



**INQUIRY IN RELATION TO
PENRITH RUGBY LEAGUE CLUB LIMITED**

**CONDUCTED BY
IAN TEMBY AO QC**

R E P O R T

December 2004

**INQUIRY IN RELATION TO
PENRITH RUGBY LEAGUE CLUB LIMITED
(REGISTERED CLUBS ACT 1976, SECTION 41X)**

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8 December 2004

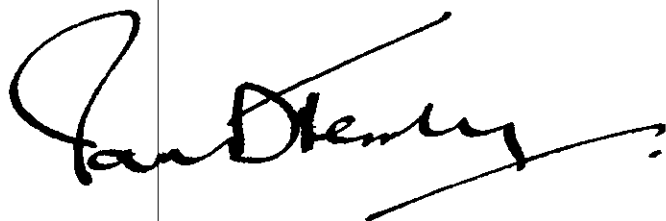
Mr K Brown
Director of Liquor & Gaming
323 Castlereagh Street
SYDNEY NSW 2000

Dear Mr Brown

I refer to the Instrument of Appointment under section 41X of the Registered Clubs Act 1976, dated 30 April 2004, to conduct an Inquiry in relation to Penrith Rugby League Club Limited.

As required by the terms of that Instrument, I now furnish to you my Report. This is being done in both printed and electronic form.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Ian Temby', with a long horizontal stroke extending to the right.

Ian Temby AO QC
Chairman

CONTENTS

INTRODUCTORY NOTE ACRONYMS AND GLOSSARY

vii
ix

PART 1 COWAN AND THE PANTHERS

CHAPTER 1 – The Club, Growth	1
<i>Early Days; Constitution; A Registered Club; Cowan and Phyro; Growth; Current Contracts; Amalgamations; Some Figures; Cowan's View</i>	
CHAPTER 2 – A Power Struggle	8
<i>Board Changes; Cowan's Neurosis; Rugby League in Crisis; Fight for Disclosure; Amalgamations; First Election; No Confidence Resolution; Second Election</i>	
CHAPTER 3 – The Inquiry	15
<i>Instrument of Appointment; Administrative Arrangements; Inquiry Outcomes; Conduct of Inquiry; Procedural Fairness; Nature of Task; Litigation; Proof of Matters; Publicity; Documents</i>	

PART 2 AMALGAMATIONS AND ELECTIONS

CHAPTER 4 – Amalgamations	25
<i>Why Amalgamate?; Early Resolutions; Port RSL Amalgamation; ClubNova Amalgamation; Constitutional Position; The 5/4 Board; The 9/5 Board</i>	
CHAPTER 5 – Cancelled Election – March 2002	34
<i>Nominations; Ticket; Big Numbers Vote; Solicitor Boon Retained; Unanimous Decision; Possible Result; Electoral Imperfections; Conclusion - Allegations 1 & 2</i>	
CHAPTER 6 – Purging Five Directors – October 2002	43
<i>"Board Wars" Story; The SCOT Meeting; What Team Leaders Did; Staff Voting; Election, Result; Had Staff Not Voted; Management's Role in Election; Wrong in Principle; Commercial Companies; Local Government Elections; The Club Election; Advertisements – Who Paid?</i>	
CHAPTER 7 – Voting Rights – Promises Made, Then Broken?	57
<i>Findings; Cowan's Authority; Promises Made; Board's View; Cowan's View; Board Misled?; Conclusion – Allegations 3 & 4</i>	

PART 3

MONEY AND CONTROL

CHAPTER 8 – Sign On Till 70	65
<i>Main Contract; Phyro Contracts; Confidentiality; Surrounding Circumstances; Some Findings; Knowledge of Phyro; The Fifth Document; Another Fifth Document?</i>	
CHAPTER 9 – Accounts Rendered, Paid	74
<i>1966-2004; Arbitrary Figures; The Spreadsheet; Phyro's Entitlements; Phyro Claims; Who knew about Phyro Invoices?; Knowledge by Executive; Knowledge by Directors; Knowledge by Management; Knowledge by Members; Conclusion – Allegation 5; Lou Zivanovic; Panthers on the Prowl</i>	
CHAPTER 10 – Disclosure Required And How Made	89
<i>Disclosure Required; Rationale; The True Position; Inclusion of Phyro Profits; \$43,498 – How Arrived At?; Members Misled</i>	
CHAPTER 11 – The Board And Prudential Supervision	97
<i>Leave Written Off; Large Accounts Checked; Internal Audit; Monitoring Cowan's Performance; What Was James Shown?; Belated, Inaccurate Report; Role of External Auditors; In Conclusion</i>	
Chapter 12 – Panthers – Cowan's Personal Fiefdom?	107
<i>The Allegation; Close Associates; The General Picture; What Cowan Did; Benefits to Cowan?; Conclusion – Allegation 6</i>	
 APPENDIX 1 – List of Witnesses	
 APPENDIX 2 – Report by Ernst & Young dated 10 December 2003	

INTRODUCTORY NOTE

This Report follows an Inquiry, supported by hearings, held for the purpose of investigating allegations said to involve corrupt or improper conduct in relation to a registered club, Penrith Rugby League Club Limited.

The Inquiry was conducted in accordance with Part 4A, Division 6 of the Registered Clubs Act 1976, on the basis of a Instrument of Appointment dated 30 April 2004 pursuant to s41X of that Act. The terms of that document are contained in Chapter 3.

The Report is in three parts. Part 1 outlines the story of the Club and the closely related story of Roger Cowan, formally its secretary since inception, and in fact the man who ran it and made it grow. It also deals with the setting up and running of the Inquiry.

Part 2 deals in detail with the topic of amalgamations undertaken by the Club from the late 1990's, constitutional changes, and a Club board election which was aborted in March 2002 and held again late that same year after important constitutional changes.

Part 3 deals, again in detail, with the arrangements between the Club and related entities on the one hand and Cowan and his family company, Phyro Holdings Pty Limited, on the other. Very extensive, and largely undisclosed, financial dealings between Phyro and the Club have taken place over many years and the Inquiry revealed cause for grave concern as to money and accounts. Part 3 deals in addition with the allegation that the Club has been run by Cowan as if it were his private domain, not exclusively for the benefit of all its many members.

The Inquiry was presided over by Ian Temby QC, who wrote the Report; when the personal pronoun is used, he is the person speaking.

This note is followed by a list of selected acronyms and a short glossary of some frequently used terms. At the end of the Report there is an appendix containing a list of witnesses. It also identifies the paragraphs in which each of them is mentioned.

The Report contains extensive quotes from hearing transcripts and exhibits. They have been reproduced verbatim, complete with grammatical and spelling errors, to maintain the integrity of the information provided. With respect to verbal evidence, the transcript punctuation and format have been maintained. All quoted material is shown in *italics*.

As a general rule surnames only are used in the report, in the interests of economy and consistency. No discourtesy is intended.

ACRONYMS AND GLOSSARY

Act - Registered Clubs Act 1976.

amalgamation – a bringing together; the process by which two registered clubs become one, pursuant to the Act.

Board – the governing body of the Club, latterly after amalgamations and constitutional amendments called the Group Board.

CEO – Chief Executive Officer.

the Club – Penrith Rugby League Club Limited, a registered club under the Act and the subject of this Report; sometimes called the Penrith Club.

ClubNova – ClubNova Co-operative Limited, with which the Club amalgamated in 2002.

Cowan – Roger Cowan, the Secretary of the Club for nearly 40 years, whose title is now CEO of the Panthers Entertainment Group; one of his sons, who also works for the Club, is referred to as Max Cowan in this Report.

constitution – the basic document establishing and empowering something; each of the Club and the Football Club had a constitution, comprising a Memorandum and Articles of Association.

Counsel Assisting – a barrister appointed to assist an inquiry; in this case there were two, Mr David Staehli and Ms Vicki Hartstein.

DGR – Department of Gaming and Racing.

DLG – Director of Liquor and Gaming, who commissioned the Inquiry.

the Football Club – Penrith District Rugby League Football Club Limited.

Footy Five – a name given to a group of directors of the Club, who were voted off the Board in October 2002.

Inquiry – the investigation conducted pursuant to the Instrument of Appointment set out in Chapter 3.

Metro-Poll - the organisation which conducted elections for the Club in March and October 2002, and for the Football Club and the Club in September-October 2002.

Panthers – the Club and all related entities, including the Football Club and PSP; more recently often called the Panthers Entertainment Group. Also used to refer to the Penrith football team.

Phyro – Phyro Holdings Pty Limited, a Cowan family company.

PMP – Port Macquarie Panthers.

Port RSL – Port Macquarie RSL Club Limited, with which the Club amalgamated in 2002.

PRLC – Penrith Rugby League Club Limited, ie the Club.

PRSL – Port RSL.

PSP – Panthers Sports Promotions Limited, a company – which no longer trades - owned by the Club and the Football Club.

Report – this document, which results from the Inquiry.

Secretary – under the Act every registered club must have a secretary, who is the Chief Executive Officer of it; Roger Cowan has been Secretary of the Club for the past 39 years.

SAMs – this stands for the Structure And Mentoring section, and means the senior management team, at the Club.

SCOT – name given to a regular meeting of Club team leaders, standing for Synergy and Cooperation Of Teams.

Ticket – at an election, a team of candidates or their how-to-vote card.

PART 1

COWAN AND THE PANTHERS

CHAPTER 1

THE CLUB, GROWTH

- 1.1 Penrith is a major centre of population situated about 50km from the Sydney CBD and close to the Blue Mountains. It has a rugby league team, whose players used to wear brown jerseys and were derided as the Chocolate Soldiers. Now they are the Penrith Panthers, and the team won the Australian Premiership in 1991 and the Australasian Premiership in 2003. These wins were matters of great pride to many Penrith residents. This Report has nothing to do with the football team, says something about the football club, and takes as its subject the Penrith Rugby League Club Limited. According to the evidence, it is the largest club in the world.

EARLY DAYS

- 1.2 In the years up to the mid-1960's there was a body called the Penrith Rugby League Club. It operated out of modest premises in Station Street, Penrith. Roger Cowan was a member of its committee – he was the Treasurer. He then worked as a school teacher. Late in 1965 he left the committee and became Secretary. There were then about 30 employees. Cowan was asked:

And do you remember what your starting salary was? --- No but I can remember it was very low. It was a very small club then, 26 poker machines and 800 members.

CONSTITUTION

- 1.3 The Penrith team joined the Sydney First Grade League competition in 1967. In the same year, on 26 June, Penrith Rugby League Club Limited was incorporated. It was, and continues to be, a community-based club. The subscribers to the original Memorandum of Association showed the president was a butcher shop proprietor, and others on the committee – all men – comprised two boilermakers (one of whom was a vice president), a branch manager (the other vice president), two head storemen, a dealer, a driver, an overseer, a railways assistant, and a railway relieving officer.
- 1.4 The Club – as it is called in this Report – has always, as its name indicates, been concerned to support rugby league football in the Penrith district. The first four out of more than two dozen objects for which the Club was established were these:

- a) *To acquire all the assets of the Penrith Rugby League Club subject to all debts owing in respect thereof and all other liabilities subsisting at the date of such acquisition.*

- b) *To obtain the transfer to or its nominee of all licences held by or on behalf of the Penrith Rugby League Club under the Liquor Act 1912 as amended or under any other State or Federal Statute.*
- c) *To provide for members and for members' guests a social and sporting Club with all the usual facilities of a Club including residential and other accommodation liquid and other refreshment libraries and provision for sporting musical and educational activities and other social amenities.*
- d) *To promote and propagate the game of Rugby League Football in the Rugby League Football District of Penrith or elsewhere and to provide or assist in the provision of training and conditioning and teaching facilities for football played in accordance with the rules of the New South Wales Rugby Football League.*

1.5 There is another, closely allied, body: Penrith District Rugby League Football Club Limited. In this Report it is referred to as the Football Club. It was incorporated on 4 December 1989. The subscribers to its Memorandum of Association, some of whom become witnesses before the Inquiry, were again all men. Five of them were shown as retired, one as a director of GIO Insurance, one as "*Managing Director Real Estate*", one as a company director, and the ninth as a business consultant.

A REGISTERED CLUB

1.6 The Club is registered under the *Registered Clubs Act*. The Football Club is not. These simple facts assumed high importance, as Chapter 6 of the Report shows. Each is a company limited by guarantee.

1.7 A registered club has two very significant entitlements. One is to sell alcoholic beverages under the *Liquor Act 1982*. The other is to operate gaming machines, under the *Gaming Machines Act 2001*. In common parlance, registered clubs can sell liquor and run poker machines. The Club, the subject of this Inquiry, does both those things on a huge scale.

COWAN AND PHYRO

1.8 Cowan has a wife, Phyllis, and three sons – Max, Stephen and Phillip. Roger and Phyllis Cowan are directors of the family company, Phyro Holdings Pty Limited. All five hold shares in it. Nobody else does. Cowan answered in the affirmative when asked whether Phyro "*had always been a Cowan family company*", and always "*under his effective control*".

1.9 Phyro was registered on 27 June 1968. It has been involved in Cowan's employment arrangements with the Club from an early stage, although precisely

when that started is now unclear. Cowan gave the following explanation of how Phyro first became involved:

At the time I was on a very low salary, I could introduce new services to the club through the magazine and marketing, that I could increase my salary. I could get greater confidentiality about my salary, and that all fitted in pretty well with having this company set up which was set up by a barrister here in Sydney and it has been that way ever since. So there were a number of good reasons for it. One being increase in salary; another one being confidentiality and I suppose a third one would be that it was a good tax planning as well.

Later he said:

... from the very day I started I always had that belief and desire for confidentiality. When I came in to the industry it was an industry riddled with dishonesty. It took me two years to pluck up the courage to buy a new car in case people thought I was ripping the players off. Confidentiality was extremely important to me ...

GROWTH

1.10

Cowan must be an extremely effective club administrator. Success in business affairs does not happen accidentally, and the Club grew and grew. There were of course difficulties, but they were overcome. In 1984 the Club moved to a very large site in Mulgoa Road, Penrith which has been developed over the years to provide a remarkably wide range of facilities. Other registered clubs in NSW have grown, but none to the extent that Panthers has. Success was due to many factors, including a steady recognition that the core business was entertainment, and the putting into place of first class systems. The driver of all this was Roger Cowan. Over the period of nearly 40 years since he became Secretary of the Club, most Board members have admired and strongly supported him.

CURRENT CONTRACTS

1.11

Cowan was born on 9 November 1935. His current employment with the Club is chiefly governed by an agreement dated 1 September 1996, the opening portion of which appears on the next page. I note the contract covers a period of more than nine years, expiring on Cowan's 70th birthday.

1.12

There are three other agreements, all entered into on that date – 1 September 1996 – with one party being Phyro. The other parties are respectively the Club, the Football Club and Panthers Sports Promotions Limited. The last company is wholly owned by the Club and the Football Club.

AGREEMENT made the 1st day of SEP 1996

BETWEEN: PENRITH RUGBY LEAGUE CLUB LIMITED ACN 000 578 398, a company duly incorporated in the State of New South Wales and having its registered office at Mulgoa Road, Penrith in the said State (hereinafter called "the Club") of the one part

AND: ROGER MAXWELL COWAN of Riverside Road, Emu Plains, in the said State, General Manager (hereinafter called "the General Manager") of the other part.

WHEREAS:

- A. The General Manager has been employed as General Manager of the Club for some time past.
- B. The Club is desirous of retaining the services of the General Manager for a further period ending Nov 9, 2005.
- C. The General Manager is desirous of serving the Club in the capacity of General Manager for such further period.

IT IS AGREED AS FOLLOWS:

- 1. The Club shall employ the General Manager for the period ending November 9, 2005 subject to determination as hereinafter provided.
- 2. The remuneration of the General Manager shall be one hundred and seventy-five thousand dollars (\$175,000) per annum and shall be payable by weekly instalments such remuneration to be increased annually by 5% or the CPI whichever is the greater.
- 3. The Club will provide and maintain for the sole use of the General Manager a motor vehicle of a suitable type and shall pay all expenses in connection with such use, such motor vehicle to be changed from time to time in accordance with the Club's policy regarding motor vehicle replacements, and in the Club's absolute discretion.

- 1.13 Most directors of the Club were quite unaware of the terms of the four contracts, or even the existence of the Phyro contracts, until last year.

AMALGAMATIONS

- 1.14 Over a period of about four years from 1999 the Club amalgamated with a number of other clubs: several in the Sydney metropolitan area, one at Bathurst, one at Lavington, near Albury, one at Newcastle and one at Port Macquarie. The last two were large clubs, each having two licensed premises and a membership in the tens of thousands. They were ClubNova Co-operative Limited and Port

Macquarie RSL Club Limited. Those two clubs increased the Penrith Club's gaming machines by over 700. The result of the entire process of amalgamations, in terms of gaming machines numbers, was roughly to double those run by the Club. They now total well over 2,000, at 14 venues. More importantly, the amalgamation process more than doubled the membership of the Club, which as at 5 July 2004 exceeded 160,000, including over 24,000 unfinancial members. There were also large increases in the Club's turnover and in its nett worth.

- 1.15 In the case of each amalgamation the Penrith Club was by far the stronger entity, and in each case the process that ensued could be fairly described as a friendly takeover. The Club strengthened its position by obtaining assets cheaply, as well as members. It provided a strong balance sheet and expert management. Most of the clubs taken over would have collapsed if amalgamation had not proceeded.

SOME FIGURES

- 1.16 The report of the Panthers Entertainment Group for the year to 31 October 2003 states that the group then had 1,547 employees. In that year its revenues from ordinary activities were shown as \$177,532,000, of which \$42,079,000 came from catering and beverages, and \$104,003,000 from gaming machines. Other significant revenue sources were accommodation (\$6,233,000), gate receipts (\$1,207,000), functions and banquets (\$4,177,000), advertising and promotion (\$1,136,000) and sponsorship (\$2,107,000).

- 1.17 These figures are impressive. So are the following, taken from the balance sheet. As at 31 October 2003 the group had total assets worth \$295,119,000 of which over \$4,000,000 was in cash. Property, plant and equipment worth \$275,133,000 was shown. The total liabilities were \$122,511,000, leaving nett assets of \$172,068,000.

COWAN'S VIEW

- 1.18 What follows is taken from Cowan's report, as group CEO, in the annual report for the year to 31 October 2003. It says something about what, from his viewpoint, led to the current Inquiry.

Profit last year, before State and other taxes was \$29 million. Poker machine tax took \$25 million of that, Payroll tax and Land tax took \$3.74 million, and Income tax took the rest – and a bit more as well. The group made a slight after tax loss for the year (\$220,000).

Another and a more important way of looking at the results from the bankers' perspective is the Earning Before Interest Tax and Depreciation, which was \$23 million. The small after tax loss was converted into a profit of \$4.7 million after taking into account the increase in asset revaluations

(mainly properties) of \$4.8 million. Taking everything into consideration it was a disappointing result.

Poker Machine Tax would have been \$43 million had the new rates been in place. We have a huge challenge ahead.

Total salaries and wages for the group was more than \$50 million. The club provided income to more than 1,500 employees and more than 700 of those jobs were in the clubs that amalgamated with Panthers, many of which would probably have been lost by now if the amalgamations had not proceeded.

The conflict between the club industry and the Government arose from the disagreement over the imposition of new tax rates. The clubs claim the increases are unfair and unaffordable. The Government disagrees.

Panthers will be expected to find an additional \$17 million. If we were running a normal company we would not be giving away the first \$5 million we make each year – to support Rugby League and other community activities. But even without those costs we would still be \$12 million short.

1.19 At the end of his contribution to the annual report, Cowan said this:

When the Club industry reacted negatively to the announcement of new taxes, the State Government began what appeared to be a campaign to discredit clubs. Panthers was one of the prime targets in this strategy and a personal attack was launched against me.

Front page headlines in The Sydney Morning Herald "Panthers Boss charged the club millions", and the story that followed might have given some people the impression that there had been dishonesty in my arrangements with Panthers. The Treasurer repeatedly claimed there had been conflicts of interest in the arrangements.

There are 3 things about this sequence of events that I would like the members of Panthers to know.

- 1) *Justice Marcus Einfeld, one of Australia's most eminent judges, was asked to review the contracts involving Panthers, my family company, Phyro Holdings Pty Ltd, and me. In a 12 page report he stated that: "there was no question of conflict of interest."*
- 2) *The auditors for the club and the auditors for Phyro Holdings Pty Ltd reviewed all payments and invoices and reported that Phyro Holdings*

had charged the club less than it was entitled to charge. There was no dishonesty and it was very misleading to say that I had taken "millions" out of Panthers.

- 3) *The Department of Gaming and Racing (DGR) investigated the arrangements. At the time of writing this report the DGR has not notified the club or me of any breaches.*

The arrangements between Phyro Holdings Pty Ltd, Panthers and me were perfectly legitimate, there was no conflict of interest and everything was done honestly and legally.

1.20

A written opinion by the Hon Marcus R Einfeld AO QC PhD, then and now a retired Judge of the Federal Court, was tendered near the end of the hearings. It is dated 5 November 2003, although I note its terms were still being discussed in emails between him and AMC Media on 11 November 2003. As I understand the position AMC Media were acting on behalf of Cowan, although the cost of the opinion was met by the Club. The Einfeld opinion, like any other, depends upon the particular questions that were asked and can be no better than the facts put forward upon which the advice was based. Certainly it does not allay all concerns as to the dealings between Cowan and Phyro on the one hand, and the Club and related entities on the other.

CHAPTER 2

A POWER STRUGGLE

- 2.1 It is normal in human affairs that discord will arise from time to time. In the late 1990's the Club was beset by strong stresses and strains, which led to a struggle for control of the Club between Cowan and certain long-standing directors on the one hand, and a group of mostly new directors on the other.

BOARD CHANGES

- 2.2 At one time the Club's Board was elected every year, and later every two years. There was little turnover of directors; most served for long periods. To give one example, Leo Armstrong was a director for well over 20 years, and chairman for 14 of them.
- 2.3 By Panthers' standards it was therefore almost cataclysmic when three of the nine directors changed in a period of just over six months. Leigh Mawhood resigned and was replaced by Greg Evans, proprietor of a local newspaper. Vern Mychael died and was replaced by Craig Terry, who worked as a financial controller and internal auditor. Merv Cartwright resigned and was replaced by Dennis Coffey, a former player and local businessman. All this happened in the latter part of 1997 and the early part of 1998. It took time, but these three later combined with Geoff James (a long-standing director) and John Bateman (a Penrith solicitor, and mayor of Penrith in 1999 and 2000, who had joined the Board in December 1995), to form a group which was determined to make management accountable. From Cowan's viewpoint it was opposed to management, and a frightful nuisance.

COWAN'S NEUROSIS

- 2.4 Cowan said he was "*a bit neurotic about confidentiality*", and that puts the matter mildly. He was determined to the point of obsession that people generally should not know what he and Phyro were receiving under the four agreements. Those privy to the remuneration arrangements, including Phyro's involvement, were the Executive – the Board Chairman and the two Deputy Chairmen, senior and junior. That gave rise to the most undesirable situation in which there were two groups of directors, inner and outer.
- 2.5 In September 1996 when the four agreements were entered into the Executive comprised Armstrong (President), Mychael and Keith Rhind. Later, Barry Walsh became an Executive member after Mychael died. That continued until 1999 when Armstrong was replaced as Chairman by Walsh, and James became a member of the Executive. According to Cowan those changes were engineered by the group he saw as opposed to him, and caused Armstrong bitter disappointment.

RUGBY LEAGUE IN CRISIS

- 2.6 In 1997 the rugby league world was in turmoil. The competition had earlier split in two, absurdly large sums of money were paid to many players, and after a peace process a 20-team competition for 1998 was agreed upon. That was quite unviable, except perhaps in the short term. It was agreed the number of teams should be reduced to 17 in 1999 and 14 by 2000. Criteria were set, and Cowan became convinced, probably rightly, that the Panthers might well miss out. That would have done the Club considerable commercial harm, and of course disappointed very many members. Cowan therefore proposed that consideration be given to combining the Panthers with another team which would guarantee survival of the brand name in the competition. The most attractive possibility was to combine with Parramatta, the resulting team to be called the Parramatta Panthers. Some Board members thought this was a dreadful idea, and greatly resented the fact that Cowan would not let it go.
- 2.7 The Board convened a public meeting for 7 September 1998. According to Cowan it was to *"explain to the members our position regarding the future of Rugby League. It was agreed that I would present the information to the members ... I was committed towards telling the members both sides of the problem. If we decided not to fully investigate a merger we might be caught without any options. Merging would create a different set of problems. It was my job to accurately advise the members of both sides"*. Ron Mulock, club patron and a former Deputy Premier of NSW, addressed the meeting after Cowan, who says he *"gave a highly emotional address accusing the Board of being too old. He spoke of corruption and appeared to be referring to me. He made other claims which were untrue and generally behaved in an extraordinary and unexpected manner. In the audience there were some people who were supporting Mulock and attempting to undermine the integrity and standing of our Chairman of Directors and other members of the Board"*.
- 2.8 After the meeting the Board resolved that Panthers cease joint venture merger negotiations, and stand alone in the competition. A Stand Alone Committee was formed, including Armstrong, Walsh, Terry, Heidtmann and Cowan from the Club, Mark Levy from the Football Club, Mulock, and representatives from the four local government areas from which the club drew most of its membership.
- 2.9 At the end of the day the Penrith team was accepted as a continuing member of the competition. The issue was thus resolved, but it left some scars. There were some who continued to contend that Cowan had tried to get rid of the football team by merging it with the Parramatta team. He insists he was only doing his bounden duty, that is to protect the best interests of the Club and have its Board consider all feasible options.

FIGHT FOR DISCLOSURE

2.10 In May 2000 the Club engaged an expert in corporate governance, Terry Kilmister. Cowan said that was at his suggestion, *"to see if we could improve our general decision making processes and get somebody to come and give us a bit of a talk on how we should work together ..."*. One of the issues which arose in meetings attended by Kilmister was the question of Cowan's remuneration, and *"he said he thought it was inappropriate for the CEO's salary not to be known by the whole Board, but he also said there was nothing illegal about it either"*. Some Board members agreed with the first part of this, and pressed the issue. Either when Kilmister was there or at the subsequent Board meeting Cowan said *"the day the Board finds out what I am paid is the day I leave the Club"*.

2.11 Concerning that Board meeting Cowan said:

I can't remember the actual discussion but I got a bit angry about the fact that a contract is a contract, an agreement is an agreement, and you don't go back on it and when they kept on insisting, I said I don't really want to work for people like that, I'm off.

So you took your bat and left? --- Yes and resigned and when I nearly got back home I thought this is a stupid thing I am doing, I've let a lot of people down, I am acting selfishly and so I drove back and went into the room and nobody said anything when I got back there or not.

Did you mean by your departure to resign from Panthers? --- Yeah, yeah.

Do you think that would have been understood by those who were left behind? --- I thought they would have. I thought when I walked back in they would say "No way, you resigned".

But in any event, they accepted your return without comment, apparently? --- They seemed to, yeah, yeah.

2.12 In the result nothing was achieved. Cowan's pay was known only to him and the Executive, as was the involvement of Phyro.

AMALGAMATIONS

2.13 John Wilson, the Club's gaming manager, first proposed that it embark upon one or more amalgamations. Cowan became a proponent and the Board followed, some of them reluctantly. An interim policy adopted on 17 November 1998 adopted *"a strategy of expanding by taking over other clubs"* where certain conditions were satisfied, including that there be *"no risk of a reverse takeover"*. That was not a problem with the early amalgamations, which were the subject of applications to the Licensing Court made between September 1999 and early

2001. However, different considerations applied to amalgamations with Port Macquarie RSL Club Limited (Port RSL) and ClubNova Co-operative Limited (ClubNova) in Newcastle, which were the subject of such applications made in February and September 2001 respectively. Each was a club with a very large membership. ClubNova had a largely union base: indeed to be a director one had to be a union member. Cowan's position was that there was no real risk of the Penrith members ever losing control of the Club, even after all the amalgamations which roughly doubled its membership. Some directors thought otherwise. This gave rise to unhappiness, although it did not really surface until early 2002.

