions limiting the ability of councillors to gain access to reports, advice and other documents.

These restrictions included limited access to documents, by appointment in the General Manager's office. This process was alluded to by Councillor Waller, who described the process:

MS JOHNSON: (21/02/04, p.23) *If you wanted to obtain copies of those advices, were they accessible to you in Council?*

MS WALLER: *Yes, you could go and read them, you could go and access them through the General Manager's office.*

MS JOHNSON: *What arrangements did that involve?*

MS WALLER: *You would have to ring up and make an appointment and then go and read them.*

MS JOHNSON: *So you would need to make an appointment with the General Manager of his - - -*

MS WALLER: *Or his staff, or whoever was in-charge of looking after those documents.*

Councillor Harrington also described the process:

MS JOHNSON: (21/02/04, p.86–87) *Did you ever avail yourself of the opportunity to go and look at the advices in the general manager's office?*

MR HARRINGTON: *Yes.*

MS JOHNSON: *And was that an easy process to undertake?*

MR HARRINGTON: *Not as easy as having it sent out to see but I did take up the opportunity to have a look at some legal advice and also the Price Waterhouse advice.*

4.12.5

The opportunity to read reports and advice was also hindered by the short circulation time between when reports were provided to councillors and the time of the next council meeting. Again this became a common complaint.

In the process of entering into the Oasis project the council received extensive reports from its legal, commercial and probity advisers.

The evidence of the councillors led to the inevitable conclusion that they were largely content to rely on review of the reports and advice by council's senior staff.

Despite all of their expressed concerns over their inability to consider the complex documentation, reports and advice that they were required to deal with, they steadfastly refused to adjourn meetings to allow a further opportunity to read reports, despite attempts by councillors Harrington and Dobell-Brown to defer consideration.

Councillor Harrington gave the following evidence of his attempts to defer consideration to allow sufficient time to consider advices:

MS JOHNSON: (21/02/04, p.87) *You were saying that you, about 50 per cent of the time I think you just said—confidential material at any rate was provided to you on the night of the Council meeting.*

MR HARRINGTON: *Mainly Oasis, I think.*

MS JOHNSON: *Oasis.*

MR HARRINGTON: *Yes.*

MS JOHNSON: *Confidential material was provided on the night of the Council meeting. Can you tell me at what point was that advice provided? At 6 o'clock that night for you to pick up? At 7 o'clock when the meeting began?*

MR HARRINGTON: *Well, I feel disadvantaged because quite often we got it at the intermission of the meeting where we would move into committee as a whole, it would be handed out there or sometimes there would be exceptions where it would be on the table at 7 pm when you came into Council. Certainly, it didn't come out with the bag. So the earliest I would get it would be at the beginning of the meeting or later in the evening when we went into closed session.*

MS JOHNSON: *In those circumstances, did you feel you had enough time to review, consider, make your decision about the matters raised in those advices. Did you have enough time to read them for starters?*

MR HARRINGTON: *In lots of cases I was able to read through them providing they weren't quite a volume of them, but there were times when I had to virtually speed read through them just to get from front to back, but it is not as efficient or effective as sitting at home in comfort and browsing through it at your own content.*

Councillor Anthony attributed her lack of support in the following manner:

MR BROAD: (16/02/04, p.43–44) *On Tuesday, the day before. The advice from Abbott Tout was received in the afternoon of the 29th. Given the complexity of the reports and the advices that Council was receiving, would it be your view that an adequate understanding could be obtained of those documents?*

MS ANTHONY: *Not in that time frame, no.*

MR BROAD: *Councillor Harrington gave evidence of attempts to have decisions made on important matters deferred. Did you at any stage support motions put by Councillor Harrington?*

MS ANTHONY: *No, because I was bound by caucus to - - -*

MR BROAD: *If you had not been bound by caucus?*

MS ANTHONY: *I would have supported the deferral, yes.*

While Councillor Pascale felt that the pressure to make decisions quickly was excessive:

MS JOHNSON: (16/02/04, p.63) *When did you pick up—when were the confidential reports provided to you?*

MR PASCALE: *5 or 10 minutes prior to the Council commencing. They won't give it to us—just when they are ready to start, they come and give it to us and then we have a 5 minutes recess so we would be able to read it.*

MS JOHNSON: *Was that sufficient time to read those reports?*

MR PASCALE: *Certainly not. We asked what the urgency was. They would have to make decision that particular night—was very important.*

MS JOHNSON: *So you felt you didn't have enough time to read those reports? Is that right?*

MR PASCALE: *Certainly not.*

MS JOHNSON: *I think, on a couple of occasions, at least Councillor Harrington asked for—he talked about asking for a deferral of the meeting in order to have time to read those reports. Do you remember those motions being moved by him?*

MR PASCALE: *Yes, I certainly did. Yes.*

MS JOHNSON: *Did you vote in favour of those motions?*

MR PASCALE: *No. I didn't vote in favour because the Council—the General Manager told us it is very important to have to make a decision that particular night.*

Despite all of these complaints, the Labor and Liberal councillors exercising majority powers made no attempt to change the process nor take other steps to take control.

It was not surprising that the Councillors demonstrated little understanding of the nature of the agreements that they had entered into, nor of the reports and advice.

4.12 Findings

- 1. Many councillors, despite the size and importance of the projects and the duties placed on them, paid little regard to advice and reports provided to the council.**
 - 2. To an extent the confidentiality provisions put in place by the councillors added to their difficulties in reviewing the advice. This does not excuse the councillors as they could (and should) have removed such restrictions on access.**
 - 3. Councillors steadfastly refused to defer matters in order to allow adequate consideration of reports.**
 - 4. As a consequence of their acts in restricting access to reports, advice and agreements and their omissions in obtaining an adequate understanding of agreements, the reports or the advice given to the council were essentially useless.**
-

4.13 The Deals

4.13.1 Much has been made of the complexity of the deals made with Stardome, Oasis and Liverpool 2020 projects.

Despite all that has been suggested, the principles underlying the deals were relatively simple.

4.13.2 The Stardome Project was about the construction of a multi-purpose Arena and a tennis complex on Woodward Park.

The Heads of Agreement anticipated that the Arena would be the subject of a build, operate, transfer agreement under which the developer, the AIC, would build the Arena and, after a somewhat circuitous path, obtain a long-term lease under which it would operate the Arena for a period of 44 years with an option to purchase the land (Stardome Heads of Agreement Clause 3.2). AIC would construct a tennis complex, and operate it under a 99 year lease AIC sought to ensure its income by entering into a number of agreements with agents and concessionaires. AIC took on the responsibility for providing funding. Ultimately the deal fell over when AIC could not obtain funding.

4.13.3 The Oasis project extended beyond Woodward Park, including the TAPP's land and CBD sites.

The intent of the deal was to develop and sell the CBD sites and a component of the residential development at Woodward Park to provide surpluses to augment or provide funds initially for the Arena and Waterpark. Subsequent residential development on Woodward Park and commercial and residential development on the TAPP's land would fund the stadium and car parking station.

The Foundation would act as a special purpose vehicle, owning the property and carrying out the developments. Over the longer term the Foundation would manage and maintain the facilities. The agreement anticipated the sale of the sale of the Arena and the Waterpark.

To the extent that the Foundation became the new owner of the property, the agreement anticipated that council's position be protected by an entitlement to appoint directors to the Foundation's board (Commercial Agreement Clause 23).

4.13.4 The Early Construction Agreement was not a project separate from the Oasis project. Rather, it sought to change the development priorities contained in Oasis, bringing forward the construction of the Arena.

As differences had arisen between Macquarie and the Bulldogs, Macquarie did not enter into this agreement, and for all intents and purposes withdrew from the process.

This withdrawal culminated in the need to appoint the Trustees.

4.13.5 The Macquarie MOU really does little more than to preserve all but one of the developments proposed in Oasis under a proposed PPP and to grant exclusive rights to Macquarie to effectively control the processes.

The council appears to have gained little from this agreement, as there is no security, and no promise of funding by Macquarie.

In all the projects the council sought to provide a multi-purpose arena at Woodward Park. Under Oasis the infrastructure extended to the provision of a stadium.

The evidence was given on behalf of Macquarie by Mr Wright, who indicated that the projects were not severable.

MR BROAD: (28/01/04, p.56–57) *Are any of the developments severable from each other? In other words, assuming Council wanted to go ahead and complete the Arena, would that be a totally severable part? At that stage could the partnership then cease?*

MR WRIGHT: *No. The funding of the Arena certainly contemplates, at least, Bathurst Street, if not more. The Arena has a quite considerable shortfall in its funding and Macquarie's original contemplation was, and this is going back to the original Oasis project, that some decent urban development be undertaken. Surpluses are created and those surpluses are then applied to element the community feel are in the best interests of Liverpool. So in the former example, if Arena was consider that sort of outcome, the surplus would exist and one could complete it.*

What we are talking about today is roughly a \$50 million structure of which 15 is in the ground. Council, based on its cap of 22 has only got another 7 to put in so one needs to, if like, hypothecate the balance from forward profits and what Council was seeking from the bank was to underwrite that position. Now, whether Bathurst Street alone will do that, it may it may not. So there is a point at which you could cut it off but the cut off point would be sufficient development so that no debt would be left for Council. We had not contemplated leaving any debt on the Arena. The idea was that it be an unencumbered entity on Council's balance sheet.

MR BROAD: *So the hinge to the proposal is the CBD properties and the [TAPP's] land, potentially?*

MR WRIGHT: *If the Arena is a go forward, yes.*

The construction of the Arena was dependent on a lease to a third party to provide its income and in the absence of this it would not proceed.

MR BROAD: (23/02/04, p.44–45) *So the Arena is dependent on what to provide its income?*

MR WRIGHT: *It is dependent on a lease, a third-party lease, to mitigate the risk. It is at best a marginal surplus to Council. Council's view has been—and I'm simply articulating their position—that a civic facility that could provide compensing entertainment and sporting facilities is something that would life the profile of Liverpool. This is the brief we were given. When we asked about the appropriateness of this facility—\$47 or \$50 million versus other infrastructure—the view firmly held at that time, and I don't think it's universally held within the elected members, but certainly it was held by the Mayor and the general manager that this was an important piece of infrastructure for Liverpool, and I think in my previous evidence I said one has to rely from time to time on public sector counterparts to make those calls as they would have with the Opera House and Darling Harbour and other pieces of infrastructure that at points in time would have looked ambitious.*

Our view is that the State Government is not convinced of that and, yes, it was a condition precedent to the MOU that it would be one of the key items that would be financed.

MR BROAD: *Yes. In light of what you say, you basically say, as I understand it, that yes, we go forward with the Arena. We then pause, we then engage the community before proceeding further. Is that what you are saying to the inquiry?*

MR WRIGHT: *No. I'm saying to the inquiry, that was a precondition of forming the MOU. I'm not saying that during the initial analysis we may not have found alternative higher and better uses for Woodward Park. Now one has to remember that Woodward Park is a 20 hectare precinct of which part of the land that the Arena is being built on is Crown land. Now, in the absence of the New South Wales Government's support for it, the Arena won't complete. So it's, if you like, a two step process. Step one is Council's desire to complete the Arena because Council either wholly or partly believes that the Arena will be an important piece of infrastructure. I don't believe that that necessarily has—I don't believe we have the State Government convinced on that and Macquarie Bank hasn't expressed its view.*

MR BROAD: *To the extent of what you have been saying about community involvement, are you limiting your anticipated community involvement only in respect of Woodward Park?*

MR WRIGHT: *No, no. Absolutely not.*

MR BROAD: *Would it be intended to seek community involvement in respect of the CBD projects?*

MR WRIGHT: *Absolutely.*

MR BROAD: *How does that sit conformably with your progress report of September 2003? Are you aware of that document?*

MR WRIGHT: *I'd like to see it if I can. Yes.*

MR BROAD: *Can I take you to page 10. There's a heading "Next Steps."*

MR WRIGHT: *Yes.*

MR BROAD: *If I can quote you:*

In order to meet the spirit and intent of the partnership's MOU, Macquarie suggests that Council commit to the following steps.

If I can go through those steps?

MR WRIGHT: *Sure.*

MR BROAD: *The first one is:*

To finalise the Development Rights Agreement over all 5 partnership sites, to establish a PPP Council Advisory Committee, to appoint a probity officer...

and relevantly:

to review and revise the Bathurst Street proposal to better reflect the vision and outcomes of the partnership and submit an amended DA.

How does that connote that there will be a pause to obtain the public's view?

MR WRIGHT: *This is a site—are you familiar with the Bathurst Street site?*

MR BROAD: *Yes, I am.*

MR WRIGHT: *Okay, well this is a site that is quite an iconic residential site. Part of the challenge in Liverpool is to lift the overall quality of urban development. That is one of the challenges. This community has a 10,000 population increase every year and a desire to reverse its brain drain. Developing iconic residential sites is critical. This DA had been submitted—certainly prior to my involvement—and was certainly a desired outcome of Council. Our view was that it could certainly go toward repositioning Liverpool in an urban development context, but we thought the design required some changes to reflect a better structure and a better economic outcome. But I have to say Bathurst Street is certainly consistent with revitalising Liverpool.*

MR BROAD: *I didn't ask you that question, though. What I asked you was whether that approach was in conformity with your previous expression that it was your intent to re-engage the public.*

MR WRIGHT: *Well, I don't think the public need to be engaged on the population pressure that's being exerted to Liverpool. I think the Council can form a view as to what is required to revitalise its city.*

MS JOHNSON: *But, Mr Wright, you just said—and maybe I have misunderstood—that the public would be engaged in relation to the CBD developments, to the [TAPP's] land developments, to all of these stages of the project and I think what Mr Broad is saying, but on the other hand your next seven steps don't seem to include step asking, you know, stopping to seek the public's opinion. The implication from your earlier comment was that if the public said there is no way we want these developments, that you would at least pause and perhaps reconsider the developments in their entirety. Have we misunderstood your evidence?*

MR WRIGHT: *No, I don't think you have. I think the point that perhaps you are missing is the Council needs to take a leadership role in changing the urban fabric of Liverpool. Local developers are not doing that necessarily, and zoning instruments are not the solution.*

MS JOHNSON: *So really when you say the public will be engaged, you are saying the public will be informed of what Council's leadership roles are?*

MR WRIGHT: *No, I am not saying that. You're limiting the example to one site to which Council had already applied for a DA some time ago. They had formed the view quite correctly that an iconic urban development across the road from a major redevelopment of a shopping centre on a key site would be an appropriate outcome to lift the overall urban development fabric in Liverpool. I think it is a little bit unfair of you to then say "does that mean you are not going to engage with the ratepayers of Liverpool?". I mean, I think it's been taken out of context. I am completely comfortable that this would be consistent with revitalising Liverpool.*

Ultimately, the Macquarie MOU may have left the council in a position where it was required by Macquarie to develop the CBD properties and the TAPP's land, but fail to obtain construction of the Arena.

4.13 Findings

1. **Despite what may have been suggested to the contrary, the concepts behind the various deals were relatively simple. In Oasis and Liverpool 2020, the proposals were centred on the development and sale of council-owned property to fund the infrastructure, most importantly, the arena.**
2. **Despite all its deals, the council has not been able to secure construction of the arena.**
3. **Conversely, it may have assigned long-term development rights to external parties in its unsecured bid to obtain an arena.**

4.14 Building in Safeguards

4.14.1 The Oasis project called upon the council to be a commercial "partner" with the Bulldogs and Macquarie for, potentially, a very lengthy period. This period was unspecified. Simply, it was the time over which the developments were to be undertaken.

Additionally, the Foundation could require that the council grant a 99-year lease to it over the whole of, or any part of, the project lands (Commercial Agreement Clause 9).

The Stardome project, similarly, had anticipated the grant of long-term rights (Stardome Heads of Agreement Clause 3). The Macquarie MOU also anticipates the grant of long-term rights of undetermined length. As in Oasis, the “partnership” would prospectively continue over the development period for the period over which “the PPP Entity is granted long term rights to undertake the Development” (Macquarie MOU Clause 4).

The agreement is silent regarding the grant of occupation rights over the public infrastructure, although the grant of such rights was anticipated by Macquarie.²⁶

4.14.2 Mr Lamond at the Public Hearings indicated that PPP might have to last up to 30 years and emphasised their need to be robust (29/01/04, p.41).

Mr Douglas speculated at the Public Hearings:

MR DOUGLAS: (30/01/04, p.51) *The critical bit of the MOU is it locks up all that land without a sunset clause. I don't think people in the Council understand what that does. This Council while that agreement is on foot can't do a thing except with Macquarie's involvement. So if the Council 3 years from now or 30 years from now says: let's develop the [TAPP's] land in this manner or develop it at all, Macquarie has got to agree.*

Mr Lamond (29/01/04, p.43–44) who has had extensive experience dealing with commercial contracts and, particularly with PPP emphasised the need to build safeguards into such an agreement, emphasising:

- The differences between the commercial objectives of the partners
- The need to have mechanisms to resolve issues

Circumstances may change over the period that an agreement may operate. There is need for the agreement to be able to meet these changing circumstances.

The failures that occurred in the Oasis project and the consequent failure to deliver the Arena, despite the enormous contributions made by the council, demonstrate that the Commercial Agreement and Early Construction Agreement lacked the safeguards and robustness required.

4.14.3 There are some uncertainties surrounding the Macquarie MOU. They include:

- The uncertainty surrounding the development to be undertaken
- The time over which development may occur
- The economic and financial threshold on which the project is built
- The nature and extent of the development anticipated
- The long-term and short-term financial outcomes for the council
- The short-term and long-term costs that the council may bear.

26. See Evidence of P Wright: 23/02/04, p.44–45

It can only be concluded that the MOU lacks sufficient certainty, let alone safeguards, for it to represent a document binding the council to, potentially, long-term unspecified development rights affecting council owned or controlled property.

In discussing the Macquarie MOU it is important not to confuse this document with a PPP. As was suggested by Mr Douglas the Macquarie MOU is really in the nature of a development rights agreement, under which Macquarie gained effective control of the right to develop land. Importantly, the agreement does not guarantee the provision of any infrastructure in exchange for the grant of the rights.

4.14 Findings

- 1. In its various dealings, the council failed to enshrine sufficient safeguards to protect:**
 - its land,
 - its contributions,**and to ensure its objectives were not subsumed by the commercial objectives of its partners.**
 - 2. In light of the losses that the council has sustained it has not secured construction of the arena and may have assigned rights to dictate development on council-owned land in Liverpool for a considerable time into the future.**
 - 3. Council is left with an agreement, the Macquarie MOU, which the council may or may not regard as binding. Council is unable to indicate a firm view.**
 - 4. The Macquarie MOU does not guarantee construction of the arena.**
-

4.15 Arms Length Transactions

4.15.1 In early March 2000 council's Strategic Panel was briefed by representatives of the Bulldogs and Macquarie on the Woodward Park Master Plan.

The Oasis project was now hatched. An indication of the extent of the proposal was given in the report to council's meeting on 26 April 2000. As has been indicated throughout this report, the proposals called upon the council to facilitate major development on Woodward Park, the TAPP's land and council-owned properties in Liverpool's CBD.

Much of the development proposed had clearly not been anticipated by the council. Importantly, its planning strategies did not consider the development that was involved.

In the lead-up to council's entry into the Commercial Agreement the council did not stand back and consider, independently, the appropriateness of the proposals from planning and social perspectives.

Mr Turissi council's senior Development Planner gave the following evidence of his involvement in the lead-up to the Commercial Agreement:

MR BROAD: (29/01/04, p.70–71) *Can I ask you of your involvement in planning issues in the lead up to the commercial agreement? Were you asked to look at planning issues that might arise in the commercial agreement?*

MR TURISSI: *No. My role in that regard was being presented scenarios and then asked questions as to whether or not I felt that would run into particular problems, from a procedural point of view.*

MR BROAD: *Were you presented with any scenarios associated with the CBD developments?*

MR TURISSI: *I was presented, at one stage, some scenarios with the Bathurst Street site, in terms of conceptual plans.*

MR BROAD: *Yes. Do you recall when that was?*

MR TURISSI: *Look, no—it would have been after—it was after my time as the interim position, I think - - -*

MR BROAD: *Would it have been before the commercial agreement was entered into or after?*

MR TURISSI: *No. It was after.*

MR BROAD: *After?*

MR TURISSI: *It was after.*

MR BROAD: *Would it be usual, given your position in Council, for those matters to have been referred to you?*

MR TURISSI: *I mean, certainly—yes. I mean, there was—yes.*

MR BROAD: *Okay. So if the Council was looking to enter into an agreement which provided that it make available a large area of development opportunity, then you would normally expect that to be taken up with you before anything was done on that?*

MR TURISSI: *Certainly ask questions of it, yes, in terms of what my views were.*

4.15.2 Given the effect of the proposals it is difficult to believe that there was so little involvement of specialist staff within council. Also, having regard to the nature of the proposals, it is surprising that expert planning advice from outside council was not more broadly sought.

4.15.3 In entering into the Commercial Agreement the council nullified its planning and development decision-making processes.

Mr Carr did not accept this proposition when it was put to him, relying on clause 5.4 which provides:

5.4 The parties acknowledge that in dealing with the Master Plan, Development Control Plan, any amendment or variation thereto or any application for consent (such as an application for development consent), nothing in this Agreement shall derogate from, limit, fetter or restrict Council's power, rights and duties at law to deal with the same.

Mayor Paciullo likewise considered that the provision in the Commercial Agreement overcame this problem.²⁷

4.15.4 Council's exercise an independent role providing planning regimes within their local area. Subject to state and regional planning control exercised at a state level, councils are granted autonomy as the primary planner and development decision-maker for their local government area.

The Commercial Agreement mandates the following:

- That council must facilitate the planning outcomes of the Oasis vision plan (Commercial Agreement Clause 5.2–5.5)
- That council must facilitate approval of the development applications relating to the proposed developments
- That council must provide a minimum of 80,000m² of commercial and/or residential area from the CBD properties (Commercial Agreement Clause 14.2)
- That council must rezone of all land to provide an average rate of 25 dwelling per hectare (Commercial Agreement Clause 6.8).

The extent to which the council's planning and development decision-making processes were nullified can be seen from the drafting of the Commercial Agreement.

The agreement required that the Foundation lodge the various applications. No provision is contained in the agreement which anticipates:

27. Evidence of G Paciullo: 20/01/04, p.79

- Council's consultation and consideration of the Master Plan, despite this being anticipated in the master plan (Oasis Vision Master Plan, p.54).
- Review, amendment, rejection, modification or other of development applications.

4.15.5 Evidence provided to the Inquiry suggests that the Bulldogs and Macquarie did not have sufficient regard to, or any sufficient understanding of, planning and development processes.²⁸

The Mayor and General Manager were quizzed on planning issues related to the Commercial Agreement. They gave the following responses:

MR BROAD: (20/01/04, p.82) *Given that the Council could exercise its own discretion whether it would approve an application which envisaged these sort of densities, did Council consider whether that may in turn lead to a breach of this agreement?*

MR PACIULLO: *Well, I can't recollect there being any discussion about that particular aspect, Mr Broad.*

MR CARR: (03/02/04, p.17) *Well, in fact, it can't—as they progressed the development and they put forward proposals, the Council will be standing as the planning authority and will determine what those ratios will be and if it doesn't meet the requirements of the commercial agreement, well then there can be no recourse because the Council cannot be fettered in its proper role at law. So we were always – in fact, I thought that was stated also in the legal advice and I was always under the view that the Council's law and its requirements at law would stand above any arrangement that may have been indicated in this commercial agreement.*

MR BROAD: *So what you are saying is, the Council's discretions that lie under the Environmental Planning and Assessment Act couldn't be fettered by this agreement?*

MR CARR: *Yes.*

MR BROAD: *Could this though, lead to a situation where if Council in its town planning decisions failed to achieve the 80,000 square metres required, could place Council in breach of the terms of the commercial agreement?*

MR CARR: *I don't believe so because I think Council's decision as a planning authority and exercising its right to that law would override any challenge from any proponent to say that they had been treated unreasonably under the agreement.*

MR BROAD: *This clause is unconditional isn't it? It reads: That there has to be a minimum of 80,000 square metres. It also has in sub clause (c) a provision for additional associated development, doesn't it?*

28. See Evidence of P Wright, W Moss, G McIntyre and A Constantinidis

MR CARR: *Yes, it does, it actually mentions - - -*

MR BROAD: *It doesn't ever suggest in that clause, that Council shall, subject to any town planning constraints, make that area available, does it?*

MR CARR: *No, it doesn't make mention in the clause, but if I could suggest that the document would be read in its entirety and therefore clause 5.4 would have some—well, significant bearing on any execution of the clause 14.2.*

4.15.6

The outcomes for council's planning and development decision-making processes may not have improved under the Macquarie MOU.

While the agreement, being in the nature of an anticipatory document, does not prescribe outcomes with the same certainty as Oasis, it is clear that Macquarie has adopted a stance where its perceived outcomes should rule the process.²⁹

The development decision-making process was explored with the Mayor and Mr Carr.

The Mayor was content to suggest that consideration by council's Independent Hearing and Assessment Panel would overcome the concerns, stating:

MR PACIULLO: (20/01/04, p.80) *Well I get back to the answer I gave you before, that development applications were assessed independently and were reported by an independent hearing and assessment panel, to Council.*

Mr Carr recognised the significance of the role of the panel, providing the following evidence:

MR BROAD: (02/02/04, p.32) *Was that the first time that it was suggested that there might be a conflict of interest if Council acted as consent authority?*

MR CARR: *No, I think it was generally being discussed about that dilemma. I think initially it was being talked about that the Council would talk about the Council being on the Foundation. Then it was suggested it can't be the planning authority and then Council wasn't going to be on the Foundation until its planning responsibilities or a certain time period had elapsed which is how I think it was described in the commercial agreement. So it was certainly seen as being something that was difficult because of Council's role, even though it has an independent hearing and assessment panel but ultimately the recommendations from that independent hearing assessment panel come to Council for it to make the decision.*

Ultimately, the council failed to ensure that its planning and decision-making processes remained at arms-length.

²⁹. See Evidence of P Wright

4.15 Findings

- 1. Before entering into the Commercial Agreement the council:**
 - Failed to ensure the independence and integrity of its processes;
 - Failed to adequately consider the planning issues associated with the proposal;
 - Failed to adequately consider the nature of decision making processes it would be called upon to exercise when considering the proposed developments;
 - Failed to consider the appropriateness of the Oasis proposals from planning and social perspectives.

 - 2. In doing so, it:**
 - Failed to enshrine adequate provisions in the agreement to protect the integrity and independence of its decision-making processes
 - Placed itself in a position where, if it exercised its planning and decision-making powers robustly and independently, it risked outcomes that would constitute a breach of the Agreement.

 - 3. The Commercial Agreement nullified council’s planning and development decision-making processes.**

 - 4. Neither the Bulldogs nor Macquarie had either an understanding of, or regard to, planning and development processes.**

 - 5. Council failed to ensure that its planning and decision-making processes remained at arm’s length.**
-

4.16 Confidentiality

4.16.1 Just before Christmas in 1992 the council adopted Master Plans for the Whitlam Centre and Woodward Park.

Subsequently the council went through consultative processes for the reclassification of council land, culminating in the adoption of a Local Environmental Plan for Woodward Park in August 1995.

In 1997 the Stardome proposal was hatched. Subsequently the council considered the initial Bulldogs, Macquarie and Grocon proposals, the Oasis Project and Liverpool 2020.

Its dealings with each of these proposals appear to have been characterised by a perceived need to maintain their confidentiality, both internally and externally.

Elsewhere in this report consideration is given to the effect that council's penchant for external confidentiality had. This section considers the effect of what became an imperative in its internal processes. Much evidence was given by the councillors of the confidential nature of the projects.

Council's pursuit of confidentiality within its internal process appears to have been driven by Mr Carr and based on:

- A belief that a request that a document remained confidential required adherence
- Inadequate consideration of council's processes
- The earlier leaking of material.

Mr Carr gave evidence of Councillor concerns that confidential material had been leaked:

MR CARR: (03/02/04, p.60) *If I could go back and again emphasise that the distribution of these reports was based on an issue that councillors themselves had about keeping documents confidential, and it was said on numerous occasions about the leaking of information, leaking of commercial and legal documents, concerns about that. They were expressed to me, and as a consequence of that we put this system in place.*

The Mayor and Councillor Gauci also spoke about material being leaked:

MR PACIULLO (01/03/04, p.82–83): *Well, I was about to answer that. I just make the point that I had no influence about—I didn't exert any influence over whether or not meetings should be confidential, and there were times when I thought I wish they were, because what was happening was that on every occasion we dealt with something confidentially it would appear in the media via a source. Now, I have no doubt where the source was, but having proof of that is another matter, and this was happening on a regular basis and, as I said, I wasn't trying to influence a secret discussion about matters. We were advised that they were of a particular nature and that we should meet confidentially, and, as I've pointed out, decisions were made public and the details would come out in one form or another in some arm of the media or another by people who were obviously trying to undermine the project. ... All I'm saying is, on a regular basis this happened and that led to the Council itself determining that we should have a process that would minimise—although I don't think it stopped it—the leaking of information which was against, as often is, against the interests of the parties involved to come up with arrangements that were in the public interest.*

MS JOHNSON: *Did you ever raise with the General Manager the need to get the reports earlier so that you would actually have an adequate opportunity to read them before the meeting.*

MR GAUCI (16/02/04, p.81): *Every councillor has actually asked for that and the reasons we were given not to—the report has not been given earlier because the leakage to the press or in the Liverpool area with this there was the anti casino group and that was fear that information would have been leaked to them.*

4.16.2 Mr Carr commented on the process of treating reports, advice, and other documents as confidential to the councillors (02/02/04, p.44):

MR CARR: *That practice was adopted with this particular project and the reason it was adopted was that there were concerns within the Council about the leakage of confidential information and confidential documents. Council has a code of conduct which outlines the way that Councillors should deal with confidential documents and its integrity.*

So this practice was put in place not to deny elected members the access but to reinforce that when they secured a copy of a confidential document such as the independent consultant's reports that they would sign and acknowledge the confidentiality of it. I will just read—I refer to the receipt of appendices and I've got a copy of one of those sheets that would have been signed by a Councillor coming in to receive the document. It reads:

I acknowledge that I have received a copy of Volume 2 of the appendices to the confidential report on the proposed early construction for Arena at Woodward Park to be considered by Council on 31 August 2001. I also acknowledge that these appendices are confidential and must be treated confidentially in accordance with the Local Government Act and Council's code of conduct.

So that is basically what—all they had to do was come in and sign that and got the document.

4.16.3 Mr Carr provided only one instance where leaks had occurred. These leaks occurred after council's entry into the Macquarie MOU, more than two years after the Oasis project was being considered.

MR CARR (26/02/04, p.14): *the document was confidential and was to remain so. I can't recall the resolution that was adopted by Council, but I was always under the impression that the commercial agreement, the legal document, was accessible to elected members to view but copies were not to be distributed. If I could just say about leaking of documents, the same issue was with the memorandum of understanding.*

As it was, that memorandum of understanding was leaked and it was given to Stateline, and Catherine Harvey from Minter Ellison said that the copy that appeared on the Stateline web was the copy that was given to Mr John Marsden, so the leaking of documents seemed to be something that was happening at Liverpool that elected members were expressing some concern about.

Mr Marsden spoke of the leaks and the witch hunts that followed.³⁰ Interestingly Mr Marsden gave evidence that, to his knowledge, the press had little interest in the council at the time that the Oasis project was being considered.³¹

In the end, the pursuit of confidentiality and the consequent restrictions placed on access to information served to reinforce council processes, undermining its ability to properly consider the projects and the ability of the councillors to discharge their duties under the Act.

4.16 Findings

1. **Council became obsessed with confidentiality, misapplying and misunderstanding the principles associated.**
 2. **The pursuit of confidentiality was contrary to the intent of the Act.**
 3. **The pursuit of confidentiality and the restrictions imposed in this pursuit served to undermine proper consideration of the projects and the discharge by the councillors of their duties under the Act.**
-

4.17 Tendering

4.17.1 The Act (Section 55) requires that councils invite tenders before entering into contracts of the type envisaged by the Stardome, Oasis and Liverpool 2020 projects.

The council steadfastly refused to meet this primary obligation.

Instead the council, at least so far as the Commercial Agreement, Early Construction Agreement and Macquarie MOU were concerned, purported to characterise each agreement as being subject to extenuating circumstances, thereby avoiding the primary obligation to call tenders.

Fundamental to the approach taken by the councillors were assertions contained in their resolutions not to call tenders for Oasis and Liverpool 2020, that for various reasons, a satisfactory result would not be achieved by calling tenders.

4.17.2 When resolving to enter into the Commercial Agreement the reasons for not tendering included:

- *The failure of the council to obtain any other interested parties to conclude an agreement with the council for the construction of an arena or stadium at Woodward Park despite negotiations with other parties and the issue being in the public domain for over three years;*

30. Evidence of J Marsden: 18/02/04, p.13

31. Evidence of J Marsden: 18/02/04, p.14

- *The obligation of council to provide an arena for the Razorbacks basketball team at the earliest opportunity;*
- *The need to ensure that an arena is financially viable so far as is possible which will be assisted by the involvement of the Bulldogs having regard to its ownership of the Razorbacks and the close proximity of its proposed club;*
- *The contribution by Bulldogs of not less than (sic) \$10,750,000 of financial support towards construction of the Arena;*
- *The tax exempt status of the proposed Bulldogs' foundation which facilitates generation of moneys from the commercial elements of the development for the Arena, Waterpark and Stadium;*
- *The commitment of Bulldogs to provide moneys towards the Stadium and national sporting teams;*
- *The probity and due diligence enquiries already made;*
- *The existing ownership of a key element of the Woodward Park precinct by the Bulldogs;*
- *The ownership of designs for the proposed development by the Bulldogs;*
- *The involvement of Macquarie Bank Limited both as a provider of funds for the development as a whole and in relation to the council's borrowings as the Bank's term proposals are better than those available elsewhere; and*
- *The uniqueness of the proposal involving commercial developments to fund community projects in conjunction with not for profit organisation.*

The exclusionary provisions of Section 55 (3) of the Act that the council relied upon anticipate:

“a contract where, because of extenuating circumstances, remoteness of locality or the unavailability of competitive or reliable tenderers, a council decides that a satisfactory result would not be achieved by inviting tenders”.

In 1997 the Department of Local Government had published Tendering Guidelines.³² It indicated the advantages of competitive tendering as including:

- *Competitive tendering relies on competition to achieve greater efficiency and better quality service provision. It is not based upon a judgement that the private sector is more efficient than the public sector. Rather, it takes advantage of the competitive marketplace in an attempt to obtain the best value for the community.*

32. Competitive Tendering Guidelines – Jan 1997

- *Competitive tendering requires councils to look closely at the level of service desired, the specifications, and the level of quality. This can assist in driving improvements to in-house providers. Councils can then test the effectiveness of their providers with others to make an informed decision about the best way to provide a service. Efficiency gains can be realised within council through competition regardless of whether or not a contract is awarded externally.*
- *Competitive tendering should focus attention on outcomes rather than processes. In designing specifications for contracts, a council will need to examine the exact service it wishes to buy and the objectives it wishes to satisfy. Council may find that costing a service leads to an adjustment of priorities. It may need to refine its organisation structure and resources as a result of defining the desired outcome more clearly.*
- *Some studies point to competition more than any other single factor as crucial for the achievement of best value for money. Without competition, organisations, be they private or public sector entities, may not operate to full capacity. The savings from introducing competition to perform a service have been reported as 20%, on average, and often much higher. However, these estimates have been criticised as being inaccurate. Actual savings vary according to the degree of efficiency prior to tendering, the intensity of competition, and the way in which council manages the process. The Industry Commission also lists a number of studies in its Report into Competitive Tendering and Contracting by Public Sector Agencies, 1996.*

Analysis of the reasons put forward in the report to council's meeting on 5 February 2001 fly in the face of these reasons.

Given the requirements of the Act and the propositions contained in the guidelines it is difficult to see how:

- *The need to ensure that an arena is financially viable so far as is possible, which will be assisted by the involvement of the Bulldogs having regard to its ownership of the Razorbacks and the close proximity of its proposed club;*
- *The tax exempt status of the proposed Bulldogs' foundation which facilitates generation of moneys from the commercial elements of the development for the Arena, Waterpark and Stadium;*
- *The probity and due diligence enquiries already made;*
- *The ownership of designs for the proposed development by the Bulldogs;*
- *The involvement of Macquarie Bank Limited both as a provider of funds for the development as a whole and in relation to the council's borrowings as the Bank's term proposals are better than those available elsewhere;*

provide any basis why they should, separately or conjunctively, lead to a conclusion that they constitute “extenuating circumstances” on which to base a conclusion that “a satisfactory result would not be obtained by inviting tenders”.

4.17.3 The reasons that were also put forward as reasons not to tender included a perceived need to provide an arena for the Razorbacks.

It is clear that many in the council, principally the Mayor, perceived some form of obligation to meet the needs of the Razorbacks.³³ This view was not supported by the Razorback’s representatives, who gave evidence.³⁴

Importantly, there does not appear to have been a contract giving rise to this obligation.

It is likely that the “obligation” was nothing more than pressure being placed on the councillors for an early resolution to enter into the Commercial Agreement, and subsequently, the Early Construction Agreement.

4.17.4 Perhaps the primary reason driving council’s entry into the Commercial Agreement was the consistent failure to develop the arena over a number of years. The council had sought to develop an arena since at least 1995. The proposals had included BOOT schemes with Transfield and Leightons, associated with the Olympic proposals and subsequently the Stardome proposal.

Each had failed. The most recent, Stardome, had failed in May 1999, almost 2 years before the Commercial Agreement. Importantly, there is no suggestion that in the period from July/August 1989, when the council sought expressions of interest from 56 companies, it had ever gone to market to test interest in any project to re-develop the existing Whitlam Centre or to provide a new arena.

4.17.5 The Oasis project went much further than the provision of an arena, containing proposals for sporting and recreational infrastructure as well as commercial and residential development, on five discrete sites.

In concluding that a satisfactory result would not be achieved by inviting tenders, council’s consideration of its failure to obtain other interested parties relied on a call made in 1989, and possibly its failure to conclude an agreement, in circumstances where, similarly, it had not gone to market.

A further reason for not tendering refers to the “uniqueness” of the proposal. Contrary to this suggestion, uniqueness alone would have been a sufficient reason to test the market to see if other proponents were willing to put forward other, perhaps equally “unique” proposals.

33. See Evidence of G Paciullo: 19/01/04, p.45; 20/01/04, p.45; C Anthony: 16/02/04, p.34 and W Waller: 21/01/04, p.40–41

34. See generally evidence of A Looby: 23/02/04 and S Bosnjak: 17/02/04, p.36–37

4.17.6

Council's later entry into the Macquarie MOU was again dependent on a resolution that a satisfactory result would not be achieved by calling tenders.³⁵

The reasons relied upon to activate the section comprised:

- *Council has previously entered into contractual arrangements with Macquarie Bank, via the Commercial Agreement, in relation to the Woodward Park project. The Memorandum of Understanding is an evolution of the original contractual arrangements and is therefore consistent with Council's original intention in relation to the Woodward Park project.*
- *Prior to the signing of the Commercial Agreement in 2001 the market had been thoroughly tested in relation to possible proponents for the Woodward Park project with Macquarie Bank being the only party willing to enter into an agreement to finance the project.*
- *Council cannot undertake the development program without a co-venturer.*
- *The issues have been carefully considered by Council's solicitor Mr John Marsden and the Foundation's solicitor Mr Michael Eyers who both consider it is appropriate for Council to legally exercise its discretion under S55(3).*
- *Macquarie Bank is likely to be the only viable funding arranger and project development manager with sufficient and intimate knowledge of the project to enable it to proceed in a timely manner.*
- *Macquarie Bank is entitled to object to any attempt by Council to substitute another financier or developer for Macquarie Bank in the Woodward Park development program.*
- *There will therefore be the risk, or a greater risk, of litigation arising out of the Commercial Agreement if the Memorandum of Understanding is not entered into.*
- *Completion of the Arena and other projects contemplated in the Commercial Agreement may be significantly delayed if the Memorandum of Understanding is not entered into.*

Despite what was being put to the councillors, the council was simply buying itself out some of the problems that had arisen in Oasis by coming to terms with and entering into a further arrangement with Macquarie based on perceived commercial and political need.

Importantly, the council had placed itself in this position because it was driven by a perceived need:³⁶

35. Report to meeting: 13/03/03, p.2-3

36. See generally evidence of B Carr: 03/02/04, p.24-26 and Evidence of M Eyers: 27/01/04, p.77-80

- To provide an arena for the Razorbacks
- To provide a positive outcome to meet public perceptions
- A decision to explore resolution of the issues between itself, the Bulldogs and Macquarie.

Of the reasons put forward to council, perhaps one provided a reason for the council to resolve not to call tenders, it was:

- *There will therefore be the risk, or a greater risk, of litigation arising out of the Commercial Agreement if the Memorandum of Understanding is not entered into.*

Regrettably, this circumstance followed directly from the culmination of council's other failures.

It must be remembered that, despite what might otherwise be suggested in the various reports, the Stardome, Oasis and Liverpool 2020 projects were presented by private proponents. At no time did the council test the market in the manner anticipated by the Act.

The use of the "extenuating circumstances" provisions contained in section 55 (3) constituted an improper use of council's processes, adding to the other wide-ranging failures to undertake prudential decision-making.

4.17 Findings

1. **The council failed to discharge its obligations under the Act by calling appropriate tenders for the proposals anticipated by the projects.**
 2. **It is the inevitable conclusion that the determination not to call tenders was an excuse to avoid the council's responsibilities under the Act.**
 3. **The council incorrectly applied the exemptions under Section 55 (3) of the Act in an attempt to legitimise its failures.**
-

The Decision Tree

In order to provide a measure of clarity to the processes that took place on the surface and the underlying processes that drove them, it is appropriate to provide an assessment of the various positions held by various people within the council structure.

As will be seen, not only from this part, but the entirety of this report, council's decision tree was to fail miserably.

1. The Mayor

- Leader of ALP councillors
- Leader of right (majority) faction
- Authorised, with GM, to negotiate Oasis and contracts settlement
- Read executive summaries or highlighted sections of advice and reports
- Driven by social (political) goal.

2. The ALP Councillors

- Absolute majority in council
- Divided into 2 factions
- Right faction had controlling vote—unless a councillor was not entitled to vote
- Junior councillors bound to follow faction leader
- Adopted caucus system—“decisions” made in caucus
- Relied on Mayor's knowledge and political experience
- Future political career determined by obedience
- Could not voice concerns outside caucus.

3. The Liberal Councillors

- No political power
- Chose to follow ALP
- Failed to read documents thoroughly—if at all

4. Independent Councillors

- Political pariahs
- Failed in attempts to stimulate debate
- Councillor Harrington attempted to fulfil obligations under the Act
- Councillor Dobell-Brown absolutely opposed to Oasis and refused to countenance or consider the project.

5. Mr Carr—General Manager

- Possessed by need for confidentiality
- Caught up in Mayor's goals
- Furthered Mayor's goals for his political purposes
- Failed to exercise independent judgement
- Failed to consider or understand council's obligations under the Act or EP&A Act
- Acted autocratically

6. Council's staff

- Unprepared for Oasis proposal
- Not effectively consulted
- Overtaken by perceived project outcomes
- Failed to provide rigidity to council processes.

Section 5: Taking and Maintaining Control

5.1 Introduction

In the late 1980's and first half of the 1990's, following the adoption of the Woodward Park Master Plans, the council had been active seeking ways to provide either new facilities or to upgrade the Whitlam Centre.

It had sought expressions of interest from 56 companies to re-develop the pool site, albeit without success.

It had actively pursued the re-development of the Whitlam Centre and had obtained proposals, costings and initial feasibility studies from LRM Australia in 1992.

It had constructed and opened the new aquatic centres as part of the Whitlam Centre in 1994.

It had proposed BOOT schemes with Transfield and Leighton during 1994 to 1996 that were associated with its Olympic bid.

The Bulldogs had shown some interest in the development of a licensed club. In 1997, following its commitment to support the Slammers, the council undertook the process of expanding the Whitlam Centre to provide the required accommodation. During this period the council was the driver of the developments—albeit, to that stage, unsuccessfully.

With Stardome, Oasis and Liverpool 2020 council's role was to change from driver to passenger.

Council's acceptance of this role was a critical reason for its ultimate failure to ensure the outcomes sought.

5.2 Setting the Deal

5.2.1 In 1997 the council had received a proposal from the Bulldogs involving:

- *the purchase of the old swimming pool site which would be redeveloped as a major 'resort' (licensed club and hotel complex);*
- *the lease of the Hillier Oval which would be used as a training ground for the Canterbury Bankstown Football Club (CBFC) and possibly in the longer term, as a home ground for the 'Bulldogs' Super League matches;*
- *the establishment of specialist fitness and administration facilities for the CBFC which would be developed as an extension to the existing Whitlam Leisure Centre; and*
- *the physical 'linking' of the Whitlam Leisure Centre with the proposed resort.*

The council was recovering from a \$15.4m deficit, the legacy of earlier council decisions, and had limited ability to finance such a proposal.

5.2.2 On September 2, 1997 council received Stardome's initial proposal to construct a stadium.

By December that year the proposal had changed to an entertainment centre and basketball arena.

On 19 December 1997 Stardome wrote to the council, dictating the terms on which it would proceed.

In moving forward with Stardome the council allowed its role to change from driver to passenger. It no longer set the deal, but rather it took the passive role allowing, initially Stardome, but subsequently the Bulldogs, Grocon and Macquarie to dictate:

- The proposals
- The role that council would have
- The processes that council would adopt
- The approvals that the council would give
- The planning processes and outcomes that council would undertake and provide
- The contributions that council would make
- The infrastructure that council would provide
- The fees and levies that the council would forego.

5.2.3 The council appears to have been a willing participant, apparently driven by a perceived need to provide an arena and obtain a national sporting team. It was also motivated by its perceived inability to either fund the arena or obtain a better deal.

Ultimately council's failure to take an active role setting the deal was to facilitate the process where council contributed \$15m to the Foundation without adequate safeguards. Despite the lessons that might otherwise have been learned after the salary cap revelation (when council obtained the Foundation audit report) council again let the Bulldogs and Macquarie dictate the terms of the settlement that it reached with them and the terms of the Macquarie MOU.

5.2.4 Mr Constantinidis made it clear that he regarded the council as not having any role driving the process. Rather, his evidence suggested that council was a participant whose lands were to be used for whatever the other participants wanted:

MR BROAD: (17/02/04, p.94–96) ... *The Bulldogs and the Macquarie Bank promoted the Oasis agreement as a partnership. Were you aware of any reasons why the Council was not provided with equal opportunity to the financial modelling of the Macquarie Bank?*

MR CONSTANTINIDIS: *No. Except the normal commercial in confidence reasons.*

MR BROAD: *They didn't treat it as being commercial in-confidence between the Bulldogs and the Macquarie Bank.*

MR CONSTANTINIDIS: *Sorry. Between them? You mean from one party to another?*

MR BROAD: *Yes.*

MR CONSTANTINIDIS: *They are commercially in a venture together, so they would share that information.*

MR BROAD: *And the third party to that venture was the Council.*

MR CONSTANTINIDIS: *Yes.*

MR BROAD: *It was at least an equal party, wasn't it?*

MR CONSTANTINIDIS: *No, it wasn't.*

MR BROAD: *Well, could I explore that with you? The Council was providing the land upon which the arena would be built.*

MR CONSTANTINIDIS: *That's right.*

MR BROAD: *The water park would be built.*

MR CONSTANTINIDIS: *Yes.*

MR BROAD: *The stadium would be built.*

MR CONSTANTINIDIS: *That's correct.*

MR BROAD: *The CBD lands.*

MR CONSTANTINIDIS: *That's correct.*

MR BROAD: *The Tapps lands.*

MR CONSTANTINIDIS: *Absolutely.*

MR BROAD: *Council was providing up to \$22.25 million.*

MR CONSTANTINIDIS: *Whatever the figure is.*

MR BROAD: *Yes. The Bulldogs were potentially providing a loan of, I think it was \$10.85 million.*

MR CONSTANTINIDIS: *10 something I'm familiar with.*

MR BROAD: *The Bulldogs were providing expertise.*

MR CONSTANTINIDIS: *Yes.*

MR BROAD: *The Bulldogs were providing a football club.*

MR CONSTANTINIDIS: *That's right.*

MR BROAD: *The Macquarie Bank was providing a means of finance and was providing project management skills.*

MR CONSTANTINIDIS: *And any other banking skills we wanted, yes.*

MR BROAD: *To what extent then was the contribution of the Council less than either the Bulldogs or the Macquarie Bank?*

MR CONSTANTINIDIS: *It wasn't less in the context that to take anything away from them. As I recollect all the componentry of land values, whenever land was provided I understand the bank guarantees had to be put up for the value of the land on the advice of the Council advisers. So if they put up, for instance, Tapps land in the order of \$5 million for a component—I don't have it but I understand the agreement, the final signed agreement, provided for bank guarantees to be provided.*

Equally—no, that's preserving the Council—you're asking me a question in one sense. I'm just trying to understand I'm answering it the right way. If they were providing land for the arena, that parcel of land was valued and that became part of their contribution, not just: here is a piece of land; to the Foundation or to Macquarie Bank.

MR BROAD: *Can I interrupt you there?*

MR CONSTANTINIDIS: *Yes.*

MR BROAD: *I'm asking simply why you suggest the Council was anything less than an equal partner?*

MR CONSTANTINIDIS: *I'm not going to be drawn on—when you say an equal partner, I'm not there to draw straws on the percentages.*

MR BROAD: *Okay. Anything less than a partner.*

MR CONSTANTINIDIS: *I understood Council to be a partner because it's a party to the commercial agreement. They are a partner. Now, if that means that partners— certainly Macquarie Bank didn't hand over its model and its laptop and say look, here is a thing, go away and play with it; or certainly I don't think they handed that over to the Bulldogs. They did their expertise within their organisation as an institution.*

5.2.5 Mr McIntyre of the Bulldogs likewise had adopted a view that the council was to be subservient, giving effect to the Macquarie/Bulldogs proposals:¹

- *Council would be required (subject to the discharge of its statutory obligations as a development approving authority) to approve of the construction of approximately 2,500 residential units...*

5.2.6 Macquarie's representatives were more guarded in their evidence. Mr Moss gave evidence regarding the creation of a consortium in the lead-up to the Oasis project:

MR MOSS: (23/02/04, p.5–6)... *So we agreed to form a working committee or a consortium as we called it, and to make that consortium workable I insisted that we brought in a respectable architectural firm. We brought in Woods Bagot and we brought in the managing partner there, Randolph Griffith came into the consortium and Randolph had previously been on the Sydney of City Planning Committee, was very well regarded for his design and architectural expertise and costing expertise.*

MS JOHNSON: *At this stage Mr Moss, you were still working effectively with the Bulldogs and it was the Bulldogs who had the relationship with the Council, is that right?*

MR MOSS: *That is right. In fact, we had from my perspective, very few meetings with the Council at all through this whole process. At that stage, we were working as a consortium, we were speculating our own time to try and come up with a project that could be economically viable that could be put on the table to enable the interested parties who wanted to be involved in this to achieve what they wanted to achieve...*

MS JOHNSON: *But the project that you were offering was a project that was being offered to the Bulldogs and Council, is that correct or you were putting forward something that the Bulldogs could then offer to Council?*

MR MOSS: *At that stage we were trying to put forward a proposal that could be put to Council that would come forward from really this working group at that stage. What we did do then, very quickly we put together a structure and that structure had Woods Bagot, Macquarie, the Bulldogs involved in it. Mr Al Constantinidis was involved and a whole series of people were providing input into this which included people from the Council, people from the sporting teams, etcetera and that was the original structure. We are talking now, in January '00.*

1. Additional material provided by G McIntyre: 01/03/04

5.2.7 The deliberations that led to the Oasis project proceeding did not involve the council:

MR MOSS: (23/02/04, p.7) *At that stage because we were working on the financial viability of this and what happened over—at that period of time leading up to a meeting in early April on 7 April, we were working out, we were trying to ascertain the details of the project with regards to infrastructure, trying to understand the planning constraints, trying to understand all the different components of this project and on 7 April, we had a meeting in the Hunter Valley and the purpose of that was to discuss the viability of the project. The conclusion that was reached out of that meeting was that, if this vision was to go forward, we would need to provide additional residential land to the project to provide the surplus funds for the facilities to be built.*

PROF DALY: *Could I just interrupt again. When you say, we, had this meeting in the Hunter Valley, is that Macquarie Bank?*

MR MOSS: *The consortium.*

PROF DALY: *The whole consortium?*

MR MOSS: *It was attended by Woods Bagot, Macquarie Bank and the Bulldogs and Mr Constantinidis.*

PROF DALY: *No one from the Council?*

MR MOSS: *No one from the Council.*

5.2.8 Mr Carr recognised that the council did not have control of the Oasis project and spoke of council's attempt to gain control:

MR CARR: (02/02/04, p.43) *When the Bulldogs salary cap issue was first known, and the project ceased, then we went through a process of how we actually get control of what has actually happened. I was appointed the interim Foundation Manager, and we went through a process of determining the way forward. Michael [Eyers] was then engaged, came on board. He prepared reports and those reports all went to Council.*

5.2.9 The instructions given to Mr Eyers involved mediating settlements and agreements between the council and Macquarie and the Bulldogs.²

Mr Eyers' position was hamstrung by council's pursuit of the arena:

MR BROAD (27/01/04, p.79–80): *What I'm asking you is whether your instructions and/or whether Council's desire to move forward was predicated by a perceived need on the part of Council to construct the Arena.*

² Evidence of M Eyers: 27/01/04, p.77

MR [EYRES]: *Certainly I had the perception that a number of Councillors wanted a solution that included completion of the Arena but it wouldn't be fair to say that that was the only attraction of the solution for them.*

5.2.10 Council's continued failure to set the deal ultimately led it into the Macquarie MOU.

Despite the desires of the council to obtain an agreement securing the construction of an arena, council obtained an agreement under which it granted development rights for projects dictated by Macquarie.

Construction of the arena had not been secured, as was acknowledged by Mr Wright.

MR BROAD (23/02/04 p.45–46): *Now if one was to build the Arena and you are talking about leasing it out, the lessee I would assume would look at being able to obtain a financial return?*

MR WRIGHT: *Yes.*

MR BROAD: *The question that has been put up is that, well, arenas traditionally don't make a financial return. Is the project dependent on being able to put together an arena which will provide a financial return?*

MR WRIGHT: *Can I say, if you're referring to Mr Moss's evidence and in fairness to his evidence when he last saw the Arena it had two uses: basketball and ice. Certainly based on those uses, netting about \$1500 a game for basketball, you can't make money. There was a radical redesign undertaken by McLachlan Lister, or managed by McLachlan Lister, and the Arena as it is today mothballed, but has eight uses, so the only way an operator can really make money out of a facility like this is through entertainment and conferencing. Sport will not provide a return. Sport provides interest for the community and builds community spirit, but it's not something you'd make money out of. Our view is that it would be possible to enter into a third party lease with a creditworthy operator that could operate this similarly to the Sydney Entertainment Centre, but in a smaller version.*

MR BROAD: *Right. If the Arena were to go ahead and if—I assume what you'd say is you would only go ahead if you could find a lessee?*

MR WRIGHT: *Absolutely.*

MR BROAD: *Right. So it's dependent on that?*

MR WRIGHT: *Yes.*

5.2 Findings

1. **The council failed to enunciate and seek proposals to provide the infrastructure facilities it sought.**
 2. **In failing to do so it allowed the proponents to dictate what council should provide and approve, and in doing so forced council to circumvent proper processes.**
-

5.3 Choosing Partners

5.3.1 Council's choice of its partners was fundamental to its pursuit of infrastructure in Woodward Park.

The entirety of the evidence available to the Inquiry leads to the conclusion that the council took no active steps to stand back and consider whether it should choose not to pursue projects put up by the various proponents. They continued to seek new partners after old partners had demonstrated a lack of faith, or had failed to carry out what the council perceived as their obligations.

5.3.2 In 1997 the council had been warned by Mr Marsden of the credit-worthiness of Stardome and its proponents.³ Mr McIntyre, of the Bulldogs had warned the council of his concerns over “side deals” being proposed by Macquarie affecting the constitution of the Foundation and the fees to be charged by Macquarie⁴ before the Commercial Agreement had been signed. In turn, Macquarie's representatives had met with Mayor Paciullo and Mr Carr to voice their concerns over the Bulldogs, in mid 2001, importantly, before council entered in the Early Construction Agreement.⁵ Council had warnings aplenty about its partners, and it took no notice of any of them. Council was filled with hubris as the schemes unfolded and expanded; something of a collective madness overtook its key decision-makers, as they allowed their partners to usurp the council's rightful role.

5.3.3 Ultimately the council did not choose its “partners”. It did not seek them out through a tendering or expression of interest process. Rather, it relied upon prospective partners to come to it with proposals.

This failure led to the council playing a subservient role to the aspirations and machinations of its partners.

5.3.4 By the time that council came to enter into the Macquarie MOU it had lurched from one proposal to the next preferring construction of either the arena alone, or, for a sporting hub based around Woodward Park.

3. See evidence of J Marsden: 18/02/04, p.24 et seq. B Carr: 26/02/04, p.22 et seq.

4. See evidence of G McIntyre: 01/03/04, p.20–21; B Carr: 26/02/04, p.31–33, G Paciullo: 01/03/04 and Foundation letter: 16/07/02

5. See evidence of G Paciullo: 01/03/04, p.67–74; W Moss: 23/02/04, p.30–31

The overwhelming theme of council reports, memoranda and the evidence of staff and councillors suggests a desperation in the elected body and senior staff to grab onto the proposal that was then being put to the council on the basis that, if the deal was missed, no other proposal was likely to be forthcoming.

