



Office of
Local Government

SECTION 433 OF THE LOCAL GOVERNMENT ACT 1993

INVESTIGATION REPORT

**REPORT OF THE
SECTION 430
INVESTIGATION INTO
STRATHFIELD MUNICIPAL COUNCIL**



OCTOBER 2015

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1 EXECUTIVE SUMMARY

The Office of Local Government has conducted an investigation into Strathfield Municipal Council. The investigation has concluded that there have been failures in the Council's administrative processes and the report makes a number of recommendations.

Council has already taken action to address some of the systemic deficiencies that potentially contributed to the issues the subject of the investigation of its own volition and in response to a Performance Improvement Order made separately to this investigation.

Looking to the future, Councillors should demonstrate that they have proper understanding of importance and the seriousness of the matters that been reported. Council should be diligent in ensuring that the improvements that have been made are maintained in order to avoid similar circumstances arising in the future.

2 INTRODUCTION

1. This is a report on the results of an investigation under section 430 of the *Local Government Act 1993* ('the Act') into Strathfield Municipal Council. It is presented to the Minister for Local Government and copied to the Council, pursuant to section 433(1) of the Act.

Determination to conduct an investigation

2. On 4 March 2014, the Chief Executive¹ of the Office of Local Government (the Office) determined that an investigation pursuant to section 430 of the Act be undertaken into Strathfield Municipal Council. The Chief Executive appointed Mr Richard Murphy and Mr Angus Broad, Senior Investigators employed by the Office, to conduct the investigation.
3. The Chief Executive authorised Mr Chris Duff, a Senior Performance Analyst employed by the Office, to assist in the conduct of the investigation.

Appendix 1 - Notice of Decision to Conduct an Investigation

Terms of Reference

4. The Notice of Decision to Conduct an Investigation set out the Terms of Reference for the investigation as follows:

To investigate and report on:

- 1) *Whether there has been maladministration and/or serious and substantial waste of local government money in relation to Strathfield Municipal Council's:*
 - a) *procurement and expenditure on services from the International Property Group Pty Ltd (ACN 117 214 829);*
 - b) *procurement and expenditure on legal services and associated professional advice since 1 July 2011; or*
 - c) *decisions of 7 May 2013 and 2 July 2013 pertaining to the appointment of an external auditor and the related tender processes.*
- 2) *Strathfield Municipal Council's conduct and performance as the Trust Manager of the Hudson Park (R62163) Reserve Trust since 1 July 2009.*
- 3) *Any other matter that arises directly from the principal investigation of the Council's work and activities set out in the terms of reference.*

¹ Being the Director General as defined in the Local Government Act 1993 as stipulated in Administrative Arrangements Order 2014 under the Constitution Act 1902.

5. The Act does not provide a definition of “maladministration”. The investigation proceeded on the basis of the ordinary meaning of the word, as defined in the Macquarie Dictionary and the Oxford Concise Dictionary. It was also informed by the position adopted by the NSW Ombudsman, as detailed in its fact sheet on the topic of maladministration. It also had regard to the definition in section 11 of the *Public Interest Disclosures Act 1994* (PID Act), particularly in regard to focusing the investigation on actions or inactions that were “serious” in nature.

Appendix 2 - NSW Ombudsman Fact Sheet

6. The investigation also considered what could constitute “*serious and substantial waste of local government money*”.
7. The investigation was guided by the definition of “*local government money*” in section 12B of the PID Act. Notwithstanding the assistance provided by that definition, it remained necessary to consider the meaning and application of the terms “*serious*”, “*substantial*” and “*waste*”.
8. Guidance can be found in the NSW Ombudsman’s publication *Investigating complaints: A manual for investigators*² which states at page 97 that:

“Serious and substantial waste refers to the uneconomical, inefficient or ineffective use of resources, authorised and unauthorised, which results in a loss or wastage of public funds or resources.

In addressing any complaint of serious and substantial waste, the Auditor-General has advised that regard will be had to the nature and materiality of the waste.”

9. The Ombudsman’s Manual outlines different types of waste as follows:
 - *absolute – the value of the waste is regarded as significant*
 - *systemic – the waste indicates a pattern which results from a system weakness within an authority*
 - *material – the waste is material in terms of:*
 - *the authority’s overall expenditure*
 - *a particular type of expenditure*
 - *affects an authority’s capacity to perform its primary functions.*
 - *material by nature, not amount:*
 - *the waste may not be material in financial terms but may be significant by nature i.e. it may be improper or inappropriate.*

² Investigating complaints. A manual for investigators. NSW Ombudsman, 2004

Statutory requirements relating to this investigation report

10. Section 433 of the Act provides that:

- “(1) The Director-General must report to the Minister on the results of an investigation under this Division and must send a copy of the report to the council concerned.*
- (2) The report may comment on any matter that, in the Director-General’s opinion, warrants special mention and may contain such recommendations as the Director-General considers appropriate.*
- (3) A report furnished to the council under this section must be presented at the next meeting of the council after the report is received.*
- (4) Section 14B of the Royal Commissions Act 1923 applies in relation to any report that the Minister wishes to lay before both Houses of Parliament in the same way as it applies to a report made by a commission under that Act.”*

11. Regulation 244 of the Local Government (General) Regulation 2005 (Regulations) provides that:

“When a report of the Director-General or a person to whom the Director-General’s functions under section 430 of the Act have been delegated or sub-delegated under section 745 of the Act has been presented to a meeting of a council in accordance with section 433 of the Act, the council must ensure that the report:

- (a) is laid on the table at that meeting, and*
- (b) is subsequently available for the information of councillors and members of the public at all reasonable times.”*

The investigative process

12. The investigators prepared a “Notice of Direction for Production of Documents” (the Notice), which was served on the Council’s General Manager, Mr David Backhouse on 14 March 2014. A copy of the Notice has been provided as an appendix.

Appendix 3 - Notice of Direction for Production of Documents

13. The investigators visited Council on 21 March 2014.

14. The investigators reviewed the documents supplied by the Council in response to the Notice. Subsequently, Council was asked to provide further documents and information on a number of occasions. Council responded to these requests in a timely manner.

15. The investigators interviewed and obtained statements from a number of current and former staff. A list of the persons who provided statements has been provided as an appendix.

Appendix 4 - List of Persons from whom Statements were obtained

16. Further information was obtained from Council's former external auditor and the Australian Securities and Investment Commission (ASIC).
17. The investigators interviewed the General Manager, three current Directors and four former employees.

Procedural fairness

18. All persons interviewed were informed of the terms of reference. All persons had the opportunity to have an independent person or legal advisor present when interviewed.
19. All current Council staff, with the exception of Council's Solicitor, were interviewed in the presence of an external legal advisor retained by Council.
20. The interviews with the General Manager, the current Directors and one of the former Directors were recorded. Each was provided with a copy of the audio recording of the interview at its conclusion. A transcript of the interview was prepared and provided to them.
21. Persons who were the subject of adverse commentary or findings in the draft report were provided with the opportunity to make a submission on the draft report.
22. All persons who were invited to make a submission did so, and in many instances they provided further supporting material.
23. The Council (as the body politic) was also provided with the opportunity to make a submission on the report prior to it being finalised. Its submission has been included as the final appendix.
24. All submissions on the draft report have been carefully considered and reviewed. Where it has been considered relevant to do so, this report has been amended to reflect the responses and the additional material that was provided.

3 FINDINGS

Term of Reference 1(a) “to investigate and report on whether there has been maladministration and/or serious and substantial waste of local government money in relation to Strathfield Municipal Council’s procurement and expenditure on services from the International Property Group Pty Ltd (ACN 117 214 829)”

25. The investigation found that the Council failed to comply with section 55 of the *Local Government Act 1993* by failing to call for tenders prior to entering into contracts with IPG on 17 May 2010 and 3 May 2011.
26. Council paid \$899,937.50 to International Property Group Pty Ltd (ACN 117 214 829) (IPG) from May 2009 to July 2013.
27. The bulk of the payments to IPG were made pursuant to contracts that obligated the Council to pay IPG a monthly “retainer” of \$22,000 per month regardless of the actual services provided. Ultimately, \$866,937.50 was paid pursuant to the retainer agreement.
28. While it is evident that IPG provided services over the course of its period of engagement, the investigation was not able to identify probative evidence that the level of services was commensurate with the level of expenditure paid pursuant to the retainer agreements.

Term of Reference 1(b) “to investigate and report on whether there has been maladministration and/or serious and substantial waste of local government money in relation to procurement and expenditure on legal services and associated professional advice since 1 July 2011”

29. The investigation found that there had been:
 - A practice of accepting fee estimates from legal firms which could contravene the tendering provisions of section 55 of the *Local Government Act 1993*; and
 - Inaccurate and incomplete reporting of legal expenditure to the Council and the community.

-
30. The investigation is unable to express a view whether there was serious and substantial waste of local government money in relation to expenditure on legal services and associated professional advice.

Term of Reference 1(c) “to investigate and report on whether there has been maladministration and/or serious and substantial waste of local government money in relation to Council’s decisions of 7 May 2013 and 2 July 2013 pertaining to the appointment of an external auditor and the related tender processes”

31. The investigation found that there had been a failure to adopt and comply with appropriate processes in relation to the appointment of Council's external auditor, but these failures did not affect the result of that tender process.
32. The Council and the Council's Director, Corporate Services, failed to comply with the Council's Procurement Policy and failed to adopt and implement an adequate probity plan for the tender process.
33. There was an excessive delay in the appointment of the auditor. The term of Council's previous auditor finished on 1 July 2012. The process to commence filling the vacancy did not start until 16 January 2013 and tenders were not called until 5 March 2013. A new appointment was made on 2 July 2013, over 12 months after the previous auditor's term had completed.
34. Section 424(4) of the Act provides that *“If the office of auditor becomes vacant, the council must appoint a qualified person to fill the vacancy”*. While the Act does not stipulate a time frame for this to occur, a delay of over 12 months is excessive.
35. In relation to the decision of 7 May 2013, the Council resolved in accordance with the recommendation provided to it. While this decision appears to have been made without full consideration of the circumstances giving rise to the recommendation of a second tender process, or the resources required for this process, this decision was not such as to warrant a finding of serious and substantial waste
36. In relation to the decision of 2 July 2013, the Council carefully and diligently considered the matter prior to making a decision, and no adverse finding is made.

Term of Reference 2 – “Strathfield Municipal Council’s conduct and performance as the Trust Manager of the Hudson Park (R62163) Reserve Trust since 1 July 2009”

37. An analysis of the Council’s conduct and performance as Trust Manager of the Hudson Park (R62163) Reserve Trust since 1 July 2009 can be found at Schedule 3 Section 3.4 of this report.
38. The investigation identified deficiencies in the procurement and selection of a licensee to operate the Hudson Park golf course, delays in the issuing of a licence, a failure to secure performance guarantees from the licensee, poor administration of the licence, a failure to ensure compliance with licence conditions and a failure to maintain proper records.

Term of Reference 3 - Any other matter that arises directly from the principal investigation of the Council’s work and activities set out in the terms of reference.

39. Nil.

4 RECOMMENDATIONS

40. As noted earlier, section 433(2) of the Act provides that a report on the results of an investigation undertaken pursuant to section 430 *"may contain such recommendations as the Director-General considers appropriate"*.
41. In considering what recommendations may be warranted it is to be noted that the Minister for Local Government served the Council with a Performance Improvement Order (PIO) on 27 July 2014. A copy of the PIO has been provided as an appendix.

Appendix 5 - Performance Improvement Order

42. This PIO addressed the need for the Council to improve its internal controls regarding the procurement and expenditure on goods and services and for it to ensure relevant staff are accountable for their performance in regard to ensuring the establishment and maintenance of such controls. It also requires the Council to establish and implement an effective internal audit function.
43. In the circumstances, there is limited utility in making recommendations that go to matters that have already been addressed in the PIO.
44. Further the Council itself has taken action, of its own volition, to respond to matters that might otherwise have warranted the making of recommendations. The Council has employed a Procurement Specialist and amended Council's Procurement and Tendering policies and guidelines to ensure that additional internal controls are in place. These amendments have been approved and endorsed by Council's temporary advisor, who was appointed by the Minister under the PIO.
45. This Report recommends as follows:

1. Review the conduct, performance and capabilities of its General Manager having regard to the findings in this report.

This recommendation has been made having particular regard to:

- the General Manager's knowledge of, and involvement in, the engagement of IPG;
- the adverse findings primarily relate to operational matters within the province of the General Manager's functions;
- the General Manager's accountability for the efficient and effective operation of Council's organisation and the day to day management of the Council, including but not limited to the performance of the staff who report to him.

Council should, having regard to due process, take any action that may be warranted.

2. Closely monitor and review the actions taken by the General Manager to review the conduct, performance, capabilities and responsibilities of its Director, Corporate Services having regard to the findings in this report.

The Council and the General Manager are responsible for taking any action that may be warranted to address aspects of the Director, Corporate Services' conduct that may be unsatisfactory.

Council needs to satisfy itself that appropriate action has been taken by the General Manager. It should, by resolution, require the General Manager to provide a report detailing what action has been taken by him in response to the Director, Corporate Services' conduct, particularly in relation to the appointment of Council's external auditor and the related tender processes.

The Director, Corporate Services has had a significant role in the development and implementation of Council's governance framework. Going forward, it is important that responsibilities of this position are clearly defined and that the incumbent is capable of fulfilling the role. Again, this is a matter for the General Manager to address and for the Council to monitor.

3. Regularly monitor and review Council's performance as Trust Manager of the Hudson Park (R62163) Reserve Trust and other Crown land for which it is responsible

It is a matter for the Council to determine how best to implement this recommendation, and in doing so should consider the establishment of a

standing committee or task force, and requiring regular reports from the responsible officer/s.

4. Review and clearly define the responsibilities of its Directors and Managers in fulfilling its responsibilities as Trust Manager of the Hudson Park (R62163) Reserve Trust and other Crown Land for which it is responsible.

Council should define the responsibilities of its Directors, Managers and other relevant staff in fulfilling the Council's responsibilities as Trust Manager and should ensure appropriate management of the physical asset and compliance with the terms of any legal obligations and future licence.

The Council should ensure staff engaged in this function are capable of and are fulfilling their functions in a proper, efficient and effective manner.

This report recommends that a Director or Manager be given overall responsibility for ensuring that Council fulfils its responsibilities as Trust Manager, and is requested to regularly report to Council.

In relation to the foregoing paragraph, it is noted that Council has taken steps to assign responsibility for the administration of its role as Trust Manager to the Director, Technical Services.

5. Review and closely monitor expenditure on legal and associated professional advice.

The report details Council's expenditure on legal and associated professional advice. The level of expenditure is significant, particularly having regard to Council's past expenditure.

It is important that the elected Council review and monitor its legal expenditure.

6. Require that the General Manager provide a detailed report in relation to legal costs and expenses since 1 July 2011 in relation to the Australian Catholic University site.

Significant legal expense has been incurred in relation to planning matters related to the Australian Catholic University's Strathfield campus. Council

should investigate these costs and satisfy itself as to need for and quantum of these costs.

7. Implement a program to ensure ongoing compliance with the *State Records Act 1988*.

The *State Records Act 1988* requires that the Council create and maintain proper records of its activities. The investigation has revealed numerous instances where it did not do so, particularly in relation to records of meetings with third parties, the deliberations of its senior management group, emails and legal documents.

Council has advised that certain records have been deleted or removed from its electronic records management system. It was also apparent that not all of the documents provided by the Council, particularly emails, had been held on the relevant Council file.

The investigation noted that the Council has taken steps to respond to this issue, however, the elected Council needs to oversee this process.

5 SUBMISSION OF THE REPORT TO THE MINISTER

I hereby make this report to the Minister for Local Government, the Hon Paul Toole, pursuant to my obligation to report on the results of the investigation.



Tim Hurst
Acting Chief Executive
Office of Local Government

Dated this 6th of October 2015

SCHEDULE 1 - RELEVANT LEGISLATIVE REQUIREMENTS

1. This section of the report details some of the statutory requirements which were considered pertinent to the terms of reference.
2. It should be noted that the report does not purport to provide a compendium of all of the applicable statutory requirements.
3. Further commentary on these and other statutory requirements can be found in section 6 of the report, which provides further commentary and analysis on the results of the investigation.

Council's charter and functions

4. Councils are guided by a charter containing a number of principles, as provided by section 8 of the Act. These principles include:
 - *to provide directly or on behalf of other levels of government, after due consultation adequate, equitable and appropriate services and facilities for the community and to ensure that those services and facilities are managed efficiently and effectively*
 - *to exercise community leadership*
 - *to properly manage, develop, protect, restore, enhance and conserve the environment of the area for which it is responsible, in a manner that is consistent with and promotes the principles of ecologically sustainable development*
 - *to have regard to the long term and cumulative effects of its decisions*
 - *to bear in mind that it is the custodian and trustee of public assets and effectively account for and manage the assets for which it is responsible*
 - *to facilitate the involvement of councillors, members of the public, users of facilities and services and council staff in the development, improvement and coordination of local government*
 - *to keep the local community and the State government (and through it the wider community) informed about its activities*

- *to ensure that, in the exercise of its regulatory functions, it acts consistently and without bias, particularly when an activity of the council is affected*
 - *to be a responsible employer.*
5. Sections 21 and 22 of the Act provide that a council has the functions conferred or imposed on it by or under this Act or under any other Act or law.

Role of councillors

6. Section 232 of the Act requires that councillors as a group direct and control the council's affairs, allocate resources, determine policy, and monitor the council's performance.
7. As individuals, councillors communicate council policy and decisions to the community, exercise community leadership and represent the views of residents and ratepayers to council.
8. The Act requires councillors, as the governing body, to appoint a person to be general manager (section 334). Having done so, the role of the governing body is to oversee the general manager's performance.
9. The governing body must review the performance of the general manager at least annually against the agreed performance criteria for the position.

Functions of the General Manager

10. Section 335 of the Act provides that a council's general manager is generally responsible for the efficient and effective operation of the council's organisation and for ensuring the implementation, without undue delay, of decisions of the council. It further stipulates that the general manager has the following particular functions:
- *to assist the council in connection with the development and implementation of the community strategic plan and the council's resourcing strategy, delivery program and operational plan and the preparation of its annual report and state of the environment report*
 - *the day-to-day management of the council*
 - *to exercise such of the functions of the council as are delegated by the council to the general manager*

- *to appoint staff in accordance with an organisation structure and resources approved by the council*
- *to direct and dismiss staff*
- *to implement the council's equal employment opportunity management plan; and*
- *such other functions as may be conferred or imposed on the general manager by or under this or any other Act.*

Role and responsibilities of Council's Responsible Accounting Officer

11. The Regulation stipulates that a council's *Responsible Accounting Officer*³ (RAO) has a number of responsibilities including:

- maintaining a system for budgetary control (cl. 202);
- provision of budget review statements and revision of estimates (cl. 203);
- keeping of the council's accounting records (cl. 207).

Conduct of councillors and staff

12. Section 439 of the Act provides that councillors, members of staff and delegates of councils must act honestly and exercise a reasonable degree of care and diligence in carrying out their functions under the Act or any other Act.

13. The conduct of all council officials (councillors and staff) is subject to the provision of the Council's adopted Code of Conduct, which in turn is required to be consistent with the Model Code of Conduct for Local Councils in NSW.

14. The conduct of council staff is also subject to any applicable contract of employment and/or industrial instrument and their common law duties as an employee.

³ Clause 196 of the Regulation defines "*responsible accounting officer*" of a council as:
(a) a member of the staff of the council designated by the general manager, or
(b) if no such member has been designated, the general manager.

Provisions pertaining to the appointment of an auditor

15. The Act⁴ provides for the appointment a council's auditor. Relevantly, it provides at section 422(5) that *"An auditor may not be appointed or reappointed unless tenders for the appointment or reappointment have been called."*
16. Section 424(1) of the Act further provides that *"A council's auditor holds office for 6 years and, if otherwise qualified, is eligible for re-appointment"*.

Provisions pertaining to procurement

17. Councils' procurement and disposal activities are governed by strict considerations of probity, transparency and accountability, as they involve expenditure of public funds for public purposes.⁵
18. Section 55 of the Act stipulates that councils must invite tenders before entering into certain types of contracts including *"a contract for the provision of services to the council (other than a contract for the provision of banking, borrowing or investment services)"*.⁶
19. The tender process is further prescribed by the provisions of Part 7 of the Regulation which sets out the procedures to be adopted.
20. Councils are also required, pursuant to section 23A of the Act, to have regard to the OLG's Tendering Guidelines prior to undertaking tendering.

Authorisation of Expenditure

21. The Regulation (clause 211) provides that a council, or a person purporting to act on behalf of a council, must not incur a liability for the expenditure of money unless the elected council has approved the expenditure, and has voted the money necessary to meet the expenditure.
22. Clause 211 also stipulates (with some exceptions) that all such approvals and votes lapse at the end of a council's financial year.

⁴ Chapter 13, Part 3, Division 3

⁵ Department of Local Government Circular No. 09-39, 26 October 2009

⁶ Section 55(1)(f). Note that Section 55(3) details some exemption for certain types of contracts that would otherwise be subject to tendering.

Crown Lands Act 1996

23. Council, as the Trust Manager of the Hudson Park Reserve Trust exercises functions under Part 5 of the *Crown Lands Act 1996*.
24. Section 10 of the Act emphasises that Crown land is to be managed for the benefit of the people of New South Wales.
25. In turn, section 11 provides that Crown land is to be occupied, used, sold, leased, licensed or otherwise dealt with in the best interests of the State.
26. In measuring the standard of care to be applied to reviewing Council's performance and conduct as Trust Manager, it is noted that Courts have held that, in the management of the trust business, a trustee should exercise the same diligence and prudence as an ordinary prudent man of business would exercise in conducting that business if it were his own (*The Charitable Corporation v Sutton* 26 ER 642).
27. Section 102 of the Act requires that a reserve trust not grant a licence (other than a *temporary licence*), unless the trust has decided that it is desirable to do so (on the terms and conditions specified in the decision) and the Minister has consented to the proposal in writing.
28. The Act also includes other relevant provisions including requirements for the provision of reports and information required by regulation.

SCHEDULE 2 - COUNCIL POLICIES AND PROCEDURES

1. This section of the report details the policies and procedures which were considered pertinent to the terms of reference. Section 6 of the report which follows, provides analysis and commentary on whether Council and/or Council officers complied with these policies and procedures.

Code of Conduct

2. Council's code of conduct is the key instrument that regulates the conduct of staff and councillors. All councils are required to adopt a code of conduct that meets at least the minimum standards set out in the *Model Code of Conduct for Local Councils in NSW* prescribed by the *Local Government Act 1993*. All council officials (councillors, staff and delegates) must comply with the code of conduct. It guides them on a range of matters including the need to act with care and diligence.

Purchasing and Tendering Guidelines

3. In March 2007, the Council replaced its existing purchasing procedures with a new document titled *Strathfield Council Purchasing and Tendering Guidelines*. A revised version of this document was adopted on 25 August 2012.
4. Both the 2007 and 2012 versions of the document detail "guiding principles", administrative processes and requirements going to the breadth of the procurement activities undertaken by Council.
5. Both the 2007 and 2012 documents are referred to in this report as the investigation considered actions that preceded the adoption of the 2012 version. The 2012 version indicates that it is to be read in conjunction with Council's Procurement Policy, which was adopted at the same time.

Procurement Policy

6. Council's *Procurement Policy* is an operational policy approved by the General Manager and adopted on 25 August 2012. It does not appear to have been preceded by or to have replaced an existing policy. Rather it was an added element to the framework governing the procurement of goods and services.
7. The stated objectives of the Procurement Policy are to:

- provide policy and guidance on procurement activities to ensure consistency
 - to set out Council's procurement framework, responsibilities and procedures.
8. This policy applies to all procurement, tendering and contracting activities undertaken by the Council.
9. A copy of the policy has been provided as an appendix.

Appendix 6 - Procurement Policy

Legal Practice Policy & Legal Practice Procedure

10. Council's *Legal Practice Policy* is an operational policy of the Council originally approved by the Council's General Manager on 30 May 2008. It was revised with effect from 24 March 2011.
11. It is this revised version that is relevant to the investigation. Its stated purpose is to "*provide policy for the administration and coordination of legal practice that is provided both internally and from external sources to Council.*" Council also adopted a *Legal Practice Procedure* to be implemented alongside the *Legal Practice Policy*.
12. Copies of the policy and the procedure have been provided as appendices.

