

# SUPREME COURT OF SOUTH AUSTRALIA

(Civil)

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## DAVIS v MCLAREN VALE & DISTRICTS WAR MEMORIAL HOSPITAL INCORPORATED & ANOR

[2024] SASC 119

Judgment of the Honourable Auxiliary Justice Bochner

14 October 2024

### CORPORATIONS - MEMBERSHIP, RIGHTS AND REMEDIES - MEMBERS' REMEDIES AND INTERNAL DISPUTES - OPPRESSIVE OR UNFAIR CONDUCT

Application seeking a declaration that the resolution to transfer the Association assets is invalid and that the affairs of the Association were conducted in an oppressive manner.

Held:

1. The conduct of and decisions made by the Board of the Association, between the period December 2022 and 25 May 2023 were invalid because the Board was not properly constituted.
2. Otherwise, the Association did not engage in conduct that was oppressive or unreasonable during this period.
3. Between 10 May 2023 and 4 July 2023, the Association engaged in conduct that was oppressive and unreasonable.

*Associations Incorporation Act 1985* (SA), referred to.

*Millar & Ors v Houghton Table Tennis and Sports Club Inc* [2003] SASC 1; *Pettit v SA Harness Racing Club Inc & Ors* [2006] SASC 306; *Ridgway v Sporting Shooters' Association of Australia Hunting and Conservation Branch (SA) Inc* [2015] SASC 7; *Singh v Singh*; *Flora trading as Flora Constructions v Budget Demolition & Excavation Pty Ltd* [2008] NSWSC 386; *Ngarluma Aboriginal Corporation RNTBC v Ramirez & Anor* [2018] FCA 1900; *Margaretic v Western Australian Trotting Association [No 3]* [2023] WASC 229, considered.

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**Applicant:** ROBERT LLOYD HENRY DAVIS      **Counsel:** MR A DAL CIN - **Solicitor:** BELPERIO CONNELL

**Respondent:** MCLAREN VALE & DISTRICTS WAR MEMORIAL HOSPITAL INCORPORATED  
**Counsel:** MR J WHITE KC WITH MR L WICKS - **Solicitor:** ANDREYEV LAWYERS

**Interested Party:** JAMES BROWN MEMORIAL TRUST      **Counsel:** MR J WARREN KC - **Solicitor:** LYNCH MEYER

**Hearing Date/s:** 12/08/2024 to 16/08/2024, 21/08/2024 to 22/08/2024, 29/08/2024

**File No/s:** CIV-23-007502

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**DAVIS v MCLAREN VALE & DISTRICTS WAR MEMORIAL  
HOSPITAL INCORPORATED & ANOR  
[2024] SASC 119**

**CIVIL**

1           The McLaren Vale and Districts War Memorial Hospital Inc (which I will refer to as “the Association”) commenced operation in 1951, with its first patient being admitted on 7 May 1951. Since that time, it has operated as a private hospital in McLaren Vale. At the time of the incorporation of the Association, McLaren Vale was a small rural community, distant from Adelaide, with few medical services and facilities between it and the Royal Adelaide Hospital. At the time of its commencement, it offered a full suite of medical services, including obstetric care and surgery.

2           Over the decades, McLaren Vale’s isolation from Adelaide decreased and sophisticated medical services were introduced much closer to its growing population, including the Flinders Medical Centre and the Noarlunga Hospital. As a result, the demand for services at the hospital run by the Association decreased, as did its relevance to the community. Its facilities became outdated and it struggled to attract and retain medical and nursing staff. In particular, surgeons operating in private elected to take their business elsewhere and by the early twenty-first century, the Association was struggling to make ends meet. It became dependent on government funding, and it became very difficult to recruit board members. The membership of the Association had dwindled to fifty-seven at the time of its annual general meeting in October 2022.

3           In January 2023, the board determined that the hospital should close and the Association be wound up. It approached the chief executive officer of the James Brown Memorial Trust (“the JBMT”), which operated the nearby Kalyra Nursing Home, and, in effect, offered its assets to the JBMT, subject to a number of conditions. It then put to a special general meeting of the Association resolutions to allow this to occur, which would result in the ultimate winding up of the Association. In brief, that is what has led to this action, in which a member of the Association has claimed that it has acted in a way that is oppressive or unreasonable, within the meaning of s 61(15)(a)(ii) of the *Associations Incorporation Act 1985* (“the Act”).

**The Association**

4           It is necessary to spend some time with the Constitution of the Association. Clause 1 provides that the name of the Association is “the McLaren Vale & District War Memorial Hospital Incorporated” and throughout, it refers to the Association as “the Hospital”. Thus, it is necessary, immediately, to distinguish between the business operated by the Association, a hospital, and the Association’s method of referring to itself in its Constitution as “the Hospital”. When it refers to the business operation of the Association, the Constitution refers to it as the “MVDWMH”.

5 The objects of the Association are set out clause 4:

4. Objects

- a) To remain incorporated as an association pursuant to the Act. To avoid confusion, this means that the Hospital is to remain membership based with any proceeds of the Hospital being used to further its objectives.
- b) To provide the community with a viable and sustainable health care service.
- c) To develop and maintain a program for the maintenance and development of the MVDWMH and its environs.
- d) To effectively and efficiently administer all facets of the health care service.
- e) To provide an effective system of communication with regard to Hospital activities and facilities.

6 A number of features of these objects immediately invites comment. First, the Association is not required, by its Constitution, to operate a hospital. It is to provide the community with a viable and sustainable health care service. Second, it is to remain a member-based association incorporated under the Act.

7 The powers of the Association are described in clause 5 of its Constitution. Relevantly, clause 5 provides:

5. Powers of the Hospital

In addition to the powers conferred by section 25 of the Act, the Hospital shall have the following powers:

...

- b) To sell, exchange, lease, mortgage, hire, dispose of, turn to account or otherwise deal with all or any part of the real and personal property of the Hospital. This power is subject to the requirement that the intention of the Hospital to sell, exchange, lease, mortgage, hire or dispose of assets of anticipated value exceeding \$250,000 or any real estate disposal, but excluding Hospital equipment, shall be notified by public advertisement in a local newspaper with sufficient time for a special meeting of Members to be called if deemed necessary by Members under the terms of Rule 10.3.

...

- d) To take over or enter into and conclude any agreements and make or do any deed, act matter or thing in furtherance of the objects of the Hospital.

...

- l) To apply the income and property of the Hospital towards the promotion of the objects of the Hospital.

8 Thus, it can be seen that, to sell real property of any value and other assets worth more than \$250,000, the membership of the Association must be given



notice of this intention with sufficient time to allow the calling of a special general meeting if required by a member. It is also clear that the income and property of the Association can only be “applied” for a purpose that promotes its objects.

9 Clause 6 deals with membership. The following parts of clause 6 are relevant to this action.

Clause 6:

6.1 Eligibility

Any person aged 18 years or over, who support the objects of the Hospital is eligible for membership of the Hospital.

6.2 Application for Membership

To become a Member of the Hospital, a person must:

- a) Complete that prescribed application for membership form (at Schedule1); and
- b) Pay the Annual Fee.
- c) On commencement of membership, Members agree to be bound by these rules.

6.3 Member Entitlements

Upon the expiration of four weeks from the date of commencement of membership, Members are entitled to:

- a) Nominate for election to the Board;
- b) Nominate other Members for election to the Board; and
- c) Vote at General Meetings.

10 These provisions make it clear that, as long as an applicant for membership is over that age of 18 and supports the objects of the Association, they are eligible for membership. If they have fulfilled the requirements of clause 6.2, they will become a member, without the need for consideration or acceptance by the Association or its Board. In effect, membership is automatic, if clauses 6.1 and 6.2 are satisfied. The only restriction on membership (of relevance to this action) is a qualifying period of four weeks before the member can vote at General Meetings.

11 Clause 8 of the Constitution provides that the Board “shall be comprised of eight (8) Board Members”. Clause 8.4 allows casual board vacancies to be filled in the following manner:

8.4 Casual Vacancies

The Board shall have the power to appoint a Member to fill any casual vacancy occurring on the Board. The appointed Member will hold office, subject to these Rules, for the remainder of the Term of the vacancy being filled. The appointed Members shall be eligible for re-election at the completion of the Term.

12 Clause 8.5 provides that a quorum is half plus one of the Board Members.

13 Clause 10.3 provides for special general meetings of members. It says:

10.3 Special General Meetings

- a) The Board may call a Special General Meeting of the Members at any time.
- b) A Special General Meeting shall be called by resolution of the Board; or
- c) On delivery to the Chief Executive Officer of a request in writing and signed by twenty (20) or more Members. The purpose for holding the Special General Meeting must be specifically stated in the written request and that business only will be discussed at the meeting.
- d) The Special General Meeting shall be publicly advertised in the same manner as the Annual General Meeting.
- e) The Chief Executive Officer shall convene the Special General Meeting within sixty (60) days of receipt of the written request for such meeting.
- f) Members eligible to vote shall have power to deal with any business the subject of which notice has been given.
- g) An eligible Member may vote by proxy at a Special General Meeting in the same manner as for an Annual General Meeting.
- h) The quorum for a Special General Meeting shall be one-third (1/3) of Members as recorded on the register of members or twenty (20) Members eligible to vote, whichever is the lesser.
- i) If a quorum is not achieved at the expiration of 20 minutes from the time specified for commencement of the meeting, the meeting will lapse.
- j) Retention of minutes shall be the same as for the Annual General Meeting.

14 Clause 10.2(f) provides for the manner in which notice is to be given of an annual general meeting (and therefore of a special general meeting). It provides:

At least twenty eight (28) days public notice shall be given of the Annual General Meeting by the posting of written notices in public and prominent positions in the Hospital district. In addition one (1) public notice shall appear in the Southern Times Messenger or its equivalent for the Hospital district at least twenty eight (28) days prior to the Annual General Meeting.

15 Winding up of the Association is dealt with in clauses 16 and 17. They provide:

16. Winding up

The Hospital may be wound up in the manner provided for in the Act.

17. Application of Surplus Assets

- a) If after the winding up of the Hospital there remains ‘surplus assets’ as defined in the Act, such surplus assets shall be distributed to any organisation which has similar objects and has rules which prohibit the distribution of its assets and income to its members.
- b) Such organisations shall be identified and determined by a Special Resolution of Members in General Meeting.

16 It is useful to note, at this point, the way in which the Act deals with the winding up of an association. Section 41 of the Act relevantly provides:

**41—Winding up of incorporated associations**

- (1) Subject to the succeeding provisions of this Part, an incorporated association may be wound up—
  - (a) by the Supreme Court; or
  - (b) voluntarily; or
  - (c) on the certificate of the Commission issued with the consent of the Minister.

17 As long as an association is not being wound up because it is unable to pay its debts, it can be wound up voluntarily by its members, on the passing of a special resolution, for any reason.

**The assets of the Association**

18 The Association’s real property, on which the current hospital stands, was given to it in 1947. The gift included five acres of land and a house built in 1862 which is called “Tsong Gyiaou”. The construction of the current hospital building commenced in April 1950 and, as I previously mentioned, it opened for business in late April 1951. It later built a retirement village, however this venture was not successful as the Association did not have sufficient cash reserves to allow it to meet its obligations in a timely manner when a resident’s unit was vacated. In 2018, the Association negotiated the sale of the retirement village to the JBMT; the sale was approved by a special general meeting of members held on 26 September 2018.

19 Another parcel of land had been leased for a number of years to the South Australian Housing Trust, on terms unfavourable to the Association. This land was recently (but before the events in question in this action) sold to the state government.

20 The land retained by the Association is currently valued at approximately \$6,000,000.

21 The Association has leased some of its facilities to tenants. The Wellbeing McLaren Vale GP Clinic (“Wellbeing”) first leased space within the Association’s premises in 2007. A further lease was entered into on 1 November 2022, for a period of five years, with a right to renew for a further five years after that.

Wellbeing pays a commercial rent for this lease. I understand that this lease is registered.

22 Clinpath also had a lease with the Association. I understand that at some point in the last year or so the space leased by Clinpath has been incorporated into the area leased by Wellbeing, and Clinpath has become a sub-lessee of Wellbeing.

23 On 5 May 2008, the South Australian Ambulance Service (“SAAS”) leased part of the Association’s premises and established an ambulance station. The lease is for a period of fifty years, and SAAS pays a peppercorn rent. I understand that this lease is also registered.

24 A group of volunteers has established an op shop in part of the Association’s premises. The op shop generated substantial income each year, and that income, along with moneys from other fundraising events held by the volunteers, substantially increased the annual income of the Association. It seems that the op shop is a profitable business much valued and strongly supported by the local community. In 2023, the volunteers obtained planning approval to build two large sheds on land owned by the Association to allow them to expand their efforts.

25 At some point (although it is not clear when exactly), the Association entered into two commercial agreements, with the JBMT and with Meals on Wheels. Pursuant to the agreement with the JBMT, the Association provided all of the meals offered by the JBMT in its aged care facility. While this was meant to be at commercial rates, poor management by the Association led to its pricing the meals at below cost price; as a result, the Association did not obtain the value out of this contract that it should have and in fact suffered a loss of more than \$100,000 per year. This situation was remedied in about 2021, when a new manager was employed who changed the price structure of the meals to allow the Association to meet the costs incurred from this contract, rather than the substantial loss that it had been making. I understand that a similar problem was found to exist with the contract to supply meals to Meals on Wheels; this was also rectified in around 2022.

26 A physiotherapist leases rooms in Tsong Gyiaou, and a community radio station also operates from there, although the evidence did not make it clear whether the radio station leased space or was permitted to use space in Tsong Gyiaou on some other basis.

27 At the time of the trial, the Association had sold off its plant and equipment. Thus, its only remaining assets are the land and infrastructure and the leases. Since the closure of the hospital, it has entered into a lease with the JBMT and Meals on Wheels to allow them to use the kitchen for their meal supply.

#### **External advice sought by the Association**

28 The Association has, on at least two occasions, sought advice from external consultants about the ongoing management and financial viability of the hospital.

29 Asia Australis delivered a report to the Association in March 2020. According to the report, Asia Australis was engaged:

... to review the current situation of the Hospital including

- The necessity to achieve and maintain financial viability over the long term.
- The current state of the hospital's buildings, equipment and facilities.
- The needs, expectations and aspirations of key stakeholders including the Board, the staff, the Members, the Minister and his Department (represented by the Southern Adelaide Local Health Network ("SALHN")) and the wider local community.
- The current and foreseeable demographic, socio-economic and health industry specific trends that may impact upon the hospital in the future.
- Any other factors that appear to be relevant.<sup>1</sup>

30 In undertaking the review, Asia Australis consulted:

- Board members;
- Hospital management and staff;
- SALHN including its Division of Rehabilitation, Aged and Palliative Care;
- Southern Palliative Care;
- Wellbeing;
- The SAAS;
- Straight Back Physiotherapy; and
- Referring general practitioners.

31 It does not appear that there was consultation with members of the Association or the broader community.

32 Asia Australis identified the following options available to the Association:

- Continue with its existing arrangements including its current level of government funding;
- Continue with its existing arrangements absent any government funding;
- Increase the number of public beds available;

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<sup>1</sup> A1, document 11.

- Continue as a private hospital, on the basis of 90% occupancy;
- Move to a fully public hospital;
- Close the hospital and open a regional medical centre, offering general practitioners, allied health and other health related services on the site;
- Move to a palliative care provider, including in-patient palliative care; and
- Sell the site.

33 Financial modelling was carried out for all but the last three options. It found that none of these was financially viable. It also found that there was insufficient demand for a local palliative care centre. It recommended that the Board consider the regional medical centre option and carry out the due diligence necessary to allow an informed decision to be made in this regard. Mr Overland's evidence was that the report was received and discussed by the Board. He said that the Board accepted what the authors were saying "but there was a great reluctance on the part of the board at that time to simply give up and close the hospital".<sup>2</sup>

34 Sometime later, the Board commissioned Destravis Group to undertake "a detailed clinical services planning study for the hospital which would help the Board and staff understand the opportunities that may exist over the next 5 to 10 years for the future development of the hospital."<sup>3</sup> Destravis delivered its report in May 2021.

35 Destravis, like Asia Australis, consulted with those whom it regarded as key stakeholders. They were:

- Board members;
- Employees of the Association employed in senior roles at the hospital;
- Representatives of SALHN;
- An orthopaedic surgeon; and
- A physiotherapist.

36 Again, it appears that there was no consultation with members of the Association or with the wider community.

37 Destravis identified four "focus areas" and listed actions to be taken to build on these areas. Each "focus area" was based on the Association continuing to run a hospital offering low acuity inpatient care, including convalescent care, care

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<sup>2</sup> T331.19-23.

<sup>3</sup> A1, document 20.

awaiting nursing home placement, palliative care and some types of post-operative care.

38 As to the Destravis report, Mr Overland said:

- A. Yes it was received by the board and discussed by the board. Destravis did a very comprehensive analysis, statistical analysis and it in many ways tended to reenforce what Asia Australia has actually said. So we focused on the idea of encouraging SALHN to engage with us to do some of the things that the Destravis report had talked about.<sup>4</sup>

### **This action**

39 The applicant, Mr Davis, seeks to have set aside a resolution of members on 4 July 2023 to give the Association's assets to the JBMT for no consideration. He wants the Association to undertake a proper consultation process about what to do with its property, with members and the broader community. He says that the Board of the Association made a unilateral decision to close the hospital, to give its assets to the JBMT and to wind up the Association, without giving any real consideration to the available alternatives. Further, not only did it ignore requests for consultation, it treated as enemies those seeking consultation and investigation of alternative uses for the site.

40 Mr Davis makes the following complaints about the actions of the Board:

- That at the time that the Board made the decision to close the hospital and give the Association's assets to the JBMT, it consisted of only seven members and so was not properly constituted. As a result, its decisions are void.
- The Board reached an agreement with the JBMT before seeking the authorisation of members to close the hospital and dispose of its assets.
- The Board failed to give any real consideration to alternatives to the giving of the Association's assets to the JBMT.
- The Board colluded with Wellbeing to boost membership numbers so as to ensure their preferred outcome was achieved.
- The Board would not engage in any dispute resolution processes as required by the Constitution.
- The organisation to which the Board seeks to give the Association's assets is not a like organisation for the purpose of clause 17(a) of the Constitution, and so it cannot receive them. The JBMT is not a member-based association; rather, it is incorporated by statute, and it is constituted by its trustees. It has no general membership. Further, it is limited in the objects of its assistance.

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<sup>4</sup> T334.7-13.

It can only assist those who are aged, infirm, lack sufficient means or are otherwise in need of charitable assistance. In effect, it is limited to operating in an aged care setting, unlike the Association, which has much broader objects, in effect, to provide a health care service for the community.

- The Board misled the community by referring to the proposed transaction as a merger between the Association and the JBMT. In fact, the plan was simply to give the JBMT the Association's assets and then wind up the Association. The Association would no longer exist in any form whatsoever.
- The Board engaged in a campaign of misinformation, by alleging that those who opposed the JBMT proposal wanted to enter into an arrangement with a private property developer which would put at risk all of the services currently operating from the site.

41 Mr Davis also calls into question the validity of the members who joined the Association at the instigation of the Board and Wellbeing in the period between 6 May 2023 and 4 July 2023. This is on the basis that they joined the Association in order to vote in favour of a resolution that would lead inevitably to its winding up; if this is the case, then they have not fulfilled one of the eligibility requirements, that they support the objects of the Association.

42 Mr Davis seeks a declaration that the resolution to transfer the Association assets is invalid. He also seeks a declaration that the affairs of the Association were conducted in an oppressive manner. He seeks a direction that the Board appoint a committee, which is to include himself and Mr Baragwanath and two nominees of the Board, to investigate the alternatives available for the assets of the Association to be used to achieve its objects. He seeks this relief pursuant to s 61 of the Act, on the basis that the conduct complained of was oppressive.

### **The witnesses**

43 Mr Davis called three witnesses, himself, Mr Baragwanath and Mr Bignell. Mr Baragwanath is a long term resident of McLaren Flat. He is the managing director of an ASX listed company and has experience in managing investments for charitable organisations. He has worked extensively with a number of not-for-profit organisations. I consider that Mr Baragwanath was a reliable witness, who gave his evidence in a clear and honest manner. I formed the view that he sought to assist the Board and the community and that he was not motivated by any self interest in his dealings with the Association and the Board. He gave his evidence in a reasonable and measured way and I have no difficulty in accepting his evidence.

44 Mr Davis is a lawyer and is currently running for preselection as the Liberal candidate in the federal seat of Mayo, of which McLaren Vale is a part. He is a long standing business associate of Mr Baragwanath, who first drew his attention to the plight of the Association. Mr Davis was also a clear witness who gave his evidence in a straightforward manner. I consider that he was a witness of truth,



who did not appear to be driven by his own interests. At times he appeared somewhat disengaged from this action and the affairs of the Association; I do not, however, consider that this is a reason to distrust his evidence.

45 Mr Bignell is the local state member of parliament for Mawson, in which McLaren Vale and the surrounding region fall. He gave his evidence in a straightforward manner and I have no difficulty accepting him as a witness of truth.

46 The Association called four witnesses, Mr Overland, Ms Blunt, Dr Lawlor-Smith and Dr Lovell. I consider that Mr Overland was an experienced and conscientious Board member, with a long career in hospital and health administration. He has been a member of the Board of the Association since early 2019. He gave the impression of one who had given all he had to give; the effort of keeping the Association afloat had worn him down. At times he became quite heated and emotional in his evidence about the work undertaken by himself and other Board members for the benefit of the Association. At the same time, he appeared dismissive of others' views; he seemed to take the view that there was no point seeking others' views on how to manage the Association because no one else knew anything about it. At times, I found his evidence to be somewhat disingenuous as he tried to distance himself from the actions of Dr Lawlor-Smith. At other times, he was defensive of his actions and the decisions of the Board. He also tended to preface many of his answers with words such as "I would have..." and so it was unclear to me whether he had an independent recollection of the matters that he was giving evidence about, or whether his evidence was a reconstruction of what he thought would have been the case. Nonetheless, I consider that he was a conscientious witness who did his best to assist the Court. Generally, I accept his evidence, with that caveat.

47 I accept that Ms Blunt, Dr Lawlor-Smith and Dr Lovell were also witnesses of truth, who did their best to assist the Court.

48 I note that Mr Dal Cin, who appeared for Mr Davis, and Mr White KC, who appeared, with Mr Wicks, for the Association both urged me to make findings unfavourable to the witnesses of the other side. I am unable to do this. As I have said, I generally found all of the witnesses to be truthful. While Mr Baragwanath and Mr Davis clearly have political interests, I do not consider that they sought to pursue those interests through the vehicle of the Association or this action. Similarly, I accept that the fears and concerns expressed by Dr Lawlor-Smith were genuinely held by her and that she was not motivated by any financial concerns or other self interest.

49 It is worth noting that there were, in fact, very few factual issues in dispute between the parties. What was in dispute was the characterisation of the actions of the various individuals and the Board.

50 I should also say at this point that I do not intend this judgment to be a criticism of the actions of the Board members. I accept that, at all times, they acted

in good faith and in what they considered to be in the best interests of the Association and its members. I accept that, with the benefit of a combination of hindsight, and the fact that I was not enmeshed in the day to day running of the Association, it is perhaps easy to criticise actions of well-meaning volunteers who are doing their best to promote the best interests of the Association and its members.

### **The events leading to the decision to close the hospital**

51 On 9 June 2022, Mr Chris Overland, the chair of the Association’s Board, provided what he called a “Retrospective Review” to the Board.<sup>5</sup> As part of the section of that report headed, “Background”, Mr Overland said the following:

For the last 4 years the Board has been engaged in a more or less constant process of crisis management as it has dealt with a series of problems arising from a combination of factors including previous imprudent or misguided decisions (or non decisions) and what appears to have been managerial incompetence, as well as new problems such as the ongoing pandemic.

52 He then outlined the problems and how they had been dealt with, including the problems with the catering contract and the sale of land to the JBMT and the South Australian Government.