The entirety of the evidence does not indicate any willingness to drawback, to review, to learn from earlier mistakes and to exercise any element of choice to determine whether it should proceed with any proposal that was being proffered.

5.3 Findings

1. **In not one instance over the seven years that the council entered into a variety of commercial arrangements to develop infrastructure in the Woodward Park Precinct did it choose a partner. Each of its arrangements came from an unsolicited approach from the private sector.**
2. **In some instances a private sector partner selected another private sector partner, without consultation with the council, or partners recognized by the council prepared schemes with each other, leaving council sidelined from the decision-making. This happened when the Bulldogs and Macquarie linked to form the Oasis project.**
3. **There is no evidence of the council actually rejecting the advances of prospective partners.**
4. **There is evidence of the council continuing to believe it had obligations towards its private sector partner(s) even when there appeared to be strong breaches of trust by that partner.**

5.4 Farming Down

5.4.1 The Oasis delivery structure, which has been outlined in the previous section, anticipated substantial farming down of the roles and processes.

It involved:

- The Foundation, which was to undertake the role of construction maintenance and management of the facilities
- ODC, which was to act as development manager for the various projects. Its initial director was Gary McIntyre, who was subsequently replaced by David McIntyre (the son of Gary McIntyre) and Achilles Constantinidis on 20/12/01. Mr Constantinidis continued as a director of ODC until 3/6/02 when disputes between Mr Constantinidis and the Bulldogs came to a head. Shortly thereafter Mr Nathan Palmer was appointed as Director.

The Foundation initially held 1 ordinary share with Mr G McIntyre and Mr Constantinidis each holding one “B” share.

Mr Stalley described the effect of the ownership of the shares:

MS JOHNSON (22/01/04, p.56–57): *Who are the individuals who held those B-class shares?*

MR STALLEY: *Originally it was Gary McIntyre and Al Constantinidis. Sometime in 2001, the share being held by Al Constantinidis was transferred to David McIntyre. Effectively what that meant - - -*

MS JOHNSON: *Yes.*

MR STALLEY: *- - - for ODC was that, even though it was economically owned by the Foundation, it was effectively under the control of the Bulldogs Leagues Club and that’s important for later.*

MS JOHNSON: *Right. Thank you. What did ODC—you said that the Liverpool Arena Proprietary Limited, owned the assets. What did ODC—did it have any—did it own anything? Did it have any - - -*

MR STALLEY: *The only asset that ODC owned were various development management agreements that entitled it to a percentage of the construction costs, to undertake project management and supervision type work.*

MR STALLEY (22/01/04, p.56): *There was a second subsidiary company of the Foundation, called Oasis Development Corporation and that’s the one marked ODC. The relationship between ODC and the Foundation was that the Foundation owned the sole ordinary share in ODC. Subsequent to that ordinary share, there were two B-class shares issued. Now a B class share typically is one where it has no economic benefit but has voting rights.*

MS JOHNSON: *Right.*

MR STALLEY: *Those two B-class shares were owned by individuals associated with the Bulldogs and held in trust for the Bulldogs Leagues Club.*

5.4.2 Subsequently, on 29/7/02, the Prestige Development Corporation Pty Ltd was registered.

MR STALLEY (22/01/04, p.57) ... *There is another company there, PDC, which is Prestige Development Corporation. This was a sister company to ODC, set up in 2002 as a defensive mechanism by the Bulldogs, to protect what they saw as a valuable asset, which was the Development Management Agreements in that some of the development management agreements were transferred from ODC to PDC.*

Its sole director was Robert Cadee, a director of the West Sydney Basketball Management Pty Ltd, the owner of the Razorbacks.

5.4.3 Liverpool Arena Pty Ltd, which was to act as asset owner of the Arena, was another entity that was formed. Its original directors were Gary McIntyre and three other directors of the Bulldogs League club. Its sole share was owned by the Foundation.

It was intended that other companies would be registered to act as project vehicles for each project.

5.4.4 Because the council and Macquarie had not appointed directors to the Board of the Foundation, all the subsidiary companies fell under the control, either totally or effectively of Mr G McIntyre and Mr A Constantinidis.

Mr G. McIntyre:

- Was Chairman of the Foundation⁶
- Was appointed chief executive of ODC
- Was chairman of the project management committee⁷
- Was appointed as a consultant to ODC at a fee of \$200,000⁸

Mr Constantinidis:

- Was the sole director of International Sports Marketing Pty Ltd (ISM) which was appointed as Development Manager to OCD for 3 years at a fee of \$400,000 plus GST⁹
- Was a director of ODC
- Was the likely beneficiary of payments made by the Bulldogs relating to ISM's involvement in the Stardome and Oasis projects.¹⁰

5.4.5 The position of Mr G. McIntyre and Mr Constantinidis was further reinforced by the appointment of Mr David McIntyre, the son of Mr G. McIntyre as assistant CEO of ODC.¹¹ David McIntyre was also a director of the Foundation from 12 July 2000 until 15 November 2001, shortly before his appointment to the board of ODC. While Mr McIntyre strongly defended his son, on the basis of his qualifications,¹² his involvement further closed the circle who had charge of the process. Again, while it was challenged by Mr McIntyre,¹³ Mr Stalley and Mr Merchant, both of whom have expertise in the field, gave evidence of the quality of the Foundations accounts.

6. Foundation Minutes: 12/07/00

7. Project Management Meeting No. 2 Minutes: 24/01/04

8. Evidence of G McIntyre: 01/03/04, p.12

9. Additional material provided by G McIntyre, para. 2

10. Additional material provided by G McIntyre, paragraphs 13–20

11. Supporting material provided by G McIntyre, p.21

12. Evidence of G McIntyre: 01/03/04, p.26

13. Evidence of G McIntyre: 28/01/04, p.92

Mr Stalley described them to the Public Hearings:

MR STALLEY (22/01/04, p.64): *The accounting entries when we got control of the Foundation were in such a terrible state that we effectively went back to the source documentation and started again.*

Lengthy evidence was also given by Mr Stalley and Mr Merchant of:¹⁴

- Overpayment of fees by the Foundation to ODC
- Loan by the Foundation to ODC of \$503,000 that was subsequently written off
- Failure of the Foundation to pay GST
- Fines being imposed by the Australian Taxation office
- The failure to deduct group and other taxes
- The failure to pay superannuation
- The failure to record Mr G McIntyre, Mr Constantinidis and Mr D McIntyre as employees of ODC
- Pre-payment of fees totalling \$651,000 that were subsequently written off.

5.4.6 Following the salary cap revelations PwC was commissioned to conduct a limited audit of the Arena Trust account.¹⁵

PwC reported:

Oasis Development Corporation (ODC) acts as development manager to the Arena Project. The Development Management Agreement, which is with the Foundation, provides for a development management fee to be calculated and paid on the basis of:

“...the costs incurred for the Project during the month as a proportion of total forecast costs for the Project multiplied by 5% of the estimated total development costs for the Project.”

The costs of the Project to 30 June 2002 are stated as \$5 452 014 on the attached statement prepared by the Foundation (refer Attachment A). The forecast costs for the Project are stated as \$33,000,000 in the Early Construction Agreement and Commercial Agreement. ODC would therefore appear to be entitled to receive a development management fee of:

$$\frac{5\% \times \$33,000,000 \times \$5,452,014}{\$33,000,000}$$

or \$272,600 to 30 June 2002. ODC actually charged \$896,875 (excluding GST) in Claims 1 to 7 which appears to be in excess of what the Development Management Agreement allows.

14. See generally evidence of R Stalley: 22/01/04; G Merchant: 25/02/04

15. Letter of Engagement PwC: 08/09/02

In discussions we have held with Mr David McIntyre of ODC, it was agreed that the development management fees were billed ahead of time. He has calculated the total over-billing up to the present date, including Claims 8 to 10 which were paid post 30 June 2002. The amount of over-billing was \$754,616 (excluding GST) of which \$651,491 (excluding GST) had been paid to ODC from the Arena Trust Account. We have attached this calculation as Attachment B to this Report.

Upon request, we have subsequently been provided with a letter from the Foundation signed by Mr Garry (sic) McIntyre explaining the reasons why the billings were not in agreement with the Development Management Agreement, This letter is attached as Appendix C to this report.

Mr Merchant's evidence was that \$1.096m was paid by ODC as follows (Evidence of G Merchant 25/2/04 p.15-18):

Gary McIntyre Pty Ltd	\$201,960
International Sports Marketing Pty Ltd	\$266,665
R. Prescott (architect)	\$261,636
R. Camping (project manager)	\$166,650
Softasand (on behalf of Braith Anasta)	\$200,000

The effect of the farming down of roles and responsibilities within the Oasis project and the clustering of roles and decision-making exercised by Mr G McIntyre and Mr Constantinidis added yet another layer to the loss of control that might otherwise have been exercised by the council over the project.

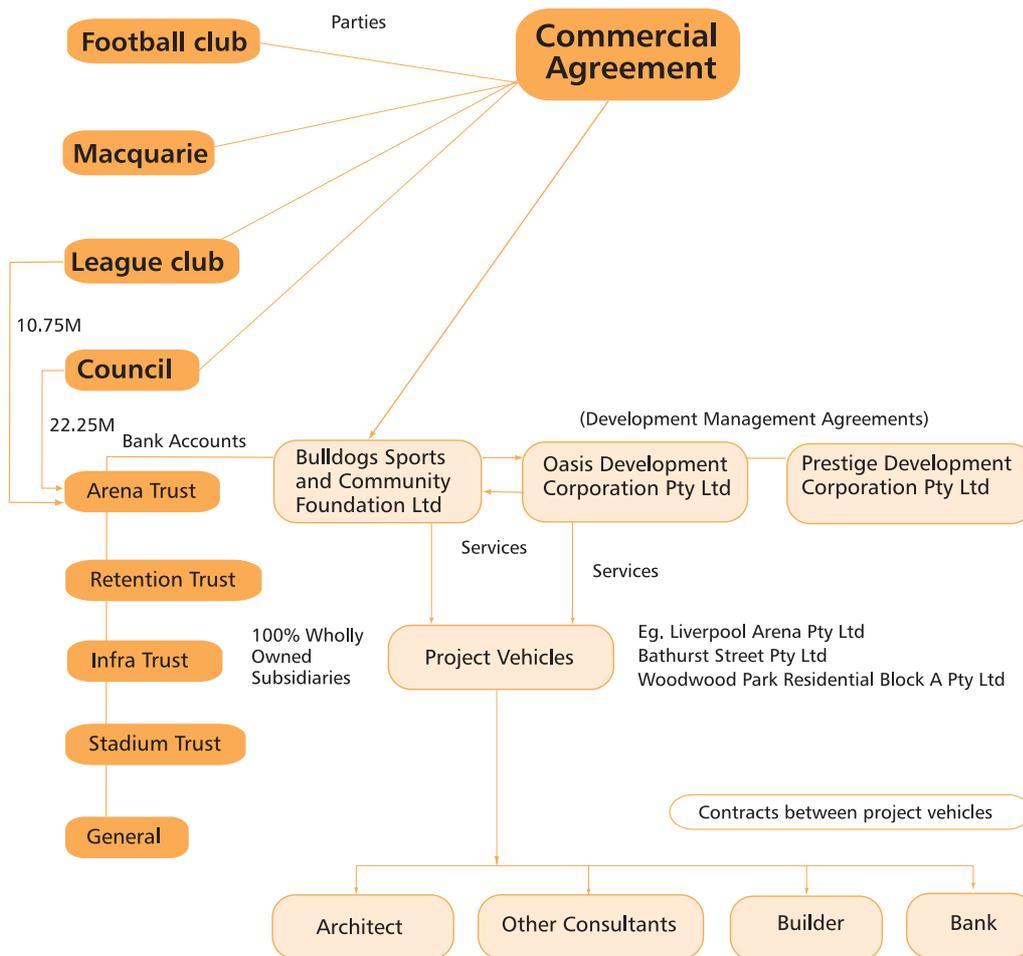
5.4 Findings

- 1. The delivery structure under Oasis was complex, and as a result of the failure of both the council and Macquarie to appoint representation to the Foundation or other entities, riven by nepotism.**
 - 2. The structure facilitated abrogation of governance mechanisms that might otherwise have applied.**
 - 3. Under the arrangements Mr Gary McIntyre, Mr David McIntyre, Mr Constantinidis and certain Bulldog football players received handsome payments sourced from the \$15 million that the council had given to the Foundation. It is not clear from the evidence that such payments properly related to the duties those people were meant to perform.**
 - 4. Very substantial sums of the Foundation's money (sourced from the council) have been written off. Tracing what happened to that money is beyond the Terms of Reference of the Inquiry; however, there is strong justification in the Inquiry recommending the referral of these matters to bodies with the competence to pursue the matters.**
-

5.5 Section 358 and the use of corporations

5.5.1 Mr McIntyre provided a submission to the Inquiry containing the following structure for the Oasis project:

Oasis Project Delivery Structure



5.5.2 It will be seen that this structure anticipated the formation of the Foundation, Oasis Development Corporation Pty Ltd, Prestige Development Corporation Pty Ltd and other specific project vehicles including Liverpool Arena Pty Ltd.

In entering into the Commercial Agreement the council was to involve itself with, or to provide for a myriad of companies, specific tasks, which were to handle the funds or serve as intermediaries in the project.

Only one, the Foundation, was party to the Commercial Agreement. Its primary role was to carry out the developments and manage and maintain the facilities.

5.5.3 The Commercial Agreement did not refer to, or join as parties to the agreement, the various companies:

- That would act as project vehicles, such as Liverpool Arena Pty Ltd, who would own the particular asset, such as the arena.
- That would manage the developments such as ODC and Prestige Development Corporation Pty Ltd.
- That would act as consultants including International Sports Marketing Pty Ltd.

5.5.4 In the end, the council left it to the Foundation to facilitate this structure. The Foundation had been promoted by the Bulldogs and Macquarie as an altruistic body that was a non-profit company limited by guarantee. It was formed to construct and maintain the facilities. Its purpose was to encourage sport, culture, education, entertainment and recreation. It also had charitable tasks such as assisting the underprivileged and the disadvantaged and other community service obligations. It was to be tax exempt. It would have council, Bulldogs and community representatives making up its board of directors.

These features had been largely drawn from the constitution of the Foundation, which had been registered on 12 July 2000. It was anticipated that the board of the Foundation would comprise four representatives of each of the proponents, namely, the council, the Bulldogs and Macquarie.

As the constitution of the Foundation provided that there could be no distribution to the members, the role of the directors guiding the Foundation through its operations was paramount.

The council elected not to take up any positions on its board of directors, consequently losing any control over its processes.

5.5.5 The effect of the Commercial Agreement was, in part, a delegation by the council of its functions. The Commercial Agreement provided for the council joining with the Bulldogs and Macquarie to carry out developments, relevantly on council-owned lands and with financial assistance provided by the council.

Yet the council was to have no say in any detail of what was to be undertaken.

While the council may have had the power to make this delegation (under Section 377 of the Act), given the enormity of the project it was entirely inappropriate to have done so.

5.5.6 The course adopted by the council of not having its representatives on the Foundation also avoided the consequences of section 358 of the Act.

Section 358 states:

358 Restrictions on formation of corporations

(1) A council must not form or participate in the formation of a corporation, or acquire a controlling interest in a corporation, except:

- (a) with the consent of the Minister, or*
- (b) as provided by this Act.*

(2) This section does not prevent a council from being a member of a co-operative society or a company limited by guarantee and licensed not to use the word "Limited" in its name.

As the council was not involved in the formation of the Foundation and as it did not acquire a controlling interest in it, ministerial consent was not required.

Sub-section (2) may have allowed the council to become a member of the Foundation; however, this view is far from certain. Sub-section (2) may be read as allowing participation only in companies limited by guarantee that have been licensed to delete the word "limited" from their name. In those circumstances the council would have been prevented from becoming a member of the Foundation.

Given the period of time over which the developments may have been constructed, and the Foundation's role as a developer and maintainer of the developments, the council should have been a member of the Foundation.

While it was never suggested by council as a reason for not becoming a member of the Foundation, the Act needs to provide greater clarity:

- Regarding the circumstances in which a council may form or become a member of a corporation
- The nature and extent of the interest that a council may obtain in a corporation
- The nature and extent of the council's role in the governance of a corporation
- The extent to which the provisions of the Act, e.g. the auditing, disclosure and tendering provisions, should be incorporated into the constitution of such a corporation

- The manner in which conflicts and/or pecuniary interests shall be dealt with
- The manner in which councils fulfil their planning and development decision-making processes in relation to such corporations.

5.5 Findings

1. **The council allowed the Oasis project to be controlled by a Foundation over which the council had no authority. The Foundation spawned a series of other companies, which were not referred to in the Commercial Agreement, and were not party to the Agreement. Council had absolutely no control over these companies.**
2. **In terms of the council's ability to safeguard community assets, the corporate structure of Oasis was a mess. The council had been effectively conned by the Bulldogs, and it didn't seem to have noticed. Had Section 358 of the Act been stronger this might not have happened. Section 358 fails to ensure adequate governance provisions to meet the duties cast on councils as trustees of public assets.**
3. **Section 358 requires legislative reform.**

5.6 Additional Comments

5.6.1 This section has considered the manner in which the council failed to ensure that it took and maintained control of the processes, principally associated with the Oasis project.

There is abundant evidence to support the view that the council neither took nor maintained control of any of the projects or the processes.

5.6.2 Following the salary cap revelations the council was presented with an opportunity to take control of the processes.

- In September 2002 it gained control of the Foundation and appointed Robert Stalley, Murray Douglas and Mark Lamond directors.
- In September it retained PwC to conduct an audit of the Arena Trust account.
- Council and the Foundation executed Confidentiality Deeds providing access by council's auditor to information held by ODC.¹⁶
- In September 2002 it received its auditor's report on the Arena Trust Account.
- In November 2002 the council had received a draft report from PwC of its findings on procedures adopted by the Foundation, ODC and Liverpool Arena Pty Ltd.

5.6.3 A series of issues relating to receipts and payments by ODC were identified in the PwC report of 06/11/02. In particular (p.4-6) the report identified:

16. See – Confidentiality Deed: 28/08/02; Confidentiality Deed: 31/10/02

b) *Project Advisory Fee*—ODC also billed the Foundation a one-off project advisory fee of \$272,250 (including GST). The Development Management Agreement sets out the Development Manager’s role which would appear to encompass project advisory services. Schedule 2 of the Agreement includes, amongst a number of responsibilities of the Development Manager, the responsibility to: “plan, manage and co-ordinate the design and development process such that the Project achieves the established objectives for design, quality and programme”.

c) *Consultants*—ODC appointed the following consultants and executives at the stated annual retainers:

	\$'000	Role
Al Constantinides	400	Development Manager
Gary McIntyre	204	Chief Executive
David McIntyre	200	Assistant Legal & Finance Manager
Rob Camping	200	Project Manager
Russell Prescott	200	Chief Architect

We were advised by management that no formal agreements were entered into to support these appointments.

d) *Burwood premises*—ODC leased premises in Burwood for an annual rental of \$110,000. The lessor was a company associated with Mr Al Constantinides. The lease has been terminated but final rental balances have yet to be agreed. We were advised by management that no formal lease agreement had been entered into.

e) *Loans to consultant*—ODC loaned Mr Al Constantinides two sums of \$80,000 and \$53,333 respectively. No formal loan agreements were entered into. No interest was charged on the loans. We were advised by management that the loans had not been repaid at the time of writing this report and are in dispute.

f) *Overpayment to consultant*—Mr Gary McIntyre was appointed by the ODC Board as Chief Executive at an annual salary of \$204,000 (\$17,000 per month) plus statutory entitlements. He was actually paid as a consultant at \$18,360 per month (excluding GST) although, for the first 5 months he received \$34,000 per month (excluding GST) in error. The payments in error were not supported by tax invoices, and we were advised by management that they have recently been repaid in full by Mr McIntyre.

g) *Payroll*—ODC’s payroll include a number of persons who performed duties outside of ODC—including Mr David McIntyre and Mr Joshua Smith. At the time of our review, there was no recognition of this outside work in the ODC accounts. Subsequent to our review, we were advised by management that an amount of \$85,000 has been charged out of ODC for these services.

h) *Payments to Bulldogs Players*—Two payments were made to Bulldogs players from ODC:

- \$220,000 to Softsand Design P/L, a company associated with Mr Braith Anasta. The payment was explained by ODC management as being an upfront four year payment for Mr Anasta being “The Face of Oasis”. There was no formal agreement to support this payment and the invoice provided by Softsand did not indicate the nature of the services to be provided.
- \$30,000 to Favero Scabill Trust Account being associated with Mr Mark O’Meley. The payment was treated as a loan by ODC, however, there was no formal agreement made or interest charged on the arrangement. We were advised by management that the loan had recently been repaid.

i) Possible private or non-related payments—The following payments were made by ODC:

Cheque	Payee	\$	Description of payment on documentation
400044	Law Society of NSW	775.00	Renewal practicing certificate for Mr Gary McIntyre
400019	Chair Doctor	341.00	Repair of chairs for Bulldogs Finance
400022	NSW Police Service	63.00	Parking Fine for Mr Gary McIntyre
400043	Telstra	1,889.76	Cancellation of Priority One3 Service for Bulldogs Finance
EFT	Rimfire	6,443.80	Hype tape and highlights package—Bulldogs Sponsor lunch for Bulldogs and Razorbacks Marketing
400020	Stewarts Gentlemens Outfitters	1,200.00	Club jackets for Mr Al Constantinides and Mr David McIntyre
400023	CPA Australia	529.00	Membership subscription for Mr David McIntyre
400060	CPA Australia	550.00	CPA Program for Mr Joshua Smith

5.6.4 The PwC report also stated:

ODC have explained that all the above were legitimate ODC expenses and, that in the case of Cheque 400044, Mr Gary McIntyre has since repaid the amount at his own election.

We noted that credit card payments amounted to over \$50,000 including over \$20,000 for Mr Al Constantinides. ODC have advised that around \$9,600 of Mr Constantinides’ balance is unauthorised expenditure which ODC is seeking to recover. A table listing this expenditure is attached to our report.

5.6.5 In November 2002 the Foundation had sought specialist legal advice from Maddocks solicitors regarding the PwC report. In their memorandum of advice Maddocks stated:

1.1...we were asked to review a draft report (the Report) prepared by PriceWaterhouseCoopers (PWC) dated 6 November 2002 and to advise on the following issues:

1.1.1 *whether, given the issues raised in the Report, there is any prima facie evidence of inappropriate behaviour on the part of individuals connected with Oasis Development Corporation Pty Ltd (ODC) that should be referred to an appropriate body or bodies; and*

1.1.2 *whether or not, prima facie, Council has any right to seek recovery of any money paid out inappropriately by ODC, and how those rights may be pursued.*

2.1 Unprofessional behaviour

2.1.1 *On the information provided to us, it appears possible that contraventions of the Corporations Act 2001 have occurred. These may be established even if there has been no fraud or dishonesty on the part of any person within ODC or the Foundation. Accordingly, the Council may choose to refer the matters it has discovered to date to the Australian Securities and Investments Commission.*

2.1.2 *We have not been provided with sufficient information to determine whether there are any substantial issues in relation to tax compliance. It may be that these would be identified upon further investigation or, alternatively, ODC management may have already rectified any issues.*

2.1.3 *The same circumstances which may give rise to contraventions of the Corporations Act 1900, if the element of dishonesty is established. Council may choose to refer these matters to the NSW Police although ASIC is more likely to have the necessary powers, expertise and resources to properly investigate the matter.*

2.1.4 *There do not appear at this stage to be any circumstances which would give rise to the making of a complaint to the Law Society of New South Wales or CPA Australia.*

2.2 Remedies available to Council

2.2.1 *The Foundation and ODC may have a cause of action against their directors and officers in relation to any misappropriated funds or excess funds paid out. Council will be in a better position to assess its chances of success in such actions if it gains control of the Foundation and ODC and has access to the records of these entities.*

2.2.2 *Council or the Foundation may also be able to trace assets and secure court orders for the restitution of moneys.*

5.6.6 Importantly, Maddocks had indicated that the views expressed in the advice were preliminary, and advised:¹⁷

17. Memorandum of Advice – Maddocks, p.2

2.3 Further information required

There is a number of significant documents (described in part 7) which we did not have access to when preparing our advice. We recommend that Council seek access to these documents together with the right to provide these documents to its legal advisers for the purpose of receiving legal advice.

5.6.7 The council did not take control. It did not pursue the preliminary advice that it had received from Maddocks. Instead, the Foundation appointed Mr Eyers, whose role was to mediate a settlement between the council, the Bulldogs and Macquarie.

Mr Carr was asked about how he saw council's position at that point:

MR BROAD (03/02/04, p.24–25): *At that stage Council was probably in a position where it had to make a choice whether it should proceed or stop with this project. Did you see it as such at that stage?*

MR CARR: *I didn't view it as a case of proceeding or stopping as clear-cut as that. I saw the necessity to actually get into that Foundation. That's why I suggested to Council that I be made the interim Foundation manager for a short period. I recommended those officers to go on that Foundation. I suggested that we needed to get some legal advice. There were discussions with Premier's Department about who would be appropriate and Michael [Eyers] name was made available and I contacted that person. I saw it as a process of really finding out what's happening within that organisation and also what's the potential of moving forward.*

MR BROAD: *So you didn't see it as a circumstance where you had to decide whether the voyage should be stopped, but rather that of dusting off the deckchairs?*

MR CARR: *Well, more about finding out what the current state of play is and to get some facts. There were at that time a lot of issues being raised, there was a lot of media attention - - -*

MR BROAD: *There were very serious issues?*

MR CARR: *Absolutely—and the ICAC were following through, so we had an ICAC inquiry. We had the media exploring that as well, and I think it's fair to say that the environment—the Council environment—was under severe pressure and attention.*

MR BROAD: *A lot of adverse publicity?*

MR CARR: *Significant.*

5.6.8 Having adopted this course, and having resolved its issues between the Bulldogs and Macquarie under the Deeds of Transfer and Indemnity and of Release (14/05/03), no purpose could be served in obtaining concluded advice from Maddocks.

The advice provided by Maddocks raised serious concerns over the conduct of the office holders of ODC, the Foundation and the other companies, such as International Sports Marketing Pty Ltd.

The Maddocks report raised the possibility of breaches of criminal, corporations, and taxation law, as well as civil breaches. It raised the possibility of complaint to ASIC and others.

As has been indicated above, these matters have not, as yet, borne further consideration. While ICAC reviewed certain matters involving the Woodward Park project, its attention was not focussed on the possible breaches that were the subject of the Maddocks report.

- 5.6.9 This Inquiry is bound by its Terms of Reference. The Terms of Reference do not enable the Inquiry to delve into these transactions in detail. Rather the Terms of Reference may permit the Inquiry to obtain a sufficient understanding of the processes as ancillary to its overall understanding necessary to fulfil the Terms of Reference.

The concerns that were raised by PWC and the views expressed by Maddocks bear further review.

5.6 Findings

1. **In late 2002 the council had the opportunity to take control over the processes concerning the development of infrastructure in the Woodward Park precinct. It let the opportunity slip by; instead, it rushed into a new agreement with Macquarie, which continued the process of council ceding authority to its partners.**
 2. **At that time the council, for the first time, gained some understanding of the ways in which the funds it had directed to the Foundation had been used. A preliminary report to the council by Maddocks solicitors raised the possibility of breaches of criminal, corporations, and tax law, as well as civil breaches. The council took no action.**
 3. **Rather, the council accepted Mr Eyers, retained by the Foundation, as a negotiator between the council and the Bulldogs. The result was that council became obliged to make further payments to the Bulldogs despite the suggestions of various breaches raised in the Maddocks report.**
 4. **The matters raised by the Maddocks report were serious, but so far have not been pursued. Under the Terms of Reference of this Inquiry there is no scope to pursue the matters. The Inquiry believes, however, that they are of such moment that they should be investigated by appropriate bodies.**
-

Section 6: Securing Performance

6.1 The Significance of Trust

6.1.1 In February 2001 the council entered into the Commercial Agreement and subsequently, in August that year, the council was to facilitate the construction of the Arena through the ECA.

The issue that council should have considered was whether it was wise to push ahead with the construction of the Arena. As pointed out in B5, and reviewed again here, the council was amply informed about disagreements between the Bulldogs and Macquarie. They proved to be so great that Macquarie stepped away from the project. Council ought to have understood the dangers of proceeding when the consortium began to fall apart.

Prior to its entry into the Commercial Agreement, the Bulldogs representatives, principally Mr Gary McIntyre, had already expressed their concern over “side agreements” proposed by Macquarie.¹

Later, before the council entered into the ECA, Macquarie had detailed its concerns about the Bulldogs to the council.²

The concerns raised by each of the other parties involving the other were quite serious. They should have been sufficient, in the absence of any other conduct, to suggest to the council that it should apply strictures to the project.

The ECA changed council’s position significantly:

- Council was required to make cash contributions totalling \$22.25M between September 2001 and May 2002,³ substantially beyond that previously contemplated.
- Macquarie, who was to provide development, management and other skills; who would also administer and manage the Foundation; and who would provide trustee services for the funds to build the Arena, would no longer be involved.⁴
- There would be neither council’s nor Macquarie’s representatives on the Foundation

Subsequently, Macquarie was to advise that it would not provide trustee services.

1. Evidence of G McIntyre: 01/03/04, p.22

2. Evidence of W Moss: 23/02/04, p.30 et seq.

3. ECA Clause 11

4. Commercial Agreement Clause 16 and Commercial Agreement Clause 4.5

6.1.2 As was later to become apparent, the role of the trustee did not provide any protection to the council. The comfort that the council drew from the appointment of Mr Livanes and Mr Boland as trustees representing their law firms, was to blind the councillors and council staff to the actions of the Foundation, ODC and those in control of those companies.

The councillors and council staff ignorantly thought that the appointment of representatives of two of Sydney's eminent law firms would protect their investment.

6.1.3 In a six page Deed the trustees were only proposing to invest themselves with the power to sign cheques, as required by the Foundation.

They had neither capacity nor a role:

- to refuse to sign the cheques if the formal requirements of the warrant had been met, i.e. that three of the Foundation's directors had signed the warrant
- to inquire into the payments
- to verify the correctness of any matter or thing behind the payments
- to undertake any consideration of the warrant or to form any opinion regarding its correctness
- to advise or account to the council of or for the payments.

Despite Mr Douglas' suggestion:⁵

...Both are legal firms of some considerable standing, and both are willing to service.

their standing was to provide no benefit to the council, as Mr Stalley indicated:

MR BROAD (22/01/04, p.59) ... *Did they have any obligation to form an opinion whether or not those moneys were being paid in accordance with any agreements that the Council might have had with the foundation, with Liverpool Arena or any other party?*

MR STALLEY: *No. The requirement was that they were to sight the single sheet of paper. They did not sight any invoices. They did not check the validity of those invoices for their correctness. For example, whether it was a tax invoice, whether it had an ABN number on it, whether it was made out to the right company. Apart from that they did not check any of the contractual arrangements that related to those invoices, so they didn't check the nature of the engagement, they didn't check the nature of the contract, they didn't check—or they weren't required to check any of those and they didn't check any of those details.*

6.1.4 The subtlety of the appointment of Mr Boland and Mr Livanes as “bare trustees” was most certainly lost on the councillors and the General Manager.

5. Report to council meeting: 26/11/01, p.3

Mayor Paciullo expressed his view:

MS JOHNSON (19/01/04, p.40): *So if I've understood you correctly, the Council put money into a trust account. The Foundation gave bills to the trustees of that trust account for work that it had done in constructing the arena and which had everything gone according to plan would have resulted in the expenses of 22 odd million being spent in constructing that arena, and the trustees signed those cheques to pay for the work done by the Foundation. Is that right?*

MR PACIULLO: *That's correct.*

MS JOHNSON: *Who are the trustees of the arena trust account?*

MR PACIULLO: *Well, representing Council was Mr John Boland and I think, representing the Bulldogs was a Mr George Livanes.*

Councillor Gauci described his understanding of their role as:

MR VINCENT (16/02/04, p.89–90): *Did you have any—when you heard that they were to look after the money, did you have any understanding as to what their role would be?*

MR GAUCI: *I would have—when we have learned that these two people were signing the cheques, or invoices, I would have expected them to actually make sure that not only the paperwork is right, but ensure that the product is delivered and not just because you had paperwork, you just sign the cheque over, and that is my understanding that the way it is supposed to have happened.*

MR BROAD: *Did you have any understanding that they had put themselves in a position where they had virtually put blinkers over their eyes?*

MR GAUCI: *Not at that stage. Now, yes.*

Councillor Glavich confirmed his understanding:

MR BROAD (16/02/04, p.115): *Were you aware, when the early construction agreement was entered into, that the trustees were to sign cheques on the basis that they were only to receive a notification from three of the directors of the Foundation?*

MR GLAVICH: *Yes, in hindsight, yes. Once again we didn't find out that the Foundation did not have representation by Council. I believe the person that had control of it was Garry McIntyre and at the stage where Macquarie Bank actually left the Foundation was I believe, and what we were told due to Garry McIntyre's actions and in the way he tried to run the Foundation. We believed—if I can just finish that—we believed that the community were to have three representatives as well, as well as Council, as well as the Bulldogs, so there is not an uneven number, but the Macquarie Bank came in after that.*

MR BROAD: *Were you aware that neither Mr Boland or Mr Livanes who are the trustees, were required to make any inquiries about whether the amounts they were requested to pay were in order?*

MR GLAVICH: *I am not aware of it but I believe they should have been aware of it and I trusted the General Manager to tell us that that is what they would be overseeing.*

MR BROAD: *So did you assume that they had to make inquiries to make sure that what they were paying was correctly payable?*

MR GLAVICH: *Of course, particularly in the large sum of money that is being mentioned.*

Similarly, Councillor Beuk provided his understanding:

MS JOHNSON (17/02/04, p.49–50): *But how would Council retain control over the money that Council was putting into the Foundation?*

MR BEUK: *In terms of referring to the money, my understanding of that was a trust account was set up with two trustees, one on Council and one on their side, and that was the process or the mechanism used to ensure that they were satisfied that what was provided to them as invoices or bills or whatever satisfactorily addressed what was actually being delivered.*

MS JOHNSON: *So your understanding of that trust arrangement was that the trustees would verify that the bills were - - -?*

MR BEUK: *Were indeed valid before they paid them, because they're the ones that signed the cheques.*

MS JOHNSON: *So did you understand that they would be not just checking that there was an invoice that corresponded with the cheque, but checking that that invoice was properly issued and the work - - -*

MR BEUK: *Correct.*

MS JOHNSON: *- - - invoiced in that invoice had in fact been done?*

MR BEUK: *Had actually been done. That is my understanding, that whether it was a QS or however it was actually undertaken, those actual works that were being invoiced had actually been done prior to and a signature being put on the cheque.*

MS JOHNSON: *Do you recall the phrase "bare trustees" being used in relation to that trust?*

MR BEUK: *No.*

MS JOHNSON: *And do you recall reading legal advice saying that they were in essence merely to check that there was an invoice, check invoices—I'm sorry, let me start that again—that the trustees' role was merely to verify that there was an invoice and that the cheque was written out in the amount of that invoice?*

MR BEUK: *No, I wasn't aware that was the case.*

MS JOHNSON: *And that wasn't your understanding?*

MR BEUK: *My understanding was that the work had to be validated by some other, whether it be independent or otherwise, to determine whether or not that invoice was valid.*

Mr Carr's view was that the trustees would exercise some supervisory role:

MR VINCENT (02/02/04, p.63): *Once it was paid in, was there any control to Council, what was the reporting like from the Foundation?*

MR CARR: *There was—in the commercial agreement and the early construction agreement there was an obligation on the Foundation to keep Council informed. There was also the ability for Council to audit the Arena trust account, and in terms of any moneys flowing from that Arena trust account, was on the basis of documentation being submitted to two trustees and they would assess whether the documentation was in order and then make the payments.*

6.1.5

Mr Boland had described the role he and Mr Livanes were to perform as “bare trustees”, indicating that they were required to deal with the Arena Trust account in accordance with clause 12 (a) of the ECA,⁶ which provided:

“no payment may be made from the Arena Trust Account unless authorised in writing by three directors of the Foundation”.

In November, Mr Douglas had written to Mr Boland, responding to Mr Boland's suggestion that the council

“may find comfort in its other solicitor also being a trustee”,⁷

suggesting that it would provide comfort to the public.

The appointment of Mr Boland and Mr Livanes did not protect the position of the council. It did not alter the terms of the ECA that had been previously entered into.

To suggest otherwise is incorrect.

6. Abbott Tout letter to the Foundation, council and Bulldogs: 17/12/01

7. Letter Abbott Tout: 14/11/01 and Letter council: 14/11/01

Through a series of decisions the council had removed itself from any control over the developments proposed in the Oasis Project. It had only retained a right to review the Foundation's accounts.

The council could take no effective steps to secure the performance of its partners.

6.1 Findings

- 1. The protection of the council's monetary contributions to the Oasis projects was intended to come through the trustee role that Macquarie was meant to play under the Commercial Agreement. Within a very short time of signing the Agreement, Macquarie had decided to step away from the project. Instead of seriously reviewing the implications of this for the project as a whole, and for the protection of council's funds, the council pressed ahead with the Early Construction Agreement. Its desperate desire to construct the basketball Arena overwhelmed its decision-making processes. It lost sight of its primary responsibility to 'participate in the optimum allocation of the council's resources for the benefit of the area' (The Act Section 232).**
 - 2. The council was duped by the Bulldogs into believing that the appointment of legal representatives of the council and the Bulldogs as trustees would protect the council's funds that went into the Foundation. In fact the two lawyers had no discretion but to sign any cheques presented if three Directors of the Foundation had signed the warrant. Since the council had allowed the Bulldogs to take complete control of the Foundation, the council gave the Bulldogs complete control over the substantial funds that the council had directed to the Foundation.**
 - 3. By entering the Early Construction Agreement the council had actually increased the level of its liabilities, as it had to find \$22.25 million for the construction of the Arena.**
 - 4. Neither the councillors nor the former General Manager understood that they had given total control over the council's funds to the Bulldogs.**
-

6.2 Oversight of the Proposals

6.2.1 In March 2000 the council had been briefed on the Oasis Master Plan vision.

As has been indicated elsewhere in this report the Oasis project anticipated more intense and diverse development of Woodward Park to provide sporting, recreational, commercial and residential facilities, than had been previously proposed.

Additionally, the proposal anticipated substantial developments on other council-owned land.

6.2.2 These developments were to form the backbone of the proposal, and are detailed in a schedule contained in the plan.⁸

While the developments anticipated in this plan were not set in concrete, they formed both the basis upon which the council considered whether it should enter into the Commercial Agreement and the underlying tenets of the developments anticipated by it.

Under the Commercial Agreement, the council had effectively constrained itself, whether legally or as a matter of policy, to granting consent to the developments that were subsequently made by the Foundation; without the consents, the council could not ensure the outcomes that would fund the arena and other infrastructure.

The council had declined a role on the Foundation and therefore had no say in the proposals it may put forward.

The Oasis Master Plan contained a development schedule that set out details of the proposals including floor or site areas, the number of storeys of the proposed buildings and the dwelling and car parking yields.

Council's failure to exercise or to maintain any control over the Foundation enabled the Foundation an unfettered role in changing the potential outcomes of the developments.

6.2.3 In May 2002 the development application for the Bathurst Street property was received.

The following schedule provides a comparison between what the master plan anticipated and what the development application proposed.⁹

8. Oasis Master Plan, p.41-42

9. IHAP report – Report of Bob Tillott & Assoc: September 2002

	Master Plan	Development Application
Storeys	N/A	24
Apartments	240	326
Private Car Parks	240 spaces	408
Commercial Office	2,400 m2	2,110 m2
Public Car Parks	450 spaces	362
Retail	3,400 m2	2,015 m2

In its internal dealings, the Foundation was to propose other substantial changes to the development yields, including:¹⁰

- an increase in the height of residential development in Woodward Park precinct W3.
- an increase in the number of dwellings in the stadium development from 180 to 300–500
- an increase in the number of lakeside apartments from 80 to 270
- an increase in the total number of dwellings (including retirement units) on the TAPP’s land from 720 to 890

6.2.4 Overall, when these numbers are reviewed with later proposals to increase the number of units in the Bathurst Street property,¹¹ the number of dwellings that the Foundation was proposing had risen from 2100 to 2865.

The land budget for Woodward Park and the TAPP’s land was showing 36% of the land was to be taken up with residential development, which combined with commercial development and road reserves led to a loss of some 53% of the two parks.

There was to be a sharp dichotomy between council’s obligations under the Commercial Agreement. On the one hand the Agreement prescribed outcomes, joined with council’s adherence to obtaining the outcomes it so dearly sought. On the other hand, the council had to play its role as planning and consent authority under the EP & A Act.

If the Foundation was to proceed with its proposals, that doubtless were commercially driven, the council could be placed in the vexed position either choosing to recognise its planning ideals or choosing to avoid a possible breach of its obligations under the Commercial Agreement.

6.2.5 This proposition was taken up with the Mayor, the then General Manager and Mr Turissi, council’s Corporate Manager—Built Environment.

10. Comparison between Development Schedule in Oasis Master Plan and Development Yield document confirmed at meeting: 23/01/02

11. ODC Development Director’s Report: 07/02/02

Mr Turissi gave the following evidence:

MR BROAD (29/01/04, p.72–73): ... *Did the vision document anticipate that yields such as 80,000 square metres on the three sites that I've spoken about would be anticipated?*

MR TURISSI: *From my perspective I always emphasised that it was visionary and we needed to go through the processes of doing all the relevant studies on the lands to see whether or not that could be facilitated and in my view, you know, it was about ensuring that if that could be justified then there was nothing wrong with the vision but if all the supporting studies demonstrated there were issues and these things can't be physically done well then as far as I was concerned those numbers really, you know, didn't mean much.*

MR BROAD: *What happens from a town planning perspective if a contract requires that a certain yield be obtained and you as a town planner take a view that the site cannot bear that sort of yield?*

MR TURISSI: *Well, my position was—and at different stages I had discussions with the General Manager about this and explained this also to, at the time when the commercial agreement was being prepared—that I wanted to ensure that at no stage going through the planning process that we were forced to make a decision based upon a commercial agreement and that there was appropriate protection or clauses in there which actually ensured that Council's responsibility wasn't fettered at all by this vision document.*

MR BROAD: *Were you asked to review the commercial agreement in a final form before it was executed?*

MR TURISSI: *Not in the final form, no.*

MR BROAD: *In a preliminary form?*

MR TURISSI: *At different stages I was—as I said before, I was called in to look at specific aspects of the document which related more back to the town planning side of things.*

MR BROAD: *At the time the commercial agreement was entered into were you aware of the clause that I've been referring to?*

MR TURISSI: *I was aware of that clause, yes.*

MR BROAD: *You didn't see that as fettering the town planning discretion.*

MR TURISSI: *I raised concerns as to the clause being there but I was reassured that with the provision in the commercial agreement saying that Council's responsibility would not be fettered that that would suffice to be enabled myself and the professional team to be able to do the right things in terms of to assess the LEPs and do the appropriate study.*

Similarly the Mayor felt confident that the council's planning decisions would hold:

MR PACIULLO (20/01/04, p.82): *I have a recollection of that provision, but I also have a clear recollection that in dealing with any proposal that came to the Council it was the Council's decision and it would be unfettered in making those determinations in terms of those applications.*

MR BROAD: *Given that the Council could exercise its own discretion whether it would approve an application which envisaged these sort of densities, did Council consider whether that may in turn lead to a breach of this agreement?*

MR PACIULLO: *Well, I can't recollect there being any discussion about that particular aspect, Mr Broad.*

Mr Carr had a clear view, placing reliance on Clause 5.4 of the Commercial Agreement:

MR BROAD (03/02/04, p.16–17): *One of the outcomes was the provision of new council chambers within the CBD and the estimated requirement was 8000 square metres and possible 10,000 square metres. The commercial agreement provides and I will read it to you, it is clause 14.2:*

The CBD developments shall make provision for the following:

Now, I don't propose to read the next part in A which I have just dealt with, but if I can take you to clause B, do you have that in front of you?

MR CARR: *Yes.*

MR BROAD: *It provides a minimum of 80,000 square metres of associated commercial and/or residential facilities, which would be sold to the Foundation, there is not need to repeat the rest of the clause. Given the terms of that clause, in your view was Council fettering its ability as a consent authority to view whether any proposal was appropriate for any of the sites.*

MR CARR: *No, there was some discussion, certainly some discussion about that particular matter, and the Council representing team, or negotiating team was making it very clear that the Council, as a statutory authority and its obligations as a statutory authority, shall not be fettered, and in fact to really emphasise that matter, there was a clause put in the agreement, 5.4, which reads that:*

The parties acknowledge that in dealing with a master plan, development control plan, any amendment or variation thereto, or any application for consent, nothing in this agreement shall derogate from, limit, fetter or restrict Council's powers, rights and duties at Law to deal with the same.

So whilst there were targets established in the commercial agreement, there were also targets established in the master plan.

MR BROAD: *You suggest that that 80,000 square metres was a target?*

MR CARR: *Well, in fact, it can't—as they progressed the development and they put forward proposals, the Council will be standing as the planning authority and will determine what those ratios will be and if it doesn't meet the requirements of the commercial agreement, well then there can be no recourse because the Council cannot be fettered in its proper role at law. So we were always—in fact, I thought that was stated also in the legal advice and I was always under the view that the Council's law and its requirements at law would stand above any arrangement that may have been indicated in this commercial agreement.*

MR BROAD: *So what you are saying is, the Council's discretions that lie under the Environmental Planning and Assessment Act couldn't be fettered by this agreement?*

MR CARR: *Yes.*

MR BROAD: *Could this though, lead to a situation where if Council in its town planning decisions failed to achieve the 80,000 square metres required, could place Council in breach of the terms of the commercial agreement?*

MR CARR: *I don't believe so because I think Council's decision as a planning authority and exercising its right to that law would override any challenge from any proponent to say that they had been treated unreasonably under the agreement.*

MR BROAD: *This clause is unconditional isn't it? It reads: That there has to be a minimum of 80,000 square metres. It also has in sub clause (c) a provision for additional associated development, doesn't it?*

MR CARR: *Yes, it does, it actually mentions - - -*

MR BROAD: *It doesn't ever suggest in that clause, that Council shall, subject to any town planning constraints, make that area available, does it?*

MR CARR: *No, it doesn't make mention in the clause, but if I could suggest that the document would be read in its entirety and therefore clause 5.4 would have some—well, significant bearing on any execution of the clause 14.2.*

In the fallout from the salary cap breaches when the council obtained representation on the Foundation, this view was to be tested.

6.2.6 On 9 September 2002 Mr Turissi wrote a memorandum to the Acting General Manager, Mr Heapy, regarding the number of car parking spaces in the proposed development of the Bathurst Street property:

As you are aware, the independent consultants have finalised their assessment of the development application for the Bathurst Street car park site. This application is going before IHAP this Thursday, 12 September and subsequently to Council on 23 September.

The consultant has assessed the application as submitted and has recommended approval subject to conditions.

I draw your attention that the Woodward Park vision nominated 450 public car parking spaces on this site as part of the commercial agreement. In any pre da meetings that I had with the Oasis Development Corporation (ODC), I made it clear that any development on this site would need to make provision for 450 public car parking spaces and any subsequent parking spaces generated by the development. Unfortunately, the ODC has failed to make provision of 450 public car parking spaces within their proposal, only providing 244 public car parking spaces, 14 spaces above that which is existing.

The issue of the provision of 450 public car parking spaces on the site is created by the commercial agreement rather than town planning requirements. Therefore the consultant has technically correctly assessed the development application.

On 26 September, Mr Carr raised the issue at a meeting of the Foundation.

The minutes record the matter as follows:

8. Bathurst Street

Brian Carr reported on parking issues relating to the CBD development in Bathurst Street and the fact that an original allocation of 450 parking [sic] spaces had been modified to 240 in the DA. He reported that this disparity needed to be assessed and that Council and the Foundation needed to work together towards a satisfactory outcome.

He advised that any anomalies between the parties ought to be resolved sensibly around the table as it is in everyone's best interest to ensure that the traffic and car parking strategy works effectively in the CBD.

Murray Douglas declared an interest in the matter of CBD car parking because of his role with Council.

George Livanes cautioned that the Foundation could pursue its legal rights if the parking requirement was not in line with Council's decision.

Motion Moved Kevin Stewart Seconded Mark Lamond

That the Foundation request Liverpool City Council to assess the Bathurst Street development proposal expeditiously.

Carried

6.2.7 It is clear that council's decision not to be represented on the Foundation removed it from a position where it could exercise oversight of the proposals to be put by the Foundation.

The council could not secure compliance with the developments envisaged by the master plan.

Its position was further weakened by its partners' view that the council was bound to approve the developments they sought.

6.2 Findings

1. The council could not exercise any oversight over the proposals put forward by the Foundation and was placed in a position where it could be in breach of the Commercial Agreement if it exercised its planning and consent powers refusing consent for such proposals.

2. Consequently the council had little control over a situation where its commercial partners were interested in increasing the yields of the different projects.

3. When the council wished to promote the interests of the community, by opposing a reduction in the number of car parking spaces in the Bathurst Street project, it was forced to accede to the wishes of the Bulldogs.

6.3 Oversight

6.3.1 The Act contains a number of sections, including those relating to the letting of contracts and the appointment of staff, that intend to ensure that councils' dealings are open and transparent, and achieve best value for money.

The Act makes provision for these goals by requiring that major contracts be tendered, that staff be appointed in an open and public manner and that councils not operate through subsidiary entities.

These goals provide a backbone for good governance.

6.3.2 The Oasis proposal was to place council in a vexed position.

Council was to provide land and financial contributions to a separate legal entity. That entity would manage the finance and ultimately provide the sporting facilities sought by the council.

Throughout this process, the council would provide the planning outcomes and the development consents to allow the developments to proceed.

The council saw itself in a position where, if it was to be involved in the legal entity putting forward the proposals, and also acting as planning and consent authority, it would be perceived as having a conflict of interest.

Council decided that it must choose between the former or the latter.

Pragmatically, although it was not suggested in the documents or in evidence given at the public hearings, the council could only ensure the outcomes that it so dearly sought by retaining its role as planning and consent authority.

If the council was to accept the view that it could not be involved in both roles, and that it was preferable that it continued its planning and consent role, then it was necessary for the council to ensure that sufficient safeguards were incorporated in to the manner that the Foundation went about its business.

In other words, it was necessary for the council to ensure that the safeguards provided the backbone that would provide for good governance.

6.3.3 The council was being offered a vehicle (the Foundation) by its other “partners” that was being portrayed as a non-profit making entity with social ideals, principally supported by the Bulldogs, similarly, a non-profit organisation.¹²

Mayor Paciullo described the benefits he saw in the partnership and the Foundation:

MR BROAD (19/01/04, p.74): ... *When you referred to partnerships, you said that the original partnership which involved the Bulldogs and Macquarie Bank, did you see that as a partnership of three separate entities joining together equally to provide benefits? Having equal say and each making a profit according to their share as in a partnership, as in a small business, or do you mean that in the sense of three parties getting together, coming to a commercial agreement, with a view to getting an end result, not necessarily as an equal and shared result?*

MR PACIULLO: *No. My understanding of the original arrangements were that we would be equal partners. That is in the original arrangements and we would all have an equal say and in the end, the development profits would come back to the Foundation which was a non-profit organisation and all the benefits accruing to the community and obviously to the local area.*

When the council was to consider whether it should enter into the Commercial Agreement, the report to councillors was to describe the Foundation in the following terms:¹³

12. See generally Reports to council Meetings: 26/04/00, 10/07/00, 05/02/01

13. Report to Meeting: 05/02/01, p.15

Bulldogs Sport and Community Foundation Limited (the “Foundation”) is a not for profit organisation established specifically for the project according to the objectives set forth in its constitution. The Foundation is the principal party responsible for the carrying out of the project works and then to arrange facility operators. It will have a tax exempt status, enabling it to maximise surplus funds for the project. Its role is also to maintain and upgrade facilities. The Foundation has clear community objectives in encouraging sport and culture. Its philanthropic focus is to assist the disadvantaged and provide projects or funds benefiting the community. The Board of the Foundation comprises of representatives of the Bulldogs League Club and Macquarie Bank. Once Council approves the development applications for the project, Council can be represented on the Foundation’s Board by four members.

The Foundation (ACN 093 742 119) has been created as a Limited Company established under Corporations Law. Its constitution has the following objects:

- 1. To encourage, establish and support sport, culture, education, entertainment and recreation;*
- 2. To provide sporting, cultural, educational, entertainment and recreational world class facilities;*
- 3. To maintain and up-grade the facilities;*
- 4. To expand and improve the facilities;*
- 5. To encourage and promote any game or sport;*
- 6. To encourage and promote charitable, educational and cultural purposes and to assist any public hospital and any medical or scientific research;*
- 7. To assist the underprivileged and disadvantaged; and*
- 8. To assist any community service purpose.*

The Commercial Agreement entitles Council to appoint four Directors to the Foundation. The appointment may happen after Council considers all relevant development applications or, if no applications are lodged for the Arena, Waterpark and Stadium, after 12 months from Council’s adoption of the Master Plan. During the development phase Council remains at arms length from the Foundation so that its planning and other regulatory roles are not compromised or to avoid conflict of interest.

... The Foundation is a philanthropic organisation. Its constitution outlines the nature of the Company and generally its rules; for instance remuneration of Directors, which states that “the Company must not pay any fees to a Director”. The Foundation cannot spend any funds outside of Liverpool Council area without Council’s approval. This particular safeguard is extinguished once the Minimum Stadium has been constructed.

6.3.4 PwC had been called upon to provide its review of the Commercial Agreement, relevantly, to consider the risks to the council. It was to conclude:¹⁴

The Proponent's offer of international sporting facilities of the scale envisaged for Liverpool City is visionary and potentially a major asset for the community. It would appear to incorporate community aspirations for such facilities as indicated by Liverpool City Council, and in so doing generate a sense of pride and identity for its citizens. The Proponent's offer is not wholly altruistic however...

Earlier, PwC had reported on its suggestion of the establishment of an independent project control group.¹⁵

Council Representation on the Foundation Board of Directors (in lieu of Control of the Development Structure Proposed by the Proponents) PwC had suggested the establishment of an independent project control group to sit between the Proponents and the developer. The role of this body would be to assess and review each stage of development before and during construction.

The proponents maintain that the developer shall be the Oasis Development Corporation (see Appendix 2–Proposed Delivery Structure) a body controlled solely by the League Club and Macquarie, and shall not be answerable to any outside group, even Council. The Developer shall have the right to establish the terms and conditions for construction contracts and to appoint builders and project managers as they see fit. The reason stated for this refusal was their fear that Council could slow the Project or thwart whole parts of the development especially in the event of a change of administration, and the Proponents need for upfront certainty for all components before they could commit to delivering any single component (or offer best endeavours for others).

As a means of enabling some overseeing of delivery, Council will be able to appoint two representatives to sit on the Foundation Board of Directors (of a total of ten) to oversee Foundation activities. This could only occur after Council had approved all Master Planning and Development Approvals (to overcome a perceived conflict of interest argument).

The two directorships should enable at the very least a “whistle blowing” role to be performed with regard to Foundation activities requiring explanation.

Ultimately, the council did not appoint any directors to the Foundation.

6.3.5 As was anticipated by PwC the developer was ODC, but relevantly, after the ECA, controlled solely by the Bulldogs, or perhaps more relevantly by the interests associated with Mr G McIntyre and Mr Constantinidis.

14. PwC Report: 25/01/01, p.13

15. PwC Report: 20/12/00, p.37

The council did not avail itself of any means of overseeing delivery. It had made a decision not to be represented on the Foundation. It did not, thereafter, build processes into the arrangements between itself, the Bulldogs, Macquarie, the Foundation or, importantly, ODC that would allow it any oversight.

As it was to turn out, the Foundation, through the trustees, was to glibly pay what ODC sought, whether over-charged or not.

6.3 Findings

1. **By removing itself from the Board of the Foundation, council effectively elected to let the projects of which it was a part, to be run through a subsidiary over which it had no control, and into which it had no input. In allowing this to happen it destroyed a significant basis of good governance as prescribed by the Act.**
2. **The Foundation was meant to be a non-profit organization with social ideals. Without input from the council, the Foundation behaved in quite a different fashion to the expectations generated by its constitution.**
3. **ODC was able to operate in a manner that the council could not. It was not governed by the provisions of the Act, and conducted its business,¹⁶**
 - **letting contracts without tender,**
 - **letting contracts to companies sponsoring the Bulldogs**
 - **appointing staff**
 - **making payments and**
 - **making loans****that were outside what the Act anticipated as necessary to ensure openness and transparency and best value for money.**

6.4 Financial Control

- 6.4.1 In September 2000 Abbott Tout had written to PwC acknowledging the Foundation's role as¹⁷

As you know the Foundation is the key participant with the Council in the proposed transaction in that it will be responsible for performing the construction of the various facilities in which the Council is particularly interested as well as the other developments which it is proposed will result in the community facilities being developed. By "community facilities" we refer to the Arena, Waterpark and Stadium. We appreciate that the Council will not own any of those facilities.

and drew the following matters to PwC's attention.

