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1. A Letter from the Presidents

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Dear valued Member,

We strongly urge you to vote for the proposed merger of our two Clubs.

The merger is founded on two key planks. It will be a merger of equals who also share a common Vision – to create a new Club that will be one of the finest in Australia.

The extensive due diligence investigation of the financial, legal and golfing aspects of a merger present a compelling case that those objectives can be achieved.

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As equal partners both founding Clubs will contribute their assets (of comparable value) to the new Club and will have equal representation on its Board.

The vision – of Members enjoying the finest in Sandbelt golf with two championship standard courses, state-of-the-art facilities and financial security through a substantial Future Fund – can be met through the financial, legal and governance arrangements outlined in this Members' Information and Voting Pack.

The due diligence, conducted with the assistance of independent professional advice, has demonstrated there is no case to stay "as we are" and a strong case to merge:

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- The financial, structural and societal challenges faced by the private golf club sector – and the individual circumstances of our Clubs – mean that industry rationalisation is inevitable and that maintaining, or tinkering with, our current business models is not sustainable; and
- By contrast, the merger will provide greater financial certainty, cost synergies, a top tier Sandbelt Club with strong membership, enhanced course budgets, no ongoing requirements for external borrowings, an annual operating surplus and a Future Fund.

We believe that it is in the best interests of the Members of both Clubs to merge – and **to create, together**, one of the finest Clubs in Australia.

It will be a Club of which you will be proud to be a founding Member, which will honour the history of our great Clubs and which will enhance greatly your golfing and social enjoyment.

Yours sincerely,

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Peter Sweeney

President
Kingswood Golf Club

Gerry Ryan

President
Peninsula Country Golf Club



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August 12, 2013

The Members
Peninsula Country Golf Club and Kingswood Golf Club

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Dear Members,

It is no shock to most that there is mounting operational and financial challenges being faced at many golf clubs across Victoria. At a high level, the general challenges being faced include membership attrition rates, the overall value proposition of membership, facility expense growth, increased governance and compliance responsibilities and costs, and on-going funding of infrastructure renewal and replacement.

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In response to these realities some clubs have already conducted club to club discussions about the possibilities of amalgamation. With varying processes followed, some of these discussions progressed a reasonable distance, with others stalling almost as quickly as they began.

Recognising the wider challenges being faced and observing the club to club discussions taking place, Golf Victoria ("GV"), as the peak body for golf in Victoria, believes successful amalgamation outcomes are in the industry's interests and also the long term interests of GV.

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Golf Victoria supports the work done by Peninsula CGC and Kingswood GC to drive the potential successful merger of two clubs. The creation of a future fund will ensure a strong financial position and safeguard the longevity of the new club.

We wish you all luck in your golfing future.

Yours sincerely

Simon Brookhouse
CEO

John Hobday
President

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2. Executive Summary

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This Member Information and Voting Pack has been prepared to enable Members to make an informed decision on the Resolutions and should be read in full. It follows an extensive review process undertaken by both Clubs over a number of months. This summary provides an opening insight:

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- The challenges faced by the private golf Club market are adversely impacting our Clubs. Traditional business models are not sustainable (pgs. 8-9, 26, 34, 46-51)
 - Declining memberships, discounting, "pay for play", growing unfunded capex, trading losses
- By contrast a merger of our Clubs offers a great opportunity for the new Club to thrive through (pgs. 26, 34, 52-54)
 - Financial strength, a high quality offer, cost synergies and stability from a large membership base, and no long term external borrowings
- Fundamental to that will be the creation of a Future Fund that provides financial security and regulated access, through the Club's Constitution, to some Fund earnings while the value of the Fund increases over time (pgs. 14-16, 53)
 - Estimated growth from \$39.4M (2017) to \$43M (2019) to \$51.1M (2023) post Club disbursements
- The merger can achieve all elements of the new Club's Vision (pgs. 10-11, 34, 38)
 - The finest in Sandbelt golf in a country club environment – with two championship standard courses playable by all members, state-of-the-art facilities and the financial security offered by a Future Fund
- Member benefits, both transitional and long term, are substantial (pgs. 18-23)
 - Subscription relief, no house levy, grandfathering membership categories, enhanced courses and facilities, founding membership of a premier Sandbelt Club
- The governance arrangements, and asset composition, for the new Club reflect the equal partner status of both founding Clubs (pgs. 13, 25)
 - Through the transition, equal Board representation and annual rotation of the Presidency; and by committing Club assets of comparable value
- The merger procedure is tax effective and complies with relevant law (pgs. 17, 37)
 - Using the current corporate entity, Kingswood, as the vehicle to create the new Club "Peninsula Kingswood Country Golf Club" will save substantial stamp duty which can be put to member benefit
- 40 and
 - A three stage strategy has been framed offering a pathway to deliver the Vision for Members (pgs. 40-41)
 - 1 - Establishing the essential building blocks for success, 2 - Completing the course and facility enhancements, 3 - Emerging, and being recognised, as a Top Tier Sandbelt Club that is one of the finest private golf Clubs in Australia



3. Introduction

The Challenges for Traditional Private Golf Clubs

Traditional private golf clubs throughout Australia are facing structural, financial and societal challenges unlike anything previously experienced.

External economic factors have reduced discretionary expenditure and increased the need for private golf clubs to offer greater value for money to existing and prospective members.

Demographics, increased work and family commitments, time constraints, alternative leisure pursuits and new entrants offering attractive 'pay for play' options have lessened the demand for the traditional membership offer.

The Facts

- Australian golf club memberships nationally are in a 10 year decline.¹
- 5 Australian clubs are closing or under administration, and numerous better quality public access courses are now for sale or in administration.
- Victorian golf club memberships fell by 7% between 2008 and 2012.²
- 50% of Melbourne golf clubs have reported financial losses in the past 12 months.³
- Golf club entrance fees are disappearing.
- Discounting of annual subscriptions is placing many golf clubs under duress.
- Waiting lists have all but vanished; and
- Rationalisation, including mergers, is being explored by many golf club entities.⁴

¹ Golf Australia 2012-2013

² Golf Victoria Structural and Governance Review 2012-13

³ Golf Victoria Structural and Governance Review 2012-13

⁴ Sport Business Partners

Traditional private golf clubs throughout Australia are facing structural, financial and societal challenges unlike anything previously experienced.

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Peninsula Country Golf Club (PCCC)

- The entrance fee for 7-day membership has halved;
- 6-day memberships have been introduced with no joining fee;
- An under 40's category was introduced at 50% rates;
- Membership has declined from 1,730 to 1,705 over the past 4 years;
- Trading losses are not sustainable and are estimated at \$165,000 in 2013; and
- Substantial capital expenditure will be required over the next ten years to ensure that courses and facilities remain competitive with top tier Sandbelt Clubs

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Kingswood Golf Club (KGC)

- Membership has declined by 25% over the past 10 years;
- Joining fees have all but disappeared in the last 3 years
- To maintain current facility and course standards an average subscription and levies must rise to \$5,000 by 2017 and to \$8,000 in the next 8 - 10 years; and
- Significant capital expenditure will be required over the next 5 years.

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Strategic Reviews

Separate investigations were undertaken by PCCC and KGC with similar findings.

These included:

- Development of substantial club house facilities is no guarantee of member increases or profit generation;
- Golf alone is not an adequate rationale to command a joining fee;
- Working families find golf membership difficult to justify;
- Competition among Tier 2 clubs has obliterated joining fees;
- Few, if any, new golf developments have demonstrated economic viability in the past decade; and
- Many quality clubs are working through the same challenges.

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In a strategic review, KGC examined four options, culminating in a careful study of the cases for "staying" and "merging". This study led the Board to support a merger because it offered the best outcome.

PCCC's strategic response was to develop a vision to create a leading Top Tier Club with a secure future. It evaluated seven options to achieve that vision and concluded that a merger offered the best solution.

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4. The Proposed Merger

Our vision for the future is clear

Working together the Clubs created a vision of a new country golf club. The new Club would provide outstanding facilities and courses on the Sandbelt whilst honouring the history of both founding Clubs.

It would be a merger of equals: the assets of both Clubs would be placed in the new entity: the new Board would comprise 6 members from each founding Club; and, no founding member would be disadvantaged.

An important part of the vision was the development of a framework for a Future Fund, that would provide a long term, financially secure new Club.

THE VISION

**The finest in Sandbelt golf
experienced in a country club environment**

**To be a true private members' Club that respects
the history of both founding Clubs**

**To maintain two championship standard golf courses
ranked amongst the best in Australia, playable by and
presenting an enjoyable challenge for all levels of golfers**

To meet members needs by providing state-of-the-art facilities

To establish a future fund to ensure a secure financial future

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The New Club

The new Club will have a range of features including:

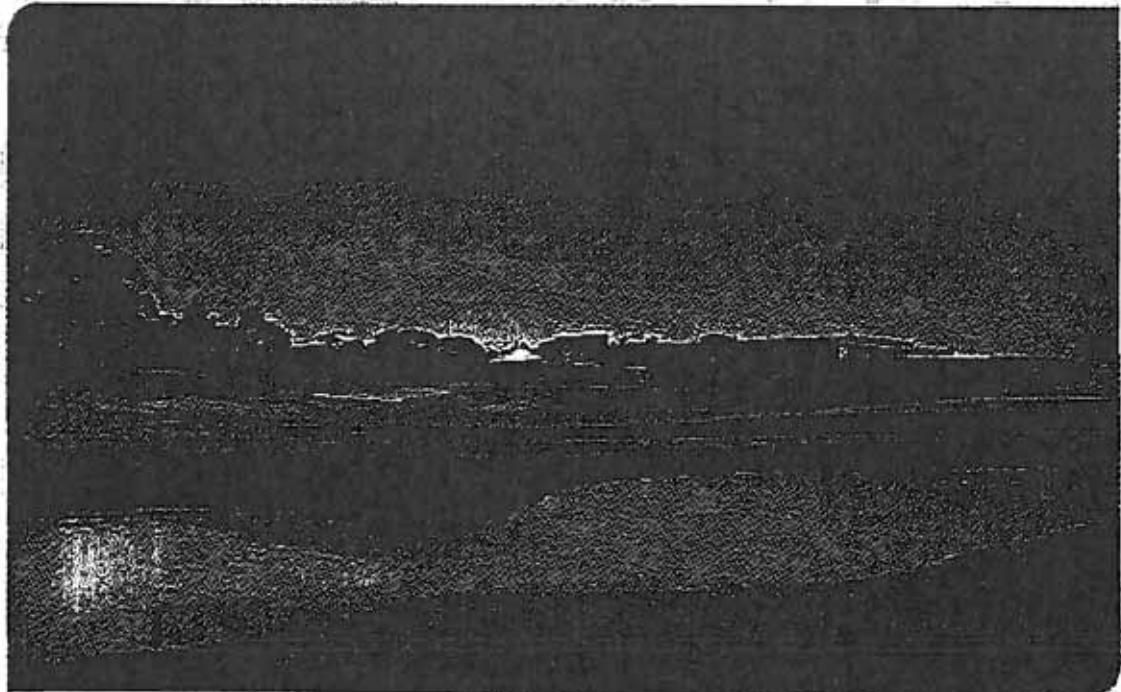
- Two first class, Sandbelt, 18-hole courses;
- State-of-the-art practice facilities;
- Modern facilities including an enhanced club house, dining room and museum;
- Additional sporting facilities such as tennis courts, lawn bowls and croquet; and
- Accommodation and possibly a gymnasium and a swimming pool.

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The new Club will be one where you will be proud to be a member and to entertain your family, friends and colleagues.

At the heart of the Club will be the history of the founding Clubs, where trophies, honour boards, books and photographs will reflect the rich heritage of both Clubs.

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5. The Due Diligence Process

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Scope

A Merger Investigation Working Party (MIWP) was established to oversee the due diligence process. The MIWP comprised the Presidents, General Managers and selected members from both Clubs. This body then reported to the respective Board and General Committee.

The due diligence process covered:

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Governance and Merger Procedure

- Corporate Structure;
- Name;
- The Board;
- The Constitution;
- Future Fund Governance; and
- Transitional Arrangements.

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Membership

- Proposed Membership Categories;
- Transitional arrangements for founding Members; and
- Playing/access rights - transitional period and beyond.

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Financial Due Diligence

- Valuation of each Club's land, as both Clubs will contribute them to the new Club;
- Initial planning advice;
- Due diligence of each Club's recent and current financials;
- Forecasts (to 2019) of 'stand alone' financials of each Club;
- Forecast (to 2019) of merged Club's financials;
- Future Fund forecasts; and
- Taxation implications.

Note: The Board and General Committee present the results of the due diligence in good faith, based on the best available advice and data as at August 2013.

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6. Governance and Merger Procedure

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Corporate Structure

The merged Club will, pursuant to the Corporations Act, be a Company Limited by Guarantee and not having a Share Capital.

Name

The Club's inaugural name will be:

~ PENINSULA KINGSWOOD COUNTRY GOLF CLUB ~

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The name has been chosen as it:

- Honours the founding Clubs by including each in the new name;
- Reflects the new Club being at the Peninsula site;
- Recognises the marketing value of the Sandbelt brand.

The Board

Particular provisions of note to Members are:

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- The Board of the new Club will comprise up to 12 people: comprising the President, Vice President, Captain and Honorary Treasurer ("Officers") and up to eight other members ("ordinary Board members");
- For the first three years (for reasons of continuity and achieving the Vision being voted on by members) a Transitional Board will be appointed by the Board and General Committee of the Founding Clubs pursuant to a binding Merger Agreement to be entered into by the Founding Clubs;
- The Transitional Board will comprise 6 members from each of the founding Clubs - with the offices of President and Vice President to be filled on an annual basis by rotation between Board members from each of the founding Clubs;
- In the event that any Member of the Transitional Board is unable to continue serving as a Director, the remaining Directors of the relevant Founding Club may choose another person to replace the former Director;
- Following the transition period (3-5 years), normal election arrangements will apply, i.e. each year thereafter the two longest-serving Directors (chosen by lot where there is equality of length) must retire at the Annual General Meeting, one of whom may stand for re-election.

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The Constitution

A copy of the proposed Constitution is able to be viewed on the Clubs' websites: www.kingswoodgc.com.au and www.peninsulagolf.com.au

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The Future Fund

The starting premise for both Clubs to consider a merger was that the current private members club model was not sustainable for reasons outlined on pages 8 and 9 of this report and an alternative source of income was required for Clubs to remain viable going forward.

The creation of the Future Fund will provide that additional source of income.

The governance rules are aimed at ensuring a consistent, prudent distribution from the Future Fund to support the operating requirements of the new Club while aiming to maintain the Fund's real value over time.

The Future Fund will ensure the new Club's long term financial viability and contribute to the realisation of the Club's vision as a true members' Club with two championship standard golf courses and state-of-the-art facilities for the enjoyment of Members and their guests.

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The net proceeds from the sale of the Kingswood Club land (after payment of all transitional, operational and capital costs, including the discharge of all Club borrowings) will be invested in the Fund.

The Board of the new Club will be responsible for the management of the Fund. The broad provisions for the creation, initial funding and accessing of the Fund are contained in the proposed Constitution. The detailed governance arrangements will be framed in consultation with independent financial advisers before the Fund is established, prior to the receipt of land sale proceeds.

Those arrangements will include the Fund's defined investment objectives, investment guidelines and instruments to be used, the delegation of investment authority, and the reporting and monitoring arrangements.

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Each financial year an amount of up to 3% of the balance of the Fund would be transferable to the Club for general operational purposes. After this payment, any further accumulated growth of the Fund in excess of aggregated CPI may also be transferred to the Club if required. Undistributed earnings would be capitalised and remain in the Fund. Any further access to the Fund beyond that described here would require the approval of Members.

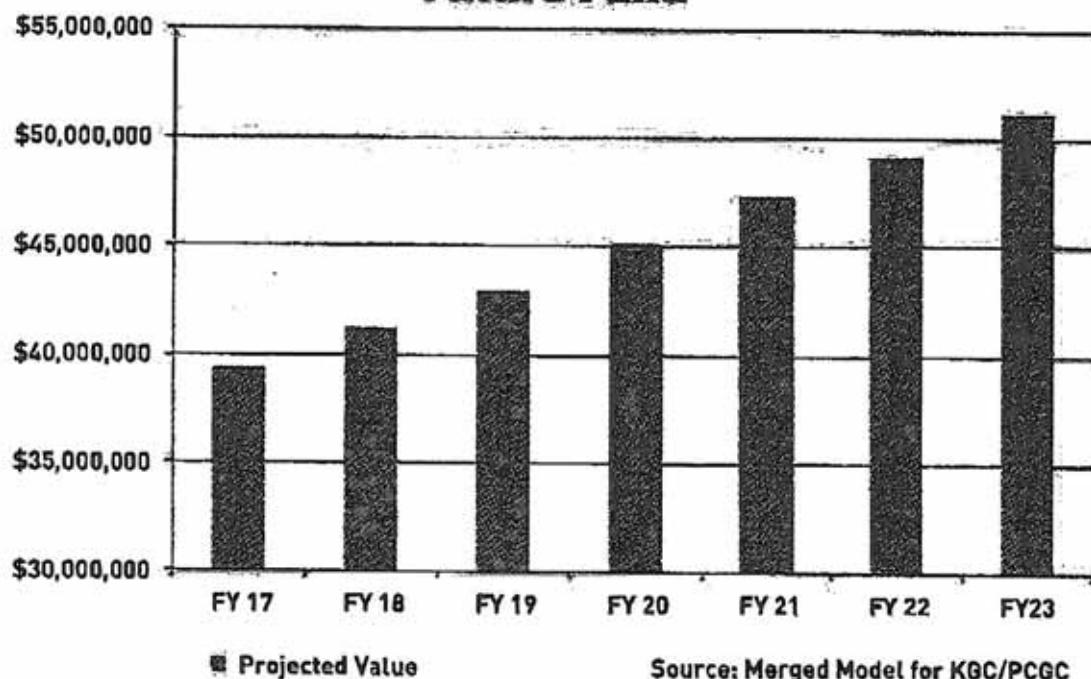
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The following excerpt highlights the projected value of the Future Fund that will underpin the Club's long-term future.

Future Fund



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Based on an average 6% return, and projected trading, cash flow and Capex requirements it is forecast that the Future Fund will not only contribute to annual trading but will grow from \$39.4M in FY17 to \$43M in FY19 and \$51.1M in FY23. PwC has reviewed our assumptions in preparing the projections and believe them to be reasonably based.

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Sale of Land and Future Fund		\$000s	\$000s	\$000s
Estimated Sale Proceeds - Dingley Land (see pg. 25)		70,700		
Costs Associated with Sale				
Transaction Costs/Consultants			2,100	
Re-Zoning Costs - Dingley Land			500	
Stamp Duty - (Frankston Land Transfer) ¹			2,800	
Total Costs Associated with Sale			5,400	
Total Gross Proceeds				65,300
20	Payments for Member Benefits			
	Founding Member Incentives - Subscription Relief			
	KGC - Founding Member Incentives - Transition Period		2,500	
	PCCG - Founding Member Incentives - Transition Period		1,000	
	Founding Member Subscription Relief to FY17			3,500
30	Application of Funds to Frankston Site Facilities			
	Course/Links Upgrades		1,800	
	Course Equipment Replacement		600	
	Water Supply Upgrades		3,200	
	Practice Facility Upgrades		1,000	
	KGC and PCCG Memorabilia/Museum		500	
	Clubhouse Upgrades ²		8,000	
	Total Costs of Course & Clubhouse Upgrades			15,100
	Total Payments for Member Benefits and Improvements			18,600
	Total Proceeds			46,700
	Future Fund			
	Total Proceeds from Land Sale less Member Benefits			46,700
40	Debt Retirement			
	Trading Losses During Transition Period - FY15 to FY17		2,500	
	Existing Debt - PCCG		3,000	
	Interest on Debt from Transition Period - FY15 to FY17		1,700	
	Total Debt from Trading Losses & Transition Incentives			7,200
	Net Proceeds to Future Fund			39,500

¹ May be less subject to stamp duty ruling² Clubhouse upgrade will include locker rooms, bar, dining, pro shop, roofing, kitchen, club and buggy storage and parking

Note: All figures are rounded

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Transitional Arrangements

A number of transitional mechanisms to create the new Club were examined. The key drivers in that examination were to adopt an approach that was the most tax effective and satisfied all Corporations law requirements.

The transition mechanisms are:

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- To hold a vote of the Members at each Club on Board/Committee resolutions to merge the two Clubs (using the steps outlined in this part of the Members' Information and Voting Pack).
 - *By way of an Ordinary Resolution.*
- To change Peninsula Country Golf Club from an incorporated Association to a Company Limited by Guarantee (retaining its assets upon which stamp duty may not be payable subject to ongoing discussions), and having one shareholder (PKCGC)
 - *This will require a 75% vote in favour by eligible Peninsula Members who vote and will be voted concurrently with the merger vote.*
- To admit all Peninsula Country Golf Club Members to membership of the Kingswood Golf Club;
 - *For stamp duty savings and incorporation reasons (See below).*
 - *Peninsula Members need only to sign the authority in the voting pack.*
- To use the current Corporations law entity (Kingswood Golf Club) as the vehicle for creating the merged Club
 - *Reducing potential stamp duty from \$5.5m (if both Clubs had been placed into a new entity) to an estimated \$2.75m by retaining the Kingswood assets in the existing entity (with some potential for further savings in relation to stamp duty on Peninsula's assets);*

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- To approve (under Corporations law, by a 75% vote in favour of those who vote) a new Constitution and name for that entity (i.e., The Peninsula Kingswood Country Golf Club Ltd - PKCGC); and
- Both Clubs will be bound to proceed with the Merger once these steps are completed.