53 Mr Overland outlined the Association’s clinical challenges. He described the Association’s difficulty in attracting the services of a sufficient number of general practitioners to ensure its viability. He also addressed the Association’s relationship with the SALHN, in whose purview the Association falls. He described an improved relationship with the SALHN but noted that at that time, the financial arrangement between the Association and SALHN did not extend beyond the end of 2022.

54 Mr Overland concluded his report in the following way:

As will be apparent from the foregoing discussion, the Board has had to devote a great deal of time and energy to taking the hospital from technical insolvency to its current relatively buoyant position. Given the many problems that have had to be overcome this is a very significant achievement.

It will also be apparent that significant vulnerabilities remain that may impact upon the hospital’s capacity to remain a viable service provider for the wider public hospital system.

In my judgment the Board has exhausted its potential to do much more to ensure that the hospital can continue to provide acute and sub acute patient services in a cost effective manner. Its fate is now largely in the hands of its principal funder and the SA government.

55 Mr Overland again addressed the financial situation of the Association in his report to the annual general meeting on 26 October 2022.<sup>6</sup> He said that the hospital reported a profit for the financial year ending 30 June 2022. He reported that the

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<sup>5</sup> A1, document 33.

<sup>6</sup> A1, document 35.

current funding arrangement with SALHN expired on 31 January 2023 but that the Board was “hopeful” that a new contract of the same or longer duration would be negotiated. About the long term viability of the hospital, Mr Overland said the following:

Turning to the future, the Board’s immediate priority is to secure a long term funding agreement with SALHN. Once such an agreement is in place the Board can consider the hospital’s future role in the community.

A critical factor in any decision about the longer term future will be the extent to which SALHN will actually require access to the facility. It is in the process of planning for the construction of an additional 200 bed capacity on the Flinders Medical Centre site. These beds seem likely to come on stream, perhaps in stages, over the next 3 to 5 years.

Realistically, once these beds are available it would make little sense for SALHN to continue to fund beds at McLaren Vale. As I mentioned in my report last year, the hospital is now over 70 years old and no longer meets contemporary expectations about how a hospital is designed and configured. Redevelopment is not a realistic option both from a cost and architectural standpoint.

This hospital is, in truth, now too old, too small and in the wrong place to meet the future needs of even the immediate local population.

As a consequence, the Board will have to consider what the best use of the facility would be were it not operating as a hospital.

One plausible option for the future would be to convert the hospital into a health hub which offers a range of both public and private health and related services to the wider southern vales community. The Board would welcome suggestions from the community about what could or should be done.

56 It seems from this that, in October 2022, the Board was considering the regional medical centre option recommended by Asia Australis as a possible alternative use for the assets of the Association.

57 At the annual general meeting on 26 October 2022, present, apart from Board members, were ten members and four non-members. The minutes of the meeting record the following was said by Mr Overland:

So, I think that means as a community we need to start turning our minds to what we’re going to do with this really good facility once its time as an acute hospital ends. We have the luxury of a certain amount of time, I think and we need to use that time to think about the future.

I feel I have to say this publicly now, so people can go away from here and understand that this hospital cannot operate as an acute care facility on an indefinite basis. However, it can be something else. It can be a focus for community health services or private health services, it can be turned into consulting rooms, or, in a worst case scenario, it can be bought for housing.<sup>7</sup>

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<sup>7</sup> A1, document 38.

58 It is interesting to note that Mr Overland appeared to stress the notion of community engagement in any planning process for the future. How this was going to be achieved is not explained, given that only ten members (in addition to board members) attended the annual general meeting. No evidence has been adduced that broader community consultation was sought, or that there was any attempt to advise the community (outside of the ten members who attended the meeting) of the situation that the Association was in with regard to the viability of the hospital.

59 I further note that, neither in his written report, nor in the oral statement that he made at the annual general meeting, did Mr Overland refer to the difficulty with recruiting and retaining general practitioners to work at the hospital, or the concern about the upcoming retirement of one of the hospital's long standing general practitioners.

60 On 22 November 2022, Mr Overland wrote to the Honourable Leon Bignell MP, the local member of parliament for McLaren Vale and the surrounding areas. In this letter,<sup>8</sup> he told Mr Bignell that the hospital was operating at a loss and expected a deficit of between \$100,000 and \$200,000. He outlined the Association's hopes with regard to ongoing government funding and support from SALHN. He then outlined the difficulty that the Association had in attracting and retaining general practitioners to provide ongoing care of both public and private patients admitted to the hospital. He discussed the future of the hospital as an acute care facility in the following terms:

As you are aware I have for some time been publicly flagging that the hospital is approaching the end of its working life as an acute care facility.

I have made this point quite directly and openly at the last two Annual General Meetings. There has only been a muted reaction to my comments. Most people appear to understand that the hospital is now too old, too small and in the wrong location to have an indefinite role providing acute and sub-acute care.

I have pointed out that redevelopment of the hospital to meet modern standards and expectations would, in any event, be prohibitively expensive and that new hospital facilities would logically be constructed in the areas of major population growth in the southern region.

The Board understands this situation and has already begun turning its mind to what might be done with the facilities in the future. The most logical use would be as a 'health hub' where various types of health and health related services were delivered by both private and public providers.

That said, the hospital remains capable of providing acute and sub-acute services over the medium term of 3 to 5 years.

61 This letter is consistent with the message that Mr Overland sought to convey at the annual general meeting a month earlier. The clear message was that, while the hospital's life was limited, it was viable for three to five years, during which

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<sup>8</sup> A1, document 40.

period the Board would consider to what use the Association's assets would be put once the hospital ceased to operate. The alternative consistently put by Mr Overland is use of the assets as a "health hub".

62 Two days after this letter was written, the Board of the Association met. The minutes of the 24 November 2022 meeting record that, in relation to the Association's finances, while there had been a loss for the month of October 2022, "the hospital appears to be travelling well."<sup>9</sup>

63 On 7 December 2022, Mr Overland sent an email to Board members, in which he reported on a recent meeting with SALHN representatives to discuss the funding arrangement for the Association.<sup>10</sup> He reported that SALHN was likely to offer funding for a period three years, and was willing to consider an increase to the amount. He then said this in relation to the hospital's medical workforce:

There is a clear recognition of our vulnerability in relation to medical services. They understood the pressure operating upon GPs generally and the many disincentives associated with delivering care in a hospital setting. Craig [Whitehead, Director, Rehabilitation and Palliative Care at SALHN] in particular is very concerned about what will happen when Graham Lovell retires in mid 2023. The prospects of replacing him look slim and he currently is the GP looking after the most public patients. I made it clear that in the absence of a viable panel of GPs we could not continue to operate as a hospital and that the Board would have to look at closure in that situation.

64 Mr Overland reported that he told the meeting that Board members were devoting more time than would normally be expected to oversee the management of the hospital. He said that this could not continue indefinitely and that finding people to take on Board positions was "no easy task".

65 Mr Overland further noted that the timing of the closure of the hospital was discussed, on the basis that the government would "not countenance such a decision in the run up to an election." Overall, the tone of the email was buoyant and optimistic.

66 This is the first mention of Dr Graham Lovell, one of the doctors at Wellbeing, and his retirement in mid-2023. While the difficulty of attracting and retaining doctors had been raised on numerous occasions in the past, Mr Overland had not previously linked the ability of the hospital to provide services to one doctor in particular, nor had he suggested that the retirement of one individual would lead to the closure of the entire hospital. In his oral evidence, Mr Overland said the following about Dr Lovell's retirement:

A. ... The message we were getting was that Graham was contemplating retirement. And Graham was a person we were quite heavily reliant on then to take public patients, particularly palliative care patients. So, we thought that - the advice we were

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<sup>9</sup> A1, document 41.

<sup>10</sup> A1, document 42.

receiving was that he was looking towards retirement. Graham is affected by Parkinson's disease, and we thought that was probably influencing his thinking.<sup>11</sup>

67 In cross-examination, Mr Overland said the following about Dr Lovell:

Q. So what you're reporting in this email is that you said to the area network people that 'Dr Lovell or a GP in Dr Lovell's role is mission critical for us'.

A. Yes, the GPs collectively were mission critical.

Q. Yes, but also 'If we lose one we are in trouble and we'll have to look at closing'.

A. Yes, the reason for that is that the doctors were uncomfortable with taking more than two or three patients each. So that did heighten our vulnerability.

Q. Yes, but you explained that to Dr Whitehead and Mr Gadd.

A. Yes, they knew it, they understood anyway, yes.

Q. That 'If the eventuality happens that Dr Lovell retires and we don't replace him, we can't continue to operate' was your view.

A. Yes, my view was we wouldn't be able to continue to operate because we wouldn't be able to replace him. The other GPs wouldn't just simply pick up the load.<sup>12</sup>

68 As to the timing of any closure of the hospital, Mr Overland gave the following evidence:

Q. You weren't talking in general terms, were you, because you've made a note that you discussed that the government would not countenance such a decision, which I suggest is a closure decision, in a run-up to an election.

A. That was our thinking, basically, and I think that was based on experience, yes.

Q. And so the effect of a discussion is: the government's not going to countenance a closure at the end of the three-year period.

A. We would have thought not, in our experience, collectively.

Q. And it's for that reason that the timing of a decision to close would be important. Do you see your sentence -

A. Well, yes, I understand -

Q. - I'm focusing your sentence.

A. - where you're driving with this. But the timing of our decision, you also see in there I say at various times we've said we were hostage to fortune, which we were. So the timing was not necessarily going to be ours.<sup>13</sup>

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<sup>11</sup> T344.1-8.

<sup>12</sup> T452.18-35.

<sup>13</sup> T457.1-22.

69 He went on to say that there was no other discussion about the timing of any closure; the conversation did not extend beyond a general agreement about the reluctance of a government to accept the closure of a hospital in the lead up to an election.

70 Mr Overland wrote to Board members on 17 January 2023.<sup>14</sup> He reported that the hospital's finances were on "a stable if not necessarily strong footing", on the basis of the Association's available capital fund and the current funding arrangement with SALHN. He noted that the Association was overly reliant on Board members for executive level support and that this was taking its toll on the Board members concerned. After discussing other matters, he said:

Fifth, the situation with respect the (sic) doctors remains highly problematic. The hospital is dangerously exposed should one or more decide to cease providing services. At present Dr Lovell is taking the lion's share of patients. Upon his retirement it seems highly likely that there will be no replacement. If that is the case, then the hospital will be unable to fulfill its contractual obligations to SALHN.

71 As with the email of 7 December 2022, the retirement of Dr Lovell is given prominence as a risk factor for the hospital. In his cross-examination, Mr Overland said that he had not received any further information about Dr Lovell's retirement:

...we still had a belief that Graham would proceed to retirement at sometime that year, but we didn't have any confirmation to that effect...<sup>15</sup>

72 He confirmed that, if the hospital was not able to fulfil its obligations to SALHN, it would need to close.<sup>16</sup>

73 The Board next met on 25 January 2023, eight days after Mr Overland wrote his letter. The minutes<sup>17</sup> note that a profit of \$41,301 was reported for the month of December 2022, but that the hospital continued to underperform against its occupied bed days budget.

74 The minutes then record that Mr Overland advised the Board that SALHN had agreed to extend the Association's funding agreement for six months, rather than the anticipated three years. In the context of that advice, the minutes then record:

Chris O. indicated that MVH struggles to retain core nursing staff and is critically reliant upon less than a handful of GP's, the most active of whom will retire in June.

75 Mr Overland is also reported to have said that the Association was too reliant upon its Board members for management functions, and that finding replacement Board members was a problem.

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<sup>14</sup> A1, document 43.

<sup>15</sup> T466.26-29.

<sup>16</sup> T467.23-25.

<sup>17</sup> A1, document 44.

76 The minutes go on to record:

There was a clear consensus amongst Board members that the hospital's situation has been rendered untenable due to the apparently insurmountable problems surrounding ongoing finance, senior executive leadership and the constant struggle to recruit and retain nurses and doctors to provide patient care. It was agreed that the Chair would draft a letter to the Minister outlining the problems now being confronted and proposing that there be a managed closure of the hospital...Having regard to the community and political sensitivities surrounding this decision, the letter would be couched in terms suitable for inclusion in Hansard.

77 As to the use of the Association's assets in the future, it was agreed that the Board would need to seek legal advice.

78 Mr Overland said that the Board felt that it could no longer carry on under the current funding arrangements. He said:

... But, we felt that an offer of five months or six months further renewal of the contract reflected a complete lack of commitment by SALHN to the hospital, even in the medium term. And there was no appetite to continue battling on when the outcome was going to be inevitable.<sup>18</sup>

79 About Dr Lovell's retirement, Mr Overland said:

Q. Is it the case that you'd actually learnt definitely that Dr Lovell was retiring in June.

A. No, I had not learned definitively, but that was what was being reported to me.

Q. You see, one inference is that - and the reason for the change in your assessment, of the optimism of your assessment between December and January is that between 7 December and mid-January you learnt conclusively that Dr Lovell was going to retire.

A. No, I did not learn conclusively that he was going to retire at any point. As I said to you, I had been told that that was what the situation was. I'm kicking myself now for not having asked him, but the reality was at no time did Graham or anyone else come along to me and say Graham is going to retire in June.<sup>19</sup>

80 As can be seen, in the space of only two months, the attitude of the Board and Mr Overland in particular has gone from cautiously optimistic and foreshadowing a life of approximately three to five years for the hospital, to one where the immediate closure of the hospital was required. This is despite the "stable finances" referred to in Mr Overland's letter of 17 January 2023.

81 It was not elicited in evidence when or how Mr Overland became aware of the apparent intention of Dr Lovell to retire in the middle of 2023, nor whether it was a matter that he reported to SALHN at the meeting in December 2022, or whether it was a matter about which the SALHN representatives had independent knowledge. Be that as it may, it appears that the supposed retirement of Dr Lovell

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<sup>18</sup> T346.38-347.5.

<sup>19</sup> T476.38-477.14.



was the catalyst to the change in the Board's attitude about the longer term viability of the hospital. It is also clear that the workload for Board members was a significant factor in deciding to close the hospital.

82 Mr Overland said that, before the decision was made to close the hospital, the Board had considered what should happen to the Association's assets. He said:

A. We had thought about it at various times, both formally and informally. There were a range of options, but we knew there was several things that we, I think we all collectively came to understand before we even thought about what specifically might be done. We knew that whatever the future may hold it was going to require a lot of capital to do something with the site, which we didn't have, it was going to require a very strong cashflow to sustain whatever organisation ultimately took control of the site while it was doing something with it, and it needed the management expertise to actually conduct some sort of large scale capital works project. So, we knew that whatever the future involved it was not going to be, to be blunt, as a community controlled entity, that it would have to be passed over to an organisation of some sort which had that sort of capability. It also had to be some sort of organisation whose objects were consistent or broadly consistent anyway with those of the hospital. We also wanted to make sure that whatever it was it was a registered charity, not for profit organisation, because we didn't believe that the property should be used for profit purposes. And also we were very concerned about the interest of our tenants, and also the historic and heritage values of the sites. So, all of those considerations were already in play, as it were, when we were thinking about what we might do. We did think about redeveloping the hospital, but that was a pretty easy option to discount because of the massive cost that would have been involved in doing that, and there was no plausible business case that you could put together for trying to build a new private hospital at McLaren Vale. The same applied to residential aged care, there was no plausible option for redeveloping it as residential aged care, it doesn't comply with the current Commonwealth standards for residential aged care.

Q. Pausing there, you mean the existing buildings.

A. The existing buildings, right. So, we knew redevelopment of the - the only option for the existing buildings which was sort of feasible, was this idea of a health hub, but even that would be very expensive to do, we knew that. We didn't just want to sell it, it was ... open to us to just sell the site and get as much money as possibly could, but then we were stuck with the problem of what did we do with that money, so that didn't appeal to us. There was a suggestion at one point that perhaps it could be used for a school, which seemed strange given that there are four schools within a 7 km radius of the site. What else came up, we really couldn't think of issues much beyond that, I mean if it had been a private company we would have sold the site for the maximum amount of money we could return, distribute it to the investors and everyone would have been happy, but we didn't want it - we couldn't see how we could sell it for housing or for a boutique hotel or something like that. So, we weren't - by January 2023 we didn't really have a clear idea about what the future might hold.<sup>20</sup>

83 Mr Overland outlined in some detail in his evidence the efforts made by the Board to increase the viability of the hospital, including meeting with Mr Bignell,

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<sup>20</sup> T349.18-350.38.

the local member of parliament, the health minister and executives at SALHN. I accept that he and the Board were diligent and hardworking in their efforts to shore up the future of the hospital.

84 Mr Overland ruled out the notion of going to the members for ideas about how to keep the hospital operating. He said:

A. How could the members who had no knowledge or experience in running hospitals - let's be frank here, they didn't know anything about it - how could they suggest to us how we could finesse or change the operations of the hospital? Because if those of us who had spent literally years managing the place, years, had had effectively exhausted all of the options available and we had not given up trying over that whole period of time. Again there is a litany of correspondence showing just how hard the board worked to try and rescue this organisation. We rescued it from insolvency. We negotiated a better deal financially for the hospital and despite all of that effort, despite all of the efforts we devoted to engaging with SALHN, we persuaded them to send us their officers so that they could have confidence in clinical services, all of that when you think of that effort that was put in by us and then suddenly bang, 'We'll give you six months funding.' Why wouldn't the board have concluded, any board acting reasonably would have concluded that that was the situation, right, and that's exactly what we did. The membership of the day, 57 members -

Q. Not worth consulting is that right.

A. - the likelihood that they were going to come forth with a cunning plan to rescue the situation that we couldn't think of was nil.

Q. So it was not worth asking them.

A. We didn't even think about it.<sup>21</sup>

### **The events from 25 January 2023 to 5 May 2023**

85 On 30 January 2023, Mr Overland wrote to the Minister for Health, the Honourable Chris Picton MP.<sup>22</sup> In this letter, he provided background to the financial position of the hospital and said that the offer of six months' funding by SALHN was not a viable outcome. He described the difficulties faced by the Association in recruiting senior management staff to the hospital, as well as the difficulty faced in recruiting medical and nursing staff. In relation to medical staff, he said:

The hospital is reliant upon less than a handful of GPs to provide services to public patients. The most active of these GPs is due to retire in June this year and attempts to find a local GP willing or able to replace him have been successful.

86 Again, Dr Lovell's retirement loomed large in this line of reasoning. In relation to the burden on Board members, he said:

The current Board is composed of a group of unusually knowledgeable and experienced people, most of whom are over age 70 years. Several members, including me, have

<sup>21</sup> T481.26-482.16.

<sup>22</sup> A1, document 46.

indicated that they intend to retire at the conclusion of their current terms of office in October 2023. The likelihood that they can be replaced at all seems problematic, while attracting people of comparable knowledge, experience and skills seems even more improbable.

The Board has had to involve itself in the management of the hospital to a far greater degree that is either normal or desirable. In practice, several individual members are playing de facto executive roles to compensate for the absence of such skills in the management structure. It is simply untenable to rely upon unpaid Board members to fulfil these functions over the longer term and, in fact, they will soon be unable to do so.

87 He further said:

In essence, the Board believes that all realistic options to ensure the ongoing viability and sustainability of the hospital as a going concern have been exhausted. There is neither the will nor ability to keep battling with the above issues when it is obvious that the hospital is not fulfilling a vital or irreplaceable role within the local or wider community.

88 The Board also wrote to its lawyers, to obtain advice on whether it had the power to close the hospital, and the process that it needed to adopt to dispose of the Association's assets.<sup>23</sup>

89 On 7 February 2023, Mr Overland met with Sara Blunt, the chief executive officer of Kalyra, the organisation operated by the JBMT. It seems that this meeting did not arise out of the planned closure of the hospital; it had, in fact been initiated by Ms Blunt as part of the JBMT's strategic planning process.<sup>24</sup> Mr Overland described the meeting in the following way in his evidence:

... In terms of the future use of the site, what happened was I got a request to meet with Sarah Blunt who's the Chief Executive of James Brown Memorial Trust Kalyra to talk about the future use of the hospital's kitchen and it was Sarah's intention at that time to tell me that James Brown Memorial Trust intended to build their own kitchen near their residential aged care facility and that consequently at some point in the not too distant future and perhaps a year or two, they would no longer be taking meals from the hospital and it was in the course of that conversation that the idea that James Brown Memorial Trust might actually takeover the whole site and put it to use for some other community purpose because that's when that idea arose.<sup>25</sup>

90 He reported on his meeting to the Board in an email dated 8 February 2023.<sup>26</sup> He said that Ms Blunt said that the JBMT would consider buying the hospital to use for affordable housing. He said that they discussed the constraints on the future use of the site, including the leases to the volunteers, Wellbeing and the SAAS, and the heritage listed Tsong Gyiaou building and Ms Blunt indicated that these were not insurmountable obstacles.

91 Ms Blunt described their meeting in the following way:

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<sup>23</sup> T356.14-27.

<sup>24</sup> T713.3-14.

<sup>25</sup> T357.1-15.

<sup>26</sup> A1, document 48.

- A. ... So I was in full strategic planning mode, so I was thinking a lot about what the demographic trends were and what things might look like for the future; and so I was considering that we might want to look at our own kitchen, some sort of a café, and other services that we could combine with that that would encourage the training of staff and young people in the area, and I also was interested to know what he knew about other demographic pieces. That then led to a conversation where he said, 'Well, you know, if you were able to have the access to the hospital surrounds, what would you do with it', and I said, 'Well, that could be along the lines of the things that I've just been talking about'. We could do a café, a wellbeing clinic with supporting - and drawing new GPs into the area, because we're also very interested in supporting GPs because of the cohort of clients and residents we have there. We could look at respite services, we know that day respite and palliative care respite, dementia, are all issues for the local community and generally across the nation. We also - I also talked a bit about that housing, having an alternate to the entry point to retirement living could be useful in the local area, because we know, for example, that nationally there are trends, like women over 50 who don't have the asset base to buy into retirement living, so affordable housing kind of options or lower price point options would be good. We also talked about the things that we're doing in progress there at the time. So I knew that the association that provides for the op shop was a really important part of the local community, and the residents living in our retirement living are very involved in that, and that was something that we would want to support because that gives a lot of meaning and purpose and is successful. And of course, I knew about the ambulance service, the speech pathologist in the Tsong Gyiaou building, and so on.<sup>27</sup>

92 In his evidence, Mr Overland explained why the Board became focused on the JBMT as the recipient for the Association's assets:

- Q. Were alternative charitable or not-for-profit institutions considered.
- A. Not really. Our focus eventually became, as you know, on James Brown Memorial Trust. And the reasons for that were that James Brown Memorial Trust had a longstanding relationship with us; the land upon which they built their residential aged care facility had been, essentially, gifted to them by the hospital. They were the owners of Aldersey Grove Estate, which directly abutted the hospital. We provided, and had provided for many years, meal services to them, so they were established presence in town, they were literally right next door. It is certainly the case that an organisation like ACH Group or elderly citizens' homes could, potentially at least, have been people we looked at. But, our view was that the logic of the situation we're in and the history of the place suggested that it was logical to go to James Brown Memorial Trust.<sup>28</sup>

93 On 15 February 2023, Mr Overland wrote to the Board members and copied in Mr Wayne Gadd, the SALHN Director of Finance.<sup>29</sup> The purpose of the email was to advise Board members about a meeting that he had had that day with SALHN executives. He advised that the proposed date for the closure of the hospital was 30 June 2023. He also discussed staff issues and the catering contracts

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<sup>27</sup> T714.22-715.20.

<sup>28</sup> T353.28-354.7.

<sup>29</sup> A1, document 51.

with the JBMT and Meals on Wheels. With respect to the Association's assets, he said:

In the meantime, it is my intention to liaise with Sara Blunt on trying to clarify what JBT might be willing to do in terms of either buying the facility outright or, possibly, merging with the hospital, ie effectively taking over the assets of the incorporated entity. In this latter case, there would need to be undertakings given about, for example, providing the volunteers with tenure in their sheds and, perhaps, a reserved seat on the Board of JBT. This is obviously an area where we need legal advice.