Appendix 7 - Legal Practice Policy

Appendix 8 - Legal Practice Procedures

SCHEDULE 3 - ANALYSIS

1. This section of the report details the results of the investigation and where considered appropriate, provides further commentary and analysis:
 - Section 3.1 deals with the Council's procurement of services from the International Property Group and its expenditure on these services;
 - Section 3.2 deals with the procurement of legal and associated professional advice, and expenditure on these services;
 - Section 3.3 deals with the appointment of Council's external auditor;
 - Section 3.4 deals with the Council's conduct and performance as the Trust Manager of the Hudson Park Reserve Trust; and
 - Section 3.5 deals with a number of the other matters that arose directly from the principal investigation.
2. The analysis should be read in conjunction with the appendices. These include a number of chronologies. It is important to note that the appendices only include the evidence that was considered to be particularly relevant to understanding this analysis, the findings and recommendations. Similarly, the chronologies only refer to events and documents that were considered similarly relevant.
3. In providing details of the results of the investigation and further commentary and analysis, it should be noted that the ambit of the investigation was confined to the Council, its work and activities and implicitly the conduct of Council officials.
4. It has been necessary to refer to entities and persons other than the Council and Council officials. However, no findings have been made as to the conduct of these entities and persons in relation to the matters investigated. Given this, due caution should be exercised before drawing any adverse inference from this report as to the capability, performance or conduct of these other entities and persons.

3.1 Procurement of services from IPG & expenditure on these services

5. The terms of reference required the investigation to consider whether there has been maladministration and/or serious and substantial waste of local government money in relation to Council's procurement and expenditure on services from the International Property Group Pty Ltd (IPG).
6. A chronology of events and documents considered relevant to the examination of the Council's procurement of and/or expenditure on services from IPG has been provided as Appendix 9.⁷

Appendix 9 - Chronology – International Property Group

Expenditure on services from IPG

7. Council records indicate that it paid \$899,937.50 to IPG from May 2009 to July 2013. The expenditure involved:
 - i. An agreed fee of \$33,000 for the provision of advice and assistance in preparing a submission seeking funding from the State government for work on a proposed transport interchange at Strathfield.
 - ii. 38 monthly "retainer" payments of \$22,000 (totalling \$836,000) from May 2009 to July 2013, payable in advance.
 - iii. A payment of \$30,937.50 for "*Strategic Advice & Coordination on the sale of Matthews Park*" (51 Matthews Road Greenacre), representing a 0.5% of the sale price of that property.

The lines of enquiry

8. The terms of reference required the investigation to consider how IPG's services were procured by the Council. As Council had previously disclosed how much it had paid IPG, the investigation sought to ascertain:
 - whether the expenditure was, or should have been, incurred pursuant to one or more written contracts between the Council and IPG;
 - whether there should have been one or more tender processes prior to Council entering into any such contracts; or in the alternative,

⁷

Note that the Chronology does not record the receipt of all the monthly invoices from IPG for the retainer payments claimed by them and nor does it record the dates those payments were authorised and made.

- whether the requisite contracts were exempt from tendering by way of the operation of section 55(3) of the Act or otherwise, and if so, whether there are records to substantiate this;
 - whether the procurements were undertaken in a manner that was consistent with the Council's *Purchasing and Tendering Guidelines*.
9. Relevantly, the Council's Guidelines required that Council officers obtain three written quotes when procuring goods and services involving expenditure greater than \$10,000 and tendering for services where expenditure was estimated to be likely to exceed \$150,000, unless a prescribed circumstance indicated that these processes were not required. The latter requirement generally reflects the tendering provisions of the Act.

The initial procurement

10. The Council's initial procurement of services from IPG was to obtain assistance with the preparation and making of a grant submission for funding to undertake a feasibility study for an underground transport interchange at Strathfield.
11. The decision to procure this service from IPG was made shortly after a meeting on 24 March 2009 between representatives of IPG and Council's General Manager, Mr David Backhouse. Subsequently, IPG wrote to Council on 27 March 2009, referring to the meeting and suggesting the terms upon which it could assist Council. A copy of the letter has been included as an appendix.

Appendix 10 - IPG letter to Council of 27 March 2009

12. IPG's letter contained a proposal to provide services in relation to the "Strathfield Square project". It provided a quote of \$30,000 (excluding GST) to assist Council in the preparation of the grant submission for funding of the underground infrastructure component of this project.
13. The letter also indicated that IPG would, subject to the success of Stage 1 of the program (as outlined in the letter), seek appointment as "Council's project co-ordinator" for stage 2 of the program of work outlined in the letter.
14. It is not clear what transpired after the letter was received by Council.
15. Mr Backhouse, in his response to the draft report, provided an undated letter from Mr Wong to him. Mr Wong states in the letter that he had discussions with a representative of IPG on 30 March 2009 "in relation to the engagement of IPG

and scope of works being proposed.” No record of the meeting has been provided.

16. Council provided a copy of an email exchange between Mr Wong and Mr Scott Campbell of IPG dated 15 April 2009 which indicates that IPG had commenced work on the project, presumably on the basis that Council had or would ultimately accept its proposal. The email exchange also indicates Mr Wong provided IPG with confidential information. Council had not, at that time, provided any written advice to IPG as to its acceptance of IPG’s proposal.

Appendix 11 - Email exchange Mr Wong and Mr Scott Campbell of IPG

17. Either Mr Backhouse and/or Mr Wong sought advice from Council’s then Legal Officer, Mr James Ng, regarding the procedural requirements for engaging IPG. Mr Ng provided advice in an email addressed to Mr Backhouse dated 22 April 2009 (copied to Mr Wong).

Appendix 12 - Email dated 22 April 2009 from James Ng to David Backhouse

18. Mr Ng’s advice was:

I note that the proposed fees for Stage 1 of the project is less than \$100,000 and that Council will only consider engaging International Property Group to do Stage 2 of the project at a later date and once Stage 1 is finished. In the circumstances, tendering is not required and Council may engage IPG to carry out the Stage 1 works.

Attached is a draft letter to IPG. I have also attached a copy of Council’s Business Ethics Policy which should be attached to the letter.

19. The draft letter attached to Mr Ng’s email was dated 21 April 2009.

Appendix 13 - Draft acceptance letter to IPG dated 21 April 2009

20. The date of the advice and the draft letter is significant given that it is apparent that IPG had, as at that date, already commenced work on the project and been provided with confidential information by Mr Wong.
21. It is apparent that the General Manager considered Mr Ng’s advice and that he signed a letter dated 30 March 2009 accepting IPG’s proposal for stage 1. The letter advised that “*Upon successful completion of Stage 1, a determination will be made in relation to IPG’s proposal to carry out Stage 2*”.

Appendix 14 - Council's letter to IPG of 30 March 2009

22. It is clear that Council's written acceptance of the offer from IPG was backdated. The substantive content of the 30 March 2009 letter is identical in every respect to the draft that was provided to Mr Backhouse on 22 April 2009 by Mr Ng.
23. Mr Backhouse was invited to comment on the "backdating" of the letter. A copy of his response of 30 April 2015 has been provided as an appendix. For ease of reference, the relevant content of his response has been reproduced hereunder:

It is apparent I signed and caused to be forwarded, the backdated letter. I did so unaware of the date that it carried and the fact that it had been backdated. I have no present recollection of having signed that particular letter. More particularly I did not ask for nor approve the letter being backdated and had I realised at the time of signing the letter, that it had been backdated I would have corrected it. In the ordinary course of a day I am called upon to sign correspondence prepared by others and I have evidently overlooked that the subject letter had been backdated.

Further, and on reflection, I am puzzled as to why whoever caused the letter to be backdated did so as there appears to be no purpose (appropriate or inappropriate) served by reference to the letter having been backdated.

Appendix 15 - Invitation to Provide Further Comment on Council's letter of 30 March 2009 and Response

24. Mr Ng provided a statement detailing his recollection of the circumstances of providing the advice and draft letter. In it, he indicated that he had no knowledge as to the circumstances by which the letter came to be backdated.

Appendix 16 - Statement - Mr James Ng

25. Council's acceptance letter indicated that payment of the initial \$20,000 fee to IPG was conditional on receipt of IPG's commitment to Council's *Business Ethics Policy*. Council was not able to produce any record that indicated IPG's commitment was ever received. Notwithstanding this, the evidence indicates that Council proceeded with the procurement. Mr Backhouse, in his submission on the content of this report, disputed the relevance of this:

I dispute the relevance of stating that "Council was not able to produce any record that indicated IPG's commitment to the Business Ethics Policy...". The Policy, at that time, was based on the Model Code of Conduct for Local Government which in 2010 was binding on contractors and consultants. There was no obligation on Council to obtain any such written undertaking from IPG at the time that that [sic] this version of the Code was in force. The

Business Ethics Policy was designed to inform contractors of Council's ethical standards and the consequences of not adhering to Council's ethical standards set out in the Code of Conduct. In any event, the contractor was bound by the Code of Conduct.

26. Mr Backhouse's view does not recognise the fact that it was he who acknowledged and reinforced the importance of the commitment being secured, when he issued the letter to IPG which stipulated this as a condition. Having recognised the value of informing contractors of Council's ethical standards and the consequences of not adhering to Council's ethical standards, and having stipulated that a formal commitment to those standards was required, it was contingent on the Council to ensure that the commitment was obtained and recorded.
27. IPG emailed Council's General Manager an invoice for \$22,000 on 6 May 2009, which the General Manager forwarded on that same day to the Director, Technical Services, with the instruction "Pl. respond and action."
28. A Council purchase order directed to IPG was prepared. It bears the date 18 May 2009. The order form indicates that the service was requisitioned by Mr Hazeldine and approved by Mr Wong, on behalf of the General Manager.⁸
29. On the face of the documentary evidence, the initial decision to procure the services from IPG was approved by the General Manager. Mr Backhouse's signature is on the letter accepting the proposal. Mr Backhouse written submissions acknowledge that he received a recommendation to engage IPG. There is evidence that he sought and received advice from Council's Legal Officer in relation to the procurement.
30. There is no probative evidence that the Council considered alternative providers of strategic property advice prior to deciding to engage IPG.⁹ Specifically, there was no evidence of three quotes having been sought or obtained (written or otherwise), as required by Council's *Purchasing and Tendering Guidelines*.
31. The *Purchasing and Tendering Guidelines* and Council's *Code of Conduct* required that Council officials make a record of their decision and, where

⁸ It should be noted that all Council order forms contain the printed words that indicate the Order is signed/approved on behalf of the General Manager.

⁹ While Mr Wong has stated that there was consideration of other providers. There is no evidence that this occurred.

appropriate, the reason for their decision. Council did not provide any document recording why IPG was selected to undertake the work and/or why additional quotes for the work were not obtained.

32. The results of the investigation indicate that in undertaking the initial (2009) procurement of services from IPG, Council did not:

- comply with the provisions of its *Purchasing and Tendering Guidelines*
- make and/or retain a full record of the procurement process and the related decisions.

33. Mr Backhouse made the following submissions in regard to the consideration of alternative providers and the making and keeping of records pertaining to the decision to engage IPG:

I am not aware of the considerations for alternative providers as it was [sic: the] Director Technical Services that put forward IPG. Mr Ng's advice in relation to the initial procurement provided a letter to sign which implied it complied with Council's Purchasing and Tendering Guidelines and I followed that advice.

Director Technical Services made the recommendation and would have carried out the necessary procedures.

AND:

Council relied on the advice in relation to the initial procurement provided by Council's former Legal Officer. The provision of a draft letter for execution implied it complied with Council's Purchasing and Tendering Guidelines and I followed that advice. The recording of the decision was a matter for the Director Technical Services who made the recommendation and was responsible for documenting of the decision.

AND:

I signed the engagement letter but the other parts of the process, including the recording of the decision, were the responsibility [sic: of] the recommending officers and I acted in good faith on the advice of these officers.

34. While Mr Backhouse's view is that the responsibility lay with others, it is evident that he was directly involved in the consideration of IPG's proposal and that it was his decision to engage IPG.
35. Mr Backhouse has submitted that the initial engagement of IPG was considered and supported by councillors. He supplied statements from three former councillors in support of this submission.
36. While Mr Backhouse's submission and the statements of the former councillors have been considered, there is no record of a resolution of the elected Council that indicates that it specifically supported or endorsed the initial engagement of IPG. Nor are there any Council records that indicate that the specificity of engaging IPG to assist in the preparation of the funding submission was considered or supported by the Council on the occasions cited by Mr Backhouse in his submission.

The 2010 procurement

37. This part deals with Council's processes in entering into a contract with IPG on a monthly retainer of \$22,000 (including GST) and payment of an additional fee for coordinating the sale of a Council property (0.5% of the sale price).

IPG's Proposal

38. On 24 December 2009, Mr Chris Demertze of IPG sent Mr Backhouse an email attaching the final invoice for the work they had done on the funding proposal for the train/bus interchange. Attached to the email was a document which Mr Demertze described as IPG's "Government Advisory Services" profile. The profile is an 8 page document detailing the services IPG could provide to government clients.
39. On 3 March 2010, Mr John Elvy, a Director of IPG, sent an email to Mr Backhouse with the subject heading of "Assistance". It made reference to a conversation between Mr Elvy and Mr Backhouse on the previous day. Mr Elvy indicated that he understood that "*Council is keen to pursue an affordable housing agenda on specific sites owned or controlled by Council*" and indicates that IPG could provide a "*design concept and feasibility analysis*" for Mr Backhouse to consider.
40. Mr Elvy's email noted that the Council was "*considering a consolidation of some sites in the municipality, which may require the acquisition of some privately*

held land" and suggested that *"this process should be done VERY quietly and at armslength to Council."* The email advised that IPG had the experience to do this for Council and asked for a confidential discussion with the General Manager and the then Mayor about how they could approach this issue.

41. It appears that there was a meeting on 30 March 2010 attended by Mr Elvy, Mr Backhouse and the then Mayor of the Council. On 31 March 2010 Mr Elvy sent an email to Mr Backhouse seeking confirmation of what Mr Elvy understood to be Mr Backhouse's and the Mayor's instructions in relation to a presentation for Councillors on the highest and best use of a number of properties, including Matthews Park. It concluded with the following statement *"Once I have your response, I can prepare a proposal for this work to be carried [sic] and the fees associated with that brief. I would need 2 weeks to collate, research, analyse and prepare feasibility for these properties."*
42. No record of any written response from Mr Backhouse to the two emails has been provided. On 15 April 2010, Mr Elvy sent Mr Backhouse a copy of his email of 31 March 2010 seeking a response. There is evidence of Council providing information to IPG about Council properties on 30 April 2010 and of a meeting between Mr Backhouse and Mr Elvy on 4 May 2010.
43. Mr Backhouse indicated that he had no specific recollection of a meeting with Mr Elvy on 4 May 2010, observing that there were many meetings and that he couldn't recall the date. He remembered a meeting between IPG representatives and Council staff (including himself) where the affordable housing strategy was discussed and a meeting between Mr Elvy, the Mayor, Mr Wong and himself in relation to the development potential of a number of council properties and properties in the Parramatta Road/Loftus Crescent area.
44. On 6 May 2010, Mr Elvy sent an email to Mr Backhouse, attaching a letter from him. The letter provided Council with an IPG proposal for the provision of *"Strategic Property Advice"*. The email was sent directly to Mr Backhouse. A copy of the email and letter has been included as an appendix.

Appendix 17 - IPG Email and Letter to Council of 6 May 2010

45. IPG's letter of 6 May 2010 refers to the meeting held with Mr Backhouse on 4 May 2010. In the letter, IPG proposed an engagement for a 12 month term, monthly retainer payments of \$20,000 (excluding GST) and the payment of an

additional coordination fee where the sale of a property was involved, this fee being 0.5% plus GST of the sale price.

46. While the letter canvassed a number of specific projects and related tasks, it ultimately suggested that IPG's engagement *"be for 12 months then reviewed, or cease upon completion of tasks assigned to us, whichever (sic) is sooner. This will mean you will have access to all of our services on call and we would provide monthly reports in a format that you require."*
47. The letter continued: *"I am sure that there will be other property related issues that need to be addressed in the future and I believe this would be a very cost effective way of Strathfield Municipal Council having their own "property department" without the on-costs."*
48. Ultimately, IPG was offering to provide strategic property advice and to perform related tasks, as assigned by Council. Importantly, their work for Council was not limited to the specific projects and tasks canvassed earlier in the letter. In return they were to receive payments of \$264,000.00 over the annual period.
49. When interviewed, Mr Backhouse recollected having received the email and letter. He indicated that he would have passed it on to Patrick Wong (who was then the Council's Director, Technical Services).
50. Mr Backhouse was asked about his view on the proposal. His responses indicated that:
 - Council was very satisfied with the IPG. They thought they were getting good value from the results.
 - The retainer would have been a very good price reduction from the daily fee.
 - That the Council did not have a specialised resource to provide the services proposed to be provided by IPG.
 - That the Council needed the services proposed.
51. Mr Backhouse explained that *"it was the view of the whole team involved with it, particularly with Patrick, that we needed a firm with that sort of commercial experience, and we certainly didn't have that in house."*

52. In responding to the draft Report, Mr Backhouse provided a statement from Mr Tony Maroun, a former Councillor who was the Mayor from September 2009 until September 2011. Mr Maroun stated that he had “directed” Mr Backhouse to proceed with the engagement of IPG.
53. More generally, Mr Backhouse submitted that the “*elected council*” approved and directed the engagement of IPG.
54. The Act requires that decisions of Council be by a resolution of the councillors at a duly convened meeting. There is no evidence that councillors passed any resolution authorising the retainer arrangement with IPG.
55. Further, as is reinforced by the Code of Conduct, councillors cannot direct staff in the performance of their functions. Any direction by the Mayor could not operate to excuse compliance with the requirements of the Act.
56. Council did not provide any minutes or file notes pertaining to the meetings between Council officials (including the General Manager) and IPG representatives prior to Council receiving the offer from IPG.

Acceptance of the Proposal

57. Council provided a copy of a Council letter to IPG, dated 17 May 2010 that communicated its acceptance of IPG’s proposal.

Appendix 18 - Council letter to IPG of 17 May 2010

58. The letter bears the signature block of the General Manager and a signature. “David Backhouse” is also noted as the contact person in the letter. The letter included the following statement:

“Council accepts your offer to engage International Property Group (IPG) on a monthly retainer of \$20,000 in lieu of a daily fee or a project by project arrangement, for a period of 12 months then reviewed, or cease upon completion of the tasks assigned to IPG, whichever is sooner.”

59. The Council’s letter to IPG concluded:

“I look forward to meeting with you soon and please don’t hesitate to contact me on 9748 9924 if necessary.” The phone number provided is the contact number for the General Manager’s office.

60. In responding to the draft report, Mr Backhouse emphasised that the Executive Group (the General Manager and the three Directors) had agreed to engage

IPG. In doing so he raised doubts about the authenticity of the letter. It might be noted that, despite an earlier suggestion that a forensic investigation be convened, Council has not provided any evidence to dispute the provenance of the letter.

61. While Mr Backhouse provided statements by a number of directors and senior staff that support his assertion that a collective decision was made to engage IPG, no contemporaneous records evidencing such a decision by the Executive Group have been provided.
62. Mr Backhouse provided, in his response to the draft report, a table of information described as "*Key Issues – Technical Services – Strategic Planning Section – Report to Executive*". Mr Backhouse suggested that the information contained in the document evidenced consideration by Council's Executive Group and its apparent agreement to the engagement of IPG. While the document does contain some references to the Strathfield Town Centre Project and work IPG was doing for Council, there is nothing that indicates a collective decision by the Executive Group to engage IPG.
63. As noted earlier, the Office of Local Government (then the Division) made preliminary enquiries of Council about IPG. HWL Ebsworth (HWL) and O'Connor Marsden & Associates (OCM) provided a response on behalf of Council, in the form of a report. The report contained the following statement in regard to the engagement of IPG on the retainer:

We are instructed that the General Manager, Mr David Backhouse, has no knowledge or recollection of signing, or otherwise authorising the letter dated 17 May 2010 to IPG. The General Manager also stated that the signature evidenced on this letter is not his signature and has initiated a forensic investigation of the letter's provenance. Mr Backhouse does have a limited recollection of the letter from IPG dated 6 May 2010 and recalls passing the letter to one of his Directors to formulate a response and/or recommendation.

The General Manager has instructed us that he firstly, did not authorise the IPG retainer; and secondly, was unaware of the monthly payments and the quantum of funds expended to IPG.

64. It is difficult to accept this version given the weight of the evidence that suggests that Mr Backhouse made the decision to accept IPG's proposal for the retainer. In this regard it is noted that:

- Mr Backhouse was present at meetings with IPG in the lead up to the decision to engage them on a retainer.
- Council's letter of 17 May 2010 bears his name as the contact person, his signature block, invites the IPG to call him directly and provides the contact number for the General Manager's office.
- When interviewed, Mr Backhouse was asked about who made the decision on how to respond to IPG's letter of 6 May 2010. His response indicated that he made the operative decision that IPG be engaged on the retainer. The relevant section of the transcript has been reproduced hereunder:

Q178 *Okay. Are you saying in respect of the matters in this letter, that's 6 May 2010, that the decisions relating to that were not made by you?*

A *I'm saying on the advice that I've received that I was fine to proceed with the use of IPG on Matthews Park and other properties.*

Q179 *Did you make the operative decision to retain IPG on that retainer?*

A *Made the?*

Q180 *Decision to retain IPG*

A *I was fine for it to proceed on that basis.*

Q181 *No, no, no*

A *So yes.*

Q182 *you made the decision?*

A *Well, yes.*

Q183 *It wasn't Mr Wong's decision, it was your decision?*

A *Patrick Wong approached me with the proposition, strongly advocating for their continued use, gave a proposition in regards to the value of the retainer for council, which we agreed. And prepared letters in accordance with that.*

65. Any assertion that Mr Wong was ultimately responsible for the engagement needs to be considered having regard to the value of the contract that was being entered into and Mr Wong's delegation. The contract had a value of \$264,000 inclusive of GST plus the coordination fee that was likely to flow from the sale of Matthews Park. Mr Wong's purchase authorisation limit was \$50,000 whereas Mr Backhouse's was unlimited.
66. Council did not provide any document that recorded:
- its decision to procure strategic property advice;
 - why IPG was selected to undertake the work;
 - why no tenders or other quotes for the work were obtained prior to entering into the contract with IPG; and
 - why it had not complied with the tendering provisions of the Act.
67. There is no explicit evidence that shows the Council considered alternative providers of strategic property advice prior to deciding to engage IPG either initially or in the lead up to the retainer based contracts.

Failure to call for tenders

68. Section 55 of the Act requires that councils undertake a tendering process before entering into a contract for an amount exceeding \$150,000.00.
69. Section 55(3) provides limited exceptions to this general requirement.
70. Mr Backhouse, Mr Redman, Mr Wong and Mr Hazeldine have all indicated that they believed that IPG was on a "government contract" and thereby exempt from tendering.
71. Mr Redman indicated that the contract was exempt under section 55(3)(a) of the Act.
72. Section 55(3)(a) and (g) imposes limitations on such contracts, requiring that the contract only operate during the *specified* period, at a rate not exceeding the

specified rate and that the contract be made with a supplier who has been *specified* to supply the service.¹⁰

73. Council's own enquiries, undertaken on its behalf by HWL/O'Connor Marsden considered whether Council was entitled to rely on an exemption under section 55(3)(a) or (g) of the Act.
74. HWL/O'Connor Marsden reported that HWL had conducted an extensive search of various government contract registries and could find no evidence to support this understanding. The report attached emails from Local Government Procurement, NSW Procurement and the Commonwealth Department of Finance and Deregulation evidencing this conclusion.
75. Mr Backhouse provided statements from Mr Redman and Mr Wong. They state, in effect, that they informed Mr Backhouse that no tendering was required because of the existence of an applicable state government contract exemption. Mr Backhouse has submitted that his understanding, that tendering was not required, was based on what he was told by the two Directors. Mr Backhouse has indicated that he would otherwise have been of the view that tenders should have been called prior to entering into the retainer based contracts.
76. Mr Backhouse has submitted that he was content to rely on the verbal advice provided by Mr Wong and Mr Redman, that it was proper for him to do so, and that he acted in good faith in doing so.
77. While Mr Backhouse's submission has been noted, it was clearly incumbent on him to do more to enquire as to the nature of the "government" contract that was being relied upon as the basis of the exemption.
78. No probative evidence has been provided that IPG was party to a pre-existing arrangement that would exempt the proposed retainer contract from tendering. Nor has any evidence been provided indicating IPG represented itself as being party to such arrangement or that their services were being supplied to Council in accordance with the terms of such a contract.

¹⁰ Section 55(3)(g) of the Act provides that a contract for the purchase of goods, materials or services may be exempt from tendering where it is "*specified by the NSW Procurement Board or the Department of Administrative Services of the Commonwealth, made with a person so specified, during a period so specified and at a rate not exceeding the rate so specified*". Section 55(3)(a) is couched in similar terms.