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The Transition Period

The transition period is expected to take between three to five years. It will commence upon the approval of the merger by the members and conclude at the time when the Kingswood course is no longer available for play.

Formal arrangements for playing rights will commence on 1st July 2014. Prior to this date, interim playing rights will be in place.

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During transition, all members will have unlimited access rights to both the Dingley and Frankston Clubhouse facilities during normal service periods. Both courses and Clubhouses will continue to operate as normal.

Transitional Playing Arrangements

The proposed merger is a merger of equals. As such, it provides benefits to members from both clubs during the transitional period and into the future

During transition, members will have Home Club golf rights at their founding club and Visiting rights at the other club.

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A key advantage of the merger is that PCCG offers two championship courses. Analysis of time sheets from both Clubs over the last 12 months, shows that an immediate merger would provide time sheet availability on all days other than Saturday, when on some occasions there would be full fields on both courses.

Following the transition period, tee times will be accessible on both courses, 7 days a week.

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40 The transition period is expected to take between three to five years. During transition, members will have Home Club golf rights at their founding club and Visiting rights at the other club.

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Transitional Playing Arrangements**Year 1: July 2014 - June 2015**

Member Category	Entitlements
All Playing Members	25 mid week games at other club for use on non main competition days
	Swap days and bulk visiting times will be made available
	Use of practice facilities
7 day members	15 rounds on weekends
6 day members	15 rounds on Sundays

Years 2 and 3: July 2015 - June 2017

Member Category	Entitlements
All Playing Members	40 mid week games at other club for use on non main competition days
	Swap days and bulk visiting times will be made available
	Unlimited practice facility access
	Guests with host club approval
	20 places in main mid week competitions at each host club for other club visiting members
7 day members	20 rounds on weekends
6 day members	20 rounds on Sundays

Years 4 and 5: July 2017 - June 2019 *

Member Category	Entitlements
All Playing Members	Unlimited mid week play for eligible members outside main competition times
	40 places at each host club for visiting members during main midweek competitions
	Unlimited practice facility access
	Guests at appropriate times
Eligible Members	3 day advance access to timesheets for internet bookings for Saturday and Sunday

* If the transition period extends beyond 3 years

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7. Membership

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Member Benefits

Members at both founding clubs will receive considerable immediate and longer term benefits from the proposed merger. In acknowledgement of KGC members relocating from Dingley to Frankston, the benefits reflect that contribution to the merger.

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Benefits for KGC Members include:

- Subscription relief - there will be a 50% reduction in annual subscription rates as compared to 2013 and no competition fees during the 3 year transition period;
For example, Kingswood founding members' subscriptions for years 1 to 3 - including no competition fees - provide substantial savings over this three year period (savings are based on fees rising 7.5% per year):
 - A full member will save \$7,010
 - An intermediate member will save \$6,025;
 - A weekday member will save \$5,360;
 - A veteran weekday member will save \$4,652;
 - A couple, who are both intermediate members, will save \$12,050;
- Grandfathering of all main playing membership categories;
- Grandfathering use of golf scooters at PCGC;
- Free practice balls and pull buggy hire at KGC;
- Playing rights to 54 holes during transition;
- Full access to both Clubhouse facilities during normal service periods;
- New reciprocals rights to 35 clubs in Australia and overseas;
- Access to accommodation and other sporting and social facilities such as bridge, tennis, bowls and croquet;
- Two free nights accommodation for pre-payment of subscriptions; and
- Every Member's tenure and length of Membership to carry forward.

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Kingswood Membership Subscriptions in transition *

Member Category	2013/2014	2014/15	2015/2016	2016/2017
Full	3,180	1,590	1,646	1,703
Veteran Full	2,705	1,352	1,400	1,449
Veteran Intermediate	2,320	1,160	1,201	1,243
Veteran Weekday	2,070	1,035	1,071	1,109
Intermediate	2,730	1,365	1,413	1,462
Weekday	2,435	1,218	1,260	1,304
Country/Interstate	535	268	277	287
Limited	1,025	513	530	549
Junior	630	315	326	337
Honorary Life	-	-	-	-
Professional Member	-	-	-	-
Vet. Specific Day	1,050	525	543	562
Social	190	95	98	102
Clubhouse	-	-	-	-
Veteran Social	160	80	83	86
Veteran Limited	870	435	450	466
Social (no charge)	-	-	-	-
Vet. Non-Competition	1,590	795	823	852
Vet. Full (50)	1,355	678	701	726
Vet. Intermediate (50)	1,160	580	600	621
Vet. Weekday (50)	1,040	520	538	557
Vet. Social (50)	80	40	41	43
Vet. Limited (50)	435	218	225	233

* Current Fees

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Benefits for PCCG Members include:

- Subscription relief – Subscriptions will be frozen for three years during the transition period;
- Combined with the discounts in years 4-6, this amounts to an approximate saving of \$2760 per Ordinary member;
- House Levy (currently \$300) will be removed;
- The Club debt of \$3M will be retired;
- Playing rights to 54 holes during transition;
- Full access to the Kingswood clubhouse during transition;
- Grandfathering of existing membership categories;
- Every Member's tenure and length of Membership to carry forward; and
- All existing member benefits to continue.

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Long Term Benefits for all include:

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- In years 4 to 6 all founding members will receive discounts off the subscription rates then determined by the Board from year to year (15% year 4, 10% year 5, 5% year 6).
- All founding members will be members of a Top Tier Sandbelt private golf and country club;
- It will be a truly private club for use of members and their guests;
- Access to two championship standard courses rated amongst the best in Australia;
- Enhanced facilities - clubhouse, locker rooms, dining, museum, bridge room; and
- A financially strong, viable club, through the establishment of a capital protected Future Fund.

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Every member of KGC and PCCG has the opportunity to become a proud founding member of one of the finest private golf and country clubs in Australia.

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Membership Categories

Membership categories at both Clubs were reviewed by a sub committee which included members of both Clubs.

The proposed membership categories and transition arrangements are:

- No member will be disadvantaged in the transition period;
- Member tenure and years of membership will be fully recognised;
- 18 categories of membership;
- Remaining categories from the Clubs' existing structures will be retained for founding members and grandfathered out as they become vacant;
- Entrance fees for new members to be determined by the Board - full ordinary membership attracting a full fee, other categories attracting a lower entrance fee proportionate to their annual subscription amounts; and
- Once the merger is approved, both clubs will cease intake of new members during the transition period, with the exception of immediate family and other mutually agreed exceptions, to facilitate the absorption of all founding members into the new club.

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The Membership categories in the New Club will be:

Life	Younger 31 - 39
Honorary	Non-playing
Ordinary Member	Social
Provisional	Non-playing < 40
Country/Interstate > 200kms	Long term 30/70
Junior 12 - 17	Long term 40/70
Junior 18 - 21	50 Year member
Intermediate 22 - 25	Long Term 40/80
Intermediate 26 - 30	Absentee

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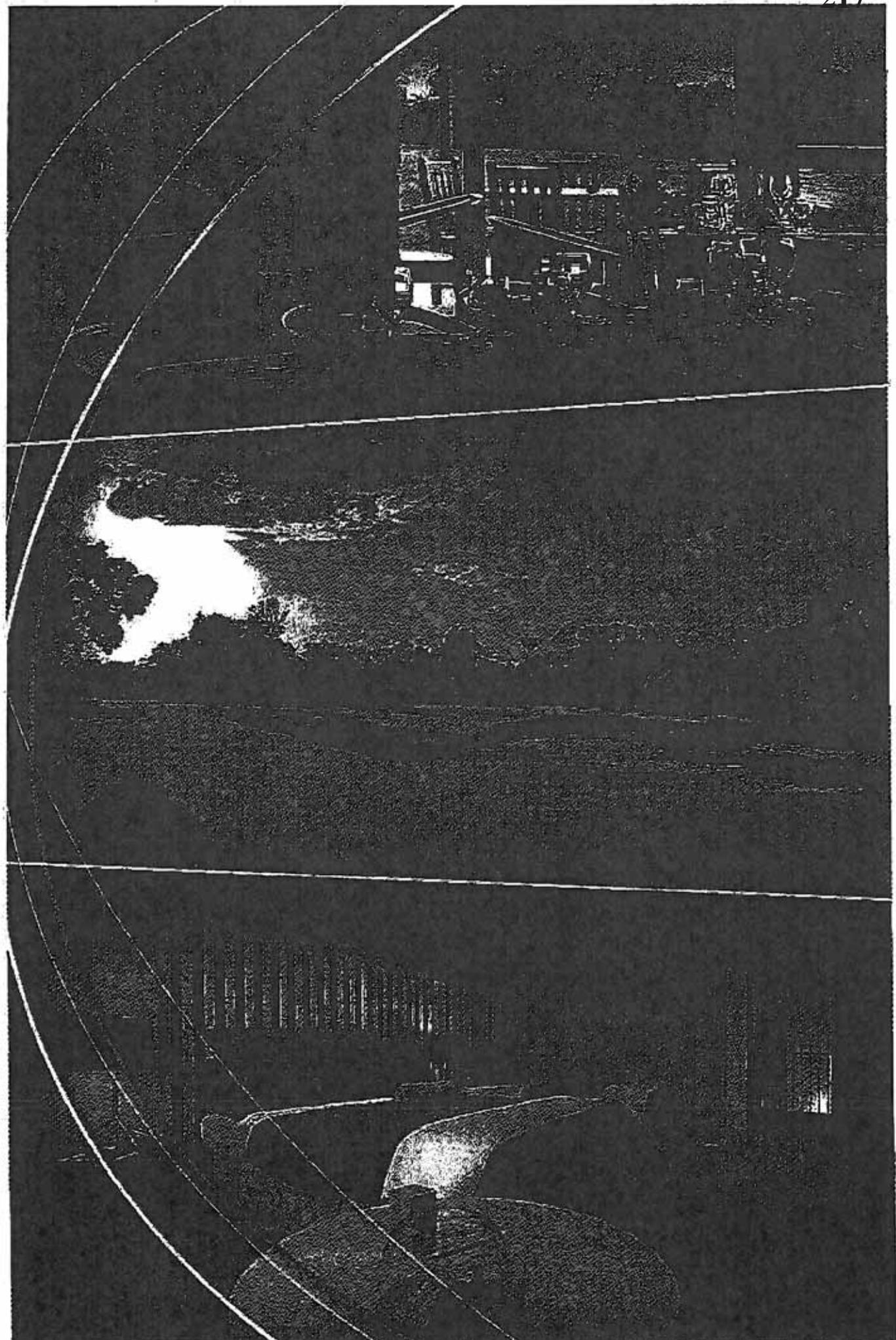
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8. Financial Due Diligence

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Land Valuations

Land valuations were carried out at both properties on an 'as is' basis and on a rezoned Residential basis.

The valuation results are as follows:

Kingswood Golf Club

Valuation 'as is': \$52 million

Valuation if rezoned Residential: \$71 million

Peninsula Country Golf Club

Valuation 'as is': \$54 million

Valuation if rezoned Residential: \$72 million

The KGC valuation of \$71M has been factored into the financial modelling undertaken by PwC for the merged case.

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Financials

Following a bid process, PricewaterhouseCoopers Securities Ltd (PwC) was appointed by the Clubs to undertake a due diligence process which included:

- KGC and PCGC current liabilities and assets
- Operating models until 30 June 2014 and the projected financial position at that time
- The position for each Club were they to operate 'as is' over the next 5 years
- Forecast financial performance of the merged club
- Taxation issues

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PwC's work focused on the historical results for Kingswood for the 3 years ended 30 April 2013 and Peninsula for the 3 years ended 30 June 2013, the projections prepared by us for each club on an 'as is' basis for the 6 years ending 30 June 2019 and the projections for the proposed merged Club for the 6 years ended 30 June 2019.

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PwC's Views at a Glance

PwC's views "at a glance" are that:

- **"The medium to long term viability of Peninsula and Kingswood in their current structures is not financially viable on a stand alone basis."**
 - Based on current trends, Kingswood and Peninsula are projected to operate at a loss of \$1.2m and \$1.0m respectively by the end of the 2018/2019 financial year;
- **"The forecast merger assumptions appear reasonable, with the proceeds from the future fund providing members with increased certainty over the longer term financial sustainability of the Merged Club."**
 - A strong membership base, cost synergies, annual operating surpluses, no requirement for long term external borrowings and further potential upside from stamp duty savings; and
- **"While the financial reasoning for the merger is sound, there are a number of non financial considerations for Management and members."**
 - Securing short term external funding to meet expected cash requirements prior to the sale, managing member numbers during and after transition, achieving the planned sale proceeds and securing the Club recognition needed to drive future member growth.

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PwC's Detailed Views

Kingswood Golf Club

"Given the declining trend in member numbers and the switch from high to low fee membership categories, a significant reduction in operating costs would be required to arrest Kingswood's declining financial performance. This may be difficult without reintroducing high entrance fees or reducing service levels to an unacceptable level." (PwC)

"Management has forecast operating cost increases of only 1.1% p.a. from FY13 to FY19. Given historical cost increases of c 4.1% p.a. and the relatively fixed nature of the cost base, there will need to be a reduction in services (e.g. closing the bar on certain days) and in employee numbers in order to achieve the forecast." (PwC, Kingswood 'As is' case)

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Kingswood Golf Club - Stand Alone

\$000s	Actual FY13	Forecast					
		FY14	FY15	FY16	FY17	FY18	FY19
Members - Total	908	857	807	763	723	689	660
Members - Playing	776	720	665	616	571	532	498
Total Subs Revenue - \$000s	1,675	1,676	1,603	1,529	1,497	1,435	1,383
Ave Subs per Playing Member ..\$	2,159	2,328	2,411	2,482	2,622	2,697	2,777
Total Revenue	3,568	3,516	3,389	3,269	3,195	3,099	3,020
Operating Costs	(3,470)	(3,535)	(3,508)	(3,523)	(3,535)	(3,543)	(3,554)
Trading Profit	98	(20)	(119)	(255)	(339)	(444)	(535)
Interest Income/(Expense)	40	29	11	(41)	(124)	(215)	(293)
Depreciation	(217)	(202)	(211)	(272)	(325)	(397)	(379)
Operating Result	(79)	(192)	(319)	(567)	(789)	(1,056)	(1,206)
Operating Result	(79)	(193)	(319)	(568)	(788)	(1,056)	(1,207)
Capital Expenditure	(102)	(213)	(430)	(957)	(1,002)	(895)	(230)
Depreciation	257	202	211	272	325	397	379
Other Cash Movements	17	(79)	(86)	(86)	(69)	(35)	(29)
Net Cash Movement	53	(283)	(624)	(1,339)	(1,534)	(1,589)	(1,087)
Opening Cash/(Debt)	829	882	599	(25)	(1,364)	(2,898)	(4,487)
Net Cash Movement	(53)	(283)	(624)	(1,339)	(1,534)	(1,589)	(1,087)
Closing Cash/(Debt)	882	599	(25)	(1,364)	(2,898)	(4,487)	(5,574)

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PwC project that if KGC were to stand-alone and continue "as-is" the result would be;

- Falling Membership numbers;
- Progressively increasing trading losses; and
- A negative \$5.6M cash position in 6 years.

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"Kingswood's ability to continue increasing subscription rates to offset the decline in member numbers is limited by the fact that the majority of members are retirees on fixed incomes." (PwC, Kingswood 'As is' case)

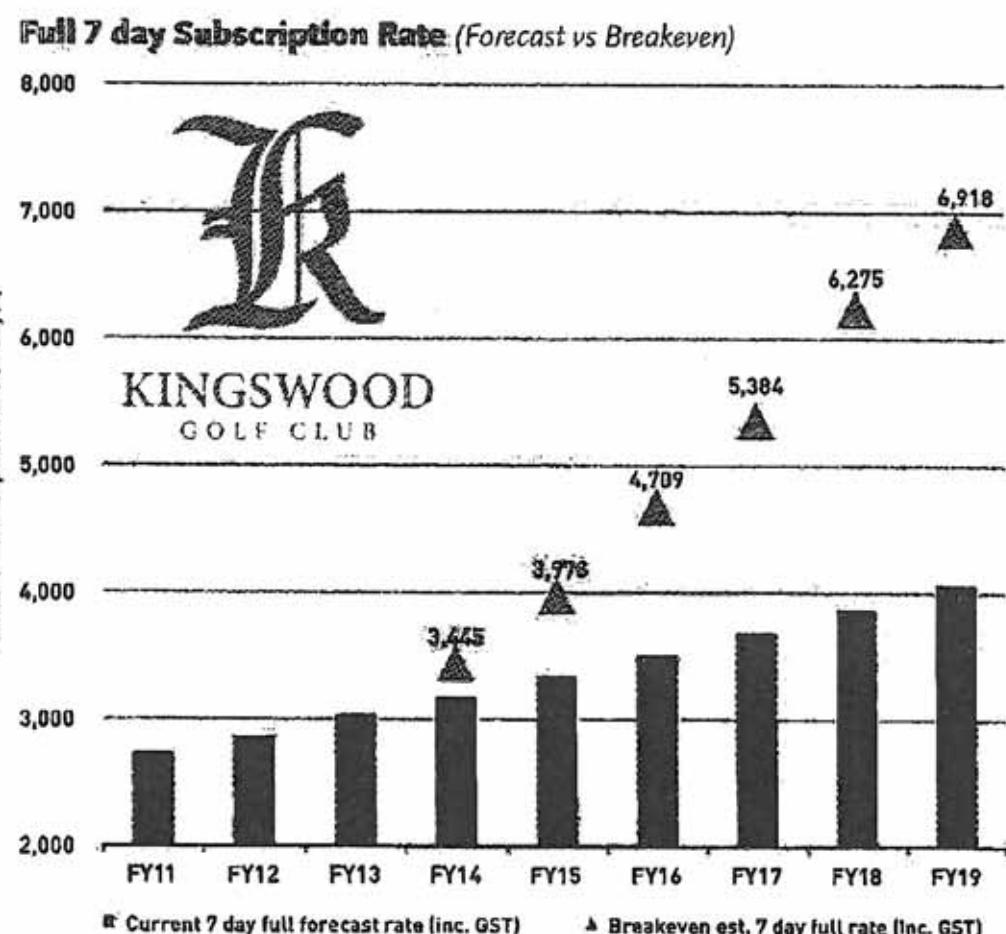
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The following chart demonstrates members' subscriptions, using historical increases compared with rates which are required for the Club to trade at "break even":

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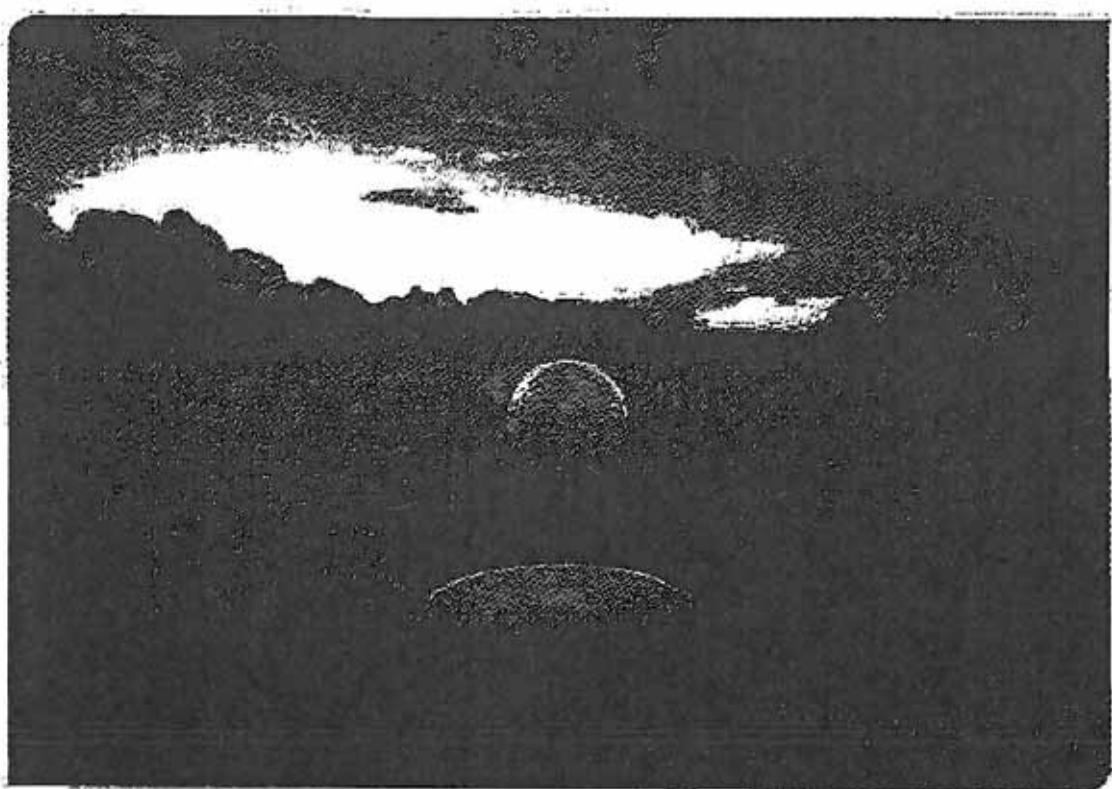
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"Given the forecast negative operating cash flow, the club's ability to complete the necessary capex projects, in particular the sprinkler upgrade, is at risk without additional sources of funding, which may be difficult to obtain due to the forecast negative operating cash flow." (PwC, Kingswood 'As is' case)