94 This is the first evidence before the Court of the Board's being advised of a proposed closure date and of the possibility of an arrangement with JBMT other than a for value purchase of the Association's assets.

95 The next Board meeting was held on 23 February 2023. The minutes record that there was extensive discussion about the "potential future" of the site, although no details of this discussion have been recorded.<sup>30</sup> The minutes do not record a discussion about the proposed date of the closure of the hospital.

96 Mr Overland gave evidence that the Board discussed a range of options and, while there was interest in the JBMT proposal, they discussed other uses for the property. He said:

A. The one that - well, as I previously mentioned, we did talk about whether it was sensible to try and redevelop the site and the consensus was that that wasn't a feasible option either for a private hospital or for residential aged care. We talked about the idea, once again, that we might become landlords, in effect, and rent out premises in the building but our view was that the standing costs of running the building was such that the chances of us recovering sufficient revenue from that to make it realistically feasible looked pretty slim. We talked again about the idea of a multi-purpose service or a health hub which we all liked but that would actually be difficult and probably expensive to carry off. I think the issue of just a straight out sale came up but then we were stuck with the problem that, one, we couldn't necessarily look after our tenants and the historic and heritage aspects of the site and also what were we going to do with the money anyway, assuming we got a large sum of money because we knew that if you drove the proverbial bulldozer through the site then you could realise a multi-million dollar sale on it. So, those sorts of considerations came up.<sup>31</sup>

97 On 10 March 2023, Mr Overland emailed to the Board members a proposal from Ms Blunt that there be a merger of the JBMT and the Association.<sup>32</sup> It included a term sheet, which set out the basis for a negotiated agreement. The term sheet contained objectives of the parties, which included, as the first objective:

Dissolution and winding up of the [Association] and transfer of all surplus assets including the [Association] property to Kalyra.

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<sup>30</sup> A1, document 53.

<sup>31</sup> T363.24-364.8. See also T583.8-17.

<sup>32</sup> A1, document 56.

98 If this first objective was not achievable, other arrangements, such as a joint venture or lease, would be considered. Thus, in the space of only a month, Ms Blunt moved from a commercial proposal to one where the assets of the Association were to be given to the JBMT for no consideration.

99 The next Board meeting was held on 23 March 2023. The minutes record that there was a lengthy discussion about a communication strategy although it is not clear whether this was related to the hospital closure or the proposed merger with the JBMT as no detail is provided.<sup>33</sup> Mr Overland said that, by the time of this meeting, the Board had formed the view that the best option was for the assets of the Association to be transferred to the JBMT and for there to be a merger with it.<sup>34</sup>

100 It seems that on 24 March 2023, Mr Overland telephoned Ms Blunt. She reported on this conversation to the trustees of the JBMT in the following terms:

Chris Overland, Chair of McLaren Vale War Memorial Hospital Board, called today and informed me that last night the board resolved to close the hospital service on 1 July 2023. Further to this they resolved to dissolve the Hospital Board and hand over the remaining assets to an appropriate entity, that being the James Brown Memorial Trust. To that end they are now in the process of drafting the resolutions for a Special General Meeting of members to be held on 28 April 2023.<sup>35</sup>

101 It should be noted that the minutes of the Board meeting the day before did not record any decision having been made about the closure date of the hospital, the transfer of assets to the JBMT, or the date of a special general meeting to put the matter to members.

102 A letter about the closure of the hospital was sent to the Association's members on 27 March 2023.<sup>36</sup> The letter informed members that the hospital was no longer viable and must close and that the Board was in negotiations with the JBMT to merge the two organisations. It advised that an information session would be held at the hospital on 29 March 2023 and that a special general meeting would be held on 27 April 2023 at which they would be asked to vote in favour of resolutions to pursue a merger with the JBMT. On the same day, a media release was prepared and staff were advised of the closure of the hospital and the proposal to merge with the JBMT.

103 Dr Lawlor-Smith first learned about the decision to close the hospital on 27 March 2023, when a letter was sent to medical practitioners in similar terms to the one sent to members. Her evidence was that the closure came as no surprise.<sup>37</sup>

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<sup>33</sup> A1, document 57.

<sup>34</sup> T368.19-22.

<sup>35</sup> A1, document 58.

<sup>36</sup> A1, document 59.

<sup>37</sup> T629.3.

104 Mr Baragwanath first heard about the closure of the hospital from reading a post on the McLaren Vale Facebook page. On 28 March 2023, he wrote to the Board.<sup>38</sup> He had recently been involved with an association in a similar position as the Association, helping the members engage with the process of deciding what to do with their assets. He considered that the position of the Association was similar and believed that he had the skills to assist. In addition, he felt that he had neglected his own home, despite providing assistance to other organisations, and he wished to do something for his community. Before writing his letter, he read the Association's Constitution and reviewed its financial statements for the last five years, which were freely available on the ACNC register. He formed the view that the Association was a profitable enterprise, although it was in a challenging position, and that there must be other options that he could assist with investigating.

105 Mr Baragwanath had a number of concerns about the closure of the hospital and the giving of its assets to the JBMT. First, he did not consider that there had been sufficient (or indeed, any) community consultation about either of these decisions. Second, he was concerned that the Association was giving away a valuable asset for no consideration. Third, he was concerned that the JBMT, while a worthy institution, was not an appropriate recipient of the Association's assets, because its scope of operation was narrower than the Association's. In effect, he considered that giving the asset to the JBMT would not be consistent with clause 17(a) of the Constitution. He described this objection in the following way:

A. ... It's not the point that the specific organisation remains in control or does something, it's that Kalyra is limited in what it is able to provide, right. So, it's a public benevolent institution, there's only so many things it's allowed to do; a health promotion charity can provide services to all people. So, the point to your question and the explanation is it's not about that particular organisation, it's about what that asset and land can do for the community broadly. So, the point of your question and the point of the answer is to ensure that an asset in a land-locked area remains available for use by the broadest group of people.

Q. Which is to say, your view is that Kalyra having the asset would be a, perhaps, sub-optimal use of the asset, is that right.

A. Yes, yes - restrictive.<sup>39</sup>

106 He went on to say:

Q. And that the money in the hands of the respondent would be a better use of that money - or the respondent could put that money to better use than Kalyra holding the money itself.

A. 'Better' is unfair because aged care is still a very important charity type, right. It's more that it would be used in line with the health promotion element. So, to give you a quick example, \$6 million invested would provide \$320,000 a year of income, which could be donated to pay for, you know, gaps, you know, dentistry, things like

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<sup>38</sup> A1, document 63.

<sup>39</sup> T257.14-30.

that to people in the area or outside the area. Whereas, a public benevolent institution would only be able to provide aged care services or to people that are destitute and, you know, in desperate need of, you know - in suffering circumstances.<sup>40</sup>

107 In his letter to the Board, Mr Baragwanath offered his services and the resources of his company to carry out an investigation over the next month into the continued operation of the hospital at no charge to the Association. He also advised that he had worked closely with a developer, Ross Pelligra, who had redeveloped the Calvary Wakefield hospital site in Adelaide. He said that Mr Pelligra was interested in considering ways to help.

108 Mr Baragwanath's evidence was that, when he initially learned of the JBMT proposal, he did not think it was a bad idea. He believed, however, that there needed to be a process to enable the community to buy into the proposal and agree to it. He was not happy with the quality of the information that had been provided with the proposal and he believed that he could "solve his own problem".<sup>41</sup> He offered to undertake a review to determine what was possible, because he did not know what was possible at that time, including keeping the hospital open.<sup>42</sup>

109 Mr Baragwanath said that he contacted Mr Pelligra in order to demonstrate to the Board that there were options other than the JBMT proposal which could be investigated.<sup>43</sup> He said:

A. No. The intention was for the board to see that the best way for any motion to pass is to engage the community in public consultation. So, the community was already unsatisfied with the closure and my advice was that if you engage with the community in consultation then whatever option you actually put forward will be successful. If you try and force an outcome, it won't be.<sup>44</sup>

110 Mr Baragwanath's evidence was that, at the time that he wrote this letter, he was not aware of either the Asia Australis or Destravis reviews.

111 Mr Baragwanath did not receive a response to this letter.

112 Mr Overland gave the following evidence about the receipt of Mr Baragwanath's email:

Q. And it was comforting, wasn't it, to receive a communication from a person who was a member of the local community offering his services and being a person who clearly had thought about issues.

A. It wasn't comforting. This is the equivalent of cold calling on the telephone. Mr -

Q. Why do you say that.

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<sup>40</sup> T258.16-31.

<sup>41</sup> T79.10-12.

<sup>42</sup> T115.37-38.

<sup>43</sup> T117.21-22.

<sup>44</sup> T118.7-14.



A. No, hang on a second. I didn't know Mr Baragwanath at all. He wrote to me and said that he wanted to do these things and thought he could help. As far as I was aware, he knew nothing whatsoever about hospitals. Why would we suddenly decide that on the strength of one email from a person we didn't know who had not, to the best of my knowledge, even been a member at that point, change course?<sup>45</sup>

113 He went on to say:

A. I'm probably being a bit unkind in using that terminology, but this came out of nowhere as a were, from a person I didn't know that had no previous association with the hospital as far as I was aware, who had no background or record in hospitals. Why would we as a board having spent a great deal of time and energy thinking about what might happen in the future on the strength of one email from one individual decide to bring a halt to a process that we'd already agreed to undertake.<sup>46</sup>

114 He then said:

A. We were going to take the views of members, that was our obligation. Our obligation was to inform and to advise our members and to make a recommendation, which we had done. I should also say that we'd been the beneficiaries of two consultancy reports in relation to the viability of the hospital, and what it may or may not have been able to do in relation to the provision of public health services. So we viewed this in that context. Why would we need yet another investigation into what the hospital may or may not be able to do.<sup>47</sup>

115 Mr Overland was unable to recall if Mr Baragwanath's email was circulated to the Board, although he could recall speaking to some of the Board members about it. He also agreed that the Board had no interest in investigating any option other than the transfer of the Association's assets to the JBMT.<sup>48</sup> He said:

A. ... We felt we were given earnest consideration to the various options or feasible options that were available, and we certainly didn't want to take yet another what amounted to a consultancy to look at further options. We felt we'd been properly advised. As I said to you, we had two previous major consultancies undertaken. We had years of experience in running the hospital. We were well aware of the situation. We knew that there was no chance at all that the hospital could actually be operated viably as a private hospital, that had been made very plain to us years before, by Asia Australis, and nothing in our subsequent experience had caused us to believe otherwise. So that was the context, right, in which this was viewed.<sup>49</sup>

116 Mr Davis said that he was told about the proposed closure of the hospital by Mr Baragwanath, who also told him that there were a number of disgruntled members as a result. He said:

And I also thought it was very strange that during a ramping crisis you'd be closing hospitals. And then he suggested that I become a member, so I did.<sup>50</sup>

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<sup>45</sup> T431.1-15.

<sup>46</sup> T432.11-20.

<sup>47</sup> T433.32-434.3.

<sup>48</sup> T435.16.

<sup>49</sup> T435.16-30.

<sup>50</sup> T189.17-19.

117 Mr Davis considered that what was happening with the hospital was wrong and not in the interests of the community and the state. Mr Davis joined the Association on 2 May 2023.

118 In late March or early April 2023, Mr Baragwanath made a comment about the closure of the hospital and the proposed merger with the JBMT on the McLaren Vale Facebook page. This led to his being contacted by Becky Hirst, who had been a member of the Association's Board in the past.

119 Ms Hirst and Mr Baragwanath decided to set up a Facebook page dedicated to the hospital, to allow people to express their views freely about the closure of the hospital and the JBMT proposal. Mr Baragwanath's evidence was that the page is still operating and has around 400 members.

120 On 4 April 2023, a letter was sent to the Association's members from Mr Overland, giving notice of a special general meeting on 5 May 2023 at which they would be asked to vote on resolutions.<sup>51</sup> The letter said (amongst other things):

The decision has been made to negotiate with a not for profit provider which already provides an important local service in our community that aligns with the objectives of the hospital.

We do not believe the community would support the sale of the property to a private developer for commercial purposes.

...

Kalyra is a trusted not for profit aged care provider and through an arrangement with them key services including the Wellbeing GP clinic, Clinpath, SA Ambulance Service and the volunteers' Op Shop and shed will stay. As well Tsong Gyiaou will be preserved and its tenants can stay.

121 With Mr Overland's letter was the notice of the special general meeting. The notice contained the two resolutions that were to be put to the meeting. The first resolution was:

That for the purposes of Rules 5(b) and 17 of the Constitution and sections 25 and 43(2)(a) of the Associations Incorporation Act 1985, and for all other purposes, the Hospital be empowered and authorised to transfer to James Brown Memorial Trust the assets and undertakings of the Hospital on such terms as the Board determines.

122 The second resolution was:

That for the purposes of Rule 16 of the Constitution and Part 5 of the Associations Incorporation Act 1985, and for all other purposes, the Board be empowered and authorised to wind up or deregister the Hospital.

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<sup>51</sup> A1, document 66.

123 The notice of the special general meeting contained explanatory notes, which explained who was entitled to vote at the meeting and how a member could vote by proxy. In addition, it provided an explanation of the resolutions. In relation to the resolution to wind up the Association, the explanatory notes said:

Following the scheduled close of the operations of the Hospital on 30 June 2023, the board has determined that the appropriate course is for the Hospital to be wound up or voluntarily deregistered. Provided that the resolution in relation to item 1 of this notice of meeting is passed and the assets and undertakings of the Hospital have been disposed of to Kalyra, the Hospital will no longer have any utility as an incorporated association. In that event, the winding up or voluntary deregistration of the Hospital is the prudent course.

124 Mr Baragwanath and Ms Hirst hosted an online community forum, to provide members of the community with information about the closure of the Hospital and the JBMT proposal. Approximately 45 people attended the meeting. In cross-examination, Mr Baragwanath said that, by this time, he had formed the view that members of the community should be encouraged to join the Association. He had also considered taking some form of legal action but had not done so. Nor had he, at that point, turned his mind to who should be on the Board of the Association should the current Board resign, although he had considered the possibility of the Board's resignation.<sup>52</sup>

125 Mr Baragwanath denied that he was promoting a joint venture or other relationship with a for-profit organisation. He proposed the Pelligra plan merely as an example of what might be possible. He said that his objection to the JBMT proposal was not related to the JBMT, but to the fact that a valuable asset was being given away.<sup>53</sup> He also denied that he was motivated by any thought of personal profit or opportunity.

126 Mr Baragwanath's evidence was that he spoke to Mr Overland on 5 April 2023. He said that they had a professional, friendly conversation. Mr Overland described his background in the health sphere and Mr Baragwanath explained his experience in charities and financial services. After discussing the financial position of the hospital, Mr Baragwanath said the following conversation took place:

Mr Overland was clear in saying that essentially the board had put a lot of time and a lot of effort over a long period of time and that they were tired, and that they'd frankly had enough.<sup>54</sup>

127 Mr Baragwanath said that Mr Overland told him that he had taken an architect through the building and was told that it would be too hard to renovate, and that it would be easier to knock it down and build a new one, but that the Association did not have the money to do that. He said that Mr Overland was very

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<sup>52</sup> T121.28-31.

<sup>53</sup> T123.6-7.

<sup>54</sup> T83.28-31.

clear that the hospital would close on 30 June 2023 and that “specialist procedures needed specialist facilities that were not available.”<sup>55</sup>

128 Mr Baragwanath’s evidence was that Mr Overland told him that the architect who walked through the building was paid with a bottle of red wine, which led to some discussion about the type of assessment required to determine what work was needed to bring the building up to standard.

129 Mr Overland also gave evidence about this conversation. He said:

A. My general recollection of that phone call is that Mr Baragwanath put to me the thinking that was behind his email at the time, and I outlined to him the reasons why the board had decided that it needed to close the hospital and why it was thinking that the best option was to transfer the assets of the hospital to James Brown Memorial Trust and obviously that was not a point of agreement between us, but I do recall that he devoted quite a bit of time to telling me about the activities of himself and other members of the Adelaide Masonic Lodge in persuading some of the more reluctant members of the Lodge to accept that there would be some damage or removal of historic aspects of the building for the sake of major development which they were proposing to undertake on that site, and I inferred from that that what he was really telling me was that the historic and heritage type issues that we were concerned about were not insurmountable obstacles to doing something other with the site than transferring it to James Brown Memorial Trust.<sup>56</sup>

130 Mr Overland does not recall discussing the walk through of the hospital with an architect from Brown Falconer. He confirmed that this did occur and said:

...and we did have a look at the hospital and had a chat about it over lunch. He gave us his impressions.<sup>57</sup>

131 He confirmed that no written report was prepared.

132 On 6 April 2023, Mr Baragwanath wrote to a number of people, including Mr Davis.<sup>58</sup> His email reads, in part:

As discussed with you each individually I would like to look at retaining reasonable health services in McLaren Vale. I’ve had a chat with Pelligra and there is a strong interest in a partnership which would maintain and improve services to the area. They are happy to proceed to a HOA – I’ve suggested that community consultation is best done first.

...

I had a long chat with the chair, his experience is closing the Repat and while he has served since 2017, it’s clear that this closure is more about him being “over it” than the interests of the community. There has been ZERO consultation and no investigation into the building’s capabilities other than an architect he knows doing a walk though in exchange

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<sup>55</sup> T85.36-86.1.

<sup>56</sup> T379.33-380.14.

<sup>57</sup> T380.2-3.

<sup>58</sup> A1, document 76.

for a glass of red – hardly a professional report. Having said that it is true that the theatre facilities and rooms will need improvements.

...

My plan is:

- 1) Get 20 members together to call for a special meeting (I note that while one has been called for the 5<sup>th</sup> of May there has been no public notice as required in the constitution.)
- 2) Vote and pass a series of resolutions that prevent the sale, commence a community survey program and ask the board to enter into negotiations with interested parties to ensure the long-term viability of the site in line with the constitution's objects.
- 3) Appoint new directors assuming the current ones will resign (and they will be strongly encouraged to).
- 4) Run a large-scale community survey.
- 5) Use the feedback to scope and finalise negotiations for private/public partnerships.
- 6) Properly communicate a long-term vision for the site.
- 7) Gain support for the vision.
- 8) Pass relevant motions to support the vision.
- 9) Implement it.

133 Mr Baragwanath said that he chose to send the email to a number of recipients who, he considered, were qualified to assist in the management of a charity such as the Association. In cross-examination, it was put to him that he wished to take control of the Association. He denied that his intention was to cause the Board to “collapse”, but said that, if it did so, he had a “stand in” Board ready to run the Association. He was trying to implement a continuity plan in the event that the Board resigned.<sup>59</sup> He agreed that he wished to encourage the Board to resign but did not seek to force the members out.<sup>60</sup> He said that he had no interest in being paid for any work that he did for the Association.<sup>61</sup>

134 Mr Davis said that he received this email, but did not recall reading it in particular detail. He also said that he had not engaged with the Facebook group set up by Mr Baragwanath and Ms Hirst. He said that he did not participate in the various activities in April 2023 in relation to the Association. He considered that it was a matter for the local McLaren Vale community.<sup>62</sup>

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<sup>59</sup> 126.12-29.

<sup>60</sup> T127.8-23.

<sup>61</sup> T128.1-13.

<sup>62</sup> T213.26-33.

135 On 19 April 2023, Norman Waterhouse Lawyers (“Norman Waterhouse”) wrote to the Association.<sup>63</sup> Norman Waterhouse had been instructed by a number of members of the Association (including Mr Baragwanath but not Mr Davis) who were concerned about the closure of the hospital and the disposal of its assets to the JBMT. In particular they complained:

- That the decision to close the hospital was made without any consultation with members;
- That the Association had disabled its website so that people in the community were prevented from joining the Association to express their views; and
- That the Board had determined that the Association’s assets were to be distributed to the JBMT, without any consultation with members.

136 Norman Waterhouse said that it considered that these actions, done without consultation with members, were in breach of the Association’s objects and of the duties owed under the Act. It also suggested that the actions could be viewed as oppressive or unreasonable and against the interests of the members and the wider community. It further noted that Board was currently operating with fewer than the number of members required by the Constitution. It said that this put into doubt the validity of any of the powers exercised or decisions made to date.

137 Norman Waterhouse requested the Association to call a special general meeting to rectify these matters, including by appointing additional board members to meet the requirement of the constitution, and commencing a thorough and open public consultation about the future of the Association, including the hospital site.

138 On 21 April 2023, Ross Pelligra, the Chairman of the Pelligra Group, wrote to Mr Baragwanath.<sup>64</sup> Mr Pelligra expressed preparedness to enter into a joint venture arrangement with the Association to develop the site so as to allow it to continue to operate as a hospital. This preparedness was subject to such an arrangement having “broad community support”. Mr Baragwanath posted this letter on the Facebook page created by him and Ms Hirst, “Community Action: Save McLaren Vale Hospital” (“the Facebook page”).

139 Mr Baragwanath agreed that he “basically wrote the terms” set out in the letter from Mr Pelligra<sup>65</sup> but did not at any stage consider that the Pelligra proposal was the only option worth considering. In fact, in his evidence, he described this proposal as “suboptimal”.<sup>66</sup> He conceded that, when the Pelligra letter was written, he had not read (and was not aware of) the Asia Australis or the Destravis reports,

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<sup>63</sup> A1, document 81.

<sup>64</sup> A1, document 85.

<sup>65</sup> T88.6.

<sup>66</sup> T88.25.

which set out in some detail the hurdles that would be faced to develop the site sufficiently to allow surgery to be recommenced at the hospital.<sup>67</sup>

140 Mr Davis was not involved in obtaining the letter from Mr Pelligra.<sup>68</sup> He said that he did not agree with Mr Baragwanath's statement that the Pelligra proposal was suboptimal and explained this view in the following way:

A. ... The reality is that this site could be used in a number of different ways. Who's to say what's optimal, what's not optimal? That would require an investigation and a proper analysis of what the site could be used for. It would also require a request to the State Government and a proposal to the State Government to judge their view on the current situation. So what is optimal and what isn't optimal is not really something that an individual who isn't a part of the board could progress without board support, really, or wanting to investigate it.<sup>69</sup>

141 On 21 April 2023, Mr Baragwanath posted the Norman Waterhouse letter on the Facebook page, with the comment, "I'm personally not fussed if the community ultimately decides that gifting the asset is the right thing to do. But as it sits at the moment, I don't believe the community have been shown the respect we deserve." In his evidence, he was adamant that that expressed his view; it did not understate his opposition to the JBMT proposal.<sup>70</sup>

142 On 22 April 2023, Mr Baragwanath wrote to the Association's Board.<sup>71</sup> He attached to his email a copy of Mr Pelligra's letter and also the Norman Waterhouse letter advising of the concerns held by members of the Association, currently unsigned. He advised that if he did not receive a response by 27 April 2023, he would deliver to them a signed copy of the second letter, make public this letter and other correspondence, and consider further action. He also copied this email to Ms Hirst.

143 Mr Baragwanath accepted that he threatened to make the Pelligra and Norman Waterhouse letters public to put pressure on the Board.<sup>72</sup>

144 Mr Overland's evidence was that the Norman Waterhouse letter was referred to the Association's lawyers. As to the Pelligra letter, Mr Overland said that he had never heard of the Pelligra Group.

145 On 23 April 2023, Ms Hirst sent to Dr Lawlor-Smith an email in which she discussed the JBMT proposal and forwarded a copy of the Pelligra letter and the Norman Waterhouse letter.<sup>73</sup> Dr Lawlor-Smith's evidence was that she was concerned that there was a commercial interest in the site. She said:

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<sup>67</sup> T131.27-37.

<sup>68</sup> T214.9.

<sup>69</sup> T215.5-15.

<sup>70</sup> T129.28-30.

<sup>71</sup> A1, document 88.

<sup>72</sup> T135.22-24.

<sup>73</sup> A1, document 88.

...I thought that was a major risk for the association and the community.<sup>74</sup>

146 Dr Lawlor-Smith gave the following evidence about her understanding of the JBMT proposal:

A. So, my understanding was the board was negotiating a position whereby certain community needs would be met and given those conditions were met, for example, that our lease would be honoured, that the board was proposing transferring ownership of Kalyra - sorry - transferring ownership of the hospital to Kalyra for the ongoing community benefit.