16. See generally: PwC report on factual findings on ODC, Liverpool Arena and the Foundation: 06/11/02; Evidence of G McIntyre; 01/03/04, p.12 et seq. and 28.01.04, p.92 et seq.; Evidence of A Constantinidis: 17/02/04, p.112 et seq.

17. Abbott Tout Letter: 11/09/01

1. *The Foundation was incorporated as a company limited by guarantee with the Constitution which you have seen. The Constitution is in a fairly standard form for a company of this nature with the only matters particular to this Foundation being its objects (Clause 1.4) and particular matters relating to the directors and their appointment contained in Clauses 6.1 and 6.3 which entrench Bulldogs Rugby League Club and Macquarie Bank.*
2. *For a company to be incorporated as a company limited by guarantee it is necessary for ASIC to be satisfied that its objects are charitable and that upon liquidation any surplus assets will not be paid to the members but to a company having like objects —see Clause 11.1.*
3. *In the present circumstances it was essential that the Constitution also be in such a form as to give the Foundation tax exempt status and of course the confirmation of that status is a condition precedent of the proposed Commercial Agreement.*
4. *It follows from the above that it is not possible for the assets of the Foundation at any time to become assets of the Council.*
5. *For the reason set forth in 4, the best that could be achieved for the Council in relation to the assets of the Foundation is for it to have control of the Foundation. This would enable it to direct use of the assets of the Foundation for the objects of the Foundation which are to be for the benefit of Woodward Park. In this regard, the objects of the Foundation when incorporated were wrong and we enclose a copy of a letter dated 11 August 2000 from Clayton Utz referring to the amendments to be made to the objects.*
6. *The protection for Council in the context of funds for the Stadium to be constructed by the Foundation were to ensure that these funds did not get paid to the Foundation but were instead retained in the Stadium Trust account and Stadium Retention Account.*
7. *To achieve control of the Foundation in the event that less than two of the Arena, Waterpark or Stadium were constructed, Clause 17.7 of the proposed Commercial Agreement provided for “control of the Foundation” to be provided to the Council by the League Club, the Bulldogs and Macquarie with all necessary changes to be made to the Constitution of the Foundation to effect that. It was intended that the formal documentation would ensure that the process by which that result would be achieved would be detailed.*

This letter was also circulated to the council.

6.4.2 Subsequently Abbott Tout raised the involvement of council representatives on the Board of the Foundation because:¹⁸

It now appears that it is appropriate to re-address the issue of Council's involvement in the Foundation as Council, as yet, has been unable to satisfactorily negotiate a position where its risks are adequately protected to the satisfaction of its commercial advisors.

They explored the concerns and provided their view:

There are three areas which must concern Council in becoming involved in a company such as the Foundation. These are:

- *The prohibitions contained in Section 358 of the LG Act.*
- *The need for any Council appointees to ensure that they are not "conflicted out" of Council decision-making processes by reason of Council codes or the requirements of the LG Act in relation to pecuniary interests, or conflicted out of the Foundation decisions.*
- *The need to ensure that the decision-making processes of the Council are transparent and unfettered.*

In our view, if there was equal representation on the Board of the Foundation by nominees of the Council and nominees of other interested parties such as the Bulldogs/Macquarie Bank such that there was equal "representation" by the Council and Bulldogs, but not a majority position by either of them, then Council's influence in the decision-making processes of the Foundation would be strong, and we would propose such an arrangement.

Its conclusion was:

It appears to us therefore that there are no impediments to your Council having representatives on the Board of the Foundation at the time when the development applications and other matters are proceeding through the Council in relation to the Woodward Park redevelopment but Council should err in the direction of making clear that it is applying all its usual standards and requirements in relation to any such developments and applications which it must consider.

Despite this clear statement, the councillors and former General Manager suggested that advice was that council should not be represented on the Foundation.¹⁹

6.4.3 Having come to this decision by at least September or October 2000, the council did not take steps to ensure oversight of payments made by the Foundation or ODC. Of course as far back as July 2000 it was known that a company, separate from the Foundation would act as the developer.²⁰

18. Abbott Tout Letter: 10/10/00

19. See Evidence of G Paciullo: 19/01/04, p.38 et seq.; Gauci: 16/02/04, p.92; B Carr: 03/02/04, p.38 et seq.

20. See Chart: Report to Meeting: 06/07/00, p.4

Subsequently, PwC reported that ODC would be controlled by the Bulldogs and Macquarie and:²¹

... shall not be answerable to any outside group, even Council. The Developer shall have the right to establish the terms and conditions for construction contracts and to appoint builders and project managers as they see fit.

6.4.4 Despite the warnings the council did not move to ensure that it had financial control.

On 20 December 2000 PwC reported on what had been a token effort, that the trust accounts to be established under the Commercial Agreement be audited.²²

We had requested that Council be provided with annual audited accounts of each of the development elements as these complete and commence operating.

We saw this as a way of exerting some control over operating expenses so they might not impact detrimentally on the surplus account, and again, affect the likelihood or speed of construction and delivery of sporting facilities.

Notwithstanding the Proponents continued commitment not to reveal detailed financial information for each development component, we have been able to secure commitments to enable various trust accounts to be established and for these accounts to be audited annually.

This was as flawed as it was fallacious.

6.4.5 Council, having been blocked from having control over ODC, needed to ensure that ODC and the Foundation adopted governance procedures that were in accord with those placed on the council, particularly as the Foundation and ODC were to carry out development on “public” assets owned by council, using funds provided by the council.

Auditing serves only to check that required processes have been previously observed.

In the event, council’s right to audit the Foundation was limited to checking that the warrants directing the Trustees to pay moneys had been signed by the three directors, as required by the ECA.²³

An audit could never exert any control over expenses. An auditor would not have the access to the root documents nor the background information regarding the documents. An auditor could not form any reliable opinion regarding “operating expenses” as suggested by PwC, let alone exert any control over them.

At best an auditor might comment on the quality of the warrants sighted by him.

21. PwC Report: 20/12/00, p.37

22. PwC Report: 20/12/00, p.37–38

23. ECA Clause 12(a)

As it was, the council had been made aware that both Macquarie and the Bulldogs intended to be unanswerable.²⁴ It was incumbent on the council to build appropriate rigour into the action and procedures of the Foundation and ODC to ensure appropriate standards, reflecting those imposed on it, were adopted by ODC and the Foundation.

6.4.6 The council held the vital cards. It had both the land, the funds and, as planning and consent authority, the power to give effect to the commercial dreams of the Bulldogs and Macquarie and, in turn, its social dreams.

In the end, the council entered into the Commercial Agreement and, subsequently, the ECA without securing oversight of its partners and the manner in which they were to conduct themselves.

While the council may have had limited knowledge of the discussions involving Macquarie and the Bulldogs over ODC at the time the Commercial Agreement was about to be entered into,²⁵ they were certainly aware of the governance issues that had been raised by Macquarie prior to the ECA.²⁶

Further, the dealings between the council, the Bulldogs and Macquarie had been taking place over a lengthy period.

6.4.7 During this time, particularly in late 1999 when issues arose over council's intent to tender the arena, Macquarie and the Bulldogs had shown disregard for council's need to meet its governance obligations under the Act.

In October 1999 Mr Ritchie had written a memo to the General Manager expressing concerns:²⁷

Brian,

Having now been involved in the Arena Project for a few days and having had now lengthy discussions with Abbott Tout Solicitors, I am concerned about the process and probity issues surrounding the arena proposal.

It seems to me that the parties to the Memorandum of Understanding and particularly Macquarie Bank Limited who were the project proponents have given no regard to the requirements and process stipulations of the Local Government Act. For example: How did the Memorandum of Understanding signatories intend to have the Arena built on public land with a 21 year lease without either a public tender process. This would be so for both construction and operation.

If the parties were relying on LGA Section 55 (3) extenuative circumstances to obtain Council approval then this has not been documented nor in my mind justified at this stage.

24. PwC Report: 20/12/00, p.37

27. Memorandum: 27/10/99

25. See Evidence of G McIntyre: 01/03/04, p.15 et seq.

26. See Evidence of W Moss: 23/02/04, p.30

et seq.; G Paciullo: 01/03/04, p.67 et seq.;

B Carr: 26/02/04, p.31 et seq.

6.4.8 Despite having been again warned about governance concerns affecting the Bulldogs, the council took no steps to ensure financial controls or oversight were in place when it agreed to provide \$22.25M funding for the project under the ECA.

It was not sufficient to trust Macquarie or the Bulldogs, as the Mayor suggested, when he gave the following evidence:

MR PACIULLO (19/01/04, p.57): *Well the events from there of course meant that we had to reassess our relationship with the Bulldogs. Up till then I regarded the Bulldogs as one of the most successful, and it was, clubs and well managed clubs in the country, let alone the state and there was an element of trust in—obviously you have to have in your partners and arrangements but that had to be reassessed. But we still had a legally binding agreement with them under the commercial arrangements and it was obvious that we had to reassess that relationship and that reassessment took place.*

6.4.9 The same blind trust was reflected in the General Manager's report of 5 February 2001: ²⁸

... Council needs to rely on Macquarie Bank's integrity as a corporate citizen and assume that its project assessment undertaken with the Bulldogs is commercially sound and achievable.

The council should not have based its entry into the agreement on the corporate success of the proponents, and then to rue their failures:

MR CARR (02/02/04, p.80): *I didn't foresee what actually transpired. Mr Gary McIntyre, who was also the—not only on the Foundation as a director and I think, Chairman of the Foundation—but was also Chairman of the Bulldogs Leagues Club for some time and a solicitor. I didn't contemplate at all that those vehicles that were being established, were going to be used to put money in and disguise payments to players. In fact, I feel a bit foolish about this comment but when people told me there was a breach of the salary cap I didn't know what that was. So I certainly didn't foresee that sort of corruption coming from a person who had been certainly a leader within the Bulldogs Leagues Club community and held himself out as a champion for this particular project and to put this project in jeopardy by undertaking what I consider to be an extremely foolish act.*

PROF DALY: *You felt let down by that?*

MR CARR: *Sorry, sir?*

PROF DALY: *You felt let down by that?*

²⁸. Report to Meeting: 05/02/01, p.17

MR CARR: *Let down and quite angry about somebody who would repeat to the Mayor time and time again: "Mr Mayor, I will never let you down." He held himself out as a person of trust and clearly he breached that, in my view.*

6.4 Findings

1. **Council incorrectly chose not to be involved in the Foundation based on a perceived conflict of interest.**
2. **Having made this decision, the council failed to ensure sufficient safeguards were placed in the manner that the Foundation conducted itself.**
3. **When council later became involved with the Foundation, council placed itself in a position where its role as planning and consent authority might conflict with its ability to properly consider and prescribe goals for the Oasis project. This was before the Commercial Agreement was signed.**
4. **Council's failures were to allow the Foundation, ODC and particularly the persons associated with the Bulldogs to proceed unchecked and unhindered.**

6.5 Audit

6.5.1 The council did reserve the most basic right under the Commercial Agreement, the right to carry out an audit of the various trust accounts established under the agreement.²⁹

Despite paying \$15M to the Foundation, the council had not obtained an audit of the Arena Trust account before the salary cap breaches were disclosed.

On the day following the *Sydney Morning Herald's* publication that the Bulldogs had taken nearly \$900,000 out of the Oasis project, 24 July 2002, the council sought an audit of the Arena Trust account.

Council's right to audit was, as Mr Douglas was to concede, the only mechanism that council had to acquire access to the information about the Foundation.³⁰

The council did not even exercise this right until the fox had well and truly run amok in the chicken coop.

29. Commercial Agreement Clauses 14.13, 16.13, 21.10

30. Evidence of M Douglas: 30/01/04, p.23

6.5 Findings

- 1. The former General Manager and councillors misrepresented the advice given by their legal advisors, suggesting that council’s decision not to be represented on the Foundation’s board resulted from the legal advice given to them.**
 - 2. The council had received clear and express warnings from its commercial advisors that Macquarie and the Bulldogs anticipated that the project’s developer, ODC, would act in an unconstrained manner. The council failed to act on this warning by imposing governance controls over the operations of ODC and the Foundation.**
 - 3. The governance regime provided under the Commercial Agreement was flawed, only allowing limited review. It did not provide any governance regime.**
 - 4. Neither the Foundation, ODC nor any other corporate vehicle was required to meet the governance requirements placed on the council. Given that the project was dependant on the provision of council-owned lands and funds such a regime should have been adopted.**
-

6.6 Conclusion

This section has looked at the position taken by council in securing the performance of the outcomes being sought by it.

Essentially this chapter reports a series of issues and concerns that required the council to instigate the means to secure its outcomes.

The council did not take any effective steps to secure its outcomes, whether by:

- defining its outcomes
- ensuring that they were embodied into the various agreements
- ensuring that its partners met its outcomes, particularly the governance issues imposed by the Act, in their dealings
- ensuring that it could be satisfied that its “partners” were meeting the outcomes.

As in many of its other dealings the council abrogated its responsibilities.

It neither defined, sought nor ensured its outcomes, through a series of failures or conscious acts.

The attitude demonstrated by the councillors and Mr Carr, the former General Manager, particularly their lack of resolve, no doubt enshrined the existing view of the proponents that they could do what they pleased, without regard to the council or to commercial morality.

To the extent that the council was driven by its vision, it became the active tool of the proponents to act in the manner outlined above.

6.6 Findings

- 1. Council's right to audit the Arena Trust account provided an insufficient safeguard, and council was left without any means of securing the outcomes it sought.**
 - 2. Council's disregard for supervision of its "partners" meant that it had failed to exercise even this right despite paying \$15M into the Arena Trust account. In turn, its partners believed they could do whatever they pleased, as the council became the active agent in promoting such an opinion.**
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PART

C

Internal Governance

Section 7: Internal Governance: Planning Issues

7.1 Town Planning Structures

7.1.1 The various schemes for the Woodward Park Precinct each involved development projects. The planning system provides the contextual base and the processes for assessing developments. It is important to understand if Woodward Park developments were treated in the same way that developments in any other part of the council area were treated. Mr Turissi assisted the Inquiry with background to these issues. Mr Turissi was Senior Development Planner at the council from 1994 to 1998, and from 1998 to the start of 2003 was Group Manager in the planning area. He is one of the few senior staff whose employment with the council traversed almost the entire period in which the various schemes were developed.

7.1.2 Mr Turissi testified that Woodward Park developments were treated no differently, in terms of development approval processes, to developments in any other part of the council area. Where council land was involved, as with portions of Woodward Park, an independent consulting planner would be hired to consider proposals.

PROF DALY: (29/01/04, p.54) ... *You said you heard that the Bulldogs group had some interest in looking at doing things at Woodward Park. Were you involved with Woodward Park in any specific way around that time?*

MR TURISSI: *I was involved with Woodward Park when it came to certainly all the town planning issues associated with the project so I was certainly involved in that time when it dealt specifically with the planning issues, yes.*

PROF DALY: *At that stage it was being dealt with in any particular way or was it being dealt through the general processes? What I mean, was it singled out as something distinctly different from what Council normally does with development proposals or was it just running through the normal processes of vetting and so forth?*

MR TURISSI: *Well, I mean, it went through the normal process of all the town planning. The Council had a procedure that where Council either was the owner of the land or had an interest being the applicant that we engage in dependent consultants to assess those applications. So from that perspective, you know, applications did go through an independent process through that whole period.*

7.1.3 Mr Turissi explained that, in the example of the Stardome proposal, the council hired a specialist planning consultant (Mr George) and, because of the particular problems with traffic that the proposal raised, a traffic consultant (Mr Thompson). In the case of the Bathurst Street development the council used another consultant planner, Mr Carver. After the Stardome group dropped out of the picture, an amended Basketball Arena proposal went before the council and was approved. In that case the council did not employ any independent consulting planners to consider the proposal, arguing that the planning issues had been covered when the Stardome proposal was considered.

PROF DALY: (29/01/04, p.54—57) *Do you remember who those consultants were?*

MR TURISSI: *Yes, initially it was Mike George who was involved in assessing a number of the earlier applications and Scott Carver was involved in assessing the Bathurst Street development application from what I recall. There was another consultant, Bob Tillott, who was also assisting in the process.*

PROF DALY: *I will come back to Mr Tillott a little later. The role of Mike George and Carver, the other name you mentioned, they were to provide Council with an independent advice on the merits or demerits of particular proposals?*

MR TURISSI: *When the development applications came in we went through a process of allocating it to then a consultant planner and then that consultant planner then assists the application. So their involvement was specifically in that regard.*

PROF DALY: *Was that because it was a big proposal?*

MR TURISSI: *No, it was because of the fact that it was—the Council had involvement through the fact it had land tied up with the project. As I said before, Council's procedure was always to engage independent consultants regardless how big it was, even for a fence of whatever it was, if it was Council involved then it was done by an independent consultant.*

PROF DALY: *So the purpose of this was to remove any potential conflict of interest?*

MR TURISSI: *That's correct.*

PROF DALY: *What weight do the independent consultant's evidence or information have when it is delivered to Council?*

MR TURISSI: *Well, in those latter periods where certainly I was the Corporate Manager, I mean, if the consultants recommended (a), well, then it wasn't my role to question them and say: I don't agree, I want you to change that recommendation. I mean, simply if that was their position, that was their position. If there were issues we would talk through the issues to see whether they were resolvable and if they were, great. If the weren't, well, then we would have to address them, I guess. So at no stage*

were the consultants ever told or asked to do anything other than give us their professional opinion and views to the projects.

PROF DALY: Was Mike George involved with projects like the Stardome proposal?

MR TURISSI: Yes, Mike George was involved in the Stardome project, that's correct.

PROF DALY: Do you remember broadly what he saw as difficulties with that project?

MR TURISSI: I think there was issues—I recall there was a lot of discussion about how we would manage traffic management issues. That was certainly one of the issues which certainly came about. It was also managing some of the operational issues in terms of the relationship with the Council Chambers being next to it and how we could operate the Council Chambers and the facility at the same time.

PROF DALY: When you got a report that said there are very distinctive traffic problems, for example—I imagine Hoxton Park Road might have been one example of that—what happened then? Who did the report go to first of all?

MR TURISSI: Well, if Mike George had a specific concern, for instance, it would come to me and he would raise it with myself and then I would facilitate from a process point of view potentially meetings with the relevant officers to see whether or not there was an ability to walk through and resolve those issues. So I guess I was the conduit and the facilitator in creating the linkages with other people.

PROF DALY: Now, if you and your officers decided that certain things should happen in relation to the traffic arrangements, did that go forward or did that go to someone else to make a decision on whether or not they should follow your advice?

MR TURISSI: With the traffic, if I recall correctly, with the traffic we did engage an independent consultant to look at the traffic issues which was Dave Thompson and we chose him specifically because he was a local in the area and so we knew he was more familiar with the local issues. So in that instance, for instance, there is times when David was used to assist Mike George in coming to decisions, yes.

PROF DALY: I'm just trying to piece together the way in which this works. So you have got a proposal, a fairly large one. To ensure that the Council isn't involved in a conflict of interest problem you get an independent person or group to look at the proposal. Out of that comes some recommendations, alterations. You then as a professional take up those recommendations. In this case the traffic.

MR TURISSI: That's right.

PROF DALY: You hired another group who are specifically traffic engineers or related to that and they give an opinion.

MR TURISSI: *Yes.*

PROF DALY: (29/01/04, p.62) *Were there any particular town planning issues that had to be sorted out in relation to it, the arena that is, going forward in such a short time?*

MR TURISSI: *If I recall correctly, I think at that particular point of time, I think the approval for the arena had already been issued so from what I can recall, no I don't think there were any specific town planning issues because at that stage, we had already approved the Stardome application. Certainly, when the second application came in, the issues were I guess somewhat resolved and given the second application was a lesser development in comparison to the first one, you know, the issues were pretty much managed a lot earlier. And as I said, I can't recall the exact dates and timing but if I remember correctly, I think the arena was already approved at that time, so unless I'm, you know, wrong.*

7.1.4 When the independent planner had satisfied himself that any planning issues in a proposal had been addressed, his report was sent to the council's planners. They prepared a summary document to explain what the process had been, and the proposal was sent to the Independent Hearing and Assessment Panel (IHAP), a group of independent experts, who would review the proposal and make recommendations to council. In the case of the Woodward Park Precinct projects the council ratified each of the IHAP recommendations.

PROF DALY: (29/01/04, p.57) *What happens then?*

MR TURISSI: *Well, once Mike George came to a position where he said: right, I'm satisfied I can now complete my report and make a recommendation, then from there it had to go to the Independent Hearing Assessment Panel for consideration. Therefore what then happened was I would attach a one-page report accompanying Mike George's report to the Independent Hearing Assessment Panel and really that report was just, you know, acknowledging that: here is a consultant report, can you please consider it, so it was more procedural. Then it went before the Independent Hearing Assessment Panel and they went through their process.*

PROF DALY: *So throughout that whole process it is the professional officers and expert consultants who dealt with the issues. It did not go before Council in any way?*

MR TURISSI: *Ultimately it did go before the Council, yes.*

PROF DALY: *After the IHAP.*

MR TURISSI: *After the Independent Hearing Assessment Panel had made a recommendation, that then went before the Council.*

PROF DALY: *In that instance or in other instances with which you are familiar did the Council generally accept the outcomes from that, for instance?*

MR TURISSI: *Certainly the recommendations which went before the Council were adopted by the Council, yes.*

7.1.5

Despite the broad compliance with council procedures, as explained by Mr Turissi, issues remain concerning the way the council handled aspects of planning for the Woodward Park Precinct. One of these relates to the building height limit in the CBD when the Bathurst Street development application was approved. When the council entered into the Commercial Agreement the height limit of buildings in the CBD was four stories. The Commercial Agreement required the council to provide residential and commercial yields that were impossible to achieve with the existing height. The council had been reviewing its plans for the CBD since 1994, but at the time of signing the Commercial Agreement the review had not been completed. The intention of the review was to involve the elevation of Liverpool's CBD to the status of a regional centre. Necessarily this would have led to denser building forms. The Commercial Agreement apparently forced the issue, although the Bathurst Street proposal was not set within a completed new CBD framework.

MR BROAD: (20/01/04, p.79–80) *Council has however received and dealt with an application to redevelop the Bathurst Street property?*

MR PACIULLO: *Yes.*

MR BROAD: *That, according to Council's time line, was received on 13 May 2002 and Council granted consent on 3 November 2003. I probably don't require an answer to that. The Council has indicated that the DA proposed mixed use development of six buildings varying in height from four to 22 storeys. As I understand it, when Council went into the commercial agreement, its planning policies did not anticipate buildings of that height. Are you aware of that?*

MR PACIULLO: *My understanding is that those applications were made to the Council and assessed and all the considerations taken into place by independent planners and then further assessed by an independent hearing and assessment panel, which looked at all the objections and made recommendations to Council.*

MR BROAD: *Can I stop you. What I was asking you was not the processes adopted by Council but, rather, the then current planning policies which had been adopted by Council, and I was simply asking you whether you knew that at the time the development application was made, the policies did not anticipate buildings of the height for which the development application was received. Now, is that your understanding?*

MR PACIULLO: *I cannot answer that question.*

7.1.6 In his response to Mr Broad (7.1.5), the Mayor said that IHAP had dealt with all objections. The Mayor, and others at the council, appears to have thought that a supportive recommendation by IHAP suggested that all issues had been covered. This seems to have been interpreted as an independent endorsement of aspects of the Oasis Project. Such was not the case. IHAP focused solely on planning issues related to a single development application. IHAP was also constrained by the information supplied to them, whether that information came from council officers, specialist consultants, or representations from the public. They would not have dealt with questions of density within the CBD, per se, or with broad objections to the concepts of the Oasis Project, when they were considering one isolated part of the project. The council did not take into account objections that were made against the Oasis Project by a significantly large number of people in the community. The Mayor saw their objections as political, and they appear to have been excluded from serious consideration in the DA process as a result. In fact, since the Mayor saw the Oasis Project as centrally important to his vision for Liverpool, he made no attempt to gauge public opinion on the issue, believing that his win in the 1999 elections was a mandate to push through with the vision. The details of that vision were not considered to be town-planning matters by the Mayor. As a result the council did little or no pre-planning before it entered into its commercial agreements.

MR BROAD: (20/01/04, p.80) *Right, thank you. Now, can I take you further to the terms of the commercial agreement and in particular, to the anticipated yield of the commercial agreement? There is provision made in the commercial agreement that there is provision for the Council chambers that I had spoken about, and that, and I quote you:*

A minimum area of 80,000 square metres of associated commercial and/or residential facilities which shall be sold to the Foundation.

MR PACIULLO: *Are you quoting the - - -*

MR BROAD: *I'm quoting the commercial agreement.*

MR PACIULLO: *Sorry.*

MR BROAD: *My question is, are you aware of that now?*

MR PACIULLO: *No.*

MR BROAD: *Were you, at the time that Council entered into the commercial agreement, aware of that provision in the commercial agreement?*

MR PACIULLO: *Well I can't recollect, to be able to answer your question, as to what my knowledge was then. I just haven't a clear recollection of those—to be able to answer that question.*

MR BROAD: *Mayor Paciullo, were you aware at the time of entering into the commercial agreement, whether the Council had undertaken any studies as to the suitability of that density level in the developments?*

MR PACIULLO: *Well I get back to the answer I gave you before, that development applications were assessed independently and were reported by an independent hearing and assessment panel, to Council.*

MS JOHNSON: (20/01/04, p.31–33) *You mentioned earlier on that there had been a fairly strong campaign run against the Oasis development Foundation in the 1999 election. That was the anti-electronic casino campaign, is that right?*

MR PACIULLO: *That is correct.*

MS JOHNSON: *Do you remember if you received any other, in 1999 or afterwards, if Council received any written objections to the Oasis development?*

MR PACIULLO: *There would have been written objections, I imagine, during the process of public exhibition and so on.*

MS JOHNSON: *Was there any petitions lodged with Council objecting to the Oasis development?*

MR PACIULLO: *At that time there could have been.*

MS JOHNSON: *Do you recall a petition of 1700 signatures objecting to the development?*

MR PACIULLO: *Yes, now that you mention that, I do. Yes.*

MS JOHNSON: *Do you know—did Council ever undertake any surveys to gauge the level of support for the development amongst the community?*

MR PACIULLO: *There were surveys undertaken, but not by Council as far as I can recollect.*

MS JOHNSON: *Who undertook them?*

MR PACIULLO: *I think the Bulldogs.*

MS JOHNSON: *Right. They would have had a vested interest in the outcome, though, wouldn't have they if they were, in effect, trying to get the development off the ground?*

MR PACIULLO: *Well, I'm not sure when these things are commissioned if the ones who are commissioned are told: bring me back this result. I just assume that they are authentic.*

MS JOHNSON: *Did you make any inquiries as to the kinds of questions that were asked about in the surveys.*

MR PACIULLO: *No. I had some verbal advice from Mr McIntyre, but I should add to my question that the '99 elections proved beyond any doubt that the community of Liverpool wanted to see this complex occur and I, as I said, 1 day of the week I'm available for all the residents and I speak to many thousands of people over a year and the overwhelming message I was receiving was despite the objections, which were very vocal and very noisy and they are entitled to be, there was overwhelming support for the project.*

MS JOHNSON: *Would you be—would it be your practice to respond to letters of complaint if they had been received?*

MR PACIULLO: *I respond to all letters addressed to me as a matter of practice.*

MS JOHNSON: *So if complaints are received about the Oasis development or about other matters that are happening in Council it is your practice to respond to them.*

MR PACIULLO: *It is my practice. Yes.*

MS JOHNSON: *Some of the submissions have suggested that letters of complaint to the Council went unanswered.*

MR PACIULLO: *To me, or to the Council?*

MS JOHNSON: *To the—I don't know that they were specific about to whom they were addressed. If they were addressed to the Council, would you expect them to be answered?*

MR PACIULLO: *Well, that is an administrative role and I don't have any part in answering correspondence, but if I get complaints from people when they access me, as I said, they have every ability to do so, then I would take an interest in that response.*

MS JOHNSON: *You are Mayor of the Council, though, aren't you? So that you have got a role in governing the administration?*

MR PACIULLO: *Yes, but I don't interfere with the administration, but I do respond to complaints.*

MS JOHNSON: *As Mayor of Liverpool, you'd expect your Council, the administrative body to respond to complaints that it receives, though, wouldn't you?*

MR PACIULLO: *Yes.*

MS JOHNSON: *Are you concerned by the suggestion that it didn't respond to complaints?*

MR PACIULLO: *Well, a local Government body especially a growing one like ours gets all types of complaints and sometimes when I hear, or when I'm told, the answer hasn't been—or a letter hasn't been responded to be it a complaint or anything else, I'm most concerned and I indicate that to the General Manager or to the Corporate Manager and indeed there's a long history of my office being concerned about this type of complaint.*

7.1.7

In planning terms the Oasis Project appears to have been treated as a visionary exercise in which particular input by the council's specialist planners would only occur when a DA proposal appeared. As 7.3 shows, council effectively ceded control over its planning for Woodward Park to its commercial partners. In the lead-up to the Commercial Agreement Mr Turissi the Corporate Manager for planning seems to have only been incidentally consulted, and then only by the General Manager, and not the Project Management Group. The issues raised by the General Manager with Mr Turissi were essentially procedural, and the context was set in terms of the visionary aspects of the Oasis Project, rather than its detail.

PROF DALY: (29/01/04, p.59–62) *I will come back to that. In terms of the commercial agreement, the whole project had become much bigger. We move from the stage of how to build something to house a basketball team down to something that incorporated a lot of different elements and extended beyond Woodward Park. Were you involved in your capacity as Manager of the unit in terms of the planning issues related to that extension? I'm thinking particularly getting away from Woodward Park. You've got the [TAPP's] land, you've got the CBD properties. Were you involved in—what happened on a planning front at that stage?*

MR TURISSI: *Well, during the negotiations of the commercial agreement at different stages I would be asked to comment from a planning perspective as to, I guess, obligations or what my views were, how did this affect Council from a planning perspective and certainly at different stages I would be called not necessarily to the meetings of the negotiation of the commercial agreement.*

PROF DALY: *This would be the project management group that you would be dealing with?*

MR TURISSI: *No, at the time it was fundamentally the general manager and we would talk through, you know, certain issues which, you know, how we could preserve Council's position on certain aspects of the project and whatnot and so I got asked from a planning perspective how we could achieve that and what not and what was required to be done to facilitate the vision.*

PROF DALY: *Right. Somewhere around that time, the period we are talking about, there was a development or the beginnings of a development of a new plan for the CBD, was that right?*

MR TURISSI: *The new plan for the CBD came about probably in around that February period.*

PROF DALY: *February 2001?*

MR TURISSI: *Yes, I think it was 2001. Yes.*

PROF DALY: *Roughly, I know it is a lot to ask you in a couple of sentences, but what was the particular focus of that plan?*

MR TURISSI: *Well, the Council had in its corporate plan, in its annual plan, has always had, as a vision for Liverpool to be, you know, a regional centre. So the driver behind that was about what opportunity there was to try to, you know, review our controls and maybe create some incentives so, you know, we could actually make Liverpool a regional centre and so that was really the fundamentals of why there was a conscious decision to do the review. Also, from a good planning point of sense, the DCP 30, which is the CBD DCP, I think, was adopted back in the mid eighties, thereabouts, and I think it desperately needed to have a review. So it was a combination of a number of issues.*

PROF DALY: *What were the major outcomes? Did it involve a change in the allowable height of buildings which involved changes in the footprints? Did it involve changes in the traffic systems of the CBD? What did it do?*

MR TURISSI: *I mean, the answer to that is yes, it fundamentally went about doing those but it was also about meeting specific, strategic outcomes which was to have a work-force of, you know, 30,000 in the CBD and obviously to achieve some of those goals, you are not going to achieve that unless you do increase the heights and what not. So it was about providing a place where you can work, live and play, so to speak. So there was a lot of strategies about what opportunities were there to develop that and obviously in doing that, to grow, you had to grow either, you know, in terms of height and in doing that as well there was all the other associated issues with traffic management and the like which therefore you would have to take into account.*

PROF DALY: *So there was a series of strategic objectives which might express the vision of what the CBD would be into the future. What are we looking at, 20 years or what is the - - -*

MR TURISSI: *I think at that time it was, yes, we are looking at around 2020. We are looking at up until the year 2020, that was the vision.*

PROF DALY: *Right, and then out of that, there were a number of practical changes such as modifications to the DCP 30?*

MR TURISSI: *That is right. Yes.*

PROF DALY: *Okay. Going back to the commercial agreement. As I understand it, the underlying plan, I don't mean in a physical town planning sense, the underlying scheme to make that viable was that the CBD properties that the Council owned would be developed first?*

MR TURISSI: *I know there was an order within the commercial agreement. I can't recall specifically the exact order but—look, I can't tell you whether they were to be developed first. I mean, I think they were pretty much high up.*

PROF DALY: *I believe they were, yes.*

MR TURISSI: *Yes.*

PROF DALY: *Let me go to the TAPP's land. That was included in the broad scheme of the Oasis for residential development, I think, up to about four storeys, if I remember correctly.*

MR TURISSI: *I was going to say there was a vision for that but there still had to be the process of the LEP and the DCP which had to be gone through.*

PROF DALY: *Yes. But you were aware of that?*

MR TURISSI: *Yes.*

PROF DALY: *I raised this with Mr Ritchie this morning. The TAPP's land is an old—a large part of it is an old tip. It also has drainage problems, so there were significant town planning issues to do with that?*

MR TURISSI: *Definitely, and I think a lot of the professional people were aware of that in terms of that. What was being adopted as part of the commercial agreement was a vision and there was a lot of work which had to be done outside the vision to try to see whether or not, you know, it could be brought to reality.*

PROF DALY: *Did they consult you about the suitability of that land for residential development?*

MR TURISSI: *Yes. Certainly I had some initial input but, you know, being a visionary document and not really having any planning statutory weight, you know, it was obvious that those sort of land uses, given the surrounding land uses was the most appropriate land use if you were to develop that land.*

MR BROAD: (29/01/04, p.70–73) *Can I ask you of your involvement in planning issues in the lead up to the commercial agreement? Were you asked to look at planning issues that might arise in the commercial agreement?*

MR TURISSI: *No. My role in that regard was being presented scenarios and then asked questions as to whether or not I felt that would run into particular problems, from a procedural point of view.*

MR BROAD: *Were you presented with any scenarios associated with the CBD developments?*

MR TURISSI: *I was presented, at one stage, some scenarios with the Bathurst Street site, in terms of conceptional plans.*

MR BROAD: *Yes. Do you recall when that was?*

MR TURISSI: *Look, no—it would have been after—it was after my time as the interim position, I think - - -*

MR BROAD: *Would it have been before the commercial agreement was entered into or after?*

MR TURISSI: *No. It was after.*

MR BROAD: *After?*

MR TURISSI: *It was after.*

MR BROAD: *Would it be usual, given your position in Council, for those matters to have been referred to you?*

MR TURISSI: *I mean, certainly—yes. I mean, there was—yes.*

MR BROAD: *Okay. So if the Council was looking to enter into an agreement which provided that it make available a large area of development opportunity, then you would normally expect that to be taken up with you before anything was done on that?*

MR TURISSI: *Certainly ask questions of it, yes, in terms of what my views were.*

MR BROAD: *The commercial agreement provided that the CBD developments make provision for Council chambers of some 8000 square metres and a minimum area of 80,000 square metres in addition. Were you ever consulted on that condition before the agreement was entered into?*

MR TURISSI: *Not in the areas, no.*

MR BROAD: *Were you ever consulted in respect of that proposal as an overall proposal and separate from Bathurst Street after the agreement was entered into?*

MR TURISSI: *Not that I recall other than to say that we prepared a brief which looked at how much area we would need if we were to build a new Council chambers and therefore it was for me with that area that we knew how much area the Council would need. I can't recall whether it occurred during the commercial agreement or after the commercial agreement. I can't recall the timing but we did engage a consultant to assist us in terms of what our needs would be if we were to relocate to the CBD in terms of accommodation.*

MR BROAD: *Would the provision of 80,000 square metres—leaving aside the Council chambers—would the provision of 80,000 square metres of associated commercial and/or residential facilities within the CBD properties—those are the properties in Bathurst Street, Northumberland Street and of course the Warren Serviceway—raise town planning issues?*

MR TURISSI: *Certainly. There was a whole series of traffic management issues associated with that and certainly, you know, at the time the current development control plan certainly wouldn't have been able to probably facilitate some of those heights like I was explaining before.*

MR BROAD: *Prior to the receipt of the development application for the Bathurst Street property were you consulted in respect of the possible yield that might come from that site?*

MR TURISSI: *I was by the fact that there was yields recommended or yields identified in the vision document.*

MR BROAD: *Did the vision document embody any of the principles contained in the commercial agreement?*

MR TURISSI: *I'm not sure what you mean, sorry.*

MR BROAD: *I'm sorry. I withdraw it. Did the vision document anticipate that yields such as 80,000 square metres on the three sites that I've spoken about would be anticipated?*

MR TURISSI: *From my perspective I always emphasised that it was visionary and we needed to go through the processes of doing all the relevant studies on the lands to see whether or not that could be facilitated and in my view, you know, it was about ensuring that if that could be justified then there was nothing wrong with the vision but if all the supporting studies demonstrated there were issues and these things can't be physically done well then as far as I was concerned those numbers really, you know, didn't mean much.*

MR BROAD: *What happens from a town planning perspective if a contract requires that a certain yield be obtained and you as a town planner take a view that the site cannot bear that sort of yield?*

MR TURISSI: *Well, my position was—and at different stages I had discussions with the General Manager about this and explained this also to, at the time when the commercial agreement was being prepared—that I wanted to ensure that at no stage going through the planning process that we were forced to make a decision based upon a commercial agreement and that there was appropriate protection or clauses in there which actually ensured that Council’s responsibility wasn’t fettered at all by this vision document.*

MR BROAD: *Were you asked to review the commercial agreement in a final form before it was executed?*

MR TURISSI: *Not in the final form, no.*

MR BROAD: *In a preliminary form?*

MR TURISSI: *At different stages I was—as I said before, I was called in to look at specific aspects of the document which related more back to the town planning side of things.*

MR BROAD: *At the time the commercial agreement was entered into were you aware of the clause that I’ve been referring to?*

MR TURISSI: *I was aware of that clause, yes.*

MR BROAD: *You didn’t see that as fettering the town planning discretion.*

MR TURISSI: *I raised concerns as to the clause being there but I was reassured that with the provision in the commercial agreement saying that Council’s responsibility would not be fettered that that would suffice to be enabled myself and the professional team to be able to do the right things in terms of to assess the LEPs and do the appropriate study.*

7.1.8 The only development that actually proceeded under the Oasis vision was the Arena. The approval to commence work on the Arena was given by a private certifier. That approval related only to the footings, and not to the remaining components of the building. Work progressed beyond the footings and was then stopped by the council. It never resumed. In 12.2.7 details of how the errors made by the Private Certifier were brought to Mr Turissi’s attention are provided. Mr Turissi failed to pursue the matter because he felt that it might injure the council’s reputation.

PROF DALY: (29/01/04, p.64–65) *... We now proceed to later in the year when the first sod was actually turned, did the building or the preliminary building works start immediately?*

MR TURISSI: *Yes, pretty much so from what I recall. The approval for the construction was not issued by Council, was actually issued by a private certifier.*

PROF DALY: *This is the building certificate?*

MR TURISSI: *This is the actual—yes, construction certificate, that is right.*

PROF DALY: *Yes.*

MR TURISSI: *So the Council did actually issue the CC, so it was done by a private certifier.*

PROF DALY: *Were there any problems with that?*

MR TURISSI: *None, not particularly. I mean, they have issued—they issued the CC for the footings and they commenced work accordingly.*

PROF DALY: *But as I understand it that process was stopped?*

MR TURISSI: *It was stopped because the construction certificate was only for the footings and they never then got appropriate approval subsequently for the remaining component of the building, and therefore I was the one who actually put the stop work order on the builder when it became apparent that they hadn't received the CC work—approvals for the remaining part of the building.*

7.1.9

The cessation of work on the Arena site was seen as a major embarrassment to the council. The aim was to get the work restarted as soon as possible. Despite these efforts the work was effectively halted as the actions of the Bulldogs began to surface, and the Oasis partnership fell apart.

PROF DALY: (29/01/04, p.65–67) *So there were problems?*

MR TURISSI: *There were problems, yes.*

PROF DALY: *Was it the private certifier who had caused the problems by not issuing this certificate properly?*

MR TURISSI: *Well, the private certifier issued an approval for the footings because that is all he had—he had approval, you know, sought for, so he issued approval for that. It appeared that the builder just kept building and obviously internally they—their paperwork obviously was sloppy and they didn't, you know, get the relevant approvals subsequently. It is not uncommon for large scale developments of this scale to have multiple construction certificates for different phasing and obviously what happened was that they got their first construction certificate to the earth works and the piers, but for whatever reason they didn't follow through and got all the other relevant construction certificates. And as I said, it wasn't until we started to notice that this thing was proceeding and we hadn't seen within the Council any subsequent documentation that we asked some questions, and as soon as we became aware that they were building unlawfully we put a stop work order on it.*

PROF DALY: *Okay. Thank you. I would like to refer to a file note which I've got and it was about the private certifier.*

MR TURISSI: *Right.*

PROF DALY: *I think it is best if I read it. This is dated the 9th of the 8th and I will read:*

Following discussions with Mr Gerard Turissi I raise the matter of reporting the private certifier on the Arena to Planning New South Wales for failing to comply with the requirements of the EPAA. Mr Turissi stated to me that this would not serve any purpose at all, as it would do further discredit to the Council for not following the correct process. A placed a strong verbal disagreement with Mr Turissi and was instructed not to pursue this matter any further. The concerns I raised related to the issuing of a construction certificate without fully and total compliance with the conditions of consent.

Would you like to comment on that?

MR TURISSI: *Yes. I don't recall expressing that view at all. I mean, certainly when I became aware that they were building illegally, I mean, I took the matter directly to our solicitor to work out the appropriate course of action and on many occasions we—or but on many—on a couple of occasions we did report matters to private certifiers or to DIPNR where people, you know, we felt were not doing things properly. I don't recall saying to anyone not to inform DIPNR at all, so I—no, I don't recall that at all.*

MR BROAD: *Can I just recede with one or two procedural questions? You say you don't recall, is it likely that you would have said something like?*

MR TURISSI: *I think I might—if I would have said anything, that the thing I might have said at the time, was let us focus on sorting out. The fact that we have got illegal building work, resolve the issues associated with that, rather than just sort of create other problems for ourselves and I think if it was—if anything was said, it was more than likely put in that context. That is at the time, we had the illegal building work being done, I had met with Council's solicitors, we worked out a protocol how to move forward in terms of how we could get the project up and running again in terms of being able to issue a building certificate for the unauthorised works and if I would have made any comment it would have been the line, let us get that sorted out first and then we could then take the matter on further subsequently.*

MR BROAD: *You have raised the comment about creating problems for yourselves, I assume you mean Council, what sort of problems could that give rise to?*

MR TURISSI: *Sorry, I'm not sure what you mean.*

MR BROAD: *Well, you just said, you speculated that you might have said, let us sort it out rather than raising problems for ourselves.*

MR TURISSI: *Sorry. The point I'm trying to make was that I thought it would be better to focus on resolving unauthorised works first rather than having two or three matters running concurrent because the reality was, was that even if we referred the matter there and then I didn't see that that was a high priority in resolving that aspect, it was more about resolving the fact that there was illegal building work.*

MR BROAD: *I'm still in a quandary about what possible problems there might be. I mean, are you talking about the fact that you might have to do more work or what sort of problems?*

MR TURISSI: *Maybe the use of the word, problems, is inappropriate in terms of what I was trying to say. No, it was a question about trying to prioritise and just focus on what was more important and that was to resolve the fact that there was unauthorised works. I'm not saying that that wasn't important. It's just—to me, at that particular time, it may not have been a priority.*

MR BROAD: *What was your priority at that time?*

MR TURISSI: *Well it was certainly to ensure that the builder stopped working and that was my first priority. Then the second priority was then trying to work out what work was unlawful and then to see whether or not we could actually issue a building certificate for the unauthorised component of the works.*

7.1 Findings

1. In most matters concerned with Woodward Park Precinct development applications, council followed its usual practices and processes.
 2. There is clear evidence that in signing the Commercial Agreement council fettered its capacity to make independent judgements on planning issues associated with sites that were part of the Oasis scheme. A lack of pre-planning by the council made it vulnerable, and that vulnerability translated into the detailed planning for Woodward Park being done by the Bulldogs and Macquarie.
 3. The council did not engage their professional planning staff sufficiently in terms of the planning implications of the Commercial Agreement, either prior to signing the Agreement, or after signing it.
 4. The council followed due process when it discovered problems with the construction certificate for the Arena, but were not willing to take action against the private certifiers of the certificate because it might have harmed the council's reputation.
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7.2 Conflicts of Interest and the Foundation

- 7.2.1 The most contentious issue concerning the process of assessing development approvals for the Oasis Project was not related to any one development. The council decided that it might have a conflict of interest, as the consent authority, if it were to place Directors on the Foundation, the body responsible for putting the development proposals to council. The council abstained from appointing any Directors to the Foundation. By taking this approach the council forfeited any control over the actions of the Foundation, and most disastrously, forfeited control over the \$15 million that it directed to the Foundation. The Mayor claimed that the council was given legal advice that it should not have any Directors on the Foundation because it was the consent authority for development proposals related to the Oasis Project. No such legal advice has been found.

MS JOHNSON: (19/01/04, p.38–39) ... *Your understanding though obviously was that Macquarie Bank, the Council and the Bulldogs would all have an input into this Foundation. Is that right?*

MR PACIULLO: *Yes.*

MS JOHNSON: *Did you understand the input to be an equal one, so that you all had equal say and the decisions the Foundation made?*

MR PACIULLO: *Yes.*

MS JOHNSON: *How was that going to work? Do you—were you all going to appoint people to a board?*

MR PACIULLO: *To the Foundation. Yes.*

MS JOHNSON: *To a board of the Foundation?*

MR PACIULLO: *Yes.*

MS JOHNSON: *And equal numbers of representatives, you understood?*

MR PACIULLO: *I cannot recollect the actual numbers and there was I gather, some discussion about that after we received advice that we should as a Council not be represented on the Foundation initially, because there was still a number of development applications to be made to Council and we had advice that we should not be there at that time. Therefore that issue initially didn't become one for the Council. Initially.*

MS JOHNSON: *So just to take a step back then Mr Paciullo. There is a Foundation that is going to be set up. It was going to have representatives from Macquarie Bank, from the Council and from the Bulldogs on it but on advice the Council wasn't to have any representation or any say in which the Foundation was being run. Is that right?*

MR PACIULLO: *We had advice because we were told we would have a conflict of interest by having representatives because then the Foundation with its own representatives, Council representatives would be making application to itself and we were advised that was a conflict of interest, and at that time not to appoint our representatives.*

7.2.2 The idea of the Foundation came from Macquarie according to Mr McIntyre. Who came up with the idea that the council should stand aside from holding positions on the Board is a mystery. It has been alleged that it came from the Bulldogs, who took control of the Foundation, and its council-given funds, but that allegation has been vigorously denied by Mr McIntyre.

MS JOHNSON: (28/01/04, p.81–82) *I just wanted to come back to that idea of the Foundation. You say that that was a suggestion put forward by Macquarie Bank. Is that right?*

MR McINTYRE: *Yes. We didn't want to make say 200,000 or 300,000 or whatever it was and lose half of it in tax so we formed a Foundation, a profit Foundation. It was Macquarie's idea. We got our tax exemption. We were refused our land tax exemption and our stamp duty exemption but we were confident, had we contested the first levy of those duties, that we would have won it on a court case. So there was enormous value in using the Foundation. It was a vehicle—being non profit, it wasn't the Council and it wasn't us—it was still, you know, community—there was a community feeling about it and if you want to address, later on, the directorship of that, when you see the final directorship of that I think you will agree that it is very community, you know, aligned, as far as the directors are concerned.*

MS JOHNSON: *Well I wanted to come to that because in fact, initially, if I'm right in recalling it, it was proposed that Macquarie, the Council and the Bulldogs would have equal directors on the Foundation. Is that the initial proposal?*

MR McINTYRE: *That's right. Four each but Macquarie—sorry, but the Council could not, for legal reasons, you know, sit on—appointed—sorry, took the view that it couldn't appoint its directors.*

MS JOHNSON: *Right. Do you remember how that issue arose? I mean, there's been the suggestion frankly, Mr McIntyre, that it was the Bulldogs who first pointed out this difficulty to the Council. Is that your recollection?*

MR McINTYRE: *No. That's certainly not correct. No.*

MS JOHNSON: *How did that issue come up, to the best of your memory?*

MR McINTYRE: *You shouldn't be sitting on the Council if you don't know that. You know, I think Council would have known it themselves. I'd like to know who said that. I mean, as anyone knows, that you couldn't sit on both sides of a development situation. You couldn't be both the developer and the consent authority.*

7.2.3

Mr Carr was asked for an explanation of the fact that the council had no active part in the running of the Foundation. Mr Carr's first answer was that the council was warned in the Ernst and Young Probity Report that there were potential conflicts of interest. The Probity Report, however, does not mention specifically any problems that might arise because the council was the consent authority for DAs. It vaguely mentions the possibility of council representatives having different obligations to council and the Foundation. It doesn't specify what these obligations might be, except to say that they may arise from differing duties of confidentiality and good faith. This doesn't make much sense when the same thing could surely have been said of the Bulldogs or Macquarie. The Probity Report also mentions potential liability issues arising to council if its representative were to be in breach of their obligations as a Director of the Foundation, or if the Foundation traded insolvently. The same issues could have been put about the Directors of any organisation. None of the issues raised in the Probity Report constituted a reason for the council not to appoint Directors to the Foundation. Mr Carr's use of the Probity advice as a reason for the council not having Directors on the Foundation is a nonsense. The Probity report only came to council on January 31 2001, and the council voted in favour of the Commercial Agreement on February 5 2001. The council decision not to have Directors on the Foundation was made long before January 31 2001.

MR BROAD: (02/02/04, p.31–32) *Can I jump back to the commercial agreement? Under the commercial agreement a vehicle being the Foundation was created. One of the major aspects of that, of the Foundation was simply this, that Council had no active involvement in its running. Can you indicate the considerations that led to Council not being involved in the Foundation?*

MR CARR: *There was quite a bit of discussion, general discussion about this point in as much that whether Council could be on the Foundation and be seen as the part of the body that was putting forward the development proposals and delivering those proposals on the one hand and then on the other hand sitting as a planning authority and determining those, ultimately determining those applications. It was considered that there could well be a conflict of interest.*

MS JOHNSON: *Who considered that, Mr Carr? You said "it" was considered. Was it considered by you, was it something put forward in advice you received?*

MR CARR: *It was considered in the probity report and if I could report to that report, I do have it tagged if you'd like.*

MR BROAD: *Yes, please do, please so. Don't feel that you should answer questions without reference to documents.*

MR CARR: *In the Ernst and Young probity report on page 6 it reads:*

There is potential for conflicts of interest in relation to Council exercising its entitlement to appoint representatives to the Foundation Board of Directors.

It then goes on to say:

Potential problems may arise from differing duties of confidentiality and good faith arising from the representative having differing obligations to Council and the Foundation. There may also be potential liability issues arising to Council if its employee representative is in breach of his or her obligations as a director of the Foundation or if the Foundation is found to have traded insolvently.

7.2.4 When Mr Carr was questioned further on the topic he switched to the argument that the potential conflict of interest was broadly discussed within the council, and the sense of his argument was that there was agreement that a conflict of interest existed. He argued that the legal adviser, Mr Boland, had alluded to it as well.

MR BROAD: (02/02/04, p.32–33) *That was in the probity report which is dated 21 January 2001.*

MR CARR: *Yes.*

MR BROAD: *Sorry, 31 January 2001.*

MR CARR: *Yes, 31 January.*

MR BROAD: *Council entered into the commercial agreement on 6 February 2001.*

MR CARR: *Yes.*

MR BROAD: *I think you have indicated earlier that there was a process under which the commercial agreement was drafted long before then.*

MR CARR: *Yes.*

MR BROAD: *Was that the first time that it was suggested that there might be a conflict of interest if Council acted as consent authority?*

MR CARR: *No, I think it was generally being discussed about that dilemma. I think initially it was being talked about that the Council would talk about the Council being on the Foundation. Then it was suggested it can't be the planning authority and then Council wasn't going to be on the Foundation until its planning responsibilities or a certain time period had elapsed which is how I think it was described in the commercial agreement. So it was certainly seen as being something that was difficult because of Council's role, even though it has an independent hearing and assessment panel but ultimately the recommendations from that independent hearing assessment panel come to Council for it to make the decision and so it was considered by the probity auditor and also the legal adviser John Boland alluded to the potential conflict of interest.*

7.2.5 Mr Boland, at the Public Hearings, stated that he did not advise the council that there would be a conflict of interest if council Directors were to join the Foundation's Board whilst DAs were being processed. Subsequent to his appearance at the Public Hearings, Mr Boland supplied the advice he had given the council, and it is clear that he never suggested that they should not have Directors on the Board of the Foundation. The issue then becomes: why did the Mayor and the former General Manager both claim that Mr Boland gave them such advice? The Mayor actually did not name Mr Boland. Since Mr Boland was their legal adviser at the time, it is reasonable to assume that it was he that the Mayor was referring to when he said that they had abstained from putting representatives on the Board because of legal advice.

(Abbott Tout Letter to PwC 11/09/00)

Dear Sirs

LIVERPOOL CITY COUNCIL – WOODWARD PARK REDEVELOPMENT

We have been requested by Brian Carr to write you concerning issues relating to the Constitution of the Bulldog Sports & Community Foundation Limited (the “Foundation”).

As you know the Foundation is the key participant with the Council in the proposed transaction in that it will be responsible for performing the construction of the various facilities in which the Council is particularly interested as well as the other developments which it is proposed will result in the community facilities being developed. By “community facilities” we refer to the Arena, Waterpark and Stadium. We appreciate that the Council will not own any of those facilities.

The following matters are pertinent:

- 1. The Foundation was incorporated as a company limited by guarantee with the Constitution which you have seen. The Constitution is in a fairly standard form for a company of this nature with the only matters particular to this Foundation being its objects (Clause 1.4) and particular matters relating to the directors and their appointment contained in Clauses 6.1 and 6.3 which entrench Bulldogs Rugby League Club and Macquarie Bank.*
- 2. For a company to be incorporated as a company limited by guarantee it is necessary for ASIC to be satisfied that its objects are charitable and that upon liquidation any surplus assets will not be paid to the members but to a company having like objects— see Clause 11.1.*
- 3. In the present circumstances it was essential that the Constitution also be in such a form as to give the Foundation tax exempt status and of course the confirmation of that status is a condition precedent of the proposed Commercial Agreement.*
- 4. It follows from the above that it is not possible for the assets of the Foundation at any time to become assets of the Council.*
- 5. For the reason set forth in 4, the best that could be achieved for the Council in relation to the assets of the Foundation is for it to have control of the Foundation. This would enable it to direct use of the assets of the Foundation for the objects of the Foundation which are to be for the benefit of Woodward Park. In this regard, the objects of the Foundation when incorporated were wrong and we enclose a copy of a letter dated 11 August 2000 from Clayton Utz referring to the amendments to be made to the objects.*

6. *The protection for Council in the context of funds for the Stadium to be constructed by the Foundation were to ensure that these funds did not get paid to the Foundation but were instead retained in the Stadium Trust account and Stadium Retention Account.*
7. *To achieve control of the Foundation in the event that less than two of the Arena, Waterpark or Stadium were constructed, Clause 17.7 of the proposed Commercial Agreement provided for “control of the Foundation” to be provided to the Council by the League Club, the Bulldogs and Macquarie with all necessary changes to be made to the Constitution of the Foundation to effect that. It was intended that the formal documentation would ensure that the process by which that result would be achieved would be detailed.*

We trust that this will help explain the constitutional matters relating to the Foundation for the purposes of your advice to the Council. Please do not hesitate to contact (sic) the writer should you require any further input.

Regards,

John Boland

MR BOLAND: (27/01/04, p.64) *The reason that the Council did not become involved in the Foundation at that time, was a perception within the Council or the Council offices that it did not wish to be part of the Foundation in the sense of having anything to do with its management, at a time when it would be needing to consider the development applications put forward in relation to this project. Now, I most certainly advised them at the time that that was when Councils are considering, because of the state that the EP&A Act is, Councils are considering at all times, applications in respect of their own developments on their own land, and this was no particular exception to that. The Council in its wisdom said: we don't want any part of the Foundation, and that ultimately was reflected in the commercial agreement.*

MS JOHNSON: (27/01/04, p.66–67) *You were saying earlier about—the structure of the board changed so that only the directors—the only people who were to be directors on the board were people nominated by the Bulldogs and not by the Council. I'm right in understanding you say that, that was—who made that suggestion initially, do you recall?*

MR BOLAND: *The Council did not want to be represented on the board for the reason, as I said a little while ago, that it did not want to be considering the development application of an organisation of which it was part of the management.*

MS JOHNSON: *And that was, you say, the Council or the suggestion of the Council officers, is that right?*

MR BOLAND: *Yes.*

MS JOHNSON: *And contrary to your advice?*

MR BOLAND: *No not contrary to my advice. My advice was that there was no problem with it and I pointed out as I did earlier, that Councils are all the time considering development applications in respect of Councils own land and that this was no different.*

MS JOHNSON: *It just that certainly Mayor Paciullo gave evidence the other day that his recollection was that in fact they had come to that agreement or reached that decision on the basis of advice—legal advice given to them, but you say that wasn't - -*

MR BOLAND: *I did not give that advice.*

7.2.6

Mr Carr was given a copy of Mr Boland's advice by the Inquiry. He responded to it when he next gave evidence at the Public Hearings. Mr Carr argued that the council's viewpoint was always that it would have representatives on the Board of the Foundation, but it was a matter of when that would be appropriate. In reference to Mr Boland's clear advice that there was no obstacle to the council having Directors on the Foundation, Mr Carr stated that, although he had received the advice, he couldn't recall seeing it, nor could he recall discussing it with Mr Boland. He implied that Mr Boland had not pressed his advice on the council. He states that Mr Boland was sent a copy of the draft CA the day after Mr Boland's advice had gone to the former General Manager. In that draft it was stated that the council would have representatives on the Board, but only 'after certain events'. Mr Carr believes that Mr Boland had not highlighted his advice 'in a progressive way'. He couldn't recall Mr Boland raising his advice at subsequent meetings and in further written advice.