- 2.14 The Club's constitution was changed in January of that year to require that of the nine directors, five must be Penrith members, and that no more than two directors could come from any amalgamating club. The existing directors were keen to protect the Club's traditional roots, and at least some of them were keen to shore up their own positions. The constitutional amendment left open the possibility that all nine directors would come from Penrith, because there was no requirement that any come from an amalgamating club. However, some Board change was likely at the election scheduled for March 2002.

FIRST ELECTION

- 2.15 Voting took place over a week. Early in the period the Board discovered that a ticket was being run at ClubNova which would have seen two directors from Newcastle elected plus two from Port Macquarie, and some only of the existing Board returned. The constitution of the Club forbade such electioneering. Craig Terry, one of those not on the ticket, took advice from a solicitor recommended to him by ClubsNSW, Brett Boon. The effect of that advice was that nothing much could be done about the ticket, but in Boon's view there was much doubt regarding whether members of ClubNova and Port RSL had become in law members of the Penrith Club. If not, they could not vote. Boon's advice was firmed up and given to directors at a Board meeting. The result was that, late in the election process, the directors resolved to call it off. Walsh, the Chairman, said that decision was *"Bigger than momentous, it's probably the biggest decision I have been involved in in my 34 years"* on the Board.

- 2.16 Although the Board decision to abort the election was unanimous, Cowan (who could not vote) was opposed to and felt let down by it. He had given assurances to the boards and members of the amalgamating clubs as to their voting rights, and he felt the dramatic step taken had the effect of disappointing their legitimate expectations. He instructed Stephen Bowers, the Club solicitor, to obtain an opinion from Bernie Coles QC and Terry Lynch. That happened at the same time as Boon was obtaining an opinion on behalf of the Club from Robertson Wright QC and Robert Bromwich. The Coles/Lynch opinion was that the ClubNova and Port RSL members had been brought across as members of the Penrith Club, whereas the Wright/Bromwich opinion was to the contrary, and consistent with the advice

that Boon had given. When Cowan circulated the Coles/Lynch advice at least some Board members felt he had gone behind their backs, just as he considered that the initial involvement of Boon was an undermining of his position.

NO CONFIDENCE RESOLUTION

2.17 The Board commissioned Boon to review all amalgamations. He produced a report which was critical of management in some respects. That report was delayed because not all relevant documents were made available by Club management to Boon, a matter of which he complained. That was a major factor in a motion of no confidence in Cowan, which was passed at a Board meeting on 28 August 2002.

2.18 Many chief executives faced with such a resolution would have proceeded to negotiate financial terms with a view to separation. Cowan did not. He knew – everybody knew – that a fresh Board election was coming up in October. He hung on.

2.19 In the meantime the constitution had again been amended. The Board was increased from nine to 14, of whom five had to come from the amalgamating clubs, with again the requirement that not more than two would come from any such club. The nine Board positions reserved for Penrith members were secured by providing that only members of the board of the Football Club were eligible. The Football Club had nine directors. Hence the election that mattered, so far as nine positions on the Club Board were concerned, was the Football Club election. The Club election which followed closely after it was, regarding those nine positions, a formality.

SECOND ELECTION

2.20 As already mentioned, it was against the Club's constitution for any member to engage himself or herself in gathering votes by use of a how to vote ticket. But the Football Club's constitution contained no such provision. Further, the Club's constitution prohibited Club employees from voting at Club elections. But they could at the Football Club's election. And they did, in considerable numbers.

2.21 Mulock, the Club patron, became heavily involved in the Football Club election. The next page reproduces a pamphlet he put out, which was widely distributed. It strongly supported the 'Footy Five', as he called them, who had expressed a lack of confidence in Cowan. It suggested that the rest of the directors were past their time, and should be ousted.

Attention All Penrith Panther Members

Open Letter from Ron Mulock - Club Patron/Life Member, a former NSW Deputy Premier, Attorney General and who has held Ministerial responsibility for Registered Clubs.

The current Board Election provides members with their first and possibly the last window of opportunity to arise for them in the last 37 years.

Don't miss this opportunity to bring about generational change at both the Board and Senior Management level.

Don't be apathetic. Come out and vote the "Footy Five" How to Vote which I have fully endorsed.

Resistance to change is coming from the remaining four current Board Members who can be identified as the "Old Guard" or as Roger Cowan's "Four Kinsmen", take your pick.

This is the first open split of the Board, in the lead-up to Board Elections, since Roger Cowan became General Manager 37 years ago.

Leading the charge for change is the "Footy Five" - or the "New Breed", Craig Terry, John Bateman, Greg Evans and Denis Coffey, who first joined the Board in the last seven years in the period of 1995-1998 plus Geoff James with 18 years service.

In the past week Roger Cowan, a man under fire if ever I saw one, has emerged as Campaign Director for the "Old Guard". He has publicly attacked the "Footy Five" who in the last four years have rattled Roger's cage by challenging him where necessary in the interest of the Club and its membership.

For the Senior Executive of any Corporation to publicly attack the majority of the Board elected by the Club's Membership is totally reprehensible more so while Board Elections are in progress.

The Old Guard or Roger's Four Kinsmen - Leo Armstrong (22 years on the Board), Keith Rhind (25 years), Barry Walsh (19 years) and Terry Heidtmann (18 years) - a total of 84 years have in the past been fully protected by a system of voting based on entrenching those already on the Board of Directors.

With every vote 1 to 9 having equal value a united Board ticket, as has operated over the past 37 years, makes it virtually a numerical impossibility for an individual to be elected. There are literally hundreds of defeated candidates who can attest to this.

This time the united approach has broken down because a few weeks ago the Board resolved that a majority of the Board had lost confidence in the General Manager Roger Cowan. The "Footy Five" voted for the motion and the "Old Guard" against.

The basis for this loss of confidence has been given to Roger Cowan in writing by the five Board members and the issue is far from dead.

One key issue, but far from the only one, is Roger Cowan's role in the amalgamation process, which he has personally promoted and negotiated with the other clubs. This has resulted in considerable dilution of Penrith Rugby League Club Limited's control of the newly created group. From 100% retention of control by Penrith, the current model provides for a Group Board of 9 Panther Directors and 5 from the remaining Clubs.

It has taken 6 months for the Board to overcome what Roger described as 'a blip' when the earlier election was called off. In the process Penrith's control has been diluted by almost 40%.

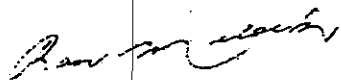
Need I say it - Roger's chances of survival will improve when the 5 Directors representing the Amalgamated Clubs join the Group Board. After all he has been the driver and primary contact person in the whole amalgamation process.

Voting the "Footy Five" How to Vote will maximise the chances for generational changes.

That's why this is a first and possibly the last window of opportunity for the Members to bring about generational change.

Please take a little time out and vote the "Footy Five" ticket Thursday and Friday 12pm - 3.00pm Saturday 10.00am - 3.00pm. Vote the Footy Five ticket.

Encourage your friends to do the same.



Ron Mulock

TIME FOR A CHANGE

- ☐ Heidtmann Terry*
- ☒ 8 EVANS Greg*
- ☒ 7 JAMES Geoff*
- ☒ 6 COFFEY Denis*
- ☐ Armstrong Leo*
- ☐ Lowe Kerry
- ☒ 5 WILLIAMS Peter
- ☐ Bentley Colin
- ☒ 9 YOUR CHOICE
- ☐ Alexander Greg
- ☒ 4 CHAPMAN Greg
- ☐ Walsh Barry*
- ☐ Rhind Keith*
- ☒ 3 HAYNE Glynis
- ☐ Fellis Don
- ☒ 2 BATEMAN John*
- ☒ 1 TERRY Craig*

*SHOES CURRENT OFFICER

VOTING CLOSES 5 PM SATURDAY
YOU MUST NUMBER 9 BOXES

- 2.22 Cowan became involved in the election. He took a public position against re-election of the 'Footy Five'. An advertisement he ran in a local newspaper appears below. The main alternative to the 'Footy Five' ticket came to be recognized and described as the management ticket. Greg Alexander, the captain of the 1991 Premiership team, stood for election for the first time.

The "Footy Five"

Panthers directors John Bateman, Greg Evans, Craig Terry, Geoff James and Denis Coffey like to call themselves "The Footy Five".

They like to perpetrate the myth that in 1999 they voted against a management recommendation that Penrith merge with Parramatta and that they have been busy saving the club ever since.

The fact is, the Board was *never* asked to vote on *any* recommendation to amalgamate with Parramatta.

But "The Footy Five" and their misinformed supporters have trotted the old myth out again in an effort to win the current board election.

There is little evidence of "The Footy Five's" support of football. For instance, their attendance at away games, particularly over the last couple of years, has been abysmal.

Compare that to the extraordinary enthusiasm shown by directors such as Barry Walsh and Keith Rhind who attend all home and away matches.

"The Footy Five" are out of touch with reality. They keep harping back to something they say happened three years ago. And their collective memory of that event is - to put it kindly - inaccurate.

They attack our amalgamation policy, which is the single most important policy this club has ever undertaken - a policy that has secured our future and safe guarded rugby league.

I've never come out publicly against members of the Board before.

But the board room antics of "The Footy Five" over recent months

have been disgraceful.

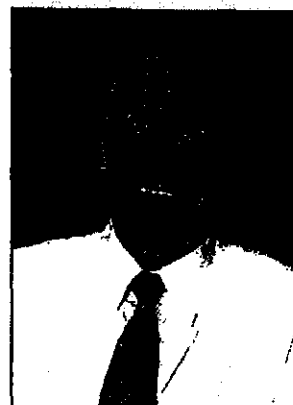
For reasons best known to themselves they have tried to sell this election as an argument between themselves and me.

It has nothing to do with me or whether I remain as Group General Manager.

It's about the future of this club. It's about leaving it in safe hands.

It's about maintaining the stability and viability of a great organisation - one that has built its reputation on being honest and open and that solved its difficult problems in the boardroom rather than in the media.

This is a club that had become the leading club in Australia a long time before most of "The Footy Five" had any interest in it.



"The Footy Five" has demonstrated beyond doubt this week what has been of great concern to me for some time - that their hearts are not in Panthers.

**Roger Cowan OAM
GM, Panthers**

- 2.23 Alexander topped the poll. Sitting directors other than the 'Footy Five' were returned, along with several newcomers. None of the 'Footy Five' was returned. The management ticket got up, and Cowan's position was reinforced.
- 2.24 Matters dealt with in this introductory chapter are covered in detail in Part 2 of this Report - Chapters 4 to 7 - and to a lesser extent in Part 3.

CHAPTER 3

THE INQUIRY

INSTRUMENT OF APPOINTMENT

3.1 On 30 April 2004, an Instrument of Appointment, in the following terms, was signed by the Director of Liquor and Gaming.

TO: IAN TEMBY AO QC

I, KENNETH MAXWELL BROWN, Director of Liquor and Gaming, hereby appoint you, a legal practitioner of at least 7 years standing, to preside over an inquiry pursuant to section 41X of the Registered Clubs Act 1976 for the purposes of investigating certain allegations about corrupt or improper conduct in relation to the Penrith Rugby League Club Limited ("the Club").

In conducting the inquiry you have the powers and authorities conferred on a commissioner by Division 1 of Part 2 of the Royal Commissions Act 1923 and by Division 2 of Part 2 of that Act (except for section 17(4) and (5)).

The matters to be the subject of the inquiry are allegations that:

- (a) the board of the Club aborted the March 2002 board election because of an apprehension that the election, if carried through to conclusion, would or might lead to loss of power by the existing board;*
- (b) constitutional changes were then effected with a view to, or which had the effect (direct or indirect) of, enabling proxies to vote, enabling Club employees to vote, and precluding all Club ordinary members from directly voting in the board election held later in 2002, and subsequent elections;*
- (c) the Club, by its board and/or Mr Roger Cowan, misled members of the clubs with which the Club amalgamated between 1998 and 2003 as to the continuing voting rights of members of those clubs;*
- (d) Mr Cowan misled the board of the Club as to those voting rights;*
- (e) information as to the remuneration package of Mr Cowan, and the financial dealings between Phyro Holdings Pty Limited and the Club, and benefits flowing to Mr Cowan and that company whether directly or indirectly from the position he holds and from those financial dealings, have since at least 1 June 1994 been withheld from the Club's board and its members;*

- (f) *the Club is, and has since at least 1 June 1994 been, to a large extent run by and for the benefit of Mr Cowan and his close associates, including members of his family and Phyro Holdings Pty. Limited, and not in good faith for the benefit of all members of the Club;*

and that such allegations involve corrupt or improper conduct.

If in the course of your inquiry you become aware of any other matter concerning the Club which in your view could usefully be examined, you are required to advise me of such matter in writing, so that I can consider extending the terms of this Instrument of Appointment.

You are required to report to me on the findings of the Inquiry no later than 1 October 2004, or such later date as may be stipulated by me, and you may in your discretion provide me with one or more Interim Reports.

The procedures to be adopted at the Inquiry (in addition to those required by any Act or law) shall be as follows:

- (a) *The inquiry is to be held in public unless you, if satisfied that it is desirable to do so by reason of the confidential nature of the evidence or for any other reason, direct that any part of the inquiry is held in private in which case you may give directions as to whom may be present;*
- (b) *You may give directions as to the form in which evidence may be received, including, if satisfied that it is desirable to do so, the giving of evidence by any witness under a pseudonym;*
- (c) *You may, if satisfied that a person or body is substantially and directly interested in the matters which are the subject of the inquiry, allow that person or body to appear before the inquiry and may allow the person or body to be represented by counsel or solicitor;*
- (d) *Any such counsel or solicitor may with your leave, examine or cross-examine any witness on any matter which you deem relevant to the inquiry;*
- (e) *If approved by you an allowance for travelling expenses and maintenance may be payable if approved by you to a witness summonsed to appear before the inquiry as if the witness were a witness in proceedings in the Supreme Court; and*

- (f) *You may determine other matters of procedure to be adopted at the inquiry consistent with this instrument and Part 4A Division 6 of the Registered Clubs Act 1976.*

DATED: THIS 30th DAY OF APRIL 2004

3.2 My appointment was effected pursuant to s41X(1) of the Act, which provides:

For the purposes of investigating corrupt or other improper conduct in relation to a registered club, the Director may arrange for the holding of an inquiry to be presided over by a person appointed by the Director.

and is followed by subsections enabling the Director to determine the matters to be the subject of inquiry, the procedures to be adopted at the Inquiry, and so on.

ADMINISTRATIVE ARRANGEMENTS

3.3 Before the end of May the necessary administrative arrangements had been made. The hearings were conducted in the Police Integrity Commission (PIC) hearing room in the St James Centre, Elizabeth Street, Sydney. That happened by the good grace of the PIC and its Commissioner, Mr T P Griffin, to whom thanks are due and given. Inquiry staff worked out of space secured by the Department of Gaming and Racing for the purpose, on another level of the St James Centre.

3.4 Mr D Staehli and Ms V Hartstein were appointed by the Crown through the Director of Liquor and Gaming to assist the Inquiry. The solicitor to the Inquiry was Mr M Steele. Others were engaged to record material as received, analyse such material, interview prospective witnesses, provide legal and paralegal support, handle media inquiries, and produce this Report. The Inquiry's staff comprised 11 people at its peak.

INQUIRY OUTCOMES

3.5 By s41Z(1) of the *Registered Clubs Act*, I am required to report to the Director of Liquor and Gaming as to the findings of the Inquiry, including any information obtained in the course of it. This follows:

(2) *If the Director is satisfied that any matter contained in the report:*

- (a) *relates or may relate to a breach of a law of the State (including this Act) or of another State or Territory or the Commonwealth, or*

- (b) *constitutes or may constitute grounds for taking proceedings of any kind (including a complaint under this or any other Act) against a registered club,*

the Director may refer the matter to a law enforcement agency or to any other person or body who may have an interest in the matter.

3.6 The Director is given further and significant powers by s41ZA:

- (1) *The Director may, if satisfied that the findings of an inquiry justify doing so, make either or both of the following orders:*
- (a) *an order requiring the registered club that is the subject of the inquiry to provide each member of the club with information about the findings of the inquiry within such time as is specified in the order.*
- (b) *an order requiring the club to hold an election of the governing body of the club within such time as is specified in the order.*

3.7 The Inquiry therefore has one necessary, and several possible, outcomes. There must be a report containing findings and including information obtained in the course of the Inquiry. And there may be – but these are entirely matters for the Director of Liquor and Gaming – a referral with a view to possible prosecution of any person, or the taking of action against a registered club, which must in the statutory context mean the Club, the subject of the Inquiry. Further possible outcomes are for the Director to order the Club to provide each member of it with information about the findings of the Inquiry, or to hold an election of the governing body of the Club within such time as is specified in the order, or both of those things.

CONDUCT OF INQUIRY

3.8 The first sitting of the Inquiry was held on 8 June 2004. At that time the appointment of each of the Counsel Assisting was noted. The Club was granted leave to appear pursuant s7(2) of the *Royal Commissions Act*, and to be represented by Mr B Coles QC and Mr T Lynch. A general opening address was then given – others concerning particular allegations were given subsequently – and the hearing was then adjourned until 15 June, on which date the first witnesses were called. The last sitting day was 19 November. In all, sittings took place on 29 days.

Appendix 1 contains a complete list of witnesses called.

PROCEDURAL FAIRNESS

- 3.9 What the Inquiry had to do was to investigate and report. Nothing contained in the *Registered Clubs Act* or the *Royal Commissions Act*, or in the Instrument of Appointment, made hearings mandatory. They were held for two main reasons.
- 3.10 The first was that a body enjoying Royal Commission powers, as the Inquiry did, is empowered not just to summons witnesses but also to require them to answer all relevant questions. By s17(1) of the *Royal Commissions Act*, the witness "*shall not be excused from answering any question or producing any document or other thing on the ground that the answer or production may incriminate or tend to incriminate the witness, or on the ground of privilege or on any other ground*". The Commission therefore had considerably greater powers than are enjoyed by the ordinary courts of the land. However, protection is provided to witnesses by s17(2): "*an answer made, or document or other thing produced by a witness ...shall not ... be admissible in evidence against that person in any civil or criminal proceedings*". That is in turn subject to exceptions. An answer, document or other thing is admissible in proceedings for an offence against the *Royal Commissions Act*, or if the witness was willing to give the answer or produce the document or thing irrespective of the provisions of s17(1).
- 3.11 It is one thing to say the Commission can compel witnesses to answer all relevant questions. It would be a very different thing to say that answers given are necessarily, or always intended to be, truthful. And it can be a difficult thing to detect mendacity.
- 3.12 The other main reason why hearings were held was to ensure that procedural fairness requirements were met. The Inquiry's report is not a judgment effecting legal rights, such as the courts pronounce, but findings it makes may well affect reputations. In *Mahon v Air New Zealand* [1984] 1 AC 808 at 820 the Judicial Committee of the Privy Council indicated that the relevant rules of natural justice could be reduced to two:

The first rule is that the person making a finding in the exercise of...(investigative) jurisdiction must base his decision upon evidence that has some probative value in the sense described below. The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected it, may wish to place before him, or would have so wished if he had been aware of the risk of the finding being made.

3.13 At 821 their Lordships went on to state:

What is required by the first rule is that the decision to make the finding must be based upon some material that tends logically to show the existence of facts consistent with the finding and that the reasoning supportive for the finding, if it be disclosed, is not logically self-contradictory.

The second rule requires that any person represented at the inquiry who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision-maker, might have deterred him from making the finding even though it cannot be predicted that it would inevitably have had that result.

3.14 These passages were cited with approval by the Royal Commission (in WA, 1992) into Commercial Activities of Government and Other Matters, in its report at 1.6.28-9. The Commissioners there also cited with approval (at 1.6.32) the following statement by the Royal Commission, in NSW, into Productivity in the Building Industry, in its report at (ix):

I can say that I do not accept that in this type of inquiry an adverse finding is the equivalent of a finding of disputed fact, of any criticism of a party, or of the exposure of evidence or material which might reflect badly on a person. Nor do I accept that a warning must be given of all possible ramifications of each piece of evidence before it can be referred to in the Report. I do agree that a party should not be confronted for the first time in the Report with a true adverse finding upon a totally new point of issue, which it could not have reasonably anticipated. I do not accept that this anticipation can only come from an express statement or warning by the Commissioner or Counsel Assisting.

NATURE OF TASK

3.15 So the Inquiry must be fair. But what is its nature? In terms of the Instrument of Appointment, it is held for the purposes of investigating allegations about any corrupt or improper conduct in relation to the Club. "Conduct" denotes that which is done, whether by an individual or a company, but not in my view by the Club itself. Conduct by the Club cannot, surely, be conduct in relation to it.

3.16 During the course of hearings I naturally gave thought to the concepts of corrupt conduct and improper conduct, as it was allegations involving those concepts that I had to investigate. One tentative conclusion reached was that corrupt conduct – a term not defined in the Act, in contrast to the definition in ss7-9 of the

Independent Commission Against Corruption Act 1988, as to which see *Greiner v ICAC* (1992) 25 NSW LR125 – was not necessarily illegal, but always most serious, and that findings as to corrupt conduct would as matter of prudence be best put to one side even if arguably available.

- 3.17 Different considerations applied to impropriety, as to which the WA Royal Commission Report referred to above said (at 1.6.58) *"it would be a mistake to attempt to frame a precise definition of improper conduct that would be capable of application in all circumstances"*. And then, speaking of public servants:

... improper conduct would be established where there was a gross departure from those standards of public administration the public are entitled to expect and which is otherwise inexplicable. An alternative form of words for the final phrase would be 'and which defies rational explanation'.

As I said in my report as Royal Commissioner into the Finance Broking Industry (in WA, 2001) at 2.17:

Conduct is improper where it involves a serious departure from the standards expected of anyone in the same position as the person whose conduct is being considered. It is not possible to frame a precise definition of improper conduct that will be capable of application to all circumstances. The quality of conduct is inevitably judged on the basis of reasonable standards prevailing in the community at the time.

- 3.18 In the latter half of July I put out an Issues Paper which identified a number of areas in which I would be looking to Counsel for assistance, and raised as to each the question whether there had been impropriety and if so by whom.

- 3.19 On 28 July, which was rather more than half way through the hearings, I heard submissions on the meaning of the expression *"corrupt or other improper conduct"* in s41X of the Act. Obviously that meaning had to be carried across to the Instrument of Appointment. Counsel for the Club then put the proposition that on a proper reading of the statute a person conducting an inquiry such as this is confined to making factual findings, and cannot competently go on to find that anyone has been engaged in corrupt or improper conduct. The importance of that submission is obvious, especially as this was the first time that a s41X inquiry had been conducted.

- 3.20 In favour of the Club's submission were that the Act does not define either corrupt conduct or improper conduct, and does not say in terms that findings as to them can be made. All this is in stark contrast to the *Independent Commission Against Corruption Act*, already referred to. It might be thought that if Parliament wanted

formal findings made, it would have said so. There were contrary considerations. It was allegations about corrupt or other improper conduct that I was appointed to investigate, and it would seem odd not to reach and state a conclusion in either respect. I was by no means loath to make findings on whether or not conduct was improper, and until the Club's submission was received the hearing had proceeded on the basis I would do so. Surely if the Director of Liquor and Gaming decided to exercise the power conferred upon him by s41ZA(1)(a), and require the Club to provide each of its members with information about the findings of the Inquiry, those members would be assisted by having my considered views on whether the facts as found warranted further findings on corruption or impropriety, either positive or negative.

LITIGATION

3.21 I had not made any ruling as to this important issue when, in early August, I became ill and two days of hearings had to be cancelled. During my period of convalescence the Club commenced proceedings in the Supreme Court. It sought declarations as to what a report under s41X could lawfully contain. The defendants were the Director of Liquor and Gaming, myself and Cowan. Only the first of these took an active role in the proceedings; the second and third defendants filed submitting appearances, signifying a willingness to abide by the Court's decision.

3.22 After argument on 6 October, Hamilton J decided on 8 October that *"it was not intended by the legislature that it be any part of the function of the person presiding at the inquiry to make findings that particular conduct constituted corrupt or other improper conduct"*, the purpose of such an inquiry being to *"investigate particular factual matters referred to it by the Director and to make a report (including appropriate factual findings) to the Director concerning them"*. The learned judge added two observations. The first was that he did not *"think the utility of the report is utterly or even seriously compromised by the lack of findings in terms of corruption or impropriety. The Director will still have the benefit of the investigative procedure, together with findings as to particular factual matters and the material gathered in the investigation to use in the performance of his further functions conferred by the Act"*. Secondly, Hamilton J said he appreciated *"the fineness at times of the distinction between findings in terms of corrupt or other improper conduct and findings of fact which may be discreditable to particular persons"*. It is clear to me from the reasons for decision that findings of the latter type may be made.

3.23 The result, so far as the Inquiry is concerned, was a declaration that on the true construction of the *Registered Clubs Act* there cannot be included in any report such as this *"a statement of finding, conclusion or opinion that there has been corrupt or other improper conduct by any person in relation to"* the club under investigation.

3.24 The litigation gave rise to substantial, and unavoidable, delay. During the period between commencement of the proceedings and judgment some further evidence was taken, but otherwise the Inquiry had to be held in abeyance. I convened a procedural hearing shortly after the reasons for decision became available, and it then emerged that there were difficulties with the availability of Counsel so far as the making of final submissions were concerned. Thereafter those involved did their best in circumstances of some difficulty. The original reporting date of 1 October had to be extended, initially to 1 November and then to 17 December.

PROOF OF MATTERS

3.25 By s41X(5) of the *Registered Clubs Act* it is provided that a person presiding at an inquiry "*is not bound by the rules or practice of evidence and may inform himself or herself on any matter in such manner as the person considers appropriate*". It is in the nature of any inquiry that it will sometimes be necessary to dig or probe to find a clue or lead, which will assist in consideration of a key subject matter. Therefore, while the concept of relevance is applicable before an inquiry, it does not operate in the same way as in ordinary civil litigation, where there are parties and clearly defined issues. While most of the evidence received by the Inquiry was of the sort that would be admissible in an ordinary court, there were exceptions. An inquiry can receive hearsay evidence, not just to establish the truth of what is being asserted but to enable further investigation to be undertaken, and that happened from time to time.

3.26 The standard of proof applied by this Inquiry was the same as in ordinary civil litigation, that is to say the balance of probabilities. However, as stipulated by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362, the greater the gravity of the allegation under consideration, the greater the strictness of proof required. As the Inquiry was investigating allegations of corrupt or improper practices and as the Report could have a detrimental affect upon reputations, critical findings as to individuals were not made unless solidly proved.

PUBLICITY

3.27 An advertisement was published in late May in two Penrith newspapers, in two having statewide circulation, and in one newspaper in each of Newcastle and Port Macquarie. It advised of the Inquiry and the general nature of the allegations to be investigated, said when the first sitting would take place, said those wishing to provide information to the Inquiry should do so, and contained contact details.

3.28 The daily transcript of evidence was posted on the internet.

DOCUMENTS

3.29 A very large quantity of documentation was received during the course of the Inquiry; from the Club and related entities, from Cowan/Phyro Holdings, some

from present directors, more from past directors, and some from others such as the Club's auditors and Cowan's accountants. The total comprised about 200 lever arch files, estimated to contain nearly 50,000 pages.

3.30 With this Report there is being made available to the Director of Liquor and Gaming a copy of the transcript of evidence, the exhibits received and marked during the course of the hearings, and a set of all documentation received, in copy form. This will enable the DLG to pursue any aspect of the matter further if he is so minded.

3.31 Two aspects of confidentiality should be mentioned, one small and one large. The former relates to a past senior Club employee, who asked that his name be suppressed when he gave evidence, although he did so in public. That application was acceded to.