Q. ...

A. No, I don't believe there was any payment involved.<sup>75</sup>

147 On 25 April 2023, Mr Overland caused another letter to be sent to the members of the Association.<sup>76</sup> The letter sought to explain further the Board's view that redevelopment of the hospital was not viable. It said:

When thinking about whether redevelopment was a viable option the Board secured the services of the Principal Architect with Brown Falconer, who is experienced in the design and construction of both new and redeveloped hospitals. Following his inspection of the hospital he recommended against redevelopment on the basis that the costs and difficulties involved could not be justified. It would be no more expensive to simply demolish the old hospital and build a new one from scratch.

148 It then went on to talk about the redevelopment of the Royal Adelaide Hospital and the Women's and Children's Hospital on new sites to avoid the difficulties encountered when working with old buildings. It also talked about Mr Overland's own experience of building a new hospital in Mount Gambier and the community discussion that occurred with regard to the redevelopment of the old hospital or the building of a new one. It gave an estimate of \$5,000,000 to redevelop the hospital.

149 The letter further canvassed the location of the hospital and the now relatively easy access to other medical services in the region. It noted that it would be difficult for even a newly refurbished hospital to compete with other established services in the area.

150 The letter went on to discuss the difficulties recruiting medical and nursing staff to work at the hospital, as well as the difficulty that it had experienced in generating sufficient revenue to allow the hospital to be viable. It said:

Unfortunately, SALHN has decided to terminate the contractual arrangements on 1 July 2023, as it has now made alternative arrangements for the treatment of patients who would otherwise have been admitted at McLaren Vale. This means that there will be an annual \$2.5 million revenue shortfall in the 2023/24 financial year which would render the hospital

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<sup>74</sup> T631.22-23.

<sup>75</sup> T632.19-29.

<sup>76</sup> A1, document 90.



rapidly insolvent if it continued to operate. There is no conceivable circumstance in which the hospital can make up this revenue shortfall from private patient admissions.

151 When this letter was sent to members, the Association inadvertently sent it openly to each member rather than blind copying them into it; as a result, the email addresses of all members were disclosed to all other members.

152 Mr Baragwanath wrote to the Association on 28 April 2023.<sup>77</sup> First, he took the Association to task for having sent the letter on Anzac Day and for having committed what he described as an “egregious” breach of privacy in disclosing the email addresses of all members. In his evidence, Mr Baragwanath said that he was “pretty annoyed” about the breach of privacy. He also considered that it was offensive of the Board to have sent the email on Anzac Day.<sup>78</sup> He accepted, however, that the breach of privacy was inadvertent.<sup>79</sup>

153 Second, Mr Baragwanath advised that a poll of members had been conducted, which showed that members wanted to ask for the Board’s resignation, rather than consult with them.

154 Third, he asked that the special general meeting scheduled for 5 May 2023 be delayed. He then said:

We ask that you respond by Monday, May 1<sup>st</sup>, 2023. If you do not comply, we will lodge a dispute with SACAT and seek injunctive relief to compel the board to meet its fundamental compliance obligations and engage properly with the community before gifting a significant asset.

We believe the closure of the hospital and the use of the land are two separate points of consideration and your letter addressed only the prospect of redeveloping the hospital.

155 Fourth, Mr Baragwanath questioned the expertise of Brown Falconer in hospital redevelopment.

156 Mr Baragwanath said that there was insufficient information about the JBMT proposal to allow members to make a valid decision. He also felt that those who had raised concerns were not being listened to. In addition, he considered that there were compliance and governance issues that were not being addressed by the Board.<sup>80</sup>

157 Mr Overland’s evidence was that he and the rest of the Board did not consider that there was any basis to delay the special general meeting “merely because one member had a view that was different to that of the board.”<sup>81</sup>

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<sup>77</sup> A1, document 95.

<sup>78</sup> 92.34-93.5.

<sup>79</sup> T136.10.

<sup>80</sup> T94.4-13.

<sup>81</sup> T383.30-33.

158 Mr Overland wrote again to members, although the date of this letter has not been recorded.<sup>82</sup> The letter commenced:

Many of you will be aware that a group of members of the hospital have (sic) been expressing disquiet about the Board's proposal to merge with the James Brown Trust (Kalyra). This group has been promoting the idea of a partnership with a private financier and developer to redevelop the hospital, and has identified the Pelligra Group as the preferred partner in the development process.

The board provides this communication to provide an objective summary of the situation and its decision making process so that members are fully informed.

159 The letter then addressed aspects of the Pelligra proposal and the objections that it had to it. It concluded that the outcome of any such joint venture appeared to be inconsistent with the objects of the Association. It concluded by endorsing the merger with the JBMT.

160 On 30 April 2023, Mr Overland sent out a notice to all staff members of the Association.<sup>83</sup> The purpose of the notice was to correct a statement which had appeared on social media about the government's willingness to continue to fund the hospital. He said (among other things):

The decision by SALHN to not offer a funding contract beyond 30 June 2023 came after the decision to close the hospital was announced, not beforehand.

161 This statement can be contrasted with the statement made in the letter of 25 April 2023, where Mr Overland appeared to suggest that the government's decision to terminate the funding of the hospital led to its closure.

162 Mr Baragwanath's next step, on 2 May 2023, was to send an email to all members of the Association, making use of the Association's inadvertent disclosure their email addresses.<sup>84</sup> He attached to his email a report, which was not in evidence. He said:

The most concerning matter for the members is how the closure of the hospital has been handled.

The board recently wrote to us advising that the state government had terminated the funding arrangement which provides the majority of the income the incorporated association earns.

However, it now appears that the government funding was terminated AFTER the announcement to close the hospital and that, in fact, the government would have continued to provide the same arrangements they had previously.

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<sup>82</sup> A1, document 96.

<sup>83</sup> A1, document 99.

<sup>84</sup> A1, document 101.

The decision to close the hospital due to its state of repair and lack of funding to bring it up to standing may be reasonable.

However, the correct procedure is to call a Special General Meeting to inform the membership and ask permission to close the hospital rather than continue.

Instead the board made this decision without your consent and may be acting outside of its powers.

163 He asked members to sign a letter asking the Board to resign.

164 In his oral evidence, Mr Baragwanath said that the report which was attached to the email detailed areas of poor governance, including the failure to have the required number of board members, the differences between the JBMT and the Association in function and structure and the failure to observe the objects of the Association.<sup>85</sup>

165 Mr Baragwanath said, in cross-examination, that he used the Association's breach of privacy as an opportunity to encourage community engagement.<sup>86</sup> When asked whether he considered that there was anything untoward in making use of the email addresses that he had received, he said:

A. At the time I thought it was a good opportunity to engage with fellow members and did exactly that. In retrospect I would have taken the other member's approach and bcc'd everyone in reply, but I also didn't think it was appropriate to use that information any further. So for example, none of those email addresses were applied to any other group or communicated with outside of that reply to that email.<sup>87</sup>

166 On 3 May 2023, Mr Baragwanath sent to the Board a document with 25 signatures requesting a general meeting to discuss the resignation of the Board and the appointment of new board members. He conveyed an offer from members to assist with hosting and organising the meeting, including the giving of notice of the meeting and he invited the Board to choose a date for the meeting at least 28 days from 4 May 2023.

167 The following day, Mr Baragwanath posted a message on the Facebook page.<sup>88</sup> He urged people to lodge a proxy vote at the special general meeting scheduled for the following day, if they were not able to attend in person. He suggested that Trish Tassie be appointed as their proxy. He went on to say:

I have elected Trish as my proxy (I will be there in person as well)

Trish has been a member since 2002. I feel that she has a better grasp of the full history of the hospital than I do. I haven't met Trish before putting my hand up to help but it's clear to me that she will make the right choice. If she's convinced on the day to gift the hospital site to Kaylra (sic) I'll support it, if she votes no I'll do my best to help.

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<sup>85</sup> T95.15-26.

<sup>86</sup> T141.28-32.

<sup>87</sup> T142.19-26.

<sup>88</sup> A1, document 105.

168 On the same day (4 May 2023), Mr Baragwanath sent an email (again copied to all of the Associations' members) in response to two separate emails that he had received following the sending of his missive on 2 May 2023. Without setting out the message in full, he said the following:

What seems to be conflated is the decision for the charity to continue operating the hospital and the decision to give away the asset. They are two decisions, not one.

In my opinion, no one should agree to give the asset away without further consultation even if they think that the hospital should close. Consultation means proper reports that members can read, not letters with opinions.

...

I agree entirely that members should vote with the facts. The facts are that the hospital is not viable right now and is very dependent on government funding. That does not mean you give away an asset, even if, unfortunately, the hospital can't continue right now. There are opportunities to attract investment to our area to improve our options for health care – those options disappear as soon as we give away the land. Our areas (sic) town border is protected by state legislation – the land within that border is very valuable and we should make sure that every square inch that can be used to benefit the ENTIRE community is doing just that.

Regarding “option c” or alternative plans.

There is a heap of ideas, but I feel strongly that it is important for the community to have a say in determining what could be done rather than leaping to a solution.

169 He then listed a number of options that could be considered for the site, including selling it and using the funds to operate a health focused charity for the benefit of local residents.

170 Mr Overland said that, in the approximate four-week period between giving notice of the special general meeting and its being held, he and other Board members were actively engaged with discussing the issue with members. In addition, there was an exchange of emails with one member, to whom Mr Overland also spoke on the telephone. He was also in contact with the JBMT throughout this period. He said that the Board was not actively involved in recruiting members, although some staff members of the Association did so. He was aware that those who opposed the JBMT proposal were actively trying to recruit members.<sup>89</sup>

171 The special general meeting was held on 5 May 2023 (“the May meeting”). Each of the resolutions was defeated by a narrow margin.

172 Mr Baragwanath said that Mr Overland chaired the May meeting. He gave the following account of what Mr Overland said at the meeting:

A. ... There was a lot of oration, if you like, with respect to why this was the only potential outcome and why it had to be done this way. But very little in the way of

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<sup>89</sup> T387.2-18.

any facts or basis for the opinion, which was that the hospital must close, it's not profitable; a lot of those stated points, but no basis, no detail. The commentary around Pelligra, he was quite neutral. He said 'Look, the Pelligra offer is written well, it requires Pelligra to engage with the community, to have a certain amount of members' and was not, you know, overtly disparaging about that. He also made a point of saying the health hub, which is something we had discussed, the idea of simply retaining the site as a hub and leasing the space to health-orientated tenants was actually a good idea - but, not something the board was prepared to enter into or research.<sup>90</sup>

173 Mr Baragwanath said that Mr Bignell spoke and was “a bit aggressive”. Mr Baragwanath described what Mr Bignell had to say in the following way:

A. Yes, he was a bit aggressive actually, to be honest. So, he was very much the view that he'd attended every meeting, was very much across what should happen in the area, and felt that, you know, that Kalyra's option was the best option by far and the only way to go. And he said - he made a point of complaining that younger people who had decided to show up and have their say that, you know, they had never been there before and who were they to come along and have an opinion.<sup>91</sup>

174 As to what he had to say, Mr Baragwanath's evidence was:

A. So I said that I had experience in dealing with this type of asset and that I knew there were alternatives, there were other ways that we could use the site to promote health and provide services in the community. I'd offered to do that and it was pretty much immediately set upon by questions from the nursing staff. So I got to say a few sentences and then was immediately sort of, 'why are you here, what are you doing', you know, which I then answered.<sup>92</sup>

175 Mr Baragwanath said that the meeting became very raucous, at which point the vote on the resolutions were held.

176 After the result of the vote was announced, Mr Baragwanath said that Mr Overland simply closed the meeting after saying that the Board would meet and come back to the members. Mr Baragwanath assumed that the Board or some of its members might resign and that they would engage in community consultation.

177 Mr Davis also attended the May meeting. He said that he arrived late and found the room to be “packed” with approximately 100 people. Mr Davis said that all of the rhetoric was that the motions were going to save the hospital.<sup>93</sup> He said:

... At that stage then Chris Overland addressed the meeting, he chaired the meeting, he spoke and told everybody that it was a fact that the hospital could not continue, that the board had taken the option to cease to run the hospital, and that the only option to - I think he used the words 'to save the hospital', was to go ahead with the motion as planned and to give it to Kalyra, and he was seeking - he basically said words to the effect of 'It's just true in the hospital world, in the health world, that you need to get big or close.' He then I believe

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<sup>90</sup> T96.23-97.1.

<sup>91</sup> T97.5-13.

<sup>92</sup> T98.11-19.

<sup>93</sup> T216.4-5.

opened it up to a number of members to be able to, you know, for people to speak, and I believe there were a few other speakers, including Leon Bignell, Sara Blunt, who I came to know afterwards as Sara, and then a few other members that were there, Michael spoke as well, and I spoke at the meeting as well.<sup>94</sup>

178 He described Ms Blunt as “very genuine” and “quite neutral”,<sup>95</sup> and, like Mr Baragwanath, he described Mr Bignell as very aggressive and accusatory. He described Mr Bignell’s speech in the following way:

... he addressed the meeting essentially saying that he had worked and sat with the board on multiple occasions and he had worked with the board to determine that the hospital should close, and then he accused the room of just showing up at the last minute and basically saying 'Well, where were you?' And I believe that there was a response from the community saying 'Well, we're here now and trying to keep the hospital open', and he was essentially saying that the board had done good work to date and that this was the only option.<sup>96</sup>

179 Mr Davis said that Mr Bignell “attacked [him] multiple times, saying why was I here and demanding to know where I lived, which was a bit strange, I said 'In Aldgate', and he said 'Well, why are you so interested? Why do you care?'”<sup>97</sup>

180 Mr Davis recalled Mr Overland telling the meeting if the resolutions were not passed, the board had agreed to resign.<sup>98</sup>

181 Mr Overland gave the following account of the meeting:

A. The meeting was held in the Lutheran Church Hall which is immediately across the road from the hospital. At that time we had, I think, about 137 members and I would have thought that the majority of them actually turned up to the meeting. The meeting went on for - it was quite an extended meeting, it was over two hours. After my opening remarks the meeting was open for people to ask questions or address the body of the meeting. Various people took up the option to address the body of the meeting. At one stage when Mr Baragwanath was speaking things got a bit unruly, peoples' emotions got the better of them and I had to take steps as the chair to try and get those people to behave appropriately, so it was quite a full and frank exchange of views, if I could use that term. At the end of about two hours we seemed to have pretty well exhausted what people wanted to say, so we then went through the ballot process.<sup>99</sup>

182 Dr Lovell attended the meeting and spoke in favour of the JBMT proposal.<sup>100</sup>

183 Dr Lawlor-Smith described her reaction to the defeat of the resolutions:

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<sup>94</sup> T192.12-29.

<sup>95</sup> T192.38-193.2.

<sup>96</sup> T193.3-13.

<sup>97</sup> T193.18-21.

<sup>98</sup> T194.26-27.

<sup>99</sup> T392.14-31.

<sup>100</sup> T694.1-11.

- A. I was absolutely devastated. I was devastated because I felt that this placed at risk our lease and therefore the long-term viability of our general practice in the community.
- Q. Did you have any other views about the desirability or otherwise of the board's proposals.
- A. I felt that it was a really sound sensible proposal moving forward. I must say that I was also really alarmed that a number of businessmen attended that meeting, only one of whom lived in the local area, Mr Baragwanath. And two other local - two other businessmen - Mr Sparrow and Mr Davis, who don't live in the area had become members of the hospital and had suddenly become incredibly concerned about the future of the hospital. And I've been to a number of annual general - or meetings - and it's usually just the local community and all of a sudden we had these gentlemen in suits turn up who had a very strong opinion about what should happen and I felt incredibly concerned that this was an attempt to take over the association.<sup>101</sup>

### Events from 6 May 2023 to 4 July 2023

184 On 6 May 2023, Dr Lawlor-Smith and Dr Lovell sent an email to the Board.<sup>102</sup> It is necessary to set this out in full, because it sets the scene for the events that occurred (and the communications that were exchanged) afterwards:

Dear Board Members,

I suspect that you are all exhausted and ready to walk away now. However, Graham and I would like to propose a way forward.

- We will start work today with legal advice to put forward a request for a special general meeting to reconsider the Kalyra proposal. We aim to have the required twenty signatures by COB on Tuesday. I understand that you will require legal advice about this.
- We will email all of our patients (several thousand people) to ask them to become members of the hospital so that they can have a say in its future.
- From Monday we will ask all of the patients presenting to our practice to become members of the hospital. We will provide them with a form and pay for their memberships.
- The aim will be to get several hundred new members paid up prior to the SGM. Prior to the next SGM we will pay staff to go and collect proxy votes from members.
- We will begin from today a paid marketing campaign to support the merge with Kalyra. I would like the hospital to consider using some of its funds to pay for marketing to sell the proposal to the community. Video statements from Leon [Bignell], the Onkaparinga Mayor, the volunteers, us, and the Kalyra CEO would all be useful.
- Graham has spoken to Leon this morning and we have arranged to speak to Chris Picton on Monday to ask for their ideas and support to move this forward.

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<sup>101</sup> T633.2-21.

<sup>102</sup> A1, document 110.

I believe that we could get the proposal through at the next SGM. It would be great if the current board would consider staying on until the next AGM when the hospital would be wound up. I know that this is a big ask.

We would appreciate the opportunity to meet with you next week to discuss a way forward.

185 Dr Lawlor-Smith said that, in fact, of the actions set out in her email, she did not obtain legal advice, because she was advised by Mr Overland that the Association would obtain advice on putting the resolution to a second vote. Nor did she email Wellbeing's patients, although she did draft a letter for this purpose.<sup>103</sup> This letter was provided to staff as part of a newsletter and was placed on the front desk with membership forms for patients to read. Staff members did not talk to patients about it unless they were asked about it. She said that Wellbeing did offer to pay for memberships, but only paid for thirty-four in total. Staff of Wellbeing did not collect proxy votes from patients. Wellbeing did undertake a paid marketing campaign which consisted of three video presentations.<sup>104</sup>

186 Dr Lawlor-Smith gave evidence that one of her motivators for undertaking the action that she did was her fear that the Wellbeing lease was at risk. She said:

A. So yes it was. So at that time, I wasn't aware that it was a registered lease, I have subsequently been advised of that and that, I understand, makes it more secure, but right from the get-go, the - Mr Baragwanath and Mr Davis I think have made it pretty clear that their - it is their intention to challenge our lease, so Graham made a couple of attempts to discuss our situation with Mr Baragwanath -

Q. ...

A. ... I think that the number and reason that I was so distressed is I believe that our lease was at risk, and that we wouldn't be able to continue practicing in the region.<sup>105</sup>

187 Dr Lawlor-Smith conceded in cross-examination that she did not seek legal advice about the enforceability of Wellbeing's lease; she did not think it was necessary because "[she] thought [she] knew what the situation was".<sup>106</sup> She said, however, that she was motivated by more than personal interest in her support of the JBMT proposal:

A. I think it's bigger than that. In terms of our private interest, we are handing over the practice and not making any money out of it, this is not what we want. The financial interest did not come into it. It's about the community, it's always about the community. We service the majority of the community. The majority of the community actually rely upon us to provide them with general practice. If we were to lose our general practice in the community it would be devastating. So it was more about, you know, you may or may not believe me, but it was more about the community interest in the interest of our staff.<sup>107</sup>

<sup>103</sup> A2, document 207.

<sup>104</sup> T634.26-637.20.

<sup>105</sup> T640.5-32.

<sup>106</sup> T647.29, 653.38-654.2.

<sup>107</sup> T648.5-16.



188 As to a threat to the SAAS ambulance station, Dr Lawlor-Smith said that she assumed that it would also be at risk if the JBMT proposal was not supported.<sup>108</sup>

189 Dr Lovell said that he also did not email patients, nor was he actively involved in asking patients to become members of the Association. He was also not involved in staff collecting proxies. He agreed that he did make a video in which he spoke in support of the JBMT proposal.<sup>109</sup>

190 Mr Overland replied the same day, in the following terms:<sup>110</sup>

I am grateful for the support that you and others have offered the Board. The strategy you have outlined is workable but it is important that all of those who wish to see the Kalyra proposal succeed are working to the same script.

For this reason, there needs to be some sort of loose coalition of people willing and able to support a large scale membership drive with specific objectives in mind. The hospital constitution is a bit of a problem in that it can be tricky to navigate, so having a well understood plan about the sequence of events to be followed is very important.

Here is a tentative plan that I think will fit with the constitutional requirements.

I am going to propose to the Board that it seek to remain in place until at least early July, mostly so that it can oversee the closure process. Our current legal advice is that we can do this even if the Baragwanath faction want an earlier meeting.

After that, we will need to convene another General Meeting at which the current Board resigns to create a 'spill' and force another election. I will not be nominating for re-election but some of my fellow Board members may choose to do so. Very probably other people will have to nominate so that there is a real contest for Board seats. The aim will be to 'ambush' the Baragwanath action by having a pre-arranged and agreed 'ticket' for members to support at the election.

The objective of this process should be to ensure the election of a 'friendly' Board which, once in situ, can promptly resurrect the Kalyra resolutions and put them to a new and probably very much enlarged Special General Meeting of members.

So far as I am aware what I have proposed is consistent with the constitution. The current Board's role will be to set in train the process that I have described. It will then be up to those who want the Kalyra proposal to proceed to mobilise large scale support through a membership drive of the type you have proposed. I understand that the hospital volunteers are beginning efforts to mobilise such support through their own networks. Kalyra may be able to help out too.

I believe that Leon Bignell may well be supportive of a process such as I have outlined and he has his own networks of people who might be willing to support the Kalyra proposal.

191 As to the Board's remaining in place, Mr Overland said:

A. As best I recall it had been. It had not been our intention originally, as is reflected in the minutes of the first Special General Meeting but in view of the fact that people

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<sup>108</sup> T650.33.

<sup>109</sup> T695.1-696.23.

<sup>110</sup> A1, document 111.

were so focussed on reconsidering the matter we decided we would stay in place, at least for the time being.<sup>111</sup>

192 When asked about whether he considered that the proposal outlined in his email was an honest one, he said:

A. Yes. Yes, why was is dishonest? Why wouldn't we pursue and objective that we had pursued diligently? There was nothing improper about what was being proposed, not at all. Those who were opposed to what we wanted to do had been vociferous in their advocacy to get people to join the board to have their way. So, there was no reason whatsoever for us be concerned about that. My concern was that whatever was done was constitutionally and lawfully proper, and it was.<sup>112</sup>

193 Mr Overland confirmed that he had not consulted with other Board members before sending his response to Dr Lawlor-Smith, but that he had copied them into it.<sup>113</sup> He also copied Mr Bignell and Ms Blunt into his reply.

194 Mr Bignell said that he “probably” recalled receiving the email.<sup>114</sup>

195 Dr Lawlor-Smith said that she did not regard Mr Overland’s email as agreement with her plan; rather, she considered that it indicated that he did not object to her proposal.<sup>115</sup> She said:

A. I think it is an overstatement to say that I believe that this was the green light for me to go ahead with my plan. This was Mr Overland detailing a plan about how he thought we could move ahead, and some of that in fact coincides with what I've said as well, but it's not a green light.<sup>116</sup>

196 Mr Baragwanath wrote to the Board on 8 May 2023.<sup>117</sup> He said:

...

It was clear from the presentation on Friday that there is no plan B. It was also clear from the meeting that the board has been set on this plan for some time and yet, offered no substantiation of any points offered.

There seems to be a clear lack of knowledge with respect to the objects of the constitution and the obligations placed on the board. I have provided a quick summary written in part by the person who drafted the constitution. There are now 244 members on the renamed “Future for McLaren Vale Hospital – Community at the Heart of Health” Facebook page. You are all welcome to join and participate.

At each step I have offered to help and that offer remains open. I think the best path forward is to quickly appoint new board members to ensure there are 8 members and to rapidly

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<sup>111</sup> T394.37-395.4.

<sup>112</sup> T503.11-19.

<sup>113</sup> T499.21-24.