MR CARR: (26/02/04, p.20–21) *The only thing I can recall about that was that it was always contemplated that Council would be on the Foundation. That was always the view. It was never a question that Council ought not be on the Foundation, it was always the view that it ought to be, but then really it went down a path of: well, they ought to be on it but it's a question of when they should be on it.*

MR BROAD: *Mr Carr, I think the Inquiry sent to you some documents provided by Mr Boland and I think attached to that was an advice from Mr Boland about Council being represented on the Foundation. Have you received those documents?*

MR CARR: *Yes, I have and I read them yesterday.*

MR BROAD: *Do you acknowledge that what Mr Boland was putting in that memorandum, was in fact, received by Council?*

MR CARR: *I accept that the letter was received. In reading that, I really can't recall it but I accept the fact that it was certainly received and I can't recall speaking to John Boland about it. I read it yesterday and I collected some thoughts and some views about this matter, which I'm sure I can outline to you.*

MS JOHNSON: (26/02/04, p.30–31) *On that point, Mr Carr, I think last time your evidence was that your understanding was that, for the Council to have directors on the Foundation would amount—you had received legal advice that that would amount to a conflict of interest? Is that right?*

MR CARR: *Yes. That was the evidence I gave on 2nd and 3rd, where it has certainly been my view all along that the Council could be on the Foundation. There was no issue about that, but it was a question of when they ought to be on the Foundation, because of this real or perceived conflict of interest that it had to contend with, and I know that letter from John Boland, which I have now read, gives a contrary view.*

MS JOHNSON: *So you would agree that Mr Boland's evidence, I think, as we discussed on the last occasion, was that his advice had always been that Council could have directors on the board of Foundation, and you have now seen two advices from him, and you would agree that that is the tenor of those advices?*

MR CARR: *That is certainly the tenor of those advices, but I have to say that, whilst that letter is dated 10 October, the draft commercial agreement received by John Boland on 11 October, had a clause 19 point (c) point (1) in it, which actually goes to the point of Council being on the Foundation with two members, but only after certain events. I just find it quite interesting that the issues that were raised in that letter of 10th of the 10th, certainly didn't get a major highlight by Mr Boland. I don't believe he highlighted them to me in a progressive way, and I don't think that the other people sitting with the Council on negotiations had that view either, and so that's why when I read it yesterday, I was really quite surprised, but it was sent and it was there and I can't dispute on - - -*

MS JOHNSON: *It wasn't something that was, from your recollection, continually reiterated by Mr Boland then?*

MR CARR: *No, I don't believe it was at all. In fact, I can recall the issue of the Foundation as part of the commercial agreement negotiations mainly, and that the Council could be on the Foundation, that was a given. The number of representatives—it started out with two and ended up with four, and the question was always when would be the appropriate time because of this conflict of interest. The draft letter obviously didn't get the attention it ought to have, because we were always questioning why, and even though this letter was apparently sent to Price Waterhouse Coopers, it still didn't get picked up or it seemed to have been missed.*

John Boland never raised it at negotiation team meetings or follow-up that I can recall. It didn't seem to get the importance emphasised, and at the same time, in fact, on 11th of the 10th as I mentioned earlier, we received the draft commercial agreement with clause 19 point (c) inserted, and that was a negotiation between George Livanes (sic) that referred it on to John Boland. There was a marked up copy of 16 October that had it in there. There was no mention of this letter that I can recall then.

There was no mention in John Boland's legal opinion of 28 November, which was a letter that he sent at the time, and no mention in the final report. We also had a—right at the end before we concluded everything, before we would take it to Council, I called a consultants group meeting and said to all of them: are there any issues, is there anything that is inconsistent, is there anything that we really need to highlight before we go to the Council? So that's why I accept the fact it was received, but I am quite surprised about it.

7.2.7 In evidence to the Public Hearings some councillors claimed that they did not know that council would have no control over the Foundation when they voted in favour of the Oasis Project. Mr Carr has pointed out that the councillors were informed of the fact that no representatives would be on the Foundation's board until conflict of interest problems were resolved.

MS JOHNSON: (26/02/04, p.24–25) *I also wanted to talk to you a bit about the councillors understanding of the role of the Oasis project in general. We have now heard—since speaking with you on the last occasion, we have now heard from all of the councillors that were involved in voting for Oasis project and it seems that certainly a significant number of the councillors said that they did not know and weren't aware that Council would have no control over the Foundation. Do you recall that issue being a subject of advice to councillors?*

MR CARR: *I find that quite extraordinary that councillors would express that view because I thought it was quite clear that Council was not on the Foundation and in fact, in earlier commercial agreements it was being suggested that Council would only have two members and then towards the end of negotiations, that increased to four which would have then been equal with Macquarie Bank and the Bulldogs Leagues Club.*

MS JOHNSON: *Was it made clear to Council before signing the commercial agreement that that arrangement had changed and that Council would have no one on the Foundation for a particular period of time?*

MR CARR: *It was in, even in my public presentation, I think, where we said that we would only get members on the Foundation after the perceived conflict of interest issues were resolved. It was in the, if I recall it was in the reports, in my report on page 15, where we say that Council remains at arms length and that it was also—I'm sure it was in all the other reports as well, the final reports. I believe that the councillors were very much aware that they weren't on the Foundation until such time as events occurred and then they would be on in equal standing.*

MS JOHNSON: *That was something you felt you highlighted for Council?*

MR CARR: *I thought the Council was very much aware of that, yes.*

7.2.8 Mr McCully, the current General Manager, argued that the council made a bad decision in removing itself from the Foundation, and that the council's suggested conflict of interest did not exist.

MR McCULLY: (04/02/04, p.4) ... *The other area is, I would never have not been where my money was. If I had to put money in the circumstances I have been involved previously with a joint venture, same issue came about the Council's planning, possible conflicts, but it is not difficult, Councils deal with these sort of conflicts all the time. It is not difficult and Liverpool has in fact a very good system in place in dealing with those conflicts where it has to be both the provider of a planning consent and at the same time be involved in project.*

MR BROAD: *Are you referring to the IHAP process?*

MR McCULLY: *Yes.*

MR BROAD: (04/02/04, p.13) *Yes, are there any other aspects that stick out in your mind?*

MR McCULLY: *Only as I said earlier, I would never have accepted advice not to be on the Foundation. I would have been where my money was.*

7.2 Findings

- 1. The council ceded its role on the Board of the Foundation on a false premise: that there was a conflict of interest in its being both engaged in developments whilst it was also the consent authority for development applications.**
- 2. The council received advice from its legal adviser that there was no conflict of interest. It did not follow that advice.**
- 3. The result was that it had no say in how the \$15 million, which it put into the Foundation, would be used, nor would the council have any general control over the Foundation.**

4. **The Bulldogs may not have suggested that council had a conflict of interest, but certainly believed that one existed.**
5. **The opinion that there was a conflict of interest appears to have arisen in discussions within the council. The former General Manager was convinced that it did have a conflict of interest.**
6. **Given the enormous level of control that the former General Manager had over the Woodward Park projects it is quite possible that his conviction that there was a conflict of interest translated into that opinion becoming the official opinion of the council.**
7. **Some councillors, including the Mayor, believed that there was a conflict of interest because the council had received legal advice to that effect. No such advice was ever received.**
8. **Some councillors did not understand that, by not having representatives on the Foundation's Board, they had effectively given control of the Foundation's affairs to the Bulldogs.**
9. **A strong suspicion remains that the conviction that a conflict of interest existed did not spring primarily from within the council, or from the council's advisers; rather, it came from one of its private sector partners. The Bulldogs gained full control over the Foundation because the council decided that there might be a conflict of interest, and had the most to gain from such a decision.**

7.3 Master Plans and Management Plans

- 7.3.1** In 2000 the Bulldogs commissioned Woods Bagot Pty Ltd to prepare a Master Plan Vision for Woodward Park. On page 9 of the Master Plan prepared by Woods Bagot a background to that commission is provided. It reads, in part:

It has become apparent that current development proposals are disparate and ad hoc. They do not "fit" within a coordinated Master Plan for the overall use of Woodward Park.

There is a danger, therefore, that opportunities in terms of site image, urban design, traffic circulation, and movement, synergy of uses and access may be lost through the lack of a strategic and co-ordinated approach to the use of the Park.

The Bulldogs are aware of the significance of this issue. In response Woods Bagot Pty Ltd has been commissioned to prepare an overall Master Plan that brings together the elements proposed to be developed in the Park in a coherent, comprehensive and co-ordinated manner. The Master Plan updates the existing Management Plan for the Park prepared in 1992.

7.3.2 Woodward Park, with an area of 21.85 hectares was dedicated for Public Reserve by the NSW government on January 20 1893.¹ On July 4 1958 the council was appointed as Trustee. On September 29 1961 2.97 hectares were gazetted Reserve R83468 for Public Baths. This was the site that was sold to the Bulldogs and on which their proposed club/hotel complex was to be built. In the second half of the 1980s around 9 hectares of land was vested to the council. The council chambers and the Whitlam Centre were built on this land. The remaining land was owned by the Crown, and categorised as community land. Sections 25 and 26 of the Act require the classification of public land. Section 36 of the Act obliges council to prepare a plan of management for community land. The last plan of management prepared by the council for Woodward Park was made in 1998. Woods Bagot appears not to have known of that plan. The Woods Bagot plan did not update or replace the 1998 plan of management. The Woods Bagot plan was actually an attempt to update the 1992 Master Plan for the Park (incorrectly identified by Woods Bagot as a Plan of Management).

7.3.3 In November 1992 a report, commissioned by council and prepared by LRM Australia Pty Ltd, indicated the need for a Master Plan of the entire Woodward Park site. This Master Plan was prepared by the council in December 1992, following concept design input by DEM, Barry Hall and LRM Australia. The plan, adopted by council, nominated the Liverpool Memorial Pool site for development of a licensed club of 15,000 square metres and a motel of 150 rooms with parking for 230 cars under the building. In September 1993 the pool site was reclassified from community to operational, and a new LEP made the additional uses (defined in the 1992 Master Plan) permissible.

7.3.4 Whilst nominating a general upgrading of the sporting facilities on Woodward Park the 1992 Master Plan did not specify the full detail of the upgrading. The 1992 plan indicated the development of a stadium with spectator capacity in excess of 5,000 and capable of staging a variety of community recreation and sporting activities. The upgrading of Hillier Oval was also envisaged.

MR BROAD: (29/01/04, p.74) *Can I swap away from that theme? In 1992 the Council adopted a master plan for Woodward Park. In the course of your involvement with Woodward Park I assume you've read that.*

MR TURISSI: *In the early days I did, yes.*

MR BROAD: *On my understanding that document basically anticipated upgrading of the Whitlam Centre. It anticipated upgrading of seating, as I recall it, Hillier Park and a general upgrading of facilities.*

MR TURISSI: *I thought it also extended to potential additional uses on the pool side as well.*

1. The site was intended to be available to the public for their use back to the time of Governor Macquarie.

MR BROAD: *It did. I'm sorry, I'm not trying to ignore that. ...*

7.3.5 A generic Plan of Management for playing fields was completed and adopted after public consultation in March 1995. The 1998 Plan of Management consolidated and extended the 1995 plan, and incorporated new initiatives and an action plan to ensure that Woodward Park remained a focus of sport and leisure in Liverpool.

7.3.6 The general objectives of the 1998 Plan of Management were to:

- Provide a framework for consistent planning over a ten year period
- Provide a basis for effective day-to-day decision making
- Ensure that the community could contribute to the development and implementation of the Plan of Management if it wished

7.3.7 The specific strategic objectives for Woodward Park under the 1998 plan were:

- To maintain quality open space for the people of Liverpool
- To encourage and support community usage of Woodward park
- To support local community, sporting and leisure clubs
- To develop a high profile sporting precinct and encourage the use of elite users as well as the existing users
- To create an identity for Liverpool that will provide exposure to the rest of Sydney and possibly Australia
- To ensure contract management quality facilities and services in a cost effective manner for the public
- To extend the range and quality of the leisure opportunities available to the community
- To ensure environmental concerns such as flooding, water quality and tree preservation are considered
- To provide improved pedestrian and vehicular access into the park with particular attention to public transport usage

7.3.8 The Plan of Management for Woodward Park was endorsed on December 11 1998. In a little over a year from that date the Bulldogs had given Woods Bagot their commission. The ten-year Plan of Management was not considered by Woods Bagot; or, at least, there is no acknowledgement of its existence in the Woods Bagot Master Plan. The vision enunciated in the Woods Bagot plan is much grander than that of the 1998 Plan of Management. The vision, as laid out on page 26 of the Woods Bagot Master plan vision has three goals:

- to promote a wide range of sport and recreation facilities available to the people of Liverpool
- to bring national sporting teams to Liverpool
- to improve the image of Liverpool and enhance Liverpool as their home

7.3.9 The actual title of the Woods Bagot report was **OASIS**, with *A Masterplan Vision for Woodward Park* as a sub-title. This document was not a council document, it was a Bulldogs' document proclaiming its vision for the Woodward Park Precinct. It designated three zones on Woodward Park: (1) Licenced Club and Hotel, (2) Water Park and Multi-purpose Arena incorporating a shopping street, residential and pedestrian plaza components, (3) an enclosed football stadium (with 34,800 seats and corporate suites) and redevelopment of the council offices. The emphasis on quality open space, the encouragement and support of community usage of the park, and the support of local community, sporting and leisure clubs (the first three specific objectives of the 1998 Plan of Management) disappeared. Instead, the Woods Bagot plan envisaged developments that would take up most of the open space of the Park including residential developments of 10–12 stories, offices, retailing and restaurant areas, serviced apartments and a motel, and car parking areas as well as the major infrastructure of the three zones. These elements shifted the concept away from a sporting complex into a wholesale development of the Park.

7.3.10 The Woods Bagot plan went beyond the confines of Woodward Park. Part B of the plan outlined uses for Paciullo Park and the council's works depot site that included two commercial sites, a retirement village, three storey walk-up units, high-rise residential, two storey town houses and detached housing lots. Part C of the plan involved the high-rise residential, commercial office, retailing and car parking schemes for Bathurst Street, Warren Serviceway, and Northumberland Street in the CBD. The fact that many of the items on the plan were prohibited uses under the zoning then in place was no deterrent. "Significant amendments to the LEP will be required," the document stated (p.52). Wood Bagot was spelling out the development plans of the private sector groups that would sign the Commercial Agreement in 2001. Their vision was not limited to Woodward Park, or the CBD, or the TAPP's land. On page 25 of the Master Plan document it was stated:

The concept presented in the Master Plan is robust and flexible. It is specific and achievable in the short term, and also flexible in the long term to accommodate the long-term goals and intentions of the stakeholders involved in Woodward Park.

In this regard the concept can be considered almost as a Plan for the whole of government approach for the use of Woodward Park. It goes beyond the development actions that will be undertaken within the site by the Bulldogs, and proposes accountable and realistic actions for government agencies involved in neighbouring development and works for which the development within the park can act as a catalyst and promote their achievement.

The concept in the Master Plan therefore recognises the importance of the area as a whole, and not just Woodward Park, achieving broad, acceptable and popular design outcomes for existing communities in the area.

This is a statement of far-reaching ambitions that goes well beyond the original concepts of providing sporting facilities. This extended vision, coincidentally or not, parallels the sentiments expressed by Macquarie Bank's Mr Wright in relation to Liverpool 2020. The expansion of the Woodward Park scheme to include the CBD and other lands was promoted by Macquarie Bank, who argued that the initial Woodward Park concept was not financially viable without the income from those other developments. It is not fanciful to suggest that the extended vision outlined in the Woods Bagot document represented a longer-term opportunity that the council's commercial partners recognised. Woodward Park may well have seemed to be just the beginning.

MR WRIGHT: (28/01/04, p.58–59) *Well, one needs to take a commercial view at that point in time. Once again, the spirit of the agreement was the development of an assembly of five sites. Frankly, it went a lot further than that. The State Government saw this as a linchpin to develop infrastructure for Bringelly to development infrastructure for the expansion of Liverpool Hospital, Moorebank Technology Park. So it wasn't contemplated that one could simply have a change of heart midstream and say, well, we are going to stop here because there happens to be a surplus in the tin because that will not have achieved what Liverpool really wants to set out and do and that is to deliver some elements to the community that it currently can't afford. So I would have thought, if that decision were made, it would be made with the State Government, Macquarie and Council involvement.*

MS JOHNSON: *The State Government is not a party to this agreement, though.*

MR WRIGHT: *The State Government is a stakeholder, absolutely a stakeholder.*

PROF DALY: *In respect of the DLAWC land?*

MR WRIGHT: *Absolutely.*

PROF DALY: *Is what you are saying that this MOU goes well beyond the Woodward Park, TAPP's land, CBD land but also prospectively guides Council into involvement with these other facilities?*

MR WRIGHT: *I am not saying it involves it. I am saying it could for the strategic platform for it. Council already is a desired stakeholder in what is referred to as Moorebank Technology Park. It is already party to a tri-party arrangement with Premiers and Department of Defence so it wants to have an involvement there. Council has a challenge going forward, as does the State Government, in terms of Bringelly.*

So no, it is not a contractual link but it is a very obvious and useful strategic platform with which one could achieve those outcomes in a far better way. No, there is no link between this and Bringelly. There is no link between this and Moorebank Technology. There is no link between this and the Minister for Health's desire to create a larger health precinct in Liverpool Hospital but Council is a stakeholder in all of those.

PROF DALY: This is something that Macquarie would put forward as being, perhaps, the seed for future projects?

MR WRIGHT: I would go so far as to say it has been put to us by the Premier's Department, it has been put to us by Council but there is no contractual obligation to bind this arrangement to any of those, there is none. It just makes good sense.

7.3.11 On March 2 2000 the Strategic Panel of the council received a special briefing on the draft Master Plan for the Oasis project, attended by representatives of the Bulldogs and Macquarie. This was their first introduction to the enlarged concept for the Woodward Park Precinct, with the Bulldogs putting the projected expenditure on the Project at \$1 billion. On March 29 2000 a revised draft of the Master Plan was submitted to council by Woods Bagot on behalf of the Bulldogs.

7.3.12 On April 26 2000 the former General Manager reported to the council on the briefing and draft delivery of the Woods Bagot plan. Nowhere in his report did the former General Manager refer to the 1998 Plan of Management for Woodward Park. Mr Carr did not refer to the 1998 Plan of Management because, extraordinary as it may seem, he didn't know it existed (see 12.2.7). In fact, Mr Carr admitted that he did not know which parts of the council's community lands had plans of management. Under Section 35 of the Act community land is required to be used and managed in accordance with the Plan of Management applying to the land. As pointed out earlier, much of the land included in the Woods Bagot document was owned by the Crown. The council was simply trustee for that land. It was categorised as community land, and Section 35 of the Act had to be complied with. By ignoring the existing Plan of Management in his report to the council, and in recognising the merits of the Woods Bagot Master Plan, the former General Manager was acting in breach of Section 35. The Woods Bagot plan simply by-passed the categorisation of the land with which it was dealing. It did so with the recognition that at some time both zonings and classifications would have to be changed. For such land to be reclassified the council is obliged, by Section 34 of the Act, to give public notice of its intentions and the public may make submissions in respect of the proposed reclassification. The council's obligations in relation to community land were not indicated by the former General Manager at the April 26 2000 council meeting, the first meeting at which he outlined the Oasis vision as laid out in the Woods Bagot Plan. The 1998 Plan of Management was still in force.

- 7.3.13 Over the next three years the 1998 Plan of Management for Woodward Park appears to have been totally forgotten, and no action was taken to reclassify the community land. Negotiations were undertaken to purchase the Crown Land. The purchase was never realised. Had it been achieved it would not have changed the fact that the land was classified as community land, and that a public process had to be initiated if the classification were to be changed.
- 7.3.14 What did occur was a de facto adoption of the Woods Bagot Master Plan by the council. The council did not commission the plan, the Bulldogs did. There was no public discussion as to its contents, and precious little opportunity for the Elected Representatives to discuss it. What the council was doing was allowing the plan for the Woodward Park Precinct to be created by the Bulldogs and Macquarie. The Woods Bagot Master Plan simply gave a planning framework to the schemes devised by the two private sector parties. All of this was done in 2000; that is, before the council had signed the Commercial Agreement. After the signing of that agreement the council had no choice but to run with the Woods Bagot plan. At the February 5 2001 council meeting, when the Commercial Agreement was approved, a resolution of council showed just how the Woods Bagot plan had been accepted by council as if it had real legal status. The resolution authorised the General Manager to secure project management services to “manage the implementation of the *Oasis Master Plan* project” (italics added).
- 7.3.15 Council never ratified the Woods Bagot plan. To do so required a number of steps to be taken by the council. The first step would have been a public exhibition of the plan and a community consultation process would have followed. If the council were to support the plan, there would have followed a series of rezoning proposals that, again, would require public exhibition and consultation. If the rezonings were then approved, the plan would be gazetted, and DAs would be lodged for the various constructions within the plan, with another round of public exhibitions and consultations. Without ratification (and without public exhibition and consultation), however, the Woods Bagot plan became the Oasis plan, and the blueprint for the future of the Woodward Park Precinct. Not only did the council lose its money in the Oasis saga, it effectively lost its authority over the planning process and allowed its private sector partners to take control. At no time did the Woods Bagot plan have any legal status. In a mind-blowing exercise in irresponsibility, the council acted illegally, accepting the Master Plan as if it were their own. By doing so, it irretrievably committed the council to the Oasis Project. By giving its private sector partners effective control over its planning system in relation to the Woodward Park Precinct, the council became a pawn in their hands.

7.3.16 A memorandum from the acting project manager—Woodward Park—(Mr Turissi) illustrated the extent of that control. It was sent to councillors and senior staff on August 7 2001 as an update on the progress of the Woodward Park Project. It advised that council had engaged Woods Bagot to prepare the LEP/DCP for the Woodward Park project. The planning firm chosen by the Bulldogs to prepare the Master Plan were then chosen by the council to prepare the detailed planning instruments for the project. The council's abdication of its role appeared to be complete.

7.3 Findings

- 1. The Bulldogs took the lead in developing a Master Plan for Woodward Park, engaging Woods Bagot to do the task. Without due consideration the council allowed this plan to become the blueprint for the Oasis Project.**
- 2. The Bulldog's Master Plan was presented to council as if it were the council's Master Plan. This means that the Commercial Agreement was signed by the council on false pretences.**
- 3. Most of the land on Woodward Park itself was classified as community land. The Act requires that a Plan of Management be put in place for community land, and council endorsed a ten-year Plan in 1998. The Woods Bagot plan paid no heed to the 1998 Plan of Management. Since the council gave de facto recognition to the Woods Bagot plan, it ignored its own Plan of Management, and in relation to the parts of Woodward Park classified as community land, breached Section 35 of the Act.**
- 4. By its actions the council allowed the effective plan for the Woodward Park Precinct to be created by its commercial partners.**
- 5. The Woodward Park elements of the Master Plan showed that the original concept of forming a sports complex on the park, had enlarged to make sporting facilities one part of a more general, wholesale development on what was essentially a public park. The continued emphasis on the sports aspects of the schemes in public statements by the council belied the real nature of the developments.**
- 6. Council gave its de facto recognition of the Woods Bagot Master Plan before it signed the Commercial Agreement. Once it had signed it was locked into the Master Plan by the terms of the agreement.**

- 7. The Woods Bagot Master Plan was never ratified, and the community was never given the opportunity to have an input into the planning process. This unratified plan formed the basis of the progression of the Woodward Park Precinct Projects in 2002 and 2003. It largely forms the general planning background to the Macquarie MOU.**
 - 8. The Woods Bagot Master Plan extended the Oasis scheme into areas beyond Woodward Park. The private sector parties that signed the Commercial Agreement led this process. The tone of the Woods Bagot Master Plan suggests that the ambitions of the private sector parties extended beyond the confines of the Oasis scheme.**
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Section 8: Council's Team

8.1 Delegations

8.1.1 On September 22 1997 council delegated to the Mayor and Mr Carr the authority to negotiate on matters concerned with meeting council's objectives for Woodward Park. On March 6 1998 the council meeting, in closed session, delegated to the General Manager and the Mayor to expedite negotiations with the State Government on financing council's proposals. At the same meeting the council delegated the Mayor and the General Manager to negotiate with the Slammers and the NBL regarding admission to the National Basketball League. At the council meeting of March 18 2003 the Mayor and General Manager were authorized to be the sole and exclusive spokespersons for council in relation to the Macquarie MOU.

8.1.2 Section 377 of the Act states that a council may, by resolution, delegate to the general manager or any other person or body any of the functions of the council, other than certain specified functions in Section 377. The exceptions relevant to this Inquiry include:

- The borrowing of money
- The voting of money for expenditure on its works, services or operations
- The compulsory acquisition, purchase, sale, exchange or surrender of any land or other property
- The acceptance of tenders which are required under this Act to be invited by the council
- A decision to classify or reclassify public land under Division 1 of Part 2 of Chapter 6
- The review of a determination made by the council, and not by a delegate of the council, of an application for approval or an application that may be reviewed under Section 82A of the *Environmental Planning and Assessment Act 1979*

It will be recognized that many of the activities entered into by the delegated negotiators involved such matters as borrowing money, committing council money, acquisition and sale of land, tendering, and reclassifying land. Since the former General Manager and the Mayor effectively made numerous decisions in relation to these matters, decisions then rubber-stamped by council, they breached the spirit, if not the letter, of Section 377.

- 8.1.3 The only power that the Mayor and Mr Carr had under the delegations was to negotiate with parties connected to the Woodward Park projects. The problem was that by September 1997 there were already a number of parties interested in Woodward Park. The parties had linkages to each other, and had, by then, developed agendas about what they wanted to get out of Woodward Park.
- 8.1.4 Mr Achilles Constantinidis was one of the parties. Mr Constantinidis had been involved in a number of consortia looking at building sporting facilities at Homebush for the Olympic Games. The South Korean group, Daewoo Corporation, had an interest in getting contracts related to the housing village to be constructed at Homebush. In his consultancy work Mr Constantinidis became aware that the Bulldogs were seeking a new home base because, with the advent of Super League, they were required to provide a standard of facilities that was above those of its Belmore site.
- 8.1.5 Mr Constantinidis and Daewoo then put up a “scenario” to the Bulldogs who at that time were contemplating three possibilities: moving to the Olympic site, or building new facilities at Bankstown or at Liverpool. Woodward Park was the site at Liverpool. Within a few months Mr Constantinidis and Mr Lim from Daewoo had developed their “scenario” to the point where the Bulldogs wanted a further presentation. By then it was known that the Bulldogs were bidding for the Razorbacks franchise licence.
- 8.1.6 The plans put forward to the Bulldogs by Mr Constantinidis were generic, in the sense that they were not specific to Woodward Park. There were other parties in discussions with the Bulldogs, and other sites that were being considered.
- 8.1.7 James Hanna had approached Daewoo in 1996 with a proposal to build a stadium at Homebush. In this way he became known to Mr Constantinidis. Subsequently Mr Hanna became involved in the discussions with the Bulldogs. Mr Hanna’s groups (Stardome and Australian Investment Corporation) began working with Daewoo, getting technical support from them.
- 8.1.8 It appears that Mr Constantinidis first spoke to Mr Carr about a zoning matter in late 1996. In his evidence at the Public Hearings (17/02/04, p.65) Mr Constantinidis said that he did not know Mr Paciullo at that stage. Mr Paciullo in his evidence (19/01/04, p.13) said he thought the first contact with the council made by the Stardome group was in 1995.

- 8.1.9** Daewoo lost interest in the Sydney market when the Olympic Village contract was announced in May 1998. The Stardome scheme's design was already half-finished. Mr Constantinidis then became a partner with Mr Hanna. At the bidding of the Bulldogs the Stardome scheme for a football stadium was altered to become a basketball stadium with ancillary facilities including a tennis centre and a hotel.
- 8.1.10** The first formal contact of the Bulldogs with the council was in November 1996 when they wrote a letter expressing their support for the development of Woodward Park.
- 8.1.11** The Bulldogs had then written to the council in June 1997 announcing their intention to shift their headquarters to Woodward Park, building a new club office accommodation, and a stadium. They made an offer to buy the old swimming pool site. They also announced that they were taking a major shareholding in the Slammers.
- 8.1.12** The association of the council with the West Sydney Basketball Management goes back to 1991. Mr Looby, Chair of the organisation (that now trades as the West Sydney Razorbacks), in his evidence to the Inquiry (23/02/04, p.61) described how the organisation approached former Mayor Mark Latham in 1992 after seeing the Woodward Park Master Plan. Mr Latham "embraced the concept" according to Mr Looby (23/02/04, p.64). The Slammers, playing in the second division Continental Basketball Association, then operated with the Whitlam Centre as their venue for the next 5 years.
- 8.1.13** The Slammers wanted to get into the NBL. They were operating on a budget of around \$100,000 whereas an NBL franchise required a budget of around \$2.5 million a year. The group then approached the Bulldogs in late 1995 or early 1996, for support. The Bulldogs initially took a 51% share, which translated into a 100% share within a few years. Since the company had few assets, and were really only selling their community-based aspects, the Bulldogs bought the group cheaply, but when the Slammers gained entry to the NBL, the Bulldogs had to pay a \$2 million licence fee.
- 8.1.14** To be accepted into the NBL competition the Slammers would have to provide a basketball stadium with a minimum of 5000–5200 seats. In 1996, but before the Bulldogs had purchased shares in the group, the council was approached for assistance. They asked the council to provide them with a letter stating that the council would upgrade the Whitlam Centre or undertake a feasibility study for a new venue on Woodward Park. The council acceded to the request. (Looby: 23/02/04, p.67).

- 8.1.15 Mr Looby reported that there had been three submissions to the NBL in 1995, 1996 and 1997 (23/02/04, p.62). The last one was successful, and the team was due to play in the season beginning October 1998. Mr Looby stated that he was primarily dealing with Mr Paciullo and Mr Carr at the council.
- 8.1.16 When Mr Paciullo and Mr Carr began as delegated negotiators for the council they were doing so against a very complex and interwoven set of linkages. The relationship between the council and the basketball team was well established, and the council had made a public commitment to the NBL to assist the Slammers. The connection between the Bulldogs and the council was at least two years old. The Bulldogs were proposing big developments on Woodward Park, including the purchase of the old swimming pool site and the development of a number of new facilities on the site. The Stardome group had been dealing with the Bulldogs for some years, and had also approached the council with proposals for Woodward Park. The Bulldogs had purchased the basketball team.
- 8.1.17 This complexity of linkages immediately made the tasks of the negotiators much more difficult. The council's own links with certain groups, and its own strong desire to see developments on Woodward Park, coloured the approach to negotiations. The negotiations were not entered into with council having a precise plan of what infrastructure was needed, or how to put their priorities in place. At the very start the council was not negotiating from a position of strength, as would be expected since they were the owner of the basic assets (land and property), but from a position of weakness. The council was in danger of becoming the pliant client of the other parties. The six years of negotiation show that the council largely followed the leads of others.
- 8.1.18 As the schemes for the Precinct changed and grew, and as new groups entered into the fray and others left, the negotiating goals for council became more unclear. Lacking their own business and action plans, the negotiators were prone to be led by the external parties, rather than *laying down the path and defining the outcomes that protected councils' interests and achieved community goals*.
- 8.1.19 Each of the other parties with which the council negotiated was clear about their priorities. The Razorbacks (and the Bulldogs) wanted a basketball arena. The Bulldogs wanted their club/hotel/office complex, and a stadium. Macquarie wanted to make money, and to have a set of projects that would generate enough income to fund them all. The council negotiators wanted to provide an outstanding set of facilities in the Woodward Park Precinct, and believed that the external parties had the knowledge, money and drive to make the "dream" come true. Although the negotiations were often tense and difficult, the fact that the two delegated negotiators were in awe of their private sector partners, and the dreams they spun, meant that the outcomes were predictable.

8.1.20 The delegated negotiators actually had no powers. Section 377 of the Act specifies that borrowing of money, acquisition and sale of land, decisions to reclassify public lands, possible tendering, planning and applications and approvals of developments, are all items that cannot be delegated. In practice the governing body eventually provided the necessary approvals for projects on the Woodward Park Precinct. There is evidence, however, that at least some councillors approved them without adequate understanding of what they were doing. By the time that the various matters reached the Elected Representatives effectively the deals had been done, and they had been done by the negotiators. The disgracefully poor communications with the elected body by the delegated negotiators, meant that virtually no information was passed on whilst the negotiations took place. At the point of voting the Elected Representatives were given background to what they were voting on (usually with a very positive spin placed on the outcomes). But they were left little time for either absorbing the information or assessing it. The huge authority of the Mayor meant that the various items would be passed regardless; there was not one major item, to do with the Woodward Park Projects, knocked back.

8.1.21 The Bulldogs and Macquarie Bank, who negotiated separately with each other, devised the grand scheme for the Oasis projects. Much of the information on the Oasis project was passed on to the negotiators by the Bulldogs after the plans had been agreed by the two private entities. The negotiators did have some influence then on how matters might proceed, but a fair bit of this was post facto negotiating. The limited real role of the governing body was even further diminished by the fact that the big decisions were agreed on by the private sector parties before the negotiators knew about them.

8.1 Findings

- 1. The delegated negotiators for the council did not formally violate the requirements of Section 377 of the Act; the governing body ratified all items that flowed from the negotiations. They did so without sufficient information, or the opportunity to understand alternatives that might have arisen while the matters were being negotiated. By the time matters reached the Elected Representatives the crucial decisions had been made during the negotiations. In practice there was a de facto violation of Section 377.**
- 2. The very complex array of linkages between parties at the start of the negotiations, and the repetitive enlargement of complexities during the negotiations, meant that the council's position in relation to the various parties was never clearly defined. The result of this was that the private sector groups tended to dictate the direction of the negotiations, and council became an aider and abetter of their ideas, rather than arguing from a distinctive council position.**

3. **The lack of any forward planning by council about what infrastructure was best suited to Woodward Park Precinct meant that the negotiators had no clear position from which to argue. Indeed, their enthusiasm for the “dream” made them willing partners, accepting the broad thrust of what was offered to them, but having little capacity to do more than make modifications around the edges of the schemes devised by others.**
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8.2 Expertise, Experience and Risk

- 8.2.1 There is no defining skills base that characterises Elected Representatives across councils. In the past decade there has been a fairly high turnover of councillors in many councils, probably reflecting changing community values and expectations. This has created a more varied set of interests and skills within the elected part of the Local Government community. Local issues change from council to council, and councillors are likely to be elected because the community believes they have the skills and desire to manage those local issues. As a result the skills base of councillors will vary from council to council, and within councils it might vary after each election.
- 8.2.2 The Woodward Park Precinct projects were very different to the kind of projects that are undertaken by most councils. The scale, costs, and probable time-frames for completion, were all much larger than normal. The Oasis project was by far the largest ever attempted by Liverpool City Council, and one of the largest projects attempted by any council in Australia. It is not disparaging the councillors involved to suggest that they were novices at the task of overseeing something like the Oasis project.
- 8.2.3 The Mayor, Mr Paciullo, had vast experience as a Cabinet Minister in the New South Wales Government, and as Mayor. His authority was recognised by many of the other councillors, and they were willing to follow his lead when the various projects came before the council. Mr Paciullo was remarkably frank about the level of his expertise when it came to matters to do with finance, as the following extract from his evidence of 19/01/04 shows. The fact that the most experienced person in the council, and the person to whom many councillors looked for leadership, had no grasp of financial issues signifies the weak skills-base of the group making decisions concerning the largest financial undertaking the council had ever attempted.

MR VINCENT: (19/01/04, p.64–65) *I will come back to the financial position in more detail later during the hearing, but I would just like to get a bit of an overview at this stage. The first question I would like to ask you is what role does the Mayor play in the financial management of the Council?*

MR PACIULLO: *My understanding of the direct role of the Mayor is a person who has responsibility for—as the Mayor of Council decisions, policy guidance and in between if necessary of taking decisions which are obviously then reported to Council. I don't know of any role that is expected of me in terms of financial management, however, I qualify that by saying that obviously those type of decisions about financial issues, one has to make a decision about, but subject of course to the consideration of advice from whether it comes from your auditor or from your financial officers or whatever.*

But just to reiterate, I don't take any initiatives about financial matters, but if to explore that, if the matter was raised at the Council with me, that was necessary for the Council to make a decision to correct a particular financial situation, obviously there would be a recommendation and I would—I know that as a matter of the conduct of my public affairs over the whole of my lifetime, I value that professional advice and there would be probably no circumstances which I would vary advice, there would have to be extraordinary circumstances for me to agree with that because I have the view, I haven't got that expertise.

8.2.4

The Deputy Mayor, Ms. Waller, had 25 years experience in the welfare sector, and nine years as a councillor. Ms. Waller clearly had some business experience but she was, at least initially, willing to follow the Mayor's assurances about changes in the Woodward Park Precinct, and the general soundness of the approach. As her evidence shows, she believes that the Mayor portrayed himself as a person of experience, and acted as a leader at meetings. At no time did he suggest that he lacked expertise in the fields relevant to assessing the projects. She stated that she only realised what the developments were costing the council, and what had been “lost” when she took over as Acting Mayor. She was astounded at how bereft the council's strategy was in terms of its own strategies and information bases.

MS JOHNSON: (21/02/04, p.26–28) *Right, and so was there a tendency for the Mayor to say: well, this is my view, this is how I reckon we should play it, and people to basically fall in behind his views is that - - -*

MS WALLER: *I would say that is a true reflection of what would happen, yes.*

MS JOHNSON: *You said that the Mayor certainly portrayed himself as being someone of experience to the Councillors. I'm not trying to put words in your mouth, is that a fair characterisation?*

MS WALLER: *Yes, yes.*

MS JOHNSON: *He said yesterday when he was giving his evidence that: he never professed to have any expertise in a range of matters on which he always sought advice. Did he ever put that proposition, or portray himself in that way to the Councillors that he was someone without much expertise in areas of development, legal advice, feasibility, probity and that he would just follow the advice of his advisers?*

MS WALLER: *I believe the Mayor acted as a Mayor in that forum and felt that he was the leader of the team and attempted to behave that way most times.*

MS JOHNSON: *Did he ever say: I'm just following the advice that we have received, I don't have expertise?*

MS WALLER: *No, he never said he didn't have the expertise, but there were occasions where he would say that he was—he had been advised by his officers and then there would be some discussion over that advice but, no, he has had 30 years of experience in the political arena and been a Minister of the Crown and has been there twice and as told people that on many occasions.*

MS JOHNSON: *Did you ever have an opportunity to have input into the kind of advice that Council received? You have heard Mr Paciullo say yesterday that he had not received advice on this topic or that topic and if he had received particular advice, he wouldn't have gone ahead in such a way. If you ever felt that there were gaps in the advice received by Council, did you feel you were in a position to say to the Mayor and/or the GM: I think we need advice on this particular issue addressing these sort of potential problems, or to cover this gap, can we get that before we proceed?*

MS WALLER: *Well, there is two things. One—the first thing is, yes, I thought there were gaps. Yes, I raised that with both the General Manager and the Mayor. The General Manager sometimes would attempt to address my concerns, but more often than not the response would be: everything is fine.*

The second issue is that I was able to become Acting Mayor for a period of three months when the Mayor stepped down and that became quite an experience, in the sense of fully appreciating how the Council was functioning internally, and I was genuinely—as a manager in my own right and with professional qualifications I might add—quite alarmed at the culture in the sense of how the information was flowing internally.

I have to say, I used that particular opportunity to try and get as much information as possible and as many facts as possible out into the open and to my fellow Councillors—to all Councillors—so we could consider the situation we were in and the—there were two major outcomes for me in that short time, one was resolution from Council that—and it was the last meeting in December before we went into the break over Christmas—where we agreed that if there were any outstanding issues that caused alarm to the Council, that they be raised with the Australian Securities Commission, or any other appropriate body.

We asked our solicitors to pursue that on our behalf because they were closely monitoring the Bulldogs issues in regards to what had been happening there. The other issue was to ensure that the Bulldogs were removed from any relationship with the Council, and the Council resolved generally those two matters. We also looked at what—for the first time, I believe, we looked at how much this Arena was really costing the Liverpool Council and the ratepayers.

MS JOHNSON: *Can you remember what the answer to that was?*

MS WALLER: *Yes. I was informed—well, it was confirmed to me that we most certainly lost the car-parks and the community facilities which I only suspected, I didn't know.*

MS JOHNSON: *What do you mean by “lost”, sorry?*

MS WALLER: *They were going and that we would have to build the community facilities—the car-parks were sold in the agreements—because that was never confirmed.*

MS JOHNSON: *Right.*

MS WALLER: *It was also confirmed to me we didn't have a business plan, a feasibility study, there had been no studies done, there was no long term impact on the project had been really looked at, that generally the cost of the Arena had gone from roughly \$40 million to \$69 million, that the arrangements of managing the project were in my view a disaster, that the Foundation had not been reporting to Council in any way, shape or form, that the moneys had not been safeguarded the way we would have liked and, generally, it was quite a concern. I felt very alarmed from that point onwards about where this project was heading.*

MS JOHNSON: *Was that the first time that you felt you had a clear picture, or a true picture of the cost and the situation of the way things were?*

MS WALLER: *Yes.*

8.2.5

As Ms. Waller pointed out in her evidence, four of the ALP councillors elected in 1999 were new to the council. The inexperience of these councillors added to the likelihood of their accepting the Mayor's assurances about the soundness of the various projects under consideration. The background of these four councillors is briefly reviewed, based on their evidence at the Public Hearings. Ms. Anthony has a public service background, working for one of the locally elected state members. When asked by Mr Broad at the Public Hearings whether in her career she had any experience working on large projects (16/02/04, p.39) Ms. Anthony replied no. In her evidence she suggested that there were often heated arguments in caucus concerning Woodward Park issues, but the Mayor's authority within the caucus always prevailed. Mr Gauci worked for the Department of Education and

the Liverpool District Senior Citizen Association. Mr Gauci stated that when information came in too late for it to be considered by caucus, the matter would be vigorously debated at the council meeting. None of this changed the pattern of voting on the major steps in the Woodward Park project developments. Mr Gauci also stated that he believed that the Mayor and the former General Manager had a very strong understanding of the issues (16/02/04, p.84). Mr Karnib is a community worker with the Arabic-speaking community. Mr Karnib said that he voted with the ALP, because he was a member of the party, and that he sought the Mayor's advice at times, and the Mayor would ask the General Manager for explanations, and "we believe him" (16/02/04, p.101). Mr Bowman is a shop manager for a Shed Company. He said that he was an employee in a one-man operated business. Mr Bowman is also on the record of having voted in favour of the Mayor's recommendation in each phase of the Woodward Park precinct projects whilst he was a councillor. The main point is that while the four ALP councillors elected in 1999 came from varied backgrounds not one had professional or commercial experience that would have greatly assisted them in understanding the Woodward Park issues. Either through allegiance to the caucus process, or by following the lead of the Mayor, they each supported the projects with their votes.

8.2.6 Mr Beuk was another ALP councillor, and had served on council from 1994. His professional background is in mathematics and information technology, and he works for the Head Office of the NSW ALP. In 1997 the council moved to a form of portfolio government, with each councillor taking responsibility for a major policy area. The duties appear to have been primarily to liaise with staff on matters to do with the area. The portfolio heads (councillors) had no powers. In the early years of the council elected in 1999 Mr Beuk was made the Head of the Major Projects portfolio. The portfolio covered a number of projects, including the Woodward Park Precinct projects. The council had a system of Panels to pass on information to councillors, and to receive their views on various matters. Mr Beuk chaired the Strategic Panel whose focus was the Major Projects. The Strategic Panel discussed all the other major projects except the Woodward Park Precinct projects. As chair of the Strategic Panel, and as the person holding the Major Projects portfolio, it might have been expected that he would receive information concerning Woodward Park projects ahead of his colleagues. This did not happen, at least not until Mr Douglas was appointed Manager Major Projects. Mr Douglas appears to have consulted with Mr Beuk on certain matters to do with Woodward Park projects. (Evidence at Public Hearings 17/02/04, p. 24-27).

8.2.7

Mr Glavich was a councillor for 13 years. He was a member of the Liberal Party, but voted on every major matter concerning the Woodward Park Precinct with the ALP councillors.

MR BROAD: (16/02/04, p.17) *Yes, and in respect of the Macquarie Bank MOU, again did you as a Liberal councillor vote with the Labor councillors in respect of that project?*

MR GLAVICH: *That is correct. I had no choice.*

He was also a real estate property manager. Of all the councillors, his work background might have placed him in a good position to understand and relate to the issues that attended the Woodward Park projects. Mr Glavich said that this was not so.

MS JOHNSON: (16/02/04, p.20) *On the question of making sound decisions, in the course of your experience as a real estate agent, have you been involved in developments or investment schemes yourself or been involved in promoting them?*

MR GLAVICH: *Not personally. I am in sight of many.*

MS JOHNSON: *So you have never undertaken developments?*

MR GLAVICH: *Apart from my own home, no.*

MS JOHNSON: *Right, and if you were to undertake your own investment strategy, your own development scheme and you got, say, a financial report about it or accountant's report, would you make that your practise to read that report?*

MR GLAVICH: *Yes. On all counts, yes, if I was doing - - -*

MS JOHNSON: *Because it is your money that is going into it and you have to - - -*

MS JOHNSON: (16/02/04, p.21) *But if it had been your money that you were putting up, you said you would have read all the reports that would have informed your decision about whether or not to enter into these agreements?*

MR GLAVICH: *If I had employed a person to act for my development controller, I would have relied on him to use my money, such as, for instance, a building company or a person that is in charge of a building company. A licensed person, and this is what I would rely on. I would not part with my money unless I knew where it was going and how it was going.*

MS JOHNSON: *So do you think you behaved differently in the way in which you dealt with Council's money as to the way in which you would have - - -*

MR GLAVICH: *No, I don't think so. I think we relied too much on the people at the top to advise us and controlled the issues that may be of interest and certainly of risk.*

Instead of vigorously pursuing the issues contained in external reports to council on the Woodward Park projects, Mr Glavich relied on the Mayor and the former General Manager to provide summaries and their own reports, and to suggest the way ahead. Mr Glavich placed implicit trust in the Mayor and Mr Carr.

MR BROAD: (16/02/04, p.17) *Subsequently, did you rely on the reports of Mr Carr and the Mayor to assist you in making your decisions as a councillor?*

MR GLAVICH: *Yes, the element of trust was always there up until a certain time.*

MR BROAD: *You relied upon them as being trustworthy?*

MR GLAVICH: *Yes, trustworthy, honest and look, I understand that they had to give a truthful presentation, an honest opinion, and we relied on that, I relied on that.*

MR BROAD: *Did you rely on them to have considered the commercial aspects of the agreements?*

MR GLAVICH: *Yes.*

MR BROAD: *To be able to report to you in clear terms?*

MR GLAVICH: *Yes.*

MS JOHNSON: (16/02/04, p.6) *When you say, "the element of trust", do you mean you trusted them to have read those reports and to have reported them accurately to you, is that what you are saying?*

MR GLAVICH: *If I can put it—there was too much trust in too few people and we—when we were elected to Council—had an element of Council with the head person which was, in my opinion, the General Manager. The Mayor directed the General Manager, as far as I can understand, but the General Manager always had to give us the truth and always had to give us advice, which is given to him by senior officers. I put too much trust in that area and I'm sort of learning differently now.*

MS JOHNSON: *So you didn't go and check copies of the—read through the whole report, the consultants' reports, that were held in the General Manager's office because you trusted the General Manager had to have told you the critical contents of that report. Have I understood you correctly?*

MR GLAVICH: *That's correct.*

8.2.8

Mr Pascale, like Mr Glavich, was in a real estate business, and was also a member of the Liberal Party. Like Mr Glavich, Mr Pascale voted with the ALP councillors on all the significant matters associated with the Woodward Park projects. Mr Pascale served on the council for 17 years. Mr Pascale stated that he had read 95% of the advice given in relation to Woodward Park projects. He also complained that the councillors were not given the time to read all the advice thoroughly; despite this he would vote in favour of the former General Manager's recommendations because, he was assured, it was imperative that the vote be taken quickly. Mr Pascale's reasons for voting in favour of the various stages of the Woodward Park Precinct developments keep going back to the assurances given by the former General Manager.

MS JOHNSON: (16/02/04, p.66–68) *The fact that there wasn't a business plan for this development, did that concern you at the time that you entered into the commercial agreement?*

MR PASCALE: *Yes. It did concern me that at one stage that, I think, councillor Harrington brought it up that there wasn't a business plan and whilst the project—the only problem that come up to tell us that the—that we couldn't have the business plan—that's the plan we have. It's quite okay and we have to proceed if, I think, it is the previous speaker, councillor Anthony said that we would have to prepare that for the Razorback to be ready for actually, this last September, I believe, to be ready so be able to pay it. Otherwise, we would have lose them—or lost them, but apparently, did not eventuated.*

MS JOHNSON: *Okay. So despite the fact that there was no business plan, you still voted though to enter into the commercial agreement, didn't you?*

MR PASCALE: *Was voted in that because we always been assured of 100 per cent. Every time we ask for question we voted support because there's no problems.*

MS JOHNSON: *Who gave you these assurances?*

MR PASCALE: *Well, the General Manager at the time.*

MS JOHNSON: *Were you aware at the time that you voted for the commercial agreement that Council's money was to paid into the Foundation and that Council would have no control over the Foundation—no directors on the Board of the Foundation?*

MR PASCALE: *I knew the money was paying to the Foundation, but I wasn't knew that the Council—I was told, I didn't even told that we had no control of it, as far as I concerned, I thought, it's trust account money and I run a trust account and I know what that means. That we pay it into a Foundation to solicitor fund and I presume that the solicitor before they release any money which is trust account money—public money, should have been controlled where the money, certainly.*

MS JOHNSON: *So the fact that the Arena trust account was established and that your solicitor was to be a signatory to that account - - -*

MR PASCALE: *Yes.*

MS JOHNSON: *- - - you took that to mean that there would be—that your solicitor would, in effect, be checking that no money was paid out of that account unless it was properly incurred. Is that right?*

MR PASCALE: *Well, I understood that should be. That's what I would do it if it were my business.*

MS JOHNSON: *Did you understand from the General Manager's reports either written or verbal that there were some irresolvable issues of concern such that the project was undercapitalised, there had been no market testing, there was no secured obligations at the Water Park or the ultimate Stadium or the new Council chambers would be build, that there would be recurrent costs and maintenance that would vest with Council. Do you recall those issues being - - -*

MR PASCALE: *I certainly don't recall, but one thing I do recall that the special, the General Manager was so anxious to get his project under way so he be able to, I presume, in my view—that he was so anxious to be under way so he can make a big name for himself where this project success and it would be well, and we believe at every time we ask for question—a lot of question we ask him. We never had a questions answer: no. It was not available to do it. It was always: yes. No problems. Everything is under control. As far as I concerned, that if I believe that we pay some senior staff to that amount of money to tell us exactly: white is white, black is black.*

MS JOHNSON: *Ultimately, though, Mr Pascale, you and the other councillors are the ones that are voting for or against this project, aren't you? I mean, you say the General Manager was enthusiastic about it and he was clearly telling you that there were no problems, but it was you and the other councillors on the Council that were in a position to say, yes or no to that project.*

MR PASCALE: *Well, insofar as I concerned, we all evidence we got from the report is that we pay consultants, and I know we pay big money, and this big money we pay—which question we asked councillor Glavich earlier this morning, it is \$600,000 to a Water Cooper—whatever their company are named, they are paid \$600,000. We never, ever were aware until such a time we received the report from the Garry McCully that they give us a report. A lot of other things would come out which were not—we never, ever heard it before.*

MS JOHNSON: *You say now, you were asking questions of the General Manager?*

MR PASCALE: *Yes.*

MS JOHNSON: *The General Manager said to you it was all okay and it was a good project and you should go ahead with it?*

MR PASCALE: *Yes.*

MS JOHNSON: *You also say the General Manager was very keen to have such a big accomplishment to his name. Is that right?*

MR PASCALE: *Yes.*

MS JOHNSON: *Ultimately, the decision was yours to make. Yours as one of a group of councillors. Is that right?*

MR PASCALE: *Yes.*

8.2.9

Mr Harrington spent 16 years as a councillor, serving as Mayor in 1990–1991. Once a member of the ALP Mr Harrington served as an independent. He was a former TAFE teacher and a former chair of Skillshare Job Futures. Mr Harrington became an opponent of the Oasis scheme in early 2001, according to his evidence. Prior to that he had supported the Stardome proposal and the sale of the old swimming pool site to the Bulldogs.

MR BROAD: (21/02/04, p.89) *Councillor Harrington, as a matter of record, did you vote in favour of any of the projects—and by that I mean the Stardome project, the sale of the pool site to the Bulldogs, to the Arena development, either the commercial agreement or the early construction agreement, or the MOU?*

MR HARRINGTON: *I voted in favour of the land sale, and I actually supported the Arena when it was totally private enterprise. The Stardome AIC proposal then was private enterprise development on Council/State Government owned land.*

MR BROAD: *In respect of the time that you were called upon - - -*

MR HARRINGTON: *I didn't finish the rest of the question.*

MR BROAD: *I'm sorry.*

MR HARRINGTON: *Once it became obvious, that was from 2001 when the Bulldogs palms resort and the commercial agreement, when that all was obvious to what it was all about, so the commercial agreement actually spelt out Council's commitments to the project, what was coming from Council from that point on I stopped supporting the Oasis project.*

MR BROAD: *I was going to a different issue. Not the reasons for doing it. What I was going to ask was whether at the time you voted in favour of those developments you felt that you had an adequacy of information and a sufficient time to review and understand that information in order to come to your decision?*

MR HARRINGTON: *Yes, relating to the pool—the sale of the pool site. Yes. The Stardome proposal from the information I remember at that time. Yes. There wasn't the urgency and obsession back then as in more recent times. There was more time to think about things.*

MR BROAD: *The question that then arises is that, if you had been minded to vote in favour of the Oasis development and the MOU, was the time which was then permitted within Council sufficient for you to have acquainted yourself fully with the documents and to have formed a view on them?*

MR HARRINGTON: *Yes.*

Mr Harrington felt that the Mayor did not understand some of the advice that was presented to him, and that a number of the other councillors did not read the advice. He stood out against the Oasis project, and for his trouble was quarantined from being included in the governance structures of the council.

PROF DALY: (21/02/04, p.88) *The Mayor yesterday, or the day before, said that he had a problem with some of the advice because he didn't have a background that enabled him to understand some of the complexities within it. Do you feel that most Councillors had that problem?*

MR HARRINGTON: *I wonder, Mr Commissioner, whether most Councillors read the advice. I honestly feel that way and I don't doubt the Mayor in some cases didn't fully understand the advice.*

Mr Dobell-Brown was a newly elected councillor in 1999. The sale of the old pool site was stated as the trigger for his involvement with council affairs, and his standing for council. Unlike Mr Harrington, Mr Dobell-Brown opposed the swimming pool site's sale. Nonetheless the pair joined forces in their opposition to the Oasis scheme. Mr Dobell-Brown described himself as self-employed with a bookbinding business, and the ownership of some factories.

8.2 Findings

- 1.** To successfully enter into ventures as large, as costly, and as far-reaching as those connected to the Woodward Park Precinct, the governing body needed to have a strong skills-base, and be capable of absorbing and evaluating the large quantity of information that needed to be assembled. The governing body lacked both the experience and the skills needed to undertake these ventures. Six of the councillors were elected before 1999, and the remaining five councillors were elected in 1999. In a critical period, post-1999, a number of new councillors were faced with making decisions that none of their predecessors had faced. A summary of the backgrounds of the councillors shows that none had the practical experience and expertise to make the decisions they made.
- 2.** The Mayor professed to the Public Hearings that he did not have the technical skills to understand the complexity of the matters with which the council was involved. Despite this, the evidence suggests that he proceeded to lead the council down a path that saw it approving ever-larger, and ever-riskier, engagements with private sector entities. This was a primary reason for the council facing the financial losses they have, and the uncertain future of many of the projects that the council championed.
- 3.** Many councillors were prepared to accept the Mayor's lead, instead of taking the time and responsibility to fulfil their duties to the community. This occurred either through a sloppy and ignorant approach to understanding what they were dealing with, or a misguided sense of duty to Party or the Mayor, rather than community.
- 4.** In a curious abandonment of the separation of powers within the council, some councillors placed their trust in the professional skills and the position of the former General Manager. Again, this was a dereliction of duty by those councillors.

