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The Honourable Barry O'Farrell Premier of New South Wales BY FACSIMILE: 02 9228 3935	The Honourable Andrew Stoner Deputy Premier BY FACSIMILE: 02 9228 5970	The Honourable Greg Smith Attorney General New South Wales BY FACSIMILE 02 9228 5874
Mr Paul Toole MP Parliamentary Secretary to Mr Stoner BY FACSIMILE: 02 6332 1900	Officers Sheldrake & Brooks & Stone Director General & Deputy Directors General Crown Lands BY FACSIMILE:02 9338 6890 BY FACSIMILE: 02 6391 3321	Ms Vincenza Colaluce NSW Crown Solicitors Office BY FACSIMILE: 02 9224 5211
Mr P Miller General Counsel to the Premier BY FACSIMILE: 02 9228 3062		

Dear Mr Premier, Deputy Premier, Attorney General, Messrs Toole, Miller and Sheldrake and Mesdames Brooks & Stone

Willoughby Council ("Council") & The Talus Street (R73306) Reserve Trust – DA2010/780
Advice from Mr Finkelstein QC that the occupation of Love 'n Deuce is unlawful

I note from previous correspondence that each of you is personally aware of the facts of this matter, the essence of which is that for many years, private interests have derived millions of dollars from this public trust without paying one cent to Willoughby Council or the government. The "super profits" generated from non-tennis activities on the trust property (namely the Love 'n Deuce "multi-sport" classes with up to 15 fee paying children on each court) have been shared with the actual lessee (Northern Suburbs Tennis Club/Association).

You should also know from my previous advices the following:

- around 1999, assisted and/or represented by Messrs Healy, Francis and Stewart, the Tennis Club was able to secure the concessional rent of a mere $14,000 per annum for this 15,300 sq metre reserve, on the condition (contained in ancillary documents) that the charity called Humpty Dumpty (a charity established by Mr Healy and Mr Francis and on which Mr Stewart also sat as a committee member) be allowed to stay on the premises rent free. Otherwise, the rent was $20,000. Council was effectively agreeing to pay Humpty's rent.
- the Club was able to secure this extraordinary rent even after an independent valuer had advised Mr Tobin of Council (in a letter dated 12 May 1999) the figure of $20,000 was "generous". Mr Tobin represented to councillors in his reports in support of the proposal, that the valuer had advised the $20,000 was "fair".
- public documents show that from 1999 to date, Humpty has been paying rent - for apparently some 10 to 20 metres of space on the Trust property - to a third party. A recent letter from lawyers for Mr Francis and Humpty admits office rent is paid to Love 'n Deuce. Since 1999, the total rent paid to Love ' Deuce is $400,000 ($1,300 per sq. m).
- over the same period, the rent paid to Council for the whole 15,300 square metres is some $209,000 (91c per sq. m).

You are now "party" to transactions that seek to subvert the public interest by effectively backdating changes to the trust and consenting to a backdated sublease between the Tennis Association and Love 'n Deuce. I am told the sublease is now with the Deputy Premier for final approval.

Under this sublease, a rent is payable by Love 'n Deuce to the Tennis Association of some $96,000 per year [sic]. This is to be backdated to 2008. I have been advised in recent days that this arrangement will not see the payment of any "new money" from Love 'n Deuce to the Tennis Association: the "rent" payable under the sublease is in fact the same money that has already been paid over recent years by Love 'n Deuce to the Tennis Association under some previous "management agreement". If that is true, is it not self-evident that each of you is now participating in a sham transaction: a transaction that seeks to rewrite the previous legal relationship between the parties in an attempt to subvert the various legal principles I have brought to your attention? I enclose a copy of an advice obtained by a Willoughby councillor who fears he and his co-councillors are personally exposed as a result of the malfeasance. The advice - from legal luminary Mr Finkelstein QC - confirms Love 'n Deuce's occupation is unlawful and cannot be "cured" by any sublease.

You should also be aware that although the Tennis Association will receive (or has received) "rent" of some $96,000 per annum, Council has agreed to accept a rent from the Tennis Association that is a mere 20% of market: $24,000 [sic]. I cannot understand the basis for such generosity: it is obvious the interests of this public trust are not being protected, especially when it is appreciated that the number of members of this Association apparently counts in the thousands, if not hundreds. Your due diligence would have established the sport of tennis has experienced the largest decline in participation of any major sport in the last decade: see ABS and Australian Sports Commission reports.

Finally, I point out that the Association owns property in Wheatleigh Street, Naremburn worth millions of dollars.

Yours faithfully,
JBOwens

Enc. Mr Finkelstein QC Advice

In the Matter of the Willoughby City Council and in the Matter of the Talus Reserve

Memorandum of Advice

1. A parcel of land in the Parish of Willoughby which is approximately 3.5 acres in size and known as the Talus Reserve was reserved for "public recreation" in September 1949. The reservation was made under s 29 of the *Crown Lands Consolidation Act 1913*. The question for opinion is whether it is lawful for a private company, Love N' Deuce Pty Ltd, to conduct for reward tennis coaching clinics and tennis competitions on part of the reserved land.