<sup>114</sup> T590.1.

<sup>115</sup> T663.35-38.

<sup>116</sup> T664.7-12.

<sup>117</sup> A1, document 112.

bring together committees to grow membership, investigate and document alternatives and raise money.

I am happy to serve on a committee, as a board members or as an external consultant on a pro-bono basis as are others.

197 Mr Baragwanath said that he wrote this email because it was clear that the Association needed help but was not being run properly. He wanted to make it clear that he was capable of helping and was offering to do so.<sup>118</sup>

198 Mr Overland replied on 9 May 2023.<sup>119</sup> He said:

I refer to your recent request that a Special General Meeting be held at which the members vote on a proposal to dismiss the current Board and elect a new Board.

It is unclear from your letter what authority upon which you are relying for the proposed resolutions. The constitution does not appear to provide for the dismissal of the Board other than under certain prescribed circumstances. This may render your request invalid. It will be appreciated if you could advise which authority you are relying on for this request.

199 Mr Overland's evidence was that the legal advice received by the Association was that there was no power in the Constitution which would allow members to dismiss the Board. Further, Mr Baragwanath had not proposed a resolution, which Mr Overland considered was required.<sup>120</sup> Mr Overland said that he asked the Association's lawyers to draft a resolution which could give effect to the request for a Board spill in the context of no power which allowed this to happen.<sup>121</sup>

200 Mr Overland sought to explain the use of the word "ambush" in his email to Dr Lawlor-Smith in the following way:

A. Yes, my background, as I mentioned yesterday, is in history but I have a special interest in military history and military leadership and I have a tendency to use military terminologies from time to time. I used the term 'ambush' but it really meant 'pre-empt' and that was clearly understood in those terms.<sup>122</sup>

201 Mr Overland said that neither he nor the rest of the Board considered that they should be involved in a membership drive. He said that the Board members felt that it was time for them to step back and leave it to the community.<sup>123</sup>

202 On 8 May 2023, Dr Lawlor-Smith sent to one of her staff members, Ms Trudgen, a letter directed to the practice's patients.<sup>124</sup> It says, in part:

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<sup>118</sup> T103.25-30.

<sup>119</sup> A1, document 115.

<sup>120</sup> T390.6-19.

<sup>121</sup> T390.36-391.2.

<sup>122</sup> T395.34-396.1.

<sup>123</sup> T397.1-5.

<sup>124</sup> A2, Document 204.

The hospital is a not-for-profit organization owned by the local community. It will continue to provide many services to the local community including:

- Leasing a space to Wellbeing McLaren Vale to provide General Practice services to the community
- Cooking and providing meals for Meals on Wheels recipients in the community and for Kalyra Aged Care residents.
- Leasing land to SA Ambulance to allow a local ambulance station to operate on site.
- Providing facilities for the seventy strong hospital volunteer service. This service raises a large amount of money yearly to support the hospital and local community.
- Housing the local community radio service.

In order to allow all of these services to continue and to develop more, the hospital board recommended that the membership voted to allow the hospital to merge with James Brown Memorial Trust which operates Kalyra. James Brown Memorial Trust is a long standing South Australian not-for-profit organization which has cared for South Australians for over 150 years. It has committed to maintaining all of the remaining hospital services and to develop more after extensive community consultation.

Unfortunately, a group of local residents supported by business people from outside our community defeated the vote to allow this to happen at a meeting last Friday. They have called a special general meeting to sack the existing board and plan to replace the board with their own members. One of their suggestions is for the hospital to go into partnership with a for-profit organization. This will involved the for-profit organization taking control over the hospital's assets. This group have provided no commitment that the remaining services on the hospital site will be allowed to continue. If their venture fails, the for-profit organization will be able to force the sale of the hospital resources and they will be forever lost to the community.

203 The following exchange took place with Dr Lawlor-Smith about this communication:

- Q. You're referring to 'local residents supported by business people from outside our community.'
- A. Yes.
- Q. You had made no inquires to ascertain what connection with the community the business people you're referring to had, had you.
- A. I'll tell you that I had googled all of these people, so I was aware that they had no previous association with the community, and my understanding at that time were they were friends of Mr Baragwanath's and they were all members of the Masonic Lodge and all had an association with the Pelligra Group.
- Q. You've made an assumption, haven't you, that they had no connection with the community.
- A. Based on the evidence that I had in front of me, I believe that was true.

Q. And you've made an assumption based on that, without speaking to them, for example.

A. Well, again, I can't speak for my husband, but we have made a couple of attempts to speak to Mr Baragwanath.

Q. Can you tell her Honour, identify to her Honour, each attempt you say you've made, to speak to Mr Baragwanath.

A. No I haven't - I have not made any personal attempts, but when my husband comes into the stand, I'm sure he would be able to share that with you, unless you wish me to share hearsay.

Q. No, you tell her Honour any occasion where you made an attempt to speak to Mr Baragwanath.

A. I have made no attempt to speak to Mr Baragwanath.

Q. Can I suggest that you've used the language of 'business people from outside our community' to trigger the reader's sense of outside money coming in to interfere with our local community.

A. Yes, it's exactly right, because that is exactly what I thought was happening, and in fact, the majority of the community thought was happening.<sup>125</sup>

204 In relation to the statement about replacing the Board, the following exchange took place:

Q. You don't accept the proposition that if the board were to be replaced, it would be replaced with persons elected by the members.

A. Yes.

Q. Do you accept that.

A. Well that's common sense.

Q. However, you describe it slightly differently in your letter, don't you. What you're conveying in your letter, is 'unless you stand against this other group they will replace the board with members - they will replace the board with members of their own group.'

A. It's how it reads, yes.

Q. That's what you're intending to convey.

A. I guess that's the case.<sup>126</sup>

205 On 9 May 2023, there was a series of emails between Ms Blunt, Mr Overland and Emma Fletcher, from an organisation called democracyCo, a company with expertise in community engagement and consultation.<sup>127</sup> Ms Blunt initiated the

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<sup>125</sup> T670.6-671.4.

<sup>126</sup> T671.26-672.1.

<sup>127</sup> A1, document 119.

chain, by writing to Mr Overland and suggesting the engagement of a democracyCo. Mr Overland said in his response:

There is a very concerted effort being made by the volunteers, the Wellbeing Clinic and others to generate sufficient new members to entirely overwhelm those who want to place the hospital in the hands of a private developer. I know that one individual has signed up over 60 new members in less than a week. I expect to very soon be in receipt of a demand for another SGM to reconsider the resolutions which lost so narrowly at the last SGM.

206 Ms Fletcher then sent an email in which she outlined the type of work her organisation could carry out, to allow what she referred to as “considered decision making” to occur.

207 Mr Overland replied that he would put the matter to the Board. A week later, on 16 May 2023, Mr Overland advised Ms Fletcher that Board had decided not to engage in the type of consultation that she had proposed.<sup>128</sup> He said:

Our view is that things have now reached the point where a consultation process is unlikely to help matters much. Indeed, it may play into the hands of some of our critics.

208 On 10 May 2023, Mr Overland arranged for a notice to be provided to the Association’s staff.<sup>129</sup> After advising staff of the failure to have the resolutions passed at the special general meeting, he reiterated that the hospital would close on 30 June 2023. He then said:

There appears to be rumours that a public meeting is being planned to reconsider the proposals put before the Special General Meeting. The Board has no knowledge of such a plan although many members are very upset and concerned about the outcome of the Special General Meeting.

209 This statement simply cannot be true. By the time that Mr Overland prepared this notice, he had already received Dr Lawlor-Smith’s email about recruiting members and holding a second vote on the motion to transfer the Association’s assets to the JBMT. It was also not made clear in the evidence whether this communication was prepared before or after the meeting which I describe below.

210 Mr Overland explained this statement in the following way:

A. Yes it is true actually because I'm referring a very specific thing, a public meeting. The context for this comment was that there's post the special general meeting, there was some conflict between some members of the hospital staff, particularly amongst the nursing staff, where those who had been supportive of the Kalyra proposal were having conversations with the small number who were opposed to it and it was provoking a bit of tension, which is the background to why I wrote this, and it was reported to me that people were talking about a public meeting, now when I say 'public meeting' I'm using a very specific term here and that's a meeting which any member of the general public could wander in to have a chat about what the future of the hospital might hold. This is the only document that I ever wrote in relation to meetings that uses the expression 'Public Meeting'. I'm very very clear about this, I

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<sup>128</sup> Ibid.

<sup>129</sup> A1, document 113.

looked long and hard to find out where I might have ever used that term. Any meeting of members I always talked about meeting of members, an annual general meeting, a special general meeting, never did I use the term 'Public Meeting' except in the context of this one document.<sup>130</sup>

211 It appears to me that Mr Overland is engaging in some sophistry here.

212 On the morning of 10 May 2023, an informal meeting was held at the home of one of the board members, Pip Forrester. In attendance were Clive Allert, Chris Bright, Ms Forrester, Gary Hennessy, Pauline Hudson, Jenni Mitton, Mr Overland and Mr Bignell. All, save for Mr Bignell and Ms Mitton, were the current Board members. The only Board member not present was Dr Kremmidiotis. Ms Forrester kept minutes, a copy of which was produced during the trial.<sup>131</sup> The minutes record that the meeting agreed (amongst other things) that:

- The Constitution of the Association did not allow for the Board to be “sacked”; as a result, the request for a special general meeting to replace the Board was invalid.
- A further special general meeting could be held to authorise resolutions to merge with the JBMT and wind up the Association.
- An eighth Board member would be appointed to assist the Board with the processes required for the merger and winding up.
- Mr Bignell would meet with the proposed developer and Mr Baragwanath.
- Separate special general meetings would be held to deal with the resolutions. That is, the first special general meeting would deal with the merger with the JBMT and the second would address the winding up of the Association.
- A special general meeting would be held on 4 July 2023 to address the merger resolution.
- To be eligible to vote, new members would need to join the Association by 7 June 2023.
- The request for the meeting would be received by Mr Overland by 17 May 2023.
- Notice of the special general meeting would be sent to members on 2 June 2023.
- Mr Overland would draft the resolution to be put to the special general meeting on 4 July 2023.

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<sup>130</sup> T568.35-569.19.

<sup>131</sup> A26.

- Ms Forrester would contact Dr Lawlor-Smith about a membership drive and the special general meeting.

213 Mr Overland said that the meeting was an informal one to discuss whether they should do something to try to influence events. He agreed to draft the letter and resolution for Dr Lawlor-Smith to ensure that the resolution that she proposed was consistent with the Act and the Constitution. He wished to ensure that the resolution would not be open to legal challenge.<sup>132</sup>

214 As to the choice of date for the second special general meeting, Mr Overland said:

- A. We made that decision based on partly on logistical issues which was finding a venue which could actually cope with what we anticipated might be a much larger meeting than the one that had been earlier in the little Lutheran Hall. And also choosing a date, we had a 60-day limit, or that's what the constitution said, that we had to call a special general meeting within 60 days, but we wanted to provide a time, a reasonable amount of time anyway, for people who wanted to become members to become members and then have the opportunity to vote. Because the constitution says that you can't vote in a special general meeting or general meeting for a period of four weeks or 28 days after you first joined. So we needed to give time for people to join.<sup>133</sup>

215 I note that Mr Overland appeared to have little independent memory of this meeting. His evidence of the meeting was largely prompted by the relevant documents.

216 Mr Bignell gave the following account of the meeting:

- A. I think, I think it was some members of the board, the hospital board, and I was there but I spent most of my time outside on the phone to Michael - and bear with me because I don't think I've actually pronounced his name before, is it Bar -

Q. Baragwanath.

A. Sorry?

Q. Baragwanath.

- A. Baragwanath, yes. Sorry, I didn't want to mispronounce his name. I spent probably 30 minutes on the phone to him, maybe a little longer, because we'd been sort of trying to have a chat. I was trying, I guess, to be someone who could play a peacemaker role in this and sort of explain - my conversation to him was that, you know 'Thank you for your interest, but we don't need this. What the community is after is what the committee of the hospital had decided to do'.

- Q. Do you have a memory of the discussions in the meeting whilst you were in the meeting.

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<sup>132</sup> T398.34-399.20.

<sup>133</sup> T400.22-35.



A. Not really. It wasn't for me to be so involved in what that discussion was about. I think everyone was looking to work out possible dates of when that next meeting could be and I think they were keen to have me at the meeting and I was about to head overseas. So I think that was my discussions, was my diary, when's Parliament sitting, when am I heading overseas, so that we could get that meeting done.<sup>134</sup>

217 Later the same day, Mr Overland wrote the following to Dr Lawlor-Smith:<sup>135</sup>

I know that you have been busy recruiting new members with the express intention of requesting a 2<sup>nd</sup> SGM. This has resulted in an explosion in membership numbers, now exceeding 300 and rising fast. The other side are doing the same thing but I do not know how effective they have been.

I understand that Pip has spoken to you about the outcomes of our strategy meeting this morning. Amongst other things, I agreed to draft a letter for you which requests a 2<sup>nd</sup> SGM. I have now done this but need to run it past our lawyers tomorrow just to make sure that it meets all the relevant legal and constitutional requirements. One thing I have learned through this process is that our constitution is a Mare's Nest of potential complications, hence the reliance on our lawyers to help us navigate its various pitfalls and surprises. Our objective is to make us invulnerable to legal challenges, and thus far, this strategy has worked perfectly.

...

218 Dr Lawlor-Smith replied the same evening, saying, in part:<sup>136</sup>

Pip has given me some dates to work to. We will keep the pressure up for the remainder of May to try to maximise the number of members willing to vote for the proposal. I am advising patients that when there is another meeting that we will come out and collect proxies for people who can't attend the meeting.

219 In her evidence, Dr Lawlor-Smith said that she was unable to recall the telephone call from Ms Forrester.<sup>137</sup>

220 On 10 May 2023, Dr Lovell posted a statement by himself on the Wellbeing Facebook page.<sup>138</sup> In this post, he said:

The proposal to redevelop McLaren Vale hospital in partnership with a for-profit organisation is doomed to fail putting the community assets of the hospital at risk.

221 On 11 May 2023, Mr Baragwanath replied to Mr Overland's 9 May 2023 email. Amongst other things, he said:

I wanted to clarify a minor note from my previous email – when I wrote, “quickly appoint new board members to ensure there are 8”, I meant to add to the current board, not replaced any existing board members. I apologize if that was unclear.

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<sup>134</sup> T591.3-29.

<sup>135</sup> A1, document 114.

<sup>136</sup> Ibid.

<sup>137</sup> T679.5-26.

<sup>138</sup> A2, document 211.

222 He then went on to propose a strategy that would allow a twelve-month consultation period with the community to devise a range of options for the use of the site on which members would vote at the end of that process. He ended his email in the following way:

Perhaps if the board is prepared to meet the minimum compliance requirements and engage with the community, members who put forward the motion to spill may be willing to reconsider it. I certainly would and would recommend that others do as well. This could go a long way in alleviating their concerns and building a positive relationship.

223 In his evidence, Mr Baragwanath said that he sought to achieve good governance for an organisation that remained in community hands.

224 Mr Overland's evidence was that the Board still considered that Mr Baragwanath sought a spill of the Board:

A. It was certainly our view at the time that the real intention was to replace the board with one who Mr Baragwanath and others would have regarded as more to their liking, yes.<sup>139</sup>

225 On 16 May 2023, Mr Overland wrote to Mr Baragwanath further about his request for a special general meeting to spill the board.<sup>140</sup> He said:

The Board has reviewed the members' request for a special general meeting and acknowledges the members' position.

The issue the board has with the meeting request is that it does not actually propose any resolutions for the members to vote on, and the board has already indicated its concerns about what authority such a resolution would be based on. Given there is no resolution proposed, it is not clear what utility the meeting requested would have in practice.

Despite this, the board has no intention of preventing the members from having a say in the composition of the board to govern the association. Therefore, the board has crafted a proposed resolution that it believes could meaningfully be voted on by the members that achieves the main thrust of the meeting request. The proposed resolution is as follows:

"That the members direct the board to commence a process whereby a special meeting is called, board nominations are taken, each board member resigns immediately before the meeting and the members vote on the appointment of a new board."

Can you please confirm if the proposed resolution is acceptable, and provide confirmation from the other members who signed the request as to the same.

226 Mr Baragwanath replied:<sup>141</sup>

I am confident that your proposal will be strongly supported; I will suggest that they all personally write to the board to withdraw their request.

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<sup>139</sup> T530.26-29.

<sup>140</sup> A1, document 118.

<sup>141</sup> Ibid.

227 Mr Baragwanath said in his evidence that he accepted Mr Overland's suggestion because he did not want to cause embarrassment to the Board. He said:

A. My view, so my view was that these were good people volunteering their time and they deserved to be respected and if they had requested something be done a certain way and you know they had recently lost what they wanted to do, that we should afford them the dignity of choosing the method by which a meeting was run.<sup>142</sup>

228 On 16 May 2023, Mr Overland also wrote to Dr Lawlor-Smith.<sup>143</sup> He said:

Attached is a draft of a letter to be sent by you to me in which at least 20 members request another SGM to reconsider the Kalyra merger proposal.

...

If you could sent it to me in the next days or so, with at least 20 members names and signatures attached, the Board will 'consider' it before advising all members ...that another SGM will be held in early July to reconsider the merger proposal.

229 In cross-examination, Mr Overland was asked why he put the word "consider" in quotation marks. He replied:

A. It was very simple, because in practical terms once we're received it we had nothing to do as a decision other than to put it. The constitution required it, it was as simple as that.<sup>144</sup>

230 As to the reference to a special general meeting being held in early July, Mr Overland asserted that the timing "logically followed from the provisions of the constitution".<sup>145</sup> The following exchange took place:

Q. Well, it doesn't follow from the provisions of the constitution does it.

A. I think it does.

Q. How.

A. Because we have a 60 day limit in which to convene a meeting, a special general meeting. So we'd obviously - I would assume we'd talked about it and that's reflected in my comment here, yes.

Q. So from when you receive a request you have 60 days within which to hold the special general meeting.

A. Yes, that's apparently the situation, yes.

Q. So on 16 May you haven't received a request from Dr Lawlor-Smith and you're able to tell her 'If you get this to us in the next couple of days the SGM will be held in early July'.

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<sup>142</sup> T105.19-25.

<sup>143</sup> A2, document 213.

<sup>144</sup> T537.12-15.

<sup>145</sup> T538.25-26.

A. Yes.

Q. Which is less than 60 days.

A. Yes.

Q. So the 60 day limit wasn't part of your consideration was it.

A. It was. We had to do it within - well, we believed we had to do it within that period, so yes. It was a consideration.<sup>146</sup>

231 This evidence must be regarded as disingenuous. It completely disregards the decision made at the informal meeting on 10 May 2023, that a second special general meeting would be held on 4 July 2023, and that, in effect, the request for that meeting was being engineered to fit in with that date.

232 Mr Overland then sought to tie the date for the second special general meeting to the request, from Mr Baragwanath, on 1 May 2023 for a Board spill:

A. No - well I can't say that we didn't talk about it after that meeting, but the trigger was definitely the receipt of a request for a special general meeting from 20-plus members.

HER HONOUR

Q. Can I just clarify, that's the request that you received on 1 May.

A. Yes. Once we'd received that we were compelled to hold a special general meeting at some point.<sup>147</sup>

233 This answer must also be regarded as disingenuous and an attempt by Mr Overland to legitimise the choice of the date for the second meeting. This is not least because 60 days from 1 May 2023 is 1 July 2023; any meeting held after 1 July 2023 would be outside the 60 days within which the Constitution required such a meeting to be held once a valid request was received.

234 The Board next met on 25 May 2023. Present at the meeting was Mr Christo Botha. According to the minutes, he was "purely attending the meeting as an observer with a view to joining the Board at the next meeting."<sup>148</sup>

235 Discussion and planning for the closure of the hospital on 20 June 2023 occupied most of the meeting. The Board confirmed the day of 4 July 2023 for the next second special general meeting.

236 As to the date for the special general meeting, the following exchange occurred during Mr Overland's evidence:

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<sup>146</sup> T538.27-539.11.

<sup>147</sup> T540.23-31.

<sup>148</sup> A1, document 121.

Q. 'The board discussed the timing of the next SGM.'

A. We did.

Q. And it says 'To be held', etc.

A. Yes.

Q. Was that the decision or, in effect, the fixing of the date for the SGM.

A. Yes, it was. We'd been hunting around for a venue that was big enough, and the hall at the Tatachilla College was clearly big enough to do it.

Q. So that's the point at which the SGM was, in effect, fixed.

A. Yes.<sup>149</sup>

237 It is difficult to accept this evidence, if it is intended to mean anything more than the Board's confirming a decision that had already been made. The informal meeting on 10 May 2023 had reached agreement that the second special general meeting would be held on 4 July 2023, and a timetable had been set for the receipt of the request for the meeting, the last date for members to join, and the date for the notice of the meeting to be distributed. Ms Forrester had, on 10 May 2023, given Dr Lawlor-Smith "some dates to work to", which can only mean the date by which the request for the meeting must be received, the date by which members must be signed up, and the date of the meeting. And, in fact, the Board did not receive the request for the special general meeting until the day after the Board meeting. Any suggestion that the date for the special general meeting was not set in stone at the 10 May 2023 meeting must be regarded as disingenuous.

238 On 26 May 2023, the Association sent an email to members.<sup>150</sup> It was headed "Update from the Board" and said the following:

Thank you to members that attended the Special General Meeting on 5 May 2023. Unfortunately, key information has been lost in the debate over the hospital.

**These are the facts:**

- The ageing hospital is not viable. We cannot employ enough staff due to workforce shortages to keep it running and that's why it will close on 30 June.
- Important services and heritage on site are now at risk.
- There is just one proposal that would protect and preserve the site and replace the hospital with a key community service – the merger with the James Brown Memorial Trust/Kalyra, a not for profit charitable organisation helping older South Australians and people with a disability.

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<sup>149</sup> T401.21-32.

<sup>150</sup> A1, document 122

- There is NO other proposal that offers protection for the site.
- The Board emphatically rejects a proposal for a private developer to take over the site with no guarantee of any community services to be provided and no protection for current services and heritage.

...

#### **Proposal for a deal with a private developer**

An alternative proposal is being promoted which places the hospital site in the hands of a private developer to be used for unspecified purposes.

The Board is emphatically opposed to this idea. Current services and heritage will be lost, and we believe that a community asset should not be used for private profit.

...

239 The following exchange took place with Mr Overland during his cross-examination in relation to this communication:

- Q. Now there was no proposal for a private developer to take over the site going to the members, was there.
- A. There was no proposal going to the members, but one had been circulated to many members.
- Q. But what you're doing is, what the board's doing is, as it were, setting up a straw man because it's saying the board rejects a proposal that the members aren't being asked to vote on.
- A. No - well, they're not being asked to vote on it, that is fair comment. What the context for this is that the proposal by Mr Pelligra was being very widely circulated and promulgated at the time, or had been, and it had come to the attention of many members, so hence that reference.<sup>151</sup>

240 On 26 May 2023, Dr Lawlor-Smith duly wrote to Mr Overland, attaching the letter that he had sent to her undercover of his email dated 16 May 2023, now signed by twenty members of the Association, asking that another special general meeting be held to reconsider the proposal to merge the Association with the JBMT.<sup>152</sup>

241 On 2 June 2023, in accordance with the agreement reached at the 10 May meeting, Mr Overland issued the notice of the special general meeting to be held on 4 July 2023.<sup>153</sup> The notice said that the meeting would consider two resolutions. The first was:

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<sup>151</sup> T555.21-34.

<sup>152</sup> A2, document 216.

<sup>153</sup> A1, document 132.

That the members direct the board to commence a process whereby a special meeting is called, board nominations are taken, each board member resigns immediately before the meeting and the members vote on the appointment of a new board.

242 The second resolution read:

That for the purposes of Rules 5(b) and 17 of the Constitution and sections 25 and 43(2)(a) of the Associations Incorporation Act 1985, and for all other purposes, the Hospital be empowered and authorised to transfer to James Brown Memorial Trust the assets and undertakings of the Hospital on such terms as the Board determines.