79. It was incumbent on Mr Backhouse to satisfy himself that all of the relevant criteria for the contract to be exempt, as stipulated in section 55(3) of the Act, had been met. These were:
- that IPG was party to pre-existing arrangement specified by a procurement body i.e. that IPG was a "specified" supplier of the service being procured.
 - that the rates set out in IPG's proposal did not exceed the rates that had been specified by the relevant procurement body for that service.
80. There is no evidence that indicates that the second criterion was considered.
81. While it is apparent that Mr Backhouse was familiar with the tendering requirements and that he made some enquiry as to the availability of an exemption, his enquiries were manifestly inadequate given the value of the proposed contract and the terms of the contract. In particular, there is no evidence that he required any evidence of the existence of the government contract that was being relied upon or that he made any enquiry as to the rates that were specified in the contract that was purported to exist by Mr Redman and Mr Wong.
82. The evidence indicates that the Council did not comply with section 55 of the Act when entering into the retainer based contract with IPG on behalf of the Council.
83. The evidence indicates that neither Mr Backhouse or the staff that reported to him:
- made proper enquiries as to whether IPG was a party to a pre-existing arrangement with a procurement body that could give rise to an exemption from tendering
 - complied with the provisions of its *Purchasing and Tendering Guidelines*
 - made and/or retained proper records of the procurement process and related decisions
 - formally advised councillors of the intent or subsequent decision to enter into the retainer agreement with IPG.

84. Despite what was submitted by Mr Backhouse in his response, no evidence has been provided indicating that the elected Council was informed of the intention to enter into the retainer contract to obtain strategic property advice from IPG and/or the terms of the proposed contract.

The 2011 procurement

85. On 3 May 2011 Mr Elvy of IPG sent an email to Mr Backhouse seeking to renew their arrangement with the Council. The substantive content of the email is reproduced below:

David

As you know our engagement as council's property and infrastructure advisors will expire at the end of this month. We would encourage you to continue our arrangement for another 12 months, as we believe with the new government there will be a great deal of work required by us and your team in the promotion of the Interchange project. Also, the acquisition of Redmyre Road and development of a financially and socially beneficial "key worker" housing project. I would appreciate if you would confirm the continuation of our engagement at your convenience.

With Kind Regards,

John Elvy

Director

86. The General Manager responded to Mr Elvy that day. The subject line was "Re: Contract renewal". The substantive content of the email is reproduced below:

John on a same as basis!

Ok

David

87. Mr Elvy responded by email later that day, thanking the General Manager for the renewal. A copy of the emails has been provided in the appendices.

Appendix 19 - IPG 2011 Contract renewal emails – 3 May 2011

88. Mr Elvy sent his request at 11:23 am, Mr Backhouse sent his acceptance at 12:34 pm and Mr Elvy responded at 5:44 pm.

89. In responding to the draft report, Mr Backhouse indicated that the Director Technical Services, Mr Wong, had discussed IPG's performance and renewal with him and the Executive Group prior to Mr Elvy's request. Council has not provided any record evidencing any discussion as to the merit or otherwise of renewing the contract with IPG for a further twelve months. Nor is there any record of Mr Backhouse having sought or received any written advice in relation to the renewal.

90. As noted at paragraph 201, HWL/OCM provided the following information:

The General Manager has instructed us that he firstly, did not authorise the IPG retainer; and secondly, was unaware of the monthly payments and the quantum of funds expended to IPG.

91. This response is at odds with the evidence of Mr Backhouse's acceptance, on behalf of Council, of both the initial retainer proposal and the proposal of 3 May 2011 for a further 12 months.

92. Council, in a letter dated 3 October 2014 signed by the Group Manager, Organisational Performance, provided some further information about the renewal of 3 May 2011. The relevant extract of the letter has been reproduced hereunder:

Again, in relation to an email from the General Manager to IPG dated 3 May 2011, the former Director Technical Services, Patrick Wong, was responsible for the engagement and coordination of IPG. IPG were engaged on an annual basis. IPG had simply contacted the General Manager in May 2011, again as an escalation point, because IPG had not received any confirmation from the Director concerning their engagement. The General Manager followed up with the Director who informed the General Manager that the contract was to be renewed on the same basis. As a courtesy since an email had been sent to the General Manager, he merely responded to IPG forwarding on that message and the Director was expected to contact IPG to confirm their engagement.

93. As pointed out earlier, the assertion that Mr Wong was ultimately responsible for the engagement of IPG needs to be considered having regard to the value of the contract that was being entered into and Mr Wong's delegation. The contract had a value of \$264,000 inclusive of GST. Mr Wong's purchase authorisation limit was \$50,000.

94. Mr Backhouse has submitted that it is "*impractical, misleading and incorrect*" to report that he assumed responsibility for the engagement by, in his words, the "*mere signing of a contract*". As the Council official who signed the contract, Mr Backhouse bore the ultimate responsibility for ensuring the contract was being

entered into in accordance with the relevant statutory requirements and Council's own policies and procedures.

95. On 5 July 2011, Mr Demertze of IPG sent an email to Mr Wong attaching the emails of 3 May 2011 together with a letter confirming the further retention of IPG. The content of the email is set out below:

Dear Patrick,

As per our conversation yesterday, please find attached for your internal records the following:

- *Email from John Elvy to David Backhouse dated Tuesday, 3 May 2011 11:24 AM.*
- *Email from David Backhouse to John Elvy dated Tuesday, 3 May 2011 12:34 PM.*
- *Letter to Strathfield Council confirm our role from 1 June 2011 unto 31 May 2012.*
- *If you require any further information, please do not hesitate to contact me.*

Regards,

Chris.

96. A copy of the letter confirming IPG's role has been provided as an appendix.

Appendix 20 - IPG Letter of 5 July 2011

97. The letter of 5 July 2011 states, in part, *"I write to you outlining the various tasks International Property Group are currently working on, in conjunction with and for Strathfield Council."*
98. IPG's letter, as well as outlining the tasks that IPG was working on at that time, also reiterated the terms of their engagement, including the monthly retainer. The letter did not refer to an additional fee being payable for work related to the coordination of the sale of a Council property. The letter also indicated that IPG *"would provide monthly reports in a format that you require"*.
99. Again, the evidence indicates that Council staff did not:
- comply with section 55 of the Act
 - comply with the provisions of Council's Purchasing and Tendering Guidelines

- record the reasons for determining to re-appoint IPG
- advise councillors of the decision to enter into the retainer agreement with IPG.

100. There is no probative evidence that anyone other than Mr Backhouse authorised the engagement and agreed to the terms with IPG. While Mr Backhouse has submitted that the decision was a collegiate decision, the evidence remains that it was Mr Backhouse who provided Council's acceptance of IPG's offer.

Ongoing retention of IPG

101. IPG's letter to Council of 5 July 2011 indicated their arrangement with Council was to continue for a further 12 months from 1 June 2011 to 31 May 2012, when it was to be *"then reviewed, or cease upon completion of tasks to us, which ever is sooner."*
102. The Council did not produce any records that indicate IPG sought a renewal or extension of the arrangement beyond 31 May 2012. Notwithstanding this, Council records indicate that the monthly payments to IPG continued until June 2013.
103. Council appears not to have had an internal control in place to alert it that the arrangement with IPG was due to be reviewed on or before 31 May 2012.
104. In responding to the draft report, Mr Redman referred to a report to Council's meeting on 2 May 2012 and suggested that it provides the basis for continuing to retain IPG from June 2012.
105. The report sought a budget allocation of \$150,000 in relation to the Strathfield Town Centre project. The report did not provide any indication that there was an existing retainer agreement with IPG, nor did it indicate an ongoing retainer agreement.

Council's payment procedures

106. The first two retainer payments were authorised by the Director, Corporate Services. Subsequent monthly payments were then generally authorised by the then Director, Technical Services and, subsequently, by the then Acting Director Technical Services.

107. Council adopted the following process:

- After receiving an invoice from IPG, a hand written purchase order was completed (but not issued to IPG)
- Payment would be authorised
- The order and the invoice would be given to the Finance section for payment.

108. In responding to the draft report, Mr Backhouse wrote

... after receiving an invoice from a contractor, payment is only authorised if in the opinion of the authorising officer the works have been undertaken to the satisfaction of the authorising officer and within their financial delegation. If the works have been satisfactorily completed, the invoice and order [sic: are] submitted to Finance for payment.

109. In a separate statement provided by Mr Wong and attached to Mr Backhouse's response, Mr Wong wrote:

Both David Hazeldine and I managed all consultants and contractors engaged by our department including IPG. I would only sign a purchase order and pay an invoice when I was satisfied the contractor had done the required work and this was the case for IPG.

110. These statements do not recognise the fact that IPG was paid in advance.

111. Mr Wong, the former Director Technical Services, was asked why the Council did not raise a purchase order for the total amount to be paid to IPG pursuant to the contract. His response initially was that he had *"no explanation. That was the process that we followed at the time."* He was then asked whether there was anything to stop him raising an order for the \$240,000. His response was that no one would know what to do with it, that it would confuse people, and the finance people would just respond with *"what did you do that for?"*

112. In his response to the draft report, Mr Redman provided the following extract from Council's letter of acceptance:

"Council accepts your offer to engage International Property Group on a monthly retainer of \$20,000 in lieu of a daily fee or a project by project arrangement, for a period of 12 months then reviewed or cease upon completion of the tasks assigned to IPG, whichever is the sooner".

113. He then submitted:

As the engagement may cease upon completion of the tasks assigned it would have been inappropriate to raise a purchase order for the total potential annual expenditure.

114. Mr Hazeldine's response generally mirrored this view.

115. Despite Mr Redman's and Mr Hazeldine's suggestion, it is clear that the agreement contemplated a period of 12 months with review or cessation thereafter.

Authorisation of expenditure

116. The investigation has considered whether the elected Council authorised the expenditure on the IPG retainer payments.¹¹ That is, whether the money required to pay IPG was included in the relevant annual budgets adopted and/or amended by the elected Council, and if so, whether the funds had been voted prior to Council entering into the retainer contracts with IPG.

117. In relation to the 2010/2011 financial year expenditure, Council accepted IPG's proposal (to be engaged on retainer for 12 months) on 17 May 2010, by way of a letter from the General Manager to IPG. This acceptance gave rise to a liability for expenditure for the following financial year (2010/2011) of \$220,000. At this time, the elected Council had not adopted its management plan or budget for the 2010/2011 financial year and it had not voted to provide the necessary funds for that financial year. It did not adopt its budget until June 2010.

118. Council accepted IPG's further proposal on 3 May 2011, by way of an email from the General Manager to IPG. This gave rise to a liability for expenditure for the 2011/2012 financial year of \$220,000. At this time, the elected Council had not adopted its management plan or budget for the 2011/2012 financial year and it had not voted to provide the necessary funds for that financial year. It did not adopt its budget until June 2011.

119. Mr Backhouse's repeated contention in regard to this is set out hereunder:

¹¹ The *Regulation* stipulates that a council, or a person purporting to act on behalf of a council, must not incur a liability for the expenditure of money unless the elected Council, at a council meeting, has approved the expenditure, and has voted the money necessary to meet the expenditure. [Clause 211 of the Regulation]

*I again contend that both the elected Council and Executive team approved and directed the engagement of IPG. Council has budget workshops in March and May each year. **The expenditure was discussed and approved within these workshops.** [emphasis added]*

120. The claim that the elected Council could approve or direct the expenditure (or make any decision for that matter) at a “workshop” fails to recognise that the elected Council can only make decisions at a duly convened meeting of the Council.
121. There is some evidence that indicates there was no provision for the IPG expenditure when the Council adopted its budget for 2011/2012, notwithstanding that a contract had been entered into with IPG. Ms Jodie Bourke, Council’s then Finance Manager and *responsible accounting officer* provided the following statement regarding the 2011/2012 financial year expenditure:

The expenditure on the IPG retainer was certainly not in the budget for 2011/2012. The Executive was aware of this. I think the expenditure would have been listed as a significant variation in Note 16.

I think the expenditure was included in the budget for 2012/2013. The amount of \$240,000 was something I was mindful of as having to be included. I recollect having discussed with Neale as to whether we going to continue paying them and if we were, that we needed to put it in the budget.

122. A full copy of Ms Bourke’s statement has been provided as an appendix. Both Mr Backhouse and Mr Redman submitted that Ms Bourke’s statement in relation to this matter is incorrect.

Appendix 21 - Statement - Ms Jodie Bourke

123. Ms Bourke’s statement is consistent with Note 16 of the Council’s 2011/2012 financial statements, which indicates that the Council spent \$240,000 more on “Strategic Planning” than it had originally budgeted for in that financial year, and that is spent \$254,000 more on “Legal - Planning costs” than it had originally budgeted for. These variations were considered to be material.
124. While Note 16 of the Council’s 2011/2012 financial statements lends credence to a conclusion that the totality of the funds required to pay IPG were not

included in the original budget, there is no probative evidence beyond Ms Bourke's statement as to the Executive Group's awareness of this.

125. Council was invited to respond to the allegation, that Council, or a person purporting to act on behalf of Council, had incurred a liability for the expenditure on IPG services in the 2011/2012 financial year, without having the authorisation required pursuant to clause 211 of the Regulation.
126. Council responded on 3 October 2014, advising that "*Council considers that the expenditure incurred in relation to services provided by IPG had at all times been approved by Council*" and on that basis, denied that there had been a breach. A copy of Council's response is provided as an appendix.

Appendix 22 - Council response of 3 October 2014

127. It might be noted that the Council response indicates that the Council ultimately allocated \$495,100 for paying property consultants in the 2011/2012 financial year.
128. Council's response confirms that the purported budget for the IPG retainer was not adopted until 23 June 2011. This is seven weeks after Mr Backhouse entered into the second retainer contract.
129. The evidence leads to the inevitable conclusion that at the time Mr Backhouse entered into each of the two retainer contracts with IPG, the Council had neither approved the expenditure nor voted the money necessary to meet the expenditure. The evidence indicates that Mr Backhouse incurred the liabilities to pay IPG in breach of clause 211 of the *Local Government (General) Regulation 2005*.
130. In the case of Mr Backhouse, while it may be that he was not aware the totality of the funds required to pay IPG funds were not included in the original budget for 2011/2012 and/or that he was of the belief that the funds were included, it remains the case that he entered into the contract prior to the budget being adopted by the Council.

Further commentary in regard to the apparent breach of section 55 of the Act

131. While Mr Backhouse has, in effect, denied responsibility for IPG's initial retainer, the evidence clearly points to his direct involvement. Further, there is no doubt that Mr Backhouse agreed to the extension of IPG's retainer.

132. While Mr Backhouse has submitted in his response to the draft report that he was directed to retain IPG, for the reasons outlined previously, such a direction was of no force or effect.

Audit queries in relation to IPG

133. Ms Bourke indicated in her statement that, in 2011, Council's auditor queried IPG's engagement, but had subsequently advised her that they had located a September 2010 report to Council which referred to the sale of Matthews Park and which indicated that associated costs would be incurred.¹² It was her understanding that the report satisfied their query in relation to the matter at that time. The relevant section of her statement has been reproduced hereunder:

75. IPG were used in relation to the sale of Matthews Park. Council's auditor raised a query 19 October 2011 in regard to whether there was any Council minute showing IPG engagement. I was subsequently advised by the auditors that they had located a September 2010 report to Council which referred to the sale of Matthews Park that indicated that associated costs would be incurred. I understood that this satisfied their query in relation to the matter at that time.

134. Ms Bourke also indicated in her statement that, in 2012, Council's auditor queried IPG's engagement. The relevant section of her statement has been reproduced hereunder:

79. In May 2012, Council's auditors were undertaking an interim audit and again queried whether there was a Council resolution pertaining to IPG's engagement; they observed that the voucher for payments to them just says "property services". On 15 May 2012 I sent an email to Neale Redman asking the question. I can't recall receiving a specific response from him.

135. The investigators asked the Council to supply a copy of the email referred to in Ms Bourke's statement as it had not been produced by the Council in response to the *Notice of Direction for Production of Documents*.¹³ Council subsequently provided a copy which had the subject line "Auditor Queries". The content of the email that pertains to IPG follows:¹⁴

Neale,

As discussed, the auditors have a couple of outstanding queries:

¹² As noted earlier, Ms Bourke was Council's former *responsible accounting officer*; a full copy of her statement is available in the appendices.

¹³ Mr Redman subsequently explained that the reason the email had not been supplied in response to the Notice was that email had not been registered in Council's records system.

¹⁴ The email also dealt with another query which is not relevant to the terms of reference for this investigation.

1. *IPG – the invoices say “Property Services for the month”: Is there any report on the current work that is being done? Is there a resolution of Council (tender or other) for their engagement?*

136. Council has not provided any contemporaneous record indicating there was a response to this email. However, Council did provide the investigation with a copy of a file note made by Neale Redman on 26 August 2014 in which he recorded that he verbally responded to Ms Bourke.

137. The relevant content of Mr Redman’s file note is reproduced hereunder:

1. *IPG*

- *The engagement of IPG is in accordance with a State Government Contract*
- *IPG have been requested to itemize the matters they are currently dealing with in their invoice to Council. (IPG invoices from July 2012 included itemization of matters with which they were dealing).*

138. Mr Backhouse has submitted that he was unaware of the auditor’s queries. There is no evidence that the queries were brought to his attention or that any Council officer raised with him concerns as to the Council’s arrangements with IPG.

Accounting for the IPG expenditure

139. Council records indicate that the IPG related expenditure was allocated to six different account numbers as shown in the following table provided by Council:

Appropriation of IPG Expenditure

Account #	Description	Amount
20257-007	Corporate -Property expenses (Incl. Valuations)	24,000.00
20403-007	Mainstreet Master Planning	33,000.00
20566-008	Sale of Matthews Park - Legal Expenses	20,000.00
20566-123	Sale of Matthews Park - Contractors	272,937.50
20624-007	Strathfield Town Centre Project - Consultant	66,000.00
40699-007	Strategic Planning - Property Consultants	484,000.00
Total		899,937.50

140. According to a file note that was supplied with the table, the job number for the sale of Matthews Park was also used to allocate the expenditure attributed to work IPG did on the acquisition of 69 Redmyre Road, Strathfield.

What services did IPG provide?

141. The terms of reference for the investigation required consideration of whether there had been serious and substantial waste of local government money in relation to the procurement and expenditure on services from IPG.

Overview on the Services Provided

142. When Council responded to the Notice of Direction for Production of Documents, it provided a draft working document headed "IPG Projects and Tasks". A copy the document has been provided as an appendix.

Appendix 23 - Council listing of IPG Projects and Tasks

143. The projects and tasks detailed in the document are generally consistent with those projects and tasks identified by the investigation, excepting there is no reference in the document to IPG's work on the acquisition of 69 Redmyre Road, Strathfield or its work on the development of an Asset/Property Register.
144. In responding to the draft report, Mr Hazeldine provided more comprehensive details of the work undertaken by IPG. Extracts from Mr Hazeldine's submission has been provided as an appendix.

*Appendix 24 - David Hazeldine – Submission (Extracts)*Development and lodgement of a grant application/funding request

145. The initial IPG engagement in 2009 was for the development and lodgement of a funding proposal related to the development of a bus/train interchange.

146. The decision to seek the funding and to seek external assistance to prepare funding proposals was not unreasonable.
147. The investigation's review of Council records indicates that a submission was prepared and lodged with input and assistance from IPG and another consultant engaged and paid for by Council. IPG clearly had a key role in coordinating the development of the proposal and undertook substantial work in its preparation and lodgement.
148. While the application for the grant was not successful, Council was clearly satisfied with IPG's work on the proposal. Mr Backhouse authored a reference dated 1 March 2010 recommending IPG for similar types of work.

Updating the Funding Submission for Town Centre Bus/Rail Interchange

149. After being appointed on the retainer, IPG was involved in coordinating and assisting with updating the initial funding submission so that it could be lodged with Infrastructure Australia. A revised submission seeking funding from Infrastructure Australia was lodged but no funding was received.
150. It is also noted that in May 2011 IPG coordinated the lodgement a third funding submission, being a second submission to the NSW Government. No funding was received.

Ongoing promotion of the interchange project

151. When Mr Elvy of IPG sought renewal of the retainer arrangement on 3 May 2011 (see paragraph 223), he referred to IPG's role in promoting the interchange project. There is evidence that IPG continued to promote the interchange proposal to Government over the course of their engagement.

Advice on the development of the "Parramatta Road Corridor"

152. Council's documents refer to IPG's work on what was described as the "Parramatta Road Corridor", where Council owned a number of properties.
153. IPG had proposed assisting Council with a "key worker" affordable housing development.
154. On 31 March 2010, Mr Elvy of IPG sent an email to Mr Backhouse with the subject line "Strathfield properties" and which referred to a number of properties owned by Council. The email stated in part, that *"Confidentially, you and the Mayor would like my company, to prepare a presentation for the Councillors, outlining the highest and best use of those properties"*.

155. The properties referred to in the email included those nominated by Council for possible development of affordable housing as well as Matthews Park, which was subsequently sold by Council.
156. In his email, Mr Elvy indicated that he could prepare *"a proposal for this work to be carried [sic.] and the fees associated with this brief"* and that he *"would need 2 weeks to collate, research, analyse and prepare a feasibility for these properties"*.
157. The investigation identified evidence of two presentations being provided by IPG in relation to the development of affordable housing. IPG also organised a Councillor visit to Brisbane (which ultimately did not occur due to inclement weather).
158. Council appears not to have taken further action in relation to this matter.

Work on the acquisition of 69 Redmyre Road, Strathfield

159. The investigation identified evidence that IPG acted as a buyer's agent for Council in relation to the acquisition of a property at 69 Redmyre Road, Strathfield.
160. Council does not appear to have been aware of the requirement¹⁵ for there to be an agency agreement with IPG. No evidence was provided indicating that such an agreement was entered into.
161. IPG's work on the Redmyre Road acquisition appears to have involved:
- communication between IPG and a representative of the then owners of the property, to ascertain their willingness to sell and, if so, their expectations as to terms;
 - a discussion with a local real estate agent to form a view about what Council might have to pay to acquire the property and conveying this view to the Council;
 - provision of some limited advice to Council about the matter.
162. IPG undertook tasks in regard to the Redmyre Road acquisition that would otherwise have fallen to Council to perform. The investigation has concluded

¹⁵ Property Stock and Business Agents Act 2002 - Division 1 of Part 4.

that the quantum and nature of these tasks was not so significant or specialised that the Council needed to use an intermediary in the way that it used IPG.

163. It is not apparent that the work performed by IPG in relation to 69 Redmyre Road, Strathfield resulted in the Council being able to acquire the property.¹⁶

164. The investigation has concluded that the expenditure (as part of the overall retainer) on IPG to undertake this task was unnecessary and was a waste of local government money.

Role in the Sale of Matthews Park

165. IPG provided services in relation to the disposal of a Council property known as Matthews Park. The services appear to have encompassed:

- providing advice on the appointment of real estate agents (obtaining expressions of interest);
- providing a summary of the expressions of interest received and providing a recommendation on the appointment of two agents;
- reporting on the marketing of the property on Council's behalf;
- procuring site surveys;
- contact with NSW Fire Brigades and Roads and Maritime Services in relation to their views on future development of the site;
- advice to Council on the assessment of the offers that were made and acceptance of one of the offers;
- providing further advice to Council during the contractual phase of the transaction;
- monitoring the transaction until completion.

166. Council employed a Procurement Coordinator and had policies and procedures in place which would have allowed it to call for and assess expressions of interest from commercial real estate agents. Given this, it is not apparent why it was necessary for the Council to engage IPG to undertake this process. It is considered that Council's staff could have retained the experts providing the site surveys.

¹⁶ After commencing compulsory acquisition procedures, Council ultimately did acquire the property in 2014 (without the assistance of IPG).

167. Council also appointed commercial real estate agents to assist with the disposal of the property and instructed one of the members of its legal panel in relation to the sale. Given that these parties had both the remit and presumably the capacity to act in Council's best interest; it is not apparent to us why it was necessary for the Council to incur additional fees for IPG's services in regard to the sale.
168. Notwithstanding observations that go to whether the Council needed to engage IPG in regard to the sale of Matthews Park, the investigation's review of the documents provided by Council indicates that IPG was actively engaged in directing the marketing and in the subsequent sale of the property. It appears to have worked diligently to assist Council achieve its objective of disposing of the land.
169. If IPG had not been engaged in relation to Matthews Park, the process may have required more time, effort and attention on the part of one or more Council officers.

Development of an Asset Register

170. IPG indicated to Council that it had expertise in the development of asset registers and there is evidence that it encouraged the Council to avail itself of this service as part of work undertaken in return for the retainer payments.
171. There is some evidence that IPG sought and received some information from Council about Council's property assets and that it suggested work that could be undertaken to develop a new Asset Register.
172. Council already had an Asset Register. Mr Redman submitted that IPG's task was essentially directed towards a review of Council's assets to determine if there were any opportunities which could be realised through the rationalisation of Council assets.
173. The investigation did not find any evidence of the Council having received a new or updated asset register. It appears that, while IPG was willing to assist Council in preparation of the register, Council failed to provide the requisite information and instructions to enable the project to proceed.
174. Council's failure to effectively pursue this project, while continuing to pay IPG's retainer, represents a serious and substantial waste of Council resources.