3.32 More importantly, I made non-publication orders with respect to closing submissions, both oral and written. Those who were interested were free to attend the hearings, and the submissions were distributed to those affected by them, but publication except for the purposes of the Inquiry was constrained out of fairness to the Club and individuals; experience shows that closing submissions, particularly by Counsel Assisting, can if publicised be seen as providing a strong indicator as to what the ultimate report will contain. That is not their purpose, and is rarely the fact. I would have made the non-publication orders self-cancelling at the same time as the Report was made public, if this was an inquiry leading to a public report. However that is not, or not necessarily, the case. The Director of Liquor and Gaming can decide that the Report should be made available to all Club members, and as there are well over 100,000 of them that would amount to making the Report available to the public generally. However that is entirely a matter for him, and I express no view as to the course he should follow.

3.33 It is for the Director of Liquor and Gaming to decide what he will do with the documents he receives, including the transcript of oral closing submissions and the actual written closing submissions. I do not think he should make them public unless the Report becomes a public document in the manner I have mentioned. If the Report does become so, then there would seem to be no compelling reason why the transcript and written submissions should not become public, in case they are of interest to anybody.

PART 2

AMALGAMATIONS AND ELECTIONS

CHAPTER 4

AMALGAMATIONS

- 4.1 The Club over several years expanded by amalgamating with a number of other registered clubs, thus doubling its size. Two of the allegations under investigation relate to, or arise out of, the amalgamation process.

WHY AMALGAMATE?

- 4.2 What follows is taken from a report by the secretary/manager of Port RSL to his board:

There have been between 40 – 50 amalgamations occur within the NSW Club Industry in recent years. These amalgamations have occurred for a variety of reasons, however the most common being a club with financial strength amalgamating with a financially stressed club, forming a common membership and one strong entity with growth in balance sheet terms; financially strong through increased membership and market share; and reduced costs through stronger buying power.

The amalgamation is the coming together of two or more clubs to form one company with a common membership base, balance sheet and organisational structure.

EARLY RESOLUTIONS

- 4.3 At a meeting on 17 November 1998, the Board of the Club resolved:

That the following policy be ADOPTED as an INTERIM policy to be reviewed at our Policy Review meeting to be held sometime in February 1999.

Panthers adopts a strategy of expanding by taking over other clubs where the following conditions will be satisfied:

- a) The take-over will strengthen Panthers' balance sheet.*
- b) Analysis of the opportunity shows that the profitability of the take-over target can be significantly improved.*
- c) The take-over target must have the potential to add value to the "Panthers" brand.*
- d) Panthers' management carries out sufficient studies on the take-over target to be able to assure the Board that there are no undisclosed liabilities, including building structural faults, to jeopardise the investment in the foreseeable future.*

- e) *The take-over will be self funding through additional loans guaranteed by Panthers.*
- f) *Panthers group profit will be improved.*
- g) *There would be no risk of a reverse takeover.*

4.4 Cowan prepared a document for consideration by the Club's Board which is dated 9 February 1999 and headed "*Policies on Takeovers*". It commenced in this way:

Decision Options

- 1. *Panthers is not interested in amalgamations at this stage, and will review that decision during February each year.*
- 2. *Panthers is interested in amalgamations. The Board will consider each proposal on its merits after presentation of all reports by Management.*
- 3. *Panthers is interested in amalgamations. Management is authorised to finalise agreements provided they conform with policies and parameters set by the Board of Directors.*

Recommendation

The third option is recommended – the Board of Directors sets the rules and Management gets the job done within those rules. The Management of Panthers has the advantages of in-house legal advice and strong management in the areas of finance, human resources, construction, maintenance, poker machines, marketing, catering, bars, information technology and others.

This option allows things to be done more quickly and with more continuity of purpose.

4.5 The paper concluded with "*a suggested set of policies that would govern all negotiations*". There were 18 separate, generally short, items. The first three of them were identical with, and the balance similar to but more detailed than, the seven items in the interim policy just quoted. It is a notable fact that (g) above, referring to absence of risk of a reverse takeover, finds no counterpart in Cowan's recommended list. Everything he recommended was adopted by the Board at a meeting held on 12 May 1999, together with these two items:

- (s) *That any additional site has the potential to expand.*

- (t) *That Management believe that any acquisition can be turned into a profit and have a positive cashflow by year two.*

4.6 Also at the 12 May 1999 meeting the Board resolved:

- a) *The pursuit of opportunities to take over other clubs to be given high priority in Panthers strategic planning.*
- b) *Management to establish a comprehensive set of criteria that have to met before an amalgamation could be finalised. This criteria to be submitted to the Board for further discussion.*

4.7 By the time of that meeting management was actively involved in pursuing amalgamation possibilities. One of the first was with Hawkesbury Sporting Club Limited, which was the subject of a detailed written advice by John Ralston of Pigott Stinson Ratner Thom dated 7 May 1999. Ralston is a solicitor with a high reputation for work involving clubs, and on the evidence is perhaps the most eminent in the field in Sydney. A matter dealt with later is how he came to be displaced by another solicitor from doing work concerning amalgamations for the Club; that happened in March 2002. His 7 May letter was addressed to "Stephen Bowers, Legal Counsel", at the Club, and Bowers also features later.

PORT RSL AMALGAMATION

4.8 The first big amalgamation was with Port RSL. A Memorandum of Understanding was entered into in March 2000, and signed by Cowan on behalf of the Penrith Club and appropriate officers on behalf of Port RSL. It contained nothing which directly bore upon the question of voting rights of Port RSL members following amalgamation.

4.9 An extraordinary general meeting of Port RSL was held on 26 November 2000, and by resolution the members present – nearly 800 of them – approved in principle amalgamation of the Penrith Club with Port RSL, "*such amalgamation to be effected by*" the continuation of the former and the dissolution of the latter. It was further resolved that the club make application to the Licensing Court for conditional approval of amalgamation. The same resolution was passed by the members of the Penrith Club (with 59 present) on 12 December 2000. The necessary application to the Licensing Court was then made, on 7 February 2001, and a great deal of toing and froing ensued. In the later part of 2001 the Port RSL board considered an alternative proposal put up by certain local investors, who proposed to buy the club's main premises and lease them back to it. The Port RSL board decided to convene a special general meeting of members, which was scheduled for 11 October 2001. Well over 1,000 people attended, but the meeting was aborted due to a bomb hoax shortly after it commenced. The board then commissioned a postal vote of all club members, and of the 6,399 who

participated only 1,901 favoured the alternative option whereas 4,459 voted for continuing with the amalgamation with Panthers. About 69% of those who voted favoured the amalgamation. At some stage a formal Deed of Amalgamation was entered into between the two clubs. The Licensing Court granted conditional approval to the amalgamation on 19 December 2001 and final approval on 3 October 2002.

CLUBNOVA AMALGAMATION

4.10 The second big amalgamation was with ClubNova. It went more smoothly than that with Port RSL – there were at least no bomb threats, so far as I know. A Memorandum of Understanding was entered into between the two clubs at some time in 2001. The copy I have was signed by Cowan on behalf of the Penrith Club and by two directors and the General Manager, respectively named Barrack, Coates and Ferris, on behalf of ClubNova. It said something about classes of membership but nothing as to rights to vote or to stand for the Board of the amalgamated entity. A Deed of Amalgamation was executed, probably on 30 October 2001, this time by Barrack and Ferris for ClubNova and Walsh and Cowan for the Penrith Club. It provided by cl 3.1(f) "*all members of ClubNova will be admitted as members of Panthers with identical membership entitlements to those they have at the date of admission and be eligible for Panthers ClubNova membership which is to be established by the Special Resolutions in Schedule 4*", of the Deed. By clause 10.1:

- (vii) *members of Panthers ClubNova at completion will be entitled to be admitted to Panthers as Ordinary members of Panthers;*
- (viii) *those members of Panthers ClubNova who elect to exercise the entitlement to be admitted to Panthers as Ordinary members of Panthers will, from admission, be eligible to attend and vote at any meeting of Panthers and be eligible to stand for election for the Board of Panthers;*
- (ix) *Members of ClubNova will have the following options:*
 - (1) *Ordinary membership rights of Panthers on payment of the annual subscription set from time to time; or*
 - (2) *Social membership of Panthers ClubNova on payment of the annual subscription set from time to time and being less than the annual subscription payable by Ordinary members.*

4.11 The Deed did not make clear when and how ClubNova members would become members of the Penrith Club, but certainly there was nothing in it inconsistent with the proposition that when they did become such members, at least up until

the time when membership dues became payable and they had to decide between full and social membership of Panthers, they would be entitled to vote and stand for the Board to the same extent as existing members of the Penrith Club.

4.12 Other relevant dates are that the two clubs made the necessary application to the Licensing Court on 5 September 2001, a conditional grant of approval was forthcoming from the Court on 12 November of that year, and the Court's final amalgamation order issued on 11 October 2002.

4.13 It follows that as at March 2002, when the election for the Club Board was to take place, both of the major amalgamations – with Port RSL and ClubNova – were the subject of conditional grants of approval, the process not having been finalised.

CONSTITUTIONAL POSITION

4.14 At one time the Penrith Club and the Football Club had differently constituted boards. The result was frequent disharmony and occasional outright conflict. The position was regularised about 20 years ago, after which there were two boards, sharing a common membership. There is nothing wrong with that. The Football Club is governed by the general law applicable to companies, while the Club itself is governed by that law and also the *Registered Clubs Act*, which imposes some particular and demanding requirements.

4.15 For many years after the mid-1980's the Club board comprised nine members, elected by the Club members entitled to vote. The constitution contains a prohibition against Club employees voting for the Board, and another against voting by proxy. These match s30(1)(d) and (h) of the *Registered Clubs Act*, by which the "*rules of a registered club shall be deemed to include*" a number that follow, including:

- a) *The governing body of the club responsible for the management of the business and affairs of the club shall be elected ... at an election at which the members entitled to vote consist only of such number of full members of the club as comprises not less than a majority of the full members of the club.*
- d) *A person shall not:*
 - i) *attend or vote at any meeting of the club or of the governing body or any committee of the club; or*
 - ii) *vote at any election of, or of a member of, the governing body of the club,*
as the proxy of another person.

- h) An employee of the club shall not vote at any meeting of the club or of the governing body of the club, or at any election of the governing body of the club, or hold office as a member of the governing body of the club.*

4.16 There is also a prohibition against electioneering contained in the Club's Article 10:

- a) A member of the Club shall not distribute within the Club premises or to any member of the Club any written matter canvassing support for any notice of motion to be dealt with by the members at any annual general meeting or extraordinary general meeting nor shall any member allow his name to appear on any how to vote card supporting his candidature for election to the Group Board of Group Directors.*

- b) A member of the Club shall not allow his name to be used or published in the press or radio or television or any other form of mass media in support of any notice of motion to be dealt with by members at any annual general meeting or extraordinary general meeting or in support of his candidature or the candidature of any other member for election to the Group Board of Group Directors. Any member who acts in contravention of this sub-paragraph or the immediate preceding sub-paragraph 10(a) shall at the discretion of the Group Board of Group Directors forfeit his membership of the Club.*

4.17 None of these provisions appears in the Football Club constitution. Members of that club who are employees can vote; proxies are not prohibited; nor is electioneering. As will appear, the first and third of these later had large consequences.

4.18 What is the purpose of the statutory provisions mentioned above, which are matched by cl 16C(j) and cl 38(b) of the constitution? In my view the statutory intent is easy enough to divine.

4.19 As a matter of participatory democracy, and to ensure that members of the governing body of every club – generally called the board of directors – are accountable to members, they must be elected by the members, the right to vote being exercised directly and not through proxies. In that respect, an election to the Board of a registered club is like a Parliamentary or local government election, not an election to the board of a public company where proxies are permitted. The prohibition upon employees voting, or holding office, has a manifest purpose, namely ensuring that the independence of board members is not compromised. If the employees can vote they may be directed how to vote, potentially by management, with the result that the board, or some members of it, become beholden to management and inclined to do the bidding of management. The

position would be more serious if employees could be elected to the board. For example, if the bar manager of a club also sat on its board it might make that individual, in his capacity as a director, beholden to the secretary/general manager, not to the members as a whole. But that is the antithesis of the function of a board: to appoint and supervise management on behalf of all members.

THE 5/4 BOARD

4.20

At a meeting held on 1 November 2001 the Club Board resolved, among other things:

The Board agrees in principle to amend the Constitution of Penrith Rugby League Club Limited and Penrith District Rugby League Football Club Limited, to ensure that a majority of Directors of Penrith Rugby League Club Limited (PRLC) and Penrith District Rugby League Football Club Limited (PDRLFC) are comprised of those persons who were full members of PRLC and PDRLFC as at 1 November 2001.

Management to prepare a further report to the Board at a meeting to be held on 13 November to recommend terms of such Constitutional changes.

An Extraordinary meeting of PRLC and PDRLFC be held on or before 23rd December 2001, to propose amendments to the Constitution in respect to (1) above.

The General Manager be instructed to proceed to pursue a grant of conditional approval of amalgamation of PRLC and PDRLFC with ClubNova Limited, provided that:

- 1. Panthers has received from ClubNova an amended letter from their Club Chairman and CEO, advising that the Board of ClubNova fully supports the proposed changes, and does not see the necessity or the legal requirement to go back to their members for approval on this matter.*
- 2. Transfer of ClubNova Limited members not occur until after the Extraordinary General Meeting called to consider these Constitutional changes has been held.*
- 3. Transfer of membership of any other amalgamated club that has not yet been transferred to PRLC and PDRLFC, not occur until after the Extraordinary General Meeting called to consider these Constitutional changes has been held.*

4.21 The general meeting to amend the Constitution was not in fact held until Sunday, 6 January. Fifty two members were present. Among other changes, the following provisions were inserted:

- 15. (a) *The governing body of the Club will be known as "the Group Board."*
- (b) *The Group Board shall consist of nine (9) Group Directors who shall be elected biennially.*
- (c) *Not less than five (5) of the Group Directors must be Penrith Club members.*
- (d) *Not more than two (2) Group Directors can be members of the same Home Club.*

15A. *The persons holding office as Directors of the Club as at the date of the adoption of Article 15 shall be Group Directors and shall constitute the Group Board and (subject to these Articles) shall continue in office as the Group Board until the conclusion of the Biennial General Meeting of the Club in 2002.*

4.22 There was thus established what came to be called "*the 5/4 Board*". It is important to appreciate that members of Home Clubs – what are called in this Report the amalgamating clubs – were guaranteed no representation on the Group Board. There had to be at least five Penrith members on the Board. There could be nine, that is to say the entire Board could under the constitution as so changed have comprised Penrith members. And all Club members could vote for all Board positions.

THE 9/5 BOARD

4.23 After the cancelled election in March 2002 – see Chapter 5 – an extraordinary amount of time was spent by both Board members and lawyers to achieve a situation in which the interests of Penrith members were even more strongly entrenched. Many models were considered. Debate was often bitter. Unhappy differences arose between Cowan and management on the one hand, and a majority of the Board on the other. In the end a model was agreed by the Board, distributed to members, and approved at a General Meeting held on the morning of Sunday, 15 September 2002. Some 58 members attended. The constitution was amended by substituting for existing articles the following:

On and from the next election of the Group Board following the date of adoption of this Article 15(b), the Group Board shall consist of fourteen (14)

Group Directors. Until that election, the Group Board shall consist of nine (9) Group Directors. The Group Board shall be elected biennially.

On and from the time when the Group Board increases in number to consist of fourteen (14) Group Directors:

(i) Nine (9) Group Directors must each have the qualifications of:

- (1) being a Life member or a financial Ordinary member of the Club, who also satisfies the requirement of Article 16(b); and*
- (2) being a Director of the Penrith District Rugby League Football Club Limited.*

(ii) Five (5) Group Directors must each have the qualifications of:

- (1) being an Honorary Life member, a financial Ordinary member or a financial Port Macquarie Panthers member of the Club, who also satisfies the requirement of Article 16(b); and*
- (2) being a member of a Home Club Advisory Board.*

4.24 This gave rise to what became known as the "9/5 Board". In a sense it improved the position of members of amalgamating clubs, because they were guaranteed representation to the extent of five members, which is to say about 35% of the Board. But the other 65% - as against a previously guaranteed five out of nine, or 55% at a minimum - had to comprise Penrith members. More importantly, those Penrith members had to have one critical characteristic, that of being a director of the Football Club. The board of the Football Club comprised nine directors only. Accordingly, the election that really mattered was the Football Club election. In that election members of amalgamating clubs had no say at all. And at that election Club staff could vote, and electioneering was permitted. For the consequences of this see Chapter 6.

4.25 The question whether, in initiating the constitutional changes, the Club Board caused to be broken promises made by Cowan to the boards and members of amalgamating clubs is considered in Chapter 7.

CHAPTER 5

CANCELLED ELECTION

- MARCH 2002

- 5.1 In March 2002 the Club Board decided to abandon a Board election in which all present directors and a number of others were candidates. This highly controversial move is examined in this chapter: how and why did it happen, and in whose interests was the election aborted?

NOMINATIONS

- 5.2 The eight sitting directors, all from Penrith, stood for re-election. So did Evans, who had resigned the previous year. So did a further eight Penrith members. Three Port RSL members stood, as did two from ClubNova, and one from the Lavington site. Of this total of 23 candidates, there had to be at least five and could be up to nine Penrith members elected, two of the three Port RSL nominees could be elected but none of them was bound to be, both the ClubNova members could be elected but neither had to be, and similarly for the single Lavington nominee.
- 5.3 This was the first election at which a number of non-Penrith members had stood for the Board. At the previous election, in the early part of 2000, the amalgamations with Hawkesbury Sporting Club Limited and Bathurst Rugby League Club Limited were well advanced, but final orders had not been made, and all other amalgamations were not even commenced. Obviously the 2002 election had the potential to be extremely interesting, if non-Penrith candidates and their supporters got organised. And that is exactly what they did.

TICKET

- 5.4 A ticket was prepared and circulated. Those on it were the three solid Cowan supporters on the existing board (Walsh, Armstrong and Rhind), the two ClubNova nominees (Barrack and Kennedy), two of the three Port RSL nominees (Batt and Hanlon) plus the nominee from Lavington (Hallows) and one known Cowan opponent (Bateman). If the ticket was heavily supported then only eight of those on it could in fact be elected, because the 5/4 requirement was in force. However, if the ticket was so supported then the resulting Board was unlikely to give Cowan much trouble; probably a deal less than he had experienced over the preceding couple of years. Dennis Coffey, who was a director from the middle of 1998 until October 2002, said of the ticket that he "*knew it was management driven*". He thought that because it was mainly circulated in Newcastle and at Port Macquarie: "*How would they know Rhind, Armstrong and Walsh?*" He said he was "*almost 100% certain*" this was a Penrith management ticket.

Did you consider whether or not the inclusion of Mr Bateman on that ticket might tend to the contrary? --- Well, I would have thought at the time Mr Bateman was mayor that would have been very difficult for him not to be

elected, so, therefore, I think they went forward with him on that ticket for that reason. They still had their numbers.

Coffey said "... management obviously wanted a board that they would probably be in control of".

BIG NUMBERS VOTE

5.5 The election took place over a number of days. At the Penrith site members could vote from Sunday, 17 to Saturday, 23 March inclusive, while at other sites voting stopped earlier. At a Board meeting scheduled for Tuesday, 19 March those present found out that the members at Newcastle and Port Macquarie were voting in large numbers. Those who had not already heard of it discovered that a ticket was being run; it was shown around and discussed. This combination of circumstances – the ticket, and many people voting - caused consternation, because the likelihood arose that only five Penrith directors would be re-elected.

5.6 A factor of relevance to some directors was that the ticket was put out with a pamphlet which read:

SUPPORT THE UNION MOVEMENT

SUPPORT PETER BARRACK
SUPPORT GARY KENNEDY
SUPPORT YOUR CLUB

Dear member,

It is imperative that you come into ClubNova Newcastle or Cardiff between Sunday the 17th of March till Thursday the 21st of March 2002 between the hours of 12noon and 8.00pm to vote for your choice of candidates in the upcoming election for the Board of Penrith Panthers.

To ensure the Union movement will receive ongoing support we strongly encourage you to participate in this vote.

This election represents the opportunity for members of ClubNova Newcastle and Cardiff to have two trusted representatives on the Penrith Panthers Board and support like minded candidates from other clubs.

If any of your friends or relatives are members of ClubNova please ensure that they also vote to ensure the desired outcome.

Please note that you must vote for all nine (9) candidates highlighted and numbered on the enclosed sheet of paper. All twenty three (23) candidates are listed, remember, only vote for those numbered.

In Solidarity

The Friends of ClubNova

Jim Boyle

Shannon Gleeson

Bob Cochrane

Gerry Mohan

SOLICITOR BOON RETAINED

5.7 One of the directors, Terry, found out that a ticket was in circulation on 15 or 16 March. He was not on it, and his position was therefore in jeopardy. On Monday, 18 March he contacted ClubsNSW and obtained from them the names of some solicitors who were experts in club law. One of them was Brett Boon of Acuity Legal, and Terry proceeded to obtain telephone advice from him. When the circumstances were explained Boon said that in his view nothing much could be done about the ticket, apart from perhaps disciplining those responsible for its circulation. However, as discussion proceeded Boon expressed to Terry doubts whether as a matter of law the ClubNova and Port RSL members were entitled to vote.

5.8 At the 19 March meeting Board members spoke to Boon by conference telephone, and he confirmed to all the advice he had previously given to Terry individually. Boon expressed the view, either at that meeting or on 21 March, that the process by which members of amalgamating clubs had purportedly become members of the Penrith Club had been messed up and was ineffective. At least some of the Board – Coffey was one of them – took the view that the Club was in jeopardy of reverse takeover, and the situation had to be addressed. The Board resolved, among other things:

To seek urgent legal advice from Acuity on the following:

- i) *Can Panthers withdraw from its amalgamation with ClubNova and what are the legal ramifications of this matter?*

That ensuring fairness to all members in the conduct of the bi-annual election of the Board, and noting the How to Vote Ticket under cover of a letter purportedly circulated by Messrs Boyle, Gleeson, Cochran and Mohan. The Board seek legal advice to see if the election can be aborted prior to the closure of voting.

5.9 A further Board meeting was held on 21 March. Boon attended. After lengthy consideration the Board passed further resolutions, as recorded in the minutes:

That the Board of Directors Resolved to stop the current election forthwith for the Group Board, having regard to legal advice received in relation to the issue of the validity of the persons listed on the register of members of Penrith Rugby League Club Limited in relation to eligibility of such persons to stand for election as a Group Director and to vote in the election for the Group Board.

Further, that the General Manager be instructed to terminate the services of the Returning Officer, Metro-Poll, and take such action to effect the Resolution of the Board.

This Resolution was passed unanimously.

That the Group Board of Directors instruct Brett Boon Solicitor, Acuiti Legal to commence proceedings forthwith in the Supreme Court of NSW in relation to the validity of membership of the persons listed on the Register of Penrith Rugby League Club Limited from ClubNova Co-operative Limited and Port Macquarie RSL Club Limited.

This Resolution was passed unanimously.

The Board of Directors Resolved to proceed with the amalgamation with ClubNova.

The Board Resolved to investigate other models for the Panthers Group structure.

At the same time, management were asked to inform all clubs of the Panthers' Constitution in relation to electoral procedures.

5.10 Steps were taken early on Friday, 22 March. The election was stopped. The ballot papers cast were taken into safe custody, a media release was issued, and the process of sorting things out with a view to a fresh election – which in fact took over six months – commenced.

5.11 There were never any Supreme Court proceedings taken. It was instead decided to find an administrative solution.

5.12 Two factors led to the decision to cancel the election. One was Boon's legal advice as to the lack of entitlement of Port RSL and ClubNova members to vote. The other was a determination to ensure that the ticket did not dictate the result of the election. The plain fact is that if the ticket was voted, four of the existing directors would cease to be such.

5.13 All of the then existing directors except for Armstrong gave evidence at the Inquiry. Each concentrated upon legal advice as the reason why the decision to abort the election was taken. However I am sure that the other factor was of relevance. I say that having considered the evidence given by each individual, and the way it was given, together with the reference to the ticket in the 19 March minutes – see 5.8 above.

UNANIMOUS DECISION

5.14 Both the minutes and evidence show that the directors' decision to abort the election was unanimous. But that does not mean everybody at the meeting was supportive of it. Cowan – who had no vote – was opposed. He had always taken the view that there was no need to change the Club constitution so as to protect the rights of

Penrith members. In Cowan's view the traditional and relative apathy of Penrith members would cease if they found the Club was in danger of being taken over by those from remote sites, and if necessary he could get them to vote in sufficiently large numbers to protect their interests. He saw no need to cancel the election, and he said so. He also protested, then or a little later, that to do so would be to cause his word to be broken, as to which see Chapter 7.

5.15

Directors were conscious from the outset that many would see the election cancellation decision as having been motivated by self-interest. This is borne out by an entry which Walsh made in his diary, some time after the event. He is a man who rarely made notes, in contrast to (for example) Bateman who did so all the time. The diary entry relates to the decision taken at the meeting on 21 March.

31 July 2002 – B Walsh and T Lackey

Before voting I told the Board I support them in the past and in the future and would do everything in my power legally to get them all elected, I told them I was worried that the Department of Gaming and Racing was about to investigate us whilts I new we had done nothing wrong that my experience in past with investergation in other clubs it could be considered by the department of gaming and racing that some of the recent board actions may be looked on as stacking election proceadures to obtain a desired result again I stressed that this was not my view but how the department might perceive it. I asked this statement be included in the minutes.

I recorded this as some of my board members were concerned, and what light I was looking at this.

POSSIBLE RESULT

5.16

When the election was cancelled, voting had been completed at Newcastle, Port Macquarie, Bathurst and the other sites away from Penrith. The election at Penrith was then still under way, voting being scheduled to conclude late on Saturday, 23 March. In considering the figures that follow it is important to appreciate that voting over the final two days at Penrith might have affected the outcome. There was some evidence that members usually voted about equally on each day of the election.

5.17

Cowan took the ballot papers and kept them at home. He mentioned this in evidence before the Inquiry. I called for the ballot papers which were surrendered, and I caused Inquiry officers to conduct a count. The main table on the next page shows the number of votes cast in favour of identified individuals who stood for election, their ranking as at the time when voting ceased which was in effect the end of Thursday, 21 March, and where the respective candidates came from. In view of

the 5/4 requirement, and assuming that the votes to be cast over the two last days at Penrith did not change the ranking – which may be an inaccurate assumption – those elected would have been the first eight plus Craig Terry, that is to say Walsh, Bateman, Rhind, Armstrong and Terry from the Penrith site, Batt and Hanlon from Port RSL, and Barrack and Kennedy from ClubNova. On the stated assumption Hallows from Lavington would have missed out because he would have been the fifth non-Penrith director elected, that not being possible.

5.18

Beside the main table there appears the "How to Vote" ticket mentioned above.

MARCH 2002 ABORTED PENRITH RUGBY LEAGUE CLUB ELECTION – VOTING TO 21 MARCH			
1	*WALSH, Barry	2546	Penrith
2	*BATEMAN, John	2408	Penrith
3	*RHIND, Keith	2296	Penrith
4	*ARMSTRONG, Leo	2230	Penrith
5	BATT, Howard	1752	Port RSL
6	BARRACK, Peter	1649	ClubNova
7	HANLON, Robert	1621	Port RSL
8	KENNEDY, Gary	1591	ClubNova
9	HALLOWS, Kenneth	1492	Lavington
10	*TERRY, Craig	1432	Penrith
11	*JAMES, Geoff	1288	Penrith
12	*COFFEY, Dennis	1283	Penrith
13	*HEIDTMANN, Terry	1071	Penrith
14	TIERNAN, Patrick	1045	Port RSL
15	LOWE, Kerry	733	Penrith
16	EVANS, Greg	680	Penrith
17	HAYNE, Glynis	668	Penrith
18	HARDING, John	601	Penrith
19	BENTLEY, Col	521	Penrith
20	LE BRETON, Tony	512	Penrith
21	DRYSDALE, Darren	415	Penrith
22	WILLIAMS, Peter	401	Penrith
23	TSUI, James	232	Penrith
	Total Votes Counted	28467	
	Total Ballot Papers Counted	3163	
	Informal Ballot Papers	110	
	Total Ballot Papers	3273	
*Denotes directors for period 2000 to 2002			

HOW TO VOTE TICKET	
1	Kerry Lowe
2	Barry Walsh
3	John Harding
4	John Bateman
5	Keith Rhind
6	Patrick Tiernan
7	Tony Le Breton
8	Kenneth Hallows
9	Greg Evans
10	Craig Terry
11	Peter Barrack
12	Peter Williams
13	Robert Hanlon
14	Gary Kennedy
15	Geoff James
16	Col Bentley
17	Glynis Hayne
18	Leo Armstrong
19	Darren Drysdale
20	James Tsui
21	Dennis Coffey
22	Terry Heidtmann
23	Howard Batt

5.19

It is apparent that tickets work. If, as appears to be the case, Terry would have been elected had the cancellation decision not been made, then it is to be hoped he has a sense of irony. It is he who consulted Acuiti Legal and thus started the cancellation ball rolling.