243 The Explanatory Notes which accompanied the notice, said:

...

Kalyra is a trusted not for profit aged care provider and through an arrangement with them key services including the Wellbeing GP Clinic, Clinpath, SA Ambulance Service, and the volunteers' Op Shop and shed will stay. As well Tsong Gyiaou will be preserved and its tenants can stay.

...

244 The Explanatory Notes recommended that members vote against the first resolution and in favour of the second.

245 The following exchange occurred with Mr Overland about the timing of the notice:

Q. Was the decision to issue the notice on 2 June your decision.

A. My decision personally?

Q. Yes.

A. No. I don't think so. I think as a board it had been agreed that that was the date because there was a conversation in the board meeting about this 28 day rule and we thought we should give a little bit of leeway to allow members to still be able to join up before that 20 day rule came into effect.

Q. Isn't this the case, that the notice was issued on 2 June in respect of a meeting on 4 July.

A. Yes.

Q. For two reasons: the first is to give the Dr Lawlor-Smith part of the team all of May to continue to maximise the number of supportive new members.

A. No. As I previously explained to you, that was the effect, I don't deny that at all, but the delay - it wasn't a delay, but the process we were following was designed to give people the opportunity to become members whether they were for or against whatever the proposal was. You need to understand, the objective was to get the broadest possible level of community involvement in this exercise whatever the

outcome was. And please bear in mind: we did not know how this could work out given that 75% majority requirement.<sup>154</sup>

246 Mr Baragwanath said that, until he received this notice, he had no knowledge of the intention to hold a second special general meeting to repute the JBMT proposal to the members.

247 Mr Davis also said that, before he received the notice of the second special general meeting, he did not know that the JBMT proposal would be put to members again. He recalls that, after receiving the notice, he and Mr Baragwanath had a discussion about calling the proposal a merger and that they agreed that this was a mischaracterisation.<sup>155</sup>

248 Mr Overland was asked whether the date for the issue of the notice was chosen in order to give minimal time for opponents of the JBMT proposal to join as members. He said:

Q. You accept, don't you, that the issue of the notice on 2 June was the first time the general membership will have learnt that the Kalyra proposal was going to be re-put.

A. Yes, I would believe that would be generally true, yes.

Q. And so the second reason the notice was issued on the 2nd for a meeting on 4 July was to leave only two or three days for the mobilisation of new memberships who might oppose the Kalyra proposal.

A. No. That's not true. The people who were opposed to the idea of the Kalyra proposal had been very, very active for the preceding month, right. It is not the case that it was just Dr Lawlor-Smith and other people who were in favour of the idea who were running around trying to encourage memberships, nor was it the case that people were completely unaware of the fact that a resolution - sorry, a motion had been put, or a request had been put by members to remove the board or indeed to support the Kalyra proposal. I mean that was not a secret, right. People were talking about that. But you've asked me the question: was the membership formally advised of that? No, they weren't until 2 June, but the idea that they didn't know is quite wrong.<sup>156</sup>

249 He then said:

A. You know, you can suggest that but the reality was, as I've said to you, is we were just responding to the requirements that were imposed on us by the constitution. You're implying there was some sort of cunning plan around this exercise which really just wasn't there.<sup>157</sup>

250 On the same day, Mr Overland sent a letter to members, which enclosed a question and answer document about the two resolutions.<sup>158</sup> In the letter, he said the following about the first resolution:

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<sup>154</sup> T559.1-26.

<sup>155</sup> T195.31-196.8.

<sup>156</sup> T559.27-560.10.

<sup>157</sup> T561.14-19.

<sup>158</sup> A1, document 134.



**Vote NO**

- If this resolution is successful members will have to attend another Special General Meeting which means more uncertainty for the hospital site and community.
- This resolution has been proposed by a group of mostly new members who are promoting a joint venture with a property developer for the site which puts at risk current services and heritage.
- This resolution is aimed at replacing the current Board with one that is more to their liking.
- Independent legal advice says that there are no valid constitutional or legal grounds for demanding the Board's resignations.
- The Board has at all times acted honestly, diligently and in the interests of the hospital and the wider community.

251 In relation to the second resolution he said:

**Vote YES**

- This resolution has been proposed by local GP Dr Laureen Lawlor-Smith from the Wellbeing GP Clinic and is the Board's original proposal.
- Voting YES for this will provide certainty to the site and protect current services and heritage on site including the Volunteers, Op Shop, the Wellbeing GP clinic, Tsong Gyaou, preparation of meals for Meals on Wheels, War Memorial Gardens.
- Voting YES will transfer the site to the James Brown Memorial Trust/Kalyra, ensuring a not for profit community service continues to be provided on site while protection all current services and heritage.

252 The question and answer document said the following:

...

**What is the James Brown Memorial Trust/Kalyra proposing for the site?**

Kalyra Chief Executive Sara Blunt has written to members saying:

If the merger was to proceed it is a tremendous opportunity for the area. Kalyra would ensure a robust community engagement process to align with future needs of the community and to fund development that supports the current services and the future options that are identified.

The Community Consultation would be an expert, independent process to ascertain the long-term needs of the area, based on the community's views and data analysis. The reason Kalyra has existed for 130 years is through very careful consideration of responding to community need. We want to hear from the people of McLaren Vale.

**Did the Board consider any other alternative proposals?**

The current Board and previous Boards over a number of years have investigated a range of options for the hospital including the government assuming responsibility for the facility,

redevelopment to meet modern hospital standards, redevelopment to create a health hub including a GP Super Centre, sale to a private hospital operator, and selling the property to establish a new Charitable Trust.

These options were either not realistically achievable or did not align with the original goal of the hospital which was to provide a not for profit/charitable community service.

**A group in the community has proposed a joint venture for the site with a private developer. Has the Board considered this:**

The Board has ruled this out as it believes that community would not support a joint venture with a developer whose aim is to make a profit from the site.

The Board will not under any circumstances enter into arrangements where assets paid for by the community are applied for the purpose of making a profit – for the direct or indirect benefit of a private individual or a company.

253 As to the real risk faced by the various tenants of the hospital, should the JBMT proposal not be accepted by the membership, Mr Overland said, during cross-examination, “I don’t think we really thought that was at risk”<sup>159</sup> with respect to the SAAS ambulance station. With respect to Wellbeing, he said that, while he knew that its long term lease gave it security of tenure,<sup>160</sup> he was concerned that Dr Lawlor-Smith might not continue to operate the practice if she did not like the owner of the site.<sup>161</sup> Mr Overland’s evidence must call into question the good faith of the Board in promulgating the question and answer document. If the Board had no real belief that the tenants’ leases were at risk if the JBMT proposal was not accepted, it should not have made this statement in the material that it made publicly available.

254 On 29 June 2023, Wellbeing posted instructions on how to vote at the upcoming special general meeting.<sup>162</sup> The introduction read:

If you are a member of McLaren Vale Hospital and wish to ensure that all current services at the hospital site including Wellbeing McLaren Vale, Meals on Wheels, the Ambulance Station and the Volunteer Service remain please vote this way.

255 In evidence was a number of Facebook posts on the Save the McLaren Vale Hospital Facebook page.<sup>163</sup> They were dated by the parties at around July 2023; an exact date has not been provided. I do not set out all of the posts that were in evidence. I note the following:

... Once we have control or the current board on side I propose to run an area wide health survey with a proper marketing budget. That will lift membership numbers pretty quickly and give people a chance to tell us what they need.

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<sup>159</sup> T563.15.

<sup>160</sup> T564.30.

<sup>161</sup> T564.30-36, 565.8-30.

<sup>162</sup> A2, document 221.

<sup>163</sup> A1, document 157.

(Mr Baragwanath)

...I've lived here for over 30 years didn't know you could be a member or that the hospital was in strife...

(J J)

We have lived in the area for almost 30 yrs and also didn't realise that we could have done more to help the hospital.

(C B)

But I totally agree with her point – the hospital needs more members. If we get 1000 members and they all agree, after being given proper information that it should go to Kalyra then it's job done.

(Mr Baragwanath)

256 Save for the posts by Mr Baragwanath, I have simply put the initials of the individuals posting the comments.

257 On 1 July 2023, Mr Baragwanath posted a document on Facebook setting out a number of options for the hospital site.<sup>164</sup> They were:

- Partnering with a not-for-profit research provider;
- Retaining local governance and partnering with another not-for-profit or for-profit under an open tender process;
- Converting the site to a health consulting office;
- Raising funds to retain health services on site; and
- Gifting the site to a reasonable recipient.

258 He provided brief notes in relation to each option.

259 On 4 July 2023, before the commencement of the special general meeting, Mr Davis commenced this action. He gave the following reason for instituting this proceeding before the special general meeting:

... I had discussions with Michael regarding that if this motion was then passed at this meeting then they could execute a document to transfer it the next day. I was worried that if something wasn't done quickly and imminently that that position wouldn't be preserved and it would go out, by then that would be it. I understand this quite a - I suppose back in June - it was quite a surprise to everyone that it was going to be put again and the membership requirements for signing up were very, very short. I'd also heard from Michael that a large number of members had been quickly signed up and so I suspected that it was essentially a done deal on the day and so I thought it - you know so I formed a view as a member with consultation with Michael in particular - that this wasn't the right way

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<sup>164</sup> R3.

forward. I then took a much longer look at the objects of the hospital and of Kalyra and it's my view that those objects were very different. However, and more so more importantly, that the constitution of the hospital had a provision in it that says that it can only be distributed to an entity on winding up that has similar purposes. So, I was very concerned that the board was essentially disposing of assets contrary to its constitution ... objects of the constitution with a view to avoiding the provisions regarding the requirement that they distribute to something with a similar purpose. So, I thought that that was an urgent thing to do and so I actually believe that I failed it and called the chairman and raised my concerns directly with him as well.<sup>165</sup>

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He gave the following, further explanation during his cross-examination:

A. It was to bring to the attention of the board that the way that by using the term 'merger' didn't correctly represent the motion that was being put at the meeting that night and that it would confuse members and it would essentially mean that the vote could potentially be invalid and so rather than, I suppose, waste the members' time, that the motion be brought again without the term being used as a merger which I thought was -

Q. But this is at 3.30 p.m. in the afternoon.

A. Yes.

Q. You're really saying, at the very last minute, 'cancel the meeting', aren't you.

A. I'm saying that -

Q. You're asking them to cancel the meeting.

A. I'm suggesting yeah, absolutely, they should because there is no merger, so I'm saying that I'm bringing to their attention that the documents that they have circulated has mischaracterised the proxy forms and all those members who had voted by proxy, were told that there was going to be a merger which implies that members would keep their membership rights and then that was not true and that they should recast it.<sup>166</sup>

261

Mr Davis said that, after the claim was filed, he contacted Mr Overland by phone, and explained his concerns. He described their conversation in the following way:

A. Yeah, so I called Chris and I said that I'm a lawyer, that I have some experience in this field particularly with deductible gift recipients or DGRs and their constitutions and their requirements as to how assets should be dealt with and that it was quite a serious obligation on him and the board. He said that he didn't know what a DGR was and I explained that a deductible gift recipient is essentially a charitable entity with a specific tax exemption for when they derive income they don't have to pay tax on that, and that there were a lot of requirements under the Act on how that needed to be dealt with. And I said to him that the specific clause around the distribution to something with similar purposes meant that they couldn't distribute the money on winding up or the assets of the fund to Kalyra because they had differing objects and I said that there were - you know it was still my view that the

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<sup>165</sup> T196.26-197.17.

<sup>166</sup> T221.19-222.2.

hospital was viable and that - you know they just couldn't distribute it to Kalyra under the constitution as it was, and I said that he should adjourn the special general meeting, yep.<sup>167</sup>

262 Mr Davis said that Mr Overland did not respond in any meaningful way.

263 The second special general meeting was held on 4 July 2023 (“the July meeting”). According to the minutes of the meeting,<sup>168</sup> there were now 967 members who were eligible to vote, as compared to a mere 57 at the time of the annual general meeting in October 2022. The vast majority had joined since the announcement of the closure of the hospital in March 2023. I will not set out the minutes in full. It is worth, however, noting the following.

264 With respect to the first resolution, the minutes record:

There is, in the Board’s view, no valid constitutional or legal basis for demanding that the members of the Board be removed from office or resign.

265 In relation to the second resolution, they record:

The Chair advised that the Board did not initiate this request but in accordance with the requirements of the constitution was obliged to convene this SGM to consider it.

266 In relation to the alternatives open to the Board, the minutes note that the following was said:

The hospital clearly lacks the management capacity to undertake a large, expensive and complex redevelopment project. Consequently, it either has to enter into a commercial joint venture with an entity that has this capacity or, as the Board has proposed, merge with such an entity.

In either case, this Association will cease to have effective control of the assets created. At best, it will end up as minority shareholder and/or landlord in some sort of private for-profit venture or, in the case of the proposed merger, be absorbed into a larger not for profit registered charity.

...

Perhaps most importantly there has been no alternative suggested that explicitly recognizes the need to protect certain features and activities on the site including the Volunteers’ Op Shop, the Wellbeing Clinic, the Tsong Gyiaou building, the SA Ambulance Service building and very importantly the War Memorial Gardens.

267 The first resolution was defeated, with 18% in favour of it and 82% against it. The second resolution was passed, with 86% of the vote in favour of it and 14% against it.

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<sup>167</sup> T198.3-23.

<sup>168</sup> A1, document 160.

268 Mr Baragwanath's evidence about the meeting was that it was long. He said that the vote was held before there was any opportunity for questions or discussion. According to his evidence:

... So the meeting was opened on the vote and Chris Overland was chairing the meeting, was very clear and saying that there would no further discussion, no other questions, only the vote would occur and then there would be opportunity for questions after the vote.<sup>169</sup>

269 He then said:

... After [the vote] that was completed, Chris Overland then narrated or gave his opinion for a good, I would say 20 to 30 minutes, in some times making statements such as 'I'll take my chair hat off for a moment and then just say what I think' which was inappropriate or not but that was what he did. Made comments to the fact that the members should just simply trust the board, that they knew what they were doing, that he had operated hospitals and had significant experience. In fact he was very clear in saying he was the only person that had experience and the only person that knew what happen with the hospital and the asset.<sup>170</sup>

270 Mr Baragwanath said that the questions were very hostile towards himself and Mr Davis, however it was clear that there were many questions that members wanted to have answered about the various options for the use of the site.

271 Mr Baragwanath said that the result of the vote was not made available until the following day, when it was communicated by email.

272 In cross-examination, it was put to Mr Baragwanath that he was mistaken about the sequence of events at the July meeting. It was put to him that, while people were given their ballot papers as they entered their meeting, they could cast their ballot immediately or wait until after the discussion if they wished. Mr Baragwanath said that his recollection of how the meeting occurred was unchanged.<sup>171</sup>

273 Mr Davis also attended the meeting. He said that there were about 300 people present. He said that, on his arrival, he raised with Mr Overland the use of the word "merger" to describe the transaction, because he believed that it did not correctly represent the motion. He also raised an objection about the way the proxy votes were being handled. His account of the meeting is somewhat different to Mr Baragwanath's. He said that people addressed the meeting before there was a call for members to vote, although he noted that most people had already cast their vote before that.<sup>172</sup> He said that there appeared to be a perception amongst many people in the room that he was a developer trying to take the land. He described it in the following way:

A. Yeah, that was definitely the perception with a lot of people in the room. And I'd seen - I believe some of the - it was quite strange because I didn't really buy into the

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<sup>169</sup> T107.19-24.

<sup>170</sup> T107.28-108.1.

<sup>171</sup> T146.2-10.

<sup>172</sup> T200.33-38.

accusations. I didn't realise how much people had actually bought into that, but it certainly seemed to me that the room felt that there was some nefarious purpose for what Michael and I were trying to achieve. And I remember I believe - saw the briefing papers around, you know, you're trying to save this from developers, I remember not feeling particularly offended by that because it's as if somebody was to accuse you of being an orange for example, you don't find that particularly offensive because it's just not true. So I thought not much of it, but when I got into the room and realised the level of hostility, I was quite taken aback that so many people had bought into this narrative that there was essentially some nefarious group coming to take over the site, and the only way to preserve it was to give it to Kalyra.<sup>173</sup>

274 Mr Overland gave the following account of the meeting:

A. It was a cold July night and a surprisingly large number of people turned out, several hundred to the Lutheran hall. Prior to the meeting commencing, Mr Davis appeared and talked to me and to Mr Chris Bright urging us to not hold the meeting on the basis that he had lodged a complaint in the Magistrates Court but we made the decision that there was no basis for us to not hold the meeting just because he'd made a complaint, and also we felt it was far too late given that hundreds of people had already arrived. Anyway, the meeting commenced and there was an extensive discussion about the issues being considered. I have to say that the bulk of the questions were directed towards either Mr Davis or Mr Baragwanath. Various people were able to speak including Mr Davis, and I think Mr Baragwanath, and Ms Tassie, and others. At the end of about an hour we asked that the questioning and statements end and that the members who hadn't voted already lodge their ballots. We had actually, I think -

Q. Just pause there for a moment. You mentioned the members that hadn't voted already.

A. Yes.

Q. Had members voted in advance.

A. Yes, some had. Apart from proxies some members had come in and been issued with ballot papers and then promptly voted before the very beginning of the meeting.<sup>174</sup>

275 The next day, 5 July 2023, Dr Lawlor-Smith caused the following message to be posted on Wellbeing's Facebook page:

Thank you to all the community members who voted on the future of McLaren Vale Hospital last night. The vote was overwhelmingly to transition the site over to James Brown Memorial Trust (Kalyra).

This gives us a guaranteed ten-year lease for our current site and secures the long-term future of the practice.

Graham Lovell and Laureen Lawlor-Smith who started the practice sixteen years ago have been working hard to secure a succession plan for the practice.

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<sup>173</sup> T201.15-33.

<sup>174</sup> T411.7-34.

We are excited to announce that from January 1 2024, Dr Linda Wu and Dr Alex Lovell will take over ownership of the practice. ...

...

Alex and Linda are Graham and Laureen's son and daughter in law.

Graham will continue to work at Wellbeing. He has no retirement plans for the foreseeable future.<sup>175</sup>

276 Dr Lawlor-Smith said in evidence that, in fact, the transition to Dr Wu and Dr Lovell had not yet occurred:

A. The ongoing legal actions, ongoing legal action has been incredibly distressing and stressful for us, and I would not allow my son and daughter-in-law to take that on until it's been resolved.<sup>176</sup>

277 Dr Lawlor-Smith also said that, since the 4 July 2023 special general meeting, three complaints have been made about her to AHPRA by members of the Save the McLaren Vale Hospital group.<sup>177</sup>

278 On 12 July 2023, Mr Overland wrote to Ms Blunt, setting out the conditions under which the Association was prepared to transfer its assets to the JBMT.<sup>178</sup> These included that the JBMT would consider the establishment of a "super clinic" or "health hub" on the site, and that it would undertake extensive community consultation about the future use of the site. The minutes of the Association's board meeting on 27 July 2023 record an agreement that the Association would fund 50% of the cost of the consultation process.<sup>179</sup>

279 One of the complaints made by Mr Davis is that members who joined the Association after the May meeting had their membership fee paid by a third party. Mr Baragwanath referred to this in his evidence, but when questioned about it, conceded that he had not analysed the membership application to determine who had paid for each one.<sup>180</sup>

280 In his cross-examination, Mr Baragwanath said that he was continuing to campaign against the assets being given away.<sup>181</sup> To that end, he had established an association called, "Save McLaren Vale Hospital Incorporated", of which he was the public officer. He also said that he was funding this action, and that he had worked at Mr Davis' office as a consultant on a *pro bono* basis, to assist with the action and to keep costs down. Boyd Sparrow was also retained as a consultant to assist.

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<sup>175</sup> A1, document 163.

<sup>176</sup> T641.33-36.

<sup>177</sup> T643.25-28, R24.

<sup>178</sup> A1, document 166.

<sup>179</sup> A1, document 177.

<sup>180</sup> T151.14-16.

<sup>181</sup> T153.29-31.



281 Mr Baragwanath was also asked questions about the dissemination of discovered documents in this action on various Facebook pages. Mr Baragwanath's evidence was that he had not disseminated documents which had been produced by way of discovery in this action. I find that this allegation was not supported by the evidence.

282 Mr Baragwanath was asked about a letter that he had written but never sent.<sup>182</sup> This letter was critical of the members of the Board and their motivations. It makes a claim for substantial damages and says that reports have been made to relevant regulatory authorities. Mr Baragwanath said that this letter reflected the frustration that he felt and was never sent. He denied that he intended to pursue individual Board members or Drs Lawlor-Smith and Lovell.

283 Mr Baragwanath said that he was not involved in the commencement of this action on 4 July 2023, the same day as the second special general meeting.

284 Mr Baragwanath was also asked about an email that he sent on 5 March 2024, to a number of people involved in the Mawson State Electorate College of the Liberal Party. In the email, he drew attention to the hospital. It was suggested to him in cross-examination that he sought to use the issue involving the Association to advance his political aims.<sup>183</sup> In response, Mr Baragwanath said:

- A. Actually, the intention of this was to draw more members to the political party than to advance its cause. So parties like this don't have enough members, and that has other consequences, nothing to do with court; but what I saw from this and what I raised here was that I did see that people that had this concern would equally be annoyed with the way our health system is being run, and would equally want to contribute in doing something about it. And so while I was saying here I could not say, 'Hey, you should join the Liberal Party' because that's inappropriate, I just felt that it was useful to tell other members that, you know, this is a live issue in our community and they should be wary of it.<sup>184</sup>

285 In response to questions about the intentions behind his actions and his motivation for involvement with the Association, the following exchange took place:

- Q. So, to pick up on that, essentially what you've been trying to do here, as with other communications, is pitch your communication in a way that is effective, as you say it.
- A. Effective. That doesn't lead people, is probably the intent. So, the intention is to say 'I think this, I think you need to do your work and make your own decision'. So, I don't - that's probably the best way to answer it.

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<sup>182</sup> R9.

<sup>183</sup> T183.12-20.

<sup>184</sup> T183.21-34.

Q. And in that sense, you're being strategic about how you pitch certain communications because you are, as we went through before, pursuing a plan, as you said to your dream team in your email, and you want that plan to succeed.

A. You're referring to an email that was probably a year before this was done, so there's no - unfortunately properly as prepared or as planned as you would like, just simply an attempt to ensure an asset retains community ownership. So my plan, as it would, would change based on what I felt was going to be effective. But not really to just go 'How do I -' well actually, I answered your previous questions, so I probably helped you one that one.

Q. And while your plan has changed in the sense that the Pelligra proposal's fallen away and different proposals have been promoted from time-to-time, the common thread of your plan has been that you and your associates take control of the association and its assets.

A. No.

Q. That's been the common thread throughout this.

A. No.

Q. And what you've been doing is changing your messaging and what proposals you've been putting up at any given time for your strategic purpose because you thought at any given time that would be the best way for your to get control of the association and its board.

A. No, I'm sorry.<sup>185</sup>

286 Mr Baragwanath was steadfast in his denial of any personal motivation or a desire to take control of the Association. He maintained throughout his evidence that he was motivated solely by the wish to ensure that community consultation occurred, that a valuable asset was not given away for no consideration without all alternatives being examined, and that the Board complied with the Association's constitution. I accept his evidence in this regard.

287 I note that Mr Baragwanath's motives were questioned further<sup>186</sup> as was the genuineness of his wish for community consultation. I accept that Mr Baragwanath has had no ulterior motive (including no political motive) in becoming involved with the Association or this legal action. I accept that he has been, at all times, motivated by a desire to do what is best for the community. I consider that he sought to make use of the contacts that he has, both in business and in politics, to achieve this goal.

288 When asked about what he sought for the Association, Mr Davis said that he still wanted the hospital to be reinstated. He said:

A. I would like to see that the hospital be reinstated. So, recently the Health Minister announced and recalled for a 25 - they were searching for expressions of interest for

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<sup>185</sup> T185.1-37

<sup>186</sup> See, for example, T274-276.