Provision of advice and services in relation to the furtherance of the Strathfield Town Centre Project

175. The Council has had plans for the redevelopment of the Strathfield Town Centre which dated back to at least 2006.
176. The project appears to have gained some new impetus following a "Strategy Review Meeting" on 22 March 2012. No minutes were provided of this meeting but it appears from related records to have involved the Council, IPG representatives and a legal firm engaged by the Council to assist with the project.
177. Council records indicate that, subsequent to that meeting, IPG provided the Council with advice and services in relation to the furtherance of the Strathfield Town Centre, including attendance at meetings, contact with owners, and contact with other service providers, and the provision of advice to Council.
178. Notwithstanding the evidence that IPG provided Council with these services, at the time that Council had ceased using IPG, the project remained largely unfunded, there was no agreement with the other property owners and there was no application for the project to proceed as a *public private partnership*.
179. While Council utilised services provided by IPG in relation to the Strathfield Town Centre project, the investigation did not separately examine the merit of the project.

Was there serious and substantial waste in relation to expenditure on IPG?

180. Council was responsible for ensuring that it received value for money and tangible outcomes in return for its expenditure on services from IPG.
181. While it is clear that IPG was willing to, and did, in some circumstances, provide Council with services pursuant to the terms of its engagements, the Council now has little to show for the \$899,937.50 it spent on procuring services from IPG.
182. The initial expenditure of \$33,000 associated with the preparation of the funding submission was relatively small and finite and it is apparent the submission was prepared and lodged. As such, no finding of serious and substantial waste in relation to this expenditure is warranted.
183. On one view, the initial expenditure was wasted given the Council did not receive the funding that was being sought. However, this view must be qualified

by observing that it is a view formed in hindsight. It also fails to acknowledge that the funding submission may have contributed to raising awareness of the Strathfield Town Centre project and this in turn may ultimately bear fruit.

184. Council has little to show in tangible and lasting outcomes for the \$760,000 paid to IPG pursuant to the monthly retainer arrangement, other than a heightened profile for the Town Centre project and the completed sale of Matthews Park. Council also paid IPG an additional fee of \$30,937.50 for the completed sale of Matthews Park.
185. Council failed to properly scope and specify the services to be obtained from IPG pursuant to the retainer arrangements and, as a consequence, it was ill-equipped to ensure that the money paid to IPG represented real value to Council.
186. These are the matters that are fundamental to the finding that it was likely that there was serious and substantial waste in relation to the expenditure on IPG.
187. This can be largely attributed to inadequate controls during entry into the retainer arrangements, lack of proper procurement processes, lack of diligence and a failure to review whether Council was obtaining value for money.
188. The use of a tender process to procure the services would have gone a long way to ensuring Council minimised the risk of waste. Council would have had to specify its intended outcomes and tested the market. Its processes would have been open and transparent and, ultimately, reviewed by the elected body.
189. The investigation carefully considered the comments and submissions made by Mr Backhouse and other Council staff, to the effect that Council received excellent value for money from its arrangements with IPG. Having considered all of the evidence available to it the investigation's conclusion remains that it is likely that there was serious and substantial waste in relation to Council's expenditure on IPG.
190. As indicated earlier, no adverse inference should be drawn from the content of this report as to the quality of the work undertaken by IPG, the capability or performance of its representatives/employees and/or its willingness to provide Council with services in return for the payments it received.
191. In this regard, there is evidence that suggests that IPG acted promptly on any instructions it received from Council and further that it endeavoured to

encourage the Council to make effective use of its services. An example of this is provided in the appendices (Appendix 25).

Appendix 25 - Email from IPG to Council – 22 August 2011

Role of the elected Council

192. Mr Backhouse and other senior staff submitted that the elected Council were aware of the terms of IPG's engagement, the services that were being received and the expenditure that was being incurred.
193. In their responses to the draft report, both Mr Backhouse and Mr Redman emphasised that Council was regularly provided with information regarding expenditure in connection with services provided by IPG. Mr Backhouse provided statements from 2 former Mayors and a deputy Mayor to support this view.
194. While this may have been the case, the investigation has not been given any documents that inform councillors that a retainer agreement had been entered into or any documents setting out the terms of such an agreement.
195. It is concerning that such a significant level of expenditure was incurred by Council without attracting the attention of the elected Council as to how the services were procured and/or what was being received. However, in expressing this concern, it must be acknowledged that it remains unclear as to what information was provided to the elected Council.
196. The provision of this investigation report to the elected Council will allow it to consider this matter with the benefit of a comprehensive analysis.

Responses to the Draft Report – Additional comments

197. Mr Backhouse submitted that he did not solicit nor unilaterally engage IPG, that he acted in good faith and that he based his decisions *"on the considered recommendations from my senior officers, in particular the Directors."*
198. The available evidence indicates that while other Council officials were aware of and involved in the engagement of IPG, the operative decisions to engage IPG were made by Mr Backhouse.

3.2 Procurement of legal & associated professional advice & expenditure on these services

199. The terms of reference required the investigation to consider whether there was maladministration and/or serious and substantial waste of local government money in relation to the Council's procurement of and/or expenditure on legal and associated professional advice (legal advice) since 1 July 2011. A chronology of events and documents considered relevant has been provided as Appendix 20.

Appendix 26 - Chronology – Legal & associated professional advice

Council's procurement of legal & associated professional advice

200. The policy and procedural framework governing Council's procurement of legal advice was reviewed. As noted earlier in the report, Council has adopted a *Legal Practice Policy* and a related procedure. These documents, when read together with the Council's *Procurement Policy* and *Purchasing and Tendering Guidelines* provide a reasonably sound basis for procuring legal advice. Given this, it was relevant to consider the degree to which Council officials acted in a way that was consistent with the aforementioned framework, this being a factor in determining if there had been maladministration.

201. Council's *Legal Practice Procedure* refers to the use of a panel of external legal advisors, this panel having been appointed "*on the basis of a preferred supplier process*". The appointment of a panel of preferred legal services providers is at the core of how the Council procured legal advice.

Appointment of a legal panel

202. Council, at its meeting on 1 March 2011, resolved to appoint a panel of six legal firms. The panel was then used as the main source of external advice in the period that was subject to investigation i.e. from 1 July 2011. The investigation examined the process by which these firms were selected.¹⁷

203. The selection process commenced with a resolution of Council, on 4 May 2010, authorising the General Manager to invite *Expressions of Interest* for the provision of legal services to Council for a period of three (3) years. The report

¹⁷

It is acknowledged the decision to appoint the panel was made before 1 July 2011.

recommending this course of action provided the following advice to the Council:

Council requires the assistance of external legal service providers to carry out its statutory functions and to meet its legal obligations effectively and efficiently. In particular, legal services are required for the following purposes:

- Advice in relation to local government, planning, environmental, property, employment, leases/licences, and other matters.
- Representation in courts and tribunals such as the Land and Environment Court.

A new EOI invitation should now be made for appropriately qualified and experienced legal advisers, following which a panel of legal advisers will be appointed.

It is recommended that a panel of four to five external legal service providers be appointed. It is proposed that Council retain the discretion to appoint advisers, or to seek expertise outside the panel, as and when required or appropriate.

The proposed appointment period is 3 years.

204. The Council placed an advertisement inviting expressions of interest (EOIs) on 20 July 2010; the closing date for submission of EOIs was 20 August 2010. Council records indicate 18 expressions of interest were received.
205. An information report on the EOI process was provided to the Councillors in December 2010. A copy of that report was obtained. It advised the Council that 6 firms had been shortlisted and that a *"Further detailed evaluation of the shortlisted firms will be undertaken"*. Council records are not available to substantiate that the EOI Panel completed the *"further detailed evaluation"*.
206. A report on the outcome of the EOI process was considered by the Council at its meeting of 1 March 2011. The report was authored by Mr Geoff Baker¹⁸ and recommended that all of the shortlisted firms be placed on the panel.
207. The report advised that *"An EOI Review Panel was established to review all submissions"*. The report does not indicate who was on the panel. Council does not have any record of who was on the panel.
208. The report advised the Council that the EOIs were assessed against 10 selection criteria. Council records are not available to substantiate that such an assessment occurred.
209. The only record of the EOI assessment held by Council is a one page annotated table detailing different hourly rates and a second page of hand written notes. The record manifestly lacks required details, is undated, unsigned and there is no indication as to who made the record. The second page of the record has been reproduced on the following page.

¹⁸

Mr Baker is employed by the Council as a solicitor

Record of evaluation of Expressions of Interest (Legal Panel)

Currently panel of 5. - 2-3 yrs
 Murdersen, Maddox, Houston Dawn O'Gara,
 Wilshire Webb, Crown Solicitors.

Houston - very happy with
 at Burwood - close to Burwood Court

Wilshire Webb. very good with planning.

Murdersen: haven't paid for some time.
 large fee

Maddox - quick to respond - GARA - Code of
 Conduct. Higher price.

- Crown -

+ H&L Elsworth.

+ Matthews & Big
 small

210. Mr Baker provided a statement in relation to his knowledge of the process which has been reproduced hereunder:

10. I authored a report that considered by the Council on 1 March 2011 pertaining to the expression of interest process which recommended the appointment of 6 firms to Council's legal panel.
11. I recollect evaluating the expressions of interest that were received by Council. I recollect that Carol Chapman, Council's Procurement Coordinator and Melanie Graetz, who was the then Group Manager Corporate Services, also evaluated the submissions. We evaluated them separately and then met as an evaluation panel.
12. I acknowledge that the report authored by me on the legal panel expression of interest process for consideration at the meeting on 1 March 2011 indicates that 6 firms were shortlisted for further evaluation, that the Council was advised of this in December 2010 and that ultimately 6 firms were recommended for appointment to the panel. I cannot recall as to whether there was any further evaluation of the firms between December 2010 and 1 March 2011 or recall as to what the rationale for such further evaluation was.
13. Ms Monica Kelly had no involvement in the consideration of the expressions of interest for appointment to the legal panel.
14. I had no prior experience in undertaking a procurement process for a government body prior to my involvement in the expression of interest process for appointment to the legal panel.

211. Mr Baker stated that Ms Carol Chapman was a member of the panel.¹⁹ The relevant section of Ms Chapman's statement has been reproduced hereunder:

36. I have no immediate recollection of the 2010 procurement, expression of interest process for appointment to a panel to provide Council with legal services.

212. The expression of interest process took nearly 10 months to complete. It took over six months from when the EOIs were required to be lodged till the matter was completed. The investigation enquired as to the reason/s why the process took this time. It was suggested by Mr Redman, when he was interviewed, that this in part, may have been a consequence of the Council's then solicitor (who

¹⁹ Mr Baker also provided the name of another employee who was a member of the panel. This person no longer works for Council. A statement was not obtained from this person.

authored the original report to Council) having resigned. While such a resignation might reasonably explain some of the delay, it does not explain why the procurement process took as long as it did.

213. When Mr Redman was interviewed, he was also asked about the apparent lack of records of who assessed the EOIs. His response was:

Look, it certainly would be preferable if we did have some documentation that identified who was - who was involved in the panel. I haven't made inquiries along those lines; I if I did, I would probably be able to ascertain that but the fact that there's no documentation, yes, ideally there - that ought to be documented.

214. While the calling for expressions of interest to establish a panel of preferred suppliers was a reasonable and proper action having regard to the Council's *Purchasing and Tendering Guidelines*, the time taken to complete the process and the failure to either make or retain records of the evaluation process was not.

2014 tender process

215. On 5 August 2014 Council resolved to appoint a new panel of 5 firms for a period of 1 year. The use of this new panel has not been subject to investigation.

Allocation of work to members of the panel

216. The allocation of work to members of the legal panel is governed by Council's *Legal Practice Policy* and the associated procedure, and Council's *Purchasing and Tendering Guidelines*. One of the stated objectives of the policy is to:

Manage Council's legal panel by allocating and managing matters, ensuring accurate and thorough reporting of matters and billing are all in accordance with the panel firms' offers of service and Council's policies.

217. Council's expenditure records indicate that most of Council's external legal advice was obtained from members of the panel of preferred suppliers.

218. The *Legal Practice Procedure* (the Procedure) detailed how panel members were to be engaged.²⁰ Where Council staff considered that an external legal

²⁰

See Clause 2.7 of the Strathfield Council *Legal Practice Procedure*

firm needed to be engaged, they were required to submit a written request to the legal team, who would then “*determine the best course of action*”.

219. The Procedure allocated responsibility for the engagement of external firms to Council’s Principal Solicitor, who was required to choose a firm from the panel, seek a cost estimate and details of who would be managing the matter and if satisfied, issue instructions on Council’s behalf.²¹ The Procedure detailed criteria that were to form the basis of the decision as to which panel member was to be used. The criteria were:

- legal expertise relevant to the issue,
- previous experience relevant to the issue,
- the legal team’s work load,
- value for money, and
- availability.

220. The Council was required to produce all records pertaining to its procurement and expenditure on legal services since 1 July 2011. While these records indicated who the services were obtained from, they contained scant information as to why decisions were made to seek external advice and why a given panel member was instructed in a given matter.

221. In responding to the draft report, Mr Backhouse and Mr Redman referred to a loss of records affecting the legal department in the period up to May 2013. Mr Backhouse’s submission indicates that the records that were lost were emails generated or received by the Council’s former Principal Lawyer, which had been deleted. It is not known what information was contained in the records that were not able to be provided by the Council.

Requirement to seek multiple quotations and to tender

222. The Council’s *Purchasing and Tendering Guidelines* provided that staff were not required to seek quotations from firms who were on a preferred supplier list provided “*that the use of Council preferred supplier is limited to \$10,000 for any one item of service*”. Where this amount was to be exceeded and the estimated

²¹ The Procedure did allow the legal team to authorise a suitably delegated staff member to instruct a panel firm to provide advice; the decision as to whether advice was provided internally or sourced externally was one for the Principal Solicitor, in conjunction with the Director, Corporate Services and/or the General Manager.

expenditure was less than \$150,000, three written quotes were required.²² Tendering was required for matters which were expected to involve expenditure of \$150,000 or more.

223. The investigation found no evidence that Council officers sought multiple written quotations for any legal matters, notwithstanding that Council had been given fee estimates that indicated that the likely expenditure could exceed \$10,000. Nor did the investigation find evidence that any exceptions to the requirement to get multiple quotes in such circumstances was ever formally authorised. The general lack of records to demonstrate this indicates a lack of transparency and poor administrative practice.
224. In responding to the draft report, Mr Backhouse indicated that the Council generally does not obtain multiple quotes unless the initial cost-estimate is considered not to be satisfactory. This approach ignores Council's policy.
225. The investigation identified one instance where the legal firm provided a fee estimate of between \$100,000 and \$250,000, for legal advice in relation to the Town Centre Project. The procurement of legal advice in relation to this matter was neither the subject of tender nor otherwise exempt from such a requirement.
226. On 16 August 2012, the legal firm instructed by Council on the ACU litigation provided an update. Their letter ended:

Given the real and [sic.] likelihood that the ACU will take all steps to challenge each of Council's actions and the Proceedings generally, it is appropriate that Council allow and budget for legal costs including disbursements (experts, Counsel's fees and various filing fees) of up to \$400000. We are extremely cognisant of the large expenditure for legal fees and please rest assured that we shall leave "no stone unturned" in advancing Council's best interests.

227. In responding to the draft report, Mr Redman noted that fee estimate included legal costs and disbursements, including traffic and planning, as well as barrister's fees. In doing so, he expressed the view that it was anticipated that

²² Clause 5.10 of the 2012 version of the guidelines provided a written exception to be granted in certain circumstances by the relevant Director or the General Manager. The exceptions allowed in the 2007 version appear to be confined to "genuine emergencies".

the costs for any individual provider would not exceed the tendering threshold of \$150,000. No basis for this conclusion was given.

228. At the point where Council received advice that the costs could exceed \$150,000 (and in this case, \$400,000), it was incumbent on the Council to consider its tendering obligations. Council has not provided any evidence that it considered this issue. No tender process was undertaken.

229. Section 55(3)(i) of the Act may release a council from the obligation to tender in limited circumstances. In order to do so, there must be extenuating circumstances. If a council is so satisfied then it must pass a resolution (which states the reasons for the decision) that a satisfactory result would not be achieved by inviting tenders. Council has not provided any evidence that it considered this issue.

Expenditure on legal and associated professional advice

230. The Council has spent over \$2,000,000 on legal expenses in the three years since 1 July 2011. Expenditure in 2013/2014 was more than 4 times as much as was incurred in 2010/2011.

231. A table has been prepared to show how much the Council spent on external legal services for the last four financial years according to its annual financial statements.

Table: Annual Legal Expense 1 June 2010 to 30 June 2014

Type of Legal Expense	2010/2011	2011/2012	2012/2013	2013/2014
Planning & development	\$133,000	\$447,000	\$547,000	\$435,000
Debt Recovery	-	\$70,000	\$58,000	\$90,000
"Other"	\$62,000	\$19,000	\$170,000	\$342,000
TOTAL	\$195,000	\$536,000	\$775,000	\$867,000
% change from previous year	51%	175%	45%	12%

232. As shown in the table, the Council's legal expenditure more than doubled in 2011/12, compared to the previous year and further increased in the following two years.

233. While the amounts reported by Council indicate that the year on year increase from 2012/2013 to 2013/2014 was a more moderate 12%, it should be noted that Council inadvertently failed to include \$71,652 of legal expenditure in the total that it reported for 2013/2014. It also included non-legal expenditure of

\$25,526.50.²³ Its actual legal expenditure for 2013/2014 was \$913,532.48, which indicates that the expenditure increased by 18%.²⁴

234. Members of Council's legal panel were paid a total of \$1,650,571.92 from 1 July 2011 until 4 March 2014 (the date the investigation was authorised). Payments to one member of the panel represented 80% of this expenditure (\$1,315,751.22). One panel member was not paid anything. The other four panel members were paid sums that ranged from \$47,531.84 to \$130,258.61.

Expenditure on planning and development matters

235. Records provided by the Council indicate that the increase in legal expenditure on planning and development matters has largely arisen as a consequence of issues related to the Australian Catholic University (ACU) Strathfield Campus.
236. Councillors would have been aware that substantial costs were being incurred on ACU related matters. The elected Council has, over time, received numerous reports on the matter and resolved to continue to pursue proceedings. On a number of occasions it voted to allocate additional funds.
237. The investigation was not able to find any reports which informed the elected Council of the total cost being incurred on the matters involving ACU on an ongoing basis. The reports to the elected Council that were examined during the course of the investigation only reported costs that had been incurred on part of the matter and/or costs that had been incurred in a given financial year.
238. This report recommends that the Council resolve to require the General Manager to provide the Council with a report on the total of the legal expenses incurred on matters related to the Australian Catholic University since 1 July 2011.
239. In responding to the draft report, Mr Backhouse submitted that the increase in legal expenditure was, at least in part, a function of the area undergoing much

²³ Council's Responsible Accounting Officer advised the investigators by way of a letter dated 19 March 2015 that expenditure of \$42,018 in relation to legal services for the Strathfield Town Centre Project and \$29,634 in relation to the "Korean Gardens Taskforce" was not included in the legal expenses. He indicated these expenditures were reported as consultancy and contractor expenses. He also indicated that the amount reported for legal expenses included town planning expenses that should have not been included.

²⁴ Assuming the reported figure for 2012/2013 was accurate. There is evidence (records of payments being treated as a consultancy expense rather than a legal expense) that indicate that the figure reported for 2012/2013 may have also understated the true level of legal expenditure.

greater development in recent years, with the attendant increase in the number of development applications lodged with Council. He submitted that the greater the number of applications gave rise to the greater the likelihood of matters being initiated in the Land & Environment Court by applicants.

240. The following table is drawn from data published by the Department of Planning and sets out the number and value of development applications determined by the Council.

Table: Development Applications (Determinations) 1 June 2010 to 30 June 2014

	2010/2011	2011/2012	2012/2013	2013/2014
Number of development applications determined	218	144	125	208
% change from previous year	-	-34%	-13%	+66%
Combined Value	\$116m	\$129m	\$59.6m	\$167.7m
% change from previous year	-	+11%	-59%	+181%

241. Notwithstanding Mr Backhouse's submission, on the face of it, there is no clear correlation between development activity and the increase in legal expenditure.

Expenditure on the Town Centre Project

242. The Council has made extensive use of advice from a member of its legal panel in relation to the Strathfield Town Centre project and as a consequence, incurred substantial expenses. This expenditure was additional to the expenditure on strategic property advice from the IPG which was commented upon earlier in this report.
243. Notwithstanding the expenditure that has been incurred, the Town Centre project has not yet progressed to the stage where a *Public Private Partnership* proposal has been submitted for consideration by the *Government Project Review Committee*.
244. The initial fee estimate from the legal firm engaged by Council was "\$10,000 to \$20,000". A subsequent estimate was couched as being a range between "\$100,000 and \$250,000".
245. The investigation was not able to find any report which apprised the elected Council of the full extent of the costs of legal and associated professional advice incurred on the Town Centre project to date or which advised the Council of the overall costs which may be incurred.

246. The Town Centre project is a strategic priority for the Council. If Council proposes continuing with this project, it will be necessary for it to ensure that it makes effective use of budget controls.
247. As of 14 August 2014, the Council began asking the legal provider being used for the Town Centre project to provide individual fee estimates for the each task it is instructed to undertake in relation to the Town Centre project; this appears to be a departure from the earlier practice where it was providing a single estimate for its work in relation to the project.

Changes to cost disclosures and fee estimates

248. The initial fee estimates provided to Council by its lawyers in regard to both the Town Centre and the Australian Catholic University matters were substantially lower than the fees subsequently charged. This may well be explained by the uncertainty as to scope of the matters and/or how the matter/project might proceed. However, the increases involved are so substantial as to warrant consideration by the Council as to whether it could have better foreseen the expected expenditure and to have taken it into account when procuring the service.

Reporting on expenditure on legal and associated professional advice

249. As noted earlier, Council reported on legal expenses in its annual financial statements. In addition, the Regulation stipulates that:

- Council's *quarterly budget review statements* (QBRs) must include the year to date expenditure on legal fees.
- Council *annual report* must include a summary of the amounts incurred by the council during the year in relation to legal proceedings taken by or against the council and a summary of the state of progress of each legal proceeding and (if it has been finalised) the result.

250. The three QBRs for 2013/2014 and the 2013/2014 annual report were examined to determine if the elected Council and the community were being given accurate and timely information about Council's expenditure on legal fees.

251. The provision of QBRs affords the elected Council the opportunity to consider the level of expenditure and resolve to take action and/or seek further details if it considers the level of expenditure a matter of concern. It also serves to inform the community of the levels of expenditure, as does the annual report.

252. The following table compares the actual year to date (YTD) legal expenditure to that which was reported in the QBRs for the relevant quarter.

Table: Comparison - reported and actual expenditure on legal fees (2013/2014)

Period:	Actual Year to Date Expenditure	Amount reported in the QBRs	Difference
Quarter ended 30/9/2013	\$164,653.69	\$80,254.00	\$84,399.44
Quarter ended 31/12/2013	\$347,913.01	\$187,801.00	\$160,111.16
Quarter ended 31/3/2014	\$542,312.14	\$235,788.00	\$306,524.06

253. As shown in the table, there was a gross under-reporting of legal expenditure on the three QBRs provided to the Council over the course of 2013/2014. As such, the elected Council was misinformed as to the total expenditure being incurred.

254. The investigation identified, based on transactional data supplied by the Council, that the QBRs reporting failed to include any of the legal expenditure on the Australian Catholic University, as well some other legal expenditure.²⁵

²⁵ In relation to legal services for the Strathfield Town Centre Project and the "Korean Gardens Taskforce".

255. The investigation found that \$197,272.48²⁶ of the costs of legal and associated professional advice incurred by the Council on the Strathfield Town Centre project were incorrectly appropriated as a consultancy expense rather than as a legal expense. This contributed to the underreporting of legal expenditure referred to earlier at paragraph 393.

256. The Council was asked to clarify what expenditure was included in the QBRS reporting. On 16 December 2014 Council provided its response. It acknowledged the failure to include the expenditure on the Australian Catholic University matters but provided no comment on the other expenditure that was omitted. Council's Responsible Accounting Officer subsequently provided additional information as to the other expenditure that was not included in the QBRS reporting.

257. In regard to the ACU expenditure, the letter indicated that *"Legal Expenditure in relation to the ACU was separately reported to Council's Planning Committee on 15 April 2014."* While this might be seen to ameliorate the failure to include the expenditure in the QBRS for the third quarter, there are some important observations to be made:

- The report to the Planning Committee meeting advised the elected Council that the financial year expenditure to date on the ACU Enforcement Proceedings was \$208,630. The actual expenditure as at the date of the report was \$258,356.99.²⁷
- There is nothing to indicate that the attention of the elected Council was drawn to the fact that the amount reported to it in the March QBRS did not include any ACU related expenditure.
- Given the March QBRS was considered at a meeting three weeks after the Planning Committee, it would have been reasonable for the elected Council to assume the total report included the ACU expenditure.

²⁶ \$42,018 in the 2013/2014 financial year.

²⁷ This was also the amount recorded in the General Ledger as at 11 March 2014, which was the date of the most recent update of cost code "20719-122" prior to the meeting on 15 April 2014.