8.3 Expertise and Structures and the Body Corporate

- 8.3.1** If councillors felt that their skills were limited in relation to the technical, legal and financial complexities of the various schemes and arrangements entered into, it might be expected that they would use the full resources of the body corporate to create what might have been called "Team Liverpool City Council". The councillors would retain their authority to direct policy, but would be able to pull together the expertise of the staff to assist them. This did not happen. Instead, as discussed in 8.2, there was an overwhelming reliance on the Mayor's leadership and the General Manager's own expertise.

8.3.2 The former General Manager took upon himself outright control of the processes that lay behind the evolution of the various Woodward Park arrangements. This, he no doubt believed, devolved from the Delegation that the council bestowed on him, and the very terms of his appointment. This singular view of his authority, his tendency towards secrecy, his willingness to rush things through council (often after long periods when council was kept in the dark), and the optimism that made him assume that positive outcomes were inevitable, contributed monumentally to the tribulations of Liverpool City Council. Many councillors, but certainly not all, exaggerated the level of knowledge and understanding that Mr Carr had of the many issues that relate to public-private schemes. Mr Carr's unending reassurances that all would be well, probably contributed to their extraordinary faith in him. Principally, however, their misplaced trust was attributable to their lack of energy in pursuing the issues, or perhaps their ignorance. Mr Carr's own self-confidence in taking such a single-handed role in the long saga of Woodward Park is more puzzling. He had had some experience of managing development projects in South Australia, but none that could compare with the Woodward Park Precinct projects. He had had some experience of working with private sector groups, but the range and variety of the many private entities that appeared across the seven years of changing focus and changing allegiances must have been new to him. Undeterred, he maintained his drive and singularity of purpose, no matter what changes or what obstacles stood in the way. There is little doubt that Mr Carr didn't know what he was dealing with. He did not appear to understand that years of endeavour, and the lessons of successes and failures in many places, had created an understanding of how public-private partnerships can be structured to increase the likelihood of successful outcomes and to transfer risk away from the public sector. At no stage did Mr Carr put in place the key structures, and follow the critical steps, that have been established as vital (see Part F 13 of this report). He did not seem to know much of what had been learnt from the decade of experience that preceded his arrival at Liverpool; or, if he did, he failed to put much of it into practice. Mr Carr appears to have had reasonably good relations with his staff, but he failed to use the considerable skills of many of them to best effect in terms of the Woodward Park projects, and certainly never formed them into a team that might in some way relate to the groups with which the council had to deal. On the one hand, staff tended to have contact with Woodward Park issues only when something fell within their usual sphere of responsibility: Woodward Park, in this sense, was dealt with as just another project. Correspondingly, it seems that people who were handed specific responsibilities concerning the Woodward Park projects, often found their voices muted, or ignored, if their views did not follow the General Manager's upbeat assessments.

8.3.3

The first attempt to develop an internal group to manage certain Woodward Park issues came in 1997 when a team, under the leadership of Mr Ritchie, worked on a proposal to expand the Whitlam Centre to provide facilities for the Slammers elevation into the NBL. This specific endeavour followed years of discussion by the council's recreation planning group on what kinds of major sporting facilities might be placed on the site, following the Master Plan of 1992. Mr Ritchie's project team included Kann and Finch, architects, and Leisure Management Australia. There was a feeling within the group that professional basketball was a declining sport at that time. Their view was that the council should pursue a financially conservative approach, and choose one of the three alternatives that were available for redeveloping the Whitlam Centre. Parallel to the project team's development of plans for the Whitlam Centre the council encouraged the Stardome group to advance their proposal to the development application stage. The idea was that both the council's own proposal (Whitlam Centre expansion) and the Stardome project would be considered on their merits by council. Only the Stardome proposal went to council. The council's own project was stopped even though the team was close to putting its report to council. The council was never to receive the advice of the specialist staff through their proposal. There is no doubt that the support of the Bulldogs and the NBL for the Stardome proposal played a part in this outcome. At the first significant step in the process that led to the Oasis and Liverpool 2020 projects, the staff input was simply removed from consideration.

MR RITCHIE: (29/01/04, p.12) ... *We processed the Whitlam Centre expansion DA right through early '98. It never finally got put to Council. We were instructed to cease work on the DA in about May '98, although we had been proposing to put the two reports to Council at the same time. There was a decision taken and I can't confirm where the decision was taken. I was simply sent a memo not to continue to propose the DA for the Whitlam Centre. So it stopped earlier than that. It stopped in May '98. From that point onwards we were running with the Stardome 8000 seat facility. I guess, that transition happened earlier in the year, probably about May, from one project to the other.*

- 8.3.4 The cessation of the planning work for the Whitlam Centre extensions came in May 1998. This was the same month that a new group, called the Project Control Group, was instituted. According to the Time Line, prepared for the Inquiry by the council, the Project Control Group held 21 meetings, around three a month, to the end of 1998. Seven further meetings were held in January and February of 1999, and no more are recorded. The idea of the group was to produce ideas and proposals about what developments might be suitable for Woodward Park. Its membership comprised the Mayor and the General Manager and representatives of the private groups who had an interest in developing the Park. It invited staff to address the group when various matters, particularly to do with planning and land issues arose, but the General Manager was the only staff member intimately connected with the work of the group. The group explored the ways in which public-private arrangements could be made. Except for a briefing to council on Woodward Park in October 1998, and a council commitment on December 11 1998 to develop Woodward Park as a world-class sporting and entertainment precinct, there appears to have been little interaction between the council and the Project Control Group.
- 8.3.5 The Time-Line suggests that there was no formal group involving either councillors or staff between February 1999 and April 2000 when the council approved in principle the Draft Oasis Master Plan. By July 2000 the Woodward Park Master Plan, and in principle support for the proposed Commercial Agreement, had passed through council, still with no evident structure through which expert advice of the staff could be made available to the governing body. The closed session meeting of council on February 5 2001 (when the Commercial Agreement was passed) authorised the former General Manager to establish an Internal Progress Group (IPG) to monitor the implementation of the Commercial Agreement from council's perspective. The first meeting of the IPG did not take place until August 29 2001. This group of staff was meant to help steer the projects. The staff was enrolled to help "make it happen". The Early Construction Agreement, to build a basketball arena before any other developments in the Woodward Park Precinct, was signed less than a week after that first meeting. Staff energies were then focussed on matters to do with the building of the Arena.
- 8.3.6 At the February 5 2001 council meeting the former General Manager was authorised to secure project management services to manage the implementation of the Oasis Master Plan project from council's perspective and to report to the IPG. On November 5 2001 Mr Douglas was appointed as Manager Strategic Projects, contracted through to March 3 2004. There is no evidence that the IPG was consulted. This was the first step in balancing the role of the former General Manager in relation to the projects by having a senior person focussed solely on

major projects, but not solely on Woodward Park projects. By then Macquarie Bank had stepped away from the operations of the Agreement and the Arena project was delayed in starting. By that point council had effectively ceded control of both the money and the project to the Bulldogs' instrumentalities. The first instalment of \$3 million to the Foundation had to be paid by the end of 2001 because some site works had begun on the Arena site. Mr Douglas signed the first draft but refused to sign any more. Mr Carr signed off on the remaining \$12 million to the Foundation in instalments. Mr Douglas at the Hearings (30/01/04) expressed various concerns about the way in which the project proceeded but he signed a new contract with the council on July 15 2002 that was meant to take him through to 2007. He complained that he was shut out of meetings as the Arena project was halted and the arrangements between the Bulldogs and the council ground towards their inevitable end. After its inception the IPG met about twice monthly until July 2002 when it held its last meeting. In much of its eleven months existence it was focused on repairing problems created by forces beyond its control.

8.3 Findings

1. **The former General Manager was singularly the most powerful person in Liverpool City Council in relation to Woodward Park Precinct issues, and the council's successive linkages with private sector groups. Mr Carr did not follow the standard procedures for setting up public-private relationships in major joint projects. His attempt to make the projects work, without a systematic engagement of staff in an open, constructive way, was a material contributor to the problems that arose. His desire to control almost all aspects of council's connections with the projects was misguided. His own self-belief in his capacity to do this, whilst attending to his numerous other duties as General Manager, was a major problem. His professional skills and his professional experience were not sufficient to warrant such a singular approach to managing the processes.**
2. **Staff was not given a proper role in the development and testing of the concepts behind the various schemes, and it was difficult for their voices to be heard. Staff with contrary views to the proponents of the schemes was treated poorly at times. There was basically no attempt to pull together a dedicated staff group whose combined expertise could be used from the concept to delivery stages of the projects. There was insufficient effort made to recruit staff with qualifications and experience commensurate with the tasks the council was undertaking.**

8.4 Augmenting the Council's Resources

8.4.1 Even if the General Manager had made better use of his staff they would not have had the skills or experience to cover all the issues involved with major joint-venture projects with the private sector. Council staff is recruited to manage and develop a range of services to the community. Their skills and experience are shaped by these fundamental tasks. Council resources are also limited and no council possesses the means to fund a fully expert group to manage PPP. In contrast, the private sector groups engaged in PPP generally have large, dedicated, broadly skilled, and experienced staff whose specific task is to make PPP work. The balance of skills is almost always tilted towards the private sector groups, and so councils, and most other public sector entities, need to employ external help.

8.4.2 In every case the public sector entity must use external experts to assist them in shaping the links with the private sector. There are two broad approaches to this. One has the public sector entity (a council in this case) employing external experts on a completely independent basis to provide frank assessments of various issues. Such assessments may give negative opinions of the council's goals, strategies, the probity of its processes, its legal or financial positions, its management of planning or environmental or transport issues, the impact of its schemes on the community, or a range of other things that would impact on the council's risk, its chances of success, or the well-being of the community. Whether the experts are positive or negative in relation to the council's approach, the critical point is that the advice is independent. The external adviser provides a "sanity check" on the council's schemes, providing expert input that the council could not provide from its internal resources. The other approach uses external experts in quite a different way. These experts effectively work as part of the council's team, giving it the strategic and negotiating muscle needed to safeguard council's interests in dealing with its private sector partners. Without both types of external help, councils will always be at a disadvantage when entering relationships with strong private sector groups.

8.4.3 The problem with the Liverpool City Council approach was that it never really understood which of the two roles it wanted its advisers to play. It employed advisers for a time, then proceeded on its own (inadequate) resources, re-employed the advisers again or, as too often happened, hired new advisers (especially in matters of law). The briefs were sometimes inadequate because they were written by the General Manager or his staff, and dealt with issues that were more complex than the writers' imagined. At times, briefs were sent out in a routine fashion, without their authors understanding what importance they might hold for the furtherance of the council's cause. Briefs were sometimes written knowing that the external advisers could not access all the material they needed

to make sound judgements. There was no internal probity plan, and no external probity officer to oversee the process from start to finish. In summarising the reports, or in converting their messages into potential actions or policies, there was a tendency to look only in the direction of positive outcomes. Finally, the reports themselves were placed on restricted access to the primary decision-makers, the Elected Representatives.

8.4.4 The other area of assistance that the council might reasonably have considered is the State Government. The NSW Government has developed a strong system for evaluating PPP, and a robust structure for instituting processes that both safeguard the State's position within a PPP, and deliver good outcomes for the community. There appears to have been no recourse to key personnel in such bodies as the State Treasury, to get advice on the direction that the council was taking at an early stage of a process that began in 1996. When the council did approach the State Government agencies the shape of its arrangements was fairly well developed. The council sought specific assistance first of a financial nature, but this was not forthcoming. The focus of contact with the State Government then shifted to problems connected to the ownership of land on Woodward Park. The council supplied the Inquiry with a list of meetings with NSW government entities, their dates, and their purpose. According to this list there were thirteen meetings, from August 2000 and running through to June 2001¹. The prime concern of council was obviously to gain hold of Crown Land in Woodward Park, because having ownership of that was vital to their plans. In that connection there were two meetings with relevant Ministers, two with the Department of Land and Water Conservation (DLWC), and a meeting with representatives from the Premiers Department, DLWC, and the Department of Local Government. There were briefing meetings given to the Department of Local Government and Premiers. The council had three meetings with the Department of Public Works and Services to explore the possibility of obtaining management services for the Woodward Park projects. There were also three meetings with ICAC to inform the body on the Commercial Agreement (one of those took place a few days before the council voted in favour of the Agreement).

1. Other evidence suggests that there must have been some earlier meetings with State Agencies. For example, the council, in its early plans, was going to try and source funds from the government, and would have made approaches to the Department of Sport and Recreation. They were also keen to build a velodrome for the Olympics and would have made representations in respect of that. The meetings referred to here, however, are meetings that related directly to the Oasis projects.

8.4.5 The major point of the series of meetings was to either get something out of the government (eg. sale of Crown Land or management services), or to brief the government on what the council was doing. The negotiations with the private sector groups were either well advanced, or completed, when the meetings took place. The council's intention was not to use the government agencies experience in PPP to assist the council in better structuring its own arrangements with the private sector, much less to get their help in determining whether the projects were viable and in the best interest of the community.

8.4.6 The council-supplied list of meetings has no meetings recorded beyond June 2001. When the Bulldogs' problems emerged the council's relationship with the government shifted. The ICAC Inquiry began on August 23 2002 and ran through to February 23 2003 when its report was released. Following that there was a series of meetings with the Department of Local Government. These latter were really reviews of the situation that the council found itself in, and attempts to find a way forward.

8.4 Findings

1. **Any major commercial arrangement between councils and private sector groups should involve assistance from external experts to supplement the human resources available internally to the council.**
 2. **In the case of Liverpool City Council, and its various attempts to create commercial arrangements with the private sector, external advisers were employed but not in a manner that would ensure that the council got the best or most relevant advice.**
 3. **The council could have accessed advice and assistance from various NSW government agencies to get assistance in evaluating whether the projects were in the best interests of the community. Instead the council approached the state agencies only after it had progressed its connections with the private sector to a point where state support was more a matter of assisting their plans, rather than helping to create them so that the risk to the council and the community was minimised.**
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Section 9: Delivering the Projects

9.1 Introduction

9.1.1 The Stardome, Oasis and Liverpool 2020 Projects did not stem from processes instigated by the council. Rather, they were discrete projects presented to the council by their various proponents.

Council's desire to obtain a national team for the local area, coupled with its desire to establish Woodward Park as a world class entertainment sporting and recreational precinct, was the catalyst for the proposals.

As the proposals contained in the various projects did not come from the council, they were regarded by the proponents as their property, not council's property.

Mr Constantinidis made clear that this was his view, at the public hearings.

MR BROAD: (17/02/04, p.94) *And the third party to that venture was the Council.*

MR CONSTANTINIDIS: *Yes.*

MR BROAD: *It was at least an equal party, wasn't it?*

MR CONSTANTINIDIS: *No, it wasn't.*

PwC had reported this view in their report of 20 December 2000, when referring to council's representation on the Foundation (PwC report: 20.12.00, p.37).

9.1.2 The proponents' goals were to serve their ends.

For Macquarie it was primarily earning fees from developments on Liverpool, although the group clearly had ambitions of building partnerships with other sections of Local Government, and so market perceptions were also important. For the Bulldogs it appears to have been the establishment of a club and the facilities that would focus attention and draw patronage.

In the pursuit of these goals neither Macquarie nor the Bulldogs paid significant attention to the role of the council, the constraints that it acted under, and its relationship to its community.

To them, the council was the owner of the land, or the means through which the land could be obtained, to provide the developments that they proposed.

9.1.3 The various structures within the Oasis Project were based on commercial considerations.

The structures do not give consideration to the principles embodied in the Act.

Similarly the course adopted by the Bulldogs representatives, when entering into contracts or appointing staff did not embody the principles embodied in the Act.

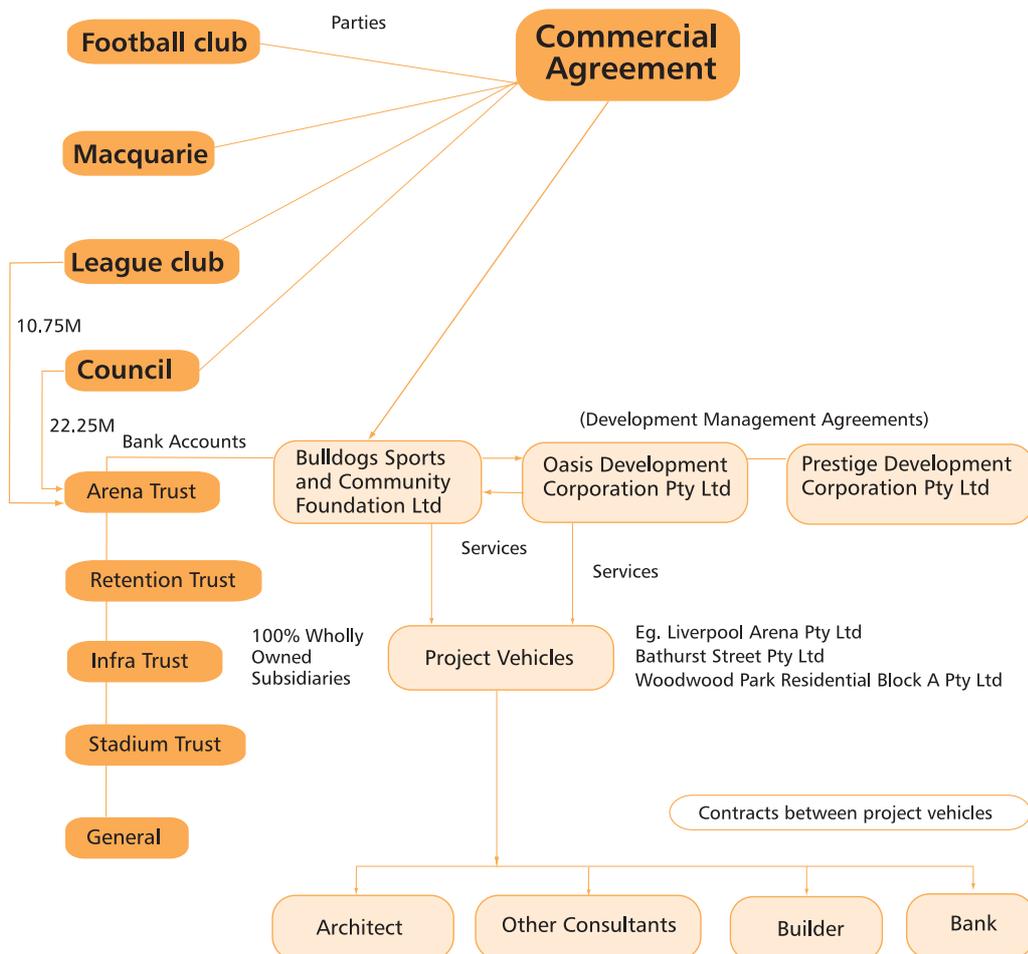
This part reviews the principles of the Act in light of the Oasis and Liverpool 2020 projects and of PPP generally.

9.2 The Structures

9.2.1 When giving evidence on 1 March 2004, Mr McIntyre took the opportunity to provide additional material to the Inquiry (Evidence of G McIntyre: 01/03/04, p.2).

Set out below is the “Oasis Project Delivery Structure” contained in this material:

Oasis Project Delivery Structure



9.2.2 It will be seen that the structure comprised:

- The Foundation.
- ODC and Prestige, which would operate under development management agreements with the Foundation.
- Various companies, including Liverpool Arena, Bathurst Street P/L and Woodward Park Residential Block A P/L, which would act as project vehicles for each project.
- Various contractors, including the architect and builder who would contract with the project vehicle.

Potentially, the Oasis project could involve a great number of corporate vehicles driving the project or particular components forward.

The adoption of this structure operated to farm down elements of the project in a manner that would make the project opaque and render void the governance principles of the Act.

9.2.3 The position would be compounded by council's decision not to be represented on the Foundation's board of directors.

Importantly, the council, although it considered representation on the Foundation, does not appear to have considered representation on ODC, which was to be the development manager or Liverpool Arena P/L or any of the project vehicles, despite the fact that ODC and the project vehicles would have the effective control of the nature of the projects and the manner that they were to be undertaken.

The failure to secure representation and thereby to enforce governance controls was a fundamental cause of the problems that council suffered, particularly its substantial financial loss.

The structure that was adopted was not in accordance with the principles of the Act. Similarly, the manner in which the various companies acted was not in accordance with what is anticipated by the Act.

9.2 Findings

1. **The adoption of complex structure of corporate vehicles under Oasis, served to make the project opaque and to void the governance principles of the Act.**
 2. **Council's failure to secure representation on the various corporate vehicles was a fundamental cause of the problems suffered by the council, particularly its financial losses.**
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9.3 The Foundation and Other Corporations

9.3.1 The Act constrains councils' involvement in corporations, providing:

358 Restrictions on formation of corporations

(1) *A council must not form or participate in the formation of a corporation, or acquire a controlling interest in a corporation, except:*

(a) *with the consent of the Minister, or*

(b) *as provided by this Act.*

(2) *This section does not prevent a council from being a member of a co-operative society or a company limited by guarantee and licensed not to use the word "Limited" in its name.*

9.3.2 When its proponents were touting the Oasis project, much emphasis was placed on the character and the objectives of the Foundation.

The Foundation:

- Was a company limited by a guarantee provided by its members to provide an amount not exceeding \$10.00 if it was wound up.
- Was prevented from making any distribution to its members, by payment of dividend, surplus or otherwise.
- Had objects that limited its activities to:
 - Constructing and maintaining the proposed infrastructure.
 - Encouraging, establishing and supporting sport, culture, education, entertainment and recreation.
 - Encouraging and promoting charitable, educational and other cultural purposes.
 - Assisting the underprivileged and disadvantaged.
 - Assisting community service.
- Had non-transferable membership.
- Prevented directors from holding an office or place of profit in the company.
- Required directors to disclose interests in related bodies.
- Was a non-profit making entity.
- Was potentially tax exempt.
- Would have a board containing equal representation from each of the council, the Bulldogs and Macquarie.¹

1. Additional material provided by G McIntyre: 01/03/04

9.3.3 Section 358 (2) limits the involvement of councils in corporations or in companies limited by guarantee to those licensed not to use “limited” in their name.

Providing the Foundation could demonstrate that its constitution restricted it to charitable purposes, prohibited distributions to members and payment of director’s fees and required directors to approve other payments to direction, it could seek removal of the word “limited”.

Council could then, without Ministerial approval, become a member of the Foundation.

9.3.4 ODC and the other corporate vehicles did not meet the requirements of subsection (2).

Section 358, however, did not prevent council’s involvement in these companies. The council was only required to obtain the Minister’s consent if it were to:

- form or participate in the formation of the company, or
- acquire a controlling interest in the company. Under Section 358 it could have held a minority share in any of these companies. The investment order, issued by the Minister in pursuance of Section 625 (2) of the Act (November 16 2000), however, raises doubts about this.

Given that the council was placing its assets at risk, and was providing funding for the project, it was imperative that it was both represented and brought its governance principles to such companies.

The council may even have explored taking a majority holding in the companies. If this required Ministerial consent, then it was appropriate to pursue this consent.

9.3.5 Since the value of council’s assets far exceeded any physical (as against intellectual or intrinsic assets e.g. the football and basketball teams) being brought by the other “partners”, it was appropriate for the council to have enforced the governance requirements imposed on it by the Act, in the conduct of these other corporations.

The council did not take these steps. Instead it allowed, as it turned out, the Bulldogs to effect governance based on its commercial alliances with its sponsors, and allowed crucial control to be exercised by Bulldogs’ representatives, and their friends and relatives.

9.3 Findings

1. **Given that the council was placing its assets at risk, council should have been represented on the board of each corporate vehicle and have required that the governance principles that operated equally apply to such vehicles.**
 2. **Council failed to apply any governance principles to the corporate vehicles and was content to let the Bulldogs' representatives exercise free and unfettered control over the vehicles.**
 3. **It is appropriate that governance principles, equivalent to those imposed on councils, as custodians, trustees of public assets, be equally applied to commercial entities in PPP.**
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9.4 Imposing Governance

9.4.1 Earlier in this section reference has been made to the various project vehicles that were to be utilised to deliver the Oasis project.

Reference has also been made to council's decision not to be represented on the Foundation, on ODC or any other corporation that would assist in the delivery of the project.

In doing this, the council potentially avoided the need to assure that the Foundation met the requirements of Corporations law and could have the word "limited" removed from its name.

Additionally, the council potentially avoided the need to obtain Ministerial consent for its participation.

9.4.2 The decision not to be represented was incorrect. The council should have been represented on the Foundation, ODC and each of the other corporate vehicles that were proposed.

Given that the proposals affected its land in the manner detailed in section B4 and council bore the risks reviewed in that section, it was appropriate that the council maintained a controlling interest or a power to veto proposals affecting development of its land.

It was not sufficient to suggest that its role as consent authority and the suggested primacy and independence purportedly granted under the Commercial Agreement would secure council's position.

The Commercial Agreement, coupled with the corporate structure, the lack of detail in the Oasis Master Plan, and council's decision not to be represented on any corporate vehicle, placed the Foundation, ODC and possibly any other corporate vehicle in a position where they were to operate unchecked.

9.4.3 The governance rules imposed under Corporations law do not equate to the governance responsibilities placed on councils.

It must be remembered that councils occupy a unique position; they are, as the Act provides (the Act, section 8), the custodian and trustee of public assets.

This principle was referred to by PwC in their reports of 20 December 2000 and 25 January 2001, where they described the standard of risk to apply (Report: 20/12/00, p.4 and 25/01/01, p.4):

Advice provided by Council's legal advisor, Abbott Tout Solicitors, is that the standard of risk applicable in relation to Council's participation in the Oasis Project is the common law duty as required of a trustee, to exercise reasonable care in carrying out its duty, and that it should "exercise the same diligence and prudence as an ordinary prudent man of business would exercise in conducting that business as if it were his own". It must also exercise functions as a Council, to "exercise community leadership", "provide adequate, equitable and appropriate services and facilities for the community", "to promote and to provide and plan for the needs of children" and "provide goods, services and facilities, and carry out activities appropriate to the current and future needs within its local community and of the wider public".

9.4.4 Under the Commercial Agreement the council was to immediately provide land currently owned by it and, subsequently, the Crown Land that it was bound to acquire. Additionally it was to provide a grant of \$10.25M towards costs of the Arena (Commercial Agreement, Clauses 4.4 and 16.3).

Subsequently, under the ECA the grant was to increase to \$22.25M.

The land and the council funds were public assets.

They were to be transferred to a corporate entity, the Foundation, in which council had no interest or representation, and which was entitled to exercise uncontrolled (so far as council was empowered) power over them.

9.4.5 The council was, effectively divesting itself of its assets.

It could not be sure whether it was investing them. It had not examined the Macquarie financial model, nor had its advisors, PwC.

While it knew the nature of the proposals affecting its lands, it did not know their full extent.

Given the lack of financial information that was available to the council and the undefined nature of the proposals, the involvement in the project could be classified as speculative, and would not meet the principles enunciated by PwC.

9.4.6 Surprisingly, even though PwC had stipulated this standard, had notified their inability to obtain sufficient detail of the Macquarie financial model and their inability to fulfil their terms of reference, they did not suggest that the council remained unable to discharge its obligation as trustee of the public assets.

This represented a substantial failure on PwC's part.

It was necessary for the council to ensure that it had met its responsibilities as trustee for council's assets. Given the inability of PwC to discharge its functions, the council (relevantly the councillors and general manager) could not be assured of this.

The Act does not spell out the duties as custodian and trustee of public assets or their duties to manage and account for them in circumstances such as these.

Section 358 imposes some restrictions and prohibitions imposed on involvement in corporations, but its wording is not clear and requires review.

The Act does not otherwise seek to subjoin its governance provisions on companies that are fulfilling roles akin to the Foundation, ODC and the other companies proposed in the Oasis project, nor the "PPP Entity" proposed under Liverpool 2020.

9.4.7 The equity courts have governed the role of trustees over many centuries. Through this time they have built up a body of law and governing the way that:

- trustees are to exercise their powers,
- the duties and liabilities of trustees in the performance of their duties under trusts.

If these principles are applied to the actions of the councillors and the council more generally, then probable serious breaches of these obligations arose.

It is not suggested that such principles should be applied and form the basis of any determination or finding in this report. Rather, they suggest a need to define and clarify the role of councillors and the need to enshrine appropriate governance standards in circumstances where council assets are to be used, particularly with co-venturers or "partners" to obtain outcomes of the nature sought in the Oasis and Liverpool 2020 projects.

The proposition was tested with a number of councillors (Public Hearings, 16/01/04—17/01/04). They may have been reluctant to admit that the test suggested by PwC had not been met by them, given their evidence generally, and particularly that relating to their understanding of the Commercial Agreement, ECA and Macquarie MOU. There can be no doubt that they failed to discharge their obligations. They failed specifically so far as imposing the standards of governance equivalent to those imposed or anticipated by the Act on the conduct of the corporate vehicles that were proposed under the Oasis project or anticipated in Liverpool 2020.

9.4.8 The council's governing body was unable to ensure, or be assured that:

- the dealings would be open and transparent
- they would obtain best value for money
- they could account for the funds provided
- that they had taken adequate steps to protect the property that they were to provide
- they had not delegated their duties to the Foundation or another entity and, ultimately
- that they had exercised reasonable care.

The discharge of these functions could not be subrogated by a view that, through the course of their negotiations, they had obtained the best deal that they could, or that they were likely to achieve.

9.4.9 Council's failure to impose a governance regime, directly through its representation on the Foundation and the other corporations was its primary failure. Its obligation as a trustee of public assets required it to go further and to impose the same governance regime that is operated under on the Foundation and the other corporations.

Only then could council discharge the obligations contained in its charter (the Act, Section 8).

While it was no excuse for council's failure, the Act bears amendment to secure a legislative imprimatur.

9.4 Findings

1. **The inability of PwC to satisfy itself of Macquarie's financial model meant that the council could not be independently assured that it discharged its obligations under the Act.**
 2. **Section 358 of the Act fails to ensure that the obligations cast on councillors and the elected body equally apply to corporate vehicles. This is a substantial failing of the Act.**
-

9.5 Governance Issues Affecting the Foundation and Project Vehicles

9.5.1 Following the disclosure of the salary cap breaches the council conducted a limited review of the operation of the Arena Trust account, the Foundation and ODC.

The review was incomplete and unsatisfactory, driven by council's perceived need to move forward with its goal of providing an arena for the Razorbacks and the need to curtail adverse publicity.

In council's drive forward, major governance issues, particularly those affecting the conduct of the officers of the Foundation and ODC were overlooked, despite serious concerns having been raised by PwC (Reports of PwC: Arena Trust Account, 11/09/02; ODC, Liverpool Arena and Foundation, 6/11/02) and in subsequent legal advice provided to the council (Advice of Maddocks, Lawyers: 16/12/02).

Further, when negotiating and subsequently entering into Liverpool 2020, no steps were taken to ensure that council met its obligations as custodian and trustee of public assets, by ensuring that the issues of concern could not subsequently arise.

In the circumstances, while the council may have ascertained where its money went and who had control of the various aspects of the project, no satisfactory review of all governance issues affecting the project vehicles was ever undertaken.

9.5.2 While it may have been beneficial for the Inquiry to undertake an intensive review of this aspect, there were two major impediments to this process:

- ODC whilst initially a subsidiary of the Foundation, became a subsidiary of the Bulldogs as part of the settlement. While the council had contemplated securing ownership of the company, it had chosen not to do so. Accordingly, ODC records were not directly available to the Inquiry.
- More importantly, the Terms of Reference limited the Inquiry's ability to enquire into these matters, as the Terms are directed towards the actions of the council.

The latter point was not lost on Mr McIntyre, as indicated in the following evidence:

PROF DALY: (01/03/04, p.3) *Thank you for that. As you would be well aware, our primary focus at the inquiry is not really to do with the Bulldogs or Macquarie Bank but rather influences on the decision-making of the Council and the context of some of that decision-making. So thank you for that material which - - -*

MR McINTYRE: *I submitted some of that in relation to the Macquarie Bank in relation to Al Constantinidis submitted because I have doubts about its relevance but nevertheless questions were asked here of matters I don't think were directly relevant and have been answered. They're on the record so they do go to that if you wish to look at them.*

This section is therefore confined to an overview of governance issues affecting the Foundation and the project vehicles, and draws from the limited evidence available to the Inquiry. The limited nature of the evidence does not mitigate the findings in this part as they refer to the principles that bind councils, which should have been enshrined in the various agreements giving effect to the projects.

9.5 Findings

1. **When entering the Macquarie MOU the council failed to take any steps that would ensure that it met its obligation as trustee and custodian of public assets by ensuring that the governance issues that had affected the Oasis Project did not recur.**
2. **The council failed to adequately review the governance issues affecting the Oasis Project in the wake of the salary cap breaches revelations.**
3. **The Terms of Reference did not allow the Inquiry to undertake a requisite review of the governance issues affecting the Oasis Project vehicles.**

9.6 Did the Financial Records of the Foundation and the Project Vehicles correctly record and explain the transactions and the financial position?

- 9.6.1 When giving evidence regarding the accounting records and the transactions of the corporate entities associated with the Oasis project, council's Manager of Financial Services, Mr Stalley, described the financial records of ODC in the following terms:

MS JOHNSON: (22/01/04, p.64–66) *You say it was convoluted, in what way was it? Was it hidden behind other transactions, or - - -*

MR STALLEY: *The accounting entries when we got control of the Foundation were in such a terrible state that we effectively went back to the source documentation and started again.*

MS JOHNSON: *So what do you mean you went back to the source documentation?*

MR STALLEY: *To cheques, to - - -*

MS JOHNSON: *Bank account records.*

MR STALLEY: *To bank account records and started again.*

MS JOHNSON: *So there was—are you saying there was no entry in the Foundation's books when you got control—when the Council gained control of the Foundation indicating that it was a loan?*

MR STALLEY: *There were lots of transactions, lots of journals passed that had no basis from an accounting point of view and so rather than trying to reverse all of the entries that were incorrect, we elected to start again from scratch.*

MR BROAD: *The Foundation employed qualified staff to do this work?*

MR STALLEY: *The employees were working at the Bulldogs Leagues Club but yes, they were qualified.*

MR BROAD: *Were they employees of the Foundation?*

MR STALLEY: *The main person who was doing journal entries and reconciling bank statements was an employee of ODC, an accountant called Joshua Smith. Clearly in my opinion he was receiving accounting advice from senior Bulldogs Leagues Club accounting personnel.*

MR BROAD: *Thank you.*

MS JOHNSON: *What was the effect of the journal entries—the invalid journal entries, if I can call them that. Was that—did that mask the true state of the—was it simply incompetent accounting practice or inaccurate accounting practice, or did it have the effect of masking the true financial position?*

MR STALLEY: *Not really. It didn't mask it from our point of view because I mean, it is an organisation that perhaps had—from a print-out of a trial balance was approximately 2—3, 4 hundred lines so it is a very limited amount of transactions went through that organisation.*

MS JOHNSON: *The journal entries that were there that were from an accounting point of view you say, had no basis, what purpose do they serve? Was there any indication as to why those journal entries had been made? Was it just that someone didn't have an understanding of when you should make a journal entry, or to the best—the best you can say.*

MR STALLEY: *Hard to say, except that it would be more on error rather than a deliberate misleading transaction, because at the time, you have to remember it was a private—it was all under control of the Leagues Club, nobody else was looking at them except those guys and there was no requirement to make public those financial statements.*

MS JOHNSON: *So whoever was keeping the books, simply just didn't understand— seems not to have understood the basic rules of bookkeeping, if I can put it that way?*

MR STALLEY: *On top of that, when Council became involved with the Foundation, we found several major flaws in relation to how they were dealing with taxation matters.*

Mr Stalley was to detail specific concerns over the quality of the records in his subsequent evidence.

9.6.2

Mr Merchant gave evidence, expressing concerns over the quality of the accounting records:

MR VINCENT: *(25/02/04, p.4–6) After the tax advice and sorting out these issues and then when Council started to take control of the Foundation, is it correct that you were called in to look at the state of the books?*

MR MERCHANT: *Yes.*

MR VINCENT: *And what did you find?*

MR MERCHANT: *We found that we did not feel, in our opinion, and I think we did not feel that the management accounts that had been prepared prior to our involvement, accurately reflected the situation.*

MR VINCENT: *What sort of concerns did you have?*

MR MERCHANT: *Although the bank recs had been done, the management accounts included amounts that the Foundation could not have incurred, predominantly a loan, a supposed loan back to the ODC in relation to costs associated with projects that had yet to be approved, and that was effectively funded by moneys that had been provided into the trust account in any case.*

MR VINCENT: *Is that in respect to Bathurst Street project?*

MR MERCHANT: *Water Park, Bathurst Street, yes, the TAPPs land.*

MR VINCENT: *So the money in the Foundation was expressly for the purpose of development of the Arena, is that right?*

MR MERCHANT: *That is my understanding, yes.*

MR VINCENT: *That was your understanding and ODC had expended some of that money towards projects other than the Arena?*

MR MERCHANT: *Correct.*

MR VINCENT: *This was what caused your concern about the way the management accounts were structured?*

MR MERCHANT: *That is correct, yes.*

PROF DALY: *Could I just ask there. What sort of projects had the expenditure gone towards?*

MR MERCHANT: *Predominantly, the most money had been spent towards the Bathurst Street project, which is a development that was taking place - - -*

PROF DALY: *And what were they? Development of architectural plans, or do you know what the expenditure was on?*

MR MERCHANT: *They were on preparation of the development application, design, cost. Well, as I said, we never saw the prime documents, that was what we were told, as against being able to verify that.*

MR VINCENT: *So what steps did you take to bring the management accounts into a format that was acceptable to yourselves?*

MR MERCHANT: *After forming the view that the ledger that we were given was what I would—was not up to scratch, we took the view to recreate the ledgers on our own systems.*

MR VINCENT: *So did you go back to day one and re-enter every transaction?*

MR MERCHANT: *That is correct.*

MR VINCENT: *Were you able to obtain all the necessary information from the old Foundation to allow you to do that accurately?*

MR MERCHANT: *In respect of Liverpool Arena and the Bulldogs Foundation, yes.*

MR VINCENT: *The transactions between Liverpool Arena and ODC, you were able to account for those?*

MR MERCHANT: *We had supporting invoices, yes.*

MR VINCENT: *With respect to ODC and the payments made by ODC, did you examine them closely or not?*

MR MERCHANT: *We were not given access to all the information.*

MR VINCENT: *Did you attempt to reconstruct their ledger?*

MR MERCHANT: *We didn't because we didn't have the prime information to do that.*

Mr Merchant went on to detail his concern in his evidence.

9.6.3 Not surprisingly, Mr McIntyre took issue with this view:

MR BROAD: (28/01/04, p.92) *We have heard some evidence from Mr Stalley, who is an officer of Council, who has gone through the financial records of the Foundation. He suggested that the records, when he was appointed a director of the Foundation, were poorly kept. During the period that you were a director of the Foundation, were you aware of that sort of complaint?*

MR McINTYRE: *That is totally incorrect.*

MR BROAD: *Right.*

MR McINTYRE: *It has never been said at all.*

MR BROAD: *Now, after the early construction agreement was entered into - - -*

MR McINTYRE: *If you went through our minutes you would find all the reports in the world you have ever seen, you know, for financial reports, project manager report, development manager report, budget—ongoing budgets and just absolutely meticulously kept, the tendering process, everything was done and I don't think there would be a company who did it as well, so you know he must be having a mental lapse.*

9.6.4 As has been indicated earlier in this part, both Mr Stalley and Mr Merchant were to give clear and cogent evidence, not only raising concerns regarding the accounting records, but also the transactions of the Foundation and ODC.

These concerns related to:

- Taxation matters, including:
 - Failure to pay group tax (Evidence of R Stalley, 22/01/04, p.63; G Merchant, 25/02/04, p.4)
 - Failure to obtain registration for GST purposes (Evidence of R Stalley, 22/01/04, p.8; G Merchant, 25/02/04, p.3)
 - Failure to pay GST (Evidence of R Stalley, 22/01/04, p.66; G Merchant, 25/02/04, p.3)
 - Overpayment of fees (Evidence of R Stalley, 22/01/04, p.73; G Merchant, 25/02/04, p.8)
 - Questionable loans (Evidence of R Stalley, 22/01/04, p.71 et seq; G Merchant, 25/02/04, p.4 et seq).

9.6.5 In their reviews (Review of Arena Trust account, 11/09/02; Review of ODC, Liverpool Arena and Foundation, 06/11/02), PwC had reported:

- ODC had been entitled to a payment of \$272, 600 as its development management fee but had sought \$896, 875.
- ODC had been overpaid \$651, 491 (excluding GST).
- the Foundation's business activity statements contained errors

- duplication of roles
- lack of formal agreements to support the appointment of :
 - consultants, whose retainers were, collectively, to exceed \$1.8M per annum.
 - a lease with a company associated with Mr Constantinidis
 - loan to a consultant totalling in excess of \$130,000
- overpayment to a consultant, Mr G McIntyre
- incorrect payroll entries
- the player payments
- possible private or non-related payments.

All of these transactions were effectively dependent upon the funds that had been provided by the council.

9.6.6 Mr McIntyre provided a contrary view:

MR McINTYRE: (28/01/04, p.103) *All the books—we made a full audit available, which were required under the commercial agreement, and it only had to extend to the Foundation. We let them have a look at ODC. Everything has been transparent. All the documentation has been there and is available for inspection and it is, you know, surprising that anyone could have a view about—that maybe something improper has happened there.*

Despite what Mr McIntyre propounded the records, whether, the Foundation, ODC or Liverpool Arena give rise to substantial governance issues.

9.6.7 It is not within the powers of the Inquiry, in its view, to conduct an intensive review of the records and transactions of these entities.

Equally, it is not appropriate to disregard or to gloss over these issues.

For council's part they emphasise a failure on the part of the council to instil appropriate principles and safeguards in the project vehicles.

On the other hand, having regard to the advice given by Maddocks (Advice of Maddocks, Lawyers: 16/12/02), it is appropriate to make recommendations for appropriate bodies to investigate the transactions of the project vehicles.

9.6 Findings

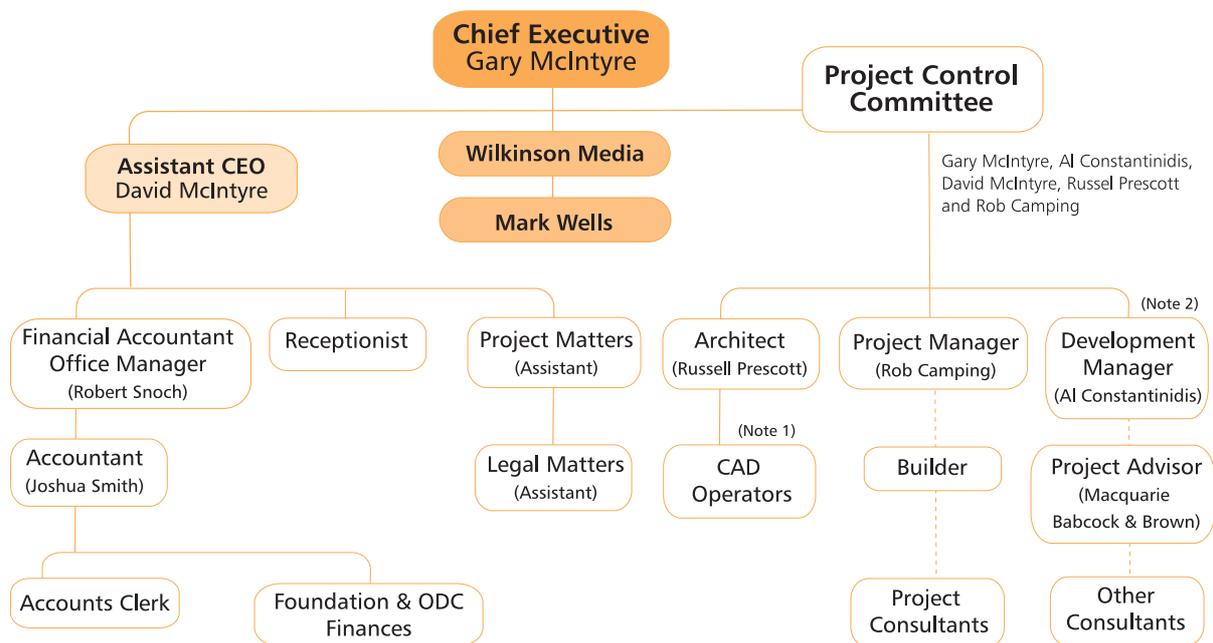
1. **There is evidence to suggest prima facie breaches by those controlling the Oasis Project vehicles.**
 2. **It is appropriate for these prima facie breaches to be investigated by an appropriate body.**
-

9.7 The Appointment of Staff and Consultants to the Project Vehicles

9.7.1 When giving evidence on 1 March 2004, Mr McIntyre provided further material that he thought might be helpful.

Amongst the material was a chart, set out below that contained the ODC management structure.

ODC Management Structure



Note 1 – Also Architects Woods Bagot and Prescott Altis

Note 2 – Geoffrey Baxter engaged to replace Al Constantinidis

9.7.2 As will be seen, Mr Gary McIntyre, his son David and Mr Constantinidis were each given a primary role. They were to be handsomely rewarded for their roles (PwC report: 06/11/02, p.4).

- Mr G McIntyre was to be paid \$204,000 per annum,
- Mr D McIntyre \$200,000, and
- Mr Constantinidis \$400,000.

Other appointees, Mr Prescott and Mr Camping were each to be paid \$200, 000 per annum.

9.7.3 Council funds were to provide the prime source for these payments, at least during the construction of the Arena. Councils operate under much tighter constraints than corporations. The Foundation (subject to certain disclosures required under its constitution), ODC and the other corporate vehicles were entitled to appoint staff through their own processes. Conversely, councils are required to adopt processes that are open and transparent, which seek to draw from all suitably qualified persons, and under which the abilities, qualifications, experience and standards of work provide the basis of appointment.

9.7.4 Such a process was not followed with the appointment of Mr G McIntyre, who gave the following evidence:

MS JOHNSON: (01/03/04, p.14–15) *How did you get appointed as CEO, Mr McIntyre? Was there a merit selection process for that position?*

MR McINTYRE: *No. I was the most suitable person to do that - - -*

MS JOHNSON: *Who were the other candidates for the position?*

MR McINTYRE: *No, just hang on, I was the most suitable person. You have got to bear in mind what we were dealing with here. We had some trouble with Macquarie, and I don't want to go over that at the moment, but it was hoping that Macquarie would come back into the fold, after it had got over its tantrums and couldn't get its own way, would come back into the fold. So my position was virtually a temporary position.*

It certainly wasn't looked at long-term. In fact, my engagement, at my instigation, was that all appointments should be, whilst expressed to be 3 years, were terminable on 3 months notice. So whether it was Al Constantinidis, the project manager or myself, they all knew we were on a 3 month term, and it was not my intention to stay there long-term. If Macquarie had come back into the fold, I would have been accepting who they wanted to take over that role.

MS JOHNSON: *So was anyone else considered for the position?*

MR McINTYRE: *No. We were dealing only at this stage with the Arena. Macquarie*

showed no interest in the Arena whatever. It was more interested in the commercial and residential stuff.

9.7.5 Mr Constantinidis gave evidence that Mr Prescott had been seconded to his position (Evidence of A Constantinidis: 17/02/04, p.87).

Mr Constantinidis himself did not go through a selection process.

MS JOHNSON: (17/02/04, p.87) *Okay. What about your job as Development Manager? Is that what you were called, Mr Constantinidis?*

MR CONSTANTINIDIS: *Yes.*

MS JOHNSON: *Was there any competitive selection process undertaken for you to win that position?*

MR CONSTANTINIDIS: *No. I didn't think it was necessary because I actually babied the project so it was my project.*

9.7.6 These processes may be quite permissible outside local government, they do not, however, accord with the principles applying to local government.

Given that the fundamental element founding the Oasis project was the use of council owned lands and the use of council funds, it was appropriate to ensure that the Act's principles affecting the appointment of staff be incorporated in and form part of the governance provisions underlying the appointment of staff by the corporate vehicles.

9.7 Findings

- 1. The development vehicles for the Oasis project were controlled by the Bulldogs but were funded, almost entirely by council funds. The council had no say in the appointments to such vehicles.**
- 2. The way in which the Bulldogs appointed their own people, and relatives and friends to highly paid positions, was totally unsatisfactory. The people who took on these roles had neither the experience, nor commercial or professional training, needed to manage such large-scale projects.**
- 3. The explanations provided by Mr Gary McIntyre and Mr Constantinidis, justifying their roles, were shallow and self-serving. The evidence before the Inquiry shows that the appointments made reek of opportunism, and an audacious enrichment of a few individuals.**
- 4. It is possible that there may have been breaches of the Corporations Act 2001 and/or the Australian Securities and Investment Commission Act 2001. It is not within the Terms of Reference of the Inquiry to make a judgement on whether or not such breaches occurred.**

9.8 The Letting of Contracts

9.8.1 Mr Douglas, who had become a director of the Foundation in September 2002, following the salary cap disclosures, raised concerns over contracts let by the Foundation, giving the following evidence:

MR DOUGLAS: (30/01/04, p.15–16) *Yes. ADCO, of course, had been doing building for the Bulldogs at their Belmore club. I didn't know that when I first started—put it back earlier. I had no idea where Liverpool was when I went there first and rugby league then and now is still a complete mystery to me and defies logic as far as I'm concerned, so I'm not involved in that. ADCO had been a constructor and were actually still working on the Belmore club when they were engaged about June 2001 on this construction management contract and there was an opinion that they were going to convert that a guaranteed maximum price some time whenever the building stopped moving in terms of the consent and the design.*

Now that never happened because there was a dispute between ADCO and Mr McIntyre about what that meant and how that worked—I've got the letters of dispute; if you wish you are welcome to those as well. You can see it got pretty tense. ADCO was also a sponsor of the Bulldogs—it is on the—I think it is on the sleeve—and there was a sponsorship clause in there, as there was proposed in the NTG contract and I believe, in the contract to one of the excavators—sub-contractors—called Le Rocks, which are an excavating firm, who are also—all of them are current sponsors....

I tackled Mr McIntyre pretty firmly about that. He went away and rang me the following day and said he has had legal advice, which I presume was from Clayton Utz, that it is perfectly fine but in the circumstances they would remove those clauses from the contracts, but it did continue to reinforce our deep and deepening concern about what actually this game was all about...

9.8.2 Mr Constantinidis indicated the lead up to the appointment of ADCO and Le Rocks:

MR VINCENT: (17/02/04, p.108–109) *So ADCOs contract was to do what?*

MR CONSTANTINIDIS: *Was construction management, literally.*

MR VINCENT: *Were they the only company approached to take on that role?*

MR CONSTANTINIDIS: *To my knowledge they were a sponsor. They were approached to give a price. I think we had two other prices for construction management services and it was certainly commercially sensible to give it to them in view of the responses.*

MR VINCENT: *What about Le Rocks? Who cleared the site? Same sort of arrangement? Were they a sponsor of the Bulldogs?*

MR CONSTANTINIDIS: *No, they were a sponsor of the Razorbacks.*

MR VINCENT: *Do you think, in your opinion, any of these contracts were awarded to Le Rocks and ADCO were more generous than they would have been if they weren't a Bulldogs or Razorbacks sponsor?*

MR CONSTANTINIDIS: *No, in fact I think I was quoted as giving the Le Rocks a harder time than normal for that very reason. The only—to put this whole tendering thing into perspective for you—we had to make a start to strip the site to do geotechnical work and to establish other procedures on the site. The initial two stages of stripping and doing the council car-park, which necessary to basically give a home to all the dislodged parking that the fenced area took up, was to build the car-park first.*

It was agreed with the council that that would be a sensible approach to do. The industry has, for instance, bulk excavation rates and otherwise. We had a QS report for what was allowed in the budget and to expedite—let's call it the first three months, while the architects got to doing the detailed drawings and packages—a decision was made to go ahead and get some prices. I think the excavation we had three prices to do the bulk excavation and Le Rocks was given almost like a right of last refusal to do the work, as a sponsor.

The detailed packages started coming off, I think February we got the engineering out, because it took them four months to do. The electrical was out when I was terminated in June. The steel contract, I think, was out around about April. So what happened was, ADCO was the manager. The packages from the architects with all the specs were drawn into a big bundle and they went out to six and seven tenderers who, if you put your hand up, you got a tender package. Those responses came back. There was a two key lock system in place for opening, for evaluating them, and the only works that I'm aware of, til I left, that were put out without that formal tender process, was that initial works package around the car-park works. Because there literally were not any plans around to tender.

9.8.3 Mr McIntyre disavowed any responsibility for the letting of contracts. He indicated it was the responsibility of Mr Campion the Project Manager (Evidence of G McIntyre: 01/03/04, p.14). He had, however, no aversion to the Bulldogs' sponsors tendering (Evidence of G McIntyre: 01/03/04, p.28).

The approach taken by ODC in letting contracts must again be contrasted against the responsibilities imposed on the council under the Act.

While, in the commercial world, such contracts may be let in circumstances where the parties may be seen other than at “arms length”, they do not accord with the principles contained in the Act.

The Act places great emphasis on achieving best value for money through an open and transparent process, principally through the tender process.

The processes adopted by ODC, whilst permissible in the commercial world, did not meet the standards that the council ought to have imposed.

Given that the council was providing its funds and land to the project, it was incumbent upon it to ensure that governance procedures adopted by the project vehicles reflected the responsibilities placed on it.

9.8 Findings

1. **The letting of contracts by the Oasis Project vehicles, whilst they may have been permissible under Corporations law, do not accord with the standards that ought to apply in such circumstances.**
-

9.9 Review

- 9.9.1 Perhaps a useful parallel might be drawn from the general law affecting trusts and particularly the duties imposed on trustees.

Amongst the duties imposed on trustees are duties not to delegate their responsibilities, nor to impeach the trust.

The failures of the council to ensure an adequate governance regime within the Foundation and the project vehicles served to impeach council's role as custodian and trustee of public assets.

- 9.9.2 The manner that the council facilitated the process, constituted a delegation of their powers to the Foundation and any other entity that the Foundation may wish to deal with.

The operations and conduct of the Foundation, ODC, Liverpool Arena and any other corporate vehicle that might be formed to give effect to the project were unconstrained.

The council had an obligation to ensure that this would not occur.

9.10 Conclusion

9.10.1 This section has reviewed the manner in which the Oasis project was to be delivered.

While that project is no longer proceeding, the council has tied itself to Liverpool 2020. This project anticipates that a special purpose vehicle, the “PPP Entity” be incorporated.

The Macquarie MOU anticipates that it be made up of a singular entity or multiple entities (Macquarie MOU: Clause 1.1, Definitions).

The Macquarie MOU provides (Macquarie MOU: Schedule 2):

(a) It is proposed that a development vehicle (and Project holding company), the PPP Entity, be established for the Development, with project specific vehicles to be established for each project. The PPP Entity will be granted long term rights by Council for the Development and each Project, and the PPP Entity will award rights in relation to a Project to a special purpose vehicle established for that Project. That project vehicle will then enter into a development agreement or construction contract with the eventual consortium responsible for project delivery.

The Macquarie MOU does not anticipate a governance regime of the nature discussed in this chapter, limiting itself to representation on the PPP Entity and securing the residual economic benefit to the council.

9.10.2 The various proponents of the projects, whether Stardome, Oasis or Liverpool 2020, have demonstrated little, if any, understanding of governance issues affecting the council.

This is not surprising as they are driven by different and more commercial needs.

Conversely, council’s role is more philosophical, in the sense that the council is the custodian of community assets, and has ultimate responsibility to protect them and use them for the benefit of the community.

It was, and remains, incumbent on the council to impose adequate governance regimes, whether directly through representation at all levels, or indirectly through the constitution and the governance regime adopted by the corporate vehicles.

The issues that arose in Oasis, particularly those affecting ODC and the Foundation evidence both the need, and the incidence of a failure to do so.

9.10 Findings

- 1. The Terms of Reference of the Inquiry permit only a limited review of governance issues affecting the corporate vehicles. Given the concerns raised by Maddocks, it is appropriate that an appropriate body review the dealings of the Foundation, ODC and Liverpool Arena whilst under the control of the Bulldogs' representatives.**
 - 2. The Act does not provide a sufficient mechanism to ensure that corporate vehicles, in which councils have an interest, meet appropriate governance standards.**
 - 3. The Act bears strengthening in this regard.**
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PART

D

Meeting Public Perceptions

Section 10: The Duty to Inform the Public

10.1 Ensuring Public Participation

- 10.1.1** Liverpool City Council brought two principal tangible resources to its dealings with the private sector entities: money and land. In its rush to be a helpful partner, the council seemed to forget that both the money and the land belonged to the community. In fact, in the case of the land, much of it was owned by the State and council was only a trustee maintaining its upkeep. The council was cavalier in its handling of those resources, and arrogant, to the point of contempt, in not properly and honestly informing the community in what it was doing with the community's resources.
- 10.1.2** Every key decision in relation to the commercial arrangements with the private sector was made behind closed doors. This was in contravention of the spirit and purpose of those sections of the Act that lay down the entitlement of the public to attend full council meetings, and meetings of council committees of which all members are councillors. Sections 9 and 10 of the Act lay out these entitlements. Details of these sections are spelt out in the Primary Findings and Interim Report, p. 80–82.
- 10.1.3** In blocking the public from learning in full what the council intended to do with the community's assets, the council argued that it was constrained by commercial-in-confidence factors. This was nonsense. There was nothing in the Commercial Agreement or the MOU that should have been hidden from the public. A case could be made for applying commercial-in-confidence constraints to material contained in the multiple drafts of agreements during the negotiation phases. Once agreement had been reached the outcome should have been freely available to the community: after all it was community assets that the council was trading.
- 10.1.4** The former General Manager proposed that certain meetings were to be held in closed session. At various times Mr Carr stated that no ratepayers' money would be spent on the Woodward Park schemes. This was always a false claim. In a curious piece of sophistry, Mr Carr appears to have put a low priority on the need to keep the public fully informed about what the council proposed to do with their assets, because of the canard that no ratepayers' money was involved. Mr Carr perhaps meant that money from the sale of assets (the old swimming pool site) and Section 94 contributions was used, and that such funds were not derived from rates. Also, because the council was contributing land, rather than money, in other parts of the plan, Mr Carr felt that he could rightfully say that no taxpayers' money was being spent. As well, it appears that Mr Carr was convinced, by the mathematics of the private sector partners, that the council would have a net gain

in assets at the end of the Oasis project. Mr Carr thought that was all the community needed to know, judging by his actions.