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"Management's forecast of a greater than 5% p.a. reduction in membership numbers from FY13 to FY19 appears reasonable given the historical trend and the club's inability to significantly improve its offering to members due to lack of funds for investment." (PwC, Kingswood 'As is' case)

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PwC's Detailed Views
Peninsula Country Golf Club

"Peninsula's forecast is broadly consistent with recent historic trends and overall does not appear unreasonable. However, it is predicated on the assumption that the club is able to maintain member numbers and generate c. \$140k p.a. in entrance fees. Both of these assumptions may be challenging in the current environment." (PwC, Peninsula 'As is' case)

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"Management's cash flow forecast indicates that Peninsula will need to extend the current loan facility beyond its June 2016 expiry and obtain additional external borrowings of c. \$5.1m by FY19 in order to meet its planned capital programs." (PwC, Peninsula 'As is' case)

"Cost control has been good over the past two years as most of the increases have related to payroll costs." (PwC, Peninsula 'As is' case)

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Peninsula Country Golf Club - Stand Alone

\$000s	Actual	Forecast					
		FY14	FY15	FY16	FY17	FY18	FY19
Members - Total	1,705	1,691	1,684	1,678	1,671	1,664	1,657
Members - EFT	1,248	1,237	1,232	1,228	1,223	1,217	1,212
Total Subs Revenue - \$000s	3,825	4,077	4,191	4,318	4,447	4,581	4,720
Ave Subs per Playing Member - \$	3,065	3,296	3,402	3,516	3,636	3,764	3,894
Total Revenue	8,050	8,455	8,684	8,930	9,181	9,438	9,704
Operating Costs	(7,149)	(7,693)	(7,870)	(8,200)	(8,547)	(8,907)	(9,284)
Trading Profit	901	852	814	730	634	531	420
Depreciation	(983)	(1,025)	(1,007)	(1,027)	(1,009)	(1,028)	(1,010)
Interest Income/(Expense)	(97)	(148)	(217)	(251)	(298)	(351)	(404)
Operating Result	(1,79)	(321)	(410)	(548)	(673)	(848)	(994)
Operating Result	(1,79)	(321)	(410)	(548)	(673)	(848)	(994)
Capital Expenditure	(400)	(2,650)	(800)	(1,200)	(800)	(1,200)	(800)
Depreciation	983	1,025	1,007	1,027	1,009	1,028	1,010
Other Cash Movements	(507)	89	(36)	(93)	(265)	46	48
Net Cash Movement	(103)	(1,857)	(239)	(814)	(729)	(974)	(736)
Opening Cash/(Debt)	321	218	(1,639)	(1,878)	(2,692)	(3,421)	(4,395)
Net Cash Movement	(103)	(1,857)	(239)	(814)	(729)	(974)	(736)
Closing Cash/(Debt)	(2185)	(1,639)	(1,878)	(2,692)	(3,421)	(4,395)	(5,131)

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PwC project that if PCCG were to stand-alone and continue "as-is" the result would be;

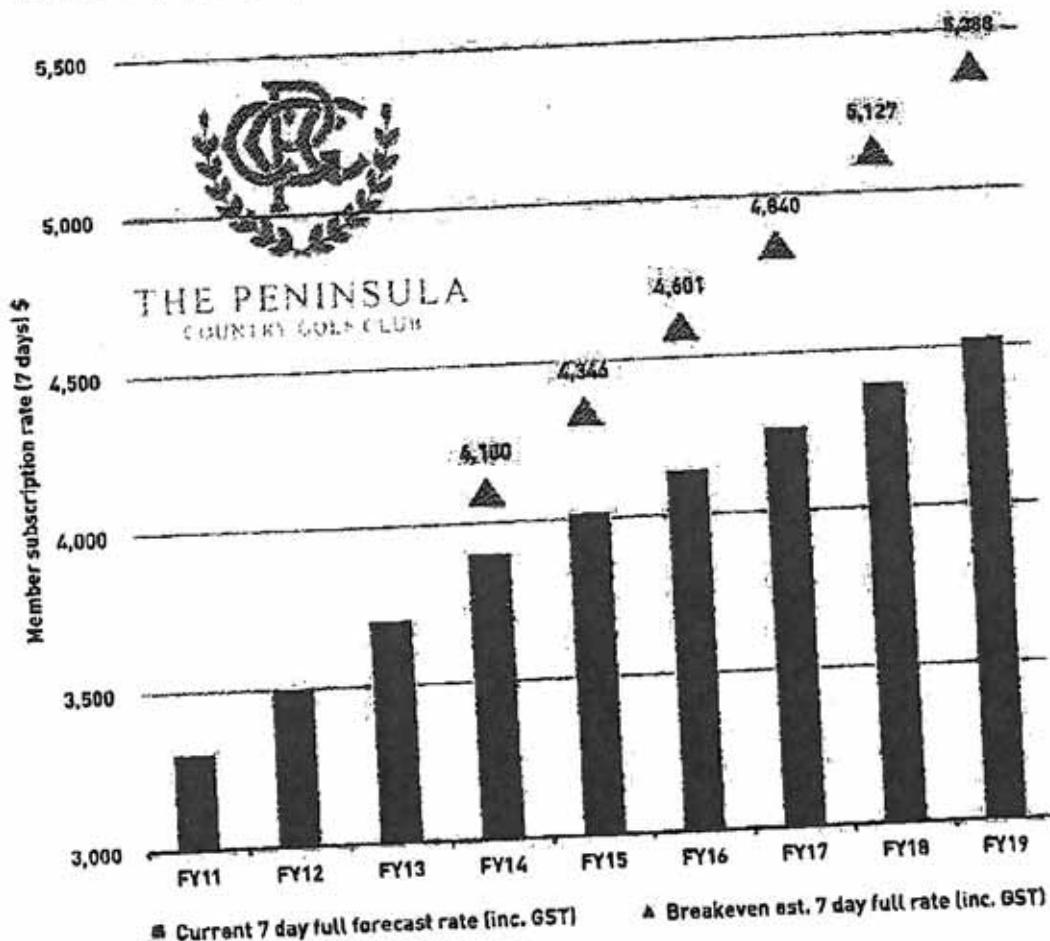
- Falling Membership numbers;
- Progressively increasing trading losses; and
- A negative \$5.1M cash position in 6 years.

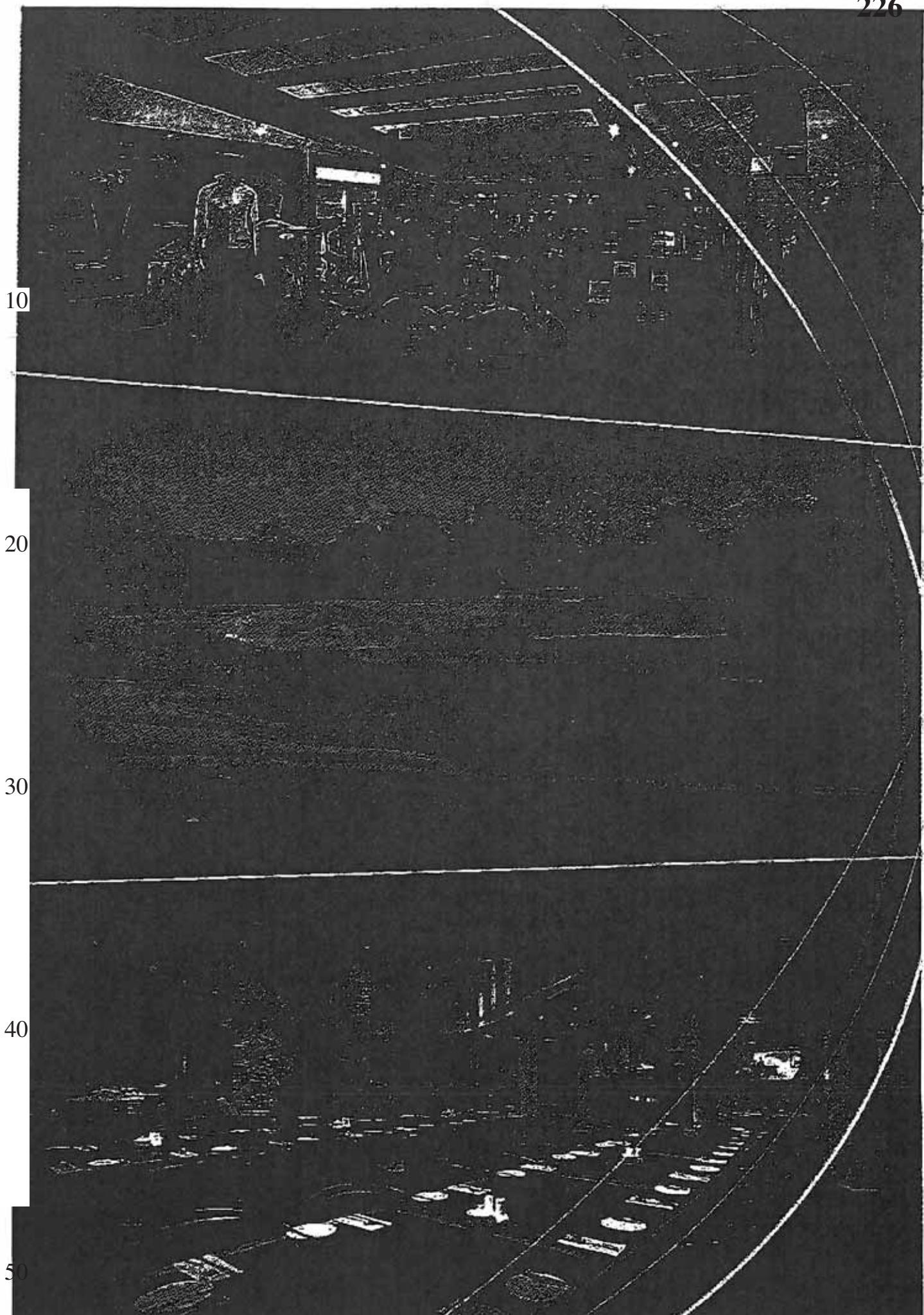
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The following chart demonstrates members' subscriptions, using historical increases compared with rates which are required for the Club to trade at "break even":

Full 7 day Subscription Rate (Forecast vs Breakeven)







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"The financial viability of Peninsula and Kingswood in their current structures is not viable without significant injection of capital. Both Clubs are expected to generate operating losses over the coming years. While the proposed merger appears to be in the best interest of members based on the financial forecasts, there are a number of considerations that will need to be appropriately managed." (PwC, Merger Case)

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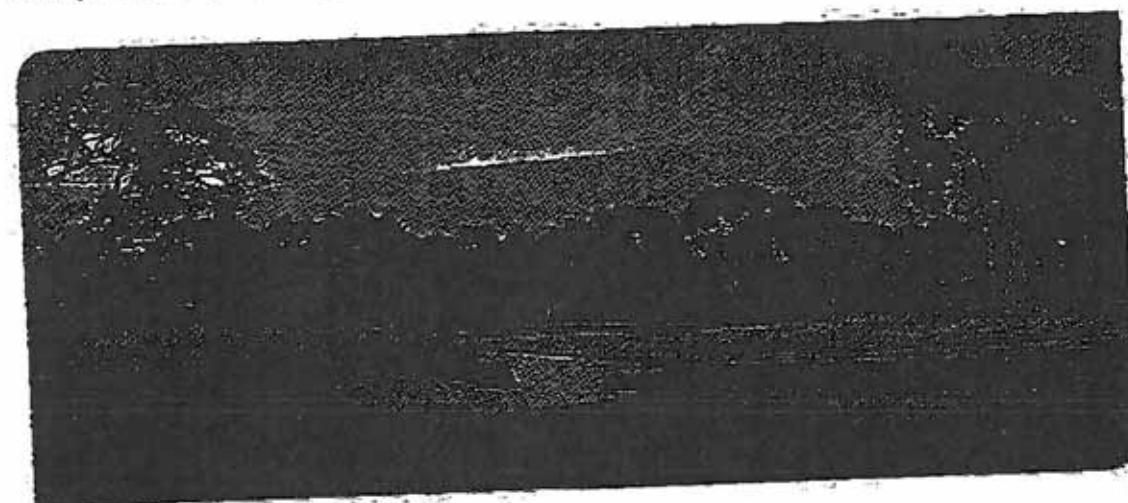
"Management's revenue assumptions during the transition period appear reasonable and reflect a degree of conservatism." (PwC, Merger Case)

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"Management's forecast allows for substantial cost increases, particular to course maintenance, during the transition period, which appears reasonable and will enable Peninsula to be developed into a 'premier club'." (PwC, Merger Case)

"Management's forecast EBITDA for the merged entity appears achievable based on the assumptions included within the forecast." (PwC, Merger Case)

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The Merger Case

Peninsula Kingswood Country Golf Club						
\$000s	Forecast					
	FY14	FY15	FY16	FY17	FY18	FY19
Members - Total	2,472	2,375	2,278	2,096	2,017	2,023
Total Subs Revenue		4,717	4,577	4,476	4,726	5,015
Ave Subs per Member - \$		\$1,986	\$2,009	\$2,135	\$2,343	\$2,479
Total Revenue		10,536	10,376	10,213	9,868	10,572
Operating Costs		(11,914)	(12,251)	(12,653)	(10,300)	(10,728)
Trading Profit		(1,378)	(1,875)	(2,440)	(432)	(156)
Interest Income/(Expense)		(486)	(982)	(1,530)	50	45
Depreciation		(1,525)	(1,917)	(2,084)	(1,786)	(1,693)
Operating Result		(3,389)	(4,774)	(6,054)	(2,168)	(1,804)
Transaction Costs		(300)	(200)	(400)		
Future Fund Income					2,363	2,424
Net Income		(3,689)	(4,974)	(6,454)	195	670
Net Income		(3,689)	(4,974)	(6,454)	195	670
Net Proceeds from Land Sale				66,200		
Capital Expenditure		(5,300)	(5,800)	(3,700)	(700)	(750)
Depreciation		1,525	1,917	2,084	1,786	1,693
Other Cash Movements		(538)	(262)	2,357	576	113
Net Cash Movement		(8,002)	(9,119)	60,487	1,857	1,726
Opening Cash/(Debt)		(2,485)	(10,487)	(19,606)	40,881	42,738
Net Cash Movement		(8,002)	(9,119)	60,487	1,857	1,726
Closing Cash & Future Fund Balance /(Debt)		(10,487)	(19,606)	40,881	42,738	44,464

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PwC project that if the Merger were to proceed, the result would be;

- Steady membership numbers once the merged Club is at the Frankston site;
- Positive trading and cash flow; and
- An increasing Future Fund from \$39.4M in FY17 to \$43M in FY19 and \$51.1M in FY23.

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KINGSWOOD
GOLF CLUBTHE PENINSULA
COUNTRY GOLF CLUB

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Financial Position of Merged Club

Pro Forma based on Estimated Market Values

\$'000s	FY14	FY15	FY16	FY17	FY18	FY19
Cash				1,500	1,500	1,500
Future Fund				39,381	41,238	42,964
Sub Total Cash and Cash Equivalents				40,881	42,738	44,464
Other Assets	1,327	1,243	1,238	1,411	1,450	1,504
Land - Dingley - Re-Zoned Value	70,700	70,700	70,700			
Land - Frankston - Golf Course Use/Zoning	54,000	54,000	54,000	54,000	54,000	54,000
Plant & Equipment	2,000	2,100	2,200	2,300	2,400	2,500
Land & Building Improvements - Frankston						
Clubhouse Improvements		3,000	6,000	8,000	7,200	6,480
Water Infrastructure		1,600	3,200	3,200	2,880	2,592
Practice Facilities			300	1,000	900	810
Memorabilia Room - Clubhouse			200	500	450	405
Total Assets	128,027	132,643	137,838	111,292	112,018	112,755
Debt	3,985	11,862	20,795			
Other Liabilities	5,242	4,781	4,643	3,892	4,518	4,655
Total Liabilities	9,227	16,643	25,438	3,892	4,518	4,655
Net Assets - Proforma Estimate	118,800	116,000	112,400	107,400	107,500	108,100

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Taxation Implications

The taxation treatment of the new Club and its assets and income are an important part of the due diligence of a merger.

PwC have undertaken a due diligence of:

- The current income tax exemption status of the founding Clubs; and have also advised in relation to
- The taxation arrangements to apply to the merged Club.

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They have advised that:

Income Exempt Status – Existing Clubs

- PwC is satisfied that both founding Clubs comply, from a constitutional and operational point of view, with the relevant Taxation Ruling (TR 97/22) that provides income tax exemption.
 - That ruling requires satisfaction of three tests:
 - *It is not carried on for the purpose of profit or gain to its members;*
 - *It must be for the encouragement of a game or sport; and*
 - *That encouragement must be the club's main purpose*

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Tax on Land Sale Proceeds and Future Fund Income

- Based on initial discussions with the ATO, the income tax exempt status of the new Club should not be voided in relation to any gain from the sale of the Dingley land nor from the earnings income of the Future Fund ie no tax liability on either;

Stamp Duty

- Based on initial discussions with the Victorian State Revenue Office, and having regard to the transitional arrangements to give effect to the merged Club, it may be possible to manage the merger so that no stamp duty is payable. A formal private ruling to confirm the stamp duty payable, if any, in relation to the proposed merger steps will be sought from the VSRO in the event that the proposed merger proceeds; and

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Note: The financial assumptions adopted incorporate a stamp duty obligation of \$2.8m, calculated by reference to the Frankston land. If it transpires that this tax is not payable, the merged entity would be \$2.8m better off which may result in an additional \$2.8m being available in the Future Fund. We do not anticipate that a duty liability will arise in relation to the land at Dingley (currently held by Kingswood).

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9. Merger - Pros and Cons

The Directors of KGC and the General Committee of PCGC (the Boards) are unanimously proposing a merger of the two Clubs. It is appropriate that the main pros and cons of the merger be presented as they appear to the Boards.

This section addresses that issue. It does not however, attempt to address all issues that individuals may personally consider to be the pro's or con's of the merger. It addresses only those matters which the Boards of the two clubs consider to be the principal and most significant matters.

Members are invited to read this section in conjunction with the full Information Pack which has been prepared to assist members to make a properly informed judgement on the resolutions before them.

Pros

- The quality of the offer to members
- The long term strength and viability of the merged Club
- The merger will create a leading, truly private golf and country club for the founding members from both clubs.
- The new Club will comprise two championship first grade Sandbelt golf courses, state-of-the-art facilities and a strong financial base.
- Grandfathering of membership categories will ensure no disadvantage to any member
- Transitional access to 3 courses and all clubhouse facilities at both sites
- Vouchers and free accommodation offers
- Playing access at other leading Sandbelt courses
- Access to a wide range of Australian and overseas reciprocals
- The merged Club will offer long term financial security in an increasingly difficult commercial environment for the private golf club market.
- The future fund will enable long term planning and provide the resources to continually enhance the Club without additional calls on members to achieve the Club's strategic objectives.
- Subscription savings - lower subscriptions in the merged Club than at the individual Clubs if they were to continue
- In years 4 to 6 all members - founding members from both Clubs - will receive discounted subscriptions: 15% in year 4; 10% in year 5; and 5% in year 6.

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Cons

- The eventual closure of the Kingswood site
- Relocating all merged Club activities in due course to the Frankston site
- The risk of a drop in the KGC land valuation might result in a reduced future fund
- Both Clubs will cease to exist in their current form
- Potential tee time pressure if transition poorly managed

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IN CONCLUSION

In the opinion of the KGC Board and the
PCCG General Committee, the benefits of the proposed
merger considerably outweigh any detriments.

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The merger offers to all members of the founding Clubs a sustainable, premier Club amongst the best in Australia, in contrast to the threat of deterioration for both Clubs and the risk of either closure or mediocrity in the longer term.

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10. Merged Club Strategy

The Board of the new Club will have as its primary strategic objective over the next decade the achievement of the Vision articulated in this document.

While the precise actions to achieve this will be the responsibility of the Club's Board over that period it is envisaged that the achievement of that Vision will have three phases:

- Establishing the essential building blocks for success
- Completing the key components of the Vision, and
- Emerging as a top tier Sandbelt private golf club

Phase 1 – Preparation and Early Transition

The first three years will be focussed on establishing the building blocks for the new Club. They will include:

Structure - Implementing the new corporate structure and the associated governance arrangements.

Unification - Engaging with members to build a unified club reflecting the high standards appropriate to a leading private golf club in Australia.

Funding - Securing transitional funding for the club's course and facility upgrades that will be repaid from land sale earnings.

Land Sale - Gaining the requisite approvals for the rezoning, sale and redevelopment of the Dingley site and securing a satisfactory sale outcome, so as to guarantee the long-term financial security of the merged club.

Courses - Establishing a plan, costings and implementation schedule for the courses which will lift them to championship standard while being playable by all. Commence initial upgrades, including a water solution.

Facilities - Establishing a plan, costings and implementation schedule for the enhancement of the club's facilities including the clubhouse, museum, locker rooms, practice areas, pro shop and storage. Commence initial upgrades.

Enjoyment - Getting to know each other through a program of members golfing and social events whilst enjoying the three courses and their facilities.

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Phase 2 – Substantive Implementation

The second three year period will be focussed on completing the key components of the Vision. They will include:

Funding - Receiving funds from the sale of the Dingley site land, repaying the transitional loans and investing the residual funds in the Future Fund, within governance provisions set in the club's constitution.

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Unification - Continuing to build a unified club which reflects the standards appropriate to a leading private golf club in Australia.