- The report to the Council's Planning Committee on 15 April 2014 was dealt with in closed session. Accordingly the community was denied access to this information.
258. The investigation also identified deficiencies in the manner in which the Council reported on legal proceedings to the community in its annual report for 2013/2014.
259. The report indicates that the costs incurred during the year in the ACU Class 1 and Class 4 proceeding was \$355,000. However, the report failed to provide the community with the required summary of the state of progress of these proceedings; in fact the only direct reference to these proceedings is the reporting of the expenditure incurred.
260. The annual report also did not report on the expenditure incurred in relation to Council's proceedings in the District Court, in which a judgment was sought against Titanium Golf Management Pty Ltd. It should have. These proceedings are discussed later in this report (see paragraph 671).
261. Council needs to ensure future reporting of legal expenditure and legal proceedings is accurate, timely and in accordance with the relevant statutory requirements.
262. Council's Responsible Accounting Officer advised the investigators that Council managers, procurement staff and finance staff have been notified that legal expenditure must be allocated to the correct cost code. This should assist him in ensuring that legal expenditure is correctly identified and reported.
263. It is open to the elected Council to resolve to require Council officers provide more frequent and detailed reporting on legal expenditure if it considers such reporting is warranted.

Has there been serious and substantial waste of local government money in relation to the expenditure on legal and associated professional advice?

264. Assessment of whether there had been serious and substantial waste of local government money in relation to the expenditure on legal advice is problematic. This is because of the difficulty in determining and measuring what outcomes were obtained as a consequence of having obtained legal advice.

265. It is also important to note that the investigation did not generally attempt to review the merit of decisions made by the Council and/or individual Council staff to seek legal advice. Doing so in the absence of full records and with the benefit of hindsight would be fraught. It was considered that there would be limited utility in doing so.
266. A large proportion of the Council's legal expenditure was related to a single planning issue, pertaining to the Australian Catholic University site. The Councillors and the local community are best placed to decide whether this money was well spent. As noted earlier, a recommendation has been made to facilitate such an assessment by the reporting of the total costs that have been incurred.
267. Another substantial component of the spending was related to the Strathfield Town Centre Project, which is a "work in progress". Time may well tell if this expenditure has been money well spent. However, the breadth of the recent estimate of expenditure from the legal firm working on this project suggests that there is an urgent need to review the scope of the work they are being instructed to undertake and whether that work falls within the ambit of the provision of legal services.
268. Ultimately, the investigation was not able to gather sufficient evidence to be able to make a finding as to whether the Council's level of expenditure on legal and associated professional advice was reasonable or necessary. It has however made recommendations to assist the elected Council consider this.

Use of Council's in-house legal resources

269. Council employed its own in-house solicitor and other professional staff. Given this, it should have been well placed to make decisions in regard to the procurement of legal and associated professional advice. However, Council's in-house solicitors have not always been involved in decisions to procure external legal advice. The evidence does not indicate that they were routinely asked to review fee estimates and invoices. Council should ensure that the advice of its in-house solicitor is obtained when deciding to procure external legal advice as provided for its *Legal Practice Policy* and procedure.

The providers of legal advice

270. The evidence does not warrant any adverse inference being drawn as to the conduct and/or performance of the firms and individuals who provided the Council with legal and associated professional advice nor the quality of that advice. Their conduct and performance was not investigated. It is for Council to ensure that it obtains value for money in any procurement, whether for legal services or otherwise.

3.3 Appointment of an external auditor

271. The terms of reference required the investigation to consider whether there was maladministration and/or serious and substantial waste of local government money in relation to the Council's decisions of 7 May 2013 and 2 July 2013 pertaining to the appointment of an external auditor (and the related tender processes that preceded these decisions).
272. The investigation examined the circumstances that gave rise to the Council's decisions of 7 May 2013 and 2 July 2013. A chronology of events and documents considered relevant to this matter has been provided as Appendix 21.

Appendix 27 - Chronology – Appointment of external auditor

Overview of the appointment process

273. All councils are required to appoint an auditor. The Act stipulates that an auditor cannot be appointed unless tenders have been called and that the appointment when made is for a six year period.²⁸
274. The term of appointment of Council's previous auditor ended on 30 June 2012. While the Act does not stipulate a set time frame for the Council to appoint an auditor, Council had an obligation to do so as soon as the office of auditor became vacant.
275. Council's then Finance Manager, Ms Jodie Bourke, sought the approval from Mr Backhouse to commence the process on 16 January 2013. Mr Backhouse approved the calling of tenders on 22 January 2013. The process could have commenced much earlier than this, as there was nothing to preclude the Council calling for tenders prior the expiration of the previous auditor's term.
276. Council invited tenders on 5 March 2013. There followed a tender process which culminated in a report being considered by the elected Council on 7 May 2013.
277. Council's Director, Corporate Services, Mr Neale Redman, recommended that fresh tenders be called, notwithstanding that the tender evaluation panel was of the view that there was a complying tender that could be recommended for

²⁸ See Sections 422 & 424(1) of the Act.

appointment. The tender evaluation panel's recommendation was not communicated to the Council. The Council adopted Mr Redman's recommendation.

278. A second tender process occurred pursuant to the decision of 7 May 2013. Mr Backhouse approved a shortened advertising period. Council called for tenders on 14 May 2013 with a closing date of 28 May 2013.
279. The second tender process culminated in two reports being considered by the elected Council, the first one at a meeting held on 4 June 2013 and the second one at a meeting held on 2 July 2013. These reports were authored by Mr Redman. Both reports on the second tender process recommended the reappointment of the incumbent auditor, Warton Thomson and Co (Warton Thomson), notwithstanding that the tender evaluation panel had ranked its tender lower than three other tenders.
280. At the meeting on 2 July 2013, the Council did not adopt the recommendation. It resolved to appoint another tenderer.

The initial tender process

281. A tender evaluation panel for the first round of tenders was comprised of the Council's then Finance Manager, Ms Jodie Bourke and two other staff members. It was to be assisted by Council's in-house solicitor (who was to fulfil the role of Probity Advisor) and the Council's Procurement Coordinator (whose role was to provide administrative support and advice).
282. The panel initially met to discuss and decide upon the weightings to be allocated to the different criteria.
283. Six tenders were received. Copies of the tender submissions were provided to the three members of the panel, who then proceeded to independently review and rate them on the agreed criteria.
284. Ms Bourke provided a statement to the investigation,²⁹ stating that during the time she was evaluating the tender submissions, she had a conversation with Mr Redman where he told her that he had received a call from the Principal of Warton Thompson and that they had not made a submission.

²⁹ See Appendix 16.

285. Ms Bourke states that she advised Mr Redman that she was aware that the incumbent auditor had not made a submission and that she had received advice from Mr Baker (the Probity Advisor) to the effect that there was nothing that could be done about it. Ms Bourke states that Mr Redman then asked her if "we" were sure that nothing could be done, and that when she confirmed this, Mr Redman said that they would have a meeting with Mr Baker. Ms Bourke's statement indicates that there was a meeting with Mr Baker where he reiterated the advice.
286. Ms Bourke's statement indicates that she then proceeded with her evaluation of the tenders and that she had a further conversation with Mr Redman prior to completing her review. The relevant section of her statement has been reproduced hereunder:

23. I recall that I had a further conversation with Mr Redman, in Mr Redman's office, prior to completing my review of the tender submissions, where we discussed the non-submission by Warton Thompson. He said that he believed that we would decline the tenders and readvertise. I then asked him "on what grounds"? He said on "on price". I said words to effect of "I think you will struggle with that because some of the submissions I have read so far are coming in under what Phil had previously charged us". He then suggested "what about maintaining good relations" or something to that effect. I responded that was not really relevant and asked on what grounds he was going to do it. He then referred to legislation not requiring a reason to be given unless you want to enter into direct negotiations with a particular company. I said that I didn't agree with that, meaning I didn't believe that declining the tenders and readvertising without stipulating a reason would be in accordance with the spirit of the legislation, as I thought that tender legislation was very specific and restrictive.
24. I felt that Mr Redman was seeking to influence me in undertaking the evaluation of the tender submissions. I have no knowledge of him having discussed the matter with Aneet or Joe.

287. In responding to the draft report, Mr Redman provided the following response:

In my discussions with Ms Bourke concerning the audit tender, I did not respond as claimed. I had not viewed any of the submissions and therefore was not able to express an opinion regarding the outcome of the tender. I do recall discussing with Ms Bourke the provisions of the Local Government General Regulation regarding tendering, which permit that tenders may be declined and fresh tenders invited. At no time was I seeking to influence Ms Bourke in the evaluation of the tenders which was subsequently carried out by her and the other panel members independent of any involvement or discussions involving myself.

288. The tender evaluation panel met with the Procurement Coordinator to discuss and moderate their evaluation of the tenders. The Probity Advisor was also present. At this meeting, the panel reached a consensus on how the tenders were to be rated and ranked. The panel formed a view that there was a tender that could be recommended for appointment as Council's auditor.
289. Ms Bourke subsequently undertook some reference checking on the most highly ranked tenderer (she contacted other councils where the recommended firm had undertaken audits).
290. Council's Procurement Coordinator provided a statement that the Manager with operational responsibility for the function/service being tendered would normally draft the report for the consideration of the elected Council. In accordance with this practice, Ms Bourke drafted and submitted her report on 15 April 2013 for inclusion in the business paper. The recommendation is reproduced hereunder:

Report by Jodie Bourke, Manager Finance

RECOMMENDATION

1. *That the tender submitted by Pricewaterhouse Coopers for audit services for a six (6) year period be accepted.*
2. *To charge the General Manager to execute the contract with Pricewaterhouse Coopers on Council's behalf.*

291. The report also included a statement about the merit of the recommended tenderer, as follows:

Pricewaterhouse Coopers submitted the preferred tender for the audit services. This tenderer demonstrated extensive capacity, quality and depth of audit performance, value added services and technical expertise.

292. Mr Redman asked Ms Bourke to also provide written advice to Council's "Executive" on the outcome of the tender evaluation. She did so by way of a memorandum dated 15 April 2013 and in doing so, indicated that the incumbent auditor had not lodged a submission.
293. Ms Bourke states that she had a conversation with Mr Redman on 15 April 2013 regarding the audit tender. The relevant paragraph of her statement has been reproduced hereunder:

34. I had conversation with Neale Redman on 15 April 2013 regarding the audit tender and he told me at that point, that it was an organisational decision that needs endorsement prior to the Council meeting. He explained that if the Executive changes the decision, they are the ones taking the responsibility and it doesn't impact on me. I advised Neale that unless there is a lawful decision to call tenders again it would put me in difficult position ethically, as I know some of the tenderers and I don't want to have to explain why I am calling tenders again. Neale agreed that it was unlikely a legal decision could be justified. I made notes of this meeting with Neale on the day that it occurred and have referred to these notes when providing this statement.

294. Mr Redman acknowledges having discussed the matter with Ms Bourke. He submitted that his comments to her were not specifically referring to the report prepared by Ms Bourke but the process for reports generally. He indicated that he made personal notes at the time, and that based on those notes, he denied that he agreed that it was unlikely a legal decision could be justified.

295. Ms Bourke was asked to review the content of her report with Council's Corporate Strategy Coordinator, Ms Cathy Jones. It is apparent that she did so and that she subsequently prepared two revised versions. Both these revised versions contained the same recommendation as the initial version.

296. When Ms Bourke submitted the second version of the report to Mr Redman on 2 May 2013, she did so by attaching it to an email. The substantive content of this email has been reproduced hereunder:

Please see attached revised report. I have only changed the main report to show that there is a confidential attachment. The attachment shows the full criteria, weighting and ranking of each of the submissions, together with some financial analysis on average price per hour & % of partner time etc. I was advised by Geoff that weightings should not be included in the main report as we may want to use the same weightings in future.

Please let me know ASAP if you require any further changes. As discussed earlier, this report cannot be delayed from the May ordinary meeting as we do not have an auditor to conduct an interim audit.

297. The content of the second version of the report is as indicated in Ms Bourke's email.

298. On 3 May 2013, Ms Bourke received further advice from Council's Corporate Strategy Coordinator, Ms Cathy Jones, on what was required to be included in the report to Council. Ms Bourke then prepared the third version of her report as indicated in the following email:

Investigation Report

From: Jodie Bourke
Sent: Friday, 3 May 2013 2:01 PM
To: Cathy Jones; Neale Redman
Cc: Colleen Alderton; David Backhouse
Subject: RE: Audit tender report

Hi Cathy,

I have revised the report based on our discussions this morning. If you need anything else, please let me know.

✉ <http://www.str>

Jodie Bourke | Manager Finance
P 9748 9926 M 0434 182 679 F 9764 1034
65 Homebush Road, Strathfield NSW 2135
www.strathfield.nsw.gov.au

299. Ms Jones sent an email to Ms Bourke, in response, to query whether Ms Bourke was still going to include a table with evaluations of the tender proposals to support the recommendation in the report. Ms Bourke's response to Ms Jones' email has been reproduced hereunder.

From: Jodie Bourke
Sent: Friday, 3 May 2013 2:39 PM
To: Cathy Jones; Neale Redman
Cc: Colleen Alderton; David Backhouse
Subject: RE: Audit tender report

Hi Cathy,

As Neale has decided to rewrite the report himself recommending a different outcome, I have supplied him a copy of the tender evaluation. My understanding from discussions with you this morning however, was that supplying that table would not give the councilors sufficient information to make an informed decision.

I also note that I have discussed with Neale my concerns that the recommendation to call for fresh tenders yet supplying the tender evaluation with a clear outcome is contradictory and that he should be leaving my report in the agenda recommending an appointment. I understand however that it is the Executive's decision to make.

Regards,

✉ <http://www.str>

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300. Ms Bourke's email indicates that at that point, Mr Redman had decided to "rewrite the report himself recommending a different outcome". As shown in the email, it was also sent to Mr Redman and a copy was sent to Mr Backhouse.
301. Ms Bourke states that she was "called into Neale's office after I submitted the revised version of the report". The relevant paragraph of her statement has been reproduced hereunder:

37. I was called into Neale's office after I submitted the revised version of the report to him. He said that he would not be putting forward my report. He advised me that he had received my revised report but he would be writing another report to seek fresh tenders. I asked on what basis. He said 'in the best interests of the organisation'. I told him that if one of the submitters decided to question, I would not be able to provide a reason. He said that I should put all calls through to him. I said that I was trying to protect him and told him not to put his name on the report. I told him that if one the submitters were to query it with the DLG or ICAC, he would take the blame for it, not the GM. I said that if the report stated that the recommendation was in the organisation's interest and Phil was appointed again, then that would show bias and other submitters would question this. I told him that I had discussed the issue with my husband and that I was so worried about everything I was considering resigning without a job to go to. He told me it was the organisation's decision and it didn't in any way reflect upon me, personally or professionally.

302. Mr Redman submitted, in response to Ms Bourke statement, that he had concerns regarding the errors/omissions in the tender specification as well as the likelihood that a greater number of proposals could be obtained by Council and that he discussed these concerns with Ms Bourke. He said that he advised Ms Bourke that the Executive had endorsed the recommendation that fresh tenders should be invited and that Ms Bourke told him that she did not agree with the recommendation. He submitted that as a consequence, he advised Ms Bourke that he would submit the report to Council.

303. Mr Redman authored the final version of the report that was considered by the Council on 7 May 2013. His report contained the following recommendation:

RECOMMENDATION

1. *That Council decline to accept any of the tenders received for audit services.*
2. *That fresh tenders be invited for audit services in accordance with Clause 137 of the Local Government (General) Regulation 2005.*

304. Mr Redman's report advised that the Tender Evaluation Panel was the Finance Manager, Council's Senior Accountant and the Group Coordinator IT and Communications, "With" the Procurement Coordinator as "Chairperson", and Council's Solicitor acting as "Probity Advisor". The report did not make clear that neither the Procurement Coordinator nor Council's Solicitor actually evaluated the tenders.

305. Mr Redman's report advised that "The panel's evaluation of the tenders has been separately circulated to Councillors". There was nothing else in the report to indicate that the attachment contained anything other than the panel's evaluation.

306. The Attachment that was circulated to Councillors was headed "*Attachment 1 Tender Evaluation*", again suggesting, when read in conjunction with the report, that the document was the panel's evaluation.

307. While the Attachment did provide details of the panel's evaluation, it also included some additional content at the end which was authored by Mr Redman. The relevant content is reproduced hereunder:

Warton Thompson and Co has served as Council's auditor for a period of 12 years.

Warton Thompson and Co contacted Council after the closing date of the tender and advised that they had intended to submit a tender however, due to an oversight on their part they had failed to lodge the tender by the closing date

Under the Regulation it is not possible to accept tenders after the closing date.

Having regard to the high quality and professional services that have previously been provided by Warton Thompson and Co it is recommended that Council decline to accept any of the tenders received and invite fresh tenders in accordance with Clause 167 of the Local Government (General) Regulation 2005.

308. While it was open to Mr Redman to make the recommendation that he put before the Council, he had an obligation to make it clear that the tender evaluation panel had formed a different view. In making amendments to the report, Mr Redman failed to make clear that it was his view alone that the tenders should be declined.

309. This had the consequence of improper interference in the process and the amendments to the report were misleading.

310. Mr Redman was also remiss in not advising the elected Council that:

- Ms Bourke, as Council's *responsible accounting officer*, had significant concerns about the proposed recommendation, and
- that acceptance of his recommendation would, in effect, extend the period of time that Council would not have a duly appointed auditor and that this might preclude the timely completion of the half yearly inspection of Council's accounting records by the auditor.

311. Mr Redman has submitted that he was aware of Ms Bourke's concerns, that he had given due consideration to them, that he had discussed them with her and that he did not agree with the comments made by her. Mr Redman asserted that it was "*ludicrous*" to propose that he should have advised the Council of the concerns that he considered had no basis.

312. Ms Bourke was Council's *responsible accounting officer* and had a key role in the tender process. Mr Redman was not the decision maker in regard to the outcome of the tender process and had an obligation to alert the Council of Ms Bourke's concerns. Had he done so, it would then have been open to him to provide advice to the Council as to why he considered the concerns were unfounded.
313. Mr Redman was aware of his obligations when reporting to the Council. On 3 May 2013 he was sent two emails from Council's Corporate Strategy Coordinator which specifically referred to the OLG's *Tendering Guidelines* and the advice contained in that document that reports to Council on the tender evaluation "*should include all information necessary to allow council to make an informed decision*".
314. Further, given his role at Council, Mr Redman would or should be familiar with *The Model Code of Code of Conduct for Local Councils in NSW*, which the Council adopted as its own Code. It provides:
- Members of staff of council must provide full and timely information to councillors and administrators sufficient to enable them to carry out their civic office functions and in accordance with council procedure.*
315. Mr Redman's actions may have contravened section 439 of the Act, which requires that members of staff act honestly and exercise a reasonable degree of care and diligence in carrying out their functions under the Act.
- Subsequent explanation from Mr Redman as to his recommendation to Council
316. Mr Redman has subsequently asserted that there was a different basis for his recommendation not to accept any tenders. In a note authored by him dated 15 April 2014 he recorded that he "*recommended that Council decline to accept any tender as due to errors and omissions in the Tender specification as well as my judgement that a broader range of proposals could be obtained by Council that may result in Council achieving a better outcome.*" The note then went on to record that in response to the readvertising "*an additional three submissions were received*".³⁰

³⁰

In fact, while tenders were received from 3 firms who had not submitted tenders in response to the first tender process, one of the original tenderers did not retender.

317. While Mr Redman's subsequent explanation has been noted, it is at odds with the advice that he provided to the Council in his report.

Other concerns about the initial tender process

318. Council's then Group Manager, Corporate Services, Ms Kim Appleby has provided a statement that indicates that she had concerns about the initial tender process and that she raised these concerns at the time of the initial tender with both Mr Backhouse and Mr Redman. The statement indicates that she raised her concerns with Mr Redman "*firstly by speaking with him and subsequently in writing.*" A copy of an email from Ms Appleby to Mr Redman dated 3 May 2013 was obtained. A copy of this email has been provided as an appendix.

Appendix 28 - Email – Ms Appleby to Mr Redman – 3 May 2013

319. In responding to the draft report, Mr Backhouse wrote:

I strongly dispute that Council's former Group Manager Corporate Services, Kim Appleby, raised any issue with the initial tender with me. There is absolutely no evidence that she raised any issues with me.

320. Mr Redman has submitted that he considered the matters raised with him by Ms Appleby and that he responded to her that the tender panel's evaluation was included in the report to the Council without alteration. There is no record of this response.

The second audit tender process

321. A second tender process commenced pursuant to the resolution of 7 May 2013.
322. Mr Redman obtained approval from the General Manager for a two week advertising period.
323. The request for tender (RFT) document used for the second process did contain some significant changes notwithstanding Mr Redman's advice to the General Manager that there was no significant variation to the tender specification.
324. The evidence indicates Ms Jones was involved in reviewing and making changes to the amended RFT, which was then approved by Mr Redman. On 8 May 2013, Ms Jones sent an email to Mr Redman attaching an amended RFT. In the email, she detailed what she characterised as the "*main changes*" to the

RFT. This email in turn was referred to Ms Bourke by Mr Redman with a request for her comments, which Ms Bourke duly supplied in an email to Mr Redman on 9 May 2013. A copy of the email exchange has been provided as an appendix.

Appendix 29 - Emails – Amended Request for Tender – 8 & 9 May 2013

325. Ms Bourke's comments on the proposed changes were considered and disregarded by Mr Redman. The changes outlined by Ms Jones appear in the amended RFT that was approved by Mr Redman.

326. The changes to the RFT included (but were not limited to) a more detailed criterion under the heading of "Key Personnel". The amended criterion has been reproduced hereunder:

(b) Key Personnel

Applicants must set out the qualifications, experience and proposed capacity of all nominated personnel who will be in attendance during the conduct of the audit. These personnel will be required to have extensive experience in Local Government auditing and be able to demonstrate detailed knowledge of Australian Accounting Standards and the Code of Accounting Practice.

The following information must be supplied in respect of managers and may be supplied in respect of other staff:

- names;
- qualifications;
- experience;
- capacity.

In assessing the capacity of applicants to provide a total quality audit service of the nature required by Council, regard will be had to:

- the previous experience obtained at a senior level in the auditing of a medium sized urban council, the nature and diversity of such experience and the range and perceived quality of auditing services provided by the applicant in respect of existing and previous audit appointments;
- the extent to which the applicant is able to guarantee the continuity of involvement by the same principals and staff in the ongoing control and undertaking of the audit;
- the experience and qualifications of Principals in disciplines of a non-accounting nature which will need to be addressed as part of a complete managerial audit approach;
- the level of awareness of applicants of the political, social, economic and demographic factors which impact upon Council's operations;
- the range and nature of professional affiliation and associations held by the Principals and nominated staff.

327. The original criterion was:

(b) Key Personnel

The following information must be supplied in respect of managers and may be supplied in respect of other staff:

- names;
- qualifications;
- experience;
- proposed capacity.

328. Some of the inclusions in the amended criterion may be seen as favouring the incumbent auditor and be contrary to Mr Redman's stated objective of attracting a broader range of tenders. It is not apparent why it was considered necessary to specify requirements for experience in auditing a "medium size urban council"

and *"awareness of the applicant of the political, social, economic and demographic factors which impact upon Council's operations"*.

329. As shown in Appendix 23, Ms Bourke questioned Mr Redman about the "awareness" requirement, asking him *"Does this really impact on their [the tenderer's] ability to perform a financial services audit?"*. Notwithstanding Ms Bourke's question, Mr Redman retained the suggested change.
330. An auditor's report is intended to provide a forensic opinion on whether the applicable financial reporting framework has been applied in the preparation of the accounts, whether they are free from material misstatement and whether they show a true and fair view of the operating results, financial position and cash flows of the entity. Awareness of the political, social, economic and demographic factors which impact upon Council's operations is irrelevant to this process.
331. In addition to the aforementioned changes, the revised RFT also contained internal inconsistencies as to the dates of the proposed appointment. In two places it indicated Council was inviting tenders for the provision of audit services for the six years ended 30 June 2018 yet in two other places, it indicated that the proposed term was to be until 30 June 2019. A diligent review of the RFT prior to approving it would have identified these inconsistencies.
332. Council called for tenders for the second time on 14 May 2013 with a closing date of 28 May 2013.
333. Council records indicate that two prospective tenderers sent emails to Council's Procurement Coordinator querying the dates of the proposed engagement (given the inconsistencies in the RFT). Council's Procurement Coordinator responded to the two emails confirming that the period was for six years ending 30 June 2018. There is no evidence that indicates other prospective tenderers were advised of this. They should have been. In the absence of any clarification advice from Council, two of the tenders that were received appear to have been submitted on the basis that the tenderers understood that the proposed terms was to be until 2019.
334. Part 1.2 of the OLG's *Tendering Guidelines* emphasises that all potential tenderers should be given the same information.