ELECTORAL IMPERFECTIONS

5.20 Ivor Jones of Metro-Poll ran the election for the Club, and also those in March 2000 and September-October 2002. On none of those occasions was there any document of appointment which stipulated his powers and responsibilities. He was contacted by Tony Lackey, on behalf of the Club, agreed to do the job, was appointed by the Board as returning officer, and carried out his functions as the Club required. That included declaring results, but of course not this time around as the election was cancelled.

5.21 That was, in the experience of Jones, a unique happening. He did not provide any written report to the Club after any of the elections which he ran for it.

5.22 Jones was asked whether anything about the March 2002 election stood out in his memory.

... Not as far as numbers voting. The only thing with March 2002 was that we were requested by Tony Lackey and Vanessa, I think, to provide daily reports on the numbers of voters at each club.

5.23 When asked how that was done, Jones said:

Our people at the various clubs were asked to fax the information through to Penrith to Vanessa and it was collated there. But I am aware that there were heavy numbers of people voting at Newcastle, Cardiff and Port Macquarie, whereas at other clubs there were very few. Lavington, I had suggested after the March episode, I had suggested to Tony Lackey that maybe the club should look at a postal system rather than people attend at the clubs, because at Lavington we had one lady sitting there for a week and she issued two votes.

5.24 Jones said that the information was provided as to the numbers voting daily at each place, by Metro-Poll staff direct to Lackey, with the acquiescence of Jones. When told the election had been cancelled, on the morning on Friday, 23 March, it seemed to him:

... fairly obvious that those figures that had come in from the various sites could have played a large part in the decision to abort. I was told the election was aborted on legal grounds. What those legal grounds were I was never told but it was on legal grounds.

... I felt on the Friday morning that it was likely, because of those figures coming in from Newcastle and Port Macquarie sites specifically, that there would be a change in the composition of the board and perhaps the board

were looking for ways to safeguard their positions. When I say the board, that's the whole board. Since that election there was a split and you had the Footy 5 and the others but the whole board were involved in the decision at the time in March.

5.25 Jones agreed with me that, even if the election had been carried through to conclusion, it would have been undesirable for daily voting figures to be made available to some candidates and not others. It is of course always likely that information flows will be greater to sitting Board members than to other candidates.

5.26 The position is that Jones conducted the ballot in the manner that the Club required, those requirements being conveyed to him through Lackey. One of those requirements was to have his people send in the daily voting figures. He was asked:

As at club elections it would be better, would it not, if interim information such as numbers of members voting at particular places was not made available to anybody except for you and your staff, lest the information might be used in some way to affect electoral outcome? --- Yes.

Perhaps unfairly? --- Yes.

Yes. --- Yes.

Now, you are an expert so you need to tell me if I have got the wrong end of the stick? --- No. I agree with what you are saying. That information can be misused, even though we may have provided the information in good faith it could be misused.

5.27 Three things are to my mind clear. First, a body such as Metro-Poll should be appointed in writing, the document setting out its powers and responsibilities. Secondly, daily voting figures should not be provided. Indeed no information should be provided to candidates by polling staff or otherwise as to how many people have voted, or (even more importantly) who have voted. And thirdly, a written report after the election, advising that all went smoothly or what went wrong, and making recommendations for the future, would be desirable. That report should be provided both to the Board and to the Club Secretary.

5.28 Jones did no wrong in providing, or causing his people to provide, the daily voting figures. He did not think about the capacity for misuse. Lackey did not give evidence, and nothing I have said should be construed as critical of him in any way. No doubt he was doing what he was told.

CONCLUSION – ALLEGATIONS 1 & 2

5.29

It is now convenient to state my conclusions with respect to two of the particular allegations contained in the Instrument of Appointment. The first is that the Board of the Club aborted the March 2002 election because of an apprehension that, if carried through to conclusion, it would or might lead to loss of power by the existing Board. My conclusion is that most of the then eight members of the Board believed that if the election results were declared there would be a change in Board composition, largely because of the ticket. That was a worry to most of them, and a greater worry than the fact of electioneering; it is clear to me that most were more concerned about outcome than principle. There was, however, a factor of greater significance, namely the serious doubt which arose as to whether members of Port RSL and ClubNova were entitled to vote. The Board was put in the invidious position of having conflicting legal advice, and it preferred to follow the Boon advice which was that members of those two clubs could not vote. In part the preference for that legal view arose from strong distrust of management by the majority of the Board, and in part it arose from the fact that Boon's advice was palatable; it was seen as justifying the decision to cancel the then current election. However, the Board cannot carry too far the proposition that it simply followed Boon's advice, because he was at pains to stress, both at the meeting on 21 March and when he gave evidence before me, that he did not advise cancellation of the election.

5.30

The second allegation, which is chiefly dealt with at the end of the preceding chapter, is that constitutional changes were effected after March 2002 with a view to, or which had the effect (direct or indirect) of enabling proxies to vote, enabling Club employees to vote, and precluding all Club ordinary members from directly voting in the Board election held in September-October and in subsequent elections. There were certainly constitutional changes effected in September 2002, and certainly they had an effect that was very much intended. It was to preclude all Club ordinary members, including those from amalgamating clubs, from directly voting for all Board positions. The Board which after long and often bitter discussion put up constitutional amendments did so precisely in order to entrench the rights of existing Penrith Club members, the consequence being that those members could indirectly (through the Football Club elections) choose nine out of 14 members of the expanded Board, and members of amalgamating clubs could have a say in the choice of only the remaining five. This diminished the rights of the latter group significantly. It is not now the case that all Club ordinary members can, in any meaningful way, directly vote in Board elections. They are thus precluded from doing so, at least in effect, and have been since September 2002. The effect of the constitutional amendments was to enable Club employees to vote indirectly in the Club elections. I do not think that was intended. It was an accidental, although important, consequence. The question of proxies, it emerged from the evidence, was one of no significance.

CHAPTER 6

PURGING FIVE DIRECTORS - OCTOBER 2002

"BOARD WARS" STORY

6.1

The October election was bound to attract much interest in any event, but that was greatly heightened by the publication in a local newspaper of a front page story, a copy of which appears below. The owner of that paper was Greg Evans, who had been invited to rejoin the Board after March 2002, and did so.

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BOARD WARS



Management under fire

Panthers chairman Barry Walsh refused to comment on media reports of a 'split' in the current Penrith District Rugby League Club board when contacted earlier this week.

Early Wednesday morning an envelope containing copies of what appeared to be authentic documents was delivered to the offices of the *Western Weekender*.

When asked to confirm the authenticity of the documents Mr Walsh also declined to comment.

The documents, dated as far back as 1998, included the reasons for the board 'split' and management's recommendation that Penrith Rugby League Football Club Limited investigate merger possibilities with neighbouring club Parramatta.

The recommendation carried the full support of current general manager Roger Cowan and the then chief executive officer Mark Levy.

The recommendation was defeated.

Reports of a 'split' Panthers board surfaced in 1998 when the now famous 'FOOTY FIVE', named so by Penrith Club Patron Ron Mulock, rose to public notoriety on the back of a 'STAND ALONE' stance in the face of mounting management pressure to merge Penrith rugby league with Parramatta.

It is believed the 'split' was a direct result of that recommendation and the fact that some directors chose to support rugby league while others aligned themselves with senior management.

Midway through 1999 senior management again recommended that a merger with Parramatta be investigated and again the majority of the board's directors voted no.

In July 1999 a last ditch effort was made by senior management to have the amalgamation with Parramatta ratified by the Panthers board of directors.

It is believed a document, alleged to be carrying the signature of Parramatta's Denis Fitzgerald, was tabled before the Panthers board of directors on the eve of the National Rugby League's deadline for all clubs to indicate an intention to amalgamate.

The date of that deadline was 31 July 1999.

Incentives to amalgamate included a reported \$8 million in funding and a six-year inclusion in the NRL competition.

This recommendation was again defeated.

Mr Walsh was not willing to confirm or deny the validity of the documents, the time frame of the events, or senior management's decision to pursue the amalgamation strategy with Parramatta despite the Panthers board's directive to terminate the issue.

Penrith City Councillor and current Penrith director John Bateman was prepared to go on record as a member of the 'FOOTY FIVE'.

"During the last four years the board has been faced with a number of challenging issues involving football, government changes to the way clubs can operate and our amalgamations with other licensed clubs. Through all of this we have managed to keep our football team in the NRL on a stand alone basis. It has been a difficult path at times and there hasn't always been unanimous agreement on what was the best direction for Panthers to take. Disagreements have arisen between the board and management, and some relationships have been strained while others have deteriorated substantially," said Mr Bateman.

continued page 2 ▶

6.2 The balance of the story on the second page of the newspaper said it was *"believed that a motion of NO CONFIDENCE in the general manager was carried last month"*.

6.3 The publication date is shown as Friday, 27 September 2002, but the paper was available the day before that, and probably late on Wednesday, 25 September. The story caused distress to some, including Glenn Matthews who was acting in Roger Cowan's stead: the latter was out of Australia, in Malaysia, between 26 September and 4 October. According to Matthews the Board had for a long time been dysfunctional, and its meetings attended by bitterness, but all that was kept:

... within those four walls. Staff had no knowledge, and I stressed on a number of occasions to the board the importance of keeping these things in-house, and the board had done a marvellous job. I guess it's fair to say there was turmoil for a year and had done a great job keeping it in-house. When that story came out it obviously caused a bit of a ruckus, yes.

Matthews said he was *"very disappointed"* by the publication.

6.4 The election was formally for the Football Club Board, although in effect also for the nine Penrith positions on the new and expanded 14 person Club Board. In Football Club elections, how to vote cards were permitted, and several were disseminated. One was published in the same edition of the Western Weekender. Endorsed by Merv Cartwright – *"Father of Rugby League in Penrith and St Marys"* – and by Ron Mulock – *"Club Patron of Penrith District Rugby League Football Club"* – it supported election of the 'Footy Five' and three others. In order they were, Craig Terry, John Bateman, Glynis Hayne, Greg Chapman, Peter Williams, Dennis Coffey, Geoff James and Greg Evans, with the ninth space marked *"Your Choice"*. The other most prominent ticket, circulated with the heading *"A PANTHERS TEAM FOR STABILITY AND SUCCESS"* sought the return of four sitting directors, Terry Heidtmann, Leo Armstrong, Barry Walsh and Keith Rhind, plus five others, namely Kerry Lowe, Col Bentley, Greg Alexander, Greg Chapman and Don Feltis. That was commonly referred to as *"the management ticket"*.

THE SCOT MEETING

6.5 A regular SCOT meeting, attended by all section leaders, was held on the morning of Friday, 27 September. Glenn Matthews addressed it. He told me he held up the *"Board Wars"* story, and *"might have even read from some of the story"*. He confirmed to those present that there had been a no confidence motion in Cowan, said that staff were entitled to vote, and that if staff felt strongly they should exercise that right. He said the Board room had become a fairly unpleasant place, and made plain to the meeting that in his view it was best for the Club if Cowan stayed. He said that some senior managers were considering their positions with

the Club. Matthews was keen to emphasise that he did not tell people at the meeting how to vote, and he could not in any event have done so.

Some people at that meeting might have thought Roger Cowan is a dreadful sort of fellow? --- Definitely possible.

But the conclusion that an intelligent, impartial person attending the SCOT meeting would have come away with was that they were being encouraged, if they felt strongly about the future of the Club, to exercise their right to vote and to vote for some change in the constitution of the board; that is fair, isn't it? --- I think it's fair.

A little later Matthews was asked:

6.6

I wonder if the point we had got to could not construed as strong encouragement to vote and to vote for some change in the board? --- Look, I think that might be a fair and reasonable view of it.

6.7

Matthews said two competing tickets were on a table at the meeting and available to be picked up, which some people did. He agreed that the 'Footy Five' were the identified anti-Cowan group. Matthews agreed that some people at the meeting may have come away from it believing that he wanted them to support the other ticket.

Do you accept that it was reasonable for one or more such participants in the SCOT meeting to go away from the meeting with that impression? --- If that's what occurred then it's reasonable. Certainly reasonable in their minds.

You wouldn't doubt their good faith if they said they came away with that impression? --- No, I wouldn't do that.

6.8

Matthews said he had become aware since the meeting that some of the team leaders who were present at it went away and encouraged their team members to vote in accordance with the management ticket.

6.9

All of this came from Matthews. He is a man of high applied intelligence, and he impressed me as a witness. It is with some regret that I say that at the meeting he over-stepped the mark. It was not appropriate that, as the man in charge of the Club at the time, in Cowan's absence, he should have expressed himself in such a way that some of those present, and through them, some members of their teams, should have understood that management was encouraging them to vote in favour of four sitting directors and against the other five. The irony is that

in Matthews' mind the desired objective would have been achieved if three only of those five – James, Terry and Evans – were not returned.

WHAT TEAM LEADERS DID

6.10 Three team leaders of the SCOT meeting gave evidence before the Inquiry: Kim Richardson, Jannette Byrne and Ben Renneberg. Of course their evidence varied somewhat as to what happened at the meeting. It may be that how to vote cards were on each of the tables at which attendees were sitting, along with copies of recent newspapers articles including the "Board Wars" story. Byrne did not remember Matthews holding up that story, but said she saw it at the meeting. Nor did she remember clearly whether and what how to vote cards were there. But the essence of what they said was consistent with the evidence given by Matthews. He encouraged those who attended, and through them members of their respective teams, to vote, and to vote for stability. They saw this as encouragement to vote for the management ticket. This is borne out by what they respectively did.

6.11 Mrs Richardson, an impressive witness, said those present were asked by Glenn Matthews:

To speak to our staff, tell them that they had the right to vote, it was important that they did vote. That if – the board was in trouble, I don't think they were the exact words used, and various people could lose their jobs and this could filter down through the club, so it was important they did vote and they voted for the ticket that had Roger Cowan on it.

6.12 She said she was shown the ticket that Matthews recommended, told it "was the way to vote to ensure that Roger and the board members that Panthers wanted to be elected was elected". As to what she then did:

At that stage I had been with Panthers five months and I was not comfortable with saying to my staff that you had to vote a certain way or you would lose your jobs, so I didn't. But we were asked to hand those out and I did that. I put them in the pigeon holes of my staff members and I did speak to, I definitely spoke to one staff member, I think I spoke to two or three ... I definitely spoke to one person, gave them the ticket and said, you have the right to vote and this is the way the management want you to vote and that's where I left it.

6.13 Ms Byrne did not recall being shown a ticket at the meeting, or handing any tickets to any members of her team. She talked to them, or some of them.

... at the time there were a lot of questions going around so I was able to answer some questions from the information that Glenn had given us on

that day and my own feelings about culture and things like that, so I would have sort of given them another side of information contrary to what the paper had said.

6.14 She told team members they were entitled to vote.

The information you gave them was likely to be encouraging rather than discouraging so far as the exercise of their right to vote was concerned? --- Sure.

You would want to say, I think, that you didn't tell anyone how to vote? --- No.

And you wouldn't, I think, see that as being appropriate? --- No.

Would it be fair to say that the information you gave members of your team, to whom you spoke, would be more likely to encourage them to vote for what came to be called the management ticket than for any other ticket? --- Absolutely.

6.15 Renneberg said that those at the meeting were "encouraged to vote", and that Matthews "was putting up the case for the management ticket" on the basis that would "mean more stability for the Club, for its management and for our future development". Renneberg had a team of about 30, of whom between seven and 10 were members, and he encouraged them to vote for stability in the Club.

Which generally means in accordance with the management ticket, as you saw it? --- Correct.

6.16 Renneberg said he was unsure whether he handed out any tickets to his staff. He asked them whether or not they had voted, and thanked those that voted for having done so.

Why? --- I thought it was important for the Club to maintain its stability.

6.17 It will be remembered that the so-called management ticket contained a heading referring to "stability and success". The evidence is overwhelming that each of these people took steps that were calculated, in both senses of the word - likely and intended - to have staff members vote in a slate of candidates who supported Cowan.

STAFF VOTING

6.18 Matthews did not rest after the SCOT meeting, which was held on the Friday before voting began. On the following Tuesday, 1 October, he sent an email a relevant portion of which read:

To: Leaders
Subject: staff voting
Importance: High

Good Morning,

There seems to be a little confusion as to the eligibility of staff to vote.

Staff are eligible to vote if:

- They are a financial member of the club, prior to the list that was approved by the Board. This list included people who joined prior to 19 September.
 - This means that staff renewing are eligible
 - This means even if you pay \$4.40 you can vote
- However, you cannot join today & vote

The response from staff so far has been excellent, but still only about 50%, I believe, have voted.

Please remind staff of their entitlement to vote.

Also, staff are entitled to cast a proxy. They can give their proxy to any member that will be present at Sunday's meeting. For ease, the Chairman is Barry Walsh & his membership number is number 1.

Thanks for your time & have a great day!!

Cheers,
glenn

6.19 Staff voted in large numbers. The figures which the Inquiry obtained were as at the close of voting on 3 October, that is to say, two days before the election period finished. As of then 231 staff members had voted, including some who became members so late they should not have been allowed to vote. The total number of formal votes cast was 1762, which means that at least 13% of the votes counted were cast by staff members, and the proportion may have been distinctly higher depending on how many voted in the final two days. Certainly, the proportion of eligible staff who voted was much higher than the proportion of eligible members generally.

6.20 Ivor Jones of Metro-Poll conducted the election. He manned the polling booth at the Penrith premises:

... and on the very first day I was surprised because we had no warning that what had happened with regard to the constitutional change for the licensed club and on the very first day at the football club election there was a queue of people waiting to vote which stretched throughout the foyer and out through the front doors of the club, and that surprised me.

Why did that surprise you? --- Well, we are talking about voluntary elections, not compulsory elections, and my experience with voluntary elections is that there is some interest but not as great as what seemed to be expressed on that particular day and the fact that leagues club staff were voting. I was assured that this was for the football club election, but I don't have to be an Einstein to see with their constitutional change that the nine directors elected from the football club automatically went on to the leagues club board. To me it seemed to be a device to circumvent the Registered Clubs Act provisions which forbid staff from voting.

How did you know that there were staff voting? --- There were – some of them were turning up in uniform, staff uniforms.

6.21 It is not just Jones who thought the Act was being circumvented. Matthews said that appeared to be the case, and hence he was not in favour of the constitutional change. Cowan was asked:

And does what happened, as a result of the constitutional changes, strike you as being a contrivance whereby the provisions of the Act could be got around? --- Yes; absolutely.

And you are uncomfortable at least about that? --- I was uncomfortable at the time about that.

And you still are? --- Yes.

ELECTION, RESULT

6.22 Election fervour continued on subsequent days. In particular, on Tuesday, 1 October, a major story was run in *The Sydney Morning Herald* referring to the "club stoush", and on the same day an advertisement, placed by Cowan, and a story appeared in the *Penrith Press*. The former, in which Cowan was very critical of the 'Footy Five' concluded with the allegation that "their hearts are not in Panthers". It is reproduced at 2.22 above.

- 6.23 The story was headlined "*COWAN HITS BACK. Boss comes clean on plot to oust him*". It referred to an overseas conference call Cowan had with a *Press* reporter, in which Matthews, Max Cowan and the gaming manager, John Wilson, also participated. Attributed to Wilson were statements that the relationship between senior management of the Club and those on the 'Footy Five' ticket was beyond repair, and if that ticket was returned there would be wholesale changes involving the departure of not just Roger Cowan but also six or eight other senior managers.

Voting took place between Sunday, 29 September and Saturday, 5 October. The results were declared on 6 October. None of the 'Footy Five' was returned. The dissidents had been routed. It is they who had tried to make Cowan accountable. And in an election in which he took an active role, as did other senior managers supporting him, they lost. This was a victory for Cowan and for Club management, just as much as it was for the four returned directors. It was a defeat for accountability.

HAD STAFF NOT VOTED

- 6.25 The last three candidates elected were Don Feltis with 1072 votes, Keith Rhind (1058), and Kerry Lowe (954). They were followed by the 'Footy Five', in order: Bateman (930), Coffey (843), Evans (797), James (738), and Terry (726). Were it not for staff voting, it is a distinct possibility that the first two of these would have been elected in lieu of Rhind and Lowe. Nobody can say with confidence because it is not known how the staff voted – doubtless some of them refused to follow the management ticket – and it is not known how many staff members voted throughout the entire election period.

- 6.26 Clearly, staff votes were important. They would not have been entitled to vote for the Club Board, as they were in effect doing, but for the constitutional amendments. Staff were encouraged to vote by management, especially Matthews. But the role played by management in the election went much further.

MANAGEMENT'S ROLE IN ELECTION

- 6.27 Cowan opposed the 'Footy Five' by running an advertisement on 1 October; it is reproduced in Chapter 2. In saying he had "*never come out publicly against members of the Board before*", Cowan made clear he was doing so on this occasion. And he used strongly critical language. He said that Bateman, Evans, Terry, James and Coffey were "*out of touch with reality*", that their "*board room antics*" were "*disgraceful*", and that "*their hearts are not in Panthers*". This was an attack on five sitting directors of the Club. It was a plea by Cowan to members; the man most strongly identified with the Club was urging members not to vote for this five.

6.28 The "Cowan Hits Back" story in the *Penrith Press* also represented an attempt to sway the election result. On this occasion the participants were Roger and Max Cowan, Wilson and Matthews. Matthews could not "*recall being involved in any call of this kind*", but that is probably because he was so extraordinarily busy at the time. Members reading the story would conclude that a situation of strong antagonism had developed between the 'Footy Five' and senior management of the Club, such that members had to choose between one or the other: them or us. If members chose them – the five sitting directors who, it must be remembered, comprised the majority of the then Board – then a wholesale exodus from the top ranks of management was well nigh inevitable. That was the thrust of the story. Those who participated in the prior discussion did so voluntarily. They must have known the nature of the message that the story would get across.

6.29 My finding is that during the October 2002 Football Club election senior management of the Club, and in particular Cowan, Matthews and Wilson, played an active role in encouraging members to vote against five candidates and in favour of another four. They thus encouraged members to fill, albeit indirectly, the nine Penrith positions on the Club Board in a particular manner. To repeat, they favoured certain candidates for election over others.

WRONG IN PRINCIPLE

6.30 They broke no law in doing this: they committed no offence. But what they did was in my view undesirable; it should not have happened. Greg Alexander, who topped the poll, agreed – although it took him time. He was asked whether such conduct seemed:

... appropriate or otherwise? --- Is it legal or illegal or wrong or not wrong to do that?

Whatever the position might be in those respects, do you have any comment you want to make as to whether it is appropriate or not? --- I'd say it is appropriate.

Does it occur to you that if that's happening then senior management are playing an active role in deciding or helping electors decide to whom they will be accountable? Yes? --- Yes.

Put that way, does it seem appropriate? --- No, it doesn't when you put it that way.

You do think that senior management are accountable to you and the other directors? --- Yes, they are, aren't they.

I take it you think that is important? --- Yes.

They can't run the show themselves as they see fit, can they? --- No.

COMMERCIAL COMPANIES

6.31 Various analogies were urged upon me. One was that of large public companies, active in commerce. They belong to their shareholders, just as the Penrith Club belongs to its members. Their directors are accountable to the shareholders, just as Club directors are accountable to its members. I accept there have been instances in which management of listed public companies in this country, of recent times, have played a role in causing sitting directors to be voted off their boards. It does not, I think, happen often – but it does happen.

6.32 In my view the analogy is imperfect, for more than one reason. Listed companies do not typically perform a local community role as registered clubs do. At their board elections proxy voting is permitted. But more importantly, some of those who vote in public company board elections may cast huge numbers of votes. A financial institution voting at a board election for BHP may have literally millions of votes, and it is inevitable (whether or not actually desirable) that management of BHP will talk to management of that institution. Then if a board room confrontation emerges some lobbying seems likely.

LOCAL GOVERNMENT ELECTIONS

6.33 An analogy I prefer is with local government elections. Each person entitled to vote has one vote only. The elections are conducted pursuant to statute: the *Local Government Act 1993* contains provisions requiring and controlling elections for the Penrith Council, just as the *Registered Clubs Act* contains provisions requiring and controlling elections for the Penrith Club.

6.34 General managers of Councils, and other members of senior management, do not support one slate of candidates against another at Council elections. Why not? Because it is to the Council that they are accountable, and a proper division of functions makes it the prerogative of ratepayers to choose those to whom Council management will be answerable. Were it otherwise, if Council management played an active role in deciding who their bosses would be, then they would probably opt for acquiescent people – those who like a quiet life, and do not rock the boat. It would be but a small step before management was running the Council as they saw fit. Evans, who served on the Penrith Council for a total of 8.5 years, said that if the General Manager of the Council had backed one candidate against another he "*would no longer be the General Manager for sure*".

6.35 Exactly the same danger existed when Cowan and his senior management colleagues helped guide Club members to vote for the management ticket. They helped choose their bosses. And they got a much easier group of people to work with than had been the case over the previous three or four years.

6.36 Dealing only with the people who gave evidence before me, I have absolutely no doubt that Greg Alexander, Don Feltis, Col Bentley and the old guard of Walsh and

Rhind would be much more inclined to do Cowan's bidding than Bateman, Evans, James, Terry and Coffey. The last of these told me that Rhind said to him *"all you've got to do is agree with Roger and it's a good lifestyle in this Club"*. According to Coffey, Rhind *"acknowledged that in 35 years of being on the Board he never, ever challenged or questioned a recommendation that Roger Cowan brought to the Board. So 35 years of saying 'Yes'"*. Rhind denied saying these things and pointed out his period of service was then 30 years, not 35 years. Whether or not he said them - I thought Coffey was telling the truth, but the events he spoke of happened over six years ago, and he had no notes - they fairly reflect Rhind's acquiescent attitude, and he was by no means alone in that respect. Feltis gave evidence that he had *"always supported Mr Cowan, yes."*

THE CLUB ELECTION

6.37 After the Football Club election, there had to be another, for the Club Board. There were 17 candidates for 14 positions, but of course only nine Penrith members stood: only those just elected to the Football Club board were eligible. The other candidates who succeeded included two from ClubNova, two from Port Macquarie and one from Bathurst. When the results were declared on 27 October 2002 those elected were Alexander from Penrith with 1680 votes, Walsh (Penrith, 1640), Chapman (Penrith, 1626), Geyer (Bathurst, 1603), Heidtmann (Penrith, 1602), Bentley (Penrith, 1569), Feltis (Penrith, 1558), Hanlon (Port, 1524), Barber (Port, 1501), Kennedy (ClubNova, 1499), Armstrong (Penrith, 1496), Barrack (ClubNova, 1435), Lowe (Penrith, 1355) and Rhind (Penrith, 1353). The unsuccessful candidates were Anderson (North Richmond, 984), Drysdale (Wallacia, 883), Bratusa (Wallacia, 842) and Corby (Wallacia, 840).

ADVERTISEMENTS – WHO PAID?