MS JOHNSON: (02/02/04, p.44–45) *The other thing I wanted to ask you about in relation to the way in which Council's decisions were made was the closing of meetings. I think you said in the evidence that you gave before lunch that sometimes Council's meetings were closed. Is that right? In what circumstances would meetings be closed? Was that your suggestion that they be closed and if so why?*

MR CARR: *There would be a recommendation that would come forward and that recommendation came from me.*

MS JOHNSON: *Yes.*

MR CARR: *The circumstances would have to meet certain criteria like the receipt of legal or commercial in-confidence information. So this particular matter was dealt with in confidential session but the decision of the Council was made public. To ensure that the general thrust of this particular matter and my report, in particular, I prepared a presentation and that presentation was delivered at the Council meeting publicly.*

MS JOHNSON: (03/02/04, p.71) *Why was it that in this situation you felt that the commercial—the feasibility reports, the commercial review conducted by PWC, the probity reports should all be treated confidentially? What was the damage that was going to result to third parties interests if they were released?*

MR CARR: *Well, it may have prejudiced Council's position with some of the arrangements that it was trying to put in place.*

10.1.5 The Mayor accepted the General Manager's decisions to hold closed meetings without demur.

MS JOHNSON: (20/01/04, p.33–34) *There's been a suggestion that the meetings at which decisions were made about, for example, entering into the commercial agreement, entering into the early construction agreement, that these were closed to the public. What is your recollection of how those—whether those meetings were open or closed?*

MR PACIULLO: *Whether or not a meeting is a confidential closed session, as I think they are termed, depends upon the advice we receive that because of the matters to be discussed because it involves this or that particular aspect under the Local Government Act, we should meet in closed session.*

MR PACIULLO: (20/01/04, p.37) *Well, as I've indicated the meetings we hold in close session are about matters which we are advised, we are acting in the Council's and therefore the public's interest to hold them in closed session. Outside of that, if there was advice that there should be an open Council, we would automatically take it.*

10.1.6 The Mayor was obsessed with his vision for Woodward Park and the facilities that he thought it would bring for Liverpool's youth. He believed he was acting in the best interests of the community. Politically, he entangled this argument with the unrelated opposition to the Bulldogs' plan to establish a large club on the old swimming pool site. Other clubs in the area, led that opposition fearing that if the Bulldogs' went ahead with their plan there would be negative impacts on their revenue. The financial viability of the Palms Resort (on the Old Swimming Pool site) was vitally based on establishing a club with a very large number of poker machines. Essentially, this was a private commercial operation, and ought not to have involved the Council. Because the Bulldogs' became allied with the Mayor in developing the dreams they shared for Woodward Park, the Mayor considered that the opponents of the Bulldogs' proposed club necessarily translated into opposition to the Oasis project. The proposed Bulldogs' club was a major issue in the 1999 election, an election that the Mayor won handsomely. The Oasis scheme, however, had not been put together at the time of that election and therefore was not ratified by the votes won by the Mayor. The Mayor seems to have been happy to hold vital meetings in closed sessions and not allow community input on the Oasis proposals at the crucial council meetings.

10.1.7 More devious than closing meetings to the public was the use made of extraordinary meetings by the Mayor and the former General Manager. The Act, in Sections 366 and 367, lays down the situations allowing extraordinary meetings to be held (see Primary Findings and Interim Report, p.82–83). Public notice was not given of the extraordinary meeting held on February 5 2001. This, in many ways, was the most critical meeting in relation to the Oasis project. It was the meeting at which the community was going to be informed of the detail of the Oasis scheme. It was the meeting that preceded a closed session of the council, at which the merit of the Oasis project was to be debated. Clearly, if the community was to have any input it would have to be at that meeting. Instead, the community was not notified about the meeting. Instead, the meeting was well attended by sporting groups associated with the Bulldogs, who obviously had been notified. The majority of these people, it would have to be assumed, did not live in the Liverpool Council area. Thus, the community was deliberately kept in the dark about the most critical meeting, while the Bulldogs stacked the meeting. The meeting was a farce, and an insult to the community. The astonishment and anger that this engendered came out in the testimony of people who appeared at the Public Hearings. Mr Rogers' evidence well illustrates this.

MS JOHNSON: (05/02/04, p.61–62) *I wanted to ask you as well a bit about the extraordinary council meetings at which the commercial agreement and then there was a second alteration to that agreement called: Early Construction Agreement, were entered into. Did you say it is your practice to attend council meetings, is that right?*

MR ROGERS: *When I can and if there's anything on the agenda that, you know, I'm concerned about or take a personal interest to, yes, I do attend, but I don't attend all council meetings, no.*

MS JOHNSON: *If you had seen a council meeting that had on its agenda discussion of the Oasis plan, presentation of the Oasis plan, would you have attended?*

MR ROGERS: *My word.*

MS JOHNSON: (05/02/04, p.61–62) *There was a meeting held on 5 February 2001 at which the General Manager of the Council did give a presentation of the Oasis plan. Were you aware of that meeting before it was held?*

MR ROGERS: *I'm not sure if that's the meeting. I got tipped off. There was some meetings that was going down with the Oasis but I wasn't aware of and none of my colleagues. I've got a good network out there and so, you know, people who do get certain information, they'll give me a phone call and then I'll pass it off on to other people, but I don't know if that was one of those meetings where we weren't told what was happening. For example, I turned up - - -*

MS JOHNSON: *Perhaps if I can just stop you to clarify it for me, were you there at that meeting, 5 February 2001, where the General Manager gave a slide presentation about the Oasis development?*

MR ROGERS: *Look, I went to so many meetings, I'd say I probably was there, yes.*

MS JOHNSON: *Do you remember how you found out about it?*

MR ROGERS: *I'd probably say one of my friends gave me a phone call.*

MS JOHNSON: *But you are not entirely sure, is that right?*

MR ROGERS: *I'm not entirely sure. You see, there was one meeting there and it is really entrenched in my mind that I didn't know what was on the agenda. One of my friends gave me a phone call and I went up on my pushbike and in the car-park and it was mind-boggling, Mr Wealth, there was a Rolls Royce in there, Mercedes and everything else and then when I went inside the meeting it's Mr Wealth with all these football players that the residents of Liverpool, I suppose, came and were paying anyway because all these football players in there, you know, from the Canterbury Bankstown Leagues Club, it would have been one of the largest crowds I ever seen.*

MS JOHNSON: *Can you remember what was discussed at that meeting?*

MR ROGERS: *It was about—that was round about '99 and that was about the selling of the old pool site and about the window dressing of the Oasis and what they were going to do.*

MS JOHNSON: *How did you know they were football players at that meeting?*

MR ROGERS: *Mr McIntyre there, you know, he—I don't know if he did a full presentation but, look, they were famous football players, you know, so yes.*

MS JOHNSON: *You recognised them?*

MR ROGERS: *Yes, recognised them, yes.*

MS JOHNSON: *Do you remember being notified of a meeting in August, at the end of August 2001, to discuss a different version of the Oasis plans?*

MR ROGERS: *I can't recall. I'd have to go back through my diary, last year's.*

MS JOHNSON: *If you had received notification of it would you have made an effort to attend?*

MR ROGERS: *Absolutely.*

MS JOHNSON: *Because it was something you were interested in and you felt there wasn't enough information around about it?*

MR ROGERS: *Yes, yes.*

10.1.8

Whilst acting according to his political instincts the Mayor, and also the former General Manager, showed a good deal of naivety in their relations with their commercial partners. They followed the injunctions of their partners of maintaining secrecy about the agreements that they were entering into. Once the agreements had been signed there was nothing in them that could have then affected the competitive position of the private sector entities, and nothing in the agreements that could have affected their intellectual property. What was in the agreements, and what the community had every right to know, was the detail of what council was doing with the community's resources. As well as being unable to assess the project details before the agreements were signed, the community was prevented from knowing what their Elected Representatives had committed them to after the agreements were signed.

10.1

Findings

1. In committing Liverpool City Council to agreements with private sector entities in the Oasis and Liverpool 2020 projects, the Mayor and the former General Manager wilfully, and wrongly, prevented the community from being engaged in the assessment of the biggest projects ever undertaken by the council. The processes adopted were anything but open and transparent; openness and transparency are necessary underlying features in the development of any commercial arrangement with private sector partners.
2. The council used extraordinary meetings and closed meetings as a means of cutting the community out of understanding what the council proposed to do with their assets, let alone participating in some way in the decision-making. The council misused the parts of the Act that allowed for extraordinary meetings and the closure of meetings. The council added to their failures to abide by the intentions of the Act, by allowing the Bulldogs to stack a critical council meeting.

10.2

Promotion of the Oasis Venture to the Community

10.2.1

Rather than attempt to engage the community in a productive assessment of the Oasis project, the council chose to “sell” the dream to them. To do this the council hired a public relations group to assist them in this effort. The Mayor was questioned about the need for this at the Public Hearings. His reply indicates that he saw the process as a political exercise. In terms of the MOU the council did not attempt to engage the community at all.

PROF DALY: (20/01/04, p.62–63) *Just while that is coming to you, a question that struck me this morning when that was being talked about—the engagement of a public relations firm by the Council. Council is there to serve the community. I’m curious about why Council’s need public relations groups to serve the community. I wonder if you have a view on that?*

MR PACIULLO: *Well, the nature of local government is that they are closest to the people. There’s a very heavy involvement. I would suggest probably at a higher level than other levels of Government. Direct involvement. We meet amongst the people which is—and we make decisions in front of them, which is quite different from the way Parliaments work. Sure, they need to pass legislation, but they are more debating legislation and those decision as you would know, I’m sure, Mr Commissioner, those determinations about which direction to take by Government are made before they reach Parliament.*

Councils generally come under a lot of fire because of their involvement and very often, it has been my experience, that there’s a lot of misinformation and I’m not saying sometimes it is deliberate. I’m sure there are occasions where it is deliberate and people

have got political reasons to want to denigrate the Council. They have got their aspirations and so on. There are other times when people make statements believing to be the truth and it is not true.

I personally see, as any organisation should, have an ability to defend itself and be given advice as to how it should defend itself which is the best way of presenting their case. I don't have a problem with that as the Mayor of Liverpool.

10.2.2 At no stage was there any attempt by the council to provide information about the Oasis project that outlined the merits and demerits of the proposals to the community. In the scarce information that was provided there was every attempt to put a positive spin on the project. There was no effort made to suggest to the community that there might be risks that the whole of the project, or some of its parts, would not be completed according to plan. The failure to even mention risks is not surprising; in other parts of this report it is shown that the council had all but abolished the notion of risk from their considerations.

The council produced one flyer that was meant to explain the Oasis Project. Extracts are given below:

“Why is Council supporting the project?”

The city needs new facilities to keep up with population growth. In the last decade 45,000 new residents have come to Liverpool. Another 70,000 people will move here in the next 10–15 years. A quarter of our population is under 15 years, indicating the need for youth facilities. Since 1988, Council has sought to transform Woodward Park into a major leisure and recreation complex. Our independent advisors have recommended the Oasis project be supported by Council. The project will also give a major economic boost to the city.

What are the benefits for Liverpool?

- *world class leisure and recreation facilities.*
- *up to 4,500 new permanent jobs and 2,800 construction jobs*
- *raise Liverpool's status and image as a major destination and attraction within the Sydney region*
- *overall economic stimulus of \$1.9 billion.*

What are the financial implications for rate payers if Council proceeds?

- *Council will need to borrow between \$5.75 million and \$7.25 million towards constructing the Arena. This will represent less than 1% of expenditure in the overall budget.*
- *There are no other budget implications, as another \$4.5 million towards the Arena's construction will come from the proceeds of the sale of the old pool site.*

- *A further \$12 million will come from developer contributions especially set aside for providing community facilities.*

Council properties in and around the CBD will be restructured. Full protection of assets and a net asset gain will be achieved upon project completion.

There will be no rate increase due to this project. PriceWaterhouseCoopers have stated that funding arrangements for the Arena will not significantly impact on Council's overall financial position....

Partnership

Because Council is prepared to work with the Bulldogs (not for profit) Foundation, the community benefits from the construction of an Arena, Waterpark and Stadium. This is a unique financial structure where all the development profits are captured and returned to the project for the benefit of the community. Council's cash and assets used in the project are fully protected along the way."

10.2.3 If the council had been serious about engaging the community in the assessment of the Oasis project it had many avenues available to communicate with the community. They produced (in concert with the Bulldogs) an expensive video that painted the future developments in the Woodward Park Precinct in the most glowing terms. In kind, the video was similar to scores of advertisements that pepper the television screen when promoters attempt to sell their most recent real estate developments. Such promoters want the public to buy units or houses or whatever else they have to sell. The council wanted the community to buy the Oasis dream, but they were not willing to tell these buyers that it was just a dream, and that it was being paid for with the community's resources.

10.2.4 Outside of the pamphlet (10.2.2) and the video (10.2.3) the only other means of communicating with the public appears to have been letters written to the local newspapers by the Mayor, or press releases of the Mayor. These letters/press releases were frequently bellicose in tone, attacking any critics of the Oasis venture.

(Press release, LEADER 30 November 2000)

"Mayor Paciullo Rebuts Catholic Club's Groundless Claims Regarding Proposed Woodward Park Development

In responding to the groundless media statement issued by the Liverpool Catholic Club's general manager, Mr John Turnbull, on October 26 2000,

Liverpool's Mayor, Mr George Paciullo, said today:

“The credibility of any statement made by the Liverpool Catholic Club’s management can be gauged from the fact that this is the same organisation that, at the time Liverpool Council was assessing the Bulldog’s application for a club on the Old Pool Site, was opposing the application on the grounds that there were too many poker machines in Liverpool—while, at the same time, they were busy cramming as many extra pokies as possible into their own premises.

“Their only intention in opposing the Woodward Park proposal is to protect their own poker machine profits.

“They are not interested in supporting the council’s efforts to create world standard sporting, recreational and entertainment opportunities for the citizens of Liverpool.

“The council’s in-principle support given on July 6 to a commercial agreement with the Bulldogs for the Woodward Park proposal is subject to the agreement receiving independent evaluation by experts, thus ensuring that its every aspect will be subject to probity checks and financial scrutiny.

“In other words, the public’s interest will be fully protected.

“The latest statement by the Catholic Club’s management is totally consistent with their self-interested campaign during the past two years, in cahoots with the so-called Anti-Electronic Casino Group, to alarm and mislead the public.”

10.2.5 In many councils customer satisfaction surveys are made to determine how well or how poorly the council’s delivery of services and facilities is being received. Liverpool City Council conducts such surveys, but there was no attempt made in the years in which the Oasis or the MOU was being developed and signed to use the surveys as a means of gauging public opinion about the projects. Indeed, there are plenty of indicators in the evidence presented to the Inquiry, that the council had no desire to engage the community in any other way than the limited, and blatantly political, fashion discussed above.

10.2.6 The Bulldogs commissioned one survey that purported to show that the community was in favour of the Oasis project. The Inquiry did not receive the survey form containing the questions asked, or any details about the survey methodology. Only the results were available. Since the Bulldogs were strong proponents of the Oasis project some suspicions, whether justified or not, hang over the favourable results. Even if such suspicions are totally wrong, the Bulldogs were a private sector group intent on achieving certain outcomes from the Oasis project. The Inquiry is concerned about the role of the council within the project, and whether or not the community was in favour of the kinds of inputs and returns associated with the council’s participation. Since the public was not informed of the details of the council resources that would go into the project, it would have been impossible for them to have made any sensible response to a

question of that nature, if it had been included in the Bulldogs' survey. The likelihood of such a question even being asked in the survey is remote. In terms of providing evidence of community satisfaction with the involvement of council in the Oasis project, the Bulldogs survey is next to useless. Nonetheless the Mayor, at the Public Hearings referred to the survey as some kind of proof of community support.

MS JOHNSON: (20/01/04, p.32) *Do you know—did Council ever undertake any surveys to gauge the level of support for the development amongst the community?*

MR PACIULLO: *There were surveys undertaken, but not by Council as far as I can recollect.*

MS JOHNSON: *Who undertook them?*

MR PACIULLO: *I think the Bulldogs.*

MS JOHNSON: *Right. They would have had a vested interest in the outcome, though, wouldn't have they if they were, in effect, trying to get the development off the ground?*

MR PACIULLO: *Well, I'm not sure when these things are commissioned if the ones who are commissioned are told: bring me back this result. I just assume that they are authentic.*

MS JOHNSON: *Did you make any inquiries as to the kinds of questions that were asked about in the surveys.*

MR PACIULLO: *No. I had some verbal advice from Mr McIntyre, but I should add to my question that the '99 elections proved beyond any doubt that the community of Liverpool wanted to see this complex occur and I, as I said, 1 day of the week I'm available for all the residents and I speak to many thousands of people over a year and the overwhelming message I was receiving was despite the objections, which were very vocal and very noisy and they are entitled to be, there was overwhelming support for the project....*

Mr Carr pointed to the fact that no surveys were conducted to gauge public opinion concerning the Oasis Project.

MS JOHNSON: (02/02/04, p.50–51) *Did Council conduct any satisfaction surveys during the time that you were general manager?*

MR CARR: *Normal customer surveys?*

MS JOHNSON: *Mm.*

MR CARR: *General surveys?*

MS JOHNSON: *Yes.*

MR CARR: *Yes, they did.*

MS JOHNSON: *Those surveys were conducted when people approached Council, is that right, or in what circumstances were they conducted?*

MR CARR: *No, they were just general surveys of the community to get feedback on all of Council's general operations.*

MS JOHNSON: *Conducted by an independent survey organisation?*

MR CARR: *Yes.*

MS JOHNSON: *They were conducted independently of the community's involvement with Council. So it wasn't one of those response forms that you are asked to—"please tell us how you think we went" when someone contacted Council.*

MR CARR: *Yes.*

MS JOHNSON: *Is that right, it was something independent?*

MR CARR: *Yes.*

MS JOHNSON: *Were any surveys conducted in relation to the Oasis development, the public's view of that development?*

MR CARR: *I don't think so. I can't recall whether there were questions in the general survey about it or not. I've been exercising my mind about that question and I don't know. I haven't got a document to go back on. But I can't recall an organised customer survey being done about the project at the time that the commercial agreement and the early construction agreement were being considered.*

MS JOHNSON: *Was one done before Council entered into either of those agreements?*

MR CARR: *No, that's why I'm saying I can't recall one being done prior to those matters being considered.*

10.2.7

The council did not provide the community with the means of sensibly evaluating whether or not it approved or disapproved of council's role in the partnerships with private sector entities. Members of the community could not make a judgement because the council did not provide them with sufficient information. In fact the public is entitled to a very large range of information under Section 12 of the Act (see Primary Findings and Interim Report, p.86–87), and it is very clear that the intention of the Act is to allow the community easy access to information that it might need. Since the Oasis (and now Liverpool 2020) projects were the largest ever attempted by the council, it might be expected that the council, in the spirit of the Act, would take pains to keep the community informed. It didn't try to do that. The former General Manager and the Mayor enshrouded the whole process in such a veil of secrecy that the Elected Representatives themselves were poorly informed. Perhaps the most natural flow of communications between the community and the council is through the Elected Representatives. Since they were so starved of relevant information, and so curtailed in the time that they could assess the information, it was impossible for the Elected Representatives to do their normal job: that of keeping the community informed of what was happening, and receiving and evaluating community responses to what was happening.

10.2.8

Besides making information available to the community, it might be expected that the council would try to formally engage the community in assisting with ideas about the structures and plans of infrastructure developments that would run over several years. No effort was made to do that. The Precinct Committees that had been formed by the previous Mayor, Mark Latham, were abolished. The committee structures that had worked well for the Casula Powerhouse were not replicated in any way. There was no attempt to assess the experience of the Casula Powerhouse in terms of lessons for the Oasis project. In fact the council turned its back on its own successful experience.

PROF DALY: (19/02/04, p.17) *Could you explain the structure of the organisation? You have a board which is made up of—who makes up the board?*

MR GOURIOTIS: *It's quite a unique structure, the Council. It's a semi-autonomous board to Council and it's an advisory board and it's chaired by Mr John Marsden and it includes a number of business and community people and professionals within the cultural industry, particularly in the arts and heritage area. So—and it also has a councillor on it who is the Mayor's representative and also the general manager's representative. So it is quite a large board. There's 14 members on the board. Also, the Casula Powerhouse is—through its board and its staff—it's able to generate a lot of partners and particularly government partners, largely because it has been a centre that has presented quite a unique program which is able to generate sort of unique partnerships from across State and Federal governments and also local government areas and sometimes corporate support too.*

MR BROAD: (19/02/04, p.19–20) *Could I ask you some questions? You said that you have a 10 year strategy and that you have got a 4 year business plan.*

MR GOURIOTIS: *That's right.*

MR BROAD: *What processes have you gone through to develop the strategy and the business plan?*

MR GOURIOTIS: *The board, every 2 years, has a major meeting where they talk about the direction of where the Casula Powerhouse and the museum should be heading, in conjunction with a whole lot of areas within Council and also State and Federal governments. So we basically review it, from the board's—every 2 years—but from an operational perspective, it's done every 12 months. The level of consultation is with our various cultural groups, like our societies, our friends groups, our—the State government, like the Minister for the Arts and its offices and colleagues from across southwest Sydney and western Sydney area and to some degree, within the Sydney area.*

The Powerhouse, in a sense, is looking to have an effect across the region and it has—it puts in place all sorts of consultation processes. Like, for example, the capital development program—there was the board and then there would be a sub-committee, a capital committee that would provide advice to the capital development—like the features of the capital development that were required say for the theatre or the exhibition space. Then, it would—there would go out—with the capital program it would go out to proper tendering process and community consultation.

All the way through this capital development program there would be a very detailed business and operational plan which would evolve with the development of the capital project. Because what Council was very clear on—what the board was very particular on too—was that the Powerhouse was going to provide more services and for it to be able to deliver those services, it actually had to provide a very detailed business and operation plan so there was a very clear understanding what the bottom line would be to Council; to allow Council to make the appropriate decisions and also for us to focus on looking at other partners to the Casula Powerhouse's operational budget.

MR BROAD: *How long has this type of planning been going on?*

MR GOURIOTIS: *Well, I became director in May—sorry, I think it was in July '98—and pretty much since that time it was one of my—one of our huge briefs was to develop levels 3—sorry, stages 3 and 4 of the Casula Powerhouse. That's what we did and you know - - -*

The community's dissatisfaction with not having an effective voice, after the abolition of the precinct committees was aired at the Public Hearings.

MS JOHNSON: (26/02/04, p.49–50) *As far as you are aware, has any action been taken in relation to the contraventions?*

MS MEDWAY: *Not to my knowledge, no.*

MS JOHNSON: *Did you have any indication as to why no action might not have been taken? One matter was cost that you just referred to earlier. Was there anything else?*

MS MEDWAY: *Well, I really don't know, because we had been told so many different times by different people in Council that something was being done, but it never went anywhere.*

MS JOHNSON: *Is this a concern just of yours, or are there other people in the community that are concerned about this issue?*

MS MEDWAY: *No, there are residents here today from our street.*

MS JOHNSON: *For the record, there is about 5 or 6 people sitting in the back of the Inquiry, also indicating their concern, and all of these people have been vocal in presenting these issues to Council?*

MS MEDWAY: *Yes. Over the years, many people from our area have gone to the—originally they were precinct meetings, then they turned into forums, and every month people went to forums and brought issues, and in the end we were told not to bring those issues to the forum, to just contact one person in Council about it, which didn't seem right to me, because that was what those forums were supposed to be for. To bring information to Council, and all the things that they advertised, were what the forums were supposed to be for.*

PROF DALY: (26/02/04, p.52) *Just one question following that. Would the kind of issue that you have brought to our attention, that is, alleged illegal occupation of the site. Would that kind of issue come before the forum committee or not?*

MS MEDWAY: *Well, it is brought up at the forum every month.*

PROF DALY: *So it is a regular issue?*

MS MEDWAY: *Yes, it was a regular issue at the forum every month.*

PROF DALY: *What was the response from the Council officers?*

MS MEDWAY: *We had different responses from about '99 on, where they said they were taking legal proceedings and different responses like that. Letters from Council, saying that they were taking legal proceedings and that is what I can't understand, that we were told so many things but nothing ever happened.*

10.2.9 The Oasis development plans affected stakeholders who were providing services within Woodward Park. The Mayor gave guarantees that these groups would not be adversely affected by the developments.

(Media Release 22 June 2000)

“Woodward Park Pre-School Services to Continue

Existing pre-school services at Woodward Park will not be adversely affected by the new master plan for the area, the Mayor of Liverpool, Mr George Paciullo, said today.

Mr Paciullo said there would be a continuous pre-school service to the community.

He made this pledge at a recent meeting to discuss the impact of the proposed Oasis development on Liverpool Memorial Pre-School. Present at the meeting with Mr Paciullo were the pre-school’s director, Kaylene Chapman, and the chief executive officer of KU Children’s Services, Antionette le Marchant.

Mr Paciullo said that if it proves necessary to move the pre-school, then the new building will be situated close to the old one, with superior conditions likely to apply.

“I reiterate my earlier public undertaking that no present users of Woodward Park will be disadvantaged,” he said.

Mr Paciullo said precise details of the new master plan for Woodward Park were being prepared by Macquarie Bank and the Bulldogs club for submission to the Council.

“Once they are received from the proponents, they will be placed on public exhibition prior to any determination being made by the Council,” he said.

Ms Chapman and Ms le Marchant welcomed Mr Paciullo’s assurances regarding the pre-school’s secure future.

They said the existing pre-school’s convenient site near transport routes made it a popular choice with clients. These were mainly low-income families, dwelling close to the centre and coming from immigrant backgrounds.”

(Questions and Answers – Breaking New Ground)

8. *What will happen to the community groups that currently utilise the area where the arena will be constructed?*

There is a process of consultation occurring to ensure that appropriate future sites are identified for relocation of these groups.

10.2.10

It is clear that despite the Mayor's assurances, the subsequent outcomes for at least some stakeholders were considered unsatisfactory. Mr Stevens, a representative of the Australian Roller Skating Club, alleged that the Club lost its facilities, built up over decades, and was not properly compensated. Mr Stevens also suggested that besides the material loss, the youth of Liverpool had lost an important facility that greatly assisted youth with social problems. The Inquiry cannot make a judgement on Mr Stevens' allegations. What is clear from the evidence, however, is that there is quite strong dissatisfaction amongst some stakeholders of Woodward Park concerning their treatment by the council.

PROF DALY: (25/02/04, p.75) *Right, so you say—perhaps if you can tell me where the state of play is now with Council? The club has closed because you no longer have a licence to operate or because there's simply not enough interest to keep it open?*

MR STEVENS: *No, look, we made it clear to the Council and to Mr McIntyre after first of all him agreeing to us to relocate it and then later saying no, well, we've considered compensation. We made it clear that the whole purpose that when we started three decades ago was to make Council recognise, Councils, that children and handicapped people had a right to safe areas, not on the streets where they were getting killed and hurt. Now, we built several skating rinks but each time and up in Liverpool, Councils changed, they have new ideas and out you go, it doesn't matter what money you've invested for the purposes of investment.*

So we said, that's not the way to go. We didn't want to go that way in the first place. We were prevailing Governments and the sporting—the sporting area of the Governments, Sports Ministry, to recognise that they should be providing areas and not discriminating against people on a roller skate, give them these places. But we were happy to say, right, we'll prove our point and give us the land and we'll build the skating rinks, but up to a point, because we had a vision or some magnificent idea that the sport and the profits it would make was for normal children skating and not knowing that we're helping the cause of handicapped children. We had quite sufficient evidence in - - -

PROF DALY: (26/02/04, p.78) *Perhaps Mr Stevens, if I can just bring you back, has Council made you an offer for compensation for the roller skating rink?*

MR STEVENS: *Council paid us \$50,000 for the skating rink after doing some—doing this all behind closed doors. They were asked during my address to consider three options: to get the independent, as they promised; the other one was to consider legal action we might take against the Council in the Equity Court and otherwise; and they ignored all of that or made it—went and had a secret meeting, closed up and then come back and say: we'll give you \$50,000, out you go, that's it.*

MS JOHNSON: *So they have paid you that \$50,000?*

MR STEVENS: *Yes.*

MS JOHNSON: (25/02/04, p.79) *The club doesn't want the roller-skating rink to be relocated, it agreed to compensation being paid but the club thinks it deserves more than \$50,000?*

MR STEVENS: *Deserves to be compensated with the intention of the deed and to fulfil the commitment made by all parties that dealt with us that we would not be disadvantaged. I can't say, and nobody can tell me that \$50,000 is not taking advantage of us when a theme to reconstruct us looked at half a million dollars.*

MR STEVENS: (01/03/04, p.97–98) *Liverpool Council must not be allowed to dishonour their commitments to the Australian Roller Skating Club by failing to compensate them to the full value of their skating facility, which was agreed to, that they should vacate their site to allow a master plan for the redevelopment of Woodward Park to proceed. The compensation was to be used for the purpose of constructing a discovery home for handicapped people. – – – I have a letter here that I wish should be put in with the submission I have given you from Mr Tony Barden, who will confirm in writing when he was the person responsible for making the arrangements between all those people who were to be not disadvantaged if they agreed to vacate their premises to allow this Oasis master plan to develop. Mr Barden has set out here in written evidence of what those arrangements were. I went to see him last week and he was good enough to give me this and I would like to leave it with the Commission. It clearly states that: All negotiations involved with the general manager, Mayor or myself with tenants, community organisations, based in Woodward Park were undertaken based on the principle that no organisation will be disadvantaged by the redevelopment.*

Half a million dollars was what should have been given this club. We've been disadvantaged by the Council not honouring its arrangements, not abiding by the written words what they should do, and gave us \$50,000 that wouldn't even pay for solicitors' fees and a few other matters.

10.2 Findings

1. **The council failed to provide the community with sufficient information for the community and interested groups to understand the merits and possible problems associated with the Oasis and Liverpool 2020 projects. Rather than engage the community the council did the very opposite. It sought to “sell” the ideas to the community rather than honestly allow the community to make its own judgement about the role that the council was assuming in the projects.**
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PART

E

Decision Makers

Section 11: The Governing Body

11.1 **The Elected Body**

11.1.1 Chapter 9 Division 2 of the Act identifies the roles of the Elected Representatives. The role of the governing body is spelt out in Sections 223 and Section 232. In both Sections the primary role is identified as being “to direct and control the affairs of the council in accordance” with the Act. Section 232 (1) further clarifies the roles as:

- To participate in the optimum allocation of the council’s resources for the benefit of the area
- To play a key role in the creation and review of the council’s policies and objectives and criteria relating to the exercise of the council’s regulatory functions
- To review the performance of the council and its delivery of services, and the management plans and revenue policies of the council.

These are weighty responsibilities. It is the prime responsibility of every member of the governing body to understand these obligations and to live up to them.

11.1.2 Section 232 (2) enjoins the Elected Representatives to represent the interests of the residents and ratepayers; to provide leadership and guidance to the community; and to facilitate communication between the community and the council. It is clear from the evidence of Section 10 of this report that the majority of the Councillors connived with the Mayor and the General Manager in avoiding their obligations to inform the community about many aspects of the Woodward Park Precinct projects. Former Councillors Harrington and Dobell-Brown are the exceptions to this.

11.1.3 In respect of Section 232 (1) it is clear that the Elected Representatives, as a body, did not provide the optimum allocation of resources for the benefit of the area. In the *Primary Findings and Interim Report* (issued in March 2004) the details of money effectively lost by the council, and accounted for to that point, are outlined. The analysis shows that at least \$18,758,483 were expended, and all that council got for that expenditure is a concrete slab and some footings, and a small open-area car park. There is a strong chance that the slab itself may simply prove to be a further cost to the council if it has to be removed.

11.1.4 Liverpool City Council in 1996 had a serious financial problem. As Mr Carr explained in his evidence to the Inquiry:

MR CARR: (02/02/04, p.62–63)... *what we were monitoring from a macro point of view was the working capital surplus position and the debt service ratio, and the reason that—the reason it was imperative that that be monitored, was because the history of Liverpool—the starting position in '96 was a 15.4 million working capital deficit that it had.*

Coupled with that it was about a 12 per cent debt service ratio. The Council had to go through a fairly rigorous exercise to claw back that deficit and to restructure the debt. Ostensibly, the way they did that was in three parts. The first part was to seek an increase in rate revenue—and I think the Ministerial increase was adopted but then there was a 5 per cent addition added to that and that was quite an exercise and quite a bit of debate within Council about what option ought to be adopted.

The second part to it was to look at where there was over runs in expenditure and, in particular, duplication and duplication of effort caused by a structure of the organisation based on a purchaser provider split and so there were a number of reforms that were put in place to vary that. The third prong to the attack, really, was to restructure the debt and there was about 10.8 million of the debt restructured to put those liabilities over the life of the asset.

In essence, that reduced the impact on the recurrent account by about 1.5 million on the debt, 1.5 million addition with the rate revenue which had growth and the rest of it had to be done through cost savings. As a result of that strategy the Council's financial position turned the corner and reached a financial surplus in 1999 and lowered the debt service ratio from 12 to about 7, and that was principally maintained from that point on.

The steps that council took to rectify its \$15.4 million working capital problem began to have some effect, but the council's external auditor, Mr Banicevic, in 1997 described the council's financial position as precarious, and cautioned the council against entering into projects that might involve the council in debt.

PROF DALY: (03/02/04, p.3–4) ... *Now, all of that, as I said, seems prudent financial management, however the auditor for the Council advised in 1997 that the Council's financial position was still precarious and that it was not a position from which to take on more debt. Do you remember that advice from Mr Banicevic?*

MR CARR: *The Dennis Banicevic advice, I think it is one of these documents that was included in here and if I can just refer to that?*

PROF DALY: *Number 21, I am told.*

MR CARR: *Number 21 is it? Yes, that was the advice that was sought by Mr Roy Newsome, who was our corporate services manager. He sought the views of the Woodward Park proposal from a financial perspective and Mr Banicevic basically outlines in his letter the difficulties that Council were facing at that time with its finances. He also talks about the sale of land and the second tranche of properties which needed to be valued to see whether that was an accurate assessment.*

PROF DALY: *I will just read from the number 3 point in that letter:*

Council's financial position 30 June 1997 is considered to be difficult. With debt ratios of below industry benchmarks and there is a significant deficiency in available working capital. Council has a strategy in place to restore its financial position—which you have told us about—which cannot, this strategy, cannot incorporate any additional funding for projects like the Whitlam Centre extension. Council should therefore only pursue projects of this nature where they are self-funding.

That is the particular point that I wanted to take note of. Given that kind of advice and given the parallel consideration by the Council over that year of the possibility of revamping the Whitlam Centre or running with the Stardome proposal to build a new stand-alone arena, was a major consideration, the fact that it appeared at that stage that it would cost Council less to run with the Stardome proposal rather than refurbish the Whitlam proposal?

MR CARR: *From my recollection at that time the Council alternative was the \$4.5 million plus other assets and another loan to—or either another loan or a grant. So therefore the capital aspect of it was much harder to achieve from the Council's perspective whereas the marketplace responding like the Stardome coming in saying, well if Council can facilitate it with some capital and some land, like \$4.5 million plus some land and they are able to then provide the rest, then the pressure on Council's recurrent account, which was under pressure at that time, wouldn't be anywhere near as great and I suppose that is one of the reasonings why there was such a strong interaction with the marketplace.*

PROF DALY: *Right. So given the warnings that were put out by the auditor, the Stardome proposal looked, purely in financial terms, to the Council a better route to take. You weren't going to pay out as much.*

MR CARR: *From a financial perspective.*

Cognisant of the difficulties of its financial base, the council was still intent on pursuing the construction of new infrastructure on Woodward Park. In 1997 it received an unsolicited plan for the establishment of a basketball arena, along with other items, from the Stardome group. As Mr Carr noted in his evidence the council jumped at the prospect of gaining a basketball arena without threatening its precarious financial position. The council was deluded by the promises of the Stardome group. This began the sorry tale of progressively larger schemes and ambitions being made for the Woodward Park Precinct, with council's ready compliance. As the partners changed, the council's almost suicidal addiction to its dreams became stronger, and overpowering. The sorry end of that tale, in 2003, revealed the failure of the Elected Representatives to do their duty over the seven years when hype and ambition seemed to rob the majority of the Elected Representatives of their judgement. One of the more peculiar aspects of this sorry story was the continued (and desperate) fixation of the council on building a basketball arena. It began with a desire to give a local basketball team the facilities that it would need to gain entry into the National Basketball League competition. The motives behind this were blameless (the good that such an event might do for local youth), but there was no attempt to understand the costs and risks to council, as scheme after scheme to build the arena enlarged its scale and scope to the point that council by itself could certainly never be in a position to fund its construction. Council, by then, was locked into arrangements with various partners, and lost any ability to control the situation. What is of fundamental importance to note, in this sorry story of vaunted ambitions overcoming civic responsibility, is that it was the governing body, the Elected Representatives, who were responsible for creating the mess.

PROF DALY: (03/02/04, p.4–5) ... *The other point which I just raise—these are really background points to the route we want to travel down today—is what appears to be almost a fixation by the council of a particular basketball team. It began in that period, and if you trace the history of the various changes and developments of the ideas of what might happen in Woodward Park, somehow you always come back to the basketball team as providing an arena, an area, in which they could play as really dominating the agenda in various ways—the early construction agreement, for example. In hindsight, do you think that the what I've called a fixation on that basketball team warped the thinking of the Council in terms of what they chose to do and what priorities they put on different things?*

MR CARR: *It was certainly a major driving factor, it was the motivation, it was the—whenever the Mayor or other people talked about this sort of project, the passion was coming through relating to having a national basketball team playing locally, having what they call the basketball players, the icons, the youth that would then be able to relate to those icons. It was really being driven from a social perspective about the importance of lifting the morale of the Liverpool community, and so it had all of those elements, and I think that it sort of had all of those emotional elements, and I think what was really driving it was the emotional elements, and, of course, we are trying to deliver an arena from a rational perspective with a lot of emotional drive. So it certainly did have a significant influence on how the council was travelling with this project to meet those emotional drives.*

PROF DALY: *Many years later there is no basketball arena and the council is certainly almost \$19 million less in its finances. Do you think somehow the tail wagged the dog in a sense?*

MR CARR: *Yes, I suppose—I mean hindsight is a pretty good thing, going back in hindsight and saying how would it have done things differently. There was a lot of really good things achieved at Liverpool over that same period of time: restoring the finances, the working capital position, lowering the debt, achieving a number of reforms, in fact getting recognition at the National and State level in awards, so there was a lot of good things that happened. This particular project was always a struggle, and the emotional drive of getting the National Basketball team playing in a venue at Liverpool to actually achieve that appetite was certainly a very strong element and influence going through the Council to achieve it.*

Clearly you would go back in points of time and say: Well, if we actually stopped at that point and delivered this we could have delivered the Kann Finch Arena, for instance, much earlier than continually going down the path where we ended up with the Oasis programme. But it did evolve, it was an evolving process, and there were judgments made along the way, and at the time those judgments by the elected officials were considered to be what they thought was correct.

PROF DALY: *So essentially you are saying—and you remarked on this in terms of the structure of operations within the council yesterday—the fixation, as I've called it, on that basketball team was something that came out of the elected representatives, you simply tried to put their policies into operation.*

11.1.5

As Part B (4) of this report illustrates, the Elected Representatives made crucial decisions in respect of the Oasis project without having time to read and digest quite complex material, and in some cases without making any effort to read the material at all. Often they behaved in this way because they were advised, by the Mayor and the former General Manager, that there was an extreme urgency about settling whatever they were voting on. Almost always this immediacy of action was related to some perceived urgency related to the basketball competition. Former councillors Harrington and Dobell-Brown several times attempted to halt the reckless pace of decision-making on the run, but their efforts were persistently reviled by other councillors.

MS JOHNSON: (21/01/04, p.91–93) *I think Mr Broad asked you some questions about this issue but I take it that—certainly in relation to Oasis and Liverpool 20/20 there was—did you get the feeling of a pressure of time within which agreements must be signed and Council had to make decisions?*

MR HARRINGTON: *Yes, there was enormous pressure. If I could describe the whole project, it was like a runaway train and nothing was going to stop it. It just ploughed on.*

MS JOHNSON: *So were there occasions when you asked for a decision about whether or not to enter into an agreement or an MOU be deferred, did you ever ask that those decisions be deferred to another Council meeting or to a later date?*

MR HARRINGTON: *Both Councillor Dobell-Brown and myself have asked for deferments but I'm not sure whether we asked for deferments of Oasis matters but it certainly arises quite often in Council where you do need more time. We could well have done but I just can't remember specifically.*

MS JOHNSON: *Did you feel then under—did you feel that you were under pressure to make a decision on the night in relation to Oasis matters?*

MR HARRINGTON: *Can I just qualify that?*

MS JOHNSON: *Yes, certainly.*

MR HARRINGTON: *One just came to mind, the commercial agreement from memory, my motion was because there was a—the motion was to proceed with it, I moved an amendment that it be deferred to allow a poll to take place and to get legal advice, a second opinion from consultants or legal people. That was defeated. So that was an example.*

MS JOHNSON: *Right. Where you tried to put a bit of a stop to the runaway train, to apply the brakes a bit?*

MR HARRINGTON: *Yes, because at that very meeting, that was the first occasion, 17 months after the last election the public first became aware of what was required of Council. On that night there was a presentation made by the general manager of the Oasis presentation and it spelt out the \$74 million of real estate in the CBD was required of Council as well as the \$22.25 million.*

MS JOHNSON: *What was your—were reasons ever given by the people making the presentations, by the Mayor, by the general manager as to what the need for the urgent—why the need for urgency? Why the need for speed in relation to making these decisions?*

MR HARRINGTON: *Well, I think the Razorbacks is what it was all about, to meet their needs of their elevation to the NBL and a time period where they need to have a new premises and that was the push I believe from the Mayor's end to meet that objective.*

MS JOHNSON: *That was - - -*

MR HARRINGTON: *I'm talking specifically the Arena now.*

MS JOHNSON: *Yes, and so you have—your recollection is that the Mayor said that we need to push ahead with this because we need to provide the Razorbacks with an area. Is that your understanding?*

MR HARRINGTON: *Yes, that's pretty fair.*

MS JOHNSON: *Of the need for the urgency?*

MR HARRINGTON: *Mm.*

MS JOHNSON: *Did you ever make complaints to anyone about your access to information on Council?*

MR HARRINGTON: *Yes. I alluded to earlier that there was five advices that were held up. A couple of them for 3 months and - - -*

MS JOHNSON: *When you say "held up" you mean that Council had received them but you hadn't got them?*

MR HARRINGTON: *That's right, that's right.*

- 11.1.6 Largely ignorant of the technical, legal and financial aspects of the arrangements upon which they were voting, the majority of the Elected Representatives placed inordinate faith in the former General Manager. At the Public Hearings, at which every councillor gave evidence, many councillors then blamed the former General Manager for their own numerous failures. Significantly they failed to consider seriously the details of the various schemes that they were so cavalierly willing to support in relation to the Woodward Park Precinct.

MR BROAD: (16/02/04, p.23) *Mr Glavich, you said a minute ago that you relied too much on people at the top, who were you referring to?*

MR GLAVICH: *Brian Carr mainly. The Mayor and some senior officers that were involved with the project.*

PROF DALY: (16/02/04, p.24) *So you relied on the General Manager and/or senior staff to explain the technicalities of what you were reading?*

MR GLAVICH: *I relied on their reports. Once we bring up a matter that may be of concern to us, we were expecting a report at the Council meeting or sooner and in most cases, it was at Council meeting. Sometimes sooner, we would be given information by fax or by the normal mail deliveries for councillors. Once again, I did expect to have an honest report. A full report. No withholding of any information.*

MS JOHNSON: (16/02/04, p.63–64) *On several occasions you voted against Councillor Harrington's motion to defer the meeting, although you, yourself, felt you hadn't had sufficient time to read the reports, is that right?*

MR PASCALE: *They didn't have sufficient time to read the reports but there was an explanation from the General Manager to tell us what exactly his view—what his recommendation was.*

MS JOHNSON: *So by the sounds of things, you then relied very heavily, if not exclusively, on the General Manager's report to you about what was in these professional reports, is that right?*

MR PASCALE: *Exactly. See if I may give you an example, I'm managing a lot of properties and my clients employ me to look after their business. It is up to me to advise him. I make sure the rent is paid, make sure they get money very day. Similarly, I expect that a similar circumstance to the General Manager. He gets paid to tell us to look after the business—the business—the Council business. It is all about make sure who does the correct way and not waste any money.*

MS JOHNSON: *Did you expect that the reports he provided to you would be balanced? That they would have both the good things and the bad things about the project in them?*

MR PASCALE: *I more expect to have the good things than the bad things. I didn't expect the bad things. I expect to have the good things to refer to the project.*

MS JOHNSON: *If there were risk associated with the project, would you expect those to be in the General Manager's report?*

MR PASCALE: *Of course.*

MS JOHNSON: *Do you remember being made aware of risks associated with entering into the commercial agreement?*

MR PASCALE: *No, I don't.*

The Mayor strongly relied on the advice of others.

MR PACIULLO: (19/01/04, p.90–93) *Throughout my public life I've always relied heavily on the advice of people who have expertise in particular areas that one cannot expect a person from my background—legal background—to have and if I could just elaborate—to vary from that advice is a huge risk in public life if you don't have that expertise and, yes, I've always relied on that type of advice.*

MS JOHNSON: *So the advices that you receive then, that come into—do they come to Council or do they come to you? Would you be the first person to see these advices?*

MR PACIULLO: *No. I wouldn't be the first person under normal circumstances to see the advice. That would go to Council first and—sorry, the administration first and then I may have—I may have been made aware of that advice but then it would go to the Council.*

MS JOHNSON: *Right. Do you read the whole of the advices that are obtained in relation to these developments?*

MR PACIULLO: *I don't read it word for word and if I could explain why. If I had the time I would but as the mayor of this particular city—and I've mentioned the enormous growth—it is impossible for me to conduct all my civic functions or my civic responsibilities to go to so many other meetings. This was not the only issue before the Council in terms of trying to fulfil our obligations to our growth and to our population and I may—and especially if I'm informed by an offer that I should read this carefully so I'm aware of what questions to ask—but I may sometimes read it more carefully than other times. Generally speaking, I rely on the advice of others.*

MS JOHNSON: *So you rely not only on the advice of experts but on someone else's précis of that advice.*

MR PACIULLO: *Precises are sometimes very useful, especially when you get a document that thick and it would take you 2 or 3 days to read it, let alone absorb it and when there's a summary in the front it is extremely helpful. That has always been the case, even as a Minister of the Crown.*

MS JOHNSON: *Right. So when you say you rely on advice, what you really rely on is someone else's summary of the advices much of the time?*

MR PACIULLO: *I assume the summary is an accurate reflection of the advice that's been given.*

MS JOHNSON: *But that is what you rely on?*

MR PACIULLO: *Yes.*

MS JOHNSON: *Right. That is even in matters of—correct me if I'm wrong—but these developments that the Liverpool Council was entering into were extraordinarily significant. The Council, I think—you were talking about the overall cost, not necessarily to the Council, but the cost of the developments being \$700 million and they were huge, weren't they?*

MR PACIULLO: *They were.*

MS JOHNSON: *Even in those circumstances, you wouldn't read the whole of the advice before signing off on say, the commercial agreement?*

MR PACIULLO: *No.*

MS JOHNSON: *You have and you have said—and correct me if I'm wrong—you wouldn't always sit down and read every line of every advice you received. You didn't have time. Much of the time you relied either on the executive summary at the front of the advice—is that correct—and/or an advice prepared by a member of staff? A member of the Council staff? Some other form of summary of the advice.*

MR PACIULLO: *There were virtually hundreds of documents and if you piled them all on top of each other, probably the ceiling wouldn't be high enough. If I could just explain it that way, to indicate to you and of course to the inquiry, it wasn't because I would not have liked to have read every word and to ask any questions that exercised my mind or any concerns that came to me as a layman. It was simply because it is utterly impossible—and we haven't even touched on the amount of time it requires to try and service the population of Liverpool—it was just simply for me to find the time, given my many other commitments, to do that.*

I would very much love to. I would very much like to say to you today and to the Commissioner, that I read every piece of advice and it exercised my mind to ask further questions. It is not a luxury but that opportunity in an area like Liverpool and given my total commitment in terms of being available to the public, which was on a regular weekly basis and the hundreds of issues that individual people wanted me to take a personal interest in—I simply ran out of time to be able to do that.

11.1.7 Section 232 of the Act is quite clear about where the responsibility lies for deciding policy, and ratifying how it might be put into practice: it lies squarely with the Elected Representatives. It was their responsibility to understand the implications and detail of council's commitments when they entered into partnerships and other arrangements in relation to the Woodard Park Precinct. It was in their power, and it was their clear obligation to the community, to stop and correct any processes that threatened their ability to make reasoned and informed decisions. There were four areas in particular, where the Elected Representatives should have exercised their authority and insisted on installing good process. These process areas should have ensured:

- Access to the full detail of advice and technical reports, and the provision of appropriately long periods of time to read the advice and reports
- Access to professional assistance to provide them with an understanding of the advice and reports when they needed it¹
- Time frames for debate and consideration of issues that were appropriate to their scale and significance
- Consistent and timely reports on a range of issues connected with the negotiations and development of projects, rather than receiving information at the end of the proceedings
- Regular and sufficiently detailed reports on the budget aspects of the projects.

The evidence shows that the majority of councillors did not insist on reasonable processes being put in place, and ultimately it was this failure that led to the dismal outcomes, and the consequences of these for the future prosperity of the community.

11.1 Findings

- 1. The governing body did not direct and control the affairs of the council in accordance with the Act; they failed to exercise their decision-making responsibilities with due care and diligence.**
 - 2. The governing body failed to achieve the optimum allocation of the council's resources for the benefit of Liverpool.**
 - 3. The governing body did not review sufficiently the impact that their decisions might have on the performance of the council and its capacity to deliver services.**
-

1. At some council meetings the authors of various pieces of advice were present. Since the councillors generally had no opportunity to have read and deliberated over the advice prior to such meetings, it was futile to expect them to utilise their opportunity to ask questions of the advisers in a productive fashion.

11.2 The Caucusing Issue

11.2.1 Throughout the entire period when the various schemes for the Woodward Park Precinct were initiated and approved by council, the majority block were members of the ALP. In the council that was elected in 1999 seven of the eleven members were from the ALP. It has been the practice of ALP councillors to discuss issues in private, determine an agreed stance on issues, and then vote as a block when the issue was put before a council meeting. With the various schemes that were put before the council regarding the development of the Woodward Park Precinct (from Stardome through to Liverpool 2020) there is not one instance where the vote of the ALP block was split on any issue. This is not surprising as it is common knowledge that the ALP rules oblige councillors to vote according to their caucus decisions. From the evidence from the Public Hearings it is clear that this process led some ALP councillors to vote at council meetings against their own judgement, and perhaps against their own consciences. Matters to do with caucusing were explored in the Public Hearings.

PROF DALY: (21/01/04, p.8) *The one case where I have seen—the evidence I have here you didn't do that, you actually seconded a proposal but then absented yourself from the vote. All of that, and what you have said this morning, confuses me a little. You voted—you say you had a lot misgivings about some aspects of the proposals and some of the background to it, yet you voted consistently for it. Can you tell me why?*

MS WALLER: *Yes, I can explain. The Liverpool Council is made up of three political parties. There's the Liberal Party representatives, there's the Community Independents and also the Labour Party. I'm a member of the Labour Party and the Labour Party has the majority of Council members and I'm bound because I'm a member of the party and I run as a member of the party in the Local Council elections, I'm bound by caucus there.*

MR BROAD: (21/01/04, p.35)... *Can I ask you something about the way that the meetings then operated within Council and specifically the ALP Councillors having adopted a position, which I assume was a resolution in respect of a motion to be put before Council, did the ALP Councillors then open up that matter for debate within Council or did they simply say our view is this and they will proceed accordingly?*

MS WALLER: *No, it would be opened up for debate more often than not.*

MR BROAD: *And in the course of debate, were you entitled to put any view contrary to that adopted by the caucus?*

MS WALLER: *No.*

MR BROAD: *So you simply maintained a caucus line?*

MS WALLER: *Yes.*

MS JOHNSON: (21/01/04, p.11–12) *What if you personally didn't feel comfortable that you had all the facts, you had all the information, you had had a chance to think about that advice before making that decision? Was the possibility open to defer consideration of the issue?*

MS WALLER: *I would raise it in the caucus and then the caucus would consider my concerns and make a decision on that.*

MS JOHNSON: *Do you ever recollect the caucus agreeing to defer consideration of these issues to a later date?*

MS WALLER: *On a couple of occasions over 8 years.*

MS JOHNSON: *Can you remember the occasions?*

MS WALLER: *No. I can't, I'm sorry.*

MS JOHNSON: *The vast majority of times, even when you had raised concerns, the caucus would say well that is tough, we've got to go on?*

MS WALLER: *Yes.*

MS JOHNSON: *The Council would then push ahead to make those decisions? Is that right?*

MS WALLER: *Yes.*

MS JOHNSON: (21/01/04, p.15) *So what you are saying is that prior to signing that MOU, a document existed, called the Urbis Report, which suggested that the Bathurst Street development was not going to be economically viable and in fact, might make a \$10 million loss?*

MS WALLER: *In its current form.*

MS JOHNSON: *In its current form. That wasn't provided to you before?*

MS WALLER: *No.*

MS JOHNSON: *You were a part of the decision to sign off on the MOU with Macquarie?*

MS WALLER: *Yes.*

MS JOHNSON: *Would that have changed your view of whether that MOU was appropriate to proceed with?*

MS WALLER: *I opposed signing the MOU in the caucus in the sense I thought the Council was rushing into another arrangement that hadn't been fully explored in a proper fashion. I made it very clear that we needed time to look at what was happening, given the recent ICAC inquiry, concerns that were happening. There had been issues raised with me personally, over a period of 8 years by Council staff, that they felt the processes weren't being properly adhered to. There were numerous personal issues raised with me and I felt that we were being quite foolish and we needed to take time to insure that we got it right and the caucus decided to sign the MOU.*

MS JOHNSON: (21/01/04, p.23–24) *I just wanted to come back, if I can, to some of the issues of caucus. You were able to take your own independent view to caucus, is that right?*

MS WALLER: *Yes.*

MS JOHNSON: *But once caucus had made a decision, you felt constrained. You were constrained - - -*

MS WALLER: *I was obliged to adhere to the caucus decision.*

MS JOHNSON: *And to vote - - -*

MS WALLER: *And morally.*

MS JOHNSON: *- - - as a block. Morally obliged, you say?*

MS WALLER: *Morally and also not legally, but as a party member that is part of my platform, that you will always vote as a block.*

MS JOHNSON: *What happens if you don't?*

MS WALLER: *Well, being a member of a political party if you choose not to follow their rules then they have options and probably they will exercise those options.*

MS JOHNSON: *You would then vote—regardless of your own view—so you had misgivings about entering into the MOU?*

MS WALLER: *Mm.*

MS JOHNSON: *That caucus had made a decision that the MOU should be signed?*

MS WALLER: *Yes.*

MS JOHNSON: *And you were then obliged to vote in that way once the matter got to Council?*

MS WALLER: *Mm.*

MR BROAD: (16/02/04, p.43–44) *Councillor Harrington gave evidence of attempts to have decisions made on important matters deferred. Did you at any stage support motions put by Councillor Harrington?*

MS ANTHONY: *No, because I was bound by caucus to - - -*

MR BROAD: *If you had not been bound by caucus?*

MS ANTHONY: *I would have supported the deferral, yes.*

11.2.2

There is evidence that material presented to the council meeting was not always available in time to give to the caucus meeting that would precede the council meeting. There is no clear answer as to what happened to determine the caucus vote in such situations, but the reality is that on each occasion related to Woodward Park the ALP voted as a whole. It would appear that the ALP faction voted in accordance with their leader's wishes (Mayor Paciullo), no matter what their feelings about the issue might have been. There is evidence available from the Public Hearings and Submissions that there was vigorous debate between members of the caucus, but in every case the caucus decisions decided the way in which the vote would run at the council meetings. In this fashion the series of decisions that led ultimately to disastrous outcomes for the council, and the bad council processes that were allowed to stand behind those decisions, were made. Various matters were passed not because some Elected Representatives thought that they were the best decisions for the community, but because they were obliged to follow party rules.