335. Mr Redman advised Ms Bourke that he wanted her to participate as a member of the second Tender Evaluation Panel. Ms Bourke indicated a preference not to do so and in any case, had been granted leave on the date when the panel was to convene.
336. A tender evaluation panel comprised of Mr Redman and two other staff members was convened. It was to be assisted by Council's in-house solicitor (who was to fulfil the role of Probity Advisor) and the Council's Procurement Coordinator (whose role was to provide administrative support and advice).
337. Eight tenders were received. Copies of the tender submissions were provided to the members of the panel, who then proceeded to independently review and rate them on the agreed criteria.
338. The panel then met to discuss and moderate their evaluation of the tenders with the assistance of the Procurement Coordinator. The Probity Advisor was also present. At this meeting, the panel reached a consensus on how the tenders were to be rated and ranked.
339. Mr Redman drafted and submitted a report on the evaluation of the tenders for inclusion in the business paper for Council's meeting of 4 June 2013. In the report, Mr Redman recommended that the Council accept the tender received from Warton Thompson and Co; this tender was not the highest rated tender.
340. It is apparent from the evidence that Mr Redman's recommendation was not based on an objective assessment of the tenders against the criteria stipulated in the request for tender. In this regard, both Mr Redman's and the Tender Evaluation Panel's ratings of the tenders rated 3 other tenders more highly than Warton Thompson and Co.
341. In responding to the draft report, Mr Redman wrote:
- The assessment of the panel, which included myself, was based on the criteria in the tender specification. This was not the sole basis on which the determination of the tenders was based.*
342. Regulation 170(1)(b) requires that the tender documents specify the criteria on which the assessment of tenders will be based. Assessment on any other basis would contravene the Regulation.

343. The evidence suggests that the decision to recommend Warton Thompson and Co. was made by Mr Redman and not the Tender Evaluation Panel.
344. A statement was obtained from Council's Senior Accountant, Mr Aneet Singh, who was a member of both tender evaluation panels. His statement was that he was unaware that the incumbent auditor, the 4th ranked tenderer, was going to be recommended for acceptance. Mr Singh's statement has been provided as an appendix.

Appendix 30 - Statement – Aneet Singh

345. A statement was also obtained from Mr Baker who was present, in his capacity as Probity Advisor, when the panels met. Mr Baker indicated that he could not recall any discussion, when the second panel met, in regard to recommending any tenderer who was not the first ranked tenderer. He asserted that he would recall such a discussion if it pertained to the 4th ranked tenderer i.e. Warton Thompson and Co.
346. Mr Redman's report to the Council advised that the Tender Evaluation Panel was comprised of himself, Council's Senior Accountant and the Group Coordinator IT and Communications "With" the Procurement Coordinator, as Chairperson and Council's Solicitor acting as Probity Advisor. The report did not make it clear that neither the Procurement Coordinator nor Council's Solicitor evaluated the tenders.³¹
347. Mr Redman's report advised that:

The Tender Evaluation Panel assessed the submissions based on the criteria above and ranked the submissions. The Panels evaluation of the tenders has been separately circulated to Councillors.

348. The document circulated to Councillors was headed "*Attachment 1 Audit Services Tender Evaluation*", again suggesting, when read in conjunction with the report, that the document was the panel's evaluation.
349. While the Attachment did provide details of the panel's evaluation, it also included some additional content at the end which was authored by Mr Redman. The relevant content is reproduced hereunder:

³¹³¹

Council records pertaining to the tender evaluation indicate that the Procurement Coordinator and Council's Solicitor were present when the Tender Evaluation Panel met but they did not review and rate the individual tenders.

Conclusion

Warton Thompson & Co have served as Council's auditor for a period of 12 years. During this time the Principal of the firm has been the lead auditor responsible for the conduct of the audit. In addition the audit manager having been employed with Warton Thompson & Co for a period of 26 years has also directly managed the conduct of the audit.

The consistent allocation of staff responsible for the conduct of the audit has resulted in highly professional and effective audit services being provided to Council.

Accordingly it is recommended that Council accept the tender received from Warton Thompson & Co for the provision of audit services for a six year period ending 30 June 2018.

350. While it was open to Mr Redman to make the recommendation that he put before the Council, he had an obligation in doing so, to make it clear that the conclusion he put before the Council was his alone. Mr Redman potentially misled the elected Council by failing to do so.
351. Mr Redman's report was considered at a Council meeting held on 4 June 2013 and Council resolved to hold a series of workshops to consider the matter further.
352. Some further reference checking was then undertaken on some of the more highly ranked tenderers. This and other information was collated and provided to the elected Council at a workshop.
353. The matter was further reported to the Council on 2 July 2013, with the same recommendation that was made on 4 June 2013, to appoint the incumbent auditor. On the occasion of this meeting, the Council resolved to accept another tender, notwithstanding that this other tenderer was not the one that had been evaluated as the best tender by the tender evaluation panel. There is no evidence as to why the Council accepted a different tender. While it was in the remit of the elected Council to do so, it may have been prudent for it to record its reasons.

Further comments on the assessment of tenders

Resolution not to accept the recommended tender

354. In a circumstance where a councillor moves the acceptance of a tender that is different to the one recommended, it would be better practice for the councillor to detail the reasons for this in their motion. If the motion is adopted, it will provide a record of why the decision has been made. Providing reasons for decisions is good administrative practice.

Assessment on the tenders on the basis of referees

355. Both tender specifications included "Referees" as a criterion and then indicated that *"The names of at least two referees should be supplied. Such referees should be senior representatives of other New South Wales councils or other audit clients"*.
356. The assessment of tenders by both tender evaluation panels was flawed in regard to the manner in which they assessed and scored tenders for the "referee" criterion. Both panels allocated a weighting for this criterion and then scored the tenders based on who the nominated referees were and possibly the number of referees who were provided. No referees were contacted as part of the panels' evaluation of this criterion.
357. Ms Bourke did undertake some reference checking on the tenderer that had been ranked highest overall by the first tender evaluation panel but this did not occur until after the panel had finished its deliberations.
358. In his response to the draft report, Mr Redman wrote:
- The claim that the process was flawed is rejected. The criteria was clearly related to the provision of suitable referees. The criteria did not refer to consideration of reference checks by the panel. Under Council's procedures and practice at the time this was a separate process from the panel's evaluation. Accordingly, the results of the reference checks were not part of the panel's evaluation.*
359. The approach suggested by Mr Redman is clearly flawed. It is the role of the evaluation panel to fully and completely evaluate the tender and, on that evaluation to make recommendations to the Council. Quite simply this process had not been completed by the time the panel made its recommendation to Council.
360. It might be noted that Council appears to have recognised this error. In his response Mr Redman advised:
- Council has subsequently amended its Purchasing and Tendering Guidelines to clearly indicate that tender evaluation panels are responsible for assessing tenders against the selection criteria, determining referees to be contacted, reviewing reference check results and recommending the preferred tenderer.*

361. In regard to the second tender process, no reference checking was undertaken prior to the matter being reported to the Council on 4 June 2013. Some reference checking was then undertaken prior to the matter being further reported to the Council for determination on 2 July 2013. Reference checking should have been undertaken prior to the matter being reported to the June meeting.

Role of the Tender Evaluation Panel

362. Council's Procurement Policy stipulates that "*A tender panel will be convened to oversee and assist in the calling, assessment and selection of specific tenders*" [emphasis added]. As highlighted, the policy intended that the tender evaluation panel be involved in the entire process, including the selection.

363. Council's *Purchasing and Tendering Guidelines* state that the role of the tender evaluation panel was to include the following:

- Review all tender specifications prior to issue, including seeking the approval of Council to service contract specifications.
- Review selection criteria.
- Conduct pre-tender meeting and interviews as appropriate
- Oversee tender assessment process.
- Review tender evaluation and recommendations.
- Endorse recommendations.

364. Council's Senior Accountant, Mr Aneet Singh, was a member of both tender evaluation panels. He provided the following statement as to the panel's role:

19. It is my understanding that the panel's role was to make a recommendation as to who had submitted the most suitable tender, that this recommendation would be reported to Council but also that it was the Council's decision.

365. Mr Singh further stated that he did not see any draft or final report in relation to either of the tender processes and that he was unaware of Mr Redman's recommendations. He indicated that prior to the day of making his statement to the investigators, that being 18 June 2014, he was not aware that "*Walter [sic: Warton] Thomson*" was the tenderer recommended to Council in regard to the second tender process and that he was similarly unaware of the recommendation not to accept any of the tenders in relation to the first tender process.

366. The evidence indicates that, in regard to the two audit tender processes, the panels' role appears to have been generally limited to the evaluation of the tenders. Any recommendations they made were, in effect, disregarded and they clearly had no role in overseeing or endorsing the recommendations that Mr Redman made to the Council.

Role of the Probity Advisor

367. The role of Probity Advisor in both tender processes was generally limited to being present when the two Tender Evaluation Panels met.

368. There was no "sign off" or certification of the overall process by Council's solicitor acting as Probity Advisor, notwithstanding that Council's Procurement Policy provides that principles of probity will be applied to *"all processes in the preparation, advertisement, assessment and management of tenders"*.

369. Council would benefit from having its tender processes subjected to a "probity review" prior to the tender being reported to Council for determination. This is a matter that would have given rise to a recommendation in this report had it not been that the Minister's Performance Improvement Order has, in effect, already required the Council to consider the role of the Probity Advisor in Council's tender processes.

Ethics and Probity considerations

Conflict of Interest Disclosures

370. Council requires staff involved in the preparation, evaluation or approval of tenders to complete a *"Conflict of Interest Disclosure Form"*. This is good practice as it can serve to remind staff of their obligations in regard to ethical and proper conduct and provides the opportunity for any disclosed conflicts to be appropriately managed.

371. All members of the two Tender Evaluation Panels, and the Probity Advisor and Procurement Coordinator completed forms.

372. Mr Redman did not complete a disclosure form in relation to the initial tender process; he should have, given his substantial involvement in that process.

373. Ms Jones was involved in reviewing and providing advice on the tender specification for the second tender process and therefore she too should have completed a disclosure form. While it is not suggested that Ms Jones had a

conflict of interests or that she would have not completed a form if she was asked, there is no evidence that she was asked to complete a form as required by Council's procurement protocols.

Mr Redman's disclosure for the second tender process

374. Mr Redman, when completing the form for the second tender process declared, among other things, that "*The specification has not been organised or designed to limit or favour any potential respondent*" and "*My independence and objectivity dealing with the issue has not been and is not likely to be compromised*".
375. The specification for the second tender process was amended from that which was used for the first process, in a manner that could potentially favour the incumbent auditor and limit other responses. Mr Redman was responsible for approving this specification.
376. Further, given Mr Redman's intervention in the initial tender process, his independence and objectivity may have been compromised. He clearly had a view as to the merit of appointing the incumbent auditor compared to a new provider. This view was expressed in his stated reason for recommending that Council call for fresh tenders. It was ultimately reflected in his recommendation to Council to appoint the incumbent auditor.

Policy requirements

377. Council's *Procurement Policy* has a section that deals with ethics and probity. The content has been reproduced hereunder for ease of reference:

Councillors and Council staff shall at all times conduct themselves in accordance with Council's Code of Conduct, Business Ethics Policy and highest standards of ethical behaviour, which will:

- treat potential and existing suppliers with equality and fairness
- not seek or receive personal gain
- maintain confidentiality of 'commercial in confidence' information
- present the highest standards of professionalism and probity
- deal with suppliers in an honest and impartial manner that does not allow conflicts of interest
- provide all suppliers and tenderers with the same information and equal opportunity
- be able to account for all decisions and provide feedback on them
- not be involved in any activity such as performing work with suppliers, consultants or contractors

All business partners of Council including prospective partners must agree to the conditions set out in Council's Business Ethics Policy, which sets out the ethical standards expected of Council's suppliers and business partners.

378. The standards of behaviour and ethical principles in the Tendering Guidelines emphasise that councils must not engage in practices that aim to give a potential tenderer an advantage over others.

379. Mr Redman favoured the incumbent auditor (an existing supplier of the Council) when he recommended that they be given a second chance to submit a tender.
380. Mr Redman further favoured the incumbent auditor when he recommended them for appointment given they were rated lower than three other potential suppliers of the service.
381. Mr Redman did not *“present the highest standard of professionalism and probity”* in the manner in which he reported to the elected Council on the two tender processes. His behaviour contravened the standards expected by the Tendering Guidelines.

Mr Redman’s response to Ms Bourke’s concerns about the process

382. Ms Bourke raised concerns with Mr Redman on a number of occasions about the recommendation and the decision to call for fresh tenders. Notwithstanding this, Mr Redman had indicated to her in an email on 27 May 2013 that he wanted her to effectively take his place on the second tender evaluation panel. Ms Bourke provided a detailed response to this request the following day, in which she reiterated her concerns and preference not to participate in the new tender evaluation panel. A copy of the email exchange between Mr Redman and Ms Bourke has been provided as an appendix.

*Appendix 31 - Email exchange - Neale Redman & Jodie Bourke
27/28 May 2013*

383. Ms Bourke, in her response, indicated that she *“strongly believed”* that Mr Redman or the *“Executive”* had a *“pre-determined outcome”*. She went on to state that *“Given the situation that has occurred I cannot guarantee a fair and impartial evaluation of a submission by [sic: from] Warton Thompson and therefore would have to declare a conflict of interest.”*
384. Mr Redman acceded to Ms Bourke’s wish, if for no other reason than Ms Bourke was unavailable and there was a time imperative to complete the evaluation of the tenders so they could be reported to the Council at its meeting on 4 June 2013.
385. Mr Redman subsequently authored a memorandum to Ms Bourke dated 29 May 2013. The memorandum details Mr Redman’s position on Ms Bourke’s concerns. A copy has been provided as an appendix.

Appendix 32 - Memorandum from Neale Redman to Jodie Bourke

29 May 2013

386. Mr Redman's memorandum to Ms Bourke concludes with the following paragraph:

At all times during the Audit Tender process Council has acted appropriately and in accordance with the relative legislative requirements. Your comments asserting otherwise are unfounded and inappropriate.

387. Mr Redman's assertion that Ms Bourke's comments were unfounded needs to be considered in light of the evidence to the contrary. There is no probative evidence that warrants a conclusion that her comments about the process were inappropriate.
388. Ms Bourke's statement indicates that she could not recall receiving Mr Redman's memorandum.
389. Mr Redman was asked about the memorandum when interviewed by the investigators. At that time he recollected writing it and that it was placed on her file but conceded that he may not have provided it to her. He indicated that he wrote it *"Because I became aware that there was a document from her in our records system that she hadn't raised with me that made a number of claims which were, in my view, without foundation and inappropriate"*.
390. He was then asked if the *"document"* he was referring to was Ms Bourke's email to him of 28 May 2023. He responded:

Yes. Yes. I was aware of the email, but I subsequently became aware that it had been registered into our and I had spoken to Jodie at the time of the email being sent and expressed my views in terms of the claims she was making. And then I subsequently documented those conversations, because and then it was it was I understand it was registered into the our records system as well.

391. He was then asked if it was conceivable that Ms Bourke never would have seen the memorandum and he responded:

Yeah, she she may not have because, as I said, it was it was consistent with the discussions I'd had with her that she as far as I'm aware, she was made a copy was made available to her but a copy was placed on her file.

392. He was asked if he received any response from her to the memorandum and he responded:

Not that I can recall, other than I mean, I was aware of her views on it, but as I said, I didn't agree and didn't consider them to be justified and indicated that to her.

393. In the memorandum, Mr Redman characterised Ms Bourke's views about the matter as her "personal views". He was asked if that was still his view. He responded:

Well that's a reference to, I think and I'll have to refresh my memory from her email where she makes comments to the effect that she's not comfortable or she, you know, feels uncomfortable about the process. Yeah. "I feel very uncomfortable with the decisions made". Well you know, there are often decisions made in organisations people don't agree with but their personal views aren't relevant to that. And I explained that to her. And indicated that the council, in my view, had dealt with this matter, you know, in an appropriate way.

394. Ms Bourke's statement indicates that on 5 June 2013, Mr Redman asked her to undertake some further tasks related to the tender. The relevant section of her statement has been reproduced hereunder:

53. On 5 June 2013, I had a conversation with Neale where he advised me that the decision on the audit tender had been deferred for a councillor briefing. He asked me to provide some analysis on a number of matters including what "value adding" services were offered by the tenderers, ASIC's requirements for not having auditors for more than 5 years continuously, resourcing of audits and turnover/loss of key personnel. I was also asked to provide reference checks for the top three ranked submissions. I subsequently undertook reference checking and made enquiries notwithstanding that I was not a member of the panel for the second tender process. I then provided Neale with information for the Councillor briefing.

395. Mr Redman's tasking of Ms Bourke to undertake the activities detailed in her statement, particularly the analysis of the "value adding" services and the reference checking, was ill-considered given that she had indicated to him the previous week that she considered herself conflicted in regard to the process. Notwithstanding this, there is nothing to suggest that Ms Bourke undertook the tasks allocated to her in an improper or less than diligent manner.

Maladministration in relation to appointment of the external auditor

396. The investigation has found that there was maladministration in relation to the appointment of the external auditor.
397. Mr Redman favoured the then incumbent auditor in both tender processes.
398. Mr Redman misrepresented the evaluations of the tender evaluation panels when he reported to Council. Specifically, Mr Redman appended his own opinion to attachments tendered with reports but failed to clearly differentiate that the view being expressed was his and not that of the two panels. He also tendered reports that implied that the tenders had been evaluated by Council's Procurement Coordinator and Council's Solicitor when in fact neither of these employees evaluated the tenders.
399. Mr Redman failed to have due regard to the concerns expressed by Council's *responsible accounting officer* in relation to the first tender process and failed to alert the elected Council that the *responsible accounting officer* had concerns about the process.
400. Mr Redman failed to exercise due care when approving the *Request for Tender* document for the second tender process.
401. Council failed to notify all prospective tenderers that there was an error in the second *Request for Tender* document in regard to the specified term, notwithstanding that two of the tenderers sought and were provided with the correct term.
402. Mr Redman was remiss in not advising the elected Council that acceptance of his recommendation in relation to the first tender process would, in effect, extend the period of time that Council would not have a duly appointed auditor and that this may preclude the timely completion of the half yearly inspection of Council's accounting records by the auditor.
403. Council's *Procurement Policy* stipulates that:

Council funds are to be used efficiently and effectively to procure goods, services and works and every attempt must be made to contain the costs of the procurement process without compromising any of the procurement principles set out in this Policy.

404. This requirement of Council's policy was not complied with given that Council engaged in a second tender process that was manifestly not necessary to the objective of "*efficiently and effectively*" appointing an auditor.
405. A delay of over 12 months in filling the vacant auditor position is manifestly excessive.
406. There was a failure to implement effective internal controls to identify and prevent this occurring.

Role of the elected Council

407. The evidence does not warrant a finding of maladministration on the part of the elected Council. In regard to the decision of 7 May 2013, the elected Council resolved in accordance with the recommendation provided to it. In regard to the decision of 2 July 2013, it is evident that the elected Council had carefully and diligently considered the matter prior to making a decision to reject the recommendation put forward to it by Mr Redman. For example, the Council's resolution of 4 June 2013, to defer consideration of the matter, so that it could receive further information, is evidence of the exercise of prudence on its part.

Was there any serious and substantial waste of local government money and/or resources in relation to the appointment of Council's auditor?

408. Whether there was any serious and substantial waste of local government money and/or resources in relation to the appointment of Council's auditor turned on:
- whether the tender processes were undertaken efficiently,
 - whether a second tender process was warranted, and
 - the quantum of any waste that could have otherwise been avoided.
409. The two tender processes, per se, appear to have been undertaken in a reasonably efficient manner.
410. In regard to the decision of 7 May 2013, it is arguable that it was made without proper regard to whether there was a need for a second tender process and without due regard to the resources that would be used. In considering whether a second tender process was warranted, the following is particularly relevant:

- following the initial call for tenders, the Council received 6 complying tenders;
- the tender evaluation panel assessed these tenders and formed the view that there was a tenderer that could capably undertake the role;
- the amount tendered by the highest ranked tenderer was within the budget allocated;
- reference checking was undertaken that supported the conclusion that the highest ranked tenderer could capably undertake the role.

411. The costs of the second tender process, both in monetary terms and staff time and effort, were a waste of Council resources. Ultimately, the Council derived no material benefit from having engaged in a second tender process. The tenderer it resolved to appoint submitted a similar tender in response to the initial tender process, the number of tenders received was similar and the amounts tendered were not materially different.

412. While the quantum of waste, in monetary terms, cannot be reasonably categorised as being substantial, it is none the less a serious matter given the circumstances in which it arose.

3.4 Conduct and performance as the Trust Manager of the Hudson Park Reserve Trust

Introduction

413. Hudson Park is a Crown Reserve. It comprises an 18 hole golf course, a driving range and some associated facilities. Control of Hudson Park is vested in the Hudson Park Reserve Trust. Council is the Trust Manager.
414. The terms of reference required the investigation to examine the Council's conduct and performance as the Trust Manager since 1 July 2009.
415. The investigation had regard to the statutory framework governing the Council's conduct and performance as the Trust Manager.
416. In measuring the standard of care to be applied to reviewing Council's performance and conduct as Trust Manager, it was noted that Courts have held that, in the management of the trust business, a trustee should exercise the same diligence and prudence as an ordinary prudent man of business would exercise in conducting that business if it were his own (*The Charitable Corporation v Sutton* 26 ER 642).³²
417. The then current version of the *Reserve Trust Handbook* issued by NSW Trade & Investment, emphasised the importance of sound management in the following terms:
- Crown land is a valuable public asset. The land must be managed prudently to ensure that the greatest environmental, social and economic benefits to the State and the public are achieved, while minimising safety or risk issues. The efficient management of buildings, assets and infrastructure assists in achieving these benefits.*
418. The investigation found that the Council has failed to undertake its responsibilities as Trust Manager of the Hudson Park (R62163) Reserve with a requisite degree of diligence and prudence. In particular, the investigation revealed:
- deficiencies in the Council's procurement and selection of a licensee

³² This principle was recently acknowledged in *Westpac Banking Corporation -v- The Bell Group Ltd (in liq)* [No 3] [2012] WASCA 157 (17 August 2012) at para 850.

- Council permitted a company to operate the golf course and driving range without a licence
- there were delays in issuing a licence
- poor administration of the licence, including multiple failures to ensure compliance with licence conditions
- failure to secure timely payment of licence fees and other charges due to the Trust.

419. A chronology of events and documents is provided as an appendix.

Appendix 33 - Chronology – Hudson Park

The statutory regime

420. The *Crown Lands Act 1989* provides that Crown land is not to be occupied, used, leased, licensed, or otherwise dealt with unless the occupation, use, sale, lease, licence, reservation or dedication or other dealing is authorised by that Act.
421. The *Crown Lands Act* makes provision for the formation of reserve trusts and the appointment of councils to manage such trusts.
422. The *Crown Lands Act* provides that a reserve trust may not grant a lease or licence, (except a temporary licence) in respect of land in the reserve except on defined conditions, and then only with the consent of the Minister.
423. The *Crown Lands Act* provides that if a council is the manager of a reserve trust and the reserve is a public reserve, the trust has all the functions of a council under the *Local Government Act 1993* in relation to public reserves.
424. The *Local Government Act* provides that a licence for a term exceeding 5 years may be granted only by tender.

Council's approach to its role and responsibilities as Trust Manager as at 1 July 2009

425. As at 1 July 2009, the Council was exercising its role as Trust Manager by maintaining the golf course. It had issued a licence to a third party for the operation of the golf course and driving range.

426. The Council was seeking to redevelop the course and driving range. It was seeking a licensee that would, over 10 years, contribute to the costs of, or undertake the redevelopment works. Council's Director, Operations, Mr Robert Bourke, when interviewed, indicated that Council had become frustrated that the existing licensee had failed to upgrade the golf course and driving range.
427. Council, as Trust Manager, was obliged to call for tenders prior to granting a licence in regard to Hudson Park and had moved to do so.

Tender for the redevelopment and management of Hudson Park

428. In July 2009, the Council called tenders for the redevelopment and management of the Hudson Park golf course and driving range. Fundamental to the revised tender was the provision of a works program to be undertaken by the licensee.

The request for tender (RFT)

429. In calling tenders, Council was seeking to re-develop Hudson Park. In this regard, clause C1 of the RFT provided:

It is intended for Council to enter into an Agreement with the Preferred tenderer, selected in accordance with the provisions of Part B Conditions of Tendering, to deliver the Project Works listed in Clause C4 within parameters acceptable to Council and within constraints applicable to the Site.

430. The RFT outlined and detailed a number of re-development works that tenderers could consider addressing in their submission. The works included re-construction of the pro shop and amenities, upgrading the driving range, upgrading the golf course, improvements to the screen fence and improved marketing. The list was neither exhaustive in detailing what work could be undertaken, nor did it mandate any works.
431. The RFT anticipated that project works would commence within 21 days of the successful tenderer being given possession. Each tenderer was required to indicate what works they would carry out. The RFT anticipated payment of a monthly licence fee and a profit sharing arrangement. The RFT specified that the successful tenderer would be required to provide an unconditional bank guarantee of \$50,000.

432. While it was apparent the Council had intended that it would continue to maintain the course, this was not made clear in the RFT.

Acceptance of a late tender

433. Council considered a tender that was submitted after the closing date for receipt of tenders. It should not have done so. Clause 177(2) of the Regulation provides:

A council must not consider a tender that is not submitted to the council by the deadline for the closing of tenders.