6.38 On 1 October 2002 a large advertisement appeared in the *Penrith Press*. It was headed *"A Team for the Future"*, featured a large and attractive photograph of Alexander, and some written copy which praised the Club's *"forward thinking management team and directors who not only live for the game but who understand it's a business"*. The amalgamation strategy was likewise praised, and Alexander said he was *"really excited about standing for the Board of Panthers. The team I am recommending has a good mixture of experience on the field in junior league and in football administration"*. Beside the text there was a how to vote card which recommended *"the best team"* as comprising Heidtmann, Coffey, Armstrong, Lowe, Alexander, Walsh, Rhind, Feltis and Bateman. Those of the 'Footy Five' left off were Evans, James and Terry – just those that Glenn Matthews thought the Board would be better off without – see 6.9.

6.39 Alexander said he arranged for the advertisement to be made.

With whom? --- I'm not sure. I know I spoke to Rob Weaver.

Rob Weaver? --- The media manager of the club. Rob helped me in writing the words next to the ticket.

6.40 Alexander said nobody helped him decide who was going to be on the ticket.

How did you decide that Mr Lowe should be on the ticket? --- Good question. I don't know.

Let me suggest to you that that's because someone in management suggested he would be a good person to be on the ticket, perhaps Mr Weaver or Mr Matthews? --- Could have, yes.

Do you know who paid for this advertisement? --- No. I don't.

You didn't? --- No, I didn't pay for it.

So who else do you think might have paid for it? --- I don't know, but the club might have paid for it but I don't know.

6.41 At the time the advertisement was run Alexander had ceased employment with the Club so the cost was not taken out of his salary. I then caused inquiries to be made as to who had met that cost, and the cost of the Cowan advertisement which appeared in the same paper on the same date, and is reproduced at 2.22 above. What emerged is that both advertisements were prepared and placed by Thomas Marsden Advertising, which does a vast amount of work for the Club and related entities. The copy from which the advertisements were prepared came from the Club. Max Cowan passed the copy on to Marsden Advertising, with a request that accounts be sent to Keith Rhind. He did that after discussions with Rhind who told me that he had paid the accounts and knew he would be reimbursed, but he did not know by whom.

6.42 Rhind was so reimbursed, by Phyro. And Phyro then sent accounts which covered these advertising costs. So at the end of the day the Club and related entities met the cost of advertisements which favoured one group of candidates in the Football Club election over another group of candidates. The responsibility for this ultimately rests with Roger Cowan. There is no evidence the Club directors, including Rhind, or Max Cowan, knew that the advertising costs were reimbursed to Phyro.

6.43 However efforts were made to justify the end result, namely that the Club paid. Max Cowan said that *"given the circumstances it was quite appropriate"*. The 'Footy Five', to his mind, diminished *"the rights of most of the members of Panthers"* by limiting the way in which members from Port RSL, ClubNova and so on could vote. He held that view despite the facts, pointed out to him at the

hearing, that the constitution was changed by the members in general meeting, following a unanimous vote by the Board. Max Cowan also said, speaking of the 'Footy Five':

It seemed to me that they were prepared to do just about anything that would – I think they were obsessed with damaging Roger and they would do just about anything to damage him even if it damaged the club in its path.

6.44 Rhind gave evidence that he saw nothing wrong with the Club paying for the "The Footy Five" advertisement:

... it gets back to the time of this election. I think that question – what was being said in the press had to be answered, so I think we are talking about this election as to achieve this end.

So, I gather from that answer that you would say that you did not see anything wrong in the club paying for Mr Cowan's advertisement? --- I'm saying in this election at the time, no, I don't see anything wrong with it.

6.45 He was, however, obliged to agree that the Club should not pay for an advertisement for a single candidate, whatever the circumstances.

6.46 Roger Cowan was asked whether there were any circumstances that could justify the Club meeting the costs of advertising one only out of a number of how to vote tickets at a then current election.

I'm really not sure about that. I think there would be circumstances where you would, yes. I just think that desperate things require desperate measures sometimes, so I'm not sure. Look, in principle, I agree with you.

A little later he was asked:

Do you suggest that club management can properly support financially or otherwise one candidate as against others? --- Well, I have said for probably 37 years the answer to that would be no, but in this case I think the answer is yes.

Because in your judgment the club was facing what you saw as a crisis of monumental importance, is that the sort of way you put it? --- Yes, that's the way I am putting it.

So great that the general principle has to be put to one side? --- Yes.

Isn't part of the general principle that management should accept whatever the members choose as the board to which management will be accountable? --- Generally I'd say that's a good principle, yes, I don't think it applied this time.

Because in your judgment the circumstances were so extreme? --- They were extreme, yes.

6.47 All this amounts to saying that the end justifies the means. At the extreme it means that if the end is sufficiently noble, the foulest methods may be justified in achieving it. That approach is in my view wrong. And it is to be noted that despite all that Cowan and his associates did, the five dissident directors polled quite well at the election. Many members supported them, despite the strong criticism to which they were subjected. Those members at least, and I think most members who voted, would surely view with alarm the fact that a significant part of Greg Alexander's electoral expenses were met by the Club, that is to say met indirectly by the members generally, while other candidates had to meet all their own expenses.

6.48 I accept the following submissions put on Alexander's behalf, namely that:

- a) he ran for the Board as a Cowan supporter, and because he has a great knowledge of rugby league;
- b) his background was mostly in football and marketing, and he had no prior experience as a public company director; and
- c) the possibility that with the benefit of hindsight, and with full knowledge of all the facts as they existed at the time, he might have conducted himself differently is not a basis for making any finding against or criticism of him.

CHAPTER 7

VOTING RIGHTS - PROMISES MADE, THEN BROKEN?

7.1 A particular allegation I am required to investigate is that the Club, by its Board and/or Cowan, misled members of the clubs with which the Club amalgamated between 1998 and 2003 as to the continuing voting rights of members of those amalgamating clubs.

FINDINGS

7.2 The findings I have arrived at are these:

- (a) Cowan made representations, which amounted to promises, to the effect that members of amalgamating clubs would have the same rights as members of the existing Penrith Club, so far as standing for the Board and voting were concerned;
- (b) he did so with the authority of the Club Board;
- (c) Board members knew he had done so;
- (d) each of the cancellation of the February-March 2002 election, and the constitutional change effected in September 2002, had the effect that members of amalgamating clubs could not vote for the Club Board generally;
- (e) each of those two steps disappointed the legitimate expectations of members of the amalgamating clubs;
- (f) it is the Board that took those steps;
- (g) Cowan opposed each of those steps, and is blameless; and
- (h) the general mass of members of the amalgamating clubs have accepted the outcome without demur.

COWAN'S AUTHORITY

7.3 Cowan was given general authority by the Board to act for and on behalf of the Club in respect of amalgamations. Just that was said in a letter which Walsh as Chairman of the Penrith Club wrote to the President of Port RSL on 15 October 2001, concerning that particular amalgamation. It is likely, and I infer, that other such letters were written. And it cannot be said that the policy laid down by the Club constrained him in giving assurances as to voting rights. I say

that in part because of the contrast between the interim policy adopted on 17 November 1998 and the longer set of policies adopted on 12 May 1999: see 4.5 above.

PROMISES MADE

- 7.4 Acting on that authority, Cowan gave assurances. He said so, and so did others. Firstly Bowers, who was asked whether part of the direction given by the Board was that:

... members of the amalgamating clubs would have equal rights when it came to standing for the board and voting in board elections? --- Yes.

And that was fundamental to all these amalgamations? --- Absolutely.

And at the end of the day something very different happened? --- Yes.

And does it make you feel uncomfortable, even today? --- Yes, it does.

Because you feel that undertakings given in good faith have been disappointed?

- 7.5 At that stage the witness became very distraught. When he recovered he said: "I had a very bad high speed motor accident some months ago and some things get me very emotional for reasons I can't explain". When asked where the fault lay, with the Board or with management, he said it was an impossible question for him to answer, adding this comment: "It was never intended to do amalgamations where people came across as less than ordinary members. You can do them, you can do those amalgamations, but we didn't want to". Bowers said that complications arose from having two sets of lawyers giving conflicting advice and "emotion came into it. I think there was emotion".

BOARD'S VIEW

- 7.6 Similar evidence was given by Walsh, the Club Chairman. He agreed that in the case of each amalgamation there were negotiations, which Cowan conducted on behalf of the Club with representatives of the other club.

And I suppose it's as plain as the nose on your face that the rights of members of amalgamating clubs, including their voting rights following amalgamation, would be a matter of importance in such negotiations? --- Yes.

Accordingly, you would take for granted that Mr Cowan, having the authority he did, would have given assurances concerning those rights? --- He would have.

And, indeed, I think he told the board from time to time that he'd given those assurances, didn't he? --- He did.

And indeed, one can, I think, take it a step further: There were times at which he complained, did he not, that actions the board was considering taking would be inconsistent with assurances he had given? --- That's correct.

And tell me if I'm wrong: He was upset about that prospect? --- Very much so. He'd given his word and the word of Penrith is a pretty good word.

And he was adamant that it mustn't be disappointed? --- Correct.

And at the end of the day was it? You think it was, don't you, in some respects? --- I think it might have been compromised a bit but, again, we had no blue print for this and we were being led through what I thought was a mine field.

Did you have the understanding that as a result of representations that had been made by Mr Cowan, the club's representative, in the course of amalgamation negotiations, there was an expectation that members of the amalgamating clubs could vote at the March 2002 Penrith Rugby Club Limited election? --- Yes.

And at the end of the day they didn't because that election did not proceed? --- Correct.

At least in that respect expectations were disappointed? --- That's correct.

7.7 Walsh agreed "Cowan was hot and strong about it".

I have given my word and I have given Panthers word? --- That's correct.

Did he put the proposition that a reason why the March 2002 election should not be aborted was that it would be inconsistent with assurances which had been given? --- He did.

He put that to the board in March 2002? --- He did.

And strongly so? --- Very much.

7.8 Walsh went on to say that he had received only one letter of complaint in this respect.

But do you have a sense of discomfort arising from the fact the March 2002 election did not proceed, in terms of the legitimate expectation of members of amalgamating clubs, who wished to vote at that election? --- I understand that. Yes, I did, very strongly.

7.9 James gave evidence to generally similarly effect. He was asked:

... you understood, didn't you, that Mr Cowan had made statements to boards and members of various amalgamating clubs to the effect that their members would come across to Panthers with full rights? --- Yes, sir.

That including full rights to vote, correct? --- Yes.

And full rights to stand for the board? --- Yes.

And you understood, didn't you, that Cowan had given the club's commitment in those respects to those amalgamating club? --- That was my understanding, yes.

Not just his word but the club's word was given to these people? --- Yes, as CEO of the club he was representing the club.

I think you say you didn't know he was giving those commitments at the time they were being given, is that what you say? --- No, what I was trying to get through there, sir, I was not privy to him supplying that information but it was generally known that that was the information that was given to amalgamating clubs.

7.10 James agreed "steps the board had taken to change the constitution of the club reduced the rights of new members".

Did that strike you as being dishonourable on the part of the club? --- No, sir, because as I said initially we were the mother club and we were coming from a position of strength, so our part of the deal was, as far as I was concerned, we were extending to clubs the olive branch, so to speak, so we should maintain the power seat.

James said, as to the first constitutional amendment:

I was acting at all times in the best interests of the members of our club.

By which you mean the Penrith members? --- Yes, yes.

7.11

As to the second constitutional amendment, when asked whether the Club's conduct was dishonourable, James said:

... I believe that we acted in the best interests of our members.

By which you mean the Penrith members? --- Yes. And I suppose to be fair you could probably conclude by saying at that stage you were acting for the members of all the other clubs, which I guess we were, but by the same token ---

You were or should have been? --- we were coming from the position of strength, that's my argument.

And you would accept, wouldn't you, that although the members had to support the constitutional changes, the people who were driving the changes were the then members of the board? --- Yes.

So if the club was behaving dishonourably so were those board members? - -- If that was the case, yes.

James agreed that Cowan spoke against these constitutional changes, on the basis they were firstly, unnecessary and secondly, contrary to the word he had given.

7.12

Heidtmann gave generally similar evidence to the other Board members dealt with above. He agreed that Cowan's word had "*by the board's conduct, been broken*", and said "*Roger was told to go back on his bike, go back and resell it*", that is to say the amalgamation arrangements.

COWAN'S VIEW

7.13

Finally, Cowan himself was asked whether the legitimate expectations of members of amalgamating clubs had been met?

I don't think we've delivered exactly what we promised.

Does that concern you? --- Yes, it does, yes, it concerns me a lot ... In fact, at one meeting we had a ... projected resignation from one manager because he felt he had gone to clubs and made them promises and they were now being dishonoured and he didn't want to work under that condition, so the whole thing was disappointing to us because we were going back on our word.

Cowan then said:

... it seems everyone is still happy to be in the group and everything is going very well at the moment, so nobody seems to hold it against us. None of the boards do. I visit the boards from time to time, ... and they have no objection of what we are doing and they are quite supportive.

BOARD MISLED?

7.14 It is clear that the Board was told by management that *"all amalgamating members MUST be moved over as full ordinary members"*. The passage just quoted is taken from a letter which Evans wrote to the President on 2 July 2002, in which he apologised for his *"unruly behaviour"* at a Board meeting in late June. He declined to apologise for his *"comments regarding the whole amalgamation process"* and what he called management's *"duplicitous role in this and other matters"*. I have concluded that management did believe that members of amalgamating clubs were necessarily entitled to full membership of the Club, and this belief was justified on the basis of advice given by Ralston, a solicitor who did amalgamation work for the Club from time to time, and also by Bowers the in-house solicitor. Later Boon expressed a different view. This gave rise to furious disagreement within the Board, and between a majority of the Board and management, in the months up to October 2002.

7.15 By that time various stratagems had been resorted to, and as a result of them members of amalgamating clubs did not have the same rights as existing Club members to stand or vote for the Board. Hence, in a sense at least, Boon was right. But I do not conclude that the Board was misled in any deliberate way; neither Cowan nor other members of senior management behaved deceitfully. Nor do I believe that Cowan behaved otherwise than in good faith in trying to ensure that what he had promised members of amalgamating clubs was achieved in fact.

CONCLUSION – ALLEGATIONS 3 & 4

7.16 This chapter has dealt with the third and fourth of the allegations in the Instrument of Appointment. The former is that the Club, by its Board and or Cowan, misled members of the clubs with which the Club amalgamated between 1998 and 2003 as to the continuing voting rights of members of those clubs. To summarise my conclusion, Cowan was authorised by the Board and did in fact make representations to members of amalgamating clubs as to their continuing voting rights, namely they would have the same entitlement as members of the existing Penrith Club. As a result of actions taken by the Board, in full knowledge of what Cowan had done, those promises were broken. Each of the cancellation of the February-March 2002 election, and the constitutional change effected in

September 2002, had the effect that members of amalgamating clubs could not vote for the Club board generally, and thereby disappointed their legitimate expectations. I repeat that no blame attaches to Cowan.

7.17 The fourth allegation is that Cowan misled the Board of the Club as to those voting rights. My conclusion is otherwise. At least in this context, to mislead is to deceive in a deliberate manner. Cowan did not do so. He fought hard to deliver on the promises he had made, and he was pursuing the interests of all members, not just those from the Penrith site. Most members of the Board, in contrast, saw their principal allegiance as being to the Penrith members. Cowan's approach, as to amalgamations and voting questions, is to my mind distinctly preferable to theirs.

PART 3

MONEY AND CONTROL

CHAPTER 8

SIGN ON TILL 70

- 8.1 Four contracts were signed on 1 September 1996, all running to 9 November 2005 which is Cowan's 70th birthday. This chapter examines them, the real deal which underlay them and the extent to which, and when, the Club Board knew of them – which was limited, and late.

MAIN CONTRACT

- 8.2 The main contract by which the Club employed Cowan has been referred to, and the first page of it reproduced, in Chapter 1. By its terms the Club employed Cowan, as its General Manager for the contract period at a remuneration of \$175,000 per annum *"payable by weekly instalments such remuneration to be increased by 5% or the CPI whichever is the greater"*. The Club obliged itself to provide and maintain for the sole use of Cowan *"a motor vehicle of a suitable type"* to be changed from time to time *"in the Club's absolute discretion"*, it paying all related expenses. The contract dealt with holiday and sick leave, in unremarkable fashion. The same cannot be said for some of the provisions that followed, but they need not detain us.

Clause 15 assumed importance in the course of the Inquiry and is now set out:

8.3

The Board shall and hereby delegates the power to fix the remuneration and other benefits for all senior management staff to a Sub-committee consisting of the Chairman, the Senior Deputy Chairman, the Junior Deputy Chairman, and the General Manager and the details of such remuneration and otherwise shall remain confidential between the said Chairman, Senior Deputy Chairman, Junior Deputy Chairman and General Manager and the member of senior management staff affected by such details. All other salaries and wages throughout the Club shall be determined by the General Manager except that any increase in salary to a level above any person occupying a senior management position shall be referred to the special Sub-committee hereinbefore referred to.

This, the main, contract contained no confidentiality clause. I doubt whether cl 15, properly understood, applied to Cowan's salary at all. It and other nearby clauses of the Agreement had to do with the respective rights of the Board on the one hand and the General Manager on the other. In the quoted clause he as General Manager was, in my view, distinguished from *"senior management staff"*.

8.4

The copy of the contract I have is signed by Cowan in the presence of his wife, and by two directors in the following manner:

**THE COMMON SEAL of PENRITH RUGBY
LEAGUE CLUB LIMITED CAN 000 578 398**

*was hereunto affixed by authority of the
Board of Directors in the presence of:*

(Signature)

(Signature)

.....
Director

.....
Director

- 8.5 The other Club contract, about to be mentioned, is so signed on behalf of the Club. In the case of each of them the common seal of Phyro Holdings Pty Limited has been affixed. In neither contract has the common seal of the Club been affixed. Minutes of Board meetings show that very often resolutions were passed that the Club seal be affixed to documents described in the resolution. I have seen no Board resolution authorising execution of either of these contracts. There is no mention of the contracts or their execution in the minutes of next Board meeting, held on 11 September 1996, or later Board minutes.

PHYRO CONTRACTS

- 8.6 Apart from the Cowan agreement, the other three each had Phyro as one of the contracting parties. The other contracting parties were the Club, the Football Club, and Panthers Sports Promotions Limited ("PSP"), respectively. The last company was owned by the Club and the Football Club; it is no longer active.
- 8.7 Under the contract between the Club and Phyro, the latter was appointed to perform duties as defined "*and in particular to carry out the Duties in accordance with the directions of the Club and its Board of Directors*". There is a real difficulty here, as throughout the contract term most of the directors were unaware of the contract, or at the least completely unaware of its terms. The other two contracts contained similar provisions, the obligation being to carry out the duties in accordance with the directions of the Football Club and its Board of Directors, and PSP and its Board of Directors, respectively. Probably the same considerations as those just mentioned applied to those two boards.

- 8.8 The Phyro contract with the Club contained the following definition:

"Duties" *the duties carried out by the Company for the Club including:*

- i. *Researching new advertising and promotion strategies for the Club;*
- ii. *Managing the provision of legal services to the Club for a fee being the "Legal Service Fee".*
- iii. *Evaluating of media proposals and advice to the Club;*
- iv. *Placement of media advertising for the Club within agreed budgets;*

- v. *Monitoring of advertising placements and reconciling the costs thereof with the agreed budget;*
- vi. *Payment on behalf of the Club of advertising fees;*
- vii. *Marketing the Club Motel;*
- viii. *Advice to the Club on research strategies in respect of the Club's market, customer, attitudes etc;*
- ix. *Consulting with staff employed by the Club.*

and the following provision as to payment:

The remuneration paid to the Company by the Club in consideration of the Company carrying out the Duties shall be 15.5% of the cost of placing advertising in the media plus direct expenses related to and including media printing, production, artwork, invoices, salaries, provided that there shall be no payment made by the Club to the Company for advertising in excess of \$1,000,000.00 per annum in the first year and in excess of an amount in each subsequent year determined by increasing the amount of the previous year by 5% or the CPI whichever is the greater.

The Club must also pay the Company on top of the remuneration aforesaid, legal fees for legal services provided to the Club by the Company which will be based on an hourly rate agreed annually and are estimated to be in the vicinity of \$100,000 per annum.

- 8.9 The Phyro agreement with the Football Club was similar, but the duties had to do with marketing of Penrith Panthers Rugby League Team, recommending strategies and assisting in the sale of sponsorship packages on behalf of the Football Club and that team, and arranging sale of advertising at the home ground. As to payment by the Football Club:

The remuneration paid to the Company by the Club in consideration of the Company carrying out the Duties shall be 10% of the total of all sponsorship sales plus the total sponsorship of boxes provided that there shall be no payment made by the Club to the Company for sales in excess of nine hundred thousand dollars per annum (\$900,000 pa) in the first year and in excess of an amount in each subsequent year determined by increasing the amount of the previous year by 5% or the CPI whichever is the greater.

- 8.10 Finally, the Phyro agreement with PSP contained a long definition of duties, centred upon the sale of advertising at the Football Club's home ground and preparing and printing the Club Magazine including sale of advertising and "Monitoring of all invoices and accounting matters in respect of the production of

the Club Magazine." PSP agreed to pay Phyro "12.5% of the total of the advertising sales in the Club Magazine combined with the total advertising at Penrith Park provided that there shall be no payment by the Club to the company for sales in excess of ... \$640,000.00 pa ... in the first year and in excess of any amount in each subsequent year determined by increase in the amount of the previous year by 5% or the CPI whichever is the greater." The Club also obliged itself to pay to Phyro the printing and distribution costs for the publishing of the Magazine.

CONFIDENTIALITY

8.11 Each of the Phyro contracts contained a clause headed "*Confidentiality*", in these terms:

All information exchanged between the parties under this Agreement is confidential to them and may not be disclosed to any person except:

- a) To employees, legal advisers, auditors and other consultants requiring the information for the purposes of disagreement;*
- b) With the consent of the party who supplied the information;*
- c) The information is, at the date this agreement is entered into, lawfully in the possession of the recipient of the information through sources other than the party who supplied the information;*
- d) If required by law or a stock exchange; or*
- e) If strictly and necessarily required in connection with legal proceedings relating to this Agreement.*

A party receiving information under this Agreement must use all reasonable endeavours to ensure the persons receiving confidential information from it do not disclose the information except in the circumstances permitted in this clause.

A party receiving information hereunder must, on the request of the party who supplied the information, immediately deliver to that party all documents or other material reflecting confidential information which it has in its possession.

In each case the word at the end of a) above should have substituted for it "*this Agreement*".

8.12 Enormous difficulties arose because the Club directors, apart from members of the Executive, were not privy to the contracts. This is strange as the standard

confidentiality clause did not preclude directors generally from sighting the contracts. Cowan would not have had legitimate grounds to complain if they had seen each of the four agreements. The main one had no confidentiality clause (see 8.3 above), and the three Phyro contracts contained the clause quoted above which took as its subject, and constrained dissemination of, "*information exchanged between the parties under this Agreement*", "*information under this Agreement*" and "*information hereunder*". The contracts themselves, and their terms, were not confidential. Accordingly, directors generally were entitled to see all four contracts.

8.13 It follows that when directors called for the contracts, they had a perfect right to do so and should have been shown them. However, I accept that there was a common belief between Cowan and the various Executive members from time to time that the confidentiality clauses had a disentitling effect in that respect.

8.14 If directors generally were to see all the contracts, that would have required Cowan to make them available, as he thought the Club did not have a set.

So your belief is that your set was the only set; is that right? That is the only set available in the club? --- Yes, that is true, but there may have been more than one copy in my file so that when I explained it to somebody I can let them have a set.

But there wasn't, so far as you were aware, anyway, a copy or a set which Mr Walsh, Mr Armstrong or Mr Rhind held? --- No.

SURROUNDING CIRCUMSTANCES

8.15 In 1996 Cowan was coming to the end of a long term contract with the Club, which was coupled with a contract of like duration between the Club and Phyro. The details may not matter and cannot be recounted, as it is said copies of the contracts are not now available. Certainly the amount reaped by Cowan and his company was a good deal less than the amount paid under the four contracts of 1 September 1996. The former amount was according to the evidence \$320,000, and it is a matter of simple arithmetic that the latter amount was \$500,000 in the first year if the contemplated expenditures on marketing and so on in fact happened. Probably they did, in that and each succeeding year, although I never saw any documents containing calculations as to amounts expended under the contracts to which amounts the percentages of 15.5, 10 and 12.5 were applicable. There had to be added to the \$500,000 superannuation, accrued leave and so on.

8.16 It should be mentioned that according to the minutes of a meeting held on 27 September 1995 – 11 months before the four agreements were entered into – the Board endorsed a decision to provide office accommodation for some of the staff of Phyro at a rent of \$650 per month, and further resolved to extend a payroll service to Phyro at \$120 per week. These figures come to \$14,040 per annum.

That is close to the amount which Phyro agreed to pay the Club under clause 7.1(d) of the agreement between them, mainly \$1,150 per month (or \$13,800 per annum) for the first two years of the agreement, and an amount subject to negotiation thereafter, for accommodation, accounting and payroll assistance, and photocopying, facsimile and telephone facilities.

SOME FINDINGS

8.17 The following matters were uncontested at the hearing, or are in my view proper conclusions to be drawn from the evidence led before me, and I find accordingly:

1. Pay of \$500,000 per year, with an allowance for inflation, plus incidentals was agreed between Cowan for himself and Phyro on the one hand and the then Executive of the Club – Leo Armstrong, Vern Mychael and Keith Rhind.
2. Cowan consulted solicitors who gave advice as to the contractual terms.
3. The Club and the other contracting parties did not have the benefit of legal advice concerning the contracts. Bowers was, through Phyro, providing legal services to the Club as a solicitor (although later he was given or assumed grander titles); he was not involved.
4. The directors other than those comprising the Executive – the other six – did not know in 1996 that an existing employment contract was about to come to an end, did not know about the then existing Phyro contract, knew nothing about the negotiations, or how much the Club, through the Executive, had agreed to pay Cowan and Phyro, or the nature of the duties to be performed by Phyro under its three contracts, or that the Club through its Board was entitled to direct Phyro in relation to marketing matters. They knew nothing of any pertinence, although some had heard of a company called Phyro, and it does not take genius to work out the connection with Phyllis and Roger, ie the Cowan family.
5. The non-Executive members of the Board did not know, generally until early 2003, that Bowers provided services pursuant to an agreement between the Club and Phyro.
6. Nor did they know that Phyro was rendering accounts to the Club, or the total amount of those accounts which in the last year amounted to nearly \$3,000,000.
7. The three Phyro contracts came to an end by mutual agreement on 31 January 2004.

8.18 Barry Walsh is the present Chairman of the Board. He became so in March 2002, and before that from the end of 1997 was Junior Deputy Chairman, and therefore

a member of the Executive. It was in 1997 that he first became aware that Phyro was contractually obliged to supply legal services to the Club, which means he did not know until then that Bowers was on the Phyro payroll, not that of the Club.

KNOWLEDGE OF PHYRO

8.19 A good deal of time was spent at Inquiry hearings in exploring who knew what about Phyro. There was mention of it, buried in the notes to the accounts, in the Club Annual Reports for years ended 31 August 1985 and 31 August 1987. The first of these notes said:

The directors have granted an option to Phyro Holdings Pty Limited to purchase its property in Riverside Road, Emu Plains for the book value which is presently \$111,085 (1984 - \$113,283).

and the latter note read:

During the year Phyro Holdings Pty Limited exercised its option to purchase the property in Riverside Road, Emu Plains at cost.

8.20 Directors could be excused for not recollecting these notes. I think the same goes for the Board resolution on 27 September 1995, referred to at 8.16. I accept that there were some directors who had heard of Phyro Holdings and knew it was the Cowan family company, just as some in Club administration knew that. But many were unaware. Far more importantly, the majority of the directors at any time, and most Club staff, and most Club members, knew absolutely nothing about the nature of the relationship between Phyro and the Club. Specifically, all these people had no idea that Phyro was rendering accounts to and receiving large payments from the Club, or that Bowers was retained by Phyro which made him available to the Club for legal advice purposes.