Consolidation - The new Club consolidated at the Frankston site.

Courses - Completing the upgrade of the courses.

Facilities - Completing the upgrade of the Club's facilities.

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Golf - Implementing the new Club's golf program.

Phase 3 – Emergence as a Top Tier Sandbelt Private Golf Club

The next three years will see the emergence of the new club as a top tier Sandbelt private golf club.

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- Both courses will be rated as amongst the top courses in Australia.
- A strong membership base from founding Clubs will be strengthened by strong demand from prospective members, culminating in a waiting list and a competitive entrance fee.
- A Club with high standards but renowned for its friendly, welcoming atmosphere, pride, camaraderie amongst members, respect for staff and a social conscience.
- The Club generating a trading surplus, having a strong balance sheet, no borrowings and a substantial Future Fund.

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11. Resolutions for Members of the Respective Clubs

10 A. PCCG Resolutions to be put to the members of PCCG on 17 September 2013.

(a) Ordinary resolution (Simple majority):

1. "The Committee is directed and empowered to give effect to the merger of the Club with Kingswood Golf Club, as described in the Information Pack distributed to members for the purpose of this meeting."

20 (b) Special resolutions (75% majority)

1. "The special resolutions contained in items 2 and 3 below are conditional and take effect only upon the successful implementation of the merger of Peninsula Country Golf Club (PCCG) with Kingswood Golf Club, as declared by a resolution of the Committee of PCCG on or before 31 December 2013. In the event that the PCCG Committee makes no such declaration, then the resolutions below are void and of no effect whatsoever."
2. "The Committee is directed and empowered to apply to the Australian Securities and Investments Commission to register the Club as a company limited by guarantee and without a share capital, the name of which is 'Peninsula Country Golf Club Ltd'".
3. "The constitution of Peninsula Country Golf Club Ltd is the document entitled 'Constitution of Peninsula Country Golf Club Ltd' signed for identification by the President of the Club and presented to the members at this meeting."

30 40 B. Ordinary resolution to be put to the members of Kingswood Golf Club at special general meeting to be held on 17 September 2013.

1. "The Board is directed and empowered to give effect to the merger of the Club with Peninsula Country Golf Club, as described in the Information Pack distributed to members for the purpose of this meeting."

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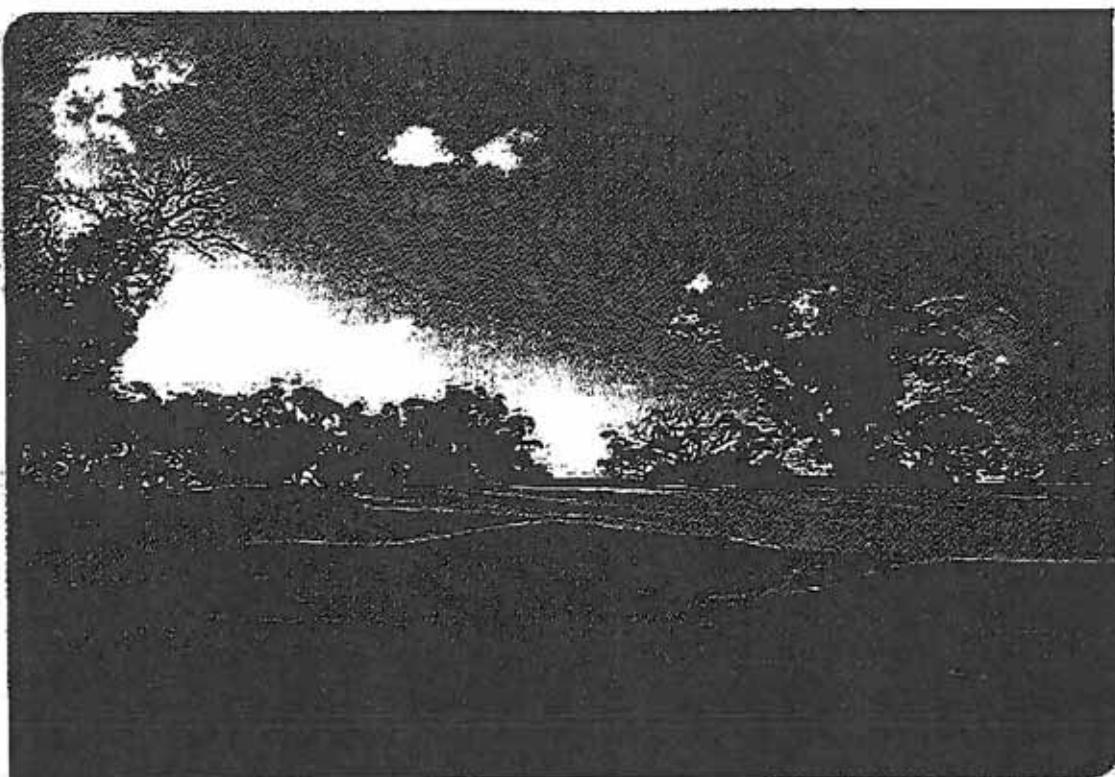
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C. Special Resolutions to be put to the members of the merged Club (i.e. KGC) at a special general meeting of members to be held in October or November 2013.

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1. "The inaugural name of the merged Club shall be Peninsula Kingswood Country Golf Club and accordingly the name of the company is changed to 'Peninsula Kingswood Country Golf Club Ltd' ".
2. "The constitution of the company is the document entitled 'Constitution of Peninsula Kingswood Country Golf Club Ltd' signed by the Chairperson of the meeting for identification and presented to the members at this meeting."

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1. Appendix Consultants

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Consultants

Professional advice and assistance was obtained from:

Financial due diligence, financial modeling and taxation:

- PricewaterhouseCoopers Securities Ltd

Governance and related legal issues:

- Mr Norman O'Bryan AM SC

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Valuations:

- Rann Property Consulting
- Charter Keck Cramer

Planning Issues:

- Robert Luxmoore Project Management
- Tract Consultants

Flora and fauna issues:

- Ecology and Heritage Partners

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Stormwater and related service issues:

- KLM Spatial

Golf industry advice, strategic aspects and project management:

- Sport Business Partners

Preparation for and conduct of the Merger Vote:

- Computershare Investor Services Limited

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Graphic Design:

- Spike Creative

Printing:

- Computershare Communication Services Limited

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2. Appendix Financials

Kingswood - Forecast Income Statement

\$ in 000's	Actual					Forecast			
	FY11	FY12	FY13	FY14	FY15	FY16	FY17	FY18	FY19
REVENUE									
Subscription Revenue	1,557	1,588	1,615	1,676	1,603	1,529	1,497	1,435	1,383
Hospitality Sales	904	915	912	983	953	927	904	887	874
Green Fees / Competition Fees	298	301	324	326	321	316	312	308	305
Proshop Sales	237	257	251	236	222	208	196	185	176
Other Revenue	395	402	306	295	291	289	285	283	281
Total Revenue	3,502	3,463	3,568	3,516	3,389	3,269	3,195	3,099	3,020
COST OF SALES									
Hospitality COS	(362)	(362)	(403)	(384)	(372)	(362)	(353)	(347)	(342)
Proshop COS	(198)	(140)	(145)	(130)	(122)	(115)	(108)	(102)	(97)
Total Cost of Sales	(560)	(502)	(549)	(514)	(494)	(477)	(461)	(449)	(439)
Gross Profit	2,942	2,962	3,019	3,002	2,895	2,792	2,734	2,650	2,582
EXPENSES									
Hospitality Expenses	(673)	(713)	(733)	(744)	(756)	(761)	(765)	(770)	(774)
Proshop Expenses	(338)	(325)	(336)	(342)	(349)	(356)	(363)	(371)	(378)
Course Maintenance Expenses	(920)	(1,037)	(1,075)	(1,098)	(1,117)	(1,132)	(1,143)	(1,150)	(1,157)
Admin & Match Expenses	(743)	(722)	(757)	(787)	(793)	(798)	(801)	(804)	(806)
Total Expenses	(2,694)	(2,797)	(2,921)	(2,972)	(3,014)	(3,047)	(3,073)	(3,094)	(3,116)
EBITDA (before one-offs)	243	165	98	31	(19)	(254)	(339)	(444)	(534)
Transaction costs	-	-	(50)	-	-	-	-	-	-
EBITDA	243	165	98	(19)	(119)	(254)	(339)	(444)	(534)
Interest income	53	58	40	29	17	(41)	(124)	(215)	(293)
Depreciation	(224)	(219)	(217)	(202)	(211)	(272)	(325)	(397)	(379)
Operating surplus/(deficit)	75	4	(79)	(192)	(319)	(567)	(789)	(1,056)	(1,206)

Source: Management Information, Kingswood Model (updated) and PwC Analysis

Note: Unlike the merged co forecast assumptions in which subscription revenue is based on opening no. of members in a given year, the standalone forecast is based on average no. of members which is reasonable given the presence of new member revenues received pro-rata during the year.

Appendix Financials



Kingswood - Balance Sheet

S in 000's	Actual		Forecast
	Apr-12	Apr-13	Apr-14
CURRENT ASSETS			
Cash	829	882	598
Investments	167	-	-
Inventories	139	143	128
Other current assets	719	145	143
Total current assets	1,195	1,169	869
NON-CURRENT ASSETS			
Property, plant and equipment	10,811	11,711	11,722
Total non-current assets	10,811	11,711	11,722
Total assets	12,005	12,880	12,591
CURRENT LIABILITIES			
Trade Creditors	(111)	(130)	(85)
Unsecured notes	(2)	(32)	(32)
Annual leave provision	(23)	(126)	(126)
Subscriptions in advance	(205)	(811)	(312)
Other current liabilities	(100)	(135)	(134)
Total current liabilities	(1,720)	(1,235)	(1,188)
NON-CURRENT LIABILITIES			
Certificate of deposit No.1	(493)	(403)	(403)
KGC Certificate of Deposit Redemption A/C	175	225	275
Long service leave provision	(9)	(127)	(127)
Total non-current liabilities	(415)	(305)	(255)
Total liabilities	(1,586)	(1,539)	(1,443)
Net assets	11,419	11,341	11,149
Reported working capital	(926)	(977)	(1,027)

Source: Management information, Kingwood Model (updated) and PwC Analysis



Appendix Financials

Kingswood - Cash Flow Statement

\$ in 000's	Actual				Forecast				
	FY11	FY12	FY13	FY14	FY15	FY16	FY17	FY18	FY19
Net Operating Profit (Before Interest)	52	(54)	(19)	(221)	(330)	(527)	(665)	(841)	(913)
Change in Working Capital	(180)	51	50	(30)	(37)	(37)	(19)	(34)	(30)
Add Back Depreciation	227	219	217	202	241	272	325	397	379
Other	(13)	(10)	-	-	-	-	-	-	-
Operating Cash Flow	51	206	743	(50)	(156)	(292)	(358)	(479)	(564)
Interest Income	54	58	46	29	11	(41)	(124)	(215)	(293)
Less Capital Expenditures	(176)	(715)	(152)	(213)	(430)	(957)	(1,002)	(895)	(234)
Change in Work In Progress	(24)	405	-	-	-	-	-	-	-
Other	(64)	-	-	-	-	-	-	-	-
Investing Cash Flow	(146)	(315)	(51)	(184)	(419)	(998)	(1,126)	(1,110)	(523)
Net Movement in Borrowings	(142)	(10)	(140)	(50)	(50)	(50)	(50)	-	-
Movement in Investments	550	143	107	-	-	-	-	-	-
Financing Cash Flow	408	133	(33)	(50)	(50)	(50)	(50)	-	-
Total Change In Cash	313	24	53	(283)	(624)	(1,339)	(1,534)	(1,589)	(1,087)
Opening Cash	492	805	829	882	598	(26)	(1,365)	(2,899)	(4,489)
Closing Cash	805	829	882	598	(26)	(1,365)	(2,899)	(4,488)	(5,575)

Source: Management Information, Kingwood Model (updated) and PwC Analysis

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Appendix Financials



Peninsula - Forecast Income Statement

S in 000's	Actual					Forecast				
	FY11	FY12	FY13	FY14	FY15	FY16	FY17	FY18	FY19	
REVENUE										
Subscription revenue	3,618	3,743	3,825	4,077	4,191	4,318	4,447	4,581	4,720	
Hospitality sales	2,205	2,344	2,258	2,344	2,404	2,468	2,531	2,596	2,663	
Proshop sales	764	743	734	739	761	786	810	834	860	
Green fees	526	612	624	644	660	676	693	710	728	
Accommodation revenue	338	364	347	360	371	382	393	405	417	
Entrance fees	223	129	96	140	140	140	140	140	140	
Other revenue	175	164	174	152	157	162	166	171	177	
Total Revenue	7,437	8,100	8,050	8,455	8,684	8,930	9,181	9,438	9,704	
COST OF SALES										
Hospitality COS	(4,098)	(993)	(951)	(1,019)	(1,045)	(1,073)	(1,101)	(1,129)	(1,158)	
Proshop COS	(378)	(393)	(367)	(355)	(366)	(377)	(389)	(400)	(413)	
Total Cost of Sales	(4,476)	(1,386)	(1,528)	(1,374)	(1,411)	(1,450)	(1,489)	(1,529)	(1,570)	
Gross Profit	(5,391)	6,714	6,722	7,081	7,273	7,480	7,692	7,909	8,134	
EXPENSES										
Links expenditure	(1,670)	(1,898)	(1,924)	(2,094)	(2,193)	(2,298)	(2,407)	(2,522)	(2,642)	
Admin & marketing	(1,231)	(1,279)	(1,272)	(1,302)	(1,361)	(1,423)	(1,488)	(1,555)	(1,626)	
Hospitality Expenses	(1,641)	(1,735)	(1,805)	(1,876)	(1,964)	(2,058)	(2,155)	(2,258)	(2,365)	
Proshop Expenses	(452)	(430)	(463)	(519)	(543)	(568)	(595)	(622)	(651)	
Accommodation Expenditure	(253)	(373)	(383)	(390)	(398)	(405)	(412)	(420)	(428)	
Total Expenses	(5,450)	(5,715)	(5,871)	(6,180)	(6,459)	(6,751)	(7,057)	(7,378)	(7,713)	
EBITDA (before one-offs)	924	998	894	901	814	729	635	532	420	
Transaction costs	-	-	-	(50)	-	-	-	-	-	
EBITDA	924	998	894	851	814	729	635	532	420	
Net interest	(124)	(119)	(97)	(148)	(217)	(251)	(298)	(351)	(404)	
Depreciation	(95)	(977)	(977)	(1,025)	(1,007)	(1,027)	(1,009)	(1,028)	(1,010)	
Operating surplus/(deficit)	(127)	(98)	(179)	(321)	(410)	(548)	(673)	(848)	(994)	

Source: Management information and PwC Analysis

*Note: Unlike the merged co forecast assumptions in which subscription revenue is based on opening no. of members in a given year, the standalone forecast is based on average no. of members which is reasonable given the presence of new member revenues received pro-rata during the year.



Appendix Financials

Peninsula - Balance Sheet

\$ in 000's			
	Actual	Forecast	
	Apr-12	Apr-13	Apr-14
CURRENT ASSETS			
Cash and cash equivalents	219	(1,639)	
Trade and other receivables	710	730	
Inventories	303	302	
Total current assets	1,232	(606)	
NON-CURRENT ASSETS			
Property, plant and equipment	10,238	11,363	
Investments	40	40	
Receivables	160	(60)	
Total non-current assets	10,438	12,063	
Total assets	11,669	11,457	
CURRENT LIABILITIES			
Trade and other payables	(1,398)	(1,396)	
Employee benefits	(390)	(390)	
Deferred income	(2,200)	(2,111)	
Total current liabilities	(3,988)	(3,897)	
NON-CURRENT LIABILITIES			
Interest bearing liabilities	(1,140)	(1,340)	
Employee benefits	(100)	(100)	
Total non-current liabilities	(1,240)	(1,440)	
Total liabilities	(5,228)	(5,337)	
Net assets	6,441	6,120	

(Indicative net working capital)

(2,942) (2,975) (2,865)

Source: Management information, Peninsula Model (updated) and PwC Analysis

Appendix Financials



Peninsula - Cash Flow Statement

\$ in 000's	Actual					Forecast			
	FY11	FY12	FY13	FY14	FY15	FY16	FY17	FY18	FY19
10 Net Operating Profit (Before Interest and Tax)	(12)	21	(69)	(173)	(193)	(298)	(374)	(497)	(590)
ADD/(LESS) INVESTING & FINANCING ACTIVITIES									
Profit on disposal of non-current assets	10	(1)	(29)	-	-	-	-	-	-
ADD/(LESS) NON CASH ITEMS									
Add Back: Depreciation	927	977	983	1,025	1,007	1,027	1,009	1,028	1,010
Change in Net Working Capital	(459)	(403)	(499)	(110)	(38)	43	44	46	47
Amounts set aside to employee provisions	262	231	29	-	-	-	-	-	-
20 Net Operating Cash Flows	724	825	928	741	852	773	679	577	467
Interest Income	152	14	13	(40)	(101)	(132)	(177)	(227)	(276)
Interest Expense	(153)	(133)	(115)	(108)	(116)	(119)	(121)	(124)	(127)
Capital Expenditures	(821)	(308)	(466)	(2,650)	(800)	(1,200)	(800)	(1,200)	(800)
Proceeds from disposal of non-current assets	18	1	27	-	-	-	-	-	-
Net Investing Cash Flows	(973)	(426)	(474)	(2,798)	(1,017)	(1,451)	(1,098)	(1,551)	(1,204)
Net Movement in Borrowings	(345)	(548)	(556)	200	(75)	(136)	(310)	-	-
Movement in Investments	(0)	-	-	-	-	-	-	-	-
Net Financing Cash Flows	(345)	(548)	(556)	200	(75)	(136)	(310)	-	-
30 Total Change In Cash	(574)	(149)	(103)	(1,857)	(239)	(814)	(729)	(974)	(736)
Opening Cash	1,041	470	321	219	(1,639)	(1,878)	(2,692)	(3,421)	(4,395)
Closing Cash	470	321	219	(1,639)	(1,878)	(2,692)	(3,421)	(4,395)	(5,131)

Source: Management Information, Peninsula Model (updated) and PwC Analysis

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THE PENINSULA
COUNTRY CLUB

Appendix Financials

Merger Case - Forecast Income Statement

S in 000's	Actual FY13	Forecast					
		FY14	FY15	FY16	FY17	FY18	FY19
REVENUE							
Subscription revenue	5,573	5,692	4,717	4,577	4,476	4,726	5,015
Hospitality sales	3,306	3,233	3,198	3,157	3,054	3,000	3,099
Proshop sales	571	1,047	997	984	1,067	1,062	1,105
Green fees / Competition fees	353	971	835	852	871	550	564
Accommodation revenue	549	360	371	382	393	393	393
Entrance fees	231	-	-	-	-	-	257
Other revenue	445	416	419	423	352	136	140
Total Revenue	10,708	11,720	10,536	10,376	10,213	9,868	10,572
COST OF SALES							
Hospitality COS	(6,431)	(1,365)	(7,350)	(1,332)	(1,337)	(1,486)	(1,535)
Proshop COS	(506)	(519)	(492)	(486)	(512)	(510)	(530)
Total Cost of Sales	(6,937)	(1,884)	(7,842)	(1,818)	(1,849)	(1,996)	(2,065)
Gross Profit	3,768	9,836	8,695	8,558	8,364	7,872	8,507
EXPENSES							
Links expenditure	(1,206)	(3,192)	(3,910)	(4,066)	(4,224)	(3,236)	(3,372)
Admin & marketing	(2,070)	(2,089)	(2,153)	(2,220)	(2,289)	(1,594)	(1,667)
Hospitality Expenses	(2,571)	(2,620)	(2,720)	(2,818)	(2,921)	(2,408)	(2,523)
Proshop Expenses	(831)	(861)	(892)	(924)	(958)	(647)	(678)
Accommodation Expenditure	(683)	(390)	(398)	(405)	(472)	(418)	(425)
Total Expenses	(6,274)	(9,152)	(10,073)	(10,434)	(10,804)	(8,304)	(8,665)
EBITDA (before one-offs)	994	684	(1,379)	(1,876)	(2,440)	(433)	(157)
Transaction Costs	-	(3,350)	(300)	(200)	(400)	-	-
Gain/(Loss) on Sale of Assets	27	-	-	59,361	-	-	-
EBITDA	1,021	(2,666)	(1,679)	(2,076)	56,521	(433)	(157)
Net interest	(63)	(161)	(486)	(982)	(1,530)	50	45
Future fund income	-	-	-	-	-	2,363	2,474
Depreciation	(1,760)	(1,143)	(1,525)	(1,917)	(2,084)	(1,786)	(1,693)
Operating surplus/(deficit) b/f tax	(240)	(3,969)	(3,689)	(4,974)	52,907	195	670
Tax	-	-	-	-	-	-	-
Operating surplus/(deficit)	(240)	(3,969)	(3,689)	(4,974)	52,907	195	670

Source: Management Information and PwC Analysis

Note: Unlike the standalone forecast assumptions in which subscription revenue is based on average no. of members in a given year, the merged co forecast is based on opening no. of members which is reasonable given the absence of new member revenues received mid-year.