25 beds in a hotel, which insane to me. We have a facility in McLaren Vale that could take a significant amount of overflow from Flinders, and rather than invest in a hotel I would imagine that that would be the immediate first option. Secondly, I think that it should be explored that the hospital be reinstated as a hospital, there are other options regarding as well that the assets be retained in a public auxiliary fund or that it be retained for the betterment of health care for members in the region, among others.<sup>187</sup>

289 During cross-examination, Mr Davis was asked a number of questions about the prosecution of this action, including delays in amending court documents and requests for mediation. I do not consider that these matters are relevant to the question to be decided in this action, and I will not dwell on them.

290 At the annual general meeting held in October 2023, Mr Baragwanath, Mr Davis and Mr Sparrow, stood as candidates for the Board. None was successful. All of the existing Board members who sought re-election were successful.

291 During Mr Overland's cross-examination, he was asked a series of questions about the financial position of the hospital. I do not consider that the financial position of the hospital is an issue in dispute in this matter. It cannot be contended by Mr Davis (and I do not consider that it was) that the hospital was generating sufficient income to allow it to continue operating. As a result, I do not consider that the evidence relating to the financial position of the hospital is a relevant matter.

292 At the time of the trial, none of the Association's assets had been transferred to the JBMT and no agreement as to the transfer has been concluded. I note that, in his evidence, Mr Overland gave the following meaning of "merger":

A. ... A merger was a shorthand way of saying transferring assets and undertaking of the hospital to Kalyra, outright.<sup>188</sup>

293 He later said the following in response to the question about the merger of the two organisations:

A. Well, we were using the terminology 'merge' in the common sense of bringing two entities together to form one, but my understanding subsequently has been that in a strict legal sense that's not what was going on. But we used the shorthand term 'merge' because it was easier than saying 'transferring the assets and undertakings of the hospital to Kalyra'.<sup>189</sup>

294 Mr Overland was asked about the objects in the JBMT proposal which had been sent to the Association on 19 March 2023. Specifically, he was asked about Objective 5.2 and why it was not implemented. Objective 5.2 read:

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<sup>187</sup> T206.6-19.

<sup>188</sup> T418.32-34.

<sup>189</sup> T572.23-29.

If dissolution of [the Association] and transfer of all surplus assets including [Association] Property to Kalyra cannot be achieved, for example if the members of [the Association] do not approve that course of action, then some other range of legally binding agreements (for example a joint venture or leases or management agreements) that give effect to these other Objectives on commercially reasonable terms and conditions;

295 Mr Overland said:

A. No, events overran us, we never even got the opportunity to return to this matter because Dr Lawlor- Smith moved quite swiftly as you've earlier indicated during my evidence.<sup>190</sup>

296 Mr Overland agreed that members of the Association were not informed that the JBMT had itself raised the prospect of a commercial arrangement.<sup>191</sup>

**The legal principles to be applied in determining whether an association has engaged in conduct that is contrary to s 61 of the Act**

297 It must be stated, at the outset, that the purpose of this trial is not to review the decisions made by the Association in the lead up to the July meeting, nor is it to examine the merits of any decision made at any particular time. At the same time, it is no answer to this action, to find that the Board acted diligently and in good faith. This is made clear in the cases that I refer to in this section of my decision.

298 Section 61 of the Act relevantly provides:

**61—Oppressive or unreasonable acts**

(1) A member or former member of an incorporated association may apply to the Supreme Court or the Magistrates Court for an order under this section on the ground that the association has engaged, or proposes to engage, in conduct that is oppressive or unreasonable.

...

(15) For the purposes of this section—

- (a) an association has engaged, or proposes to engage, in conduct that is oppressive or unreasonable if—
  - (i) it has taken action, or proposes to take action, to expel a member from the association in circumstances in which the action was, or would be, oppressive or unreasonable; or
  - (ii) it has engaged, or proposes to engage, in conduct that was, or would be, oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or was, or would be, contrary to the interests of the members as a whole; or

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<sup>190</sup> T610.33-36

<sup>191</sup> T611.14

- (iii) the rules of the association contain, or are proposed to be altered so that they will contain, provisions that are oppressive or unreasonable;
- (b) a reference to engaging in conduct includes a reference to refusing or failing to take action.

299 This Court had cause to examine the meaning of s 61 in the case of *Millar & Ors v Houghton Table Tennis and Sports Club Inc*<sup>192</sup> (“Millar”). Besanko J said this:

In the leading case of *Peters’ American Delicacy Co Ltd v Heath* (1938) 61 CLR 457, Latham CJ (at 481) considered that a decision was not for the benefit of the company as a whole if it was a decision no reasonable man could have reached. Dixon J (as he then was) said (at 512) that the expression was a very general one, “negating purposes foreign to the company’s operations, affairs and organisations”.

Finally, in this brief overview of the relevant principles in the context of the section in the companies legislation, I mention the fact that the courts have consistently said that they are reluctant to interfere with bona fide decisions of management. The court does not sit on appeal from the management decisions of a company (Wayde at 467 – 468; *Howard Smith Ltd v Ampol* [1974] AC 821 at 832).

In *Popovic & Ors v Tanasijevic & Ors* (No 5) (2000) 34 ACSR 1, Olsson J, at first instance, made the following general remarks about the scope of the s 61 as it appeared in the Act in 1985.

“According to its normal meaning the word “oppression” connotes the exercise of authority or power in a burdensome or unjust manner. Section 61 of the Act does not exclusively define its statutory meaning, other than by the inclusive provisions of s 61(7). As appears from authorities such as *Re Enterprise Gold Mines NL* (1990-1991) 3 ACSR 531 at 538 et seq and *John J Starr (Real Estate) Pty Ltd v Robert R Andrew (A’Asia) Pty Ltd & Ors* (1991-1992) 6 ACSR 63 (“John Starr”) at 65 et seq, the concept is not susceptible of precise, all embracing definition. At best, decided cases are illustrative of conclusions in specific fact situations.

However, it may at least be said that the section focuses on the effect of particular transactions sought to be impugned or management procedures adopted by those who are in de facto or de jure control. What is in contemplation is a notion of unfairness, according to ordinary standards of reasonableness and fair dealing.

Conduct complained of must be unjustly detrimental to either individual members specifically or, alternatively, members as a whole. It is not necessary to prove lack of bona fides, but conduct beyond power or in breach of statutory, legal or financial duty may well amount to oppression. The very provisions of s 61(7) reveal the importance which the legislature attaches to the proper adherence to the provisions of the Constitution and Rules of an incorporated association. This is because a failure to observe such provisions has the effect of depriving members of their right, as members, to have the affairs of the entity conducted in accordance with its Constitution and Rules (Cf *Re H R Hammer Ltd* [1959] 1 WLR 62 at 84). In the instant case the defendants have, amongst other things, attempted to propound (and have registered) a purported Constitution and Rules which they must have

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<sup>192</sup> [2003] SASC 1.

appreciated was never validly passed and have not even sought to administer the SCWA in terms of it.”

In my opinion, it is appropriate to approach the application of s 61 of the Act to the facts of this case with a number of principles in mind. First, it is not necessary in order to bring conduct within the terms of the section to establish any actual irregularity or invasion of legal rights or a lack of probity or want of good faith. Secondly, in relation to the phrase “contrary to the interests of the members as a whole” it is appropriate to apply a similar test to that applied in the case of the common law requirement that a majority of members must act bona fide for the benefit of the company as a whole. Thirdly, while it is appropriate to approach the application of the section with the underlying theme of unfairness in mind, it is still necessary to consider each of the elements referred to in the section (ie., oppressive, unfairly prejudicial, unfairly discriminatory, or contrary to the interests of the members as a whole) in turn. Fourthly, to the extent that the underlying theme is one of the prevention of unfairness, there is an issue as to how the concept of unfairness is applied in the case of a small non-profitmaking sporting organisation.

A member has no commercial interest in the Club, and therefore any test of commercial unfairness is inappropriate. I suppose that in broad terms, a member has, subject to the provisions of the Constitution, an interest in sharing in the facilities and activities of the Club, and in not being unfairly excluded therefrom. Again, subject to the provisions of the Constitution, a member is entitled to participate in the management of the Club and other decision-making bodies, and not to be unfairly excluded therefrom. In addition, a member has an interest in the longer term aspects of the Club’s operations, and by this I mean that a member has an interest in ensuring that the Club carries on its operations in accordance with its Constitution, and in particular, the objects and powers stated therein.<sup>193</sup>

300 In the case of *Pettit v SA Harness Racing Club Inc & Ors*,<sup>194</sup> (“Pettit”) White J distilled a number of propositions from Besanko J’s decision in *Millar* and other authorities examined in *Millar*. He said:

In the course of his decision, Besanko J reviewed a number of authorities and principles relating to proceedings of the present kind. The parties in the present proceedings relied very much on that review. From the decision in *Millar*, the authorities reviewed by Besanko J, and from the Act, a number of propositions relevant to the determination of the present proceedings can be drawn:

1. The constitution of an association binds the association and all of its members. This means that the Committee was bound to apply the relevant provisions of the Club’s Constitution in its consideration of the membership applications.
2. The requirement that an exercise of an association’s powers be for the benefit of the members as a whole is to exclude their exercise for “ulterior special and particular advantages”, ie, it negatives “purposes foreign to the association’s operations, affairs and organizations”.
3. Other than in the limited circumstances of the kind outlined in the majority judgment in *Wayde*, the courts are not concerned in applications of the present kind with reviewing the underlying merits of the management committee’s decision. The

<sup>193</sup> Ibid, [132] – [136].

<sup>194</sup> [2006] SASC 306.

courts do not substitute their discretion for the discretion exercised in good faith by an association's committee.

There is no appeal on merits from management decisions to courts of law: nor will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at.

4. Conduct by a committee of an association will be contrary to the interests of the members as a whole if no committee, acting reasonably, could have engaged in that conduct.

5. Conduct may be contrary to the interests of the members as a whole even though a committee does not act in bad faith. In *Wayde*, Brennan J said:

[I]f the directors exercise a power – albeit in good faith and for a purpose within the power – so as to impose a disadvantage, disability or burden on a member that, according to ordinary standards of reasonableness and fair dealing is unfair, the court may intervene ...

6. In order to succeed, it is not necessary for an applicant to show that any decision of the association was invalid.

7. However, proof of invalidity or non-compliance with an association's rules may indicate that a decision is contrary to the interests of the members as a whole. This is because of the importance which the law attaches to adherence to the provisions of an association's constitution. So much is apparent in the following passage in the judgment of Olsson J in *Popovic & Ors v Tanasijevic & Ors (No 5)*:

Conduct complained of must be unjustly detrimental to either individual members specifically or, alternatively, members as a whole. It is not necessary to prove lack of *bona fides*, but conduct beyond power or in breach of statutory, legal or financial duty may well amount to oppression. The very provisions of s 61(7) reveal the importance which the legislature attaches to the proper adherence to the provisions of the constitution and rules of an incorporated association. This is because a failure to observe such provisions has the effect of depriving members of their right, as members, to have the affairs of the entity conducted in accordance with its constitution and rules.  
[Citations omitted]

8. The power to accept or reject membership applications must be exercised in good faith.

9. The power to accept or reject membership applications must be exercised having regard to the objects of the association.

10. A refusal of applications for membership without regard to the association's objects may well be a decision which no reasonable committee could reach.

11. It is not for this Court to determine as a matter of objective fact whether or not the membership applications are *bona fide* applications.

12. An association may have many reasons for rejecting membership applications. It may determine that the aims and aspirations of an applicant are not consistent with the objects of the association. Even if the aims and aspirations of an applicant are consistent with the objects of the association, the application may be refused

because, for example, the association does not have the ability to cater for an influx of members.<sup>195</sup>

(footnotes omitted)

301 More recently, Nicholson J relied on both *Millar* and *Pettit*, when considering the operation of s 61 in *Ridgway v Sporting Shooters' Association of Australia Hunting and Conservation Branch (SA) Inc*<sup>196</sup> (“Ridgway”). He said:

Underlying the approaches of Olsson J in *Popovich* and Besanko J in *Millar* is the notion of unfairness as being a central consideration in determining what conduct will constitute oppressive or unreasonable conduct for the purpose of s61. In the context of an expulsion, the question of whether it is unfair, in the circumstances, to deny a person membership arises. This is to be considered in the context of consideration of the extent to which, if at all, a person can have an entitlement to be a member of such an association in the first place. Where, as in this case, the membership is of a non-profit making club, a person’s interest in being a member will extend to participating in the club’s facilities and activities, including its management, and in ensuring that the club acts in accordance with the terms of its constitution.

In *Pettit v South Australian Harness Racing Club Inc & Ors*, White J listed the following propositions concerning the application of s61 with which, in general, I agree.

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The considerations identified in 3, 8, 9 and 12 are particularly pertinent in this case. Further, as his Honour’s remarks in *Pettit* indicate, in determining whether the conduct of an incorporated association is oppressive or unreasonable, it is important to reflect on whether the association has acted in accordance with the terms of its constitution. As a statement of the objects and rules by which it is bound, an association’s constitution serves as a guide to any assessment of its conduct. However, the court’s role is not to quarrel with the merits underlying any managerial decisions, provided they have been made in good faith and within constitutional constraints.<sup>197</sup>

(footnotes omitted)

302 *Millar*, *Pettit* and *Ridgway* all involved applications for membership and so, in that sense, are factually dissimilar to the contest between Mr Davis and the Association in this case; nonetheless, the principles enunciated in those cases are applicable, and demonstrate the nature and breadth of conduct which is regarded as oppressive in the context of s 61.

303 It is clear that, in reaching a determination in this matter, I must:

- Consider whether the conduct of the Board amounted to “unfairness, according to ordinary standards of reasonableness and fair dealing”; but

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<sup>195</sup> *Ibid*, [26].

<sup>196</sup> [2015] SASC 7.

<sup>197</sup> *Ibid*, [152] - [154].



- Not concern myself with the underlying merits of the decisions made by the Board, including the decision to close the hospital and the decision to give the assets of the Association to the JBMT for no consideration; and
- Be guided by the Association’s Constitution in assessing the conduct of the Board.

304 I note that one of Mr Davis’ complaints is that a number of the decisions impugned in this action were made by the Board when it had fewer than the number of members required by clause 8 of the Constitution. In the case of *Singh v Singh; Flora trading as Flora Constructions v Budget Demolition & Excavation Pty Ltd*,<sup>198</sup> (“Singh”) Barrett J had this to say:

Where a constitution states that a board “shall consist of” a certain number (or a certain minimum number) of members, a body of persons fewer in number than the required number do not constitute the board at all. This is made clear by cases such as *The Faure Electric Accumulator Co Ltd v Phillipart* (1888) 58 LT 525 and *Re Sly, Spink & Co* [1911] 2 Ch 430.<sup>199</sup>

305 In *Ngarluma Aboriginal Corporation RNTBC v Ramirez & Anor*,<sup>200</sup> (“Ngarluma”) Banks-Smith J dealt with a situation where the number of directors was fewer than the number stipulated in the association’s constitution, but the number of directors present at the relevant meeting was sufficient to constitute a quorum. He found that having a sufficient number of directors to constitute a quorum did not remedy the defect of fewer directors that required by the constitution. He said:

The number of directors at the time of the resolutions at the September and November meetings was therefore less than the number specified in the Constitution. In accordance with the cases reviewed above, I consider the board was not properly constituted and there was no proper authority to pass the purported resolutions.

...

The number of incumbent directors was less than the constitutional minimum of 12 and so there was not a properly constituted board at all. The fixing of a quorum presupposes and operates on an adequately composed board. So even if the quorum were met, the resolutions or decisions were not valid. Whilst there was the ability in limited circumstances for the directors to fill a vacancy or make up a quorum, that power alone was not sufficient from which to infer there was authority for continuing directors to act generally. Nor could such power otherwise be inferred.<sup>201</sup>

## Consideration

306 The actions of the Association can be, for convenience, divided into three separate time periods, the first from about December 2022 to 25 January 2023, when the Board reached the decision to close the hospital, the second from

<sup>198</sup> [2008] NSWSC 386.

<sup>199</sup> *Ibid*, [95].

<sup>200</sup> [2018] FCA 1900.

<sup>201</sup> *Ibid*, [123] – [147].

25 January 2023 to the May meeting, and the third from 6 May 2023 to the July meeting.

307 Before I examine the time periods that I have identified, one matter can be dealt with quickly. It appears that from about September 2022 until the Board meeting on 25 May 2023, the Board only comprised seven members. On the basis of the authorities that I have referred to, I must conclude that the decisions made by the Board during this period were invalid, including the decisions to close the hospital, to enter into an arrangement with the JBMT and to hold the May meeting. I note that the Association submitted, on this question that, despite only having seven members, the Board was quorate.<sup>202</sup> This submission is dealt with by the decision in *Ngarluma*. It also submitted that these decisions were implicitly ratified once the Board achieved eight members. I do not accept this submission. I consider that decisions as important to the affairs of the Association as those in question here require more than implicit ratification.

308 I further note that, in oral submissions, Mr White submitted that, in any event, this case is only dealing with decisions made after 25 May 2023, the date on which the Board determined to hold the July meeting on 4 July 2023. I reject this submission. The events subsequent to 25 May 2023 are entirely dependent on the events that came before and so the validity of those earlier events are directly relevant to the findings made with respect to the conduct of the Association from 25 May 2023 to 4 July 2023.

309 Another matter that can be disposed of quickly is Mr Davis' contention that the JBMT is not an appropriate body to receive the Association's assets, because its objects are not similar. This submission must be rejected. One of the JBMT's purposes is to provide health and welfare services:

for the benefit or care of members of the public –

(d) who are aged or infirm; or

(e) who lack sufficient means; or

(f) who are otherwise in need of charitable assistance.<sup>203</sup>

310 While this may be somewhat narrower than the objects of the Association (although this itself is no doubt open to argument) these objects fall squarely within the Association's objects.

311 A third matter can also be dealt with as a preliminary matter. Mr Davis has criticised Mr Overland for drafting (or assisting with the drafting of) the JBMT's proposal. The Association has criticised Mr Baragwanath for drafting the Pelligra letter. There is nothing in either of these criticisms. One can assume that neither

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<sup>202</sup> Written submissions, [190].

<sup>203</sup> A1, document 1.

Mr Pelligra nor Ms Blunt signed a document that they were not comfortable to sign.

312 I will, in any event, consider all of the decisions and actions of the Board from 25 January 2023 to 4 July 2023, to determine whether the Association has engaged in conduct that is oppressive or unreasonable.

***The period from mid December 2022 to 25 January 2023***

313 Mr Dal Cin submitted that the actions and decisions of the Association during this period were contrary to the interests of the members as a whole. He said that they were intended to defeat the objects of the Association.

314 Mr Dal Cin submitted that the Court should find that no board, acting reasonably, could have made the decision on 25 January 2023 to close the hospital. The decision to close was contrary to the interests of members as a whole because it defeated the pursuit of the Association's objects, set out in clause 4(b), (c), and (d) of the Constitution. Further, he said that the members were deprived of the opportunity to consider alternative uses for the Association's assets. He said that, while it was clear that there were ways that the Association could pursue its objects other than running a hospital, it was for the members to make those decisions, not the Board.

315 Mr Davis does not seek a remedy with respect to this decision; he is aware that it will not be possible to require the Association to resume the operation of the hospital. He says, however, that it remains relevant as part of the background to the conduct leading to resolution passed at the July meeting, in relation to which he does seek a remedy.

316 Mr Dal Cin submitted that the decision made on 25 January 2023 should be impugned for two reasons: first, it was based on the assumption that Dr Lovell intended to retire in June 2023 as a result of which the hospital would not be able to fulfil its contractual obligations to SALHN; and second, it was motivated by political considerations, in that it was undesirable to close the hospital too close to the next state election.

317 In support of these contentions, Mr Dal Cin relied on the statements made by Mr Overland at the 2022 Annual General Meeting about its financial position, and the prediction that the hospital had a further "life" of three to five years. He also pointed to the other communications later in 2022 which made similar statements and prognostications. Mr Dal Cin also relied on the statements made by Mr Overland during this period, to the effect that the Association had time to consider its future operations when it was no longer operating a hospital. He says that it is clear from these communications that Mr Overland foresaw a future where the Association continued to fulfil its objects other than through operating as a hospital.

318 Mr Dal Cin submitted that, while Mr Overland continued to report on the Association's financial position in a consistent manner, the retirement of Dr Lovell and the Board's own workload began to take more prominence in the latter part of 2022 and early 2023. He goes so far as to submit that the Court should infer that discussions with SALHN must have turned to the closure of the hospital, because of the critical effect that Dr Lovell's retirement would have on its operation.

319 Further, Mr Dal Cin submitted that the Court should find that Mr Overland's change in tone was in part motivated by the fact that closure of the hospital within the predicted three year time period would place that event at the same time as the next state election, a fact that was obviously raised in his 7 December 2022 meeting with SALHN.

320 Mr Dal Cin said that the Court should find that the decision to close the hospital was caused by the combined factors of Dr Lovell's supposed retirement, the limited funding, to 30 June 2023, offered by SALHN in January 2023 and the need to avoid closure too close to the next state election.

321 It was contended by Mr Dal Cin that I should find that, at the Board meeting on 25 January 2023, the discussion that led to the consensus to close the hospital was a short one and came at the end of a long meeting. He said that I should reject any evidence of Mr Overland to the contrary. He said that I should find that the Board assumed, from the limited funding grant, that SALHN believed that the government wanted the hospital to close well before the next election. This is supported, he contended, by the statement in the Board minutes that Mr Overland should write to the Minister in terms "suitable for inclusion in Hansard."

322 Mr Dal Cin said that it was clear from Dr Lovell's evidence that he did not intend to retire in June 2023, and in fact, had not done so. The Board acted on an assumption that it did not check. Further, he said that the decision to close the hospital was made because the Board had run out of ideas, and yet did not consider seeking to recruit new members who might have ideas to assist.

323 Mr Dal Cin submitted that no committee, acting reasonably, could have made the decision to close the hospital, which was central to the pursuit of the Association's objects:

- Without having a properly constituted Board;
- Quickly and at the end of a long meeting;
- Without holding a special general meeting of members to consider the matter;
- Without asking Dr Lovell about his intention to retire; and
- While prioritising political considerations over the interests of members.

324 Mr White submitted that the decision of the Board to close the hospital was a reasonable exercise of its powers. He said that on no basis could it be said that no reasonable board would have made the decision to close the hospital. He submitted that the evidence, both documentary and oral, demonstrated that the hospital had been in a precarious financial position for many years and was heavily dependent on government funding. In addition, it demonstrated that the hospital had other, almost insurmountable, challenges, including recruitment and retention of doctors, the ability to pay competitive salaries to nursing staff, and aging infrastructure.

325 I do not consider that the conduct of the Board leading to the decision, or the decision itself, to close the hospital were oppressive or unreasonable. I am mindful that I am not called upon to decide whether the decision to close was the correct one; indeed, on the evidence before me, I could not make such a decision. I consider that the evidence sufficiently demonstrates the challenges faced by the hospital to remain viable, and I accept the evidence of Dr Lawlor-Smith, Dr Lovell and Mr Overland that the hospital had been in a precarious position for many years. It is perhaps unfortunate that Mr Overland (or someone else) did not ask Dr Lovell what his retirement plans were; nonetheless, I do not consider that that failure rendered the decision to close the hospital as one that no reasonable board could have made.

326 I consider that the ongoing operation of the hospital was a management consideration properly dealt with by the Board. The closure of the hospital as a result of its inability to remain viable, is not the type of decision which should properly go to the members; it is a business decision based on financial and other circumstances to which the members would not ordinarily be privy. It cannot be suggested that the members could have compelled the Board to continue to run the hospital when it was no longer financially able to do so.

327 I note that Mr Dal Cin invited me, in effect, to delve into the finances of the Association, in order to demonstrate that its financial position was better than that represented by Mr Overland. I decline to do so. In a hearing such as this it is neither possible nor appropriate to conduct such a broad and wide reaching investigation, which must necessarily require expert evidence and the examination of issues far broader than were adduced in this trial. I accept the evidence of Mr Overland as to the financial state of the Association and the viability of the hospital.