8.21 Many Club members, and many members of staff, would not have been very interested to have this knowledge. But the directors had a vital interest. They were entitled to know, and should have been told, all of these things. The directors had the ultimate responsibility for ensuring that the Club was run in a lawful and proper manner, that financial matters were all in order, and that Cowan was working for them and the membership; not for himself. The knowledge to which the directors were entitled was withheld from them. A lot of detail is to be found in the next chapter.

THE FIFTH DOCUMENT

8.22 Cowan gave evidence before the Inquiry on a number of occasions. The first was on 15 June 2004, and he then answered questions about the four contracts, which were tendered the following day. On 26 August, which was the 24th day of the hearings, he mentioned "a letter, a covering document" which he said formed part

of the contractual arrangements. Later that day he was shown a copy document headed:

Principles of Agreement Between Penrith Rugby League Club Limited (The Club) and Roger Maxwell Cowan (Cowan)

which was undated, and said by Cowan to be signed by Armstrong, Rhind and himself. Cowan said it was the document he had referred to earlier in the day. It refers to a total package of \$500,000. Cowan placed reliance for certain claims he had made upon a statement in the document that the three Phyro contracts:

... are to be adjusted for annual holidays and long service leave not taken during that period. This is to ensure there are no accrued holidays or long service leave attributable to those agreements at the time of retirement. The only liabilities the club will have at the time of retirement, under the terms of these agreements will be those arising from the contract between Roger Cowan and Penrith Rugby League Club Limited.

8.23 I cannot make sense of that provision. A court might be able to. It might need to be persuaded that the fifth document was signed at about the same time as the four contracts, and was intended to form part of the contractual arrangements. The first part of this is likely, the second part is doubtful. It is very unsatisfactory that there should be four contracts plus this side agreement, for which there is no apparent justification.

8.24 This fifth document contains other provisions which are now set out, with my comments on them:

The costs of providing the services through Phyro Holdings Pty Ltd are included in a monthly invoice to the club. These include media invoices, production and artwork, magazine publishing, salaries of staff, and consultants fees (including Bowers and Bowers for legal work).

That reflects what in fact happened.

The commencement date of the contracts are staggered but it is in the spirit of this agreement that no agreement would be binding on the club unless the employment contract with Roger Cowan was valid and in operation. It is also in the spirit of the agreements that any agreement which expired would be renewed while the employment contract was in force.

This is the first time I have heard it suggested that the contracts have staggered commencement dates. The evidence is to the contrary: they became operative at one time, form a coherent whole, and each is dated 1 September 1996.

The intention is to retain all services covered by the above agreements until the final day, November 9, 2005.

That is certainly true. Cowan was keen to be signed until he turned 70, and the Executive was keen to retain his services until then.

It is agreed there will be no further negotiations before the final day and that all agreements will be increased annually by 5% or the CPI whichever is the greater.

There is nothing new in this, except perhaps "... no further negotiations before the final day ..."

It is further agreed by Roger Cowan that he will not work for any organisation within a radius of 100kms from Panthers with interests in professional sport, licensed clubs or hotels for a period of 5 years after leaving the employ of Panthers without the written permission of the Board of Panthers. This reflects his agreement to remain with Panthers until retirement at age 70.

That provision is not to be found in any of the four contracts, and it is of value to the Club and related entities.

ANOTHER FIFTH DOCUMENT?

8.25

Belated reference by Cowan to the fifth document caused me concern. The concern was exacerbated by the fact that Ernst and Young, the Club's auditors, produced on subpoena a different version of the fifth agreement, again undated and apparently signed by Cowan, Armstrong and Rhind. That version had omitted from it the paragraph from which I first quoted above – see 8.22. That paragraph might be meaningless, but it might not. Certainly Cowan based substantial claims upon it. I accept what was said by Counsel Assisting in closing submissions: *"The missing paragraph is of course one which deals with the necessity to prevent the accrual of a substantial contingent liability in respect of leave entitlements from year to year, one of the critical issues relevant to whether excess payments have been made to Phyro"*.

CHAPTER 9

ACCOUNTS RENDERED, PAID

1996 - 2004

9.1

Each month between late 1996 and early 2004, when the Phyro contracts were terminated, that company rendered accounts which were prepared by Cowan. There were three each month, with a few exceptions when accounts were missed and the position later rectified. All accounts rendered were processed and paid. The largest each month was addressed to the Club, typically just as "Panthers". That for December 2001 appears below:

panthers

TAX INVOICE

PHYRO HOLDING PTY LTD

P.O. Box 967, Penrith 2751
ABN 36 000 630 820 Phone (047) 351034

Statement of Account- Panthers
Dec-01

	Invoice Media	Invoice Production	Total
Corporate	28,785.47	5,871.81	34,657.28
Hawkesbury	-	-	-
Hawkesbury membership	2,759.88	109.58	2,869.46
Bathurst	11,897.56	7,470.90	19,368.46
Bathurst membership	-	-	-
DCSLADV	-	428.40	428.40
Bridal Expo	692.66	-	692.66
Nepean Shores	9,360.73	533.15	9,893.88
Accommodation	3,498.00	169.45	3,667.45
Sponsorship marketing	-	-	-
Supporters Den	-	-	-
GXMEMB	-	105.40	105.40
Banquets	1,649.58	885.90	2,535.48
Business supporter	-	-	-
	58,643.88	15,574.59	74,218.47

Panthers Magazine Advertising		29,469.09
Services:	Sales Advertising	17560.00
	Special Event Promotion	25000.00
	Marketing Strategies	18880.00
	Public Relations	17,314.32
	Sponsorship Promotion	14,166.67
	TOTAL	196,608.55
	GST	19,660.85
	Total including GST	216,269.40


40060050-131

9.2 When asked about this account, Cowan said the figures in the first half of it were accurate. I accept that, although those figures have been processed in such a way as to make it hard to relate them back to actual invoices rendered to Phyro, which in the main came from Thomas Marsden Advertising and Thomas Marsden Print. A needless degree of complexity was thus built in. It would have been so much better to simply reproduce details taken from the Marsden invoices. However, the three figures appearing in the box are accurate. I say that with confidence on the basis of a large amount of work done by Inquiry staff.

ARBITRARY FIGURES

9.3 Cowan was asked about the figures below the box:

The figures below are not accurate? --- They are an arbitrary break up of all the costs of Phyro Holdings into those areas that Phyro Holdings does have some responsibility for in order to make sure that Phyro Holdings does make the profit it's supposed to be making.

Later he was asked, concerning the total figure appearing on the invoice, before GST:

How do you get to the figure of \$196,608.55? --- I have a spread sheet in which there was a formula that breaks up all the costs of Phyro Holdings, adds the profit and then spreads it through those categories.

Adds the commission? --- Yeah.

9.4 Cowan said he prepared a spreadsheet monthly. It showed all the Phyro expenses incurred for doing work for the Club and related entities:

Does it add to that the commission which is due to Phyro Holdings on the three contracts collectively? --- Yes.

Does that produce a monthly figure which is to be charged to the Panthers group? --- Yes.

Is that then split up between three invoices; one of which goes to the Club, one of which goes to the Football Club and one of which goes to Panthers Sports Promotions? --- Yes.

And then for the fun of it you put down some items like sales advertising which don't reflect anything? --- Well --

Do they? --- They are an arbitrary break up.

Sales advertising doesn't reflect anything? --- Well, I guess not, no. I am not sure how to answer that question. It's an arbitrary break up of the amount so I get to the right total.

If it's an arbitrary break up it doesn't reflect anything in the real world? --- Yeah.

9.5 In this passage "*Sales advertising*" refers to the second item appearing below the box in the invoice reproduced above. Cowan said "*I can't justify those figures*" in relation to everything appearing below the box.

9.6 The two other invoices for the same month, rendered to the Football Club and Panthers Sports Promotions, are now reproduced. The figures in them were all made up, save for \$37,415 claimed with respect to magazine printing, which Cowan was "*pretty sure*" represented actual costs.

TAX INVOICE	
PHYRO HOLDING PTY LTD	
P.O. Box 967, Penrith 2751	
ABN 36 000 630 820	Phone (047) 351034
Statement of Account - District Rugby League	
Dec-01	
Services:	
Recommending strategies and assisting in the sale of sponsorships	
Advising and assisting with the arranging for sponsorship of boxes	
Advising and assisting with the sale of advertising at Penrith Stadium	
Negotiating with potential sponsors including ongoing liaison	
Co-ordinating seating and services at all boxes	
Co-ordinating functions for promotion of the teams	
Organising and arranging functions for sponsors	
Variable costs	5,771.44
Sales exceeding \$1,200,000 pa	7,500.00
TOTAL	13,271.44
GST	1,327.14
Total including GST	14,598.58

TAX INVOICE	
PHYRO HOLDING PTY LTD	
P.O. Box 967, Penrith 2751	
ABN 36 000 630 820	Phone (047) 351034
Statement of Account - Panther Sports Promotions	
Dec-01	
Magazine Printing	4,005,005.00 - 4,400,006
Magazine Distribution	37,415.00
Services:	
Sales Advertising	5,771.44
Marketing Strategies	7,500.00
Sales exceeding \$800,000 pa	330,000.00
	444,000.60
TOTAL	50,686.44
GST	5,068.64
Total including GST	55,755.08

9.7 On each of these three invoices, many of the details and related figures are, to use Cowan's word, arbitrary. They did not reflect the real world or the real work. They were and are false. Cowan sought to justify the invoices on the basis that the final figure on the three of them, taken together, reflected Phyro's entitlement for the month. It appears they did, although it cannot be said with confidence that was the case in every month.

9.8 These three invoices do not stand alone. Nearly every month since September 1996 three invoices have been sent by Cowan on behalf of Phyro to the Club, the Football Club and PSP. All these invoices – up to 36 a year, for 7.5 years, over 250 in total - have contained arbitrary, that is to say false, particulars and figures. Probably that was also true for the decade before September 1996, although then only one Phyro invoice was rendered each month.

THE SPREADSHEET

9.9 The three invoices were received as exhibits on the second day of hearing, which was the first day upon which evidence was given, namely 15 June. Much later, on 6 July, Cowan produced a spreadsheet. It included with respect to December 2001 a total claim figure of \$260,566.43, which is the total of the three invoices

before GST, and a total GST figure of \$26,056.64, which is again accurate. Attached to it was a document which is now reproduced.

				Dec-01					
Total Claim				260,566.43	From ac rec 01				
Marsden			A	74,218.47	Actual payment				
Rural Press			B	37,415.00	Actual payment				
Other			C	90,909.09	Actual payment				
Fixed sundries			D	29,166.67	Profit by budget				
Variable Sundries			E	28,857.20	All other costs calculated by deducting A-D from total				
				260,566.43					
Allocation variable Sundries									
Panthers variable	60%		F	17,314.32	60% of D allocated to Club				
Sports variable	20%		G	5,771.44	20% of D allocated to PSP				
League variable	20%		H	5,771.44	20% of D allocated to League				
				28,857.20					
Allocation Fixed Sundries									
Panthers fixed	40%	170000	I	14,166.67	40% of budgeted profit allocated to club				
Sports variable	30%	90000	J	7,500.00	20% of budgeted profit allocated to PSP				
League variable	30%	90000	K	7,500.00	20% of budgeted profit allocated to League				
		350000		29,166.67					
Club invoice		A+C+F+I		196,608.55	These invoices are calculated automatically from the				
PSP		B+G+J		50,686.44	above information.				
League		H+K		13,271.44					
				260,566.43					
Other costs	28,857.20								
Wages		7,762.28							
Scarlex		2,500.00							
Ploditus		2,500.00							
Bowers		12,500.00							
Print Marsden		2,969.32							
Power Colour		1,980.00							
Rent and payroll		700.00							
		30,911.60							
Less									
P. Cowan wages		1,920.00							
P. Cowan super		134.40							
		2,054.40							
Total	28,857.20								

9.10

With some effort a person trained in accounting could follow this document; the rest of us must apply ourselves much more. It will be seen that the total claim figure has component parts, including fixed sundries totalling \$350,000 pa or \$29,166.67 per month, and variable sundries which represent Phyro expenses less those attributable to Phyllis Cowan. Confusingly, they include some actual recouped expenses to Print Marsden and Power Colour. They also include payments made to Scarlex (John Wilson's private company at the time), Ploditus (Max Cowan's private company) and Bowers, the Club's solicitor.

PHYRO'S ENTITLEMENTS

9.11

According to the three contracts between Phyro on the one hand, and the Club and related bodies on the other, Phyro was entitled to be paid for specified work at rates of pay calculated on specified percentages of either expenditure or receipts – see 8.8 - 8.10 above. Phyro was also entitled to a "*Legal Service Fee*" estimated at \$100,000 pa at the outset, and reimbursement of such items as "*expenses related to and including media printing, production, artwork, invoices, salaries*". The fifth document spoke of monthly invoices to the Club including "*media invoices, production and artwork, magazine production, salaries of staff, and consultants fees (including Bowers and Bowers for legal work)*" – see 8.22 et seq.

PHYRO CLAIMS

9.12

The three accounts reproduced earlier in this chapter are, in most respects, representative of those rendered over a total period of 7.5 years. It will be noted that they were not set out in a manner consistent with claimed reimbursement for expenditure plus percentages. I never saw any invoices which contained any percentage calculations, whether at the rate of 15.5%, 10% or 12.5%. The "*arbitrary figures*", as so described by Cowan, disguised the claims for these which were the profit elements in the invoices. And as has been noted already, the way in which reimbursement was claimed was not simple and straightforward, as it might have been by setting out invoices rendered to Phyro for work done by Bowers, or by the Marsden companies, and seeking reimbursement. Almost invariably expenditure was claimed back in a manner apparently designed to confuse, not to clarify.

9.13

Cowan through Phyro met other expenses which he recovered by increasing the amounts which Phyro billed the Club, although these claims were hidden. The accounts were quite incapable of scrutiny for correctness. This is borne out by the fact that it clearly emerged at the hearing that not even members of the Executive were aware that Phyro claims in these respects had been made and satisfied. They included – the list may not be complete – payments made:

- to Cowan himself, as he did not want any Club staff to know how much he was paid, so a certain amount was paid through the payroll office and additional amounts came to him through Phyro invoices;
- in similar circumstances to Scarlex Pty Ltd and Ploditus Pty Ltd, the private companies of John Wilson and Max Cowan;
- to Lynn Feltis, who at one time did work – and a lot of work was undoubtedly done – on a voluntary basis to help her husband, Don (now a Cowan loyalist on the Club Board) who ran the junior league for Panthers; when approached by Feltis, Cowan agreed some monies should be paid to his wife; Feltis knew nothing about Phyro;

- to a player, Rhys Wesser, \$50,000 by way of advance against his contract;
- to another player, Preston Campbell, in the sum of \$22,000 by way of advance against his contract; the payment was repaid to Phyro not once but twice;
- with respect to legal work done;
- to facilitate fund raising activities by a former player named Lou Zivanovic who has become very successful in business as a developer – see 9.28-33 below; and
- for many years to Susan Keenan, by way of salary, although it is quite clear she could just as well have been paid direct through the payroll office.

WHO KNEW ABOUT PHYRO INVOICES?

9.14 Members of the Executive from time to time knew that Phyro Holdings was obliged to provide legal services to the Club and related entities, and they must be taken to have known that Phyro was recouping the cost of so doing. But nobody on the Board knew the extent of the claims made by Phyro and the amounts paid to it, or that the claims included amounts paid with respect to the services of each of John Wilson, Max Cowan, Susan Keenan and Lynn Feltis. No Board members were aware that Phyro had received recoupment of the \$22,000 Campbell payment – even once, much less twice. In fairness to Cowan it should be said that it appears the double repayment happened accidentally, and not as a result of any attempt by Cowan or Phyro to defraud. But this serves to illustrate just how dangerous it is for accounts to be rendered in a misleading fashion, and to be incapable of the fullest scrutiny. In what follows I examine the extent to which key people knew of the Phyro claims through invoices, and payments to it. The starting point is the Executive.

KNOWLEDGE BY EXECUTIVE

9.15 The longest servicing Executive member who gave evidence was Rhind. He was asked if he knew that large amounts of the Club's advertising expenditure was processed through Phyro accounts:

I don't think that worried us so long as ---

No, that's not quite the question. The question is did you know that at the time? --- No, I wouldn't know what was going through Phyro's accounts, no.

When did you find out how much was going through Phyro's accounts? --- Just recently.

Do you mean during the course of this hearing? --- Yes, during the course of this hearing.

You've never seen a Phyro invoice to the club or Panthers Sports Promotions or the football club? --- No.

And you had no idea as to the size of those invoices until the last few days? --- Exactly.

That's a good deal less than satisfactory, isn't it? --- It is now, but I don't think that I was an account policeman. I don't think that that was my job as an executive.

Well, whose job was it? - Somebody should have had the job shouldn't they? --- Well, the accounts system that was in place.

But they worked to Mr Cowan? --- Yes, I can't answer that.

You see the point though, don't you? --- I do see the point.

It's not really satisfactory to have a more junior employee checking on the amounts which are claimed by way of financial remuneration by a more senior employee, is it? --- No, put it that way, definitely not.

- 9.16 Walsh, now the Chairman, became an Executive member about seven years ago. He could not say when he became aware of Phyro, but it was early on *and "it was common knowledge"* that Phyro was Phyllis and Roger Cowan's company. Walsh was asked if he knew the costs of preparing advertising and running advertisements

... would pass through Phyro to the leagues club rather than being billed to the leagues club directly? --- No, sir. As I say again, it never entered my mind to ask that, as I say again, we have internal, external auditors and an audit committee of the board and at no time did anyone ever show any concern.

- 9.17 James was a member of the Executive from March 2000 to October 2002. He knew nothing concerning Phyro invoices, either when he was an Executive member or earlier when he was a mere director.

- 9.18 Terry Heidtmann has been a club director for 20 years, and Executive member since late 2002 – he replaced James. He did not know how much or in what manner Cowan was paid.

Did you know whether or not any company, private company of his or otherwise, was involved in receiving part of the remuneration to which he was entitled? --- I quite honestly say I don't think so but I really can't say

whether I knew that there was, like a splitting of salaries as you might call it, but I honestly – some things you sort of grow up with and you don't quite know when they came into being and that's one of those things, I have to say. I would say I didn't.

9.19 Heidtmann said that when the September 1996 contracts were entered into they were not unusual but,

... in the last five, six years it became quite obvious to anybody that, in fact, those sort of contracts are now no longer acceptable.

What do you mean by those sort of contracts? --- Well, this type when very few people could critique them and know the details.

Later he said that the Club and its directors:

... subscribe very closely to corporate governance, and we are improving it all the time but at the end of the day if you've got an honest man where he is, and he is committed to the task, I think that supersedes all report writing and things.

and later again:

... we are all part and parcel of a very successful organisation and I tend to think that whilst the corporate governance in relation to this contract – and I don't step away from anything else – but in relation to this contract it could have been better. We have really been secured in two ways. One, we were getting the job done and two, we had a very honest bloke there.

KNOWLEDGE BY DIRECTORS

9.20 I have no doubt that "Cowan is honest, the Club is going well, so why worry?" was the attitude of directors generally, including but not limited to members of the Executive, over a long period, with the exception of the 'Footy Five'. Even they were not, I think, suspicious that Cowan was ripping the Club off. They wanted knowledge, so they could satisfy themselves that everything was in order; that internal controls were adequate; that Cowan was getting his due entitlements and no more. Or perhaps they wanted to diminish the lack of power that stemmed from their ignorance. In either respect their position was entirely justified.

9.21 Board members did not know the general extent, much less the details, of the monthly Phyro claims and payments. They did not even know that monthly invoices were being rendered and paid. They knew nothing about dealings between Phyro and the Club. That was at Cowan's insistence, with which the Executive agreed.

KNOWLEDGE BY MANAGEMENT

9.22 Glenn Matthews began working for the Panthers organisation on 19 March 1984. He became the Financial Controller about two years later, and held that position in total for roughly 15 years. He did not know what Cowan's remuneration arrangements were until recently, at the time of compulsory statutory disclosure, when he found out through the external auditors. He was asked:

*... were you aware that Mr Cowan's private company, Phyro Holdings Pty Limited, billed the club each month for various services and was paid by it?
--- I probably knew that Phyro Holdings billed the club very early on, in the 80's. In terms of contractual arrangements with the club I never had any knowledge of those, in terms of the details, but certainly it was well known that Phyro billed the club for marketing expenses, et cetera.*

So you knew about that in the 80's when you started, I suppose, in accounts and the like; is that what you mean? --- Yes.

So you would see or know of, at least, Phyro invoices and the fact that they were associated with Mr Cowan? --- Yes.

And that they apparently represented services performed by his company on behalf of the club? --- Yes.

9.23 Matthews said he was aware of a process in place for marketing employees to ensure that services charged for by, for example, the Marsden companies had in fact been received

... and there was a process in place for that and then Phyro would charge the club. Those payments would be given to Roger and the Phyro would bill us but I didn't know the exact make-up of his invoices or things like that.

9.24 It was not until recently he became aware that some of Cowan's remuneration was being paid through Phyro. Nor did Matthews know that part of the remuneration of each of John Wilson and Max Cowan was being paid through Phyro. He did not know the terms of the Phyro agreements. It follows that he, the Financial Controller of the Club, could not check the Phyro invoices to see whether they covered due legal entitlements and no more. Nobody could, because nobody but Executive members for the time being knew what the Phyro contractual entitlements were. And certainly they were not checking. It all came down to a matter of trust. Trust Roger, and all will be well.

9.25 Some Executive members seemed to think that the internal auditor was keeping an eye on the Phyro claims. He is Peter Sheridan, who has held the position for a

period in excess of eight years. He gave evidence and made it very clear that checking on Cowan's claims was no part of his duties. He was not privy to the terms of the September 1996 agreements. His understanding was that the matter was one between Cowan and the Executive, and checked by the external auditors. I have dealt with the Executive. The position as to the external auditors is dealt with in Chapter 11.

KNOWLEDGE BY MEMBERS

9.26

There may be some Club members who read annual reports and financial statements closely, and have long and accurate memories. Such people – doubtless very few in number – might know of Phyro through the notes referred to at 8.19 above. But I venture to suggest almost no members knew that Cowan was being paid in part through Phyro until last year, or of the very extensive dealings between Phyro and the Panthers organisation, month by month, year by year. Such disclosure concerning Cowan's remuneration as recently occurred took place as a result of newly introduced statutory disclosure requirements, which I find the Club complied with imperfectly at Cowan's behest. The detail is dealt with in the next chapter.

CONCLUSION – ALLEGATION 5

9.27

The fifth allegation in the Instrument of Appointment is that since at least 1 June 1994 information has been withheld from the Club's Board and members of the Club, first as to Cowan's remuneration package, secondly as to financial dealings between Phyro Holdings and the Club, and thirdly as to benefits flowing to Cowan and Phyro whether directly or indirectly from the position he holds and from those financial dealings. That allegation is made out. The Board generally did not know how or in what amount Cowan was remunerated until the hearings of the Inquiry, although members of the Executive did. Board members generally, including members of the Executive, did not know of the nature and extent of the financial dealings between Phyro and the Club, or the benefits flowing directly to Phyro and indirectly to Cowan, again until the hearings of the Inquiry. Naturally, Club members had no more information than did their directors. The very large extent to which information was withheld from directors is attributable to Cowan and his obsession with secrecy, and could not be justified on the basis of the very limited confidentiality provisions contained in the three Phyro contracts – see 8.11–8.13 above. It is clear that Cowan got his way in blocking proper information flows because of his strength of personality and, on the Board's side, a lack of vigour in asserting controls. Recent Panthers history shows that Cowan played a key role in getting rid of those directors who sought to control him.

LOU ZIVANOVIC

9.28

Lou Zivanovic played *"about 135 first grade games"* for the Panthers between 1979 and 1986. He is now a managing director of companies working in building construction and land development. In about 1998 he began, through one of his

companies, to *"sponsor the junior reps development program"* in the Penrith district at a cost of \$50,000 per annum, and that has continued. Zivanovic also through his companies raised money to send *"a junior reps team to New Zealand to participate in their national championships"*, and later to send an *"under 18's team of Penrith players over to England for a football tour"*. All this involved a lot of effort by Zivanovic's people – one event was a dinner, followed by entertainment and an auction, for 1,000 people – and a deal of expenditure. Zivanovic said that over a three year period his companies raised between \$250,000 and \$300,000 for junior rugby league in the Penrith district. These fund raising efforts were in addition to the annual sponsorship figure. It is unsurprising that Cowan should rate Zivanovic as *"pretty close to the best supporter of the club that there is"*.

9.29

On 19 October, following a telephone call by Zivanovic to Cowan, the former wrote to the latter in his capacity as Managing Director of Cabe Investments Pty Limited as follows:

Dear Roger,

As you are probably aware Cabe has been responsible for a number of fundraising events over the last 3 years to further the development and aspirations of children playing rugby league within the Penrith district.

In fact we have successfully managed to raise in excess of over \$250,000.

I have been thinking lately that the club should be looking at raising its profile to not only market junior rugby league in the district but to also be involved in some sort of way that helps the underprivileged children of the broader Penrith community.

I am willing to use my resources to market research the feasibilities of exploring the potential of implementing such a program as well as provide on going support in the pursuit of raising funds for the existing programs that are in place.

However I seek a retainer fee of \$100,000 to be spent over the next two years to try and offset some of the costs of the market research that will involve my extensive business contacts and resources as well as the procurement of memorabilia and auction items that will be used in future fundraising events.

I thank you for the support that you and the club have shown in the past and look forward to a favourable response.

9.30 Cowan agreed to the proposal. No agreement was entered into. At his suggestion Cabe Investments sent an invoice on 30 November 2001 to Phyro Holdings, the operative portion of which read:

Fees for consulting on the marketing of Penrith District Rugby League Club Limited including:

- Research into the viability of the project designed to assist school Students experiencing behavioural and educational difficulties
- Research into the feasibility of raising funds for the club and for special projects.

Research included contracts with schools and the education department. Fund raising feasibilities included market testing with potential sponsors.

Amount due, payable in 7 days please

\$100,000.00 incl GST

PANTHERS ON THE PROWL

9.31 The invoice involved some puffery, because no real research was done, beyond Zivanovic talking to a few people. However, I accept that money was raised, and it went to a good cause, a programme called "*Panthers on the Prowl*" which was aimed at helping under-privileged children in the district and increasing the amount of contact between Penrith players on the one hand and the community, especially young people in it, on the other. Nothing that I say should be taken as involving in any way criticism of that programme, or of sponsorship and fund raising as such. My concern is with process: how things were done.

9.32 A Phyro cheque for \$100,000 was duly drawn and dispatched, and on 7 December paid into the general account of Cabe Developments Pty Limited and thereafter spent. It is likely that Zivanovic companies expended more than \$100,000 on fund raising activities over the next two years.

9.33 Much the same thing happened two years later. On 3 November 2003, Zivanovic wrote to Cowan in these terms:

Dear Roger

Following the implementation and outstanding success of the Panthers on the Prowl program which has been marketed by Panthers over the last two years, I would like to review what the club's \$100,000 retainer fee that Cabe received two (2) years ago has achieved.

When Shane Richardson was appointed C.E.O. of the football club in January of 2002, he brought to the club not only his experience in running a successful football club but also a community development program model that was implemented and is now the panthers on the prowl program.

The involvement and on going support of both Mr Barry Walsh as chairman and Mr Glen Matthews as an active board member of Panthers on the Prowl has been invaluable.

The program to date has helped to give a hundred children in the Penrith District a new sense of purpose in life be it either emotionally or physically in school or at home and has the potential to reach hundreds more

I now wish to recap our financial achievements since my letter of October 2001

Over the last couple of years we have held the following events that have proved to be financially successful.