434. The tender closed at 4 pm on 17 August 2009. At the time the tender closed, Council had received a tender from Stacey Holdings Pty Ltd. No other tender had been received.
435. On 11 August 2009, solicitors for Titanium Golf Management Pty Ltd (Titanium) wrote to the Council advising that it acted for "Titanium Golf" and that it would not be able to meet the tender date. The letter sought an extension of the tender period to accommodate the needs of Titanium. The letter sought a number of concessions on behalf of Titanium. There is no evidence that Council replied to this letter.
436. On 18 August 2009, Titanium lodged a tender with the Council. There is a hand-written notation on the tender reading:

"Received over counter on 18/8/09"

Appendix 34 - Titanium tender

437. Having received Titanium's late tender, Mr Bourke wrote to Titanium, care of its solicitor, noting that the tender had been delivered out of time. The letter continued:

Late tenders may be considered by Council subject to the provisions of the Local Government Regulation 2005. The regulation requires the tenderer to satisfy Council that the tender was posted or lodged at a Post Office or other recognised delivery agency in sufficient time to enable the documents to have been received by the Council in the ordinary course of business before that deadline.

438. The letter sought reasons or evidence to satisfy the Regulation.

439. On 7 September 2009, Titanium's solicitor replied. The letter attributed blame to the Council for failing to respond to the earlier correspondence. The letter acknowledged that:

... the tender while being late was delivered to the Council at the very first opportunity after the close of tenders that is, on the morning of 18 August, 2009.

440. The letter submitted that the late tender was capable of being accepted pursuant to clause B8 of Council's RFT on the basis that it was a late tender, submitted by hand. Clause B8 provided:

Late Tenders delivered by hand may be considered if the Contact Officer is satisfied that under normal circumstances they would have been received by the date and time for closing of tenders and that the delay was beyond the control of the Tenderer.

441. Council apparently accepted this submission and proceeded to evaluate Titanium's submission, along with the tender that had been received prior to the closing date. Regulation 177(5) did not permit this course of action, providing:

A council must also consider a tender received within such period after the deadline for the closing of tenders as it decides to be reasonable in the circumstances if the tenderer satisfies the council that the tender documents and all other requisite essential information were posted or lodged at a Post Office or other recognised delivery agency in sufficient time to enable the documents to have been received by the council in the ordinary course of business before that deadline.

442. The response provided by Titanium's solicitor was not directed to sub-clause (5). There is no evidence to indicate that Titanium had posted or lodged its submission at a Post Office or other recognised delivery agency in sufficient time for it to be received by the council prior to the closing date for receipt of tenders. Given this, Council was not able to rely on clause 177(5) as a basis for considering Titanium's submission.
443. Clause B8 of the RFT, which purported to give a general discretion to Council to consider late tenders, contravened the Regulation. It was ultra-vires and, accordingly, should not have been included in the request for tender document.

Requirement to submit a conforming tender

444. Clause B2 of the RFT required tenderers to submit a conforming tender that *"completely complies with the Invitation to Tender"*.
445. Stacey Holdings Pty Ltd lodged a conforming tender that addressed the criteria and provided detailed information. Titanium's response was non-conforming. It was substantially incomplete:
- it contained the notation "TBA" in relation to items 3, 4 & 5 of schedule 1
 - it contained the notation "TBA" in relation to schedule 4
 - it contained the notation "To Be Provided" in relation to schedules 5 & 6
 - it failed to provide audited or certified financial statements
 - it provided brief particulars of its purported experience and performance
 - it also failed to provide details of the re-development program. (schedule 8)
446. Council ignored this and proceeded to evaluate Titanium's response.

The evaluation of the tenders

447. A tender evaluation panel was convened. It comprised the Director Operations, Robert Bourke; Director Technical Services, Patrick Wong; Legal Officer, James Ng and an independent Consultant, Phil Hodgson, who acted as secretary and chair. The evaluation panel met and reviewed the responses on 9 September 2009. The minutes of this meeting record:

The evaluation stages, agreed unanimously were completed as follows:

Stage		Stacey Holdings Pty Ltd	Titanium Golf Management Pty Ltd
1	Initial Evaluation	PASSED	PASSED
2	Key Requirements	PASSED	FAILED
3	Technical	PASSED	N/A
4	Support	PASSED	N/A
5	Commercial	PASSED	N/A
6	Pricing	PASSED	N/A
	Evaluation Sheet	N/A	N/A

The hand written evaluations for each member of the TEC were filed at the end of the meeting

The TEC resolved to meet again to agree their formal decision in accordance with Part 11 of the Tender Evaluation Methodology.

448. In his reply to the draft report, Mr Bourke advised that the Tender Evaluation Committee met again to *"agree their formal decision"*. Council has not provided a record of this meeting.

449. On 3 November 2009, the elected Council considered a report on the tender process authored by Mr Bourke. The report incorrectly stated that *"At the closing of the tender, Council received a total of two (2) submissions."* As noted earlier only one such submission had been received.

450. The report's summary stated:

The most advantageous tender for Hudson Park Golf Course is the submission from Stacey Holdings, however it does not make provisions for certain capital improvements sought by Council under an agreement term of 10 years (5+5 option). It is believed that there is scope for negotiating improved terms in relation to the tenders received by Council which would allow Council to proceed with the redevelopment of Hudson Park Golf Course and secure its management for a set term sooner than if it were to embark on the process of inviting fresh tenders or applications.

451. The report recommended:

1. *That Council note that the tenders received for the redevelopment and management of Hudson Park Golf Course do not make provisions for certain capital improvements sought by Council.*
2. *That Council decline to accept any of the tenders.*
3. *That Council authorise the General Manager to enter into negotiations with any of the tenderers (or any other person) with a view to entering into a contract for the redevelopment and management of Hudson Park Golf Course.*
4. *That Council authorise the General Manager to enter into a contract with the person with the most advantageous proposal after negotiations provided that the proposal is no worse than the best submission that Council has received from the tender process.*

Appendix 35 - Report to Meeting 3 November 2009

452. There is nothing in the report to indicate the basis for Mr Bourke's belief that there was scope for negotiating improved terms. However, a separate briefing document authored by Mr Bourke advised Councillors that declining to accept any tenders would allow *"Council to further maximise revenue and add value by offering two licence opportunities within the Golf Course precinct"*, one for the redevelopment and management of the golf course and driving range and another to *"build and manage a "Kiosk and Café"*; he suggested this would *"allow Council to realise revenue not previously captured and encourage usage and patronage within the whole precinct."*

Appendix 36 - Councillor Briefing - 3 November 2009

453. Council adopted the recommendations and resolved:

That Council authorise the General Manager to enter into a contract with the person with the most advantageous proposal after negotiations provided that the proposal is no worse than the best submission that Council has received from the tender process.

454. Thereafter, Council commenced to negotiate directly with Titanium and Stacey Holdings Pty Ltd.

Negotiations with Stacey Holdings Pty Ltd

455. Stacey Holdings Pty Ltd was the incumbent licensee as at 1 July 2009. On 10 November 2009 Mr Bourke and Mr Ng met with representatives of Stacey Holdings. Further meetings took place, however negotiations subsequently broke down. On 14 December 2009 Mr Bourke provided a written briefing to Mr Backhouse on the negotiations with Stacey Holdings. In it, he expressed concern that Mr Scott of Stacey Holdings had indicated an intention to retire and that Council could face the risk of not knowing whether the replacement operator could fulfil the terms of any agreement. He further advised that Council would have no control of who the licence would be assigned to. The report recommended that Council attempt to negotiate a better outcome with Titanium.
456. The negotiations with Stacey Holdings did not progress further. On 3 March 2010 Stacey Holdings wrote to Council terminating its licence.

Negotiations with Titanium Golf Management Pty Ltd

457. On 3 December 2009 Titanium wrote to Mr Bourke putting a proposal for payment of a monthly fee of \$37,000, construction of a kiosk and for 50% of net profit to be re-invested into capital works.

Appendix 37 - Letter from Titanium Golf Management 3 December 2009

458. On 14 January 2010 Council's Legal Officer, Mr Ng and Community Space Technical Officer, Mr Swinney met with Titanium's representatives. The minutes of this meeting indicate that Titanium was to provide further information. Collaterally, the Council was to explore the grant of a liquor licence within a café or restaurant at Hudson Park.

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459. On 3 February 2010, Mr Redman, Mr Wong, Mr Ng, Mr Swinney and Council's Group Manager Corporate Services, Ms Graetz met to discuss the Hudson Park negotiations. The minutes record that no probity checks of Titanium had been carried out at that stage, although "Google" searches had been undertaken. The meeting resolved that a risk assessment should be undertaken on Titanium's business plan and its projections and that reference checks on Titanium should be obtained.
460. On 8 March 2010 Mr Bourke, Mr Ng and Mr Swinney met with Mr Salvato of Titanium. The minutes of the meeting record that Council wanted to proceed with Titanium's proposal, with a takeover on 31 March 2010. On 17 March 2010 Mr Bourke provided a memorandum to Mr Backhouse and the Mayor. He reported that Titanium had offered substantial improvements including:
- construction of a new outdoor licensed kiosk/cafe facility
 - upgrade to signage and driving range equipment
 - significant capital investment based on reinvestment of 50% of net profit
 - improved management and marketing with an allocated annual budget of 5% of turnover
 - a fixed licence fee of \$440,000 per annum.

Appendix 38 - Memorandum (17 March 2010)

461. Council provided a draft licence agreement to Titanium on 19 March 2010. The licence was for 6 months expiring on 30 September 2010. There were a significant number of errors in the draft licence, not the least of which was the inclusion of clauses that assumed the licence would be for a number of years.
- Council allowed Titanium to commence operations without a licence
462. Council allowed Titanium to commence operations at Hudson Park on 1 April 2010 without the requisite licence. At that point in time Council was yet to conclude its negotiations with Titanium and the matter was yet to be the subject of a further report to the Council.
463. Neither the *Crown Lands Act*, nor the *Crown Lands Regulation* allowed Council to permit Titanium to commence and/or continue operations without the requisite licence in place.

464. Mr Redman submitted that if Council had not allowed Titanium to manage the facility there would have been significant impacts on the community due to the facility not being available for use. While this may have been so, it was contingent on the Council to ensure that its arrangement with Titanium was properly documented by way of a duly executed licence prior to Titanium being allowed to commence operations.

Council's assessment of Titanium and its proposal

465. Given Council's decision to allow Titanium to commence operations, it is relevant to consider Council's processes in determining to grant a licence to Titanium.
466. As noted at paragraph 599, Council officers had identified the need for a risk assessment on Titanium's business plan and its projections, and the need to carry out reference checks on Titanium. Council arranged for its auditor to undertake a "due diligence" assessment of Titanium.
467. Mr Backhouse provided his understanding of the importance of due diligence processes in the following terms:

Q718: *In your view what is involved in due diligence?*

A: *Well, it's to check the whole capacity of the other party, verification as to what they're saying is correct and to provide back to the council some assurance that, you know, tick, tick, tick, tick, everything is in order.*

Q719: *The dominoes are lined up?*

A: *Yes.*

Q720: *Now in respect...*

MR MURPHY

Q721: *Including reference checks and financial checks?*

A: *Yes. Yes.*

468. On Wednesday 3 February 2010, Council provided its external auditor with a copy of various documents submitted by Titanium, including an unaudited financial report for the 2008/2009 financial year, budgeted profit and loss

statements and the business plan it had submitted. Council requested that the response be provided within 2 days.

469. In responding to the draft report, Council's then external auditor wrote:

I received an email from a Council officer late Wednesday afternoon, 3 February 2010, requesting me to forward my report by Friday 5 February 2010. I considered that this two day period was not sufficient time to satisfactorily undertake an examination of all documents provided as well as seek information that I currently did not possess especially all matters concerning due diligence. I conveyed this opinion to the officer and I was advised that I should formulate my report based on the documents and information provided by Council.

470. By letter dated 5 February 2010, the auditors reported that Titanium had the business and golf experience and expertise as well as the necessary financial capacity to successfully undertake the management and improvement of Hudson Park Golf Course. Council's auditor provided the following assessment of Titanium's capacity:

In view of the fact that Titanium will pay an annual fee of \$444,000 to Strathfield Council and will apply 50% of the net profit into golf course capital works, it has been necessary to examine these Profit and Loss Statements closely to determine Titanium's financial capacity to meet the terms of the agreement. Indications are that Titanium will (on the basis of projected number of golf rounds) produce an accumulated net profit for five years of approximately of [sic.] \$1.92m. Titanium proposes that one-half of this profit is to be applied to funding the above-mentioned capital works of \$550,000. Therefore \$0.96m will be available to fund anticipated capital works of \$0.55m. The profit of \$1.92m is after the payment of \$444,000 per annum to Strathfield Council.

471. As part of their due diligence report, Council's auditors also reported:

Titanium Golf Management Pty Ltd is a privately owned company with an issued capital of \$10. The company was incorporated on 8 August 2008 with the sole director and shareholder being Mr Carlo Salvato. Prior to the incorporation of the company Mr Salvato operated his business under the business name of Titanium Enterprises.

Appendix 39 - Letter from Warton Thompson & Co 5 February 2010

472. The documents produced by the Council and by Warton Thompson do not indicate that it, or its auditors, contacted Mr Salvato's former employers and/or persons that may have had dealings with Titanium in order to verify

Titanium's claims. The supporting documents supplied to Council by Titanium refer to Titanium Enterprises. Neither Council nor its auditors appear to have tested the veracity of Mr Salvato's/Titanium's claimed association with Titanium Enterprises.

473. In light of the matters raised by Warton Thompson, a statement was obtained from Mr Ng, who had had written to Warton Thompson seeking the due diligence and risk assessment on Titanium.

474. Mr Ng stated that he did not recall any person indicating to him that the time frame for providing the assessment was insufficient, nor did he recall responding that the assessment should only be based on the documents he had provided.

475. Both Mr Bourke and Mr Redman relied on the views of others in relation to Titanium. Mr Bourke provided the following evidence:

Q142: *Now, in terms of forming a view that they, Mr Salvato and Titanium Golf, were a credible applicant, did you make inquiries yourself as to their background?*

A: *No, that wasn't my job to do that. That was the solicitor, I think, at the time that did the due diligence, review of Titanium and which the solicitor looks at all aspect of their business, their company, and I recall seeing a very credible report, I think, that came in from an independent due diligence solicitor.*

Q143: *You certainly didn't do any reference checks yourself?*

A: *No, I didn't. No, the solicitors had done the checks.*

Q144: *The review that you're talking about, is it this review that was provided by Warton & Thompson?*

A: *Yeah, that's it, yeah.*

Q145: *And you regarded that as credible?*

A: *At the time, yes.*

476. Mr Redman provided the following evidence of his understanding of the due diligence process:

Q637 *Rather than have you speculating, can I show you a letter from Warton Thompson which is a report to council which talks about financial assessment and due diligence. Given the benefit of that document, is that your understanding of what you were seeking at the time of the meeting?*

A *Yeah, look I to be honest with you, I'm not sure. It there's two two possibilities; one is it's a reference to this exercise, which is the due diligence. I I suspect it's that, you know, when a when there's the comment about council auditors or someone else, so yeah, it appears on the basis of this, that that's what it's a reference to, about a due diligence exercise in terms of their capacity and their to, you know, perform the the terms of the proposed agreement that we were looking at.*

Q638: *So do you have a good understanding of what's meant by due diligence exercise? Due diligence process?*

A: *Well in general terms, yeah, it's a an exercise where in this case council needed to satisfy itself that well first of all the information that we'd been given by this particular proponent was accurate and complete; that they had the capacity to perform what was required of them under the proposed arrangement, you know, in terms of experience and you know, resourcing, both, you know, staffing and equipment, whatever necessary equipment may be required et cetera et cetera as well as financial wherewithal given the you know, the expenditures associated with the and the overheads associated with operating the facility. So that would be that's my sort of impression of what would have been*

Q639 *Would you agree that that would be a prudent exercise to undertake prior to entering into the licence agreement?*

A *Yes. Yeah, of course*

Titanium – a brief analysis

477. It is relevant at this point to consider the information that the Council could have readily obtained about Titanium and its sole director. The investigation reviewed material publicly available on Titanium Enterprises' website, conducted "Google" searches and searches of ASIC records.
478. Titanium was registered on 8 August 2008. Mr Salvato was its sole director and secretary. Titanium had an issued capital of \$10.
479. Mr Salvato had been, but was no longer, a director of Benbrush Pty Ltd, Keenfit Pty Ltd, Northern Investors Pty Ltd, Pearlbreeze Pty Ltd and Port Biggs Pty Ltd. He had held small shareholdings in Pearlbreeze Pty Ltd, Northern Investors Pty Ltd and Pinmark Australia Pty Ltd.
480. As noted earlier, Council's auditors reported that Mr Salvato operated his business under the business name of Titanium Enterprises. This appears to be incorrect.
481. The website of Titanium Enterprises indicates that its Chief Executive is (currently) Kieran O'Connor. It describes itself as a privately owned and operated group of companies and operates under 15 Titanium Group Companies and 4 Titanium Group Trusts.
482. A search of the directorships held by Carlo Salvato revealed that he was never an officeholder in Titanium Enterprises. Rather, it appears that Mr Salvato was an employee of Titanium Enterprises and held a managerial role with a company within that group.
483. Titanium's letter of 3 December 2009 had given its address as Level 29 Chifley Tower, 2 Chifley Square Sydney. These are serviced offices, leased on a monthly basis.
484. Titanium's annual report for the year ended 30 June 2009 was not audited, despite the requirement in the tender. It showed sales of \$936,475 in the year and a profit before tax of \$203,588. It showed current assets of \$62,718, and \$150,000 goodwill.
485. It is interesting to note that Titanium's annual report for the following year (not available at the time of the tender) does not record any business activities in

the previous year, nor any assets or goodwill. Again, the annual report (which was only sought by the Council in May 2013) is unaudited.

486. The documents supporting Titanium's tender imply that it was part of or associated with Titanium Enterprises. The documents appear to be cut and pasted from various sources (including the website of Titanium Enterprises) in order to provide legitimacy for Titanium's claims of experience and expertise.
487. The documents produced by the Council and by Warton Thompson do not indicate that contact was made with Mr Salvato's former employers or with those that may have had dealings with Titanium.
488. Titanium's tender indicated that its bank was "*Balmain Commercial*"; there is no evidence that Council or Warton Thompson confirmed this or otherwise sought to clarify who the bankers were.
489. All of the evidence indicates that Council failed to adequately scrutinise and review Titanium's proposal, its history and its suggested alliances/association with Titanium Enterprises.
490. There is no cogent independent evidence that Titanium had either the requisite experience or capacity to secure Council's goals.

Report to Council of 6 April 2010

491. The granting of a licence for the operation of Hudson Park was considered as "urgent business" at the Council meeting held on 6 April 2010. As of this date, Titanium had already been allowed to commence operations at the Golf Course. The relevant extract of the minutes of the meeting has been reproduced hereunder:

Urgent Business - Hudson Park Golf Course Licence for Management

101/10

RESOLVED: (Carney/Barron)

1. That Council note the results of the negotiations for a licence to manage Hudson Park Golf Course and that the offer by Titanium Golf Management Pty Ltd (Titanium Golf) is the most advantageous proposal and is better than the best submission that Council received from the tender process.
2. That Council note that the existing licensee Stacey Holdings Pty Ltd provided 1 month notice that they are terminating the current licence agreement effective 31 March 2010.
3. That Council give public notice of the intention to enter into a licence agreement with Titanium Golf as per the requirements of section 102 of the Crown Lands Act 1989.

4. That should no submissions be received Council enter into a licence agreement with Titanium Golf for management of Hudson Park Golf Course for a period of five (5) years plus a further five (5) year option.
5. That the Mayor and General Manager be authorised to sign and affix the seal to the deed document and forward the deed for the Ministers Consent.

Voting on this item was unanimous.

492. The resolution indicates that Council officers had advised the Council that the negotiations with Titanium had been concluded. This was not the case.

The “interim” licence

493. On 19 March 2010 Council had provided a draft licence agreement to Titanium. The licence was for 6 months, expiring on 30 September 2010.
494. Council, having allowed Titanium to commence operations without the requisite licence, was then in a position of still having to negotiate the terms of the licence. Council records indicated that it provided a revised version of the interim licence to Titanium on 19 May 2010.
495. On 31 May 2010, Mr Salvato advised that he would be dropping off the signed copies of the licence that week, which would seem to indicate that the terms of the licence had been settled. However, it appears from subsequent records that they were not.
496. On 4 June 2010, Mr Bourke wrote a memorandum to the Mayor and Mr Backhouse asking that the interim licence be signed. The memorandum provided:

The interim licence agreement allows management of the course in the period of 6 months from the cessation of the previous licence agreement on the 31st March 2010 until Council obtains ministerial consent for the substantive licence agreement on the Crown Reserve. The agreement has been prepared by Councils Solicitors based on the standard licence agreement format for Crown Land and will be similar to the final substantive licence agreement.

497. On 25 June 2010, Mr Bourke provided a further briefing to the Mayor and Mr Backhouse advising that the terms of the interim licence had now been agreed and asking that the interim licence be signed by the Mayor and Mr Backhouse. On 1 July 2010, Mr Bourke provided a further memorandum to

the Mayor and Mr Backhouse providing more detail of the outcomes of the negotiations with Titanium. The report echoed the report of 17 March 2010. It described Titanium's offer in the following terms:

The most advantageous offer for management of Hudson Park Golf Course was the submission from Titanium Golf that provides both a vision and new direction to increase patronage, significant capital investment and better financially that [sic] the best offer in the tender.

498. The report advised:

Titanium Golf offered Council significant improvements/redevelopment that include:-

- *construction of a new outdoor licensed kiosk / café facility,*
- *upgrade to signage and driving range equipment,*
- *significant capital investment based on reinvestment of 50% of net profit*

The report set out forecast capital expenditure of \$550,000 over 5 years, the improvements to management and marketing and an increased revenue stream. As he had done previously, Mr Bourke asked that the interim licence be signed by the Mayor and Mr Backhouse.

499. Despite requests, Council has not provided a signed copy of the interim licence to the investigation.

500. There are significant errors in the unsigned version of the interim licence provided by the Council, not the least of which was the inclusion of clauses that assume the licence would be for a number of years.

501. In responding to the draft report, Mr Bourke advised that Council had engaged external lawyers to review the draft interim licence. The Council has not provided any documents recording the request, nor any advice provided to the Council.

The granting of a licence to Titanium

502. In November 2010, the Council took action to secure the requisite Ministerial consent for the granting of a licence to Titanium. At this time, Titanium had been operating the golf course for seven months. The investigation has not been able to establish the reason for the delay in seeking the Minister's consent. On 30 November 2010, Mr Bourke provided a briefing to the Mayor and Mr Backhouse advising:

The licence agreement for Hudson Park Golf Course expired in April 2010. Titanium Golf Management Pty Ltd has been the interim licensee since that date.

A 5 year with 5 year option licence has been prepared and has been:

- *Prepared by Solicitors Maddecks. [sic]*
- *Updated by Peter Fahey.*
- *Overviewed by Strathfield Council's Solicitor Geoff Baker.*
- *Forwarded to the Minister for Lands, The Hon. Tony Kelly MLC for approval.*

The licence agreement was forward [sic] to the Minister on Friday 26 November 2010 seeking approval as the licence agreement is for a period greater than 5 years.

When the licence agreement is returned from the Minister it will be prepared for signature by the Mayor and General Manager,

It will be then forward [sic] to Titanium Golf Management Pty Ltd for their signature(s).

503. On 1 December 2010 Mr Bourke provided a further briefing to Mr Backhouse, generally in the same terms as the 30 November 2010 briefing.
504. The licence records it was signed on 11 March 2011 but the Minister's consent was not obtained until 8 June 2011. A copy of the Licence has been provided as an appendix.

Appendix 40 - Licence

505. The delay in the signing of the licence and in the obtaining of the Ministerial consent can partly be explained by the apparent loss of correspondence sent to the Department of Lands. More relevantly, it took from mid-December 2010 until 24 March 2011 for the Council to respond to alterations to the licence that were required by the Land & Property Management Authority.
506. Part 14 of the then current version of the *Reserve Trust Handbook* provided clear advice on the processes to be adopted when granting licences. This advice was not followed by the Council. Council's processes represented a significant departure from these processes. The relevant extract from the Handbook has been provided as an appendix.

Appendix 41 - Extract from Reserve Trust Handbook

Commencement date of the licence

507. The licence expressed itself to have commenced on 1 April 2010. However, in the absence of the Minister's consent, the licence did not take effect until 8 June 2011. At that time Titanium had been in possession and operating the business for over a year.
508. The commencement date of the licence appears to have simply ignored that the Council had purportedly entered into an interim licence that was to operate for a period of six months from 1 April 2010 to 30 September 2010.
509. In the absence of some express or implied surrender of the interim licence, the 5 year licence could, on the face of it, only commence after the interim licence had expired. Alternatively, the commencement date may be indicative that an interim licence was not ultimately granted.
510. Given the paucity of Council records pertaining to the granting of the licence, it is now not possible to make a finding as to the reason why the licence indicated a commencement date of 1 April 2010.