MS JOHNSON: (16/02/04, p.79) *That you have the Labor caucus meeting first and that those reports would then be available to you when you left the caucus meeting and walked into the Council chamber to start the Council meeting, is that right?*

MR GAUCI: *Well, my correction with that—when that happens is, a decision is not made at caucus. Other issues were being read—dealt with—but if we didn't have the full information of the most document—at our confidential reports—my—I can't recall of actually making a decision in caucus.*

MS JOHNSON: *So are you saying that if the confidential reports hadn't been seen by you because they weren't made available until the Council meeting started, caucus didn't vote - - -*

MR GAUCI: *That's correct.*

MR BROAD: (16/02/04, p.80) *Sorry. At caucus meetings the caucus would form a view on how it would vote at Council's meetings, wouldn't it?*

MR GAUCI: *That's correct.*

MR BROAD: *It wouldn't make a decision because the decision wasn't made until the Council meeting took place, would it?*

MR GAUCI: *That's correct.*

MS JOHNSON: (16/02/04, p.81) *Did you ever feel that you didn't have adequate time to consider the issues raised in the reports?*

MR GAUCI: *Adequate time to read the full report, yes, but after asking questions by myself or any other councillors, by the people who actually wrote all the advice of the General Manager, this is make, I satisfied myself before a decision I made.*

MS JOHNSON: *That you had fully understood the issues and you were aware of the contents of the report and the advice being given to Council.*

MR GAUCI: *That's correct.*

MR GAUCI: (16/02/04, p.82) *To my knowledge if we didn't see the full report we didn't make a decision in caucus.*

MS JOHNSON: *Then Labor Council members were just simply free to vote as they wished?*

MR GAUCI: *In most cases—well, in my recollection that happens, yes, it was, and my understanding—one meeting that comes to mind, we ran over until almost midnight and I think the councillors will also tell you that I was the most vocal at that night.*

MR BOWMAN (recent letter to Prof Daly received 04/05/04) *There are occasions where criticism is made of the caucus system. I would absolutely refute the allegations that Councillors were either gagged in caucus or during meetings. All members of the caucus were clearly entitled to ask any questions and I am not aware of any instance where anyone was refused access to information. It was also quite clear that Councillors were allowed, no matter what political persuasion they came from, to ask questions in Council meetings.*

I clearly, as did others, raise on numerous occasions concerns over the project and sought and was given assurances that things were proceeding in accordance with plans and advice given.

MR BROAD: (21/02/04, p.37–38) *Can I change tack a little bit? Having regard to what has now become apparent in the Oasis dealings, is it your view that the Councillors as a whole not as you, individually, acted to participate in the optimum allocation of the Council's resources for the benefit of the local area?*

MS WALLER: *Given the resolutions passed I would say that no, we didn't.*

MR BROAD: *In the events subsequent to what has become known in respect of the Oasis developments, is it your view that the Councillors as a whole have been able to review the performance of Council in its delivery of services and the management plans and revenue policies of the Council?*

MS WALLER: *I would have to say yes and no to that in a sense that separate to the Oasis Council still functions and there other issues happening which didn't have the same constraints so - - -*

MR BROAD: *I'm not asking for an answer as to whether or not Council failed as a whole. Clearly Council maintains control and continues to provide services and various things and whether it is at the lowest level, that is garbage but looking particularly at Oasis?*

MS WALLER: *If we are looking only at Oasis, I would have to say that yes, there was a major issue and what you have said I would agree with.*

MR BROAD: *Is it your view that the caucusing adopted by the ALP Councillors had any adverse effect on this process?*

MS WALLER: *Yes.*

11.2.3

Although the blame for poor decisions being made might be sheeted home to the caucus system, the evidence suggests that there was something else operating to push through the various voters to favour the Woodward Park schemes. On every occasion when the ALP block vote was exercised, the two Liberal Party representatives on council voted in the same way as the ALP councillors. In their case the reasons given were that they voted in accordance with the evidence available and their general feeling that the schemes were good for Liverpool. The reality is probably that these two councillors were drawn in by the magnetism of the 'dream', so imperfectly presented to them, and by the power of the Mayor to convince them of the merits of the dream.

MR BROAD (16/02/04, p.16–18): *Now, you have been a Liberal councillor since, what, 1991. In respect to the proposals for Woodward Park, I will start with the Stardome project, did you, as Liberal councillors or yourself individually, vote with the Labor councillors on all matters affecting the Stardome project?*

MR GLAVICH: *We did. We even voted on the initial stages when the land was rezoned to operational land. That was done, I believe, in 1992 by the Labor - - -*

MR BROAD: *That ultimately - - -*

MR GLAVICH: *Yes. Sorry, the vote was constantly for the project and it was my connection with a lot of individuals in the Liverpool district, a lot of residents, that the project was wanted and it was badly needed, particularly for the youth due to the high crime in our area.*

MR BROAD: *Now, in respect of the Oasis project, did you, as one of the Liberal councillors, vote in favour of that project?*

MR GLAVICH: *Yes.*

MR BROAD: *That was at all Council meetings relating to that project?*

MR GLAVICH: *I would say 99 per cent, yes.*

MR BROAD: *Yes, and in respect of the Macquarie Bank MOU, again did you as a Liberal councillor vote with the Labor councillors in respect of that project?*

MR GLAVICH: *That is correct. I had no choice.*

MR BROAD: *Now, is it usual for you and Councillor Pascale, as Liberal councillors, to vote with the Labor block or to exercise your own views?*

MR GLAVICH: *It is not usual. Councillor Pascale and I have on occasions different opinions, different views, and we vote individually. It is not common that we vote with the Labor party unless we agree that it is the correct decision.*

MR BROAD: *Now, in—excuse me, your Honour, I will just get a date—in 1997, sorry 1998, no 1997, the Mayor and Mr Carr were delegated the responsibility before the development of Woodward Park by Council. Do you recall that?*

MR GLAVICH: *Yes.*

MR BROAD: *Subsequently, did you rely on the reports of Mr Carr and the Mayor to assist you in making your decisions as a councillor?*

MR GLAVICH: *Yes, the element of trust was always there up until a certain time.*

MR BROAD: *You relied upon them as being trustworthy?*

MR GLAVICH: *Yes, trustworthy, honest and look, I understand that they had to give a truthful presentation, an honest opinion, and we relied on that, I relied on that.*

MR BROAD: *Did you rely on them to have considered the commercial aspects of the agreements?*

MR GLAVICH: *Yes.*

MR BROAD: *To be able to report to you in clear terms?*

MR GLAVICH: *Yes.*

MR BROAD: *Did you expect that they would report both the good aspects and the potentially bad aspects of any proposal?*

MR GLAVICH: *On the General Manager's point, yes. I'm not sure whether the Mayor would have to bring that to our attention because his position is only to chair the meeting, but the General Manager supplies the information which, again, is supplied by the officers and I trust all of those avenues.*

MR BROAD: *So you think that the Mayor might have had a different role?*

MR GLAVICH: *In relation to the project?*

MR BROAD: *Yes.*

MR GLAVICH: *No, I don't think so. I think the Mayor had a vision as all the councillors, and I think he was—the General Manager had a vision.*

11.2.4

The ALP has modified its rules on caucus voting to allow ALP councillors a free vote on Development Application matters. It might be interpreted that the change would have allowed ALP councillors at Liverpool to have had a free vote on many matters related to the Woodward Park Precinct schemes. This interpretation might be reached because some of the arrangements effectively bound the council to ensure certain development outcomes for some parcels of land. There is evidence that some ALP councillors sought clarification on the matter from their Party's Head Office but, as the extract of evidence below shows, the advice in relation to the Macquarie MOU was ambiguous enough for those councillors to be cautious and vote in favour of the MOU.

(Email from Helen Nezeritis NSW ALP 12/12/02)

"In response to a media report concerning local government and caucusing, all ALP Councillors are reminded that ALP rules limit matters that can be caucused on. Development applications are not matters that are included as matters for caucusing.

'Rule H.1(d) states that:

Labor Councillors can only caucus on Party policy, local election policy, council estimates, finance and rates, staff matters, town planning, the election of Mayor, President, Chairpersons and Deputies and members of Standing Committees and other representative bodies.'

As per the Party rules, all Labor Councillors are prohibited from caucusing on development applications."...

(Letter from Mark Arbib, Assistant General Secretary, ALP, 12 May 2003 to Tony Beuk, Secretary Caucus, Liverpool City Councillor)

“Dear Tony,

Thank you for your letter concerning the issue of local government caucusing.

‘Rule H.1(d) states that:

Labor Councillors can only caucus on Party policy, local election policy, council estimates, finance and rates, staff members, town planning, the election of Mayor, President, Chairpersons and Deputies and members of Standing Committees and other representative bodies.’

If the issues you have raised fall under one of the above categories then all Councillors will be required to abide by the Caucus decision.

As per the above rule, all Labor Councillors are prohibited from caucusing on development applications.

I hope this clarifies the matter.”...

11.2

Findings

- 1.** **The evidence supporting the contention that adherence to caucus voting obligations was responsible for the series of poor decisions made by the council in relation to Woodward Park is not conclusive. The evidence suggests that three of the ALP councillors may have changed their vote on some matters, had they had a free vote. This would still resulted in a six-five outcome in favour of the arrangements voted on at various times because the Liberal Party councillors consistently voted with the Mayor.**
 - 2.** **The fact that some ALP councillors, on a number of occasions, voted against their judgement on what was best for the community implies that these councillors effectively contravened their obligations as set out in Section 232 of the Act.**
-

Section 12: The Corporate Body

12.1 The General Manager's Role

12.1.1 The Act specifies the duties of the governing body and the body corporate to ensure that there is a separation of powers between the two. The governing body represents the interests of the residents and ratepayers, and provides leadership and guidance to the community. The governing body facilitates communications with the community. Its prime task is the direction and control of the affairs of the council, participating in the optimum allocation of the council's resources for the benefit of the community, creating and reviewing council's policies and objectives, and its performance. These specifications relate to Section 232 of the Act, discussed earlier. The body corporate, through the General Manager, is responsible for the efficient and effective organisation of the council's organisation, and for implementation, without undue delay, of decisions of the council (Section 335 of the Act).

12.1.2 There are further functions of the General Manager defined in Section 335. These include the day-to-day management of the council, the exercise of the functions delegated by the council, and the appointment, direction and dismissal of staff.

12.1.3 The former General Manager played a key role in organising the structures and negotiations that led to the Commercial Agreement, and other major steps in the process of creating the Woodward Park Precinct projects both before and after the Commercial Agreement. In playing this role Mr Carr acted in accordance with his role, as defined by the Act, and also in accordance with the specific requirement of his appointment to bring the major projects for Woodward Park to a successful conclusion. It can be said that the central role assumed by Mr Carr between 1996 and 2003 in pushing forward the various schemes for the Woodward Park Precinct demonstrated that he was doing the job delegated to him by the council. What is not clear is how Mr Carr managed to do all the other things connected to the day-to-day management of the council and fulfil the onerous duties associated with Woodward Park.

MS JOHNSON: (02/02/04, p.3) *Mr Carr, I just wanted to begin by exploring with you the role of a General Manager. That was your position when you were at Liverpool City Council. Can you tell me what you see the role of the General Manager being?*

MR CARR: *The General Manager is the Chief Executive Officer of the Council. It presides over the resourcing of the organisation, it provides policy advice and the General Manager interacts with the Mayor and the Council in ensuring that decisions that the Council make are effectively delivered.*

MR CARR: (02/02/04, p.5) *I had a lot of direct contact with the Mayor but I also had direct contact with all the elected members on occasions. I had an open-door policy so elected members could come in or contact my office.*

MS JOHNSON: (02/02/04, p.74–75) *I just wanted to talk to you a bit about your staffing at the Council. Your relationship—perhaps to start it in a more general way, how many staff were there in total at Council?*

MR CARR: *There was about 650 staff.*

MS JOHNSON: *You were, although not having day-to-day monitoring over all them, the ultimate head of—the ultimate supervisor of all those staff, is that correct?*

MR CARR: *Yes, as General manager, yes, you're responsible for the staff.*

MS JOHNSON: *How would you describe your relationship with the staff that you worked with?*

MR CARR: *I thought I had—my view is I had a good relationship with the staff, had good relationship with the management and the general staff. I used to on occasions visit a number of the outlying areas, child care centres was in particular an enjoyable experience, go to the libraries and moved around amongst the staff. Probably didn't do it as much as I would have liked because of other work pressures but I believe I had a good relationship with staff.*

MS JOHNSON: (26/02/04, p.28) *Councillors said in their evidence, Mr Carr, that they relied on you to advise them about the negatives as well as the positives of the Oasis project, and to bring any matters of concern to their attention. You would agree that was your obligation as a General Manager, with a delegated responsibility for the project?*

MR CARR: *Well, I thought I had brought the issues in front of the Council in my report which was - - -*

MS JOHNSON: *So that was your aim, to bring before them all, the relevant issues?*

MR CARR: *Yes, and in hindsight, and since thinking about the issues of this Inquiry, that those consultants' reports, clearly they ought to have been distributed, and even though the councillors were saying to me that they wanted them to be treated under a regime of confidentiality where people had to come in and sign for them, etcetera, I was attempting to do what the Council thought was appropriate, to protect the Council from mischievous behaviour. In hindsight, I shouldn't have done that, I should have just*

distributed those reports and be done with it, but I didn't. I took a view that I was attempting to protect the Council in its entirety from the way that those documents were being handled or dealt with, or potentially dealt with.

MR BROAD: (26/02/04, p.35) *On another issue, were you, towards the end of the period of your contract with the Council, or prior to your retirement, attending the Council on a full-time basis?*

MR CARR: *Was I attending the Council on a full-time basis?*

MR BROAD: *Yes.*

MR CARR: *Yes.*

MR BROAD: *So there would be no suggestion that you simply weren't attending on one or more days of the week?*

MR CARR: *No. I was attending meetings, I was dealing with matters on the memorandum of understanding and I was attending meetings, in fact, I—in terms of the negotiations, I have suggested a longer date - - -*

12.1.4

The evidence suggests that the Mayor was quite happy to leave Mr Carr to deal with almost all of the detailed work connected with the various infrastructure proposals. As Section 11 demonstrates a large number of the Elected Representatives placed great faith in Mr Carr's ability to handle the complex issues that the infrastructure projects presented to council. Mr Carr was placed in a difficult position by the general disinterest in the detail of the proposals exhibited by many councillors. He felt it was his duty to bring the infrastructure plans to fruition, and he worked hard to do this. The problem was that this somewhat lone central role brought Mr Carr into dangerous territory in terms of the separation of powers. As shown in earlier Parts of this report, the Woodward Park precinct project was really a moving structure with the goals being changed and expanded at several points over the seven years that Mr Carr was General Manager. Effectively Mr Carr was at the heart of that process. Consistently, Mr Carr was at the centre of discussions that shaped the changing structure. Because the Mayor was interested only in the broad vision, rather than the financial, organisational, technical and legal details, Mr Carr managed the process for council. At a number of points Mr Carr was effectively charting the direction of the changes. Because of the ever increasing scale of the projects, and because of the innovative, but risky, links with private sector parties that were being established, Mr Carr was taking the council into new directions that really amounted to the development of new operational policies. The new directions most definitely impacted on whether there was an optimum allocation of the council's resources for the benefit of the community. At every stage the governing body would vote on the direction of change, and at every stage the governing

body voted in favour of the structures that Mr Carr presented to them. It has been amply demonstrated that the governing body frequently did not have sufficient time, or sufficient access to reports and other material, to be able to analyse the background material. They did not cast their votes confident that they understood all the complexities and all the risks of what they were approving. The Mayor, driven by his grand vision, encouraged the councillors to follow the leads given by Mr Carr, and most of them followed willingly. The manner in which this happened meant that Mr Carr drove the process, and the Mayor decided that what Mr Carr proposed represented the interests of residents and ratepayers. Most certainly Mr Carr, with his fetish for secrecy, did not facilitate communications with the community.

MS JOHNSON: (20/01/04, p.93–95) *You spoke this morning about some of the advices that Council had received and you said that you had not had the luxury of the time to be able to read all of those advices that Council was given.*

MR PACIULLO: *I think I said that yesterday, didn't I?*

MS JOHNSON: *Yesterday, yes. You were—you and Mr Carr together were delegated the responsibility by Council to pursue this development, the Oasis and then subsequently Liverpool 2020, weren't you?*

MR PACIULLO: *Yes.*

MS JOHNSON: *And you accepted that responsibility?*

MR PACIULLO: *Yes.*

MS JOHNSON: *You accepted it knowing that it would require a great deal of your time and effort if it was to be done well, is that right?*

MR PACIULLO: *Well, I didn't perceive at that time that I would be required, even though the delegation was given to me and the GM, to involve myself in the kind of detail which was alluded to—I'm not sure if it was yourself—I understood that as a result of that resolution, advice would come back to me from Mr Carr as a General Manager, and we may have discussions about that and then be presented to Council for their determination.*

MS JOHNSON: *So you didn't see that delegation, or your role as having responsibility for that project as requiring any particular extra responsibility on you as giving you any - - -*

MR PACIULLO: *Well, any particular expertise which I don't have, and I would think very few, unless I happen to be involved in the finance industry, would have in my role.*

MS JOHNSON: *What about responsibility though, Mr Paciullo, not expertise, but responsibility for thoroughly considering each aspect of the development that came before you, the advices that were prepared?*

MR PACIULLO: *Well, that came before me and then the Council.*

MS JOHNSON: *Do you think that that delegation gave you responsibility for thoroughly considering all the aspects of the development and the advices that were given in relation to that role?*

MR PACIULLO: *Well, I understand that is what you're alluding to. I didn't perceive that I would have to give a full-time or near full-time consideration of those matters for the reasons that I gave you before. I mean an impression, not deliberate, can be given that this was the only issue before the Council. It was certainly the dominant issue, but in the course of my normal duties I am required to do so many other things that an administrator does not have to do and I don't want to go through those. It just then makes it impossible to place the time to gather the information and to be acutely aware of all the issues as much as I would like to be.*

MS JOHNSON: *So knowing that it was impossible, or at least even if you didn't know at the time you accepted the delegation, you obviously became fairly quickly aware that it would be impossible to give it the time that was needed, did you ever consider relinquishing that responsibility?*

MR PACIULLO: *No.*

MS JOHNSON: *Going back to Council and saying: I can't give this the time that it needs, does someone else want to take it on?*

MR PACIULLO: *No, I did not, because I considered that the delegation would fall heavily on the shoulders of the GM and in pursuing the different matters and his recommendation.*

12.1.5

Mr Carr revealed two things about himself, and his role at the council, in his evidence of 26/2/2004. He revealed his frustration, and his singular belief, that in matters related to the Oasis project he, and not the governing body, had the right and responsibility to run the project. Left to its own devices, Mr Carr believed that the governing body would have no capacity to make the right decisions.

PROF DALY: (26/02/04, p.16) *We seem to be going round in circles here, Mr Carr. I think we should stop at this point.*

MR CARR: *Maybe if I could just conclude this matter with saying that one thing I have learnt out of all of this is that you cannot protect the Council from itself, and that is what I attempted to do in dealing with some of these confidential documents.*

PROF DALY: *That is a very curious statement.*

12.1.6 The importance of getting the project right was also generated by Mr Carr's desire to do well in his annual performance assessments, and to receive his bonus.

PROF DALY: (26/02/04, p.36) *My final question. In the cover letter to some material that you forwarded to the Inquiry last week, in the penultimate paragraph you state: My contract of employment expressly provided that I advance this project — meaning the Woodward Park project—which was subject to an annual performance assessment and bonus payment.*

MR CARR: *That is correct.*

PROF DALY: *Could it not be interpreted that what you were really doing, is not so much protecting the Council from itself because the Council ended up losing quite a lot of money but you were trying to fulfil your contract but also making sure that the bonus payments kept coming?*

MR CARR: *Well, the bonus payments didn't only relate to this project, there was a number of things that were outlined in my contract.*

PROF DALY: *In this letter, you expressly refer it to the Woodward Park project?*

MR CARR: *That was a high priority project but it wasn't only that and I think that I can forward to you, a schedule of all the things that were listed that I needed to achieve, which was worked out by the Council itself. So yes, it was—I mean in terms of any contract it was more about making sure that we performed to the best of our ability and that was what I was attempting to do. I think, where I made the comment about protecting Council from itself, what I meant, well particularly was, giving out information, giving out copies of documents - - -*

12.1 Findings

1. **The governing body of the council did not live up to its various responsibilities, as defined by Section 232 of the Act, in conferring so much power to Mr Carr to structure the various stages of the Woodward Park Precinct projects.**
 2. **In conferring such power there was a gross abuse of the separation of powers intended by the Act, and an abrogation of responsibility by the Mayor and other councillors.**
 3. **Mr Carr has some justification in arguing that he was only doing his job, and fulfilling the particular terms of his contract.**
 4. **He was also mindful of his bonus and the need to push hard on the Projects to ensure that he received it.**
 5. **His fervour for pushing ahead with the projects, however, aided and abetted the process whereby the separation of powers was violated.**
-

12.2 Staff: Expertise, Needs, and Duties

12.2.1 The General Manager, under Section 335 of the Act, is responsible for appointing staff, in accordance with an organisation structure and resources approved by the council. The General Manager is also responsible for directing and dismissing staff. The evidence shows that when Mr Carr became General Manager, on March 4 1996, there were concerns about the financial and administrative position of the council, and in conjunction with the governing body, Mr Carr set about streamlining both the processes and structures of the body corporate.

MS JOHNSON: (02/02/04, p.3–5) *Mr Carr, I just wanted to begin by exploring with you the role of a General Manager. That was your position when you were at Liverpool City Council. Can you tell me what you see the role of the General Manager being?*

MR CARR: *The General Manager is the Chief Executive Officer of the Council. It presides over the resourcing of the organisation, it provides policy advice and the General Manager interacts with the Mayor and the Council in ensuring that decisions that the Council make are effectively delivered.*

MS JOHNSON: *You told the Commissioner about the experience that you had had in South Australia prior to coming to Liverpool. Does the role of a Chief Executive Officer in South Australia differ in any notable ways to that of a General Manager in New South Wales?*

MR CARR: *No, I don't think so. I don't think the role of a General Manager or Chief Executive Officer differs between state and state but I think the environment of a Council is certainly very different.*

MS JOHNSON: *One of the aspects of a General Manager's role—correct me if I am wrong—is overseeing the staff of the Council with which they work. Could you just indicate for me who were the major staff, the significant staff, that you worked with and what their roles were during the time that you were at Liverpool, particularly in reference to the Woodward Park development but perhaps more generally?*

MR CARR: *There were a number of staff. In terms of staffing of an organisation there are two elements that govern that. The first element is the organisational structure that Council adopts, so that basically determines what sort of senior management you are going to have and then my responsibility is to ensure in consultation with Council that we appoint senior staff. In terms of the Woodward Park project since 1996 there have been a number of corporate managers that have come into the organisation and have left and they've left for various reasons, and if you want me to go through some of those people then I can do; I will refer to some of my notes.*

MS JOHNSON: *Perhaps if you could just tell me. So in terms of structure it starts, you were the chief, the most senior staff member of the Council's corporate body.*

MR CARR: *Yes.*

MS JOHNSON: *Underneath that sat how many corporate managers?*

MR CARR: *Well, when I first started in '96 as the general manager, the organisation was structured under a purchaser/provider split and the number of direct reports to the general manager was quite excessive, something like about 30, and the organisation really wasn't travelling that well and that was coming forward by a number of people. We undertook a review of that and the number of direct reports were reduced significantly. I think it was reduced to about eight and over a process of time and changes that were occurring it got down to six and then it got down to four.*

Now, those sorts of changes were not just changes made by me, they were suggestions that were being put forward by elected members in terms of reducing the number of senior management within the Council.

12.2.2

Mr Carr considered progressing the infrastructure developments of Woodward Park to be one of his prime responsibilities. He and the Mayor had delegated authority to work on the projects on behalf of the governing body. Mr Carr did not believe that the Elected Representatives had experience of operating large commercial businesses. The Mayor, by his own admission, did not see himself as a person who would come to grips with commercial detail. This left Mr Carr as the primary agent of council in dealing with the Woodward Park projects. Mr Carr believed he had the background to perform this function, having overseen a large residential development when he was Chief Executive Officer of Tea Tree Gully Council in South Australia.

MS JOHNSON (02/02/04, p.2): *The Councillors that you worked with, what sort of backgrounds did they come from? What sort of expertise did they bring to their work as Councillors?*

MR CARR: *It was a variety, a variety of backgrounds. I mean the Mayor pretty obviously had quite a political career and then there was the—I think in my time there has been three deputy mayors: Councillor Sanchez, Councillor Waller and councillor Beuk, all from the ALP Group, and then there were a variety. There were the two Independents and the two Liberals. The two Liberals came from a property development side. The two Independents, Geoff Neville was a bus operator and then he was no longer a Councillor after the last election and Steven Dobell-Brown took that up and I think he is in private business to do with binding of books. Councillor Harrington was formerly associated with industry and became a TAFE tutor or lecturer. I'm just trying to think of all the others there.*

MS JOHNSON: *To your recollection did any of them have or do any of them have accounting backgrounds or financial management backgrounds?*

MR CARR: *Not to my knowledge.*

MR BROAD: *... Do any of the Councillors in the current Council, that is from 1999 onwards, have a background in the operation of larger commercial businesses to your knowledge?*

MR CARR: *Not to my knowledge. They were probably involved in either small business or Government agencies.*

PROF DALY: (02/02/04, p.5–6) *Prior to coming to Liverpool what was your background in local Government?*

MR CARR: *I was the Chief Executive Officer of the City of Tea Tree Gully in South Australia. I was there for 4 years. Prior to that I was the Chief Executive Officer of the City of Elizabeth and prior to that I was the Chief Executive Officer of a Council called Wakefield Plains, which was the amalgamation of three Councils in South Australia—mid north.*

PROF DALY: *Elizabeth and Tea Tree Gully are fairly large Councils, I believe?*

MR CARR: *Yes. they are, sir. The Tea Tree Gully Council was the second largest Council in South Australia at the time and it was presiding over the Golden Grove development which was the biggest residential development in South Australia, potentially Australia. Elizabeth Council is a smaller Council but certainly considered to be one of the significant Councils at that time in South Australia.*

12.2.3

As the scale of the Woodward Park Precinct projects grew, and as the linkages with various private sector entities became more intricate, it is to be expected that Mr Carr would involve more of the staff he directed to take responsibility for various aspects of the programs. The evidence suggests that there were many competent people on Mr Carr's staff, but until relatively late in the piece, none had been recruited because they possessed the particular skills needed to manage infrastructure projects of the Woodward Park scale. Indeed, each had other specific responsibilities that might extend over the 305 square kilometres of Liverpool City Council. Without a strong recruitment program to add the resources needed to manage the Woodward Park Precinct challenges, it was inevitable that staff, at times, would be pressured to focus on the council's "dream" for Woodward Park at the expense of their other duties. The complaints made by many people in written submissions and in appearances at the Public Hearings, suggests that basic infrastructure (roads, footpaths, waste services, parking, playgrounds) were somewhat neglected during the years in which the Woodward Park Precinct projects became the primary focus of the council.

MR McCULLY: (04/02/04, p.62–63) ... *We generally overstate depreciation, so at the end of the day it looks worse than it is. But from the presentation I have received and investigations I have made, we are not supplying sufficient resources to maintain a reasonable level of asset management, and there's probably in the order of \$12 million capital funds and ongoing of up to \$6 million a year required to maintain the assets, and, of course, that's mainly roads. Liverpool has about 760 kilometres of roads to look after.*

If you don't look after roads—that is, particularly bitumen, asphalt concrete roads—they oxidise, so if you don't reseal them they crack, and once they crack to a certain extent and water gets into the pavement underneath you know are going to have to reconstruct them. So, rather than spending reasonable amounts of money maintaining them, all of a sudden you'll have a catastrophic event that will hit you in the face at about 20 years in the life of the asset where you could have maintained it.

So for us to get a reasonable level of asset management, particularly to our roads infrastructure, there's a need to consider quite soon an injection of capital into that, and then an ongoing yearly amount of funds.

PROF DALY: *So you've got two sets of pressures. You have got the growth of the Council in terms of population and some substantial developments related to that, so that's new infrastructure challenges, and you have got the asset depreciation problem which you say is around \$6 million a year that you have got to find just to keep base on that?*

MR McCULLY: *Yes.*

PROF DALY: *So there are very substantial pressures in terms of maintaining and developing ordinary infrastructure, if I can express it that way?*

MR McCULLY: *Yes.*

12.2.4

The pressures on staff, who were attempting to perform their standard duties and attend to the complex and fast-moving issues related to Woodward Park, were significant. Council staff is simply not trained to manage large commercial projects of the type envisaged for Woodward Park. There was an inevitable skills deficit between the hard-pressed council staff and the well-resourced, highly skilled personnel that represented the private sector partners.

12.2.5 Compounding the problems was the strong personal role played by Mr Carr. He appears to have taken such a personal responsibility for producing outcomes for Woodward Park that he expected staff to simply follow his lead, rather than express their professional opinions if they ran counter to Mr Carr's. Mr Carr was on a mission, and he took his responsibilities very seriously. In his defence, the terms of his contract were so specific that he would have struggled to adopt any other process than leading his staff to achieve his goals.

MR BROAD: (02/02/04, p.14–15) *In 1997 you and the Mayor were provided with a specific delegation to explore these proposals. Was that as a result of the Mayor's particular interest in the projects?*

MR CARR: *The reason for that decision—I can't completely recall that it was because of the Mayor's interest. The way I would have understood it was because it was such a dynamic process and such an interactive process with the market place and things were changing as it was being progressed, then the Council really was saying—my interpretation of it was: well, the Mayor and General Manager keep working these things through and when you think you've got something that you can bring to Council for consideration then bring it forward.*

MR BROAD: *So the two of you were directed really to put your attentions to this project and report back?*

MR CARR: *Yes, it was a delegation in '97 from the Council to the Mayor and myself with respect to me particularly. It was listed as a high priority project in my contract of employment. There were annual schedules that were worked up which required me to ensure that I pursued this project, along with other projects and along with other issues, but that was certainly given high priority. It was also in the corporate plans and other documents of Council.*

MR BROAD: *What was the nature of the specific requirements of your contract, were there outcomes that you had to achieve?*

MR CARR: *Yes.*

MR BROAD: *How was it put, can you give us an indication of the type of the wording?*

MR CARR: *I've got something here. I will see if I can find it. This is an example and it is dated 2002, so it is taking it a long way forward, if I can use this example, Schedule A:*

Specific measurable outcomes defined by Council, short term to medium term. The title, Woodward Park. Position master planning strategy for Woodward Park to become a centre of sporting excellence by, (a), progressing the building of an Arena to house the West Sydney Razorbacks. Progressing the building of the Palms Resort facility.

Bearing in mind this is 2002:

Progressing implementation of the Bulldogs Macquarie Bank master plan.

So that is how it was described in 2002.

MR BROAD: *2002.*

MR CARR: *I would have to go back to my other—I don't think I've got my contract here for '97 but - - -*

MR BROAD: *But to your recollection, was your contract prescribing that you had to achieve similar sorts of outcomes?*

MR CARR: *I'm sorry, what do you mean by "similar sort of outcomes"?*

MR BROAD: *Well, no, that you had to achieve a positive outcome?*

MR CARR: *Well—but I think, yes, the Council had its master plan, it had its vision and it was about being positive, about pursuing that and achieving it for the community.*

MR BROAD: *So was it put in more general terms that you had to obtain goals in respect of a master plan that had been adopted for Woodward Park, or was it put in more finite terms, that you had to achieve goals in respect of, say, the delivery of the Arena?*

MR CARR: *I would have to have a look at the '97 contract if we are relating to that period. I can recall it was about pursuing the Slammers' bid and I think it was about pursuing the Woodward Park master plan, but I would have to double check that.*

12.2.6

Mr Carr saw it as his responsibility to lead the negotiations with the private sector entities. He did not believe that other staff should be involved in what he described as often acrimonious discussions. But Mr Carr, and the council, were heavily reliant on external advice in areas such as legal and financial issues related to the projects. Curiously, staff who were relatively under-resourced, and relatively less skilled and experienced, compared to the private sector in-house capacities, wrote the briefs for that external advice. The staff, who created the briefs, were not included in the negotiations that addressed issues within the briefs, but the external advisers were.

MR CARR: (02/02/04, p.26) *However, we also involved the independent consultants in those negotiations.*

MR BROAD: *Did you involve other staff?*

MR CARR: *Other staff were involved as required and it would be, for instance, if there were planning matters that needed to be—I needed advice on then I would involve the head of the planning area, probably Mr Turissi and so I would take advice from within the organisation.*

MR BROAD: *So were those members of staff directly involved face to-face or otherwise in the negotiations or were they advising you and you and the Mayor then involved directly?*

MR CARR: *I think initially they might have been involved but as it transpired, because of the nature of the negotiations which were acrimonious at times to say the least, it really was left to me to take the lead with the consultants. So there were a lot of discussions with the proponents by myself with the Mayor being present on occasions, with Wayne Redman from Price Waterhouse Coopers, with John Boland from Abbott Tout and from time to time Bill Rock on probity. So there was quite a strong team that was trying to position this proposed commercial agreement where it could go forward to the Council in a state that we thought we could advance....*

MS JOHNSON: (02/02/04, p.34–35) *I just wanted to confirm first, we will get into some of the more details later, but as a starting point your practice was not just in relation to Stardome, in relation to Oasis, in relation to the early construction agreement and later the MOU, was to obtain advice from advisers outside of the Council, is that right?*

MR CARR: *That we obtained advice?*

MS JOHNSON: *Yes.*

MR CARR: *Yes, we did.*

MS JOHNSON: *It was your decision to obtain advice from outside advisers, from independent advisers, is that right?*

MR CARR: *Yes, on occasions, yes. For instance the Coopers & Lybrand advice that we got, that was obtained by me or I caused it to be obtained.*

MS JOHNSON: *Would it be your practice for you to write the terms of reference or to write the letter of instructions to independent advisers?*

MR CARR: *The terms of reference that you were referring to for the consultants, I wouldn't fundamentally sit and write those terms of reference. They would be prepared by the organisation and they would be engaged. I can't recollect actually how those terms of reference were generated.*

MS JOHNSON: *So when you say by the organisation, you mean one of your staff, is that right?*

MR CARR: *Yes, there would be either contract staff or corporate managers but I think under this particular matter, the Oasis project, what was required in terms of the legal assessment, a commercial and due diligence assessment and the probity, that was in that previous resolution that Council adopted it in principle but subject to this review.*

MS JOHNSON: *That was in general terms so someone had to then sit down and work out what the probity adviser - - -*

MR CARR: *What the brief was.*

MS JOHNSON: *What the commercial—what PWC was going to be asked to review.*

MR CARR: *Yes.*

MS JOHNSON: *What issues were to be canvassed in the legal advice, is that right?*

MR CARR: *I think so, yes.*

12.2.7

By taking so much personal responsibility for the projects Mr Carr was inevitably short on the detail of various issues. A more involving use of the professional skills of the staff would have produced better, and at times, a more cautious processes. The following extracts from Mr Carr's evidence at the Public Hearings illustrates how difficult it was for him to attend to every aspect of the details of council concerns with the projects.

PROF DALY: (02/02/04, p.60) *... Just one other thing while we are talking about plans, the Woodward Park site, a large part of the land was community—classified as community land, is that right?*

MR CARR: *Yes, I think—yes, it is either classified community or operational.*

PROF DALY: *Yes.*

MR CARR: *Some aspects were operational and some aspects of it were community.*

PROF DALY: *Yes. Under the Local Government Act with community land there has to be a plan of management with it?*

MR CARR: *Yes.*

PROF DALY: *Were there plans of management on the community land in Woodward Park?*

MR CARR: *I don't know the answer to that. A lot of the land issues—I was aware of the land status in terms of operational or community. I was aware that there needed to be some re-zoning and I saw coloured maps of that but the—where the plans of management were on the land or not, I don't know the answer to that.*

PROF DALY: *So to your knowledge there was no procedure in hand to deal with the plans of management for the community land as it changed into operational land?*

MR CARR: *There was Mr Turissi and others within the organisation were dealing with the planning matters and I'm aware that there needed to be plans of management for all of the community land within the city, but whether there were—and as I understood it, there needed to be—there was a program of actually getting those plans of management in place, but I don't think we had plans of management in place for the entire city, because that task was fairly large, so that is why I'm a bit hesitant to make a comment as to whether there were plans of management for Woodward Park or not. I really don't—I'm really not sure.*

MR VINCENT: (02/02/04, p.61–64) *Mr Carr, could you give us a background on the financial controls that were in place regarding Woodward Park and Oasis?*

MR CARR: *There was the money that went into the Arena trust account, is that what you mean, sir?*

MR VINCENT: *Probably going back earlier, the money that was expended by Council directly on—right back at Stardome and through—I think we have had some evidence it is around about—just under \$4 million has been spent. I just want to talk about how that money was controlled?*

MR CARR: *The money that was expended would have been shown in budget reviews. There would have been—we also—just in terms of the commercial agreement, there was a clause that said that we could recover, I think it was \$1.25 million. We put in place an accumulative record of that and—so that we are keeping tabs on that—so that we were able to demonstrate we were in a position to recover it. So the financial process, or the costing controlling process of Council was with our finance controller.*

There were budget reviews on a quarterly basis. We took the decision to expense those costs, even though they are recoverable, so assuming that the project proceeds and that that 1.25 million is there to be recovered at a point in time, that would come straight back into Council's working capital position and its working capital position currently is about 2.3 million, and what we were monitoring from a macro point of view was the working capital surplus position and the debt service ratio, and the reason that—the reason it was imperative that that be monitored, was because the history of Liverpool—the starting position in '96 was a 15.4 million working capital deficit that it had.

Coupled with that it was about a 12 per cent debt service ratio. The Council had to go through a fairly rigorous exercise to claw back that deficit and to restructure the debt. Ostensibly, the way they did that was in three parts. The first part was to seek an increase in rate revenue—and I think the Ministerial increase was adopted but then there was a 5 per cent addition added to that and that was quite an exercise and quite a bit of debate within Council about what option ought to be adopted.

The second part to it was to look at where there was over runs in expenditure and, in particular, duplication and duplication of effort caused by a structure of the organisation based on a purchase provider split and so there were a number of reforms that were put in place to vary that. The third prong to the attack, really, was to restructure the debt and there was about 10.8 million of the debt restructured to put those liabilities over the life of the asset.

In essence, that reduced the impact on the recurrent account by about 1.5 million on the debt, 1.5 million addition with the rate revenue which had growth and the rest of it had to be done through cost savings. As a result of that strategy the Council's financial position turned the corner and reached a financial surplus in 1999 and lowered the debt service ratio from 12 to about 7, and that was principally maintained from that point on.

MR VINCENT: *You mentioned the use of budget reviews to report the money spent on the project, was any of it budgeted in advance? Did you have an amount put aside in your annual budget, or was it more done in hindsight as quarterly reviews, reporting to Council how much has been spent and then seeking a resolution to - - -*

MR CARR: *I think there were variations to the budget, it was done through variations. I think—I can't recall whether there were certain allocations initially, but there was—I can certainly recall reports going to Council and variations to the budget as a result of this project.*

MR VINCENT: *Who had authority to incur expenses on the project? Was there any special authorities in place, or was it just the normal run of business of Council?*

MR CARR: *I would say it would have been the normal run of business of Council and the fact that the Council delegated authority to the Mayor and general manager to pursue these projects and it would be an impossible task to pursue these projects without incurring some expenditure.*

MR VINCENT: *What about the money that went into the Foundation, what financial controls were in place there?*

MR CARR: *Under the early construction agreement it outlined that contributions made to the Arena trust account were to happen on particular times. There was a delay in the project and we—through exchange of letters—I can recall that there was a variation to those—to that schedule of payments and the moneys that were paid into the Arena trust account came as a result of a contractual arrangement, a request by the Foundation directors that money be paid in to meet those contractual arrangements. It would be paid into that account as a result of that.*

MR VINCENT: *Once it was paid in, was there any control to Council, what was the reporting like from the Foundation?*

MR CARR: *There was—in the commercial agreement and the early construction agreement there was an obligation on the Foundation to keep Council informed. There was also the ability for Council to audit the Arena trust account, and in terms of any moneys flowing from that Arena trust account, was on the basis of documentation being submitted to two trustees and they would assess whether the documentation was in order and then make the payments.*

MR VINCENT: *Did you see—the first thing you mentioned was reporting from the Foundation. Did you see those reports about - - -*

MR CARR: *No, I had not seen - - -*

MR VINCENT: *You didn't receive any reports from the Foundation during that period?*

MR CARR: *No, I didn't.*

MR VINCENT: *So we just consider that they did fulfil that obligation satisfactorily?*

MR CARR: *The—when you're talking about "the Foundation" you're talking about the old Foundation?*

MR VINCENT: *Yes, sure, about the old Foundation.*

MR CARR: *The old Foundation from my knowledge didn't give information at that stage, other than probably whether there was a dialogue between some of the directors and the project managers and some of Council staff, but I'm aware that in July—I think it was July—just before the August salary cap issue, early July Gary McIntyre came along and gave a briefing to the Council about the Arena project.*

12.2.8 Mr Carr firmly believed that he had instituted systems that involved his staff in the major projects in an inclusive and constructive manner.

MS JOHNSON: (02/02/04, p.74–75) *In general in relation to the Oasis development it was your job to motivate the staff, impassion them towards this development, is that a fair comment?*

MR CARR: *Well, all programs or projects that the Council is pursuing are discussed and certainly considered at a corporate team meeting and anything that was of a visionary nature that the Council was pursuing it was certainly my role to promote that vision amongst the staff. It's similar to the 15.4 million working capital deficit. The Council had a real problem and so my role was to move amongst the staff and say, "Yes, we've got this financial problem but collectively we can resolve it" and I asked for their help and their suggestions. Similarly we went down a path when we had to reorganise the organisation and there was a document called: Liverpool Future Today and Tomorrow.*

My role as the General Manager is to get out there and promote the concepts of that change and promote the concepts of those adjustments that needed to take place in an organisation. Similarly, the corporate management would say to me that the big projects needed to be talked about within the staff and a lot of people were very interested. We would have briefing sessions in the chambers for staff and a lot of the staff would turn up and get the information. When you've got 650 staff and you've got projects of this nature and you've got a lot written up in the press, there is a lot of talk and there's a lot of discussion and people want to know about it.

If I can just refer to the resourcing of this particular project, this big project, initially I would say to the staff that the vision of Council is to be pursued but we are looking at a way of getting that vision delivered without it having a significant impact internally because I was aware that they were already under pressure dealing with the growth, other programs that we were pursuing. There was the Community 2168 programme which was an urban renewal strategy, the CBD and developments of that nature. There were other programs like Casula Powerhouse, the PCYC, how we could get the PCYC eventually constructed and that was a long-term ambition of Council.

So there were a lot of things that were already on the plate that the Council was pursuing and therefore I was looking at a way of resourcing the implementation of this separately to the Council and that is why I had discussions with the Department of Public Works. My view was that I thought the best result that we could have got in terms of resourcing this project was to enter into agreement with the Department of Public Works that had a solid structure and system to give courage to this project.

12.2.9 It is hard to accept that there was a comprehensive system of team-building in relation to the Woodward Park projects. There was no system of central documentation. The input of the many staff members who had some association with the projects were kept in their own files. It is hard to believe that on such large-scale ventures staff were left to compile their own notes and keep their own documents. When Mr McCully replaced Mr Carr as General Manager he was unable to obtain a complete set of documents concerning the Woodward Park Precinct ventures. The Inquiry spent considerable time working through the records of the council, extending back over many years, to try to put together a complete record. It discovered a somewhat chaotic and individualistic record base. The formal records of meetings and such seem to have been well recorded. In contrast, the individual staff records were highly variable in their quality, and each set portrayed a somewhat individualistic interpretation of events.

MR BROAD: (04/02/04, p.11) *You said earlier that you have not satisfied yourself that you have seen all the documents associated with the Oasis Project.*

MR McCULLY: *That is correct.*

MR BROAD: *Can you indicate what documents you believe that you haven't seen?*

MR McCULLY: *I don't know if I haven't seen documents. I haven't seen some files. There is, because of the nature of the filing system, Liverpool people tended to keep a lot of their own files. It is not the sort of filing system I have been used to dealing with, so therefore individuals have kept separate files and I mean in the last week, I have seen some of those appear. The documents though, the documents that are important for this inquiry, as far as I am aware, I have seen all of those. There would be some documents and some files I wouldn't have seen.*

PROF DALY: (04/02/04, p.57) *Thank you. Sorry, I'm just consulting my notes from this morning. You commented at one stage on the filing system at Liverpool Council and you said that you didn't see all the information that might have been seen in relation to the Oasis Project, and I guess other things because there was practise of individuals, more or less maintaining their own filing system, is that right?*

MR McCULLY: *Yes.*

PROF DALY: *Is that normal?*

MR McCULLY: *No, not in my experience. Liverpool does not apply, it needs to apply a lot more resources to its records area. Records are generally—the amount and quantity of records you get is as a result of population. The Council which I recently left which had a high quality filing system, had the same number of people working in it that Liverpool has, and that Council had half the population. Liverpool has purchased an electronic filing system, document management system, which is a very good system and I would suggest that over the next year it be implemented, so it wasn't the staff deliberately trying to hide things, or deliberately having other files. It was just that there was not a focus on having a very good record of management system. So when that occurs, it is certainly my experience that people will start to keep their own records so things don't disappear.*

PROF DALY: *But it makes it difficult for you and perhaps the Inquiry to find out everything that might be found out about decision making or particular events related to the various things which we are considering during the Inquiry.*

MR McCULLY: *It can make it difficult, however, I am quite assured that the Council's record keeping of its minutes and its decisions is good, and its record of legal documents and how they are maintained is good. So the important documents that are necessary to both this Inquiry for the Council's day to day management, that part of the system is good, it is the ongoing dialogue in correspondence between people to people, group to group that is not kept as well.*

12.2.10 Mr Carr firmly believed that he had a very inclusive management style.

MS JOHNSON: (02/02/04, p.76) *There's been suggestion in some of the submissions that people who disagreed with or expressed doubts about the Oasis—sorry, the staff who expressed doubts about the Oasis project—were sidelined by you and that you weren't prepared to tolerate differences of opinion in relation to the project and its benefits that it would bring. Did you want to comment on that at all?*

MR CARR: *Well, I disagree with that. When you're dealing with numerous amount of projects and you've got a corporate team there are discussions within the corporate team, people express views. I believe that my approach is that I listen to the views that are coming forward. I listen to all the views and the once you listen to those views you then have to sit down and give some consideration as to how you are going to make some judgment about how you are going to move forward. There was always debate at the corporate team not only about this project but about other projects and about other matters and there needs to be decisions made.*

I'm aware of the question that you are putting. I don't believe my style of management is about sidelining people or making it so that people can't be heard. In fact, I think it is more to the contrary. I encourage people to voice a view and I would encourage either the Commission or the Inquiry to make further inquiries about that with my other corporate colleagues because I believe that is my approach. I firmly believe that's the way I go about management.

12.2.11 The evidence of some staff contradicts Mr Carr's assessment of his management style. Mr Stalley, the council officer responsible for financial matters, presented detailed financial evidence to the Inquiry concerning the way in which the Oasis system worked, and the negative financial impacts that had on the council. He was also critical of the settlement reached with the Bulldogs. Mr Stalley's evidence was reasoned and factual, and there is little doubt that he had the best interests of the council in his focus. Mr Stalley, however, believed that rather than being included in the deliberations concerning the problems that Oasis had created, he was deliberately sidelined.

MS JOHNSON: (22/01/04, p.95–96) *To move into more general matters, there's been submissions made but also evidence given that you were prevented from attending meetings of Council. Perhaps, if I can start with that. Have you ever been prevented by the General Manager from attending meetings of Council at which you wanted to attend?*

MR STALLEY: *The answer to that is, yes.*

MS JOHNSON: *In what circumstances?*

MR STALLEY: *There was never so much as a blatant statement: that you are to stay away from this particular Council meeting. It was more subtle than that, but that did happen on more than one occasion.*

MS JOHNSON: *What were the subtleties, and in what circumstances were you—and why did you want to attend?*

MR STALLEY: *Normally, I go to all the Council meetings.*

MS JOHNSON: *Mm.*

MR STALLEY: *That was a practice that my predecessor had and I thought it was a good practice. You can pick up a lot of things by going to the Council meetings and on occasion you are called on for advice. For some Council meetings there was suggestion that if I had something better to do, then that would be okay.*

MS JOHNSON: *Who made that suggestion?*

MR STALLEY: *Either the General Manager or a group manager's support who was my direct report to.*

MS JOHNSON: *Sorry—the name of the - - -*

MR STALLEY: *Eric Heapy.*

MS JOHNSON: *All right.*

PROF DALY: *Mr Stalley, can I attempt to clarify that a little bit. Over the period that we are looking at, there have been two General Managers. Have the events that you have referred to occurred under the current General Manager?*

MR STALLEY: *No.*

PROF DALY: *Only under the former General Manager?*

MR STALLEY: *That is correct.*

MS JOHNSON: *Mr Carr.*

MR STALLEY: *Correct.*

MS JOHNSON: *So we heard evidence this morning that ordinarily you would attend, so a Councillor coming to a meeting would, on the basis of your past practice expect to see you at that meeting. Is that right?*

MR STALLEY: *Under normal circumstances. Yes.*

MS JOHNSON: *Under normal circumstances and you would normally expect to attend Council meetings unless you'd been given the "not too subtle hint" that your attendance wasn't required. Is that right?*

MR STALLEY: *I would normally expect to attend all Council meetings.*

MS JOHNSON: *Do you remember what was to be discussed at those Council meetings when you were—at which you didn't attend?*

MR STALLEY: *No specifically, but they were matters relating to the Oasis project.*

MS JOHNSON: *At about what period of time are we talking, can you remember?*

MR STALLEY: *Mainly 2002.*

MS JOHNSON: *On about how many occasions were you—was the suggestion made that you did not need to attend those meetings?*

MR STALLEY: *Specifically I can't answer that question except to say more than once, less than 10.*

12.2.12 Mr Heapy, who had worked with Mr Carr in South Australia, and had joined him as a senior officer at Liverpool City Council in December 1996, vehemently denied Mr Stalley's suggestions.

MS JOHNSON: (24/02/04, p.25–26) *Mr Heapy, I just wanted to ask you to finish off now, a couple of questions about various staffing issues. The first is that Mr Stalley, Rob Stalley, gave evidence and said in his evidence, that you or Mr Carr had implied or told him that he need not come to particular Council meetings where the issue of Oasis and the Foundation was being discussed. Do you recall ever making statements of that kind?*

MR HEAPY: *That's totally untrue. What I do recall, and I recall it very clearly and I'm sure that others would support this view, is that Mr Stalley had a considerably high workload. He was not only trying to actually cope with the pressures of being the financial controller of a fairly large organisation, he was also trying to implement a community bank project, which really had very little resourcing to go with it, and was also then appointed as a director of the Foundation.*

Now, there were a number of people in the organisation and Mitchell Morley, indeed, was one of them that approached me on a number of occasions. Vicki Lee, as the human resource manager, approached me, and a couple of other people, maybe Gerard Turissi may have been one of those, who actually approached me and said: look, as his manager, just be aware that Rob's under a considerable amount of stress and we are not quite sure that he is coping that well with it. At the same time, I was well aware that Rob had some family issues in terms of the birth of a child, and some difficulties, I believe, with the pregnancy.

I certainly approached Rob in respect of being concerned about his health and welfare, because Rob's practice was that he would attend every Council meeting, which was very different to other middle managers in the organisation who would only need to attend if there was a particular report that they had authored, or there was likely to be some questioning—let's say it was of a planning matter and it may have been the planning officer. So our practice was that all senior managers, that is, at the corporate or director level - - -

MS JOHNSON: *Perhaps if I could interrupt you there, Mr Heapy, what did you say to Mr Stalley, if anything at all?*

MR HEAPY: *I said to Rob: Rob, you need to ensure that you need to have time with your family and take care of your personal issues. I am aware of your heavy workload. There is no need for you to attend every Council meeting, but of course if there are matters that are associated with either Woodward Park, as your role as a director of the Foundation, or it is about financial reports, then naturally of course, you would expected to be there.*

12.2.13 There is no reason, however, to doubt that Mr Stalley felt that he was being deliberately excluded from certain meetings because he was producing material that was counter to the generally positive image of the projects, and the possibility of repairing problems within them, that was being put about by the former General Manager and Mr Heapy. The fact that he talked to his supervising officer, Mr Morley, about the matter testifies that Mr Stalley's concerns were genuine.

MS JOHNSON: (05/02/04, p.33) *September 2003. Both men gave evidence that they had been excluded—no. Suggestions had been made to them that it would be inappropriate if they attended Council meetings. Have suggestions of that kind ever been made to you?*

MR MORLEY: *No.*

MS JOHNSON: *Were you aware at the time, that Mr Stalley or Mr Douglas felt they were being told not to attend Council meetings? I should note that Mr Carr emphatically denies that suggestion.*

MR MORLEY: *This was prior to my becoming Mr Stalley's supervisor, if you like, but I was aware from conversations with Mr Stalley that he felt that he had been precluded, or that suggestions had been made to him not to attend Council meetings.*

12.2.14

Mr Stalley was not the only person to object to being left out of meetings. He, and others, felt that attending certain meetings was only standard by the council. Moreover they believed it was necessary for them to attend certain meetings if council were to make sound judgements and have access to all the available information. Mr Douglas is Consultant Manager, Major Projects, for the council. He was also appointed as a Director of the Bulldogs Foundation when the council took control of that vehicle. He told the Public Hearings that he was kept out of a number of meetings, when attending them appeared to be very much part of his job.

MR BROAD: (30/01/04, p.43–44) *You spoke earlier about being excluded from meetings. When exactly were you let back into the tent as you referred to it as?*

MR DOUGLAS: *I don't know the exact date but the PPP committee had had one or two meetings at Council and it was about late March early April.*

MR BROAD: *2003?*

MR DOUGLAS: *Correct.*

MR BROAD: *Yes.*

MR DOUGLAS: *That I got an invitation. I mean there has been a series of reports that Mr [Eyers] or Mr Marsden have been writing to the Council to this committee and in the bottom end of those was saying well we think all the directors should be there and I know that at least one Councillor if not others were saying, well this is daft, you know. The effect of Council negotiating an MOU to deal with Oasis without the directors of the Foundation who were the most intimately knowledgeable of what the hell was going on behind on the slab because Mr Carr didn't come to the Foundation meetings.*

He was entitled to but at one stage there was a Council resolution that didn't allow him to deal with the Bulldogs which is a bit odd in its own right. So Mr Stalley and I were asked to come to those meetings. But what then happened of course, as a result of whatever happened at the meetings, we were not involved. So we came to the meetings but nothing happened after that and indeed on one occasion the minutes which was moved by Councillor Gauci I recall that I be part of the negotiating team with Macquarie, the minutes never had my name there.

So I had to go to Councillor Gauci and say well, did you mean my name and he said yes so I then went to the mayor and said, you know, Gauci is going to move this but he agrees and the mayor agreed. Didn't get my name back in so whether that was a slip of the pen or whether it was deliberate I wouldn't know.

MS JOHNSON: *You say you were ousted or that you were prevented from attending, can you say in what way you were prevented and by whom?*

MR DOUGLAS: *Well I was—all this material was going on and nobody came near me. I was reporting to the general manager at this stage you might appreciate through this. I was not invited to any discussions with Macquarie Bank or any discussions internally with the lawyers or whatever on this matter at all. When it came to the Council meetings and I only came to Council meetings when I had an item or when requested.*

I am not a member of the executive so I don't appear ordinarily at meetings thinking about them I could do without them and I was not given the agendas. I was never told when some of the meetings were on and certainly the special meetings I think have got agendas and about that time the non public agendas which I normally got, I never got. I was just taken off that list. By whom I wouldn't know. But it was a completely clear thing.

Now when I tackled Mr Carr some time later because initially I didn't realise what was going on because I didn't know meetings were going on until Mr [Eyers] started telling me why wasn't I there or something like that. I've lost track of what I was going to say. But when I confronted Mr Carr some time later he said he wanted to just close it right down and exclude anybody else except, you know, the most narrow group.

Well the narrow group was him initially and then it was me in the normal course of events and what I found is when other staff started coming to me and saying we would like this bit of information. I'm saying, what for and they said we are asked to do this. So Mr Tolhurst was involved. Mr Morley was involved. Mr Grenfell was involved. I can't remember there'd be Turissi at an earlier stage, all doing things which would have been in my area and in many cases they had to come to me for the information. So it was pretty obvious what was going on.

MS JOHNSON: *Did Mr Carr give a reason why he wanted to have a narrow group? It wasn't that you were a director and he foresaw a conflict and he wanted to exclude you on that basis or ensure that you were isolated for that reason?*

MR DOUGLAS: *No, no. I think it is pretty clear in my mind what—my assessment was that I had publicly disagreed with him about the car parking process, the effect of the car-parking issues in the commercial agreement. I don't resile from—I'm sad that that happened and I did indeed apologise for that but I don't resile from my opinion on that. And also when George Paciullo stood down the first time under ICAC, the acting mayor was briefed by me on Oasis as I did, I briefed the mayor and I think he got offended by that.*

- 12.2.15 Mr Douglas's concerns were conveyed to other members of staff, and shared by them.