The panthers on the prowl launch \$150,000

The procurement of sponsorship from the board of panthers of \$200,000

The panthers junior development fundraising dinner \$75,000

The panthers on the prowl inaugural golf day \$195,000

To make a total of \$620,000.

As you can see we achieved the desired result that we set out to achieve.

With a view to looking forward over the next two years I am writing to ask whether the club is willing to advance another \$125,000 to contribute towards some of our costs in the marketing and organizing of future events and to ensure the continuing success of the program with the guarantee that if we are unsuccessful in raising over \$450,000 within the next two years I will gladly return the money at the end of the two years

Hoping to hear from you shortly

9.34 Phyro Holdings sent a cheque for \$125,000, which was duly banked by one of the companies in the Cabe group. Again there was no formal agreement.

9.35 The Club Board knew nothing of these arrangements. It did not know that Phyro had expended \$100,000 in late 2001 and \$125,000 about two years later for fund raising purposes. It did not know, as I find to be the fact, that Phyro invoices included those two amounts, and the Club thus reimbursed Phyro. The only people Cowan said might have known, but he could not swear to it, were the Chairman and the finance manager. It will be noted that in the first period \$200,000 was raised from the Club itself towards the Panthers on the Prowl programme. It is a very strange irony that the directors generally did not know that the Club had contributed \$100,000 towards fund raising activities to which the Club became a very large donor. It is to my mind nothing short of preposterous that the Board should not have been put completely in the picture, preferably from the outset, but certainly at the time when they were being invited to make a large contribution towards the programme. This is another example of Cowan withholding information which should have been made available to the Board.

CHAPTER 10

DISCLOSURE REQUIRED AND HOW MADE

DISCLOSURE REQUIRED

- 10.1 In 2002 the following requirement was included in the Registered Clubs Act, for the first time by, s10(1)(m):

The club is to include the following information in its annual report to its members and provide the information to its members before each annual general meeting:

- (i) *In the case of the 5 highest paid employees of the club- the number of employees (if any) whose total remuneration for the financial year (comprising salary, allowances and other benefits) falls within each successive \$10,000 band commencing at \$100,000, ...*

This provision impacted on the Club with effect from the annual report for the year to 31 October 2002, and the annual general meeting held in the first half of 2003. I mention that the relevant provision is now in s41H(1)(b) which was inserted – along with many other accountability provisions – by the Registered Clubs Amendment Act 2003.

- 10.2 The Club purported to comply with s10(1)(m)(i) by including, in the notes to the financial statements which formed part of the annual report to 31 October 2002, the following information:

29. REMUNERATION OF EXECUTIVES

The total value of the remuneration packages (comprising salary, allowances and other benefits) of over \$100,000 per year paid or payable to the 5 highest paid employees of the club.

\$1,314,506

The number of executives of the group paid over \$100,000 and who fall in the top 5 highest paid executives whose remuneration falls within the following bands:

\$	155,000	-	\$159,999	1
\$	160,000	-	\$164,999	2
\$	245,000	-	\$249,999	1
\$	585,000	-	\$589,999	1

10.3

Much more information was provided in the following year, namely:

7 REMUNERATION OF EXECUTIVES

Year Ended 31 October 2003

CONSOLIDATED	
<i>2003</i>	<i>2002</i>
<i>\$'000</i>	<i>\$'000</i>
<i>The total value of the remuneration packages (comprising salary, allowances and other benefits) of over \$100,000 per year paid or payable to the 5 highest paid employees of the club 7(a)</i>	
<i>1,639,438</i>	<i>1,314,505</i>

The number of executives of the group paid over \$100,000 and who fall in the top 5 highest paid executives whose remuneration falls within the following bands:

<i>\$150,000</i>	<i>-</i>	<i>\$169,999</i>	<i>-</i>	<i>1</i>
<i>\$160,000</i>	<i>-</i>	<i>\$169,999</i>	<i>-</i>	<i>2</i>
<i>\$200,000</i>	<i>-</i>	<i>\$209,999</i>	<i>1</i>	<i>-</i>
<i>\$240,000</i>	<i>-</i>	<i>\$249,999</i>	<i>-</i>	<i>1</i>
<i>\$260,000</i>	<i>-</i>	<i>\$269,999</i>	<i>1</i>	<i>-</i>
<i>\$290,000</i>	<i>-</i>	<i>\$299,999</i>	<i>2</i>	<i>-</i>
<i>\$580,000</i>	<i>-</i>	<i>\$589,999</i>	<i>-</i>	<i>1</i>
<i>\$590,000</i>	<i>-</i>	<i>\$599,999</i>	<i>1</i>	<i>-</i>

a) Mr Roger Cowan is a shareholder of Phyro Holdings Pty Limited which provides advertising, promotion and consulting services to Penrith Rugby League Club Limited, Penrith District Rugby League Football Club Limited and Panthers Sports Promotions Pty Limited. The profit earned by Phyro Holdings Pty Limited in respect of its dealings with the consolidated entity in each year has been included in Mr Roger Cowan's remuneration figure which, in turn forms part of the above note.

I note that similar information was contained in note 29 to the annual financial report of the Club for the same year.

10.4

It is obvious, and in any event the evidence received by the Inquiry made perfectly clear, that it is Roger Cowan whose remuneration was said to fall within the band from \$585,000-589,999 in the first year, and \$590,000-599,999 band in the following year.

RATIONALE

10.5

After publication of the first of these annual reports, the Department of Gaming and Racing sought further information as to the disclosure concerning Cowan's remuneration. He prepared, or caused to be prepared, and sent off to the DGR the document that appears below.

Salary Reconciliation for Dept Gaming and Racing							
From Affinity Payroll records							TOTAL RECEIPTS
	Ordinary	AL	Sick	Loading	Leave paid out	Loading	
6/11/01	1,969.23	2953.85		516.92			5,440.00
13/11/01	4,923.06						4,923.06
20/11/01	4,923.06						4,923.06
27/11/01	4,923.06						4,923.06
4/12/01	4,923.06						4,923.06
11/12/01	4,923.06						4,923.06
18/12/01	4,923.06						4,923.06
25/12/01	4,923.06						4,923.06
1/1/02	4,923.06						4,923.06
8/1/02	4,923.06						4,923.06
15/1/02	4,923.06						4,923.06
22/1/02	984.62						984.62
29/1/02			3,838.46				3,838.46
5/2/02			4,923.06				4,923.06
12/2/02			4,923.06				4,923.06
19/2/02			4,923.06				4,923.06
26/2/02			4,923.06				4,923.06
From Club Line records							
5/3/02			4,923.06				4,923.06
12/3/02			4,923.06				4,923.06
19/3/02			4,923.06				4,923.06
26/3/02			4,923.06				4,923.06
2/4/02			4,923.06				4,923.06
9/4/02			4,923.06				4,923.06
16/4/02			4,923.06				4,923.06
23/4/02			4,923.06				4,923.06
30/4/02			4,923.06				4,923.06
7/5/02			4,923.06				4,923.06
14/5/02			4,923.06				4,923.06
21/5/02			4,923.06				4,923.06
28/5/02			4,923.06				4,923.06
4/6/02			4,923.06				4,923.06
11/6/02			4,923.06				4,923.06
18/6/02			4,923.06				4,923.06
25/6/02			4,923.06				4,923.06
2/7/02					122,584.59	21,452.30	144,036.89
9/7/02							
16/7/02							
23/7/02							
30/7/02							
6/8/02							
13/8/02							
20/8/02							
27/8/02							
3/9/02							
10/9/02							
17/9/02							
24/9/02							
1/10/02							
8/10/02							
15/10/02							
22/10/02							
29/10/02	68,615.44				64,636.55	11,311.40	164,563.39
Totals	140,800.99	2,953.85	112,346.22	516.92	187,221.14	32,763.70	476,591.82
Super							23,197.99
Super							14,818.71
Car							22,000.00
FBT							7,576.80
TOTAL RECEIPTS FROM PANTHERS							644,895.63
Amount shown on spreadsheet							544,876.24
Spreadsheet exceeds this analysis by...							9.39
Amount shown on spreadsheet							544,876.24
Family Company Profit							43,498.00
TOTAL RECEIPTS							587,574.24
Amount disclosed in annual report							587,574.24
Spreadsheet showing Calculations by Payroll Department							
EMPLOYEE	TOTAL GROSS	SUPER 5%	SUPER 5%	SAL SAC CA	SAL SAC MOE	FBT	TOTAL
R. COWAN	476,501.82	23,197.61	14,818.71	22,000.00	0.00	7,566.00	544,076.24
J. WILSON	183,530.89	11,443.03	6,350.40	34,186.00	0.00	0.00	247,894.32
S. VANZWIETEN	123,822.95	7,001.89	4,670.40	23,002.19	0.00	0.00	163,597.53
G. MATTHEWS	104,231.62	5,560.17	4,605.94	22,000.00	15,450.00	7,566.00	160,413.73
D. ELLKS	55,296.05	5,222.78	4,507.70	0.00	0.00	0.00	90,000.00
	943,483.43	53,425.58	34,945.15	101,188.19	15,450.00	15,132.00	1,271,008.35

10.6

The year in question, to 31 October 2002, was unusual. Cowan was ill and off work for a long period – hence the sick pay figure was high. Also, he instructed the pay officer not to pay him salary for 18 weeks, something she said had never happened before. Finally, he instructed the pay officer to pay him 996 hours leave. The leave records as to Cowan were in a poor state, but I accept he had accrued an entitlement to that extent. Whether he was entitled to receive anything by way of payment in lieu of leave until he left his employment with the Club is doubtful. However that may be, the notable fact is that Cowan's decisions to postpone his pay entitlement for a period, and to have leave paid out to him, were his alone. There is no evidence the Board knew anything as to these matters.

10.7

According to the document copied at 10.5 above, its component parts were:

Ordinary Pay	\$ 140,800.09
Annual Leave Plus Loading	\$ 3,470.77
Sick Leave	\$ 112,246.22
Leave Paid Out	\$ 187,221.14
Loading Thereon	\$ 32,763.70
Superannuation	\$ 38,007.71
Car	\$ 22,000.00
Fringe Benefits Tax	\$ 7,576.00
Family Company Profit	\$ 43,498.00
Total	\$587,583.63

Putting the matter in another way, the reconciliation statement showed Cowan received \$544,085.63 direct from Panthers, and \$43,498 through his family company. All figures but the last were correct.

THE TRUE POSITION

10.8

Cowan said the document sent to the DGR was "*created after the event, I think,*" indeed "*Well after the event*". He could not say how the Phyro profit figure of \$43,498 was arrived at. Cowan told the Inquiry the commission entitlements of Phyro, which he called profits, were running at the rate of \$350,000 pa at the time. He claimed "*it wasn't all taken*" in the year to 31 October 2003, but agreed at least \$170,000 in commission was.

Your accountant, apparently, has seen it differently in getting to this figure of \$43,498? --- Yes, because of the reason I said before, we realised that the holiday pay would have to be part of that disclosure.

Yes --- And, therefore, I should pay back some of that profit Phyro made and reduce that amount so the disclosure was more realistic.

So are you saying that you made a decision at the time these calculations were being made to literally pay money back or to fail to claim it in ensuing months so it would be repaid in that pay? --- That's the way I did it. If I paid all the costs of the club that was like repaying. If I paid out \$200,000 in one month for accounts that would normally be passed on to the club, it seems to me that is pretty close to me paying the club.

But it happened outside the reporting period? --- Yes, it happened outside 31 October.

Not a matter of concern to you? --- No, because I didn't really know before then how that disclosure would be made. This was the first disclosure we ever made, I still had the problem of whether Phyro had to be declared. I discussed that with the external auditors and discussed the matter of the leave. The other difficulty was the various contracts that Phyro had: Did they all have to be disclosed? What we decided in the end was that we would stick with the spirit of the law and do it that way.

- 10.9 Cowan's final position on this issue was that all payments made to him were due and payable at the time of payment.

You just wish they hadn't been paid to you because it meant you would have to report too much? --- I would have to report the annual leave as well as the other.

Therefore you wished you hadn't received those payments? --- Yes.

- 10.10 Accordingly in the 2003-04 year Cowan did not make some claims that were due to Phyro.

Until such time as some notional repayment had been achieved? --- Yes.

Does that put it fairly? --- I think it does, yes.

- 10.11 It is important to stress that there was no overpayment. There was no error that had to be rectified. There was merely some awkwardness arising from the fact that when the Phyro commission actually received in the year to 31 October 2002 was added to all amounts received by Cowan, including the holiday pay he had taken, the total greatly exceeded the figure of close to \$600,000 which he saw as his ordinary entitlement and wished to report. There was nothing that could not have been handled by means of explanatory notes.

INCLUSION OF PHYRO PROFITS

10.12

There were discussions as to what had to be taken into account in calculating the figure to be disclosed. The key question was whether the nett benefits derived by Cowan's company, Phyro Holdings, had to be included. Key participants in the discussions were Glenn Matthews and Cowan himself from the Club, Ernst & Young who were the Club's auditors and in particular Graham Ezzy of that firm, and Lawler Partners who were accountants and tax agents for Cowan and Phyro. Those involved from that firm were Terence Lawler, Timothy Callcott who was then the partner in charge of the firm's club's division and has since left, and Karen Whiting who did most of the actual work. Each of them is a chartered accountant. The evidence shows that Cowan provided figures and Lawler Partners, especially Ms Whiting, worked each year on the basis of those figures.

10.13

Ezzy of Ernst & Young was approached by Matthews and the two men discussed the new statutory regime. Matthews advised that Cowan had a company which provided services to the Club, and inquired whether Ezzy *"thought those sort of arrangements would be captured by the disclosure required by the Club's Act as it was emerging"*, to which Ezzy said he thought *"that was exactly the intention of the Act"*. Later Ezzy expressed that view to Cowan personally. He also reviewed the contracts and formed the view they *"in substance were all about the remuneration of the Chief Executive"*. Ezzy noted that they were all executed on the same day and said it *"certainly sat comfortably with"* him that the intention of the contracts *"was to deliver (Cowan) a remuneration package"*. That is a wholly unsurprising conclusion, and accords with what Cowan said at the Inquiry, from first to last. On that basis Ezzy advised that the nett results of the Panthers – Phyro dealings should be included in doing sums under the new remuneration disclosure regime. Cowan told Ezzy he was *"happy with the view you have suggested, it should all be captured"*. Cowan put Ernst & Young in touch with Lawler Partners. Callcott of that firm held and expressed the same view as to inclusion of the Phyro nett results.

\$43,498 – HOW ARRIVED AT?

10.14

The Phyro amount that was included was the sum of \$43,498. That is on the face of it a remarkably low figure. The gross amount charged by Phyro to Panthers at about that time was well over \$2,000,000 per annum, and the commission or profit figure was then in the order of \$350,000 per annum or \$29,166.66 per month. But only \$43,498 of Phyro profit was included in the 12 months in question. Was that figure correct, and how was it arrived at?

10.15

The figure of \$43,498 was not calculated by anybody at either Ernst & Young or Lawler Partners. It was, however, vouched for by the latter to the former. That was done by a letter dated 7 February 2003, over the signature of Lawler himself, the relevant portion of which read:

In connection with your audit of the consolidated financial report of Penrith Rugby League Club Limited ("PRLC") for the year ended 31 October 2002 we, in our capacity as auditors of Phyro Holdings Pty Limited, make this representation to you to assist you in determining executive remuneration as defined in the Registered Clubs Act 1976 – Section 10 (1)(m)(i) for Roger Cowan, General Manager of PRLC.

Phyro Holdings Pty Limited is a company of which Mr Roger Cowan is a shareholder. Phyro Holdings Pty Limited performs certain services for PRLC and also conducts other activities unrelated to PRLC.

We represent to you that the net profit before taxation which Phyro Holdings Pty Limited derived from its business dealings with PRLC, being total revenues invoiced to PRLC was \$43,498. In arriving at this figure no deductions have been made for any expenses unrelated to the provision of the services to PRLC. Furthermore, no deductions have been made for any expenses which provide Mr Roger Cowan or any party related to Mr Roger Cowan with a benefit including (but not limited to): superannuation contributions, wages, provision of housing or rental income and directors fees.

10.16 There are three difficulties with this letter. The first is that Lawler Partners did not act "*as auditors of Phyro*" – merely as accountants and tax agents. Secondly, the letter reads as if that firm was certifying the correctness of a figure, but the evidence clearly showed that the figure was simply provided by Cowan and accepted by Lawler Partners. The figure was not calculated, or verified, by anybody from the firm – not Lawler, not Callcott, not Ms Whiting.

10.17 The third difficulty arises from the date of the letter – 7 February. Accounts for each month were naturally rendered after the end of the month. Accordingly, what the letter was doing was making a forecast. It reflected Cowan's intention to reduce the amount paid to Phyro in the 12 months to 31 October 2002 by making no claims for two subsequent months which mostly were after the date the letter bears. Ms Whiting was asked:

*So the letter – that figure had to be made to be true by subsequent events?
--- If you look at it that way, yes.*

That's right, isn't it? --- Yes.

Speaking as a professional accountant don't you find that alarming? --- Yes.

Because you deal with financial matters historically, don't you? --- Yes.

You deal with things that have happened, yes? --- Yes.

10.18 Later she said "... we took it in good faith" that Cowan would not invoice for those two months, and would make it his business that the figure would become true, and later again:

It seems to you now, does it not, that that figure was, as at 7 February 2003, an artificial figure? --- I am not sure.

Well, did it reflect a then current reality? It didn't, did it? --- Not at 7 February.

No. And so it's artificial, isn't it? --- There was two ways of which the over statement could have been corrected; it could have been repaid immediately and then corrected or the course of events that did occur, in which the invoices weren't raised.

MEMBERS MISLED

10.19 I find that the figure of \$43,498 was provided by Cowan. It was not calculated by anybody, as representing an actual Phyro profit figure for the year to 31 October 2002. It was made up by Cowan, as I find, simply on the basis that it was that sum of money which, when added to all other amounts paid to Cowan by the Club including pay in lieu of holidays, came to a figure close to but less than \$600,000. The figure of \$43,498 is wrong, and the amount which Cowan caused the Club to disclose as to his remuneration and other benefits from the Club was inaccurate.

10.20 It follows that the members were misled.

10.21 The evidence disclosed one way, and one only, in which a benefit foregone after an accounting period could be taken into account in adjusting figures during that period. That would be if the benefit foregone was of a permanent nature, not one which was temporarily unclaimed and intended to be clawed back later. But I find Cowan did intend to recover the amounts Phyro could have invoiced, but did not, for February and March 2003. He admitted as much. They were intended to be, and were in substantial part in fact, claimed and paid later. All Cowan did was cause Phyro to delay invoices so that the figures for the period expiring months earlier could be bodgied up so the amount disclosed accorded with his view of what should be disclosed. It was his convenience, not compliance by the Club with statutory requirements, which dictated Cowan's conduct.

10.22 In fairness to Ezzy and his firm I add that he knew nothing as to the course followed by Cowan. He and his firm relied upon the representation letter from Lawler Partners, and there was nothing wrong in their so doing.

CHAPTER 11

THE BOARD AND PRUDENTIAL SUPERVISION

- 11.1 There was a time when the extent to which Cowan could claim entitlements from Panthers was not unfettered. Two instances are provided, each going back a number of years. The more recent years stand in contrast, with no apparent constraints operating. An attempt by the 'Footy Five' to keep an eye on him is also dealt with in this chapter.

LEAVE WRITTEN OFF

- 11.2 Cowan's salary and entitlements card was marked as an exhibit. With respect to leave it seems to commence on 18 November 1975, by which time Cowan had been at the Club for a decade. He then had an accrued leave entitlement, according to the card, of 105 days. By 18 November 1979 that had increased to 145 days. On that date it was reduced to *NIL* and the adjacent note reads: "*As advised by L A Mawhood*". Then on 18 November 1982, the leave entitlement having grown to 40 days, there was again a reduction to *NIL* with the note "*as advised LAM*". Mawhood was a senior club employee, who later became a director.

- 11.3 After that date all accrued entitlement figures have been obliterated up to early 1999. The records then show an accrued entitlement as at 25 May 1999 of 2011 hours, which on the basis of a 40 hour week is 50.275 weeks, or 251.375 days. Since then the records seem to show 33 days leave have been accrued and as many taken, and 996 hours have been paid out. That happened in late June 2002. So far as appears no steps have been taken to write-off any of Cowan's leave since 1982. The greatest entitlement figure shown in the last five years on 18 November 2000, was 2331 hours which is 58.27 weeks.

- 11.4 The current Club policy as to leave entitlements requires:

All staff on negotiated pays with more than two years outstanding Annual Leave (50 days for Team Leaders and 40 days for non-leaders) are to ensure they take all of their current entitlements within six months of it falling due.

but it is not clear whether that applies to Cowan. It should so apply as a matter of principle, because it is hard to make staff behave in a desirable manner if the boss does not do so, and the taking of leave is desirable from the viewpoint of the Club as well as employees. Cowan's leave has been allowed to build up to this huge extent despite the fact that the external auditors in their management letter for the year ended 31 October 2003 pointed out that a number of employees had

"particularly large balances" as far as leave was concerned. A list followed, with Cowan at the foot of it, he having the greatest balance, and his balance exceeding by more than 50% the greatest of the others. This observation followed:

Employees holding excessive leave balances, may experience productivity issues and job stress if leave is not taken over a period of time. A financial burden to Panthers may result from cash flow issues if these employees leave and must be paid out.

and then a recommendation that *"leave accrued in excess of the assigned threshold under the policy should be taken"*.

LARGE ACCOUNTS CHECKED

11.5

Glenn Matthews was for many years the Club's Financial Controller. He is now, in effect, Cowan's deputy. He said, and I accept:

... when I joined the organisation, there was a process in place where the executive of the board came in monthly, I can recall that quite clearly, would come in monthly and audit big payments made. They always did include Phyro but it wasn't just restricted to Phyro and that occurred for many, many years ...

You said that a board executive would audit big or large payments on a monthly basis? --- Yes.

And by the board executive do you mean the chairman and the two deputy chairs? --- Back then, I can remember Mr Vern Michael and Mr Leo Armstrong would come in quite regularly, as I said, every month and would audit and would ask for a list. I remember it so clearly because Mr Vern had a habit of telling me the same story about his youth at those times so I got to know it backwards over the years. They would come in and ask for a list of payments made and I would have to pull out all the invoices for them and he would check them, tick and flick them.

11.6

Matthews went on to say that the external auditors came in several times a year. The relevant audit partner *"would certainly have some time with Mr Cowan and I understand it was to do with Phyro"*. Then Matthews was asked:

Did the checking of large accounts by the board executive cease when Mr Mychael died? --- It might have ceased just prior, it might have ceased prior to him dying. I'm unsure of the date.

But you don't think it went on after his death? --- No, it didn't.

And he was the central player, as I understand your evidence, in that tick and flick exercise? --- Yes.

I don't want in that phrase to sound critical, it was a good deal better than nothing? --- Sure.

And a pretty good idea? ---Yes.

You've then gone on to mention the external auditors but you would accept, wouldn't you, that there ought be, in financial matters, adequate prudential supervision of an internal nature, quite apart from whatever external auditors might be doing? --- Yes, I would accept that.

11.7 In summary, the position which emerges is that large accounts, including Phyro invoices, were once checked each month by members of the Executive, that is to say the most senior members of the Board. That has not happened since the late Mr Mychael's departure from this world about seven years ago.

11.8 Cowan gave evidence that he took responsibility for the Phyro invoices, which he approved payment of.

You can see that more old fashioned people might think that some independent party should be approving invoices that it's less than satisfactory you should be approving your own company's invoices? --- My own problem is if I ask somebody else to approve them because of the confidential nature of the inclusions in it then how would they be able to approve it realistically? They only would be approving if I asked them to and that wouldn't be fair.

What about the executive; they are supposedly privy to the arrangements? --- Yeah, yeah. Well, that would have been better, yes.

Of course it would have been. It should have happened. Responsibility for the fact that for years past not even the Executive checked Phyro invoices rests with both Cowan, who should surely have seen at the time how unsatisfactory the arrangements were, and the Executive members for the time being who should have continued the practice of checking Phyro invoices.

INTERNAL AUDIT

11.9 The internal auditor gave evidence. He has made few attempts to check on the activities and entitlements of Cowan, and could point to none of an effective nature. That is wholly unsurprising. It must always be a very tall order for any employee to check up on and constrain the activities of a line superior, especially

the ultimate boss, and particularly one with so much accrued power as Cowan has after nearly 40 years with Panthers. See also 9.24 above.

MONITORING COWAN'S PERFORMANCE

11.10 Arising out of the Kilmister visits – see 2.10 above - the Board resolved on 6 June 2000 to accept 21 out of 24 policies which had been put forward, some squarely based on Kilmister drafts and others more broadly based on such drafts, with significant changes.

11.11 Policy B012, "*Monitoring CEO Performance*", was deferred pending further reports from the Chief Executive Officer on his views as to how performance could be assessed. Policy B014 was deferred pending a report from the Financial Controller containing stipulated information, including industry benchmarked data as to what was an acceptable profit level for Panthers. And the Board resolved:

To DEFER Policy B024.

Pending a report from the Chairman confirming that the Executive of the Board is satisfied that the Chief Executive Officer's contract is:

- 1) *Relevant for the position.*
- 2) *In line with industry benchmark figures.*
- 3) *In line with other companies of a similar size.*

11.12 By that time the Executive comprised Walsh, Rhind and James. They met on the issue, probably two or three times. At one of the meetings Leo Armstrong was present. He had been the Club Chairman, which is to say the most senior member of the Executive, when Cowan's remuneration was struck and the Phyro agreements were entered into. Probably at that meeting Cowan was also present, that is to say five men met. It happened over a meal at one of the Panthers restaurants.

11.13 There is much contention as to whether James was, at any of these meetings, shown or informed of the Phyro agreements. He is adamant that he was not. Armstrong, who is old and sick, did not give evidence. Cowan confidently asserts that James was told of the Phyro agreements, and indeed shown copies of them, or at the least copies were there for him to look at if he chose. Rhind could not say exactly, and Walsh was not asked.

WHAT WAS JAMES SHOWN?

11.14 The contemporary documents tend to the conclusion that James was not told of or shown the Phyro agreements. Certainly he was given a copy of the main agreement, the opening portion of which is reproduced in Chapter 1. Most of the remuneration clause had been whited-out, so all that remained was:

2. The remuneration of the General Manager

after which James wrote in at some time:

\$500,000.00 pa with an annual increase of 5% for five years.

- 11.15 These words were written in afterwards, but whether days, weeks or months later is unclear. At one stage James even conceded he wrote in the figures and so on after being served with a subpoena to attend the Inquiry. Later he recanted from that, and I think he made the concession due to confusion. Probably the words were written in within days after James was given a copy of that main agreement between the Club and Cowan. However, his concession and its recantation, and other instances of confusion on his part, lead me to conclude I cannot accept what he says as to contentious matters unless his testimony is supported by other evidence, oral or written, or by objective circumstances.
- 11.16 The other contemporary documents comprise three versions of a note prepared by James and headed: *Meeting of Board Executive and former Chairman, Director Leo Armstrong on 27 June 2000. Purpose of meeting to discuss deferment of Board Policy B024.*
- 11.17 What followed was a draft of a statement to be made by the Chairman to the Board. It appears to be the case that the successive versions were necessary because Rhind was not happy with the way the matter was being expressed by James. And the early versions at least contain mistakes. The purpose of the meeting was not to discuss deferment of Board Policy B024. That had happened already, by Board decision. There also seems to be, on the face of each version of the document, doubt as to whether Cowan's package included a motor vehicle.
- 11.18 What is most notable is that none of the three versions of the document makes any reference to a multiplicity of agreements, or to Phyro. However, each included a statement that part of what the CEO received was paid into a family trust and the remainder to him by way of salary. And each stated that "*there are no written records of any kind which show the manner in which the remuneration of the CEO has been determined*".
- 11.19 The three versions of the document just referred to were included in a greater bundle sent by James to Bateman by fax on 5 July 2000. Also included was an undated note from Cowan headed "*General Manager Agreement*" which I infer went to the Executive, and included amongst other things an offer "*for me to agree that my contract is now terminated. The club no longer has any obligation to continue my employment*". Later in that document Cowan said that whether the Board stuck with him or decided to negotiate with somebody else "*a copy of my previous agreement*" would be available, and "*could be a guide to clauses that need to be considered in either case*". Reference to a single agreement, rather than to the four agreements, might be thought to be significant. But in my view it

does not compel the conclusion that the Phyro agreements were kept from James. I say that because Cowan might well have been referring to the four agreements, collectively, as being his agreement with the Club. The other document in the bundle which Walsh sent to Bateman was an email letter from Cowan to James dated 7 June apologising for his conduct on the previous evening when he stormed out of a Board meeting, explaining some of the causes from his viewpoint, and again offering his resignation.