2. It is helpful to sketch out the background. By s 29 of the 1913 Act the Minister could by notification in the Gazette declares land to be temporarily reserved from sale pending determination by him of the portion to be set apart for any public purpose. On 16 September 1949 the Minister notified in the Gazette that the Talus Reserve had been reserved for the public purpose of "Public Recreation".

3. The 1913 Act was repealed and replaced by the *Crown Lands Act 1989*. By the 1989 Act (Sch 8 Pt 1) a reservation in force under the 1913 Act has effect as if made under the 1989 Act: Pt 1, cl 1(1). It is further provided that any reservation that continues in force is to be for the same purpose as the original reservation: Pt 1, cl 1(2).

4. Provision is also made in the 1989 Act for the constitution of a reserve trust as trustee of a reserve: see generally Pt 1, cl 4. The name of the reserve trust is the name assigned to it

by the Minister. On 4 June 1999 the Department of Land and Water Conservation advised that the Minister proposed to name the reserve trust for the Talus Reserve as Talus Street (R73306) Reserve Trust. Though I have not sighted the relevant Gazette, I assume the naming proposal was given effect.

5. On 5 April 1978 the Willoughby City Council (the Council) which manages the Talus Reserve granted to Northern Suburbs Tennis Club Limited (NSTC) a 20 year lease over a portion of the Talus Reserve being that portion on which there is located eight tennis courts. NSTC is a company that was specifically established to enter into this lease. The leased land became the headquarters of the Northern Suburbs Tennis Association (NSTA). NSTC or NSTA spent a considerable amount upgrading the tennis courts and constructing a clubhouse with a shop and offices (over $260,000 in 1986) as well as on extensions (around $450,000 in 1995).

6. The lease contained an option to renew for a further 20 years. The option was exercised and a new lease was granted to NSTC on 6 December 2000. The lessor under the new lease is the Talus Street (R73306) Reserve Trust. The lease records that the demise is for public recreation. Prior to it being granted the Minister was required to give his consent to the lease: see s 102 of the 1989 Act. The Minister's consent was obtained.

7. During the negotiations for the new lease NSTC advised the Council that it had "appointed a Manager Love N' Deuce Pty Limited to handle all Court Hire (outside of the NSTC reserved times) and who is responsible for full-time staffing and cleaning and maintenance of the Centre and [has NSTC] as one full-time employee. The Manager is on an incentive arrangement". NSTC also advised the Council that it (ie NSTC) "[did]

not know what the Manager earns but [did] not believe that it is anything more than a fair living".

8. In addition NSTC informed the Council that a charitable foundation, the Humpty Dumpty Foundation, occupied an office in the clubhouse and used the tennis courts and facilities free of charge. Humpty Dumpty carrics out diverse charitable activities including raising money for the emergency ward at the Royal North Shore Hospital. NSTC advised that it received no income from the Humpty Dumpty Foundation and allowed it to use the tennis court facilities frcc of charge for its fundraising activities.

9. It is likely that the Council did not appreciate the true relationship that existed between NSTC (or NSTA) and Love N' Deuce. Love N' Deuce was established in 1975. It operates out of five tennis centres and conducts coaching clinics at two schools in Sydney's North Shore with its headquarters being at the Talus Reserve.

10. Love N' Deuce describes itself as having the largest tennis business in Australia with over 60 staff. Its activities at the Talus Reserve are far more significant than simply being NSTC's "Manager". According to some newspaper reports (the accuracy of which it must be said have not been verified) Love N' Deuce has an annual turnover of more than $3 million from its five tennis centres. Presumably the activities at the Talus Reserve make a significant contribution to those earnings.

11. In addition Love N' Deuce receives from Humpty Dumpty a fee for permitting that organisation to occupy the office (some 20sqm) in its headquarters. The current fee is $30,528 per annum. Humpty Dumpty's annual returns show that for the period from 1998-1999 to 2012-2013 the fees totalled $401,000.

12. The arrangement with NSTC pursuant to which Love N' Deuce is permitted to carry on commercial activities at the Talus Reserve was not disclosed to the Council. Whatever that arrangement may be, suggesting that Love N' Deuce was nothing more than a "Manager" carrying out its functions on behalf of NSTC was at least misleading.

13. As well, the basis upon which Humpty Dumpty is permitted to occupy part of the leased land in return for the payment of a fee to Love N' Deuce is obscure. So far as is known to the Council, the only person entitled to possession of the leased land is NSTC. Nonetheless, the fee paid by Humpty Dumpty is likely to be some type of occupation fee.

14. While the precise arrangements between NSTC, Love N' Deuce and Humpty Dumpy are not known, what is known is that the arrangements are different from how they were described to the Council prior to the grant of the further term of the lease.

15. The arrangements are also inconsistent with provisions of the new lease. Those provisions assume that NSTC is itself operating the tennis courts, albeit with the assistance of a manager, and that Humpty Dumpty was given limited free occupancy rights.

