



*general
(put at about middle of
Sept 2002)*

“PRIVATE & CONFIDENTIAL”

TO: BGS BOARD OF TRUSTEES
FROM: HOWARD STACK
RE: LYNCH UP DATE

1 Underwriter's Indemnity

- 1.1 The position on this issue, which is central to our ability to compromise with the boys out of court, has oscillated alarmingly since our last board meeting.
- 1.2 You will recall that I was then hopeful that the underwriters' new offer to pay 80% of all settlements would be improved upon. We were working up our arguments, and briefing a "name" Sydney Q.C. to add to the pressure, when the boys' lawyers produced a new affidavit from the father of an old boy (not a plaintiff) who says he informed Max Howell (in mid 1981) of a complaint by his son that Lynch had interfered with him sexually. This second such allegation is particularly concerning because:
- 1.2.1 The witness has no vested interest.
- 1.2.2 He was then a country doctor whose victim son was a homesick first year boarder who complained by phone to his family.
- 1.2.3 Father and mother drove from Bundaberg to Brisbane specifically to inform Max Howell so he could take whatever action was appropriate. There was no follow-up necessary because his son had no further Lynch contact and was unaffected.
- 1.2.4 The son was contacted by Shine Roche McGowan to join the proceedings but declined. This contact revealed the parental complaint it seems.
- 1.2.5 The witness is very firm, will be difficult to shake at all, and will be supported in any court context by the mother, and two sons who were told of the father's actions at the time.
- 1.2.6 It is alleged Max appeared unconcerned, enquired whether the police had been told, and did not report the outcome of any enquiry he made.
- 1.2.7 There are now two quite similar allegations, quite close in time, and a much higher probability that Max denials will now be believed.
- 1.3 Underwriter's response (we were obliged by law to inform them) was to withdraw their offer of 80% indemnity. We arranged a meeting in Sydney (with Max in attendance at their request to answer a fairly soft cross-examination) to re-state our arguments in their best (but diminished) light. It was a difficult meeting, but in the end underwriters restored their offer but reduced to 70% indemnity in lieu of 80%. We re-submitted our argument in writing by Corrs' letter dated September (**attached** marked "A").



- 1.4 Underwriter's response was to ...
- 1.5 We believe this offer must be accepted. If Max is disbelieved, and our additional legal arguments also rejected, both of which are probably 50% propositions only, the School would be liable for damages which could easily amount to \$6 million or more, plus costs which could also easily run into millions. We cannot "bet the school".
- 1.6 At 20% contribution, we are likely to be responsible for \$1.5 million, or in that order. It could be better or worse. That is not betting the school, only delaying current strategic planning.
- 1.7 On the positive side, at 20% or 100%, there is a prospect one can claw back a reasonable percentage from:
- 1.7.1 AON, our long standing insurance brokers on the basis that they negligently omitted to advise the school about the nature of its insurance agreements and what steps it should have taken to preserve under-writer's obligation to indemnify the school. I think we have fair prospects of establishing a breach of duty by AON; but more dubious prospects of establishing that the breach of duty cause loss to the school. I say this because in light of the allegations made, and Max's responses I think it unlikely that the school would have disclosed what are arguably material facts to underwriters even if he were properly advised and knew he should. That said, it is I think arguable and will worry AON legally and commercially in the marketplace. Well prepared I think we will have a reasonable prospect of receiving some offer of contribution.
- 1.7.2 Or from the State Government Scheme set up to indemnify HIH policy holders who suffered loss because of that company's insolvency. In 2000 HIH was an professional indemnity insurer, which policy arguably also responds to the Lynch abuse. The school had a professional duty to fare reasonable care of its boys, which it failed because of the abuse of systems to supervise Lynch performance. We have lodged a claim, but the scheme is new, and its legal and commercial ability to respond to our claim is untested. That said, our very preliminary view is it has prospects.
- 1.8

2 The Mediation Process

- 2.1 They commence Monday 30 September and are all scheduled to be concluded by 21 October. That schedule is demanding.
- 2.2 In addition to our legal advisers, Peter and I will be there almost full time. Our advice is that the school's apology will be critical to success. legal impact aside, it is something we need to do as a quality institution. It will be emotionally draining.

- 2.3 Some boys have been serious affected, and Counsel's advice is that there are up to (say) 10 which could require large damages agreements. The highest St Pauls payout was \$350,000.00. Our worst could be higher because, for example, their economic loss has been going on longer.
- 2.4 On the other side of the equation, there are many who are trying us on and deserve little. The problem is that to successfully mediate (rather than go to Court) 64 claims quickly, with all the legal and commercial advantages that has for us, we will have to accept some downside in our ability to sort out the pretenders perfectly. We may of course have to take a risk and leave some swinging if their demands are large and outrageous, with the probability they will fall into line by the end, or that we will be left with a small number we must continue to litigate with.
- 2.5 We obviously need to prepare fund our 30% share of settlements as above; we should assume by 31 December 2002. There has been informal suggestions that we should seek ex-gratia support from the State Government. I do not believe we should; the "price" would be too high.
- 2.6 By comparison with St Pauls:
- 2.6.1 There was only one very belated allegation that senior management (Case) was told, and this not long before Lynch was exposed. It therefore had no legal impact on underwriters' obligation to indemnify.
- 2.6.2 In fact the Anglican Diocese (not the School) bore about 15% of the cash settlements (with a further 3% exposure for future counselling offers) because while underwriters would not offer more, the Diocese was determined to put each claim to bed then and there.
- 2.6.3 We have no such banker of last resort, and we will so inform the Mediator, Ian Hanger QC, the boys, and their lawyers. That is we will use this fact to try to limit expectations.
- 2.6.4 We believe the 24 St Pauls claims averaged about \$100,000.00 each. The highest was about \$350,000.00, but several at \$10,000.00 each. About half of these were arguably statute barred; whereas all of ours arguably are. In mediation, this results in a steeper discount for the plaintiff so barred. This may well be offset however by the fact we have a number who have suffered for longer, and economic loss claims, which compound damage fairly dramatically, are probably far higher in some of our cases.
- 2.7 I will report progress as best I can. Weekly hopefully.

3 Generally

- 3.1 There is more to do when this mediation process is complete.
- 3.2 For example, there are obviously many boys whose trust Lynch abused who we owe an apology to. We will need legal advice, and perhaps underwriters approval, but we have walked this fine line once before on our own and we may have to walk it again. There is a lot of anger out there, and our credibility as an institution is at stake in greater or lesser degree. I know I am too close to it all in one sense, and will listen to sensible counsel, but it is an issue we must wrestle with.

- 3.3 I believe we should be very transparent with our school community once this is over. We should, for example, state the cost in fees to remove our debt, in clear un-AMP-like terms. \$100 per year per family for 10 years will pay off \$1,000,000.00 in debt. Once our community believes we have acted properly to heal a wrong, and learned from the process, at a cost they do not fear, I think we will have no adverse reaction which should concern us. Its like an Ansett type levy. If anyone says they cannot afford it, we can offer to waive it.