- 11.20 In the end I cannot confidently make a finding either way as to whether James was told of the Phyro agreements, or shown copies of them, or both of those things, by the other Executive members and Cowan. There are indications in both directions, none of the individuals concerned was a fully satisfactory witness, each had an axe to grind and a good deal of time has gone past. I cannot say where the truth lies.

BELATED, INACCURATE REPORT

- 11.21 What can be said is that Walsh reported to a Board meeting on 18 or 19 December 2001. That was more than 18 months after the request for a report; I do not know why so much time went past. The minutes are typically terse:

General Manager's Remuneration Package

The Chairman confirmed that the Executive of the Board had reviewed the General Manager's remuneration package for 2002.

- 11.22 Bateman produced to the Inquiry a document which is reproduced on the next page, the handwriting being that of Bateman.
- 11.23 Either Walsh tabled the document or he spoke to the meeting substantially in the terms of it. It is in important respects wrong. By reference to the numbered paragraphs in the document:

1. Cowan's contract was not of a fixed amount. Three of the four agreements provided for a calculated or pro-rata entitlement depending on such matters as marketing expenditure and sponsorship receipts.
2. They were executed on 1 September 1996, not two months and eight days later.
3. The variation in each agreement was for annual increments of 5% or CPI, whichever was the greater, for the entire term of the contract, not merely for five years.
4. It is hard to know what this means, and hence hard to judge its accuracy.

5. Similarly here: certainly there are pro-rata benefits payable.
6. In the absence of knowing by whom the remuneration package is said to have been "*fully investigated*", it is not possible to say whether this is a true statement.
7. Probably this is true.
8. Probably the Executive was of the stated opinion.

MEETING OF THE EXECUTIVE WITH CEO ON 6TH JULY, 2000.

SUBJECT: CEO REMUNEATION.

1. The contract of the CEO is one of a fixed amount.
2. It was executed on the 9th November, 1996, and terminates on the 9th November, 2005.
3. The only variation to the contract was an annual increase of five percent, for five years only from the 9th November, 1996.
4. The remuneration package excluded the supply of a motor vehicle but it is part of the contract.
5. There are no bonuses or benefits to the contract of any kind at all, apart from the annual increase.
6. The remuneration package was structured at the discretion of the CEO, it has been shown to us and was fully disclosed to the external auditors, and fully investigated.
7. At the time the contract was entered into it was ascertained it was in accordance with the accepted levels and benchmarks of persons employed in similar capacity.
8. The Executive is of the opinion the remuneration package of the CEO is of an acceptable standard.

*Report Given By Larry Walsh
to Andrew Jones Meeting
on Tuesday 18/12/01.*

11.24

This document again tends to the conclusion that information was kept from James throughout the relevant period. It refers to a contract in the singular, and "*It*" having been executed on a particular date. However, for reasons stated above I cannot confidently so conclude. A question which clearly arises is whether

Walsh misled the Board in conveying the information he did at the December 2001 meeting. The answer must be in the affirmative. As I have demonstrated, the information conveyed is to a significant extent simply wrong. This probably resulted from confusion, rather than mendacity, on the part of Walsh.

ROLE OF EXTERNAL AUDITORS

11.25

Several directors testified to their belief and understanding that the Club's external auditors were responsible for ensuring that all was in order so far as dealings between Cowan and Phyro Holdings on the one hand, and the Club and related entities on the other, were concerned. This was largely wrong. Those auditors are Ernst & Young, and Ezzy of that firm gave evidence that he knew of Phyro as a supplier of services to the Club, but he did not know until late that Phyro was a Cowan company. Cowan gave evidence that he probably had not disclosed to Ernst & Young that the Phyro invoices contained what he called arbitrary, but are in fact false, particulars. Ezzy had responsibility for the audit from 2000, but did not know of the Cowan-Phyro connection – in my mind a critical fact – until 2002. Many of the unusual payments processed through Phyro accounts – those detailed at 9.13 above – were not known to him.

11.26

Ernst & Young did not subject the Phyro dealings with the Club to special scrutiny until asked to do so. That happened in late 2003 when the Board at Cowan's suggestion engaged the firm to perform certain procedures by way of checking the dealings between Phyro and each of the Club, the Football Club and Panthers Sports Promotions Pty Ltd. This was done to assist Board members in satisfying themselves that Phyro's dealings with those entities, and Cowan's remuneration under his employment contract, were in accordance with the four agreements dated 1 September 1996. The period covered was three years and four months, from 1 November 1999 to 31 March 2003. Individual years were not examined. The report is to be found in Appendix 2.

Ezzy was asked:

11.27

So, for that period in its entirety, the firm found that the actual profits earned by Phyro were less than what it was entitled to under the contracts? --- That's correct.

That leaves open, however, the possibility, does it not, that in any individual year within the period – Yes, it does leave open, yes.

That the actual profits earned by Phyro were more than the budgeted profits in any particular year? --- Yes.

Or, to put it another way, in any particular period which might be examined? --- Yes.

But that your conclusion was that for the whole of the period covered by the review, Mr Cowan was, in effect, behind? --- Correct.

11.28 The position concerning the period from 1 September 1996 to 1 November 1999 is unknown. The period prior to 1 September 1996, when there was one Phyro agreement with the Club alongside Cowan's employment contract, is likewise unknown. For that earlier period, probably 10 years, it would seem it cannot be checked as I am told the relevant agreements cannot be found. Whether overall Cowan and Phyro are ahead or behind is a matter as to which I can make no finding.

11.29 The Ernst & Young working papers relative to the preparation of this report contains a list of queries, and responses to them, two of which are now reproduced:

31/7/01 – What is the scarlex invoice for? Agreed to supporting documentation. Invoices relate to marketing support provided to Phyro by Marketing Consultant

1/9/02 – What is House Deposits \$22,000? Agreed to confirmation provided by Panthers Group General Manager. Payment is in accordance with Contract and the terms of this review

11.30 In each respect an Ernst & Young employee properly sought information, which was provided. Unfortunately, in the first case it was provided wrongly, although by whom I cannot say. The plain fact is that Scarlex Pty Ltd was a company through which John Wilson, then the Club's gaming manager, received part of his remuneration. The company had nothing to do with marketing, and if there was an invoice relating to marketing support provided by Scarlex – I have not seen it – it was not accurate. As to the \$22,000 advanced to Preston Campbell to pay a deposit on a house, it is inaccurate to say that such payment was in accordance with any of the four Cowan – Phyro contracts. This matter was picked up, as reference to the penultimate paragraph in the Ernst & Young report (see Appendix 2) makes clear.

IN CONCLUSION

11.31 It seems to me that a very unsatisfactory position has arisen. Because nobody has kept a close eye on Cowan over a number of years now, and because in a number of respects document trails cannot now be followed in confident fashion, it will not be possible to work out whether the Club owes money to Cowan and his company or vice versa, and in either event what the appropriate figure is. Whether or not those who now comprise the Board will have the intestinal fortitude to try remains to be seen, but even if they do the effort is likely to

produce an uncertain outcome. That is a state of affairs which only can be deplored.

11.32 I can say two more things. The first is that there is nothing which to my mind indicates that Cowan has stolen money from the Club. His self-image is not that of a thief, and I believe him to be a man who acts strictly in accordance with his self-image. He has of course done well out of the Club, but it has done well as a result of his efforts. He has not set out to take more than what he sees as his due entitlement. He is motivated by two things – doing his best for the Club, and a desire to do as he pleases, without being accountable. Cowan's satisfied desire not to be accountable is closely linked to his obsession with secrecy.

11.33 Secondly, the job of prudentially supervising the wide range of Cowan's activities has proved to be quite beyond the Board. Most members did not even try. Those that did were got rid of, in October 2002. Cowan played a major role in their defeat, which was also a defeat for accountability.

11.34 In saying this, I have borne in mind what was said on behalf of Walsh, the Club Chairman, in closing submissions. It was that of necessity he had *"to maintain and has maintained a 'helicopter view' of the operations of the Club and its 14 separate premises and 1,500 employees. This means that many details are left to others"*. I accept that is as it should be – it is not for the Board to be across all operational issues. But it is their function to supervise the CEO, and that was not done adequately – indeed hardly at all.

CHAPTER 12

PANTHERS – COWAN'S PERSONAL FIEFDOM?

THE ALLEGATION

- 12.1 On 27 September 2002 a letter signed by the 'Footy Five' was hand delivered to Cowan. It referred to the "*fractious nature*" of his relationship with the Board, dealt with football issues and the Penrith team's lack of success at some length, rehashed the Parramatta Panthers issue, complained about information being withheld from the Board or provided to it or at its direction in a laggardly fashion, and dealt with issues concerning amalgamations. The letter was long, forceful but reasonable in its tone. It finished in this way:

As Board members we have been elected by the membership of the club to ensure that their interests are protected. Panthers is not a personal fiefdom for any director or any employee. It is not "owned" by any one person. Panthers is "owned" by it is members and it's to those members that we are always accountable. We have never been "yes men" and if we think that a decision or direction by management warrants investigation or further explanation then we have and will continue to ensure that appropriate questions are asked in order to enable us to act in the best interests of the club's members.

- 12.2 The broad question dealt with in this chapter is whether, and if so to what extent, Cowan has treated Panthers as his personal fiefdom. It relates to the last of the allegations I am required to investigate, under the Instrument of Appointment, namely that "*the Club is, and has since at least 1 June 1994 been, to a large extent run by and for the benefit of Mr Cowan and his close associates, including members of his family and Phyro Holdings Pty Limited, and not in good faith for the benefit of all members of the Club*".

- 12.3 Who can be looked on as Cowan's "*close associates*"? Clearly that includes Phyro Holdings, Phyllis Cowan and Max Cowan. Are there others? The question is not a narrow one, as the expression under consideration has no defined or otherwise precise denotation.

CLOSE ASSOCIATES

- 12.4 Each of Steven Bowers, Susan Keenan and John Wilson was paid through Phyro. That was true of Bowers throughout, of Keenan for a substantial period, and of Wilson as to part of his salary, for a substantial period in total. In his case his pay was supplemented by Phyro payments to two companies, Alaugh Pty Limited for a time and Scarlex Pty Ltd at a later time. Another person who may be looked upon

as a close associate of Cowan is Glenn Matthews, who never received any money through Phyro.

- 12.5 Bowers is clearly one of Cowan's close associates. Matthews, along with Max Cowan, and to a lesser extent Wilson, played roles in helping get rid of the 'Footy Five' in October 2002. They then emerged as strong Cowan loyalists, and as judged by their conduct can be fairly looked upon as close associates of his. However, both Wilson and Matthews are men of considerable ability, and it cannot be said that either has received undue promotion. They are both valuable and valued employees.

THE GENERAL PICTURE

- 12.6 The general picture that emerges, from the evidence as a whole, is that Cowan runs the Club much as he chooses with little interference by the Board, although in a collegiate manner as between himself and members of senior management including Matthews, Wilson and Bowers. In some respects, for example amalgamations, he had to go through the Board and did not always get his own way. And so it was with the Board decisions first to cancel the April 2002 election, and subsequently to effect constitutional changes, both of which he wished to see handled differently. It cannot be said the Board was merely a group of cardboard cut-out figures.

- 12.7 As to part of the general picture, namely Cowan's entitlements personally and through Phyro, it is clear he had effectively untrammelled power for many years. For the great part of the period since 1 June 1994 Phyro accounts have not been checked by or on behalf of the Board. Until the Inquiry most Board members, including even Executive members, did not know anything about the unusual payments processed through Phyro accounts and referred to at 9.13 above. Board members, including even Executive members, had no idea how much money was passing from the Club to Phyro; that was true at all times until late September 2003 when a story appeared in *The Sydney Morning Herald* headed "*Panther's boss charged the club millions*".

WHAT COWAN DID

- 12.8 I find that Cowan, and he alone, decided whether and when Phyro invoices would be rendered, and what would be claimed in them. He and he alone decided when Phyro invoices would not be rendered. He did this for two purposes, one particular and the other general. The particular purpose is that dealt with in Chapter 11 – to try to skew the Cowan remuneration figure which had to be disclosed with respect to the year ending 31 October 2002 by not rendering accounts in the following February and March. That was not done with the sanction of his superiors, the Board – he simply decided to do it, just as he drove the disclosure process. More generally, Cowan has from time to time claimed less on Phyro's behalf than he could have done, with a view to ensuring that the Club

was always ahead and Phyro always behind. Whether that aim was achieved cannot be said with confidence, but in any event the tempering of claims was again solely at Cowan's decision, not a course of action agreed between him and the Board.

12.9 In like manner, the evidence shows that by simple direction to the payroll office Cowan stopped taking pay for a period of months, and took large amounts of pay in lieu of leave at about the same time. Both these things were done without Board sanction, or even knowledge on the part of most directors.

12.10 It is Cowan who decided that part of his base pay should come to him through Phyro, not the payroll office. It is Cowan who decided, in consultation with the individuals concerned, that the same should be done for his son Max (through Ploditus Pty Ltd) and for Wilson (through Alaugh and Scarlex) without Board involvement. And so far as Max Cowan is concerned, I doubt he would be in the position he is were he not his father's son. That is not to say he is incompetent, and I make no finding as to whether or not the level of pay he receives is appropriate to his abilities and performance. I do not know either way.

12.11 A fair general finding, which I make, is that the dealings between Phyro Holdings Pty Ltd on the one hand and the Club and related entities on the other hand was dictated entirely by Cowan. In this area he did as he wished. He did so pursuant to contracts of which most members of the Board were entirely unaware. He decided what would go into the Phyro invoices, which contained false particulars.

BENEFIT TO COWAN?

12.12 Some people, perhaps many people, like to get their own way. Cowan is merely an extreme example of the type.

12.13 He has benefited from the extreme and unrestrained power he has to dictate the way in which Phyro deals with the Club in three ways. The first is potential for abuse, to an awesome extent, if he chose to exercise it. He could have done that at any time, although I do not find that he has taken more than his and the company's due entitlements. Secondly, the situation which has arisen and is summarized at 11.31 above is one in which the taking of accounts between the Club and Phyro will be attended by grave difficulties. To the extent that Cowan and Phyro cannot be made properly accountable in this fashion, he and the company have benefited.

12.14 Thirdly, when he considers it necessary Cowan can cause the Club to act in a manner that suits him, whether or not that is in the best interests of the Club. A good example is provided in Chapter 10 of this Report. The Club was obliged by statute to report as to his total remuneration, comprising salary, allowance and other benefits. After discussion it was agreed on all sides that this must include

the Phyro profits. Because of the large amount of leave paid out that year, the amount disclosed should have been in excess of \$750,000. That did not suit Cowan, and he supplied a Phyro profit figure of \$43,498 which had nothing to do with the amount paid to the company in the year to 31 October 2002. Cowan benefited because he caused the Club to make the disclosure that suited him, despite the fact – as found above, at 10.20 - the members were thereby misled.

CONCLUSION – ALLEGATION 6

- 12.15 The Club has to a large extent been run by Cowan over a period now approaching 40 years.
- 12.16 The Club has to an extent been run for the benefit of Cowan and Phyro Holdings Pty Ltd since at least 1 June 1994. That extent is as outlined above. I find it to be fairly categorised as considerable, rather than large.
- 12.17 I do not find that Cowan's involvement with the Club, on balance, has been against the best interests of members generally. He has done it and them much good. Nor do I find that he has done other than seek in good faith to benefit those members. Disbenefit to them will arise only if and to the extent that, because financial affairs cannot be worked out in a confident fashion between Phyro and the Club, the company gets away with more than it is entitled to. It is likely that the extent of that – if it happens, and it may not - will never be known.
- 12.18 Cowan cares passionately about the Club, and it is clear he wants to benefit its members – all of them including members of amalgamating clubs. He cares more about those members than he does about Club directors. Because of his obsessive drive for secrecy, his attitude to accountability is one which caused grave problems, and largely led to the current Inquiry.
- 12.19 I find Allegation 6 – fairly described by Counsel for the Club as "*the most serious allegation*" – not to have been made out.

APPENDICES

APPENDIX 1

List of Witnesses

	Name	Report Reference	Transcript Reference
Alexander,	Gregory Peter	2.22, 2.23, 6.4, 6.30, 6.36, 6.37, 6.38, 6.39, 6.40, 6.41, 6.47, 6.48	1372 - 1393
Identity Suppressed			1676 - 1703
Bateman,	John Gerard	2.3, 5.4, 5.15, 5.17, 5.18, 6.4, 6.25, 6.27, 6.36, 6.38, 11.19, 11.22	681 - 758 1166 - 1249 1251 - 1269
Bentley,	Colin David	5.18, 6.4, 6.36, 6.37	1393 - 1404
Boon,	Brett Andrew	2.15, 2.16, 2.17, 5.7, 5.8, 5.9, 5.12, 5.29, 7.14, 7.15,	1433 - 1482
Bowers,	Stephen	2.16, 4.7, 7.4, 7.5, 7.14, 8.17, 8.18, 8.20; 8.24, 9.10, 9.11, 9.12, 12.4, 12.5, 12.6	183 - 222 299 - 306
Byrne,	Jannette Marie	6.10, 6.13	1349 - 1355
Callcott,	Timothy William Mewton	10.12, 10.13, 10.16	1742 - 1778 1798 - 1803
Coffey,	Dennis Michael	2.3, 5.4, 5.8, 5.18, 6.4, 6.25, 6.27, 6.36, 6.38	1302 - 1334
Cowan,	Maxwell John	1.8, 6.23, 6.28, 6.41, 6.42, 6.43, 9.10, 9.13, 9.14, 9.24, 12.3, 12.5, 12.10	1086 - 1133 1804 - 1816
Cowan,	Roger Maxwell	Throughout	56 - 127 128 - 182 388 - 85 514 - 82 762 - 837 1585 - 1626 1646 - 1675 1842 - 1867 1909 - 1956 1997 - 2024
Evans,	Gregory Alan	2.3, 5.2, 5.18, 6.1, 6.4, 6.9, 6.25, 6.27, 6.34, 6.36, 6.38, 7.14	1271 - 1302
Ezzy,	Graham John	10.12, 10.13, 10.22, 11.25, 11.27	1869 - 1909
Feltis,	Donald George	6.4, 6.25, 6.36, 6.37, 6.38, 9.13	1134 - 1141
Golding,	Phillip Douglas	Not mentioned	1362 - 1365

Heidtmann, Terrence Francis	2.8, 5.18, 6.4, 6.37, 6.38, 7.12, 9.18, 9.19	636 – 679
James, Geoffrey Clifford	2.3, 2.5, 5.18, 6.4, 6.9, 6.25, 6.27, 6.36, 6.38, 7.9, 7.10, 7.11, 9.17, 9.18, 11.12, 11.13, 11.14, 11.15, 11.16, 11.17, 11.19, 11.20, 11.24	1019 – 1067 1068 – 1084
Jones, Ivor William	5.20, 5.21, 5.22, 5.23, 5.24, 5.25, 5.26, 5.28, 6.20, 6.21	1406 – 1433
Keenan, Susan Mary	9.13, 9.14, 12.4	942 – 972
Kilmister, John Terry	2.10, 11.10	486 – 514
Lawler, Terence Henry	10.12, 10.15, 10.16	1706 – 1742
Matthews, Glenn David	6.3, 6.5, 6.6, 6.7, 6.8, 6.9, 6.10, 6.11, 6.12, 6.15, 6.18, 6.21, 6.23, 6.26, 6.28, 6.29, 6.38, 6.40, 9.22, 9.23, 9.24, 9.33, 10.12, 10.13, 11.5, 11.6, 12.4, 12.5, 12.6	861 – 942
Renneberg, Benjamin David	6.10, 6.15, 6.16	1355 – 1361
Rhind, Keith Leonard	2.5, 5.4, 5.17, 5.18, 6.4, 6.25, 6.36, 6.37, 6.38, 6.41, 6.42, 6.44, 8.14, 8.17, 8.22, 8.25, 9.15, 11.12, 11.13, 11.17	583 – 635 1629 – 1645 1985 – 1997
Richardson, Kim	6.10, 6.11	1342 – 1349
Sheridan, Peter Lindsay	9.25	973 – 1018
Terry, Craig Edward	2.3, 2.15, 5.7, 5.8, 5.17, 5.18, 5.19, 6.4, 6.9, 6.25, 6.27, 6.36, 6.38	265 – 293 295 – 299 306 – 351 838 – 858
Towell, Samantha Anne	Not mentioned	1554 – 1585
Walsh, Barry John	2.5, 2.8, 2.15, 4.10, 5.4, 5.15, 5.17, 5.18, 6.4, 6.36, 6.37, 6.38, 7.3, 7.6, 7.7, 7.8, 8.14, 8.18, 9.16, 9.33, 11.12, 11.13, 11.19, 11.21, 11.23, 11.24, 11.34	20 – 56 351 – 382 1816 – 1842
Whiting, Karen Robyn	10.12, 10.16, 10.17	1778 – 1798
Wilson, John Robert	2.13, 6.23, 6.28, 6.29, 9.10, 9.13, 9.14, 9.24, 11.30, 12.4, 12.5, 12.6, 12.10	1141 – 1164
Zivanovic, Lou	9.13, 9.28, 9.29, 9.31, 9.32, 9.33	1523 – 1554

APPENDIX 2

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REPORT OF FACTUAL FINDINGS

To the Board of Penrith Rugby League Club Limited

Scope

We have performed the procedures requested by you as detailed in our engagement letter dated 3 December 2003 and described below with respect to the dealings between Penrith Rugby League Club Limited ("PRLC"), Penrith District Rugby League Football Club Limited ("District"), Panther Sports Promotions Pty Limited ("Promotions"), Phyro Holdings Pty Limited ("Phyro") and Mr Roger Cowan for the period 1 November 1999 to 31 March 2003.

Phyro Holdings Pty Limited is a company of which Mr Roger Cowan is a shareholder. Phyro Holdings Pty Limited performs certain services for PRLC, District and Promotions, and also conducts other activities unrelated to PRLC, District and Promotions. Roger Cowan is also employed by PRLC in the position of General Manager of the Panthers Entertainment Group. The trading relationship between Phyro and PRLC, District, Promotions and the employment of Mr Roger Cowan is governed by four contracts:

- 1) between PRLC and Phyro dated 1 September 1996 ("Contract Number One");
- 2) between District and Phyro dated 1 September 1996 ("Contract Number Two");
- 3) between Promotions and Phyro dated 1 September 1996 ("Contract Number Three"); and
- 4) between PRLC and Mr Roger Cowan dated 1 September 1996 ("Employment Contract")

collectively referred to hereafter as "The Agreements".

Our engagement was undertaken in accordance with Australian Auditing Standards applicable to agreed-upon procedures engagements. The responsibility for determining the adequacy or otherwise of the procedures agreed to be performed is that of the Directors of PRLC.

The procedures were performed solely to assist you in satisfying yourselves that Phyro's dealings with PRLC, District and Promotions and Mr Cowan's remuneration under the Employment Contract are in accordance with the Agreements. The procedures are summarised in the "Agreed Upon Procedures" section of this report.

Agreed Upon Procedures

- 1 We vouched the total payments made by Phyro in relation to PRLC, District and Promotions to suppliers and employees, to supplier invoices and relevant payroll documentation for the period 1 November 1999 to 31 March 2003.
- 2 We vouched the amounts invoiced to PRLC, District and Promotions by Phyro, to Phyro invoices for the period 1 November 1999 to 31 March 2003.
- 3 We compared the amounts referred to in Item 2 to deposits in Phyro bank statements for the period 1 November 1999 to 31 March 2003.

ERNST & YOUNG

- 4 We compared the Budgeted Profits¹ for Phyro to the actual profits earned by Phyro for the period 1 November 1999 to 31 March 2003.
- 5 We compared the salary entitlement for Mr Roger Cowan, per the Employment Contract to the actual salary paid by PRLC to Mr Roger Cowan for the period 1 November 1999 to 31 March 2003.
- 6 We compared the transactions in procedures 1 to 5 to the terms and conditions of the Agreements.

The above procedures do not constitute either an audit in accordance with Australian Auditing Standards or a review in accordance with Australian Auditing Standards applicable to review engagements. Consequently we do not express any audit assurance on the statutory financial statements of Phyro for the period 1 November 1999 to 31 March 2003. Had we performed additional procedures or had we performed an audit in accordance with Australian Auditing Standards or a review in accordance with Australian Auditing Standards applicable to review engagements, other matters might have come to our attention that would have been reported to you.

Our examination was made in accordance with Australian Auditing Standards applicable to agreed-upon procedures engagements. Our tests of the financial records and other agreed upon procedures were limited to those which were considered by the PRLC Board of Directors as necessary to report that the profits earned by Phyro from its transactions with each of PRLC, District and Promotions and the salary earned by Mr Roger Cowan were no greater than the legal entitlements under the Agreements.

Findings

We report as follows:

- (a) With respect to item 1 we found the total payments made by Phyro in relation to PRLC, District and Promotions to suppliers agreed to supplier invoices and to employees agreed to relevant payroll documentation for the period 1 November 1999 to 31 March 2003.
- (b) With respect to item 2 we found the amounts invoiced to PRLC, District and Promotions by Phyro agreed to Phyro invoices for the period 1 November 1999 to 31 March 2003.
- (c) With respect to item 3 we found the amounts referred to in item 2, agreed to deposits in Phyro bank statements for the period 1 November 1999 to 31 March 2003.
- (d) With respect to item 4 we found that for the period 1 November 1999 to 31 March 2003 the actual profits earned by Phyro were less than the Budgeted Profits.
- (e) With respect to item 5 we found that for the period 1 November 1999 to 31 March 2003 the salary paid by PRLC to Mr Roger Cowan was equal to the salary entitlement per the Employment Contract except for some annual increments which were in excess of the

¹ defined as the amounts which Phyro Holdings Pty Limited is entitled to receive under the Agreements



increments allowed by the Employment Contract and were compensated by reduced entitlements to Phyro.

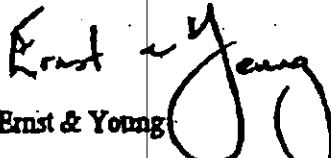
(i) With respect to item 6, we found that:

- (i) the transactions between Phyro and each of PRLC, District, Promotions were consistent with the requirements of Contract One, Contract Two and Contract Three except for one payment as noted below in 'Matter Arising';
- (ii) the salary paid by PRLC to Mr Roger Cowan was consistent with the terms of the Employment Contract.

Matter Arising

With respect to item 6, we found one payment: a 'house deposit' in September 2002 for \$22,000. This amount was subsequently reimbursed by PRLC however the nature of the payment does not appear to be consistent with the provision of the services as defined in the Agreements. Phyro did not earn any profit from this payment and its subsequent reimbursement. PRLC management have confirmed that the amount was valid and authorized expenditure of the PRLC group of companies.

Our report is solely for the purpose set forth in the first paragraph of this report and for your information. We understand that a copy of this report will be made available to the Department of Gaming and Racing. This report is not to be used for any other purpose or distributed to any other party other than Department of Gaming and Racing without our prior written permission. This report relates only to the relevant payroll documents, accounts and the items specified above and does not extend to any financial report of Phyro Holdings Pty Limited, taken as a whole.


Ernst & Young

Sydney, 10 December 2003