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Appendix Financials



Merger Case - Balance Sheet

S in 000's	Actual		Forecast				
	Jun-13	Jun-14	Jun-15	Jun-16	Jun-17	Jun-18	Jun-19
CURRENT ASSETS							
Cash	1,600	(2,485)	(10,487)	(19,606)	1,500	1,500	1,500
Trade and other receivables	790	794	720	720	966	971	1,010
Investments	40	40	40	40	40	40	40
Inventory	446	429	419	414	404	439	454
Other current assets	64	64	64	64	-	-	-
Total current assets	2,441	(1,158)	(9,244)	(18,368)	2,911	2,950	3,004
NON-CURRENT ASSETS							
Plant, Property & Equipment	21,249	21,556	25,331	29,215	19,491	18,405	17,462
Future Fund Asset	-	-	-	-	39,381	41,238	42,964
Other Non-Current Assets	160	160	160	160	160	160	160
Total non-current assets	22,109	21,716	25,491	29,375	59,032	59,803	60,587
Total assets	24,550	20,558	16,248	11,007	61,943	62,752	63,591
CURRENT LIABILITIES							
Trade Creditors	(1,523)	(1,482)	(1,471)	(1,462)	(1,524)	(1,567)	(1,586)
Employee benefits	(516)	(516)	(516)	(516)	(390)	(390)	(390)
Deferred Income	(3,011)	(2,890)	(2,405)	(2,333)	(1,873)	(2,445)	(2,595)
Other Current Liabilities	(125)	(131)	(131)	(131)	-	-	-
Total current liabilities	(5,191)	(5,019)	(4,523)	(4,442)	(3,787)	(4,402)	(4,571)
NON-CURRENT LIABILITIES							
Borrowings	(1,140)	(1,340)	(1,265)	(1,129)	-	-	-
Certificate of Deposit (net of redemption)	(210)	(160)	(110)	(60)	-	-	-
Employee benefits	(227)	(227)	(227)	(227)	(100)	(100)	(100)
Total non-current liabilities	(1,575)	(1,726)	(1,602)	(1,415)	(100)	(100)	(100)
Net assets	12,732	13,813	10,123	5,150	58,056	58,251	58,920

Source: Management Information, merged co model and PwC Analysis



Appendix Financials

Merger Case - Cash Flow Statement

S in 000's	Actual	Forecast					
	FY13	FY14	FY15	FY16	FY17	FY18	FY19
Net Operating Profit (Before Interest and Tax)	(179)	(3,808)	(3,203)	(3,992)	54,436	(2,218)	(1,850)
ADD/(LESS) INVESTING & FINANCING ACTIVITIES							
Profit on disposal of non-current assets	(24)	-	-	-	(59,361)	-	-
ADD/(LESS) NON CASH ITEMS							
Add Back: Depreciation	1,206	1,143	1,525	1,917	2,084	1,786	1,693
Change in Net Working Capital	(149)	(159)	(413)	(75)	(955)	576	115
Amounts set aside to employee provisions	23	-	-	-	-	-	-
Net Operating Cash Flows	1,076	(2,824)	(2,091)	(2,151)	(3,795)	143	(43)
Interest Income	54	(55)	(577)	(875)	(1,438)	50	45
Interest Expense	(165)	(106)	(109)	(106)	(91)	-	-
Capital Expenditures	(502)	(750)	(5,300)	(5,800)	(3,700)	(700)	(750)
Proceeds from disposal of non-current assets	47	-	-	-	70,700	-	-
Taxes paid	-	-	-	-	-	-	-
Net Investing Cash Flows	(535)	(911)	(5,786)	(6,782)	65,470	(650)	(705)
Net Movement in Borrowings	(695)	150	(125)	(186)	(1,189)	-	-
Net Movement in Investments (Excluding FF)	107	-	-	-	-	-	-
Net Financing Cash Flows	(589)	150	(125)	(186)	(1,189)	-	-
Total Change in Cash (before F.Fund)	(9)	(3,586)	(8,002)	(9,119)	60,487	(506)	(748)
Future Fund Income Withdrawn as Cash	-	-	-	-	-	1,181	1,237
Cash Shortfall/(Excess) Withdrawn /(Invested) in FF	-	-	-	-	(39,381)	(675)	(490)
Net Future Fund Cash Impact	-	-	-	-	(39,381)	506	748
Debt Drawdown for Minimum Cash	-	-	-	-	-	-	-
Total Change in Cash	(9)	(3,586)	(8,002)	(9,119)	21,106	0	(10)
Opening Cash	1,150	1,100	(2,485)	(10,487)	(19,606)	1,500	1,500
Closing Cash	1,100	(2,485)	(10,487)	(19,606)	(1500)	1,500	1,500

Source: Management Information, merged co model and PwC Analysis.

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KINGSWOOD
GOLF CLUBTHE PENINSULA
GOLF CLUB

AUSTRALIA 2002

**IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY**

No. 44 of 2015

B E T W E E N:

WILLIAM FALKINGHAM
Applicant

-and-

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PENINSULA KINGSWOOD COUNTRY GOLF CLUB LIMITED
(ACN 004 208 076)
Respondent

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EXHIBIT COVERSHEET

This is the Affidavit of Marcus Geoffrey Willison sworn 2 September 2014 referred to in **footnote 4** of the Applicant's summary of argument dated 17 April 2015.

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Filed on behalf of the Applicant
Prepared by:
Lyttletons Lawyers
2/128 Centre Dandenong Road
Dingley VIC 3172

Telephone: 8555 3895
Fax: 8555 3865

Ref: Pranesh Lal

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IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
~~COMMERCIAL AND EQUITY DIVISION~~
COMMERCIAL COURT

No. S CI 2014 04329

10 IN THE MATTER OF

PENINSULA KINGSWOOD COUNTRY GOLF CLUB LTD (ACN 004 208 075) (formerly known
as KINGSWOOD GOLF CLUB LIMITED)

BETWEEN:

WILLIAM FALKINGHAM

Plaintiff

and

PENINSULA KINGSWOOD COUNTRY GOLF CLUB LTD (ACN 004 208 075)

Defendant

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AFFIDAVIT OF MARCUS GEOFFREY WILLISON

Date of document: 2 September 2014

Filed on behalf of: The Defendant

Prepared by:

Maddocks

Lawyers

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140 William Street
Melbourne VIC 3000

Solicitor's Code: 230

DX 259 Melbourne

Tel: (03) 9258 3555

Fax: (03) 9258 3666

Ref: 6175682

Attention: Gina Wilson

E-mail Address: gina.wilson@maddocks.com.au

I, Marcus Geoffrey Willison of 8 Exhibition Street, Melbourne in the State of Victoria, Partner, make oath and say as follows:

40

1. I refer to my affidavit sworn on 25 August 2014 and filed in this proceeding.
2. I make this further affidavit from my own knowledge save where I state to the contrary. Where I depose to matters on information and belief, I believe them to be true.
3. On 29 August 2014, final offers were submitted by the 4 preferred bidders based on the key criteria of Peninsula Kingswood Country Golf Club Ltd, together with marked up contracts.

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[6175682: 13477100_1]

Stacey Marcus Willison

4. Now produced and shown to me and marked "CONFIDENTIAL MGW-2" is a true copy of the best and final offer received from one of the preferred bidders dated 29 August 2014. That offer is only valid for a period of 30 days from the date of the offer.

5. The details of the offer are confidential and highly commercially sensitive, and any disclosure of this information in the market place will be extremely detrimental to the current sale process.

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SWORN at Melbourne in Victoria
on 2 September 2014

)
)
)

Before me:

Markus W. Misra.

Signature of deponent

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Stephen D'Arcy
Signature of person taking affidavit

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STEPHEN PAUL D'ARCY
140 William St Melbourne 3000
An Australian Legal Practitioner
within the meaning of the
Legal Profession Act 2004.

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
 COMMERCIAL AND EQUITY DIVISION
 COMMERCIAL COURT

10 No. S CI 2014 04329

IN THE MATTER OF

PENINSULA KINGSWOOD COUNTRY GOLF CLUB LTD (ACN 004 208 075) (formerly known
 as KINGSWOOD GOLF CLUB LIMITED)

BETWEEN:

WILLIAM FALKINGHAM

and

Plaintiff

PENINSULA KINGSWOOD COUNTRY GOLF CLUB LTD (ACN 004 208 075)

Defendant

20

AFFIDAVIT OF MARCUS GEOFFREY WILLISON

30 Date of document: 2 September 2014

Filed on behalf of: The Defendant

Solicitor's Code: 230

Prepared by:

DX 259 Melbourne

Maddocks

Tel: (03) 9258 3555

Lawyers

Fax: (03) 9258 3666

140 William Street

Ref: 6175682

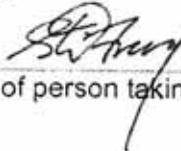
Melbourne VIC 3000

Attention: Gina Wilson

E-mail Address: gina.wilson@maddocks.com.au

This is the exhibit marked "CONFIDENTIAL MGW-2" now produced and shown to Marcus Geoffrey Willison at the time of swearing his affidavit on 2 September 2014.

Before me:



Signature of person taking affidavit

40

STEPHEN PAUL D'ARCY
 140 William St Melbourne 3000
 An Australian Legal Practitioner
 within the meaning of the
 Legal Profession Act 2004.

Exhibit CONFIDENTIAL MGW-2
 Letter from one of the Preferred Bidders dated 29
 August 2014

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[6175682:13477100_1]



29 August 2014

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STRICTLY PRIVATE AND CONFIDENTIAL

RFP Infill Development Opportunity
Attn: Marcus Willison
Ernst & Young (Ernst & Young Real Estate Pty Limited)
Level 23, 8 Exhibition Street
Melbourne VIC 3000

Dear Marcus,

Best and Final Offer

'Kingswood Golf Club', 179-217 Centre Dandenong Road, Dingley Village, Victoria.

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Reference is made to ISPT's non-binding expression of interest dated 23 June 2014, Australian Super binding Request for Proposal dated 8 August 2014 and your invitation to participate in Best and Final Offer phase (BAFO Phase).

We reconfirm Australian Super together with ISPT will partner for the acquisition and development of the site. We confirm we have undertaken further due diligence during this Phase and have satisfied ourselves to the number of uncertainties relating to the environmental constraints imposed by the adjoining landfill site and its subsequent impact on yield.

We have further considered the Vendors preferred terms as detailed in the mark-up Contract provided during the Phase and accordingly submit our best and final offer for the purchase of the site that will provide the Club certainty of outcome and also significant value upside based on rezoning and further value upside based on a minimum rezoning outcome being achieved. Accordingly we submit the following for your consideration.

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Boat and Fleet Office

Purchase Price	Up to \$125,000,000 (excluding GST) inclusive of the maximum Subsequent Payment
Deposit	\$20,000,000 (payable on exchange)
Interim Payment	\$70,000,000 (payable at Settlement to occur 3 years from exchange)
Final Payment	\$25,000,000 (payable 3 years from Rezoning)
Subsequent Payment	Up to \$10,000,000 calculated at \$4,504,505 for each hectare of Developable Land or pro rata for a part thereof if and to the extent that the Minimum Developable Area is greater than 41.48 hectares but capped at \$10,000,000 (payable 4 years from Rezoning)
Equity Letter of Comfort	AustralianSuper will be prepared to provide an Equity Letter of Comfort in support of the purchaser's obligations under the Contract in the form provided to Tan Partners on 27 August 2014

10 We confirm:

1. The Internal Investment Committee of AustralianSuper has reviewed the Offer, fully supports and approves AustralianSuper's submission of the Offer and acknowledges the Offer will be binding on AustralianSuper;
2. AustralianSuper has all necessary approvals required to make the Offer and to consummate the transaction contemplated in the Offer on the terms and conditions outlined in the Offer; and
3. AustralianSuper has the necessary funds available to fully satisfy all obligations which will arise should the Offer be accepted.

We look forward to discussing this further with you. Should you require clarification of any matters raised please contact Matt Ablethorpe, Development Manager ISPT Pty on (03) 8601 6681, David McFadyen, Fund Manager ISPT Pty on (03) 8601 6659 or the undersigned on (03) 8648 3912.

This letter and the statements contained in this letter are provided solely for the purposes of the Offer and may not be used for any other purpose or relied upon by any third party.

This offer is valid for a period of 30 days from the date of this letter.

20

Yours faithfully,



Jack McSodgan
Head of Property

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M31 of 2015

BETWEEN:

WILLIAM FALKINGHAM

-and-

PENINSULA KINGSWOOD COUNTRY GOLF CLUB LIMITED
(ACN 004 208 076)

HIGH COURT OF AUSTRALIA
FILED
01 MAY 2015
THE REGISTRY MELBOURNE

Applicant

Respondent

RESPONDENT'S SUMMARY OF ARGUMENT

Part I: Why special leave should not be granted

1. The application for special leave seeks to review the exercise of the broad judicial discretions associated with the making of orders under s 233 of the *Corporations Act 2001* (Cth) (the **Corporations Act**) and the grant of declaratory relief. The trial judge and the Court of Appeal unanimously and correctly concluded that the applicant should not be granted the relief he sought. Those conclusions were based on the factual findings that were made in relation to the applicant's delay in bringing the proceedings and the adverse consequences of this delay for the respondent, members of the respondent and third parties. These conclusions constitute an exercise of discretion in light of the particular facts of the case. The application for special leave raises no question of general application or public importance.

2. There was no issue before the trial judge and the Court of Appeal as to the principles to be applied to the relief that was sought. There was no contention that the grant of relief in relation to oppression and the making of declarations was not discretionary, nor that delay was not a relevant matter to take into account in determining whether to grant such relief. The applicant submitted that the trial judge had made a number of errors in his analysis of the delay issue. The Court of Appeal addressed and rejected these arguments.

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3. Insofar as the applicant now contends that different considerations should apply to appeals which involve a consideration of whether a defence of laches was made out at trial, no such argument was advanced before the Court of Appeal. On the contrary, the applicant himself submitted that the principles in *House v The King* (1936) 55 CLR 599 were to be applied when reviewing the trial judge's decision to refuse relief. Moreover, the nature of the appellate jurisdiction of the Court of Appeal of the Supreme Court of Victoria as provided for by s 75A of the *Constitution Act 1975* (Vic) and s 10(1)(a) of the *Supreme Court Act 1986* (Vic) is not in doubt.

10

4. The applicant contends injustice arises from the decision of the Court of Appeal; but that contention is primarily grounded in the fact that his arguments in relation to the grant of relief were rejected by the trial judge and the Court of Appeal. The trial judge and the Court of Appeal were correct in rejecting those arguments. None of the arguments raised by the applicant supply any reason why it is in the interests of the administration of justice that special leave be granted.

20

Part II: Factual issues in contention

5. The factual background set out in the applicant's summary of argument should be supplemented with the following additional matters:

30

(a) On 26 August 2013, an information pack was circulated to the members of the Kingswood Golf Club Limited (**Kingswood**) which explained the details of the proposed merger with the Peninsula Country Golf Club (**Peninsula**) and notified members of a special general meeting to be held on 17 September 2013.¹ The key features of the merger as explained in the information pack were the sale of the Kingswood golf course located at Dingley, the repayment of debt, and the creation of a "future fund" which (it was projected) would secure the long term viability of the combined club.²

40

(b) On 17 September 2013, 63% of Kingswood members at the meeting voted in favour of an ordinary resolution that the board of Kingswood be directed and

¹ TJ [7].

² TJ [8]-[10] and [106]; CA [23].

3.

empowered to give effect to the merger of Kingswood with Peninsula in the manner described in the information pack.³

10 (c) On 29 October 2013, the membership of Kingswood (which by this stage included 1,044 members of Peninsula who had been admitted as members of Kingswood) passed special resolutions adopting a new constitution and changing the name of the club from Kingswood to Peninsula Kingswood Country Golf Club Limited (PKCGC). The resolutions were passed by majorities in excess of 90%, with approximately 80% of those who had not originally been members of Peninsula (i.e. the pre-merger Kingswood members) voting in favour of the resolutions.⁴

20 (d) The applicant did not vote on the 29 October 2013 resolutions, and deposed at trial that his reason was that he considered any vote to be "meaningless" given the admission of the Peninsula members.⁵

30 (e) Following the 29 October 2013 vote, various steps were taken in implementation of the merger agreement. Subscription fees were discounted and contractors were engaged to undertake works at the Peninsula site.⁶

(f) In November 2013, the applicant's solicitor (Mr Lal) published an article headed "The Kingswood Golf Club" in the *Dingley Dossier* which stated that he had a positive legal opinion on the possibility of a legal challenge to the merger.⁷ The trial judge did not accept that the applicant had not read this article.⁸

(g) In October or November 2013, the applicant attended a public meeting held by the Save Kingswood Organisation at which Mr Lal spoke and suggested there might be a legal case to answer in relation to the merger.⁹

(h) By letter dated 20 December 2013 entitled "A Welcome, Update and Best Wishes" the applicant was updated on developments in relation to the merger and informed of the work being undertaken by the board of PKCGC.¹⁰

40 ³ CA [28] and [31].

⁴ CA [34].

⁵ CA [34].

⁶ CA [36].

⁷ TJ [14].

⁸ TJ [15].

⁹ TJ [16]-[17].

¹⁰ TJ [105].

4.

10 (i) On 22 February 2014, Ernst & Young were appointed by the board of PKCGC to advise on the sale of the Kingswood course.¹¹

20 (j) On 26 March 2014, Ernst & Young were engaged to conduct a sale campaign.¹²

(k) By letter dated 5 May 2014, the applicant received a communication from PKCGC entitled "Membership Update No 2 – Merger Implementation" which under the heading "Land Divestment" noted that Ernst & Young had been engaged by the board and were testing the market through an expression of interest process which would be advertised in the property sections of the *Australian Financial Review* and *The Age*.¹³

(l) An advertisement seeking expressions of interest was published in the *Australian Financial Review* on 8 May 2014 and the applicant was aware of this.¹⁴

(m) By the time the proceeding was commenced by the applicant on 20 August 2014, the sale process of the Kingswood course was well advanced and about to be finalised.¹⁵

6. The applicant's statement of factual background makes reference to a number of matters that were not the subject of factual findings by the trial judge or the Court of Appeal.¹⁶ These matters are to be disregarded.

Part III: The respondent's argument

30 7. Two initial observations may be made in relation to the questions formulated in Part I of the applicant's summary of argument. *First*, questions 1, 2 and 3 relate to matters which were not decisive in relation to the conclusions reached by the Court of Appeal. *Secondly*, questions 4 and 5 amount to no more than disagreement by the applicant with the unanimous conclusions that were reached below in respect of matters concerning the exercise of judicial discretion.

40 ¹¹ CA [35].

¹² CA [36].

¹³ TJ [32].

¹⁴ TJ [33]; CA [38].

¹⁵ CA [37].

¹⁶ Paragraph 7, first sentence, all the words after Frankston; paragraph 8, second sentence and final sentence; paragraph 9, second sentence and final sentence; paragraph 12, fifth sentence and final sentence.

Question 1: The defence of laches

8. The applicant argues that the conclusions reached by the Court of Appeal were the consequence of the defence of laches having been applied to defeat relief that he sought. These arguments fail to recognise both the discretionary nature of the relief that was sought and the equitable underpinnings of the statutory cause of action upon which the applicant relied.

9. In upholding the findings of the trial judge, the Court of Appeal rightly held that delay was a matter that the trial judge was entitled to take into account when considering the making of orders under s 233 of the Corporations Act and the appropriateness of declaratory relief.¹⁷ As noted by Whelan JA at [74], the legal principles surrounding delay and the grant of relief are well settled and were not controversial on the appeal.¹⁸ After discussing the relevant authorities (at [74]-[87]), Whelan JA went on to state:

20 The submission made on behalf of the respondent that an attempt to analyse distinctions between the equitable doctrines of laches on the one hand, and the relevance of delay in the exercise of the statutory discretion on the other, is somewhat academic, is, in my view, well-founded. Insofar as declaratory relief was sought, it is clear that it was open to the judge to refuse that relief in the exercise of his discretion on the basis of delay. Insofar as relief was sought under the oppression provisions, delay was a relevant matter for the judge to take into account in the exercise of the wide discretion given to him under those provisions.¹⁹

10. Accordingly, the question of whether the equitable defence of laches is available as a "stand alone" defence to a statutory oppression claim did not and does not fall for 30 determination. It was the findings below in relation to delay that were decisive in relation to both the trial judge's decision to refuse relief and the Court of Appeal's conclusions that he was correct in doing so. These conclusions would stand even if it were the case that laches could not be relied on as a "stand-alone" defence in the context of an oppression claim under s 232 of the Corporations Act.

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¹⁷ CA [54], [75], [88]-[89] and [100].

¹⁸ The applicant accepted before the Court of Appeal that delay was relevant to the exercise of discretion under s 233 and it was not contended by the applicant that, insofar as declarations of invalidity were sought, such claims might not be defeated by reason of delay: CA [84]. See also Transcript 43, line 18; Transcript 45, lines 9-10.

¹⁹ At [88] (Warren CJ at [1] and Beach JA at [116] agreeing). See also *Ansett v Butler Air Transport Ltd* (1957) 75 WN (NSW) 299, Myers J at 304; Austin & Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, on-line edition) at [8.260] (current to February 2015).

Question 2: House v The King

11. In the Court of Appeal the applicant's submissions were to the effect that the principles outlined in *House v The King* were applicable when reviewing the trial judge's discretionary decision to refuse relief. This is made clear at paragraph 27 of the appellant's outline of submissions dated 13 October 2014 where, in addressing the grounds of appeal that complained about the trial judge's failure to grant relief, it was stated: "[T]he trial judge erred in not granting the remedies sought. Either there was specific error for the reasons advanced above or the failure to order remedies was unreasonable or plainly unjust in the sense explained in *House v The King*". The applicant's position in relation to the principles to be applied on appeal in reviewing the trial judge's exercise of discretion was confirmed at the conclusion of the oral hearing before the Court of Appeal.²⁰ The matter that is now sought to be raised by the applicant was not addressed by the respondent in written or oral submissions.