16. The relevant provisions are:

- Clause 3(a) which provides that for the first three years of the lease there will be no rent.
- Clauses 3(b) and (c) which provides that if NSTC continues its involvement with the Humpty Dumpty Foundation the rent for the fourth year will be $14,000

per annum but if Humpty Dumpty Foundation vacates the premises the rent for the fourth year will be $20,000 per annum.

- Clause 4(a) which provides that the premises will only be used for tennis courts, a clubhouse and associated activities.
- Clause 4(g) which provides that NSTC will arrange for first class tennis coaching to be conducted on the premises each and every Saturday morning with the charges to be set by it but in accordance with the lessor's direction.
- Clause 5 which provides that NSTC will hire out the tennis courts to respectable and responsible persons and schools in the city with the hiring charges to be set by NSTC.
- Clause 6(a) which provides that the lessor shall retain the care, control and management of the premises as a public reserve.

17. Putting to one side the question whether NSTC has breached the lease by permitting Love N' Deuce to conduct a tennis coaching business on part of the leased land and by permitting the Humpty Dumpty Foundation to occupy a portion of the leased land in exchange for the payment of a fee, the issue raised is whether the activities of Love N' Deuce amount to a lawful use of land reserved for public recreation.

18. In this context it is important to note that s 6 of the Crowns Land Act provides that Crown land is not, among other things, to be "used, sold, leased, licensed, dedicated or reserved or otherwise dealt with unless the [activity] is authorised by this Act". Crown land is defined in s 3(1) to include land that is vested in the Crown. The Talus Reserve is Crown land.

19. The answer to the issue raised depends upon whether the use to which Talus Reserve is being put by Love N' Deuce is inconsistent with the reservation of the land for public recreation.

20. For land to be used for public recreation two conditions must be satisfied. The land "must be ... open to the public generally as of right; and it must not be a source of private profit": *Council of the Municipality of Randwick v Rutledge* (1959) 102 CLR 54, 88. So, for example, in *Storey v Council of the Municipality of North Sydney* (1970) 123 CLR 574 the High Court held that land which could only be used as a public reserve could not be leased to the Boy Scouts Association for a Scout hall and scouting purposes generally. That was not permitted because the land would, by reason of the lease, not be open to the public generally.

21. The requirement that land be open to the public is not absolute. The cases show that it is permissible to limit the use of a portion of a public reserve only to persons authorised to enter upon it. In *Waverley Municipal Council v Attorney General* (1979) 40 LGRA 419 the Court of Appeal instanced as an obvious example an oval that had been constructed on a public reserve for the purposes of organised sport and held that it was appropriate to permit one cricket game or one football game to be played and that other people could be excluded during the course of the game. Also, the Court of Appeal said that the use of buildings for public purposes allowed the Council to authorised only particular persons, or groups of persons, to conduct activities in them.

22. Some ancillary uses (ie ancillary to recreational use) is also permitted. For example, it has been held that it is permissible to construct buildings on land reserved for public recreation provided the buildings are properly characterised as being ancillary to the

enjoyment of the land as a place for public recreation. In *Attorney General v Cooma Municipal Council* (1962) 8 LGRA 111, 118 Brereton J said:

> To my mind the dedication of land 'for purposes of public recreation' necessarily involves the use of such land by the public for their recreation; land used by an individual or a council to manufacture or provide entertainment media for some subsequent enjoyment by the public or to disseminate information as to where recreation may be found is not land used for public recreation. It is obviously not necessary that the public must at all times have access to all parts of the land; indeed the type of recreation provided on it may require the exclusion of the public from parts of it, but any restriction upon the public's access to the whole of the area for the purpose of recreation can be justified only on the basis that it is in the interest of the public and to provide for their recreation within the area that they are so excluded from part of it.

23. Applying these principles to the Talus Reserve, there is nothing inconsistent with the land being reserved for "public recreation" and the construction of a clubhouse, shop and offices which are for the better enjoyment of the reserve by members of the public. Nor is it inappropriate for tennis clinics and tennis competitions, which by their very nature are not while they are being conducted open to the public at large, to be conducted on the reserve.

24. However, the problem, if there be a problem, arises if a private person conducts those activities for profit.

25. The clearly stated principle is that where profit is derived from the use of land reserved for a specified public purpose that use will only be lawful so long as the profits are devoted to the public purpose: *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council* [2012] NSWCA 358 [30].

26. That is certainly not the case here. Love N' Deuce earns significant profits from its use of the Talus Reserve. None of that profit is devoted to a public purpose.

27. For this reason Love N' Deuce's use of the Talus Reserve is unlawful, in the sense that it is not permitted by reason of the reservation. The unlawfulness cannot be remedied by the grant of a sublease or licence. The unlawful use should be brought to an end either by the NSTC withdrawing whatever occupancy rights it has conferred on Love N' Deuce or by Talus Street (R73306) Reserve Trust enforcing that part of the lease which requires the demised land to be used for public recreation.

R Finkelstein QC
Melbourne Chambers

3 June 2013

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