MR BROAD: (19/02/04, p.8) *There has been a suggestion that members of staff who did not demonstrate enthusiasm towards the Oasis development, were sidelined. Do you have any views in respect of that?*

MR ADAMS: *Yes, I have some views. I just have to think them through. I think, that in my own experience, I certainly raised—and I mentioned earlier one example—I raised concerns regarding some of the aspects of the project. Those came from not being directly involved so I have to put that into the right context. I didn't experience, you know, to my knowledge, a sidelining or an effect of that. Certainly there was an enthusiasm for the project and I guess, a pressure to work through and to make something that was quite challenging successful. So it was not easy to raise concerns but I couldn't say that I was personally constrained. I can't say directly but my interpretation was that perhaps towards the end of the time I was there, at least one other officer may have been constrained however, due to raising concerns about the project.*

MR BROAD: *Who was that officer*

MR ADAMS: *That was Murray Douglas.*

12.2.16 Mr Douglas went further than complaining about missing various meetings. He accused the former General Manager of suppressing reports. The material in the reports was germane to key areas under consideration by council at the time. Mr Carr had apparently no right to suppress the reports.

MR DOUGLAS: (30/01/04, p.10–11) *Mr Stalley and I produced a report in October 2001—sorry, 2002—and that report was suppressed.*

PROF DALY: *What date was that again?*

MR DOUGLAS: *October 9 2002, that was - - -*

PROF DALY: *Who suppressed it?*

MR DOUGLAS: *Mr Carr.*

MS JOHNSON: *What did the report say?*

MR DOUGLAS: *Very general. It just said, the Foundation has met, we are looking at this, we are looking at that. We are trying to work out the new design to find out if a new design can work. I've got a copy here if you wish, Mr McCully has had copies, the Local Government Department has had copies. Mr Carr's attitude was he was going to be the only one to save the project—that is my opinion, he didn't say it like that—but certainly he said very clearly to me, he would only give Council good news when he had a solution, at that stage we didn't have solutions and we were saying we didn't have solutions. We were talking about process.*

MR BROAD: *Do you remember with any preciseness the words he used?*

MR DOUGLAS: *My last comments are almost verbatim.*

MR BROAD: *Yes, thank you.*

MR DOUGLAS: *I might add, Mr Broad, I was aghast, astonished. I mean, one of the duties of a general manager—and I've been one for years—is that you must inform your Council. You don't play games.*

MR BROAD: *His discretion, in your view, does not extend to giving a version of the events?*

MR DOUGLAS: *He can—general managers can put their judgment, but we were directors appointed and directors asked to report, slightly different from officers simply reporting upwards.*

MR BROAD: *You were directors of a separate entity?*

MR DOUGLAS: *Yes.*

MR BROAD: *You were providing a report on behalf of that entity?*

MR DOUGLAS: *On behalf of the Council directors of that entity, yes.*

MR BROAD: *But that entity was a separate legal entity?*

MR DOUGLAS: *Yes.*

MR BROAD: *It was not, whilst it was effectively a subsidiary of Council, it was not Council?*

MR DOUGLAS: *Correct.*

MR BROAD: *You as directors of that entity were providing that entity's report, which was not subject to an overriding power of veto amendment by the general manager?*

MR DOUGLAS: *That is the way I saw it.*

MR BROAD: *That arose purely and simply because it was a separate legal entity?*

MR DOUGLAS: *Yes, and Council had given a resolution that the director should report regularly.*

MR BROAD: *Yes.*

MR DOUGLAS: *And we were carrying that out but—I mean, I - - -*

MR BROAD: *Can I just - - -*

MR DOUGLAS: *Surely.*

MR BROAD: *I know I'm probably buttering the bread a bit thick, but Mr Carr had no role as an office holder in the Foundation?*

MR DOUGLAS: *As such, no.*

MR BROAD: *Thank you.*

12.2.17

The extent of control over the corporate body's processes, in order to present the development directions in the best possible light, was not confined to Mr Carr or Mr Heapy. In a hand-written file-note obtained by the Inquiry, Mr Poole wrote that he had discovered errors by a Private Certifier that materially affected the beginning of the construction of the Arena. Mr Poole felt that the matter should be referred to Planning NSW, then the State Government body responsible for overseeing the Private Certification process. Mr Turissi, Mr Poole's then supervising officer, noted in reply that to do so would reflect badly on the council. And that no action should be taken.

PROF DALY: (05/02/04, p.44) *Right. I have been through a number of files related to the whole process of the story you have just told. I did find in one of them, a handwritten note by yourself to Mr Turissi, suggesting that the private certifiers should be reported to Planning New South Wales. Would you like to comment on that?*

MR POOLE: *My role with Council—also I sit on the State Assessment Committee for Planning New South Wales and dealing with the assessment of private certifiers, and part of that role is obviously looking at the auditing and the process which certifiers go through, eg, complaints about work not being fundamentally done in accordance with relevant approvals. I had concern about the private certifier had dealt with, or issued a preliminary works approval when there was some 24 items still outstanding relative to the consent, and I wished to highlight that to my group manager at the time.*

PROF DALY: *Was it reported to Planning New South Wales?*

MR POOLE: *No, it has not been.*

PROF DALY: *Do you know why?*

MR POOLE: *No, I can't explain why. I was directed basically that—to feel that Council would be taking itself on in issuing any notices or direction relative to private certify.*

(File Note, 09/08/02 from Garry Poole, Manager Advisory Services)

“File Note—Report Private Certifier.

Following discussions with Mr Gerard Turrisi, I raised the matter of reporting the Private Certifier on the Arena to Planning NSW for failing to comply with the requirement of the EPAA. Mr Turrisi stated to me that this would no serve any purpose as all it would do is further discredit the council for not following the correct process.

I placed a strong verbal disagreement to Mr Turrisi and was instructed not to pursue the matter any further.

The concerns I raised related to the issuing of a Construction Certificate without full and total compliance with the conditions of consent. This was the reason why I had directed works on the site cease as well as the construction works had proceeded beyond that which was specified in the C.C.”

12.2 Findings

1. **Mr Carr adopted a highly centralised control system over matters related to major infrastructure projects of Liverpool City Council.**
 2. **Despite offering a management style that was meant to be inclusive of staff, the evidence suggests that Mr Carr was wary of sharing his authority, and took steps at various times to hold back or suppress information that might not shed a positive light on developments.**
 3. **Mr Carr expected staff to follow his lead, preferring to release news only when there was something conclusive and positive to report. In this way some staff carefully considered their own attitudes and actions.**
 4. **With the limited resources available to staff, and their restricted skills base and authority to enter into very complex arrangements with private sector parties, Mr Carr’s centralism and tight control made a difficult task even more onerous for staff. In his efforts to succeed in a very challenging task, Mr Carr became something of a spin doctor.**
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12.3 Other Staff Issues

12.3.1 Item 4 of the Terms of Reference asks the Inquiry to consider council's process of appointment and management of staff. 12.2 has addressed a number of the management issues. This part focuses on the appointment processes.

12.3.2 The council did not appoint a Project Manager until rather late in the development of Woodward Park Precinct projects. Various staff members had acted in relation to such a position prior to the appointment of Mr Murray Douglas as Consultant Manager Major Projects in November 2001. The staff members generally shared the role with their other duties, a situation that was totally unsatisfactory in relation to the kinds of developments proposed. It should be noted that the November 2001 appointment of Mr Douglas was some 10 months after the council had signed the Commercial Agreement. The council to that point was content to rely on staff whose defined duties included not only the Woodward Park projects, but a number of other major council projects as well. In the lead-up to the signing of the Commercial Agreement this meant that, below the General Manager, the person chiefly responsible for the Woodward Park projects was effectively engaged part-time on the task. This helps to explain why the council was not able to put in place any effective pre-planning.

MR BROAD: (04/02/04, p.5–6) *Before a Council enters into that sort of arrangement, would it be fair to say that a substantial amount of pre-planning must take place?*

MR McCULLY: *Yes.*

MR BROAD: *Now one of the facets of course of the Oasis Development was substantial development on Woodward Park?*

MR McCULLY: *Yes.*

MR BROAD: *Other facets were substantial developments within the Liverpool CBD?*

MR McCULLY: *Yes.*

MR BROAD: *And again a substantial development on the TAPPS land?*

MR McCULLY: *Yes.*

MR BROAD: *Now the Council under the commercial agreement was called upon to make a number of decisions whether that be as to the amount of space available within the CBD, whether it be the density of development on the TAPPS land or otherwise. Now would it be appropriate to go into a contract of that nature without pre-planning?*

MR McCULLY: *Look I wouldn't go into any contract without the relevant degree of pre-planning being undertaken. I don't know if in this case there wasn't an appropriate amount of pre-planning. There was obviously a lot of work had been undertaken and some that I would to this day have not seen to enter into that agreement.*

MS JOHNSON: *Could I just ask, what types of—well you are talking about pre-planning so, before, had you been in charge in when Oasis was being mooted and discussed, what planning steps would you have taken or do you think would have been appropriately taken before signing the first agreement, the commercial agreement? What steps do you think, and what planning steps, ought to have been undertaken?*

MR McCULLY: *I don't know if there wasn't sufficient planning undertaken before the commercial agreement was signed. The commercial agreement was just a relationship between the three parties. It was when the building started, the building itself which was a moving feast. When the building contract was established and put in place, the building hadn't been designed and the design changed as the works, the physical works, were being undertaken.*

MR BROAD: *What I think we are trying to get to is this—rather than a critique of the actual commercial agreement, the Oasis agreement, what we are trying to do is obtain an overview from you as general manager of whether it would be appropriate to put in place or to have made planning decisions beforehand, or to have investigated the appropriateness of the proposals in the particular area or within the constraints of the area?*

MR McCULLY: *I suppose a greater environmental and social assessment would have needed to have been undertaken in principle, to ensure that before we entered into the agreement that there was some certainty that the outcomes that were seen from the agreement could be reached.*

MR BROAD: *Leaving aside the terms of the commercial agreement, would it be normal for a Council when it was considering a major project, for example, the project undertaken by Hawkesbury Council, to have considered the appropriateness of that development from a town planning point of view?*

MR McCULLY: *Certainly in principle, that should have been done, yes.*

MR BROAD: *Again, given that Council was the major stake-holder and the major risk taker, would it have been appropriate to have investigated the feasibility of the project?*

MR McCULLY: *Well I certainly would have had two things you would have done. Firstly, some discussion, consultation with the community to—sorry, firstly the technical planning assessment to see whether it could be done, then some consultation with community to see whether you could move the community along with whatever you are proposing, and then you would do the initial financial feasibility, so that all those three things were done before you would step off the first step.*

12.3.3 Mr Douglas' appointment in November 2001 was meant to run until March 2004. In July 2002 a new five-year contract was signed by Mr Douglas. Mr Douglas has a history of some 16 to 17 years experience as Chief Executive Officer or General Manager of councils in New South Wales, Victoria and New Zealand. When initially appointed Mr Douglas' brief was not confined to the Woodward Park projects. He also had the carriage of CBD developments contained in the Commercial Agreement, the Georges River Corridor Project, the Moorebank Technology Park project, and economic development projects. His tasks were large and varied, and compared to the resources available to the private sector signatories to the Commercial Agreement. Mr Douglas' appointment did not constitute a satisfactory response by council to the challenges that lay ahead.

12.3.4 Mr Douglas' first contact with the council and its projects appears to have been in August 2001 when his consulting company was asked to do a probity report on processes associated with Woodward Park. According to Mr Douglas he was only given eight days in which to do the probity exercise. As he was completing the report he had lunch with Mr Carr and Mr Heapy. According to Mr Douglas' evidence of that lunch, he pointed out the staffing problems of the council and the need to rectify them. By the end of the lunch he claims that they agreed that making Mr Douglas a full time member of the team would solve an important part of their staffing problems. He was offered a contract soon after, and signed it in November 2001.

MR DOUGLAS: (30/01/04, p.62) *Yes. Okay. So I really had only 8 days to do the probity report. Okay. I thought it was about 14. Towards the end of that I was having a lunch in the city with Mr Carr and Mr Heapy. We were just going over the commercial issues and some of the issues with the CBD. They started talking about the particular needs of the City of Liverpool. You know, all these projects and the pressure on the organisation, which undoubtedly was, and still is, true. It's an organisation that, in my judgment, suffers from its ability to recruit and retain high level staff in an outfit that needs the very best.*

If you look at the staff turnover, particularly the white collar—don't look at the total numbers because blue collar turnover is very modest because they are pretty well organised. White collar turnover is pretty high and recruitment is very difficult in certain areas. So they were going over that and going over their needs. I do recall saying, you know, they were saying: well, this is what we need to do. This is what we need to do and would you—you know, we were talking about whether my contract base—my contract period, the limited time one, should be altered in any way.

I said: well, you know, at the rate you are going, you almost—I should be full-time. I recall Mr Heapy saying: well, effectively, that is what we think should happen. So in a matter of days after that a contract was offered to me and I signed. So whether it was advertised, how it was advertised, whatever. That is actually how it happened.

12.3.5 According to Mr Douglas the position he was offered was not advertised. He did not go through an interviewing process, nor it would seem were referees called. From Mr Douglas' account he must have impressed Mr Carr and Mr Heapy in the brief period when he prepared the probity report for the council. It was strange that neither Mr Carr nor Mr Heapy bothered to check the circumstances behind Mr Douglas leaving his position as General Manager of the City of Sydney after a rather short tenure, or indeed the details of his other experience. Apparently, no referees were called.

MS JOHNSON: (30/01/04, p.62–63) *So you certainly didn't see an advertisement?*

MR DOUGLAS: *No.*

MS JOHNSON: *Or go through a formal recruitment procedure? You are aware that that is a requirement under the Local Government Act? Sorry, you will have to for the transcript—you will have to indicate.*

MR DOUGLAS: *I'm sorry. Yes.*

MS JOHNSON: *Thank you.*

MR DOUGLAS: *Yes. I apologise.*

MS JOHNSON: *You say that didn't happen for your contract?*

MR DOUGLAS: *Not that I'm aware of and I certainly didn't go through a formal interview in the form that you described. There could have been a job being advertised and they just recruited me into that. I don't know. I mean, that is a possibility.*

12.3.6

Within months of his taking the contract with the council, Mr Douglas was head-hunted to take a position with a Federal Government Agency in Sydney. He informed Mr Carr of the offer, and received a counter-offer in the form of a five-year contract. This position was not advertised, and the normal procedures that apply to the recruitment of people to senior positions in Local Government were not followed.

MS JOHNSON: (30/01/04, p.63–64) *You say—I think, your evidence this morning was, you had one contract for a particular duration which was then renegotiated to a 5 year contract, is that right?*

MR DOUGLAS: *Yes, what happened in the middle of 2002, through one of the head hunting agencies I was offered a Federal Government Department based in Sydney CO role. I was quite intrigued to take it. On the other hand for, as it now transpires wrong reasons, I none the less felt that Liverpool was offering a very interesting role and being a local Government person and this wasn't a local Government role that I was being offered. Being a local Government person in many ways, I had this view that Liverpool needed some pretty senior staff.*

I thought I could offer something which was—add some real value to that organisation and an organisation which at that stage I thought was both supportive and worthy. I talked to Mr Carr about it and said: look, this is the situation I'm in. I don't want to be disloyal, but equally I have to think about all matters.

MS JOHNSON: *I've got another good job.*

MR DOUGLAS: *You are only offering me another year, or less than that. He said, to his credit: well, there are things we have to do, and at that stage things were going well. What about if I offered you a 5 year arrangement. I thought about that and I said: yes, let us achieve that.*

MS JOHNSON: *So at that stage you had 1 year to run.*

MR DOUGLAS: *Thereabouts.*

MS JOHNSON: *He offered you a 5 year contract from that.*

MR DOUGLAS: *Well, it would be a little more than 1 year.*

MS JOHNSON: *Mid - - -*

MR DOUGLAS: *It would have gone through to March of this year, I think. So a bit more than 1 year. Yes. So he offered me a 5 year contract, which ends 2007 or something like that.*

MS JOHNSON: *Was there a salary increase associated with that contract?*

MR DOUGLAS: *You'd have me. I don't think so. I think it just rolled.*

MS JOHNSON: *Was that position advertised. Did you go through any recruitment procedures when - - -*

MR DOUGLAS: *No. It was the same position. It was, I think, my position is actually called Manager of Strategic Projects, but it has never been called that in the organisation.*

MS JOHNSON: *There was no recruitment for that position?*

MR DOUGLAS: *No.*

MS JOHNSON: *You didn't go through a competitive process that you are aware of?*

MR DOUGLAS: *No.*

12.3.7

At the Public Hearings both Mr Heapy and Mr Carr sought to argue that there was nothing unusual in the manner of Mr Douglas' appointment. Some time before Mr Douglas' appointment the council had engaged McArthur Management Services to assist the council in filling a position whose specifications were put together by Mr Heapy. The idea was to get a person to manage the area of major projects and provide assistance to the General Manager. The position was advertised but the salary was quite low in relation to the responsibilities: \$75,000. No suitable candidates applied. The position was re-advertised at a higher salary (\$100,000), and the selection committee that included Mr Heapy considered one applicant appropriate. That person knocked back the job offer, stating that he had an alternative offer in the private sector at a much higher salary. Mr Heapy stated that they were then going to ask McArthur Management Services to head-hunt a suitable person, but Mr Heapy and the General Manager decided that Mr Douglas could be the ideal person. They approached him and he accepted their offer. Mr Douglas' salary was \$210,000. Mr Heapy's argument is that the position had been advertised, no suitable candidates had been found, and so they were not obliged to follow normal processes in recruiting Mr Douglas. Patently, Mr Heapy is wrong. The salary given to Mr Douglas was nearly three times as high as that advertised in the first case, and more than double the salary of the second advertisement. It is ludicrous to suggest that correct procedures did not have to be followed because the council had been unable to fill the position at the lower salary levels. The very substantial jump in the salary paid to Mr Douglas should have been market-tested, and each step of the normal processes (advertising the position, receiving detailed curriculum vitae of the applicants, creating a short-list, obtaining referees' reports, interviewing candidates etc.) should have been followed. None was. Instead the deal was done over a lunch. According to Mr Douglas he himself promoted the case for the council to recruit more senior personnel during the lunch, and Mr Carr and Mr Heapy followed his advice by offering him the position.

MS JOHNSON: (24/02/04, p.26–27) *In relation to Mr Murray Douglas, do you recall his appointment?*

MR HEAPY: *Yes, I do.*

MS JOHNSON: *His appointment wasn't the subject of advertising or a merit selection was it?*

MR HEAPY: *Well, I disagree with that. The particular position that Mr Douglas was appointed to—I recall that over a period of time, we certainly had attempted—in fact I wrote the job and personal specifications for the role—we had attempted to recruit into the organisation, a resource that could offer, I think, significant relief to the general manager, because he was heavily involved and that - - -*

MS JOHNSON: *Attempted to recruit by—you had actually given it to a recruitment agency or placed an advert?*

MR HEAPY: *We gave it to McArthur Management Services, and I think the recruitment consultant could have been Deb Parker or Matthew McArthur himself at that stage. We advertised the position and I was involved in the selection process. We did, at one stage, identify one candidate that we believed would offer the necessary skills to manage a project of this size. Verbally, that person indicated that they were interested in accepting the role, but subsequently withdrew. They had been offered another position with far greater money, in the private sector.*

MS JOHNSON: *How did Mr Douglas come to be offered his contract then? You say there was a merit selection process?*

MR HEAPY: *Well, the process was open at that—at that particular point in time, we had been through that selection process. We then advertised a second time trying to recruit someone. We still could not attract or gain the right quality of applications, and then had discussions with McArthur about trying to head-hunt some individuals and whether they could, in fact, try to identify anyone in the private sector, or anyone that was available that could be suitable.*

At that point, myself and Brian Carr actually discussed that, in fact, Murray Douglas, could be an ideal candidate and we approached Murray about his interest for the position at that point in time. So whilst Murray himself, it's true, did not go through an interview per se himself, we had been through the process and failed to identify anybody and, in human resource management terms, head-hunting after you have one through that is a normal process that most organisations would go through.

MS JOHNSON: *In relation to - - -*

MR HEAPY: *It is not an unusual step to take....*

MS JOHNSON: (26/02/04, p.6–7) *Did he say to you at that time that Council ought to employ a development manager specifically to manage this project and that in his view it would be beyond your time capacity—I don't think he [referring to Mr Johnston, Department of Public Works and Services] was implying that you couldn't do it, but that it would just not be feasible for a general manager to manage a project of this magnitude and all his other obligations. Do you recall that issue being discussed?*

MR CARR: *I can certainly recall—in fact, I think he submitted that in writing that we ought to get a development manager and we were attempting to pursue that. In fact*

MS JOHNSON: *You were thinking of employing him, weren't you, at one point?*

MR CARR: *Absolutely. We heard that he was a very good operator, and our preference would have been to engage him, and his structure and system that he had in place that would have been able to deal with this issue, because we saw this issue as not only a local issue but of regional significance, and* ---

MS JOHNSON: *But once he wasn't available, Mr Carr, what steps did you take to obtain, to recruit, someone else to take the pressure off you?*

MR CARR: *Well, that is when we had MacArthur Management and there was a recruitment process put in place. I'm just trying to find some notes on that, but the* ---

MS JOHNSON: *It sounds like* ---

MR CARR: *Sorry?*

MS JOHNSON: *At the time you were talking to Mr Broad about though, by December 2000, so still a long way into the project now, you hadn't employed someone to undertake that role though, had you?*

MR CARR: *We advertised the position in 2000 through MacArthur Management Services, we made an offer to a successful candidate but they pulled out.*

MS JOHNSON: *Right.*

MR CARR: *Then we readvertised again later, that was July 2001, and no suitable applicants were received. That is why I took the position of actually trying to get people from within the organisation either seconded or to assist with the project management of this, because it was very difficult negotiations. Whilst we had Price Waterhouse Coopers and the legals and the probity, there still needed to be somebody who was really presiding over that and it was very difficult.*

MS JOHNSON: *So what you are saying though is that you took steps to try and recruit someone but you weren't able to do that and ultimately you ended up carrying the burden of the negotiations, is that right?*

MR CARR: *I think that is a fair assessment. Then on 4 May we again spoke to Norm Johnston requesting for project management services, but he had to decline.*

12.3.8 In a submission to the Inquiry, questions have been raised about the appointment of Mr Lamond to the staff of the council. It appears that Mr Lamond gave his services to the council pro bono to assist the council overcome some of the problems that arose with the Oasis project. Mr Lamond had apparently provided similar services to distressed projects related to the other organisations. In February 2003 Mr Carr asked Mr Lamond to apply for an advertised position with the council. Mr Lamond did apply and went through two processes of interviews before being offered the position. The contract was standard, but the salary offer was considered to be too low by Mr Lamond. He negotiated with the council and the offer was raised. The position had performance assessments and bonuses associated with it. The council decided to add the bonus figure to its salary offer, pushing the salary up to a level that Mr Lamond was prepared to accept. There appears to be nothing fundamentally wrong with the process. The position was advertised and passed through the standard transparent processes associated with senior positions (in contrast to the appointment of Mr Douglas). The council decided that Mr Lamond was the astounding candidate. He negotiated a higher salary than the council offered him. It might be argued that the higher salary reached (the original salary offer plus bonus) might have attracted other candidates had the position been advertised at that higher level. It is unlikely, however, that it would have made much difference to the field because the bonus addition was not so substantial as to materially increase the salary range. There is nothing in the Local Government Act that defines the salary levels of senior executives, and there is a great variation in salaries, terms, and conditions across councils. Essentially, it is up to the council to reach a package that is acceptable to both the council and the appointee.

PROF DALY: (29/01/04, p.49–50) *Thank you. I have got one final thing to raise. Item 4 about terms of reference requires the inquiry to look at Council's process of appointment and management of senior staff. You said that—I would just like to explore how you came into the position. You said that the general manager had asked you to do a pro bono task or could you just explain?*

MR LAMOND: *That was—sorry, that really had nothing to do with my. That is not quite right. That well prior to the general manager asking me would I apply for my current position. I have, I should explain that I have in the past on a number of occasions helped with people with distressed projects and give my time freely to help them because I thought there was a need and the word that you are prepared gets around and that is how the invite came. I had also had some considerable experience in solving problems on distressed projects in the finance sector so that sort of came out of that.*

I would think probably February 2003 I was asked—I was told that this particular—my current position was going to be advertised and asked would I apply for the position. For a number of personal reasons I gave that a lot of thought and on the very last day that applications closed I decided I would have a go and so I applied. I went through an interview process and a couple of interviews I think, from memory and was offered the job.

PROF DALY: *So McCully suggested that he would like to see you apply?*

MR LAMOND: *No. Mr Carr.*

PROF DALY: *Mr?*

MR LAMOND: *Brian Carr.*

PROF DALY: *Brian Carr. Okay. [A]nd then it went through the regular process of advertising?*

MR LAMOND: *Yes. There was a recruitment agencies advertised.*

PROF DALY: *Okay.*

MR LAMOND: *I was told to look for the ad. As a matter of interest I couldn't find it the first time and I decided I think on 28 February that I would lodge an application, which was the last day.*

PROF DALY: *And your contract was a standard contract out of that?*

MR LAMOND: *With one amendment, yes.*

PROF DALY: *What was the amendment?*

MR LAMOND: *The amendment was that—well, if I can give the background to this? A salary was offered. I wasn't prepared to join Council for that salary. I nominated what I was prepared to join for and that I didn't appreciate at the time that I made that comment—I hadn't seen the contract at that time and I was told that well, if we add the bonus clause to that salary, to the base salary that equals what you are asking for. Well, I said well that is simple, pay the bonus progressively in advance and you have got the base salary that I will work for. I will just call that commercial negotiation.*

PROF DALY: *As far as I understand Council has the freedom to offer what they think the job is worth to people. So what you are saying is essentially you negotiated with them.*

MR LAMOND: *That is correct.*

PROF DALY: *You said the offer - - -*

MR LAMOND: *I wasn't prepared to work for that salary.*

PROF DALY: *It was too low?*

MR LAMOND: *Yes.*

PROF DALY: *They said: Okay, we do have money in the pot that was going to be a bonus, we will now roll that into the system and you got your negotiated fee.*

MR LAMOND: *That is correct. Yes.*

12.3.9

The third issue, which will be considered in relation to employment of staff (Item 4 of the Terms of Reference), concerns Mr Ritchie. Mr Ritchie was the council's Corporate Manager Environment from 1996 to 1998, and then became Corporate Manager Major Projects from 1998 to 2000. In both positions Mr Ritchie had cause to raise a number of issues in relation to the Woodward Park projects. In his evidence to the Inquiry Mr Ritchie stated that he, at various times, expressed concerns about: the Crown Land issue; the business credentials of the Australian Investment and Development Corporation; the merits of enlarging the Whitlam Centre to provide a basketball arena as against the much more ambitious Stardome project; the composition of the Project Control Group and the role of the Mayor within it; the alienation of public space that would occur if the Bulldogs' proposals were followed; and a variety of issues concerning the legalities associated with tendering (or not tendering), as well as certain planning issues. Mr Ritchie's stance on these matters appears to have alienated him from the strategies of the Mayor and the former General Manager to accelerate the development process and to form links with private entities. Mr Ritchie was effectively forced out of his position, and indeed out of the council. His contract was due to run through to March 11 2003. He was, however, offered a variation to the employment contract that would provide him a year's secondment to PricewaterhouseCoopers to work with Mr Redmond from September 1 1999 to August 31 2000. His contract with the council would then end. Mr Ritchie accepted the offer, believing that effectively his role within the council was being terminated because of his putting forward concerns about the issues listed above. The arrangements made by the former General Manager are unusual, to say the least, and indicate his resolve (and other people's desire) to remove Mr Ritchie from raising issues that might hinder the council and its partners in their helter-skelter race to build the infrastructure on Woodward Park. There seems to be no account taken of the fact that it was precisely Mr Ritchie's responsibility to raise queries when he considered the council's welfare might be at stake. It is now clear that Mr Ritchie's judgement was right on many issues. If he had been listened to a large amount of council's money, time and resources would have been saved, and due process would have been followed. The arrangement by which Mr Ritchie would be paid by the council to work with Mr

Redmond in the PricewaterhouseCoopers' offices was both peculiar and wrong. Mr Redmond was meant to give the council independent advice on the feasibility of the projects, and other matters. It is hard to reconcile that with Mr Ritchie's secondment.

The essence of Mr Ritchie's concerns and the responses are provided by the following extracts from his evidence at the Public Hearings.

MS JOHNSON: (29/01/04, p.27) *Can I just ask on that point, Mr Ritchie, before we return to the issues that Mr Broad wanted to raise with you. You said your advice—there were people that didn't want to hear your advice, who were those people?*

MR RITCHIE: *I don't think it is appropriate for me to speculate on that. I mean, you know who was involved with the project.*

MS JOHNSON: *You reported up. Are you talking about people that you reported to?*

MR RITCHIE: *Exactly.*

MS JOHNSON: *You reported to who?*

MR RITCHIE: *And who sat on the project control group.*

MS JOHNSON: *Right.*

MR RITCHIE: *I was putting forward advice about the legal constraints on particular things. I put forward advice on what I thought the Mayor's position on the project control group fettered Council's discretion. As I described earlier, that it was inappropriate for the Mayor to hold a position so intimately involved with a proposal from a private proponent.*

MS JOHNSON: *So you are principally talking about advice that you gave to the project control group there.*

MR RITCHIE: *No. Advice I gave to the General Manager and then it would be circulated to the project control group. I mean, my conduit is through the General Manager. I sought advice on the legal positionings of various projects, various aspects, and put that advice up the line.*

MR RITCHIE: (29/01/04, p.23) *I would say that I had given what I believe was fair and impartial advice on some of these proposals and had been fairly critical of some of the capacity of the proponents to deliver on these proposals and put in writing, questioned some of the approaches about how to deal with the requirements under the Act and that I believe that there were certain hurdles that needed to be stepped over, you know, achieved particularly things like section 55 (3) of the Local Government Act, and just to take you back section 55 requires Council to tender everything that is worth more than \$100,000 where it is purchasing a service.*

MS JOHNSON: (29/01/04, p.21) *Do you remember signing a Deed of Variation to Employment Contract?*

MR RITCHIE: *Yes. Yes.*

MS JOHNSON: *That suggests that you were to be seconded to Price Waterhouse Coopers for a year from September, let me make sure that I've got this right, from the 1st of September '99 to 31 August 2000.*

MR RITCHIE: *Yes, I think so.*

MS JOHNSON: (29/01/04, p.22) *Yes. It says, that it was to be for a period of a year and clause 2.2 of that says:*

That the employee acknowledges and understands that Council is not obliged to offer employment to employee beyond the period specified.

So your employment—you were to go to Price Waterhouse Coopers for a year and then your employment was to cease, is that right?

MR RITCHIE: *Yes.*

MS JOHNSON: *That is how you understood it would operate?*

MR RITCHIE: *Yes, I signed the variation.*

MS JOHNSON: *Why was that arrangement come to? Why would you agree to go for a 12 month secondment and then—that was a earlier termination than you otherwise—sorry, that terminated your contract earlier than it otherwise would have been terminated, does it not?*

MR RITCHIE: *Yes. I believed that there was a desire to not utilise me in some of the projects that I had been working on by Council and that perhaps some of the advice that I had given was contrary to the direction that Council or some in Council wanted to go and that was my, you know, impression of it. I sought some advice on it, some legal advice from some people who knew the situation in Council and my decision was that I would take this offer because it was a, you know, a good opportunity for me personally and perhaps alleviated some of the other issues.*

MS JOHNSON: *So are you saying that Council, and we will come back to who you think this might be in a moment, your impression was Council didn't like the advice you were giving and they were trying to look for a way to get you out. PWC offer of a year's private secondment was a bonus and they knew that you would consider that as a bonus, therefore that was their trade off, here you are. you can go and work at PWC, get a year's private sector experience at our expense, but at the end of that you are out of here sunshine, is that fair?*

MR BROAD: (29/01/04, p.26) *Could I just raise an issue related to that. Your movement into Price Waterhouse Coopers on secondment and particularly the fact that you were working with Mr Redman.*

MR RITCHIE: *Yes.*

MR BROAD: *Yesterday, we had a person who then worked with Ernst and Young who did probity analysis of the proceedings to do with the Oasis and we've also heard from the Mayor and from other people that the whole set of developments that ended up as the Oasis proposal, the council had sought advice on what they should do and what they shouldn't do.*

MR RITCHIE: *Yes.*

MR BROAD: *I find it puzzling that one of the key advisers, in fact, the people who were doing the feasibility studies on the Arena and probably the project that has most dominated the council itself should have very senior council people seconded to them to work with them. I struggle a bit with the independent there. Did you find anything strange about being sent to Price Waterhouse Coopers who were the advisers to the council to work with them?*

MR RITCHIE: *I totally accept your analysis. Yes. Faced with the position that I was in, I had a judgment to make. Let us be frank. I don't believe some people wanted to hear the advice I was giving. I believe there was a decision taking by others above me that I needed to be moved from the project and other projects and that was a soft option and it was engineered outside my understanding. I mean, I was given a proposal that was pre-arranged, pre-engineered, and basically as—sorry....*

MR RITCHIE: *Ms Johnson, alluded before that there was a proposal put to me and if, it was in a sense, this is in your best interests. Now, I can read the writing on the wall like anybody else and it was an opportunity for me to do some work in the private sector. ...*

12.3.10

Mr Ritchie lasted only six months in his secondment, leaving the council to take up a position in the private sector. When he left he received \$16,000 in entitlements along with a redundancy payment of \$70,000. Mr Ritchie still had six months to run on his contract, a contract that he had voluntarily signed in September 1999. It was his choice to resign rather than serve out the final half of his contract, believing that his appointment with a large private organisation was a career-building option. It is difficult to see how the council could believe that he was entitled to a redundancy package. Mr Heapy, who ordered the redundancy payment to be made, argued that Mr Ritchie's position was one that was to be abolished in terms of a restructuring, and reduction, of the council's senior management numbers. Even if this were true, Mr Ritchie could be considered to have been given a redundancy package in the form of his 12 month secondment. It is doubtful, however, that Mr Ritchie's position was going to be eliminated as part of the restructuring. He had been appointed Corporate Manager Major Projects. This is the position that was advertised and eventually filled by Mr Douglas at a very high salary level. There can be no doubt that Mr Ritchie's criticism of various matters associated with the Woodward Park projects was instrumental in the variation of his contract. There can be little doubt that the redundancy payment was a product of the senior manager's desire to be rid of Mr Ritchie.

MS JOHNSON: (29/01/04, p.29) *It would seem that at the—and you might not have seen this. At the bottom of your letter of resignation. I can show you a copy.*

MR RITCHIE: *Please.*

MS JOHNSON: *Is a note saying—your letter of resignation is dated 27 April 2000 and at the bottom of that is a hand-written note saying:*

Please treat as redundancy.

It seems that a \$79,000 redundancy payment was included in your termination payment. Do you have any recollection of that?

MR RITCHIE: *To be honest. No. But, look, I'm sure - - -*

MS JOHNSON: *You met the - - -*

MR RITCHIE: *I don't recall the note, and yes, there was some payments made to me in leaving. No. I don't recall how they broke down, but I can certainly check them.*

MS JOHNSON: *Do you recall receiving about \$70,000 as a termination payment—gross—net?*

MR RITCHIE: *Look, I honestly don't recall the number, but it would have probably included, you know, holiday pay, leave loading, super, and the rest of it. So I can't sit here and comment without going through the details.*

MS JOHNSON: *I will just provide you with the documents that I've got and that might refresh your memory as to how much it was. The reason I ask is there's holiday pay, annual leave and things of that nature that total about 16,000 gross but then there's a redundancy payment of about 80,000 gross and that seems to me to be something that you might recollect. It is a fairly significant sum on top of what you would expect to be paid just for the other leave loading—leave pay outs and long service leave pay outs. I will provide you with these - - -*

MS JOHNSON: (24/02/04, p.27–28) *Thank you Mr Heapy. I just wanted to ask you about the departure of Mike Ritchie. There is a letter on file where he resigned his position from Liverpool City Council but there is a file note underneath handwritten by you asking to treat his exit as a redundancy, can you tell me why it was treated as a redundancy when he had in fact, resigned?*

MR HEAPY: *It is probably important that we just put this context to you. When I first started there, we had about 8 people at the senior management level or director level. There was certainly a direction that particularly came strongly from Councillor Waller that that was far too many senior managers and that had to be reduced and probably about 3 was the right number. So progressively over a period of time, we had slowly reduced the number of managers and I think at the moment, it might be 4, I think, when I left, down from 8 to 6 to 4. In terms of Mr Ritchie's area, there was a decision made in terms of a restructure of the organisation that, in fact, made him redundant because we were amalgamating and we had made the decision at that point to amalgamate his old role which, I think at the time was called corporate manager - - -*

MS JOHNSON: *Sorry Mr Heapy, he was actually contracted out to work with PWC on a one year contract at this point in time, wasn't he?*

MR HEAPY: *Yes, but his substantive position with the organisation was Corporate Manager, Natural Environment.*

MS JOHNSON: *But the contract under which he was—had varied his term of his employment contract allowed him to work at PWC for a year and then his contract would be finished?*

MR HEAPY: *That is right, there was a supplementary contract that was entered into with Mike in terms of providing him with that development and the choice at that stage, I guess was either to continue—my recollection was that when Mike was seconded out, he was still, in fact, working on Council projects.*

MS JOHNSON: *So the redundancy payment wasn't a payout to Mr Ritchie to get him out of Council's employment and to stop him asking provocative questions about the viability of the Woodward Park project?*

MR HEAPY: *No, nothing at all to do with it. Absolutely not. He, in my view, was genuinely redundant, his position that he substantively had had with Council was redundant and he would have either continued on for a period and we would have had liability for his salary for the entirety of that contract was due to run. Whereas Mike came to me and said—yes, he offered his resignation but his resignation in fact, was about saying look, I would like to exercise my right to redundancy, which was always an undertaking that I've had with him that that would be honoured if he decided to cut that short because economically it was a good thing to do.*

12.3 Findings

1. **The former General Manager failed to follow standard practice in making certain appointments to his staff. The appointment of Mr Douglas was made without advertising the position and without passing through the various checks that normally ensure that the appointment process is transparent and accountable. In this irregular procedure Mr Douglas was given a salary more than double that of a previously advertised position designed to get a person the manage the major projects. Mr Carr, assisted by Mr Heapy, then compounded the initial failure to comply with the Act by offering Mr Douglas a new contract within months of his taking up the first contract. The new contract, given in 2002, extended Mr Douglas's term through to 2007. In every aspect of these appointments the actions of the former General Manager were wrong.**
 2. **Mr Ritchie was effectively dismissed from his position as Manager Major Projects because he expressed his concerns about various aspects of the Woodward Park procedures not following due process, and risking council's position in relation to the Woodward Park projects.**
 3. **Mr Ritchie was granted a one-year secondment to Price Waterhouse Coopers in place of his original contract as Major Projects Manager that still had years to run. The contract was not renewable after one year. The organising of a senior staff member to work with an independent adviser to the council suggests a failure of the former General Manager to understand the significance of truly independent advice as council proceeded through its decision-making on Woodward Park projects.**
 4. **The granting to Mr Ritchie of a redundancy payment when he resigned from the council was wrong.**
 5. **The Inquiry could find no serious breaches in the appointment of Mr Lamond.**
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PART

F

Milestones in the Process: A Summary of Liverpool City Council's Errors Along the Way

Section 13: Milestones in the Process

13.1 The Vision

13.1.1 The second report arising from the Public Inquiry into Liverpool City Council, *Learning from Liverpool City Council: Structuring Partnerships with the Private Sector*, provided a full review of structures that have evolved in the broad set of arrangements that sit under the umbrella of Public-Private-Partnerships (PPP). In that report a comprehensive review of the mistakes made by the council in its various attempts to create PPP for the Woodward Park Precinct was not made. In this Part a summary is given of the major areas where Liverpool City Council's actions differed from the normative approaches; approaches established by the many hundreds of PPP that have been put in place around the world over the past 15 years. It is clear from the history of Liverpool City Council's various agreements that the decision-makers were largely ignorant of standard procedures. In attempting to chart their own way through the maze of factors that have to be considered in a PPP, Liverpool City Council inevitably made serious errors of judgement, and serious errors of practice.

13.1.2 The starting point to any PPP is the establishment of a proposal. In the majority of PPP the proposal is put together by the public sector entity. At the beginning of the Woodward Park Precinct saga the council made the first steps towards a proposal by creating a Master Plan for the Park in 1992. The "plan" was very broad in concept, and the council clearly expected the plan to be fleshed out by private sector partners when it wrote to some fifty plus groups asking for expressions of interest in developing the Park in line with the skeleton of the Master Plan. This was the first mistake of the council, for it immediately ceded the creative detail of the plan, and its effective control, to the private sector. This could not immediately be classed as a grievous fault, for little to no interest was forthcoming from the private sector.

13.1.3 When the new council in 1996 began to consider the issue of what to do with Woodward Park the situation changed. The possibility of assisting a local basketball team into the NBL captivated the thinking of the Mayor. Within a relatively short time the council had established a partnership with a private group that brought an unsolicited program of developments that included a grand multi-purpose basketball stadium, along with a range of other developments. By the time that the council realised that the private sector entity was incapable of delivering its promises, the council had established links with the Bulldogs. The council's fairly modest 1992 vision for Woodward Park was translated into a massive multi-component vision created largely by the Bulldogs. By then the

council had effectively lost control over the process. It didn't seem to recognise that this had happened. The Mayor, in particular, became besotted by the prospect of an expanding array of facilities that might make Liverpool a major node for sporting and recreational facilities in South West Sydney.

13.1.4 When the Bulldogs and Macquarie Bank became linked in developing the Woodward Park Precinct they formulated their ideas separately from the council, establishing a grand plan that extended into the CBD and other areas. By then the proposal had grown into a massive scheme that might have cost \$1 billion to put in place. The council willingly accepted the new vision. But by then the ownership of the vision longer belonged to other groups primarily interested in pursuing their own ends.

13.2 The Use of Council's Resources

13.2.1 As the Woodward Park vision grew and grew, the prospective costs of the ventures expanded accordingly. At the start of the seven to eight year period of ever-expanding horizons of the projects, the council was in a fairly precarious financial position. Over \$15 million, that it didn't have, was caught up in its programs. At the beginning, the council had no real way of funding even a small part of the new visions that grew and grew.

13.2.2 This did not seem to worry the council. It bought wholesale the promises of what it would gain in assets from the completion of the projects. Somehow the financial modelling of Macquarie Bank (modelling the council was never allowed to appraise in detail), and the frequent assurances of the Bulldogs, was enough to satisfy the council.

13.2.3 The council did not seem to understand that it possessed three key assets that were attractive to the various private sector partners. It had the vital asset of land, the most fundamental aspect of any development. Through its planning powers, the council had the ability to alter the zoning of areas, and rezonings are often the key to a successful development, since the value of property depends on the uses to which it can be put. The final item in the trifecta of opportunity for developers is the fact that the council is normally the consent authority for development approvals. Curiously, the council never seemed to appreciate just how strong its bargaining position really was with its potential partners. Instead of taking control of the processes by which the various agreements were reached with the private sector, the council rather cravenly let the private entities create the agenda. This happened because the council was so limited in what it could bring to the bargaining table in terms of money. Ironically, in the wash, the various private sector entities brought very few funds to the process whilst the council directed \$15 million to an entity over which it had no control, and spent

a substantial amount of additional money in their effort to push through the “dream”. In commercial terms the council was gauche and naïve in its dealings, and ultimately reckless with the community’s resources.

13.3 Action Plans

13.3.1 In a typical PPP the public agency will develop plans out of its own strategic and operational planning structures. The importance of a PPP proposal will be evaluated in relation to all the other elements of its strategy. Its value in terms of needs will be considered. The community will be consulted, and its views taken into account. There will be a rigorous examination of the value for money offered by entering a PPP compared to the council providing the asset or service itself. None of this happened with Liverpool City Council.

13.3.2 Basically the Woodward Park Precinct project was elevated to the top priority of the council’s objectives. It began as a relatively modest project that might have been achieved, and largely without extensive private sector involvement. Displaying astounding levels of gullibility the key decision-makers of the council allowed every new and grander vision for the project to take precedence over whatever had been formerly proposed. Throughout the whole sorry journey of unbounded dreaming and mutual exercises in duplicity and ignorance, the council allowed itself to lose control of its power, its money, the community assets, and the future of the Woodward Park Precinct. There was never a timeframe and linked action plan, with clear milestones, verifiable measures of achievement, means of identifying responsibilities and reward/penalty systems for reaching various goals.

13.4 Testing the Market

13.4.1 If there is one thing that has been agreed upon in the many hundreds of successful PPP that are on record, it is the vital, basic necessity of taking a proposition to market. Even in the case of unsolicited proposals means are found to test the worth of the proposal against the market. In the strangely ragged and ever-expanding dimensions of the proposals for Woodward Park market-testing was never considered.

13.4.2 The council created its own flawed argument for why market-testing was not necessary. It fell back on the apparent lack of strong market interest in its development of Woodward Park in the 1992–1994 period as a justification for taking on board whatever ideas private sector proponents finally began to offer them. The council was simply relieved to find anyone from the private sector interested.

- 13.4.3** As the magnitude and expensiveness of the proposals grew, the need for genuine market-testing of the ideas grew accordingly. Instead of one or two sporting complexes the proposals extended into various other fields including entertainment, commercial developments and large residential complexes. There were potentially many market sectors to evaluate and test, but the council tested none of them.
- 13.4.4** In a guileless and trusting fashion the council were gratified that private sector entities showed an interest in their “dreams”, believing that that of itself was enough of a market test. They convinced themselves that the private sector groups with whom they dealt were the only ones who would be prepared to develop the Woodward Park projects. As the projects expanded out of the Park itself into neighbouring areas, and into the CBD, the range of elements that might have been put to the market grew, and the range of potential ways of organising those elements also grew. Nowhere in this process did the council stop and consider that they should find a way of testing the markets.
- 13.4.5** Contrary to the idea of assessing the merits of the many proposals that sat under the umbrella of the Oasis or Liverpool 2020 schemes, the council actually protected its private sector partners. It avoided letting any of the other potential groups that might have been interested in the grand projects, that had evolved by the early years of the 21st century, a chance to explore the possibilities. It used commercial-in-confidence provisions, and the supposed need to reach decisions quickly, to avoid the need for any of the proposals to be tested in the marketplace.

13.5 Vehicles and Agreements

- 13.5.1** The creation of a vehicle to manage and organise the project is a critical step, for it effectively defines the terms of the public-private arrangement. There are many forms of vehicles that may be used, as the term PPP has effectively become a generic term containing a variety of ways in which the links between the partners may be structured. What is apparent in the Woodward Park Precinct is that the council had not gone into negotiations with any particular structure in mind.
- 13.5.2** There is no evidence that anybody in the council took the trouble to understand the different ways in which PPP could be structured, despite the rather large literature that had developed on the topic by the late 1990s. They did not explore the various examples of successful and unsuccessful PPP in different industries and in different countries. They did not appear to have studied the New South Wales government policies in respect of PPP, or their recommendations concerning processes associated with PPP.

- 13.5.3 In terms of the Stardome project the council entered into an agreement without realising that they were committing themselves to a form of partnership. They had a simplistic view that a large basketball area, larger than the council could afford to build itself, could be provided with minimal risk to the council. The council seemed to treat the arrangements as a serendipitous event, until they discovered the reality that their private sector partner could not fund its plans.
- 13.5.4 Quite quickly the council entered into a MOU with new partners, again displaying a remarkable level of innocence about the ways in which large commercial ventures are put in place.
- 13.5.5 When that MOU was terminated the council set about negotiating what came to be called the Commercial Agreement. Still lacking any real concept of which structures would give most control and most benefit to the council and its assets, the council then had scant dealings with one of the new major prospective partners (Macquarie Bank). The two private sector groups in the Commercial Agreement dealt largely with each other, the council often receiving information about the development of the new ideas or arrangements through its negotiations with the Bulldogs.
- 13.5.6 At each step of the way, in the negotiating phase and when the structures were put in place, the council allowed itself to move further away from controlling the vehicles that were to be designed to achieve the outcomes, and the money that the council was going to contribute to those vehicles. When the two private sector parties fell out with each other, the council did not attempt to analyse their position within the structure that remained.
- 13.5.7 When their remaining private sector party (Bulldogs) was forced to step back from the Woodward Park Precinct projects, the council suddenly found itself without a genuine PPP vehicle at all. Undeterred by their failures to find effective partnerships over several years, the council rushed to sign another form of partnership. A combination of haste and ignorance pushed the council from one kind of vehicle to another, and throughout it is very clear that the council itself had never come to grips with the need to understand and then select the vehicle that suited its goals and its resources.

13.6 Decision-Making Structures

13.6.1 The council did not understand the fundamental necessity of doing two things before they entered into any partnership arrangement. The first is to develop a model of what it would cost council to provide the infrastructure by itself, and to use that as a test of the cost-benefits and social/economic outcomes that would result from different forms of private sector partnerships. The Stardome-Whitlam Centre cost comparative exercise did not do this. The cost-benefit and the broad medium to long-term social and economic parameters were never evaluated. Instead the council simply believed that the large private sector proposal was necessarily better. When the stream of new proposals, beyond the basketball arena, began to emerge the council made no attempt at all to create benchmarks against which it could evaluate the merits of the proposals.

13.6.2 The second necessary evaluative mechanism that council should have had in place was an external body, or a body with a mixture of external and council members, that could weigh up the merits and feasibility of the proposals. The council left it to the Mayor and the former General Manager to make their evaluations, and inform the governing body of the value of the proposals for the council. Both the Mayor and the former General Manager were wedded to producing outcomes, and it was difficult for them therefore to make decisions without prejudice. Neither were they equipped with the skills and experience to make judgements on the overall merits of what turned out to be an increasingly complex and evolutionary set of proposals.

13.6.3 Since the council had no structured decision-making mechanisms to guide them in the first phase, they were never really in a position to make reasoned judgements as the scale and scope of new proposals grew. The council found itself aboard a kind of development vehicle that had enormous momentum, but over which it had little control. The council simply settled in for the ride, excited by the ever-expanding vision, and never realising that it had lost control over the process.

13.7 The Need for Advice

13.7.1 Council workforces are created to provide services and facilities for their communities. Most of the regular activities of council are of a routine nature, making decisions and organising delivery on a day-to-day basis. The staff also partake in infrastructure schemes that extend over longer time-periods, such as road and stormwater development and maintenance. There are many other areas that engage staff efforts of both a social and economic nature but since councils are curtailed by their budgets and the regular demands of their communities, very few staff get involved in major infrastructure projects. No council infrastructure

project, across the whole State, compared with the scale and diversity of the Woodward Park Precinct projects. There can be no criticism of the quality of Liverpool City Council's staff in suggesting that the tasks involved were beyond the human resources of the council.

- 13.7.2** For councils undertaking projects of the kind planned for Liverpool in partnership with external bodies, it is of paramount importance that they use highly skilled advisers to assist them. The council did make use of external advisers for technical, financial, and legal issues. They often presented their advisers with limited briefs. They poorly disseminated the advice received. They evaluated that advice hurriedly and with limited understanding. At times, they seemed to shop around for the advice that best suited their ambitions.
- 13.7.3** The council did not make the best use of its internal resources and did not create a suitable structure for enabling the staff and councillors to evaluate and build on the advice received. There was no apparent robust dialogue between the advisers and those who had to act on that advice (i.e. the governing body). The extraordinary level of control exercised by the former General Manager and his passion for secrecy prevented that from taking place.
- 13.7.4** There are two patterns of advice that councils need to get. One is arms-length and independent advice that is prepared to give negative or unwelcome advice as well as encouraging advice. The other is advice from external parties who work closely with the council, becoming effectively part of the council team, providing that team with skills that council does not have. In the case of the Woodward Park Precinct projects the distinctions between the different roles of advisers became fuzzy and at times confused.
- 13.7.5** It is also critical that council establishes probity systems within its own structure, and externally. Large projects must have a probity plan. There was no probity plan for Woodward Park, and only scant use was made of external probity checks. Probity advisers, and indeed other advisers, were used, and then not used, in a rather random fashion destroying the value of having continuous high-level input into the projects.

13.8 Business and Financial Plans

- 13.8.1** Once a project is evaluated and tested by a public agency the next step is the building of business and financial plans. It is extraordinary that in Liverpool's case the council constructed no such plans. It is even more extraordinary that no one seems to have even considered creating business and financial plans might be necessary.

13.8.2 It is not that council was unused to making plans. Councils create strategic plans that define the objectives of the council over time and the ways in which objectives will be achieved. They build management plans, aligned to budgets, which chart the operational aspects of their plans. Both types of plans form the basis for ordering priorities, and evaluating new projects. There appears to have been no real attempt by the council to link the ever-growing range of projects for Woodward Park with the standard strategic and management planning tools. The council also creates town plans and transport plans that affect the shape of the spatial systems, and community plans for council-owned or council-managed land. Plans abound within councils, but the council did not think to create a business or financial plan for the biggest operation it had ever tried to undertake.

13.9 Risk Management

13.9.1 The central point, that may have eluded the decision-makers when they began to engage in commercial arrangements with various private sector bodies, was that the land and the money they brought to the bargaining table did not belong to them: it belonged to the community. There is a fairly direct analogy with the structure of private sector organisations. The Board of Directors of a public company do not own the assets of that company. They act as policy-makers with clear responsibilities to the owners of those assets: the shareholders in the company. In the case of councils the community “own” the assets of the council, and the Elected Representatives have a duty of care to protect those assets. This implies that in making decisions that might affect the value, ownership, or community amenity associated with those assets the governing body must consider the risks associated with various courses of action.

13.9.2 In the view of the Mayor and the former General Manager they were enhancing the value of the assets of the Woodward Park Precinct by developing new infrastructure. They believed that they were bringing benefits to the community, especially the youth of the area, by producing new sporting, recreational, and entertainment facilities. They believed that they were building and enhancing Liverpool’s status within Sydney, and most particularly in Western Sydney. There can be no doubting the sincerity of their views.

13.9.3 As the scope of the projects grew, their conviction that they were doing mighty things for Liverpool became ever stronger. What especially reinforced their sanguine view of the projects was the notion that by linking with their private sector partners it could all be achieved at no net cost to council. The bigger the vision grew, the more convinced the council’s key decision-makers became that nothing could go wrong.

13.9.4 The various private sector partners that appeared at different stages of the Woodward Park Precinct proposals had their own agendas. Those agendas may well have included genuine sentiments that they were doing something that was highly beneficial to Liverpool, but that was always subsidiary to their primary motives. Private sector groups entering into commercial arrangements must focus on the commercial outcomes, and must be convinced that the arrangements will be profitable for them. This simple, central tenet of business appears to have eluded the leading proponents of the public-private links within the council. Conversely, and ultimately perversely, the two main proponents of the schemes within the council believed, at best, that the arrangements would produce win-win outcomes for all parties, or, at worst, believed that that the council could have it all, eventually, without any impact on its resources or its capacity to deliver all the other services to the community.

13.9.5 Consequently, the council went through seven years of developing schemes for the Woodward Park Precinct, and making a variety of commercial arrangements with different private sector parties, without ever seriously addressing the risks associated with their actions. In the extensive literature and practice of PPP risk to the public sector entity assumes a central place. The ability to transfer risk to the private sector is one of the critical criteria by which the worth of a PPP is evaluated. In the fantasyland of their dreams for Woodward Park the main proponents of the schemes within council created a world in which risk was effectively banished.

13.10 Control of Process and Evaluation

13.10.1 The majority of PPP begin with a public sector agency determining the need for private sector assistance in developing new infrastructure and associated services. The project is then tested in terms of evaluating the benefits of working with a private sector partner(s) compared to producing the infrastructure or running the service within the public sector agency. If convinced that a PPP offers better outcomes than operating the project in-house, the public sector agency will call for expressions of interest, and will go through a detailed process of producing a short-list, of receiving detailed submissions, and finally of selecting a partner. The public sector agency initiates and controls the process. Unsolicited propositions, brought to a public sector agency, normally have to go through a strong process of evaluation before being considered. Again, the public sector agency maintains control of the project.

13.10.2 The history of the Woodward Park Precinct scheme is ragged in terms of who controlled the process. It began with the council, in 1988, investigating the commercial redevelopment of the old swimming pool site. It sought Expressions of Interest from the private sector in 1989. In 1992 the council endorsed the

Master Plan for Woodward Park and the expectation was that the upgrading of its sporting facilities would be done with the involvement of one or more private sector groups. Various build-own-operate-transfer schemes were proposed in 1994 and 1995 but none eventuated. Ambitious to develop facilities for the Sydney Olympic Games the council, in 1996, linked with the Leighton construction group in an indoor arena, and later a velodrome proposal, but the bids were unsuccessful. To that point the council appears to have been relatively in control of the process. In 1996 the Bulldogs expressed interest in the development of Woodward Park. From that point on the council progressively lost control of the innovation of ideas. The leadership in ideas passed to the private sector groups with an interest in Woodward Park, and the council became a willing follower. Ultimately, it ceded control over major operational aspects of the proposed developments, and allowed its private sector partners to bind the council contractually to outcomes that should have been decided by the council on an independent basis.

13.10.3 PPP normally define outcomes, have milestones that identify the critical stages of a scheme, and have benchmarks against which progress can be measured. PPP generally have reward/penalty systems that provide incentives for the partners to achieve outcomes. The PPP usually contains provisions that protect the public sector entity and means of terminating the PPP in a way that safeguards the public interest.

13.10.4 In the various commercial arrangements entered into by the council there was no satisfactory evaluation process installed. It was almost as if the council believed that once initiated the schemes would run their course, and all that the council had to do was sit back and reap the eventual rewards of having new infrastructure and an enhanced regional status. Clearly, the termination systems were unsatisfactory and not in the public interest. The council paid dearly for its neglect to worry about all, or any, of the things that constitute the standard approach of public sector entities considering a PPP.