20

12. The resolution of the criticisms made by the applicant in respect of the primary judge's analysis of the delay issue appears from the reasons for judgment of Whelan JA at [90] to [97]. That resolution was unaffected by whether *House v The King* principles were applicable. Further, and for the reasons detailed above, the decision of the Court of Appeal did not turn on the availability of laches as a defence.²¹

30

13. Finally, the nature of the appellate jurisdiction of the Court of Appeal is not in doubt. It is well established that an appeal from a trial judge of the Supreme Court of Victoria to the Court of Appeal is in the nature of a rehearing.²²

Question 3: s 1322(2) of the Corporations Act

14. The case also does not present for consideration the question sought to be identified by the applicant in relation to s 1322(2) of the Corporations Act.

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15. Such observations as were made below in relation to s 1322(2) were not essential to the decision of either the trial judge or the Court of Appeal. The trial judge stated that if he had been required to adjudicate upon the application of s 1322(2) to the various

²⁰ See Transcript 127, lines 12-14.

²¹ Cf paragraph 28 of the applicant's summary of argument.

²² *Financial Wisdom Ltd v Newman* (2005) 12 VR 79, Eames and Nettle JJA and Williams AJA at [81]; *Waterfall v Antony* [2014] VSCA 44, Santamaria JA at [10] (Redlich JA at [1] and Whelan JA at [3] agreeing).

7.

procedural matters about which the applicant complained at trial (concerning the nomination of members), he would have been of the view that the provision would have saved any irregularities.²³ The Court of Appeal simply noted that there was no relevant error in what the trial judge had said.²⁴ The consideration of s 1322(2) did not affect the result and question 3 does not arise out of the appeal.

10 *Questions 4 and 5: Did the Court of Appeal err in dismissing the appeal?*

16. It is convenient to address questions 4 and 5 together. These questions do not identify any legal issue which would justify the grant of special leave. They seek only to challenge the correctness of the application of accepted principles to the particular facts of the case. The consideration of delay is necessarily a matter of degree and must depend on the particular factual circumstances of the given case.²⁵

17. Paragraphs [90] to [100] of the judgment of the Court of Appeal demonstrate that the Court of Appeal undertook a careful examination of the matters relevant to the issue of delay and the exercise of the discretion to grant relief. It was then concluded that the trial judge was correct in holding that relief was not warranted in all the circumstances. There is no error in this approach. The conclusion of the Court was sound.

18. There was ample evidence below to show that a range of important and irreversible things had occurred in implementation of the merger after the vote of the Kingswood and Peninsula memberships in September 2013. In 2013, the applicant knew that the resolutions had been passed in September 2013 and he knew that the Peninsula members had been admitted to membership of Kingswood.²⁶ There is no reason to doubt the correctness of the Court of Appeal's decision in relation to the exercise of discretion.

30 **Part IV: Costs**

19. The respondent seeks the costs of the application if refused, but seeks no special order as to costs.

40 **Part V: Authorities and legislation**

20. The respondent does not refer to any authorities or legislation.

²³ TJ [70].

²⁴ CA [98].

²⁵ *Haas Timber & Trading Co Pty Ltd v Wade* (1954) 94 CLR 593, Dixon CJ, Fullagar and Kitto JJ at 602.

²⁶ CA [91].

8.

Part VI: Oral Argument

21. The respondent seeks to supplement this summary of argument with oral argument.

Dated: 1 May 2015

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M31 of 2015

BETWEEN:

WILLIAM FALKINGHAM

Applicant

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PENINSULA KINGSWOOD COUNTRY GOLF CLUB LIMITED

(ACN 004 208 075)

Respondent

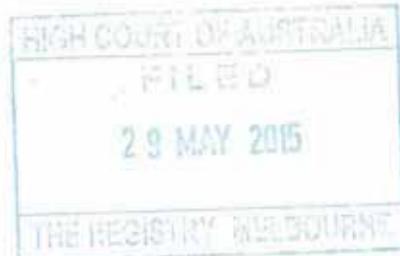
EXHIBIT COVERSHEET

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This is pages 43 and 45 of the Court of Appeal transcript of the hearing on 24 November 2014 in the matter of *William Falkingham v Peninsula Kingswood Country Golf Club Limited*, referred to in **footnote 18** of the Respondent's Summary of Argument dated 1 May 2015.

This document was created during the course of the substantive appeal and was tendered in evidence on appeal in the Court of Appeal.

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1 He's treating (indistinct) as a standalone defence
2 to a statutory cause of action, which is a legal claim,
3 which is against - which is contrary to what Justice Dean
4 said in Orr v. Ford that you can do.

5 WARREN CJ: Well, could I just analyse with you what His Honour
6 says in Paragraph 113. It says if I am wrong as
7 (indistinct) or delayed. So he puts that to one side.

10 Then, in my discretion, under s.233 I would not make
11 orders. Well is the (indistinct).

12 MS KENNY: He's treating laches as a standalone defence, so
13 it's an alternative defence. And he, in paragraphs 111
14 and 112, he looks at prejudice, the considerations of
15 prejudice, which he finds relevant only to the defence of
16 laches as he sees it. So, if you go across to page - - -

17 BEACH JA: Just before we do that, do you accept though that
18 reading Crawley v Short is correct so this laches is not
19 a relevant matter to take into account this time?

20 MS KENNY: It could be a relevant matter, yes. It's been - - -

21 BEACH JA: And it's your complaint that if it is a relevant
22 matter it should be dealt with. It should be considered
23 with all of the other relevant matters in determining
24 whether the leave should be granted, rather than on its
25 own as a knockout blow to a claim that's otherwise made
26 out.

27 MS KENNY: That's exactly. Yes, Your Honour. That's the way
28 that properly understand Short v Crawley put it.

29 WHELAN JA: So you also claim it applies by way of analogy
30 (indistinct words).

31 MS KENNY: Yes, that's right. Yes.

32 WHELAN JA: So he's (indistinct) as simply saying this is an in
33 valid (indistinct). We want the (indistinct), glad to be

1 Margovernor v Lehaines said, it is more difficult
2 to make out the defence of laches. But none of these
3 distinctions were appreciated by His Honour.

4 WARREN CJ: If the judge is facing straight s.233 application
5 and considering the exercise of the discretion, can the
6 judge consider delay?

7 MS KENNY: In s.233?

8 WARREN CJ: Yes.

9 MS KENNY: It probably would be a proper judicial
10 consideration. But he doesn't do that, Your Honour.

11 Because - - -

12 WHELAN JA: If the court is wrong - I'm confused now. I
13 thought you said before because s.233 is statutory claim,
20 14 it's always wrong to take into account the way.

15 MS KENNY: No. I said to take into account laches. The
16 defence of laches.

17 WHELAN JA: (Indistinct words).

18 MS KENNY: It's a French word actually, Your Honour.

30 19 WHELAN JA: French, is it? All right.

20 MS KENNY: It's French. It said - no, but it's quite clear,
21 Your Honour, that laches can be - laches, High Court has
22 said this on a number of occasions, a delay by itself can
23 never constitute - delay by itself can never, sort of,
24 especially delay which is within the statutory period,
4025 can't constitute a knock out defence.

26 BEACH JA: It's delay covered with consequence.

27 MS KENNY: Yes. Delay covered with consequences.

28 BEACH JA: And plainly the judge could take that into account,
29 because really the relief he is empowered to give in
30 s.222 and 233 being discretionary.

5031 MS KENNY: Yes. That's right. But, he doesn't do that, Your

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M31 of 2015

BETWEEN:

WILLIAM FALKINGHAM

10

-and-

Applicant

**PENINSULA KINGSWOOD COUNTRY GOLF CLUB LIMITED
(ACN 004 208 075)**

Respondent

EXHIBIT COVERSHEET

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This is page 127 of the Court of Appeal transcript of the hearing on 24 November 2014 in the matter of *William Falkingham v Peninsula Kingswood Country Golf Club Limited*, referred to in **footnote 20** of the Respondent's Summary of Argument dated 1 May 2015.

This document was created during the course of the substantive appeal and was tendered in evidence on appeal in the Court of Appeal.

30



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1 His Honour found that the oppression was constituted by
2 the continuing presence of those members who joined, as
3 part of improper admission.

4 And yet it is peculiar, we would say and wrong in
5 law for His Honour then to say, well even though I find
6 all this prejudice or oppression against the appellant
7 and against those who oppose the merger, nevertheless,
10 I've got to take into account that it's unfair, if I
8 unwind the merger. It would be unfair to these people
10 that joined the club in the improper way that he found.
11 In our submission, that is an illogical form of
12 reasoning. And it is a - it is the exercise of a
13 discretion which is liable to be set aside in accordance
20 with The Queen v House principles.

15 WARREN CJ: Yes.

16 MS KENNY: They're my submissions, Your Honour.

17 WARREN CJ: The court will reserve its judgment in this matter
18 and adjourn sine die.

19 ADJOURNED TO A DATE TO BE FIXED

30

40

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M44 of 2015

BETWEEN:

WILLIAM FALKINGHAM

-and-

Applicant

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**PENINSULA KINGSWOOD COUNTRY GOLF CLUB LIMITED
(ACN 004 208 076)**

Respondent

RESPONDENT'S SUMMARY OF ARGUMENT

This summary of argument uses the same defined terms as the respondent's summary of argument in proceeding number M31 of 2015.

20

Part I: Why special leave should not be granted

30

1. The application for special leave raises no question of general application or public importance. The application seeks to review the exercise of a judicial discretion as to costs. The statutory jurisdiction provided to superior courts to award costs is aimed at giving the widest possible power and discretion in the allocation of costs and is not amenable to a narrow interpretation: *Wentworth v Attorney-General (NSW)* (1984) 154 CLR 518 at 527-528. The Court of Appeal was correct to conclude that, in the particular circumstances of the case, the applicant was not entitled to an indemnity for his costs of the appeal. There is no warrant for interference with this exercise of discretion, let alone the grant of special leave.

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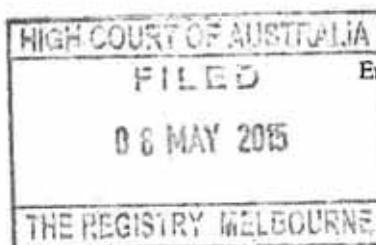
Part II: Factual issues in contention

2. The following aspects of the applicant's statement of factual background are to be disregarded:

(a) matters that were not the subject of factual findings by the trial judge or the Court of Appeal (paragraph 4, first sentence, second sentence and sixth sentence; paragraph 8, first sentence and final sentence; paragraph 12, first sentence);

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2.

(b) paragraph 4, fourth sentence, which incorrectly summarises the finding that was made; and

(c) paragraph 11(b), where it is asserted that recited submissions represent findings of the court below.¹

3. The factual background set out in the applicant's summary of argument should be supplemented with the additional matters that are referred to in the respondent's summary of argument in proceeding number M31 of 2015.

Part III: The respondent's argument

4. The bases of the Court of Appeal's decision that the applicant was not entitled to an indemnity for his costs of the appeal were that the applicant did have a personal interest in the proceeding and he determined not to seek leave under Pt 2F.1A of the Corporations Act to bring a derivative proceeding.²

5. The special leave questions identified by the applicant therefore do not arise for consideration. The principle outlined in *Wallersteiner v Moir (No. 2)* [1975] 1 All ER 849 and *Farrow v Registrar of Building Societies* [1991] 2 VR 589 was founded upon the circumstance that the relevant proceeding had been brought to enforce a right of the company and thus had been brought derivatively as agent "on behalf of the company".³ The proceeding instituted by the applicant was not of that character. Rather the applicant brought a statutory proceeding on the ground of unfairly prejudicial conduct. Such a proceeding (an oppression proceeding) is substantively grounded on an allegation of an infringement of individual rights, rather than an infringement of rights of the company.⁴ The Court of Appeal was entitled to conclude that the making of an indemnity costs order was not warranted in the particular circumstances of the case which the applicant had in fact brought.⁵

6. *Ford's Principles of Corporations Law* confirms the position that an order that a company provide indemnity for the costs of a member of a company, such as may be made in the case of a member suing on behalf of the company in a derivative action, "is

¹ Cf *Falkingham v Peninsula Kingswood Country Golf Club Ltd* [2015] VSCA 30, Warren CJ, Whelan and Beach JJA at [7].

AB 88

² *Falkingham v Peninsula Kingswood Country Golf Club Ltd* [2015] VSCA 30, Warren CJ, Whelan and Beach JJA at [11].

AB 89

³ That is, the applicant's proceeding was not a derivative action or capable of being so considered: *Farrow v Registrar of Building Societies Farrow v Registrar of Building Societies* [1991] 2 VR 589, Marks J at 591.

⁴ *Re a Company (Case No 005136 of 1986)* [1987] BCLC 82, Hoffman J at 84d (also reported as *Re Sherborne Park Residents Co Ltd* (1986) 2 BCC 99,528).

⁵ Cf paragraph 20 of applicant's summary of argument dated 17 April 2015.

3.

not made in applications which allege unfairly prejudicial conduct for then the applicant is taken to be seeking protection of the rights of members rather than corporate rights" (emphasis in original).⁶

7. As explained by Lord Hoffmann, when a judge of the Chancery Division, a proceeding in which statutory remedies for allegedly oppressive or unfair conduct are sought is not to be equated with a derivative action brought on behalf of a company. This is because:

Although the alleged breach of fiduciary duty by the board is in theory a breach of its duty to the company, the wrong to the company is not the substance of the complaint. The company is not particularly concerned with who its shareholders are. The true basis of the action is an alleged infringement of the petitioner's individual rights as a shareholder.⁷

8. His Lordship refused to order an indemnity in respect of the costs of the oppression proceeding because "(t)he procedure invented by the Court of Appeal in *Wallersteiner v Moir (No 2)* is predicated on the assumption that the plaintiff stands to the company in a relationship analogous to agent and principal or trustee and beneficiary. Such a relationship does not exist in this case."⁸

9. In any event, there is no error in the statements of the Court of Appeal about which the applicant complains. As noted by the Court of Appeal:

The appellant did not seek to bring this proceeding under Pt 2F.1A of the *Corporations Act 2001*. Had he done so, he could have relied upon the express statutory power given to the Court in s 242 to order that he be indemnified for his costs (amongst other things). He would then have been subject to the restrictions in Pt 2F.1A, most notably the requirement to obtain leave.⁹

10. The Court of Appeal was entitled, when exercising its costs discretion, to give consideration to the fact the applicant had elected not to bring a derivative proceeding.¹⁰ The applicant provided no evidence as to the reasons for his election not to do so. Nor, at any stage, did the applicant seek that the oppression proceeding be continued as a proceeding under Pt 2F.1A.

⁶ Austin & Ramsay: *Ford's Principles of Corporations Law* (LexisNexis Butterworths, on-line edition) at [10.480.6] (current to April 2015).

⁷ *Re a Company (Case No 005136 of 1986)* [1987] BCCLC 82, Hoffmann J at 84d.

⁸ *Ibid* at 85a.

⁹ At [8]. There are numerous examples of cases in which a plaintiff has pursued both derivative claims on behalf of the company and personal claims: see, for example, *Clark v Cutland* [2004] 1 WLR 783; *Fiduciary Limited v Morningstar Research Pty Ltd* (2005) 53 ACSR 732; *Vigliaroni v CPS Investment Holdings Pty Ltd* (2009) 74 ACSR 282; *Pottie v Dunkley* (2011) 82 ACSR 561. This was not one of them.

¹⁰ The reliance at footnote 19 of the applicant's summary of argument on *Clark v Cutland* [2004] 1 WLR 783 is misplaced. *Clark v Cutland* was a proceeding in which the petitioner applicant brought both a derivative action on behalf of the company and an unfair prejudice proceeding (and the two proceedings were consolidated): see Arden LJ at [2]. Further, the passage that is relied on by the applicant (Arden LJ at [35]) represented only a provisional view, a view said to be subject to any further submissions the respondent wished to make.

4.

11. Following the introduction of Pt 2F.1A of the Corporations Act, the general law right to bring or intervene in proceedings on behalf of a company was abolished (s 236(3) of the Corporations Act). Section 242 made provision for the making of orders in a proceeding under that Part as to the costs of any party and of the company, including a power to require indemnification. The Court of Appeal was correct to hold that the statements in *Wallersteiner* and *Farrow* should be read and applied taking into account these statutory developments.

10

Part IV: Costs

12. The respondent seeks the costs of the application if refused, but seeks no special order as to costs.

Part V: Authorities and legislation

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13. The respondent does not refer to any authorities or legislation.

Part VI: Oral argument

14. The respondent seeks to supplement this summary of argument with oral argument.

Dated: 8 May 2015

30

A. C. ARCHIBALD

Tel: 03 9225 7478

Fax: 03 9225 8370

Email: archibaldsec@vicbar.com.au

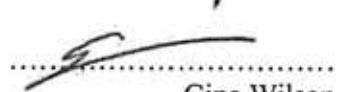
S. B. ROSEWARNE

Tel: 03 9229 5038

Fax: 03 9225 7728

Email: srosewarne@vicbar.com.au

40



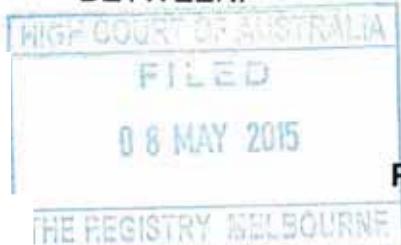
.....
Gina Wilson
Solicitor for the respondent

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M31 of 2015

BETWEEN:



WILLIAM FALKINGHAM
Applicant

and

PENINSULA KINGSWOOD COUNTRY GOLF CLUB LIMITED
(ACN 004 208 076)
Respondent

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APPLICANT'S REPLY

Factual background

1. In pars 5(c) and (d) of the respondent's summary of argument, the respondent refers to the vote which took place on 29 October 2013 on the special resolutions to adopt a new constitution and to change the club's name. The applicant notes that of the 1044 New Peninsula Members admitted shortly before that vote, 890 voted in favour of the special resolutions and 0 voted against.¹ The flooding of New Peninsula Members just prior to the vote for constitutional change overwhelmed the 214 foundation Kingswood members who had voted against the merger proposal on 17 September 2013.² While 214 "no" votes were more than sufficient to resist constitutional change in the pre-merger club (their constituting a 37% minority for the 17 September 2013 vote and a change of the constitution requiring a 75% vote), they were hopelessly outnumbered by the time the New Peninsula Members (who had a vested interest in the sale of the club's land) were admitted. In those circumstances, the applicant was right to consider the 29 October 2014 vote a foregone conclusion.
2. In response to par 5(i) of the respondent's summary of argument, no announcement of the appointment of Ernst & Young was made until the letter dated 5 May 2014, three days prior to the advertisement in *The Australian Financial Review* dated 8 May 2014 which called for expressions in interest in relation to the land. The entire sale process was shrouded in secrecy and there was no reason for the club members to expect the imminent sale of the land, particularly because prior to the merger the board represented that club members would continue to enjoy the golf course for between three to five years.³
3. In response to par 5(k) of the respondent's summary of argument, the applicant notes that the letter to members of 5 May 2014 referred to the divestment of the club's land as being "planned to occur by the end of the transition period", being three to five years (TJ: [11], [32], [105]).

AB 6,10,27

¹ PJS-33 to the affidavit of Peter Sweeney dated 25 August 2014.

² Affidavit of William Falkingham, dated 20 August 2014, par 66.

³ Applicant's summary of argument, dated 10 April 2015, par 41.

50

Filed on behalf of the Applicant

Prepared by:

Lyttletons Lawyers
2/128 Centre Dandenong Road
Dinalev VIC 3172

Telephone: 8555 3895

Fax: 8555 3865

Ref: Pranesh Lal

4. In response to par 6 of the respondent's summary of argument, the applicant relies on the matters there referred to and annexes the relevant material to this reply.

Laches

5. The respondent contends that the Court of Appeal did not consider the question whether laches was a defence to a statutory oppression claim. That is wrong. The Court of Appeal expressly upheld the trial judge's application of laches to the applicant's oppression claim, holding:

the trial judge's decision on laches, acquiescence and delay was a discretionary judgment [and] [t]he appellant has failed to establish error of the kind necessary to overturn that judgment. (CoA: [7])

AB 53

6. To the extent that the Court of Appeal conflated (CoA: [88]) the trial judge's reasons for upholding laches with the trial judge's reasons for declining, in the alternative, to exercise his discretionary power under s 233 of the Act, that was erroneous.⁴ That error is the subject of ground 7 of the applicant's draft notice of appeal in this Court.

AB 76

7. In any event, and as canvassed further below, the differing standards applicable to the review of laches and the review of an exercise of discretion under s 233 of the Act, should have prevented the Court of Appeal from combining the analyses in the way the respondent submits it has done.

8. There is no question that the trial judge upheld laches as a stand-alone defence to the oppression claim (TJ: [101]-[112]). The Court of Appeal failed to correct that novel and unprincipled expansion of equitable defences to legal claims. The applicability of the defence of laches to a statutory oppression claim falls squarely for consideration by this Court.

AB 26-31

House v The King

9. As detailed above, the primary holding of the trial judge was that the applicant's claim was barred by laches. For different reasons,⁵ and in the alternative, he would have refused to exercise his discretionary power under s 233 of the Act to grant relief to the applicant. It was not in dispute in the Court of Appeal that *House v The King* applied to that alternative exercise of the trial judge's discretion not to grant relief under s 233, but it was never contended that *House v The King* should apply to the review of laches.