328 I also reject Mr Dal Cin's submission that the decision to close the hospital served to defeat the pursuit of the Association's objects. The objects of the Association are very broad and are not limited to operating a hospital. The Association is required "to provide the community with a viable and sustainable health care service"<sup>204</sup>; this can be done in ways other than through a hospital.

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<sup>204</sup> A1, document 3, clause 4.

329 Were it not for the fact that the Board was not properly constituted, I would find that the decision made on 25 January 2023 to close the hospital and the conduct leading up to that decision cannot be impugned.

*The period from 25 January 2023 to the May meeting*

330 Mr Dal Cin submitted that the affairs of the Association were conducted in a manner contrary to the interests of the members as a whole during this period on the basis that:

- The Board was not properly constituted;
- The evidence indicates that the Board and Mr Overland pursued the JBMT proposal to the exclusion of other options;
- Mr Overland engaged with Ms Blunt to have a firm proposal ready for the Board meeting on 23 February 2023; and
- The evidence makes it clear that there was no intention to consult members about possible options, but only to engage with “the community” once the JBMT proposal was finalised.

331 In particular, Mr Dal Cin noted that the minutes of the March Board meeting did not contain a resolution to pursue the JBMT proposal and the winding up of the Association; rather, it appears that the Board operated on the basis of an assumption that these decisions had been made. He said that the Court should find that there was no discussion at that meeting about alternatives to the JBMT proposal, including consideration of the Asia Australis report which recommended investigation of the use of the site as a “health hub”. Further, he said that it must be inferred that there was no consideration by the Board of a commercial arrangement with the JBMT which would allow the Association to continue to pursue its objects. Mr Dal Cin also asked that I find that the JBMT proposal was, in fact, prohibited by clause 15 of the Constitution.

332 Mr Dal Cin submitted that the conduct of the Board was contrary to the interests of the members as a whole. He said that the communications of the Board, made on 27 March 2023 to members, the public and staff were misleading in a number of material respects. In particular, he submitted:

- The characterisation of the JBMT proposal as a merger was clearly misleading;
- The various statements to the effect that the Board had considered all the ways of keeping the hospital open were misleading because it was, in fact, motivated by Dr Lovell’s supposed retirement, when it had never asked Dr Lovell about his retirement plans and by political considerations about the timing of the closure;

- Statements in the material to the effect that the position of the hospital's nursing staff was uncertain were misleading, because by mid-February 2023, SALHN had told the Board that it would offer employment to all nursing staff; and
- The material tended to suggest that the decision to close the hospital was not already a *fait accompli*.

333 Mr Dal Cin submitted that there was no evidence that Mr Baragwanath's email was ever considered by the Board, or by members of the Board, other than Mr Overland. He said that I should reject Mr Overland's evidence that it was discussed informally by members of the Board. Mr Baragwanath offered to do that which had been recommended by Asia Australis, and yet he was dismissed as the "equivalent of cold calling". Mr Dal Cin submitted that I should find that he was dismissed because his views did not correspond to those of the Board.

334 The applicant contended that the notice of the May meeting was misleading because it mischaracterised the JBMT proposal as a merger. Further, he contended that I should find that the statements that the hospital was not financially viable were also misleading.

335 Mr Dal Cin said that the information material produced by the Board represented that it had considered the possibility of redeveloping the hospital, developing the site as a health hub or selling it, when this clearly was not the case. In relation to a sale of the site, the Board sought to create the impression that the tenants on the site would be put at risk, despite the registered leases held by Wellbeing and SAAS. It further suggested that the net proceeds of any sale would be a problem.

336 Once the Board received the Pelligra letter, Mr Dal Cin submitted that it made a further misleading statement: that it had considered and rejected the proposal in that correspondence. There is, in fact, no evidence that the Board considered the Pelligra letter.

337 Mr White submitted that it was reasonable for the Board to consider that the Association did not have the financial or management capacity to undertake a redevelopment of the site to allow it to use the site for some other purpose. Mr Overland was clear in his evidence to this effect and it was not seriously challenged. Further, Mr White said that, while there was limited formal documentation of the consideration given by the Board to alternative proposals for the use of the Association's assets, the Board was well aware of the various options open to it. It was also reasonable to prefer an option that did not involve a for-profit organisation and one that guaranteed the protection of the existing tenants and the heritage elements of the site.

338 Mr White submitted that the decision by Mr Overland and the Board to develop and recommend a single proposal to members was a legitimate one that

was clearly reached in good faith. The criticism of the lack of documentation of the Board's consideration of the options should be viewed against the background of the extensive experience of the various board members; the failure to document the ins and outs of their deliberations does not lead to the inference that those deliberations did not occur. Mr White further submitted that regard must be had to the fact that Board members were unpaid volunteers.

339 Mr White contended that it was not unreasonable for Mr Overland and the Board to ignore Mr Baragwanath's approach during this period. He was not a member of the Association and had no association with it or with the hospital system generally. He was completely unknown to Mr Overland and there was no reason to interrupt the process which had been put in place against a background of significant experience of the Board members and their deep familiarity with the Association and the operation of the hospital.

340 I do not consider that the affairs of the Association were conducted in an oppressive or unreasonable manner in the period between 25 January 2023 and 5 May 2023. I do not consider that it was unreasonable for the Board and Mr Overland to reject Mr Baragwanath's approach; the Board had been working diligently to keep the hospital operating for many years and could be expected to be far more *au fait* with its operation and the requirements to run a hospital, than a person who had never shown any interest in the Association in the past. The decision, in effect, to ignore Mr Baragwanath's approach was not one that no reasonable board could have made. On the contrary, I consider that it was not unreasonable.

341 I also do not consider that the various communications issued by the Board were misleading as alleged by the applicant. The juxtaposition of the two resolutions, to give the Association's assets to the JBMT (subject to the negotiation process concluding successfully) and to wind up the Association can have left no one in any doubt as to the true nature of the transaction: once the Association's assets had been divested, the Association would cease to exist. In this context, I do not consider that the use of the term, "merger" was in anyway misleading.

342 I accept the evidence of Mr Overland that the Board had in fact considered the various ways to deal with the Association's assets, although these considerations were not documented. The Board had had the benefit of the Asia Australis report and had discussed its finding and recommendations. It was open for the Board to conclude that the Association had neither the money nor the management ability to investigate or develop the "health hub" option, bearing in mind that the hospital was run by unpaid volunteers.

343 I also reject the criticism of the Board's presenting the closure of the hospital as a *fait accompli*. It was a *fait accompli*. As I have found, the decision to close the hospital was a management decision to be made by the Board.



344 Like the conduct of the Board to 25 January 2023, were it not for the fact that  
the Board was not properly constituted, I would find that there is no basis for  
impugning its actions and decisions in the period between 25 January 2023 and  
5 May 2023.

*The period from 5 May 2023 to the July meeting*

345 Mr Dal Cin submitted that, once the resolutions put to the May meeting had  
been defeated, the Board was required to operate in a manner that pursued the  
objects of the Association. Instead, it colluded with Dr Lawlor-Smith to undermine  
the outcome of the May meeting.

346 Mr Dal Cin submitted that I should treat the evidence of Dr Lawlor-Smith  
with caution. He said that I should reject her evidence that she had a real concern  
about the risk posed to the Wellbeing by any option other than the JBMT proposal.  
Further, I should find that if she had such a concern, she would have obtained legal  
advice. The fact that she did not do so suggests that she did not have a genuine  
fear.

347 Mr Dal Cin made numerous other submissions about Dr Lawlor-Smith, the  
financial interest of Wellbeing in any decision made about the hospital site and  
various other aspects of her conduct. I will not recite them here for reasons that I  
will explain in due course.

348 Mr Dal Cin submitted that I should find that the Board enthusiastically  
embraced Dr Lawlor-Smith's plan. He submitted that I should draw an adverse  
inference against the Association for its failure to make discovery of the minutes  
of the informal meeting on 10 May 2023 until their existence became clear in the  
course of Mr Overland's evidence. He said that I should infer that the Association  
deliberately tried to suppress this evidence. He further said that I should find that  
Mr Overland sought to downplay the meeting in his evidence in chief. He said that  
I should draw an adverse inference against the Association for its failure to call  
any Board member to give evidence other than Mr Overland.

349 Mr Dal Cin asked me to make a number of findings in relation to the meeting  
on 10 May 2023. These were:

- That the Board considered that it was permissible to put the failed resolutions to a second special general meeting;
- That the resolutions would be separated and dealt with at separate meetings because the Board understood that members were less likely to support the JBMT proposal if it was linked with a resolution to wind up the Association;
- That there was discussion about Dr Lawlor-Smith's plan and an agreement to support it;

- A decision was made to hold the second special general meeting on 4 July 2023 with notice of the meeting to be sent out on 2 June 2023;
- The date for the issuing of the notice was chosen to give Dr Lawlor-Smith time to recruit as many new members as possible, while limiting the amount of time that Mr Baragwanath would have to recruit members.

350 It was contended by Mr Dal Cin that, once the resolutions had been defeated at the May meeting, it was the duty of the Board to pursue the objects of the Association, including by seeking to negotiate a commercial arrangement with the JBMT, in accordance with the document prepared by Ms Blunt.

351 Mr Dal Cin described as a “charade” the Board’s acceptance of Dr Lawlor-Smith’s request for a second special general meeting and the fixing of the date for that meeting at its meeting on 25 May 2023, when these actions had already been decided on at the 10 May 2023 meeting and Mr Overland had, himself, drafted the letter with the resolution for Dr Lawlor-Smith to send to him.

352 Mr Dal Cin also submitted that I should find that the update to members, sent on 26 May 2023, was misleading. First, it sought to suggest that there were only two options: the JBMT proposal, and those opposed to it, who sought to involve a private developer. Second, it suggested that only the JBMT proposal would protect Wellbeing, the SAAS ambulance station and the heritage aspects of the site. Third, it stated that the Board was considering the next steps for the site when in fact it had already determined its next steps at the meeting on 10 May 2023.

353 The applicant also impugns the appointment of Mr Botha to the Board. He says that Mr Botha’s only qualification for appointment was that he would support the current Board, thus overlooking Mr Baragwanath, who had offered to serve on the Board but clearly took a different view to the other Board members.

354 Mr White submitted that the meeting on 10 May 2023 amounted to no more than an informal discussion between some of the Board members and Mr Bignell about what they should do next. This does not amount to oppressive or unreasonable conduct, particularly given the very narrow margin by which the JBMT proposal was defeated at the May meeting.

355 Mr White submitted that any suggestion that the date of the July meeting was chosen to assist Dr Lawlor-Smith’s recruitment efforts should be rejected. He submitted that I should accept Mr Overland’s evidence that the date of the July meeting was dictated by the requirements of the Constitution, and that both sides had time to campaign.

356 Mr White contended that I should reject the applicant’s suggestion that Mr Baragwanath was no longer pushing for a Board spill in his email of 11 May 2023, and that Mr Overland was manipulating him by assisting him to call a further special general meeting to require the Board to stand down. The email,

when read carefully, sets out six requirements, including the appointment of an eighth board member, and even so, does not unconditionally withdraw the request for a Board spill. Mr White contended that I should find that it was appropriate for the Board to facilitate the spill motion.

357 Mr White submitted that there can be no real complaint about putting the JBMT proposal to the members a second time. Any member was entitled to call for a special general meeting, and Dr Lawlor-Smith did just that. It is irrelevant that the resolution that she proposed was the one that the Board supported.

358 Mr White also submitted that Mr Overland's use of the term "merger" was not misleading in a real sense, even though it did not reflect the legal nature of the transaction. He submitted that it was clear from the outset that the Association's assets would be transferred to the JBMT and that the Association's members would not become members of the JBMT as it is not a member-based organisation.

359 I do not consider that the actions of Dr Lawlor-Smith or her motivations are relevant to the issues in dispute in this matter. I make no criticism of her or her motivations, and I have already found that she genuinely held the fears that she expressed for the ability for Wellbeing to remain on the hospital site. As a member of the Association, I consider that Dr Lawlor-Smith was entitled to take whatever action she considered appropriate to gain the support for the proposal that she favoured. This includes seeking out members, undertaking a social media campaign and sending correspondence to patients and staff. Even if not everything in that correspondence was completely accurate, that does not expose her to sanctions under the Act. As a result, I do not address the submissions made by Mr Dal Cin about her and her conduct as I do not consider that they are relevant. What is relevant are the actions of the Board in response to the things that she was doing.

360 I consider that the conduct of the Board was oppressive in a number of respects in the period from 6 May 2023 to 4 July 2023.

361 First, I consider that it behaved unreasonably in working with Dr Lawlor-Smith to resurrect the JBMT proposal, without advising Mr Baragwanath that it was doing so. Even though it was not a formal board meeting, the reality is that at the informal meeting on 10 May 2023, at which all Board members except for one were present, the Board determined to hold a second special general meeting on 4 July 2023 to reconsider the JBMT proposal. It also determined that, based on the terms of the Constitution, a member must have joined the Association by 7 June 2023 in order to be eligible to vote. It ensured that Dr Lawlor-Smith was advised of these dates on 10 May 2023. The meeting on 10 May 2023 was treated by the Board members as a forum to determine and set in train its next steps with regard to the JBMT proposal. I infer that the Association did not call any other Board members to give evidence on this question, because their evidence would not have supported the Association's position.

362 The Board received Dr Lawlor-Smith's request for a special general meeting on 26 May 2023 and gave members notice of that meeting on 2 June 2023, only five days before the deadline for members to join so as to be eligible to vote. This deprived all members other than Dr Lawlor-Smith of the ability to recruit new members to support their position.

363 The evidence of Mr Baragwanath and Mr Davis was clear: they had no idea that a second meeting was going to be called to reconsider the JBMT proposal until they received notice of the meeting, or even that the Association intended to resurrect the JBMT proposal. It is not to the point to say that they had been recruiting members to the Association in any event. They may well have been doing so, but without any knowledge that there was a deadline for that recruitment so that time was of the essence. Dr Lawlor-Smith, however, was aware from 10 May 2023 that she had to have members signed up by 7 June 2023 in order to be eligible to vote at the special general meeting. This gave her (and the Board) a significant advantage over Mr Baragwanath and other members who might have wished to rally support for their preferred position. I consider that this conduct of the Board was oppressive. Given that there were two clear camps recruiting members, the Board should have ensured that each camp, and indeed all members, were informed about the deadline that they faced with regard to recruitment.

364 I reject the submission that the date for the meeting was dictated by the terms of the Constitution. As I have already observed, 4 July 2023 was more than sixty days after Mr Baragwanath requested a special general meeting. And the terms of the Constitution did not prevent the Board from giving all members the same amount of notice of the meeting date as it gave Dr Lawlor-Smith.

365 Second, I consider that a number of the Board's communications were misleading, to the extent that they were unreasonable. By the time that the Board issued its update to members on 26 May 2023, it was well aware that Mr Baragwanath and his faction were no longer promoting the Pelligra proposal.

366 As early as 4 May 2023, Mr Baragwanath made it clear that he had an open mind about what to do with the site. In his Facebook post on that day, he said the following about giving his proxy to Ms Tassie to exercise at the May meeting:

If she's convinced on the day to gift the hospital site to Kaylra (sic) I'll support it, if she notes no I'll do my best to help.<sup>205</sup>

367 Mr Baragwanath's email of 8 May 2023 referred to investigating and documenting alternatives for the site and did not refer to the Pelligra proposal. His email of 11 May 2023 proposed a twelve-month period of community consultation to devise a range of options for use of the site. He also made a number of public Facebook posts which should have made it completely clear to the Board that he was no longer pursuing the Pelligra proposal.<sup>206</sup> And, on 30 June 2023, a story

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<sup>205</sup> A1, document 105.

<sup>206</sup> See A1, document 157 and R3.

published on the ABC News website quoted Ms Tassie, one of Mr Baragwanath's key supporters, as saying:

We need to look at all the options, including Kalyra, but do what's best for the community.<sup>207</sup>

368 Despite these direct statements to the Board, and the other public statements, the Board still made the following representations:

- On 26 May 2023, that an alternative proposal was being promoted which would place the site in the hands of a private developer to be used for unspecified purposes; and
- On 2 June 2023, in the question and answer document sent to all members, that a group was proposing a joint venture with a private developer whose aim was to make a profit from the site.

369 In addition, the Board suggested in each of these communications that the tenants currently using the site, Wellbeing and the SAAS ambulance station would be at risk if any organisation other than the JBMT took over the site, as would the heritage aspects of the site. This completely ignores the registered leases in favour of Wellbeing and SAAS ambulance station and suggests that it would be impossible to reach an agreement with any other organisation about the heritage features. These statements can only be regarded as an attempt to instil fear and uncertainty into members' minds about the prospect of anyone other than the JBMT taking over the site.

370 I consider that these misrepresentations were unreasonable, and that no reasonable board would have engaged in that conduct. I consider that they extend beyond giving an unbalanced account of the arguments on each side of the debate or recommending one option over the other.

371 In the case of *Margaretic v Western Australian Trotting Association [No 3]*,<sup>208</sup> Kenneth Martin J considered the question of the need for a board to put a balanced case in favour of the various issues to be decided by members. He said:

Further, the context around the Committee's decision to hold the 2022 Referendum is vital to weigh, overall. Manifestly, the Committee, in effect, as the defendant's governing board of management, expressed a collective view to voting members that the proposal which they place before the voting members via the 2022 Referendum, should be approved. That is hardly a surprise. Were that not the case, there would likely not be a referendum put. An element of merits imbalance necessarily presents then as from the time of the Committee's resolution to hold such a referendum to obtain the authority needed for what is proposed vis-à-vis a sale of part of its land at Gloucester Park.<sup>209</sup>

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<sup>207</sup> R27, document 3.

<sup>208</sup> [2023] WASC 229.

<sup>209</sup> Ibid, [233].

372 He went on to say:

For those alleged omissions from the 'No' case (which captures most of the plaintiff's grievances) - my view is that there needs to be shown what is a material omission. Such omission would need to be shown as of such a magnitude and force, bearing upon a hypothetical voting member of the defendant, that a court ought, on an objective basis, be left comfortably satisfied (on the balance of probabilities) that the omission of that factual information to the member (from out of the voting package materials provided to the voting member) can be assessed by the court as being more likely than not to have misled the member. In other words, the non-disclosure of the omitted fact must be assessed as more likely to have led a member, objectively assessed, to a negative position on the 2022 Referendum question.

That is a high standard of required materiality, which I would assess is applicable both to any alleged falsehoods and to omissions. That high standard would be in alignment with a policy respecting board management taken commercial decisions, as matters of autonomous business judgment - canvassed earlier by regard to multiple case authorities decided in the statutory oppression context.

Put another way, a falsely stated fact, or an omitted fact, would need to be shown as of such a magnitude that a court could safely conclude that a board of management (ie, here, the defendant's Committee) was not acting in good faith, by allowing that state of affairs to be put (or not put) to the eligible voting members, when their voting package materials were sent out to members.<sup>210</sup>

373 Mr White submitted that the effect of this decision is that there is a high bar before a court will find oppression and grant a remedy with respect to it. He said that there must be manifest misconduct on the part of a board before finding of oppression can be made. This submission cannot be accepted. The authorities that I have previously referred to make it clear that a Board may act in an oppressive manner, despite acting in good faith. In fact, Besanko J went as far as to say:

...it is not necessary in order to bring conduct within the terms of the section to establish any actual irregularity or invasion of legal rights or a lack of probity or want of good faith.<sup>211</sup>

374 This was affirmed by White J in *Pettit*.<sup>212</sup>

375 I consider that the misrepresentations made by the Board are material misrepresentations. They extended far beyond recommending one course over another, or spruiking the benefits of the JBMT proposal without addressing the proposal for consultation. They completely misrepresented what would be the result of a no vote and so deprived members of the ability to make an informed choice at the July meeting.

376 I further consider that the Board behaved unreasonably in characterising the JBMT proposal as a merger. Unlike at the May meeting, it was not coupled with a resolution to wind up the Association. It could be inferred that the winding up of

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<sup>210</sup> Ibid, [258] – [260].

<sup>211</sup> [2003] SASC 1, [135].

<sup>212</sup> [2006] SASC 306, [26].

the Association was no longer planned, and that it would continue to exist in one form or another. The failure to make it clear that the winding up of the Association would still occur coupled with the use of a word that suggested an ongoing existence was misleading and unreasonable.

377 For completeness, I do not consider that the appointment of Mr Botha to the Board, rather than Mr Baragwanath, was oppressive. Clause 8.4 allows the Board to appoint a new member to fill a casual vacancy. The Board is not restricted as to whom it will appoint in this regard.

378 For these reasons, I find that the conduct of the Board in the period between 6 May 2023 and the July meeting was oppressive and unreasonable.

379 The applicant contends that the resolution passed on 4 July 2023 was, in itself, contrary to the interests of members as a whole. This is on two grounds. The first is that it is possible, if not likely, that many of the members who joined the Association at the instigation of Dr Lawlor-Smith were not valid members. This is because, in supporting the JBMT proposal, they did not support the objects of the Association, as required by clause 6.1 of the Association. In fact, Mr Dal Cin submits that they joined with the intention of voting in favour of a resolution that would defeat the objects of the Association.

380 I do not accept this submission. It is not clear to me that voting for the JBMT proposal is contrary to the objects of the Association. It is arguable that there are circumstances where the only way of achieving the objects of the Association would be by transferring its assets to a larger, better resourced charity.

381 The other ground relied on by the applicant is that the proxy form did not set out the resolution in full but merely asked members to vote in favour of or against a merger with the JBMT. I have already set out my conclusions about the use of the word “merger” in relation to the second special general meeting. It follows that I find that the proxy form was misleading to the extent that it was oppressive.

382 The applicant asks me to find that the Association’s refusal to engage in mediation or utilise the dispute resolution provisions in the Constitution also amounts to conduct which is contrary to the interests of the members. I do not accept this submission. Throughout the trial, each side made a range of accusations against the other about the failure to engage in mediation, the delay in prosecuting the action and other procedural matters. It is not possible now to determine where the fault, if any, lies for a refusal to engage in some form of alternative dispute resolution.

## **Conclusion**

383 I find as follows:

1. The conduct of and decisions made by the Board of the Association, between the period December 2022 and 25 May 2023 were invalid because the Board was not properly constituted.
2. Otherwise, I find that the Association did not engage in conduct that was oppressive or unreasonable during this period.
3. Between 10 May 2023 and 4 July 2023, the Association engaged in conduct that was oppressive and unreasonable.

384 This leads me to the question of remedies.

385 Mr Davis submitted that I should, in effect, restrain the Association from entering into any transaction that would have the effect of transferring its assets to the JBMT. I should also require the Association to appoint a committee, comprised of himself, Mr Baragwanath and two nominees of the Board to investigate the alternative uses for the assets of the Association and to report to members.

386 Mr White submitted that I have a discretion as to the remedy to be granted and that I must consider what any remedy would achieve. He further submitted that, by the July meeting, the membership of the Association was much more representative of the community than it had been previously. This greatly expanded membership overwhelmingly supported the resolution to transfer the Association's assets to the JBMT. This should be taken into consideration when fashioning any remedy. While I accept that I have a broad discretion when it comes to remedy, I reject the submission that I should take into consideration the support that the expanded membership of the Association showed for the JBMT proposal. As I have explained, I consider that this goes to the very heart of the Association's oppressive conduct.

387 In the time since the July meeting, the JBMT and the Association have undertaken an extensive community consultation process. This was described by Ms Blunt in her evidence.<sup>213</sup> She also said that no agreement had yet been entered into with the Association for the transfer of its assets and that she did not consider that it was possible to proceed with this while this legal action was continuing. It may well be that further consultation, as envisaged by Mr Davis, is no longer necessary, or may be carried out in a different manner to that originally planned, given the community consultation that has occurred in the last year.

388 I consider that time should be allowed for the parties to consider the remedies available in light of this decision. I also urge them to consider the question of mediation, having regard to the community consultation that has occurred to date and what that consultation has revealed.

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<sup>213</sup> T732.22-733.9.