10. Thus, the applicant's reference to *House v The King* in his written submission to the Court of Appeal⁶ was not directed to the laches grounds.⁷ Rather, the

⁴ Applicant's summary of argument, dated 10 April 2015, pars 21, 43.

⁵ Applicant's summary of argument, dated 10 April 2015, pars 21, 43.

⁶ Respondent's summary of argument, dated 1 May 2015, par 11.

applicant's ultimate submission on laches, as recorded in his written submission, was simply that "the *laches* defence was not made out on the facts and the trial judge should not have upheld it". That went directly to the question that the Court of Appeal should have asked itself (whether laches was made out on the facts), but did not.⁸

10 11. The respondent's written submission to the Court of Appeal was similarly structured, relying upon *House v The King* in an attempt to sustain the trial judge's alternative exercise of discretion,⁹ while, on the laches point, submitting that "it was correct for the trial judge to hold that it would have been practically unjust to grant the [applicant] relief".¹⁰

20 12. The applicant cannot now be criticised¹¹ for failing to deal below with the applicability of *House v The King* to the review of laches in circumstances where: (1) neither party advanced that as the standard applicable to the review of laches, and (2) the Court of Appeal is the first court in Australia to hold that *House v The King* so applies. Rather, the applicant was entitled to assume that the Court of Appeal would approach the matter as this Court has approached its review of equitable defences for the past 50 years.¹²

Section 1332(2)

13. Section 1322(2) was the trial judge's basis for not making findings about other alleged particulars of oppression (TJ: [70]). AB 20

14. In the Court of Appeal, the respondent relied on a notice of contention which sought to attack the trial judge's holding that admission of the New Peninsula Members had been for an improper purpose (and therefore oppressive). That contention was ultimately rejected (CoA: [101]-[106]). AB 80-81

30 15. If, however, the applicant had succeeded in the Court of Appeal on the questions of relief, but the respondent had succeeded on its notice of contention on the finding of improper purpose, s 1322(2) would have squarely arisen for determination. In those circumstances, if the trial judge had erred in respect of s 1322(2) the applicant would have been entitled to a retrial on those other particulars of oppression.

16. Unless and until the respondent undertakes to this Court that it shall not rely upon a notice of contention if special leave is granted, the scope and operation of s 1322(2) remains very much a live issue.

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⁷ The grounds which attacked the laches holding were grounds 1, 2, 3, 4, 15, and 17. The submission was made in respect of grounds 12, 13, and 14.

⁸ Applicant's summary of argument, dated 10 April 2015, fn 20 and accompanying text.

⁹ Respondent's written submissions dated 17 October 2014, par 7.

¹⁰ Respondent's written submissions dated 17 October 2014, par 6.

¹¹ Respondent's written submissions dated 1 May 2015, par 11.

¹² Applicant's summary of argument, dated 10 April 2015, pars 23-24.

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Administration of justice grounds

17. The respondent resists the grant of special leave on the administration of justice grounds on the basis that the applicant merely disagrees with the result.¹³ Yet the respondent does not dispute the hardship that the result does to the applicant.¹⁴

18. The respondent has not responded to any of the serious errors of principle (and application of principle) highlighted by the applicant,¹⁵ other than to say there was "ample evidence" to justify the result. On the contrary, the applicant has shown that there was a complete lack of an evidentiary foundation for various important findings of the trial judge.¹⁶ In any event, the bald assertion that there was "ample evidence" cannot address the grave errors of principle which the applicant has identified.¹⁷

Dated 8 May 2015

C. M. Kenny
C. E. M. Exell
A. F. Solomon-Bridge

Per Lyttletons Lawyers
Lyttletons Lawyers
Lawyer for the Applicant

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30

40

¹³ Respondent's summary of argument, dated 1 May 2015, pars 4, 7 16.

¹⁴ Cf. Applicant's written submissions, dated 10 April 2015, par 49(c).

¹⁵ Applicant's summary of argument, dated 10 April 2015, pars 33-48.

¹⁶ Applicant's summary of argument, dated 10 April 2015, pars 36, 41, 44, 45.

¹⁷ Applicant's summary of argument, dated 10 April 2015, pars 33-48.

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. 31 of 2015

B E T W E E N:

WILLIAM FALKINGHAM
Applicant

10

-and-

PENINSULA KINGSWOOD COUNTRY GOLF CLUB LIMITED
(ACN 004 208 076)
Respondent

20

EXHIBIT COVERSHEET

This is Exhibit PJS-33 to the Affidavit of Peter Sweeney sworn 25 August 2014 referred to in **footnote 1** of the Applicant's reply submissions dated 8 May 2015

30 This exhibit is a document prepared by Computershare and tendered in evidence at trial by the respondent in the Supreme Court of Victoria.

40

Filed on behalf of the Applicant
Prepared by:
Lyttletons Lawyers
2/128 Centre Dandenong Road
Dingley VIC 3172



50

Telephone: 8555 3895

Fax: 8555 3865

Ref: Pranesh Lal

Maddocks

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
 COMMERCIAL AND EQUITY DIVISION
 COMMERCIAL COURT

No. S CI 2014 04329

10

IN THE MATTER OF

PENINSULA KINGSWOOD COUNTRY GOLF CLUB LTD (ACN 004 208 075) (formerly
 known as KINGSWOOD GOLF CLUB LIMITED)

BETWEEN:

WILLIAM FALKINGHAM

and

Plaintiff

20

PENINSULA KINGSWOOD COUNTRY GOLF CLUB LTD (ACN 004 208 075)

Defendant

AFFIDAVIT OF PETER JOHN SWEENEY

30

Date of document: 25 August 2014

Filed on behalf of: The Defendant

Prepared by:

Maddocks

Lawyers

140 William Street
 Melbourne VIC 3000

Solicitor's Code: 230

DX 259 Melbourne

Tel: (03) 9258 3555

Fax: (03) 9258 3666

Ref: 6175682

Attention: Gina Wilson

E-mail Address: gina.wilson@maddocks.com.au

This is the exhibit marked "PJS-33" now produced and shown to Peter John Sweeney at the time of swearing his affidavit on 25 August 2014.

40

Signature of person taking affidavit

GINA LUCIE WILSON
 140 William St Melbourne 3000
 An Australian Legal Practitioner
 Within the meaning of the
 Legal Profession Act 2004.

Exhibit PJS-33

Document prepared by Computershare

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12459_1

Vol. 3 - 837

"PSS-33"

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 **KINGSWOOD GOLF CLUB LIMITED**
2013 OCTOBER SPECIAL GENERAL MEETING – ADDITIONAL FINAL REPORTS

Peninsula Country Golf Club Inc.

Item 1

314

Direction	Proxy	Revoked	Proxy	At Meeting	Total	%
For	833	3	54	6	890	100
Against	0			0	0	
Open	54					
Total	905				890	
Abstain	1				1	
Invalid	16					

% calculated excluding Abstain and Invalid

Item 2

Direction	Proxy	Revoked	Proxy	At Meeting	Total	%
For	831	3	56	6	890	100
Against	0			0	0	
Open	56					
Total	890				890	
Abstain	1				1	
Invalid	16					

% calculated excluding Abstain and Invalid

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KINGSWOOD GOLF CLUB LIMITED
2013 OCTOBER SPECIAL GENERAL MEETING – ADDITIONAL FINAL REPORTS

Kingswood Golf Club Limited

Item 1

Less than 1/2

Direction	Proxy	Revoked	Proxy	At Meeting	Total	%
For	308	3	11	16	332	79.24
Against	75			12	87	20.76
Open	11					
Abstain	1				1	
Invalid	5					
% calculated excluding Abstain and Invalid						

Item 2

Direction	Proxy	Revoked	Proxy	At Meeting	Total	%
For	304	3	16	16	333	79.47
Against	74			12	86	20.53
Open	16					
Abstain	1				1	
Invalid	5					
% calculated excluding Abstain and Invalid						



29 October 2013

The Chairman
 Kingswood Golf Club Limited
 Centre Dandenong Road,
 Dingley Village
 Victoria 3172
 Melbourne VIC 3000

Computershare Investor Services Pty Limited
 ABN 48 078 279 277
 Yarra Falls, 452 Johnston Street, Abbotsford
 Victoria 3067 Australia
 GPO Box 2975 Melbourne
 Victoria 3001 Australia
 Telephone 61 3 9415 5000
 Facsimile 61 3 9473 2500
www.computershare.com

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Poll Report

1, the Returning Officer appointed by you in connection with the voting by poll on the motion set out below at the Special General Meeting of the Members of Kingswood Golf Club Limited held at Kingswood Golf Club, Centre Dandenong Road, Dingley Village, Victoria on 29 October 2013 at 5:30pm, report as follows:



1) "The Inaugural name of the merged Club shall be Peninsula Kingswood Country Golf Club and accordingly the name of the company is changed to 'Peninsula Kingswood Country Golf Club Ltd'".

20

	Number	%
Votes cast 'FOR' the motion	1,222	[Redacted]
Votes cast 'AGAINST' the motion	87	6.65
TOTAL VOTES CAST	1,309	100.00
Votes "Abstained"	2	

The resolution was carried as a special resolution.

30

2) "The Constitution of the company is the document entitled 'Constitution of Peninsula Kingswood Country Golf Club Ltd' signed by the Chairperson of the meeting for identification and presented to the members at this meeting".



	Number	%
Votes cast 'FOR' the motion	1,223	[Redacted]
Votes cast 'AGAINST' the motion	86	6.57
TOTAL VOTES CAST	1,309	100.00
Votes "Abstained"	2	

The resolution was carried as a special resolution.

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D. E. H.
 Danielle Hine
 Returning Officer
 Computershare Investor Services Pty Limited

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 5001.3 - 840

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KINGSWOOD GOLF CLUB LIMITED
2013 OCTOBER SPECIAL GENERAL MEETING – ADDITIONAL FINAL REPORTS

Combined members
~~Kingswood Golf Club~~

Item 1

Direction	Proxy	Revoked	Proxy	At Meeting	Total	%
For	1141	6	65	22	1222	93.35
Against	75			12	87	6.65
Open	65					
Abstain	2				1309	
Invalid	21				2	
% calculated excluding Abstain and Invalid						

Item 2

Direction	Proxy	Revoked	Proxy	At Meeting	Total	%
For	1135	6	72	22	1223	93.43
Against	74			12	86	6.57
Open	72					
Abstain	2				1309	
Invalid	21				2	
% calculated excluding Abstain and Invalid						

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. 31 of 2015

B E T W E E N:

WILLIAM FALKINGHAM
Applicant

-and-

10

PENINSULA KINGSWOOD COUNTRY GOLF CLUB LIMITED
(ACN 004 208 076)
Respondent

EXHIBIT COVERSHEET

20

This is para 66 and Exhibit WPF-13 of the Affidavit of William Falkingham sworn 20 August 2014 referred to in **footnote 2** of the Applicant's reply dated 8 May 2015.

This Affidavit was filed in support of Application made to the Supreme Court of Victoria and tendered in evidence at trial.

30

40

Filed on behalf of the Applicant
Prepared by:
Lyttletons Lawyers
2/128 Centre Dandenong Road
Dingley VIC 3172

Telephone: 8555 3895
Fax: 8555 3865
Ref: Pranesh Lal

50

10 64. 214 members had voted against the resolution. This resulted in only approximately 62.9% of members in support, which fell between the requirements for an ordinary and a special resolution. The resolution was passed by the Kingswood board.

20 65. The day after the vote, Heath Wilson (the General Manager of the Club) approached me at Kingswood when I was playing golf with Ken Brown, David Picard and Chris Malone whom I play with every Wednesday. At the end of the 9th hole, Heath congratulated me on what I had said at the meeting the previous day. He said to me that he agreed with most of what I had said.

30 **After the vote**

20 66. On or about 3 October 2013, I received a letter from Peter Sweeney dated 2 October 2013 setting out the results of the merger vote for both the Club and Peninsula. Now produced and shown to me and marked "WPF-13" is a true copy of the letter. The letter stated, among other things, that the merger vote results for the two clubs were:

30 **Kingswood**

Peninsula

Resolution 1 - Approval of merger

Resolution 1 - Approval of merger

For: 364

For: 951

Against: 214

Against: 15

62.98% in favour

98.45% in favour

40 67. This letter contained a number of bullet points about the final vote. In them it also stated at the first and fifth points respectively that... "*you must now vote to change the name and Constitution of KGC to form our new club PKCGC.... this vote will require 75% of the votes cast to be in favour of the final step of the merger to be successful*".

Purported admission of new members

40 68. I understand from discussions with other Kingswood members including probably Ken Brown, Norm Seaton, Robert Strain, John Marsh and John Munroe in or around early October 2013, that members of the Peninsula Country Golf Club had all been admitted to Kingswood for \$1 each. I cannot recall precisely who told me this, but I was

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION
COMMERCIAL COURT

LIST:

No.

10 IN THE MATTER OF
PENINSULA KINGSWOOD COUNTRY GOLF CLUB LTD (ACN 004 208 075)
(FORMERLY KNOWN AS KINGSWOOD GOLF CLUB LIMITED)

BETWEEN:

WILLIAM FALKINGHAM

PLAINTIFF

20 -AND-

PENINSULA KINGSWOOD COUNTRY GOLF CLUB LTD (ACN 004 208 075)

DEFENDANT

EXHIBIT NOTE

Date of document: August 2014
Filed on behalf of: The Plaintiff
Prepared by:
Lyttletons
53 Marcus Road
Dingley 3172

Solicitor's firm code: 106703
DX: 33401 DINGLEY
Tel: 03 9551 3155
Ref: 214083
Attention: Pranesh Lal
Email: plal@lyttletons.com.au

This is the Exhibit marked "WPF-13" produced and shown to **WILLIAM PATRICK FALKINGHAM** at the time of swearing his Affidavit on 21 August 2014.

Before me:

22

40

EXHIBIT "WPF 13"

A TRUE COPY OF LETTER DATED 2 OCTOBER 2013

KINGSWOOD GOLF CLUB LTD.

(Incorporated in Victoria) A.C.N. 004 208 075 A.B.N. 91 004 208 075

2nd October 2013

10 Dear Member,

I am writing to formally advise you of the results of the membership vote on the proposed merger with Peninsula Country Golf Club and to outline the final step to establish our new Club.

Merger approved by both Clubs

At the meeting on the 17th September 2013, members of each Club voted in support of the proposed merger:

Kingswood
 Resolution 1 – Approval of a merger
 For: 364
 Against: 214
 62.98 % in favour

Peninsula
 Resolution 1 – Approval of a merger
 For: 951
 Against: 15
 98.45% in favour

20 We look forward to uniting with Peninsula as equal partners in the creation of the new Club.

On behalf of the Board, I thank all members for their interest, feedback, offers of assistance and the vote in favour of the recommended merger. You have been the key to a pivotal moment in the history of Kingswood Golf Club.

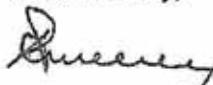
Final Vote – It is important that you participate:

- You must now vote to change the name and Constitution of KGC to form our new club PKCGC.
- A proxy form will be sent to eligible voting members this week by Computershare.
- The vote will be held on the 29th October at Kingswood Golf Club at 5.30pm.
- The simplest method of voting is to complete and mail your Proxy Form immediately on receiving it.
- This vote will require 75% of the votes cast to be in favour for the final step of the merger to be successful.
- As reflected in our last vote, Members see this as a great opportunity for Kingswood Golf Club, so I ask you all to vote again on these Special Resolutions.

Conclusion

30 May I again extend our sincere thanks for the interest and participation of our Members in this historic decision and commit to the achievement of the vision of creating a leading private golf club in Australia of which you will be proud founding members.

40 Yours Sincerely,



Peter Sweeney
 President

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. 31 of 2015

B E T W E E N:

WILLIAM FALKINGHAM
Applicant

10

-and-

PENINSULA KINGSWOOD COUNTRY GOLF CLUB LIMITED
(ACN 004 208 076)
Respondent

20

EXHIBIT COVERSHEET

This is respondent's submission dated 17 October 2014 referred to in
footnotes 9 and 10 of the Applicant's reply submissions dated 8 May 2015

30

40

Filed on behalf of the Applicant
Prepared by:
Lyttletons Lawyers
2/128 Centre Dandenong Road
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Telephone: 8555 3895
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Ref: Pranesh Lal

50

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
IN THE COURT OF APPEAL

No. S APCI 2014 0109

**IN THE MATTER OF PENINSULA KINGSWOOD COUNTRY GOLF CLUB LTD
(ACN 004 208 075) (FORMERLY KNOWN AS KINGSWOOD GOLF CLUB LIMITED)**

BETWEEN:

10 **WILLIAM FALKINGHAM**

Appellant

-and-

PENINSULA KINGSWOOD COUNTRY GOLF CLUB LTD (ACN 004 208 075)

Respondent

RESPONDENT'S OUTLINE OF SUBMISSIONS

A. Summary of issues

20 1. The appellant claimed at first instance that he was entitled to relief under ss 232 and 233 of the *Corporations Act 2001* (Cth) (the **Act**) by reason of alleged oppression by the respondent in relation to the 2013 merger of the Kingswood Golf Club (**Kingswood**) and the Peninsula Country Golf Club (**Peninsula**). The appellant's application was dismissed by the trial judge on 3 September 2014: *Re Peninsula Kingswood Country Golf Club* [2014] VSC 437. AB 1

2. There are two central issues raised by the appeal and the respondent's notice of contention:

(a) *On the appeal*: whether the trial judge erred in upholding the defence of laches and/or in exercising his discretion not to grant the appellant relief under s 233 of the Act. This issue is the subject of the appellant's amended notice of appeal dated 30 September 2014.

30 (b) *On the notice of contention*: whether the trial judge erred in finding that the board of Kingswood had improperly used its power to admit new members for the purpose of giving effect to the merger and had thereby acted oppressively within the meaning of s 232 of the Act. This issue is the subject of the respondent's notice of contention dated 24 September 2014.

B. The grounds of appeal

3. The trial judge's acceptance that the defence of laches was made out and his decision to decline to grant the appellant relief under s 233 of the Act (both decisions involving the exercise of a discretion following the trial judge's assessment of relevant factual matters and applicable legal principles) do not reveal any error reviewable on appeal.

40 4. The trial judge was correct to follow and apply the decision in *Crawley v Short* (2009) 262 ALR 654, in which the New South Wales Court of Appeal held that the equitable defence of laches was applicable to an oppression claim under s 232 of the Act: Young JA at [142]-[183] (Allsop P at [1] and Macfarlan JA at [5] agreeing). Intermediate appellate courts and trial judges in Australia should not depart from decisions of intermediate appellate courts in another jurisdiction on the content of any nationally applicable law unless they are convinced that the decision is plainly wrong: *Farah Constructions Pty*

2.

Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ at [135]. *Crawley v Short* is not plainly wrong and it ought therefore be followed (as it was by the trial judge).

5. For the reasons referred to by the trial judge in his reasons for judgment, the prerequisites for the defence of laches were made out on the evidence.¹ A range of important and irreversible things happened to implement the merger after majorities of both the Kingswood and Peninsula memberships voted in favour of the merger at the respective meetings of their clubs held on 17 September 2013.²

10 Further, and despite being specifically aware:

- (a) since late 2012, that Kingswood was looking at a relationship with Peninsula;³
- (b) of the detailed information provided by Kingwood to its members about the reasons for and the mechanics of the proposed merger;⁴
- (c) that central to the proposed merger between Kingswood and Peninsula was the sale of the land at Dingley;⁵
- (d) that the vote of the Kingswood members on 17 September 2013 was in favour of the merger by a substantial majority (63%);⁶

20

- (e) that over 1000 members of Peninsula had applied (as the members information booklet given to members on 26 August 2013 expressly stated was going to happen, which booklet was read by the appellant) to become members of Kingswood;⁷ and
- (f) that the vote of the merged membership of the respondent on 29 October 2013 had overwhelmingly approved a change in the club's name and constitution (including by nearly 80% of the pre-merger members of the Kingswood voting in favour),⁸

¹ See paragraphs [14]-[40] and [105]-[108] of the reasons for judgment.

AB 6-11,27-28

30 See paragraphs 97-106 of the affidavit of Peter John Sweeney sworn 25 August 2014 and the affidavit of Marcus Geoffrey Willison sworn 25 August 2014. The Board of the respondent resolved to approve proposed water works at the Frankston land at a cost of \$3,300,000 in January 2014 and a significant portion of those costs have been incurred: paragraph 13 of the affidavit of Gerard Patrick Ryan sworn 16 September 2014. On 5 September 2014, following an expression of interest campaign conducted by Ernst & Young, the respondent executed a contract of sale with ISPT in respect of the Dingley land: paragraph 10 of the affidavit of Gerard Patrick Ryan sworn 16 September 2014. Further, the respondent has extensively intermingled resources as between the Dingley and Frankston sites: paragraph 21 of the affidavit of Gerard Patrick Ryan sworn 16 September 2014.

² Paragraph 6 of the affidavit of William Falkingham sworn 20 August 2014.

40 ³ For example, the Q&A document placed on the Kingswood website regarding future options (exhibit WPF-4 to the affidavit of William Falkingham sworn 20 August 2014), the letter sent to Kingswood members on or about 20 March 2013 reminding them about the upcoming information night to consider the future of the club (paragraph 8 and exhibit WPF-11 to the affidavit of William Falkingham sworn 20 August 2014), the meeting held on 26 March 2013 at which Kingswood members were informed that the Board had decided that the two options that were available to the club were to stay at the Dingley site or to enter a full sale and merger with Peninsula (paragraph 43 of the affidavit of Peter John Sweeney sworn 25 August 2014, exhibit JWD-3 to the affidavit of William Dinger sworn 20 August 2014, and paragraphs 8-11 of affidavit of William Falkingham sworn 20 August 2014), the meeting held on 27 June 2013 to update the members on the "stay" and "go" options (paragraphs 66-69 and exhibit PJS-21 to the affidavit of Peter John Sweeney sworn 25 August 2014 and paragraphs 40-43 of affidavit of William Falkingham sworn 20 August 2014), the letter dated 16 August 2013 sent to Kingswood members recommending the merger (paragraph 76 of the affidavit of Peter John Sweeney sworn 25 August 2014 and paragraphs 44-45 of the affidavit of William Falkingham sworn 20 August 2014), the members information night held on 26 August 2013 (paragraph 79 of the affidavit of Peter John Sweeney sworn 25 August 2014), the information pack circulated to members on or about 26 August 2013 (exhibit PJS-28 to the affidavit of Peter John Sweeney sworn 25 August 2014), and the letter dated 3 October 2013 sent to Kingswood members setting out the results of the merger vote (paragraph 66 and exhibit WPF-13 to the affidavit of affidavit of William Falkingham sworn 20 August 2014).

⁴ Paragraph 81 of the affidavit of William Falkingham sworn 20 August 2014.

⁵ See paragraph 90(e) and exhibit PJS-29 to the affidavit of Peter John Sweeney sworn 25 August 2014.

⁶ See paragraphs 92-94 and exhibit PJS-31 to the affidavit of Peter John Sweeney sworn 25 August 2014 and paragraphs 68-72 of the affidavit of William Falkingham sworn 20 August 2014.

3.

the appellant did nothing to seek to stop the merger, or to overturn the passage of the September 2013 or October 2013 resolutions, or take any action in relation to the admission of the Peninsula members to Kingswood until commencing the proceeding below on 20 August 2014.

6. The only reason put forward by the appellant for his inaction was that he was not prepared to take steps until he was told by his solicitors that they had raised enough funds (by way of donation) in their trust account to commence the proceedings.⁹ However, despite being aware of the matters in paragraph 5 above, it was not until March 2014 that the appellant engaged solicitors.¹⁰ In all the circumstances, it was correct for the trial judge to hold that it would have been practically unjust to grant the appellant relief.

10 7. The appellant is also unable to demonstrate any error in the decision of the trial judge not to make orders under s 233 of the Act. The discretion given to the Court by s 233 is very wide: *Smith Martis Cork & Rajan Pty Ltd v Benjamin Corporation Pty Ltd* (2004) 207 ALR 136, Wilcox, Marshall and Jacobson JJ at [7], [70] and [86]; *Szencorp Pty Ltd v Clean Energy Council Ltd* (2009) 69 ACSR 365, Goldberg J at [56], [70] and [81]. When looking at the issue of relief, the Court should approach the matter conservatively and in the exercise of its discretion should favour the approach that it will not disrupt the affairs of the company at all unless there is clear justification: *Re Enterprise Gold Mines NL* (1991) 3 ACSR 531, Murray J at 590-591. Given the factual matters outlined in paragraphs 5 to 6 above, matters which were properly taken into account by the trial judge, it cannot be said that the s 233 discretion miscarried: see *House v R* (1936) 55 CLR 499, Dixon, Evatt and McTiernan JJ at 504-505.

20 8. For the reasons outlined in the trial judge's reasons for decision in relation to costs, there is no merit in the appellant's complaint that the trial judge failed to afford him procedural fairness by permitting the defence of laches to be raised: *Re Peninsula Kingswood Country Golf Club (No. 2)* [2014] VSC 483, **AB 34-36** Robson J at [5]-[16]. Further, the appellant specifically addressed the issue of laches at paragraphs 89-90 of his outline of submissions filed on the last day of the trial.¹¹

9. Nowhere in the detailed written material filed on behalf of the appellant at first instance was any submission made that he was pursuing separate and independent relief in relation to a "breach of statutory contract" claim. As is made clear in the conclusion section of his outline of submissions below, the appellant's case was put only on the basis that there had been oppression within the meaning of s 232 of the Act.¹²

30 10. Finally, the trial judge was correct to conclude that any complaint the appellant may have had in relation to the procedure that was followed by the Kingswood Board in relation to the admission of the Peninsula members would be saved by s 1322 of the Act: *Oil Basins Ltd v Bass Strait Oil Co* (2012) 297 ALR 261, Gordon J at [65]-71 and [129]-[132]; *Zomojo Pty Ltd v Hurd (No 2)* (2012) 299 ALR 621, Gordon J at [475]-[478]; *Weinstock v Beck* (2013) 297 ALR 1.

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⁸ See paragraphs 95-96 and exhibit PJS-33 to the affidavit of affidavit of Peter John Sweeney sworn 25 August 2014 .

⁹ Transcript 34, line 4 to Transcript 35, line 21 .

¹⁰ Transcript 14, line 7 to Transcript 14, line 10 .

¹¹ Exhibit P-19 .

¹² Paragraph 91 of exhibit P-19 .

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C. The notice of contention

11. The primary object for which Kingwood was established was to provide and maintain from the joint funds of the golf club a suitable golf course and clubhouse for the members of the club and their guests; cl 3 of the Kingswood Constitution.¹³ There was abundant evidence before the trial judge to establish that the future of the Kingswood (and therefore the ability of the club to provide its members with a suitable golf course and clubhouse) was in jeopardy unless the Board took action. After proper consideration of all available options and following extensive consultation, the decision of the Board was that the best option was for Kingswood to merge with Peninsula. This decision was entirely consistent with the objects and purposes outlined in the Kingswood Constitution. The Board's decision was then explained to and put before the members of Kingswood, following which the majority of the membership (63%) voted in favour of the merger. In these circumstances the trial judge erred in finding that the steps that were taken by the Board to implement the approved merger involved an improper exercise of power by the Board in breach of their fiduciary duties, thereby giving rise to oppressive conduct.

10 12. The relevant test when assessing whether conduct is oppressive within the meaning of s 232 of the Act in the context of a non-commercial company (such as the respondent) is to assess the conduct from the viewpoint of a hypothetical reasonable person associated with a company of the same type.¹⁴ Accordingly, the relevant hypothetical reasonable person in the current context is the board or committee member of a private golf club in Melbourne who has knowledge of both the issues facing the golf industry and private golf clubs and the specific issues relevant to the position of Kingswood in 2013.

20 13. It is a basic principle of the law of directors' duties that the powers which are conferred on the company directors must be exercised bona fide for the benefit of the company as a whole.¹⁵ At common law, the legal test for a finding of improper purpose is whether it is "impossible to say that the action of [the directors] was either incapable of being for the benefit of the company or such that no reasonable men could consider it for the benefit of the company".¹⁶

30 14. It is the province of the directors, not the courts, to identify where the interests of a company lie and the courts do not exercise a supervisory function over the business judgment of directors.¹⁷ As explained by Barwick CJ, McTiernan and Kitto JJ in *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil NL* (1968) 121 CLR 483:

Directors in whom are vested the right and the duty of deciding where the company's interests lie and how they are to be served may be concerned with a wide range of practical considerations, and their judgment, if exercised in good faith and not for irrelevant purposes, is not open to review in the courts.¹⁸

¹³ The Kingswood Constitution is found at exhibit JWD-4 to the affidavit of Jeffrey William Dinger sworn 20 August 2014.

40 ¹⁴ Austin and Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, Sydney, 2010, 14th ed.) p 777.

¹⁵ *Richard Brady Franks Ltd v Price* (1937) 58 CLR 112, Latham CJ at 135, Rich J at 138; Dixon J at 142-143; *Mills v Mills* (1938) 60 CLR 150, Latham CJ at 162-163; Rich J at 169 (Evatt J at 188 agreeing); Starke J at 175; Dixon J at 185; *Ngurli Ltd v McCann* (1953) 90 CLR 425, Williams ACJ, Fullagar and Kitto JJ at 438-440; *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil NL* (1968) 121 CLR 483, Barwick CJ, McTiernan and Kitto JJ at 493-494; *Kirwan v Cresvale Far East Ltd (in liq)* (2002) 44 ACSR 21, Giles JA at [121]-[133]; Young CJ in Eq at [289]-[319] (Meagher JA at [2] agreeing).

¹⁶ *Shuttleworth v Cox Brothers & Co (Maidenhead) Ltd* (1927) 2 KB 9, Bankes LJ at 19 (as approved in *Richard Brady Franks Ltd v Price* (1937) 58 CLR 112, Latham CJ at 136). Cf *ICM Investments Pty Ltd v San Miguel Corporation* [2014] VSCA 246, Nettle, Santamaria and Beach JJA at [71]-[79].

¹⁷ *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 at 823; *Wayde v NSW Rugby League* (1985) 180 CLR 459, Mason ACJ, Wilson, Brennan, Deane and Dawson JJ at 467-468; Brennan J at 469-473; *Bell IXL Investments Ltd v Life Therapeutics Ltd* (2008) 68 ACSR 154, Middleton J at [32].

¹⁸ At 494.

15. While it has been suggested that the oppression provisions may extend the grounds for curial intervention, they do not provide the Court with jurisdiction to interfere in the internal management of a company by directors who are acting honestly and for proper purposes: *Re Bright Pine Mills Pty Ltd* [1969] VR 1002, O'Bryan, Smith and Pape JJ at 1011. Where an allegation is made that there has been oppression by reason of the directors of the company acting for an improper purpose, the court does not substitute its own commercial judgment for that of the directors: *Zephyr Holdings Pty Ltd v Jack Chia (Australia) Ltd* (1988) 14 ACLR 30, Brooking J at 36-38.¹⁹ It is for the directors and not for the Court to decide whether the furthering of a corporate object which is inimical to a member's interests should prevail over those interests or whether some compromise must be made between them: *Wayde v NSW Rugby League* (1985) 180 CLR 459, Brennan J at 472.

10 16. In the present case, the trial judge failed to apply the settled legal principles set out above. Instead, his Honour assumed (without providing any reasoned analysis or reference to authority) that the Kingswood Board's power to admit new members under cl 8 of the Kingswood Constitution could not be exercised for the purpose of giving effect to the merger (without explaining why not). Accordingly, it followed automatically from this erroneous premise that the exercise by the Kingswood Board of the admission power for that purpose was a breach of fiduciary duty.

20 17. Because the trial judge's major premise was flawed in law, the conclusions which flowed from it were also inevitably wrong. There is no legal or logical reason to conclude that the Kingswood Board could not exercise the power conferred on it by cl 8(A)(ii) of the Kingswood Constitution to admit new members in order to give effect to the merger in circumstances where:

30 (a) The Board's intention to admit the Peninsula members as a necessary step in the process of the merger was clearly explained to Kingswood members in the merger information booklet sent to all members on or about 26 August 2013.²⁰

(b) The steps to implement the merger had been discussed with and by the Kingswood members at several earlier information evenings.²¹ Details in relation to the 17 September 2013 resolution and the further resolutions necessary to implement the merger to be put to members subsequent to the 17 September 2013 resolution were also displayed and explained on the Kingswood Golf club website on 2 September 2013, with this website explanation expressly noting that the resolution to change the club name and adopt a new constitution would be voted on by the merged membership.²²

(c) The majority of Kingswood members voted in favour of the merger being implemented in accordance with the proposal as outlined in the members information pack, which proposal had clearly identified that the Peninsula members would be admitted to membership of Kingswood as a necessary step.²³

40 (d) The proposed arrangements to implement the merger, which included the admission of the Peninsula members to Kingswood, were undoubtedly pursued by the Kingswood Board bona fide in the interests of the Kingswood members as a whole. All the relevant, objective evidence before the trial judge demonstrated that if Kingswood had continued alone the financial position of the club was such that it would soon collapse.

¹⁹ See also *Re G Jeffrey (Mens Store) Pty Ltd* (1984) 9 ACLR 193, Crockett J at 198.

²⁰ See p 17 of exhibit PJS-28 to the affidavit of Peter John Sweeney sworn 25 August 2014.

²¹ Paragraphs 40-42 and 44 of the affidavit of William Falkingham sworn 20 August 2014.

²² Paragraphs 85-86 of the affidavit of Peter John Sweeney sworn 25 August 2014.

²³ Exhibit PJS-29 to the affidavit of Peter John Sweeney sworn 25 August 2014 and exhibit HWW-12 to the affidavit of Heath William Wilson sworn 28 August 2014.

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18. The present case is not analogous to the "share allotment" authorities on which the trial judge relied at paragraphs [80]-[96] of the reasons for judgment. As noted by Young JA in Eq in *Kirwan v Cresvale Far East Ltd (in liq)* (2002) 44 ACSR 21:

The rules set out in the authorities and the text books are rules that apply in ordinary circumstances (if they ever exist) and are not to be applied unthinkingly to every situation. One must judge each case as to whether in all the circumstances of the case there was an equitable fraud in the exercise of the [relevant power invested in the Board].²⁴

10 19. In the authorities that are referred to by the trial judge it was relevantly held that the substantial or dominant purpose of the share issue was not to satisfy any need for capital, but rather was for the improper purpose of defeating the voting power of existing shareholders by creating a new majority.²⁵ There was no such improper purpose in the circumstances of the current case.²⁶ Rather, the exercise of the power to admit the Peninsula members was consistent with cl 3 of the Kingswood Constitution and the object of ensuring that Kingswood members were provided with (and had maintained) a suitable golf course and club house. This is because the merger with Peninsula, and taking all necessary steps to effect that merger, were matters properly directed at ensuring that Kingswood members had access to a suitable golf course and club house for the foreseeable future. The Kingswood Constitution did not say that the suitable course and club house must be located at the Dingley site. Nor has Kingswood as a golf club always been at that site.²⁷ The exercise of the admission power, having been undertaken bona fide and in the interests of the respondent and its members, cannot be impugned: *Harlowe's Nominees*, Barwick CJ, McTiernan and Kitto JJ at 493; *Sydney Brick and Tile Co Ltd* (1989) 16 NSWLR 260.

20 20. In light of the above matters, it is further submitted that the trial judge failed to comply with his judicial obligation to provide adequate and proper reasons in relation to the findings that the Kingswood Board had improperly used its power to admit new members for the purpose of giving effect to the merger and had thereby acted oppressively within the meaning of s 232 of the Act: *Sun Alliance Insurance Ltd v Massoud* [1989] VR 8, Gray J at 18 (Fullagar and Tadgell JJ at 20 agreeing); *Fletcher Constructions Australia Ltd v Lines MacFarlane & Marshall Pty Ltd (No. 2)* [2002] 6 VR 1; *Hunter v Transport Accident Commission* (2005) 43 MVR 130, Nettle JA at [21] (Batt JA at [1] and Vincent JA at [4] agreeing).

D. Conclusion

30 21. It follows that the notice of contention should succeed and the appeal should be dismissed.

17 October 2014

N.J. O'BRYAN

S.B. ROSEWARNE

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²⁴ At [302] (Meagher JA at [2] agreeing). See also Young JA in Eq at [299]-[319] generally.

²⁵ See *Darvall v North Sydney Brick and Tile Co Ltd* (1989) 16 NSWLR 260, Clarke JA at 336.

²⁶ Impropiety only arises where the relevant action by the board is dictated by an improper purpose: *Darvall v North Sydney Brick and Tile Co Ltd* (1989) 16 NSWLR 260, Clarke JA at 338. It cannot be said that the admission of the Peninsula members was undertaken for the improper purpose of diluting (and therefore defeating) the voting power of Kingswood members in relation to the October resolution concerning the change of club name and constitution. The facts of the matter are that over 79% of Kingswood founding members (and over 93% of the entire membership) voted in favour of these resolutions: see paragraphs 95-96 and exhibit PJS-33 to the affidavit of Peter John Sweeney sworn 25 August 2014.

²⁷ Transcript 12, line 19 to Transcript 13, line 27.

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M44 of 2015

BETWEEN:

WILLIAM FALKINGHAM
Applicant

and

PENINSULA KINGSWOOD COUNTRY GOLF CLUB LIMITED
(ACN 004 208 076)
Respondent

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APPLICANT'S REPLY

1. Contrary to the respondent's contention,¹ the application for special leave raises an important question as to the circumstances in which a party can apply for an indemnity order where it has not commenced a proceeding as a derivative action under Part 2F.1A of the Act. The applicant is not merely seeking review of a judicial discretion in relation to the award of costs: he is bringing the application precisely to vindicate a court's discretion as to costs, a discretion which the Court of Appeal inexplicably fettered.
2. The introduction of statutory derivative proceedings and the statutory indemnity specifically provided for in s 242 of the Act should not interfere with the court's widest possible power and discretion to award an indemnity for costs out of the assets of a company where it is just to do so. As stated by Lord Buckley in *Wallersteiner v Moir*,² such orders arise out of the plainest principles of equity. The position more recently stated in the United Kingdom is that such orders may be made notwithstanding that the action is not commenced as a derivative action.³
3. The principles founding such indemnity orders are well established and there is no reason to restrict or limit their application in the way suggested by the Court of Appeal.⁴ Part 2F.1A was intended to facilitate and simplify the pursuit of derivative proceedings by, amongst others, expressly permitting the Court to make an order for costs under s 242 of the Act. Otherwise, it has nothing to say about the circumstances when an indemnity order should be granted and certainly cannot be construed as fettering the Court's discretion to make such an order.
4. The introduction of Part 2F.1A abolished exceptions to the rule in *Foss v Harbottle*,⁵ and sought to "promote certainty regarding the nature of the action and avoid confusion between any diverging principles between the statutory

15 MAY 2015

¹ At par 1 of its summary of argument filed in this court on 8 May 2015.

² [1975] 1 QB 373.

³ *Clark v Cutland* [2004] 1 WLR 783 at [35] and see FN 19 of the Applicant's Summary of Argument filed in this court on 17 April 2015.

⁴ *Falkingham v Peninsula Kingswood Country Golf Club* [2015] VSCA 30 at [10] and [11].

⁵ (1843) 2 Hare 461; 67 ER 189.

action and the common law action".⁶ However, Part 2F.1A was not intended to arbitrarily limit the circumstances in which parties could be awarded an indemnity out of the assets of a company to "exceptional" or "unusual" circumstances.

5. The respondent is wrong to contend at par 4 and 5 that the special leave questions do not arise because the Court of Appeal based its decision to refuse an indemnity on its findings that the applicant had a personal interest in the proceeding.⁷ Even if that were so, it would not provide a proper basis for refusing to make the order. Pursuant to the principles identified in *Wallersteiner and Farrow*,⁸ a personal interest in the proceeding does not prevent the making of an indemnity order where that interest is incidental or indirect. Any such personal interest on the part of the applicant in this case was entirely incidental to the primary objectives of the proceeding to preserve the principal asset of the company, being the golf course land, and to enforce the constitution of the respondent prior to the 'merger'.

10 6. In any event, it was entirely speculative for the Court of Appeal to find that the proceedings were motivated by the applicant's desire to preserve his capacity to play golf at the Kingswood course.⁹ There was simply no evidence of this. The commencement of the proceedings is equally explicable by the applicant's intention to hold the respondent accountable for its flagrant breach of the Kingswood's constitution.

20 7. The respondent's reliance¹⁰ on the proposition set out in the commentary in *Ford's Principles of Corporations Law* is misconceived. The case cited in support of the proposition is *Re Sherborne Park Residents Co Ltd*.¹¹ In that case, the plaintiff was found to be suing as an individual shareholder. There the court noted that in share allotment cases¹² "there is no suggestion that the plaintiff sues on behalf of the company or in any other capacity other than individual shareholder".¹³ It also noted that had the plaintiff been seeking to restrain a disadvantageous transaction, "the position might be different."¹⁴

30 8. The respondent contends that the Court of Appeal was correct to consider the fact that the applicant had elected not to bring statutory derivative proceedings as decisive. As it rightly concedes, there was no evidence about the applicant's reasons for not commencing a derivative proceeding.¹⁵ However, for the reasons mentioned in pars 4-5 of the applicant's summary of argument filed 17 April 2015, due to the urgency of the injunctive application and the speed with which the matter came on for trial, it was entirely impractical to seek orders to continue the proceeding as a statutory derivative action and to apply for an indemnity order under s 242 of the Act.

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⁶ Explanatory Memorandum, p 20 [6.23].

⁷ Respondent's summary of argument filed in this court on 8 May 2015 at [4] and [5].

⁸ *Farrow v Registrar of Building Societies* [1991] 2 VR 589 at 590.

⁹ *Falkingham v Peninsula Kingswood Country Golf Club* [2015] VSCA 30 at [11].

¹⁰ Respondent's summary of argument filed in this court on 8 May 2015 at [6].

¹¹ (1986) 2 BCC 99,528; Also reported as *Re a company* (Case No 005136 of 1986) [1987] BCLC 82.

¹² Such as *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821.

¹³ *Re a company* (Case No 005136 of 1986) [1987] [1987] BCLC 82, at 85.

¹⁴ *Ibid.*

¹⁵ See [10] of the respondent's summary of argument filed in this court on 8 May 2015.

9. In response to par 2 of the respondent's summary of argument of 8 May 2015, the applicant relies on the matters set out in the factual background of his summary of argument filed 17 April 2015 and annexes the relevant material to this Reply.

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Dated 15 May 2015

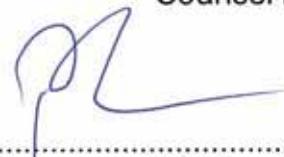
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