The licence

511. Titanium's obligations under the licence included:
- payment of the licence fee by monthly instalments
 - construction of a new kiosk within 6 months of the commencement date (i.e. 1 October 2010) and detailed its general size
 - investing at least 50% of its net profit into capital works
 - providing information to the Council, including monthly reports regarding the conduct of the business and provision of its audited financial statements
 - indemnifying the Council from all claims arising from its occupation and use of Hudson Park
 - not to grant a sub-licence.
512. The licence did not require Titanium to provide a bank guarantee or security deposit.

513. The licence permitted the Council to audit Titanium's records and required quarterly meetings between Council and Titanium to discuss compliance and other issues.
514. The licence attached the business plan. Under part 1.3, it detailed the forecasted capital needs, costs and timeframes. However, it failed to impose an obligation to undertake any work to give effect to the plan.
515. Council's responsibilities included:
- Collecting the licence fee (initially \$488,400 per annum (including GST))
 - Calculating and imposing the annual CPI adjustment
 - Adjusting the licence fee to the current market rental (if thought fit)
 - Rendering and collecting other charges
 - Collecting interest payable on overdue money
 - Ensuring Titanium's compliance with the terms of the licence
 - Ensuring the business plan was updated annually
 - Participating in the meetings required by the licence
 - Providing particulars of any claim that it received arising from Titanium's occupation and use of Hudson Park
 - Otherwise ensuring that Titanium complied with the terms of the licence.
516. It is important to note that the terms of reference for the investigation did not require consideration of Titanium's conduct and performance. However, to the extent that Titanium breached or failed to comply with the terms of the licence, the terms of reference required consideration of how Council responded to and/or managed those breaches or failures.

Council's administration of the licence

517. The then current version of the *Reserve Trust Handbook* provided:

The rents received under leases and licences often represent a significant part of a reserve's income. It is therefore important that the trust makes sure the lessee or licensee is:

- *obeying the terms of its lease/licence*

- *paying rent and other money on time*
- *not doing anything that is inconsistent with the lease/licence or the permitted purposes of the reserve.*

518. It further provided:

The trust's treasurer must monitor payments of rent or any other money payable under the lease/licence, and report any arrears or irregularities to the board as soon as they become apparent.

Collecting the licence fee

519. An initial licence fee of \$40,700 per month was payable. It was to be paid in advance on the 1st day of each month.
520. In November 2010 (prior to Council's execution of the licence) Titanium failed to pay the licence fee. Council appears not to have responded to this breach. In each of the months of July 2011, December 2011 and January 2012 Titanium also failed to pay the licence fee. As at January 2012, Titanium owed \$162,800 in unpaid licence fees.
521. In responding to the draft report, Mr Redman disputed the correctness of the foregoing statement. However it might be noted that on 31 May 2013 Mr Redman wrote to Titanium setting out the details of its default. The above figures are drawn from this letter.

Appendix 42 - Council's letter to Titanium dated 31 May 2013

522. In early December 2011, Council's then solicitor, Ms Monica Kelly, had been made aware of recovery action being brought against Mr Salvato. On 7 December 2011, she wrote a memo to Mr Backhouse and Mr Bourke emphasising the need to "*swiftly recoup the arrears and prevent further losses.*" She advised and expressed concern that Titanium's financial viability was questionable. The memo indicated that Council could terminate the licence and could charge interest. The email attaching the memo warned that Mr Salvato could be facing bankruptcy.
523. Council took neither of these courses. In January 2012, following negotiations, Council agreed to accept an additional \$10,000 per month to make up the arrears. Titanium failed to make the additional payments.

524. In April 2012, Council's then Manager Finance, issued a letter of demand and instructed Council's debt collectors to institute recovery proceedings. In April 2012, Titanium's solicitors alleged that Council had failed to maintain the golf course. Titanium's claim that it had suffered a loss of income arising from works undertaken by the Council was to serve as an effective barrier to any action for recovery.

525. Ms Kelly subsequently interviewed the grounds keepers responsible for the maintenance of Hudson Park. She communicated their evidence to Maddocks, who were providing advice to Council on the matter. Ms Kelly gave the following statement in relation to the events:

- 35 The grounds keepers had their diaries with them and they were able to give me clear answers, supported by their diary entries. The grounds keepers were credible and appeared honest in their answers.
- 36 After our meeting I drafted an email to Maddocks lawyers, who were assisting with the matter. Maddocks drafted an advice premised on the evidence I had provided and forwarded it to me in draft form to verify whether the facts were correct as laid out. I forwarded this advice to Mr Bourke seeking same. Mr Bourke's asked me to come to his office to discuss.
- 37 I walked to Mr Bourke's office and we had a conversation similar to the following
- RB "the facts are all wrong. Carlo is a business man and he's trying to run a business out there but he can't because those guys have stuffed up the grass. You can't play on the grass there they've really stuffed it up"
- MK "Well, that's not what your grounds keepers told me. They had their diaries with them and had it all written down"
- RB "Well, they're wrong and they're covering themselves."
- MK "Well, if Titanium are claiming loss Carlo needs to verify it. Have you received any audited reports from Titanium?"
- RB "Yeh, of course. They're on record"
- MK "I've seen a couple of reports with some financials in them but they're not audited"
- Mr Bourke looked confused
- RB "They were done by his accountant"
- MK "Yes, but an accountant is not an auditor. We need independently audited reports"
- RB "Yeh, yeh, they're alright"
- MK "No, it's not, we need audited reports. If Carlo is claiming loss then he needs to verify it."
- 38 I found no audited reports from Titanium. At some stage Mr Bourke forwarded me a document meant to explain Titanium's loss, however it had the same information in it from Titanium's financial report. It looked like the information had been cut and pasted from Titanium's document. Mr Bourke instructed me to forward this to Maddocks to assist with the final advice.
- 39 The final advice came back to me advising that Council owed Titanium money.

526. Mr Bourke disagreed with the advice of his staff. And, in part supported Titanium's claim that Council had failed in its maintenance obligations. On 20 June 2012, Mr Bourke authored a memorandum alleging failures on Council's part. A copy of this memorandum is provided as an appendix.

Appendix 43 - Robert Bourke's Memorandum of 20 June 2012

527. Council's solicitors noted, in their letter of 27 June 2012, that they were instructed to prefer the facts set out in Mr Bourke's memo of 20 June 2012, where an inconsistency arose.

528. On the recommendation of its solicitors, Council's efforts were directed to seeking particulars from Titanium about its claim with a view to resolving the matter by agreement.
529. While the letter advised that the licence contained a specific dispute resolution procedure, Council does not appear to have implemented the dispute resolution procedure. In this regard, it might be noted that Council's subsequent solicitors reminded it of the need to deal with this issue in an email dated 22 October 2013.
530. In the absence of any court proceedings, Titanium was under no pressure to particularise its claim for its losses. While it provided some information, it never fully particularised or quantified its claim. In a memorandum dated 15 February 2013 Mr Bourke recommended that Council waive 4 months of the licence fee. Further action for the recovery of the debt remained in abeyance until 31 May 2013 when Council wrote to Titanium demanding payment of the arrears. In doing so, it also required that Titanium provide a detailed report regarding the operation of the business, its audited financial statements and evidence of the capital works required by the licence.
531. While some of the information was provided by Titanium in response, it was not until March 2014 that Council commenced proceedings to recover the debt. By that time Titanium had failed to pay the licence fee for September, October, November and December 2013, as well as January 2014. The debt had risen to \$400,175.04. It might be noted that the amount does not appear to include the amount due under the interim licence. When asked about the likelihood of recovering the outstanding money owed to Council, Mr Redman said:
- Q685: *Have you given consideration at whether or not council's likely to recover the amount of the judgment debt against Titanium?*
- A: *I haven't. My my own view is that I think that's probably unlikely. I look, I that's a personal view because there's a couple of factors. I don't know the financial position of the company; I mean, we haven't haven't yet sort of looked at that stage of the process and in terms of what assets may be available but I'm aware, through information that we've received*

when we took the action to take over the facility, that there are a range of creditors and I think, you know, the likelihood of us receiving some or all of it is fairly low. But we're, as I said, pursuing the matter, you know, and attempting to enforce our rights.

532. Had Council obtained the financial statements as at 30 June 2012 in a timely manner, it would have ascertained that Titanium's current assets substantially comprised a loan of \$40,644 to Mr Salvato. Given this and the concerns raised by Ms Kelly in her email of 7 December 2011, Council should have been alerted to the need to take timely action to mitigate any potential loss of income.
533. Pursuant to clause 11 of the licence, Council was entitled to terminate the licence if the licence fee was in arrears for 1 month. In November 2010, prior to Council's execution of the licence, Titanium had failed to pay the licence fee. In July 2011, December 2011 and January 2012, it again failed to pay the licence fee. On each occasion Council was entitled to terminate the licence, but did not exercise this power. The documents provided by the Council do not indicate that Council gave serious consideration to terminating the licence.
534. While clause 23 of the licence required that Titanium pay interest on overdue monies, Council did not implement this clause.
535. On 9 September 2014 an order was made to wind up Titanium. Titanium's statement of affairs lodged with ASIC reports that its sole asset is a motor vehicle said to be worth \$25,000. Its disclosed debts total almost \$585,000. Its major creditors are the Council (\$460,000) and the Australian Taxation Office (\$70,000).
536. Council failed to respond to Titanium's initial and subsequent defaults by taking decisive action. Its failure to do so has contributed to its current position, facing the impossibility of collecting a debt exceeding \$400,000.

Licence fee adjustment

537. The licence fee was to be adjusted annually in accordance with the variation in consumer price index (CPI). The licence contained a formula for doing so. Additionally, the licence fee could be adjusted (at the Council's discretion) in

accordance with the market licence fee payable for such premises on the third anniversary of the licence.

538. The Council failed to adjust the licence fee on either the first, second or third anniversaries of the licence.

539. When the Council eventually raised an invoice for CPI adjustments, on 17 June 2013, the invoice understated the amount of the adjustment. Council did not claim the full amount that was due to it until 28 August 2013, being an additional CPI adjustment amount of \$31,471. When asked about the delay in making the CPI adjustments, Mr Bourke said:

Q220: *Do you recall that the CPI adjustment was not done for a couple of years?*

A: *That was brought to my attention. Once again, financial the chief financial officer and their staff should have been monitoring at the time, they should have been monitoring CPI in terms of licence agreements and other fees and charges. So, it was their role to*

Q221: *To monitor that?*

A: *Yes.*

540. There was also a delay in the Council adjusting the fee to the current market rent this could have occurred on the third anniversary (1 April 2013) but Council did not write to Titanium to give notice that it had reviewed the rent in accordance with the market licence fee until 26 September 2013.

Titanium's obligation to provide information

541. Titanium was required by the licence conditions to provide Council with a copy of its audited financial accounts within 60 days of the end of the financial year. There is no evidence that Council requested that the accounts be provided when they were due.

542. The 2009/2010 financial statements should have been provided shortly after the commencement of Titanium's operations at Hudson Park i.e. no later than 1 September 2010 and as such should have been available to Council prior to it signing the licence in March 2011.

543. On 31 May 2013 Council wrote to Titanium requesting copies of its audited financial accounts for 2009/2010, 2010/2011 and 2011/2012. On 2 July 2013, Titanium provided unaudited accounts for 2009/2010, 2010/2011 and 2011/2012.
544. Council does not appear to have made a subsequent request for provision of the 2012/2013 audited financial accounts.
545. A review of the 2009/2010 financial accounts provided by Titanium indicates:
- The 2009/2010 financial statements do not include the previous year's figures that had been supplied to Council when Titanium submitted its proposal.
 - The 2009/2010 financial statements show a substantial decline in Titanium's financial position from that previously provided, as follows:
 - a decline in pre-tax profit from \$203,588 to \$17,187
 - a decline in capital and reserves from \$142,522 to \$12,041
 - the disappearance of unappropriated profits of \$142,512
 - no current assets.
546. The 2009/2010 statements suggest that Titanium Golf Management Pty Ltd had not traded prior to being allowed to commence operations at Hudson Park. Titanium's 2009/2010 financial statements bring into question its credibility and its suitability as a licensee. By 30 June 2012, Titanium's accounts were showing that it was trading at a loss. A loan of \$40,644 to Mr Salvato made up its substantial asset.
547. By the time that Council obtained Titanium's financial accounts its position had weakened to such an extent that any profits that might have been shared were gone. Further, it owed substantial licence fees.
548. Council failures to enforce Titanium's obligation to provide audited financial statements and its failure to request and/or obtain Titanium's 2012/2013 financial accounts indicate a lack of diligence in the exercise of its function as Trust Manager.

549. The relevance and importance of the failure to obtain any audited financial statements is further indicated in the following information from the Australian Securities and Investment Commission's website:³³

An auditor's report is a key tool when reporting financial information to users.

It is an independent opinion provided by an independent external auditor as a result of an audit, review or agreed procedures conducted on an entity.

The auditor's report is intended to provide an opinion to report users as to whether the applicable financial reporting framework has been applied in the preparation of the report, whether they are free from material misstatement and whether they show a true and fair view of the operating results, financial position and cash flows of the entity.

The business plan and required capital works

550. The licence attached a business plan. Perhaps most relevantly the executive summary of the business plan provided:

Titanium Golf has proposed to take over the Management of Hudson Park Golf Course for an annual fee of \$444,000 pa plus 50% of the net profit to be put back into the golf course for capitol [sic. capital] works

551. Clause 1.2 provided:

Hudson Park will require extensive landscape work and improvements. This work will be continuous over a three year period. Work will be determined by both Strathfield Council and Titanium Golf on a priority basis and confirmed within the annual budget. Titanium Golf's ergonomic module will be utilized to improve playing surfaces by 15–20% under current budget allowances and will increase budget to reflect round growth.

552. Clause 1.3 of the business plan listed the forecast capital expenditure to ensure long term integrity of the golf course as being:

<i>Survey base of existing golf course</i>	<i>\$15,000</i>
<i>Tees Reconstruction/ Additional Teeing Area</i>	<i>\$130,000 (over 5 yrs)</i>
<i>Fairway Topdressing and Amendment Program</i>	<i>\$60,000 (over 2 yrs)</i>
<i>Requirements for additional subsurface drainage</i>	<i>\$25,000 (over 5 yrs)</i>
<i>Bunker reconstruction</i>	<i>\$150,000 (over 5 yrs)</i>
<i>Weed eradication program</i>	<i>\$20,000 (over 2 yrs)</i>
<i>Screen Fencing Improvements</i>	<i>\$150,000 (over 5 yrs)</i>
<i>Total</i>	<i>\$550,000</i>

553. The licence required the licensee to conduct its business in accordance with the business plan agreed by the Council and Titanium. The licence provided for annual updating of the plan.

554. On 25 November 2011 Council wrote to Titanium in relation to re-turfing works. The letter stated:

The Council notes that Titanium Golf has certain obligations under Schedule 2 of the Agreement to invest at least 50% of net profit from the operation of the Hudson Park Golf Course back into capital works on the premises, in accordance with the business plan that is incorporated into the agreement. Council's payment for the works outlined above is without limitation to Titanium Golf's obligations under the Agreement. It is suggested that Council and Titanium Golf convene a meeting in the near future to discuss, and agree an updated business plan. In particular, the purpose of this meeting would be to examine and reprioritise the items listed in the "Capital Needs" Section of the business plan, taking into account the re-turfing work described in this.

555. Nothing appears to have come of this letter.

556. Subsequently, on 2 August 2012 Ms Kelly sent an email to Titanium's solicitors seeking a report identifying how Titanium's Business Plan was being adhered to and what improvements it had made. Titanium was invited to provide an updated business plan. Titanium responded, advising that it had undertaken certain refurbishment work, provided floodlighting, and had purchased driving range equipment. It declined the offer to put forward an updated business plan.

557. When interviewed, Mr Bourke acknowledged that the business plan was not updated.

Q354: *So, was there an arrangement to release him from responsibility in respect of the business plan?*

A; *No, I just think from because of the due course and the nature of what was happening, there was no way some of these works could be done because we were like, he was in arrears, we had problems with his expectations, our expectations in terms of what our standard was. So, because we had that conflict, which I stated very much upfront, a lot of these things weren't realised. He wasn't going to invest in that and nor by him being in arrears and so forth, we had issues then. So we had to go back to,*

firstly, reconciling the problems that we had and the issues with arrears before a lot of this would occur.

558. The evidence provided by the Council indicates the business plan was never updated, let alone annually, as the licence required.
559. Council failed to undertake the necessary steps to ensure that Titanium undertook a program of capital works:
- it failed to adequately define and mandate the provision of capital works within the licence or through updated versions of the business plan
 - no schedule of capital works was agreed with Titanium during the term of the licence.

Failure to take action to require construction of a new kiosk and other capital works

560. The one capital improvement that the licence did provide for was the construction of a new kiosk. The licence provided:

Subject to obtaining the Licensor's and the Council's (in its role as the statutory planning authority) prior written consent before undertaking any capital works, the Licensee must complete construction of a new kiosk at the Premises within six (6) months of the Commencement Date. The new kiosk must [sic] the following minimum specifications: the construction of an outdoor pavilion with BBQ facilities and a snack bar that would seat up to 50 people.

561. The licence expressed itself to have commenced on 1 April 2010. Accordingly, construction should have been completed by 1 November 2010.
562. The kiosk was not constructed within 6 months of the commencement date of the licence, nor was it constructed within 6 months after the Minister had given his consent to the licence. Ultimately, a new kiosk was never constructed. It goes without saying that this was a breach of the terms of the licence.
563. On 7 February 2011, Titanium provided a sketch of a new kiosk to Mr Bourke for discussion. Mr Bourke provided the following evidence:

Q264: *One of the requirements for the business plan was for the licensee to complete construction of a new kiosk at the premises within six months of the commencement date. I'm sorry, not of the business plan, of the special conditions of the licence.*

A: *Yeah, that's correct.*

- Q265: *Can I show you an email from yourself to Melanie Sallis asking for some printouts. It also contains an email from Carlo Salvato to yourself of 7 February 2011 and what appear to be plans.*
- A: *Be nice to do that.*
- Q266: *I was about to ask you the obvious question: can you tell us what happened in relation to it.*
- A: *That was just a concept he put up, he put forward.*
- Q267: *So that was roughly ten months after the licence had commenced?*
- A: *We'd been pursuing him earlier to give us something and, like I said, the relationship wasn't going as well as what we would have liked. If you read that, he has documentation regarding to the greens and the condition of the course, and so forth. So, had a bit of, I guess, a conflict with our relationship, council and the licensee which did cause over quite a few issues.*
- Q268: *So, apart from receiving the concept plans, did anything else occur in relation to that proposal?*
- A: *That, where he put it up, that was just a concept he put up.*
- Q269: *You'd agree that one of the major factors of the licence for the licence agreement was to get these capital improvements and get the licensee to contribute to capital improvements?*
- A: *Of course. That's always council's aim is to maintain and upgrade the asset in the best possible way. The issue as I said, and I'll say it again is that there was a falling out, and we had some ongoing issues with that and which caused a consistent approach, I guess, with the bit of conflict between the parties, what caused a few of the issues, and you'll notice how later on with the greens, that also extended to the problem down in terms of pursuing company improvements and profit sharing, and so forth.*
- Q270: *You'll see in terms of the licence agreement, council put in that milestone, didn't it, that he had to be more consistent?*

A: *Yeah, well, I think that was part of his submissions.*

Q271: *And so can I suggest it was only six months into the licence agreement when that kiosk hadn't been built?*

A: *Well, the kiosk was already there. He'd done some minor works on the kiosk. It was existing use. He'd started to upgrade and do some works in the kiosk, and you'll see that by some of the financial statements he's made, that he injected some money into the pro shop and the kiosk. So, he believed at that time that that was sufficient.*

Q272: *Was it not council's expectation that there was going to be a new kiosk built?*

A: *No, there was already existing kiosk; it would be upgraded. A new kiosk would have meant upgrading the current one or coming up with the plan he put on the table there which never went anywhere. So, we sort of it was more based on the current building, upgrading the current kiosk that was there.*

Q273: *Well, certainly, at that six month point, nothing had occurred?*

A: *He'd done some minor works. He'd already updated minor work there, but it wasn't sufficient for council, council's expectation.*

564. Mr Bourke's evidence stands in stark contrast with the terms of the licence.

565. Titanium did seek approval to undertake some work on the existing kiosk. In an email dated 28 September 2012, Mr Bourke described the works as

... minor upgrading to his kiosk in order to sell food ,coffee etc

566. The limited nature of these works was subsequently confirmed in the *Statement of Environmental Effects* dated 2 November 2012, which emphasised that:

There will be no building works proposed to the existing structure, it will remain as it is.

567. In later correspondence between Council and Titanium, Titanium asserted that it had spent \$49,000 on upgrading the kiosk but this claim does not appear to have been verified.

568. There is no evidence that Council took any steps to require Titanium to comply with this condition of the licence. Council appears to have simply ignored the requirement for Titanium to construct the kiosk.

The indemnity

569. Clause 35 of the licence required Titanium to indemnify the Council against claims arising from its occupation, operation and use of Hudson Park.
570. In the period from 1 July 2010 to 27 March 2014 (shortly after the licence was terminated), Council had paid golf ball damage claims totalling \$44,112. On 9 August 2011 Council's then solicitor, Ms Kelly, advised Mr Redman that:

... all golf ball damage claims, and other claims stemming from the golf course, should be forwarded directly onto the licensee. Council should also instruct the claimant to deal directly with the licensee.

571. On the same day, Council's Risk Management Coordinator, Ms Marnie van Dyk, provided a memo to Mr Redman advising:

A review of the agreement signed with the Licensee of the golf course revealed that it was agreed that the Licensee indemnify Council from all liability. It is therefore recommended that any such claims reported from 1 October 2011 be handled by the Licensee.

A letter informing the Licensee of Council's intention to enforce paragraph 35 (Indemnities and Insurance) was compiled. It is strongly recommended that the letter be forwarded to the Licensee and confirmation of agreement be obtained.

572. Council failed to implement the recommendation. In a memo dated 3 May 2012, Ms Van Dyk advised:

Also this is a concern from a financial point as Council settles these claims without forwarding them to the insurance company because claims are generally below excess.

573. On 3 May 2013 Ms Marnie Van Dyk wrote to Titanium in the following terms:

Council has reviewed the "Claim form for golf ball damage" and a Privacy Statement was included. Please destroy any unused copies of the previous claim form and ensure this new form is implemented from 6 May 2013.

Please note that the new form also require [sic] that a photo of the damage be attached in order to validate the claim.

Do not hesitate to contact me on the above number if you have any further queries in this matter.

574. Council ignored advice from its solicitor that Titanium was responsible for golf ball damage claims. Council failed to ensure that Titanium met the costs of the claims.

Insurances

575. Titanium was required to effect and maintain public risk and property insurance for \$10,000,000 and \$875,000 respectively.
576. The then current version of the *Reserve Trust Handbook* emphasises the need to divest liability to licensees in the following terms:

In many cases, the major activities that occur on reserves are not carried out by the reserve trust itself. Reserves are used by a wide range of bodies, including sporting clubs, show and agricultural societies, commercial organisations and individuals providing services for the community.

In these cases, as the trust is not conducting the activity, it should not take responsibility for the risks involved and should enter into a suitable agreement that passes the responsibilities to the lessee or licensee.

577. Council's records were reviewed and copies of Titanium's certificates of currency for the periods commencing on 31 March 2011 and 31 March 2013 were obtained. Neither Council nor the investigation team was able to locate certificates of currency for 2010 or 2012.

578. A review of the certificates of currency provided by the Council indicates that property insurance to the required value was not provided. Further, the certificate of currency for the annual period commencing on 31 March 2013 indicates that Hudson Park was no longer covered by the policy.

579. Council failed to enforce Titanium's obligation to insure and failed to adequately scrutinise the evidence of insurance provided by Titanium.

The failure to secure a guarantee

580. The Council's failure to require or otherwise secure a performance guarantee warrants examination given Titanium's subsequent non-compliances with the terms of its licence.
581. Council was clearly aware of the need to seek some surety that a licensee would fulfil its obligations. It had previously issued a licence for Hudson Park

(to Stacey Holdings) that required a bank guarantee of \$75,000. The RFT indicated a bank guarantee would be required.

582. At the time Council determined to issue a licence to Titanium, it had been provided with Titanium's 2009/2010 financial statements. These showed current assets of \$62,718, made up of \$34,050 cash at bank and trade debtors of \$28,688. The total combined assets represented less than 2 month's licence fees that it would be required to pay the Council. It was also known that Titanium was a newly incorporated company with limited trading history and limited share capital.

583. Mr Backhouse gave the following evidence regarding the failure to require a guarantee:

Q734: *Can I show you Titanium Golf Management's annual report for year ended 30 June 2009 and of course that expired basically within six months prior to the tender being conducted. If I can go forward a bit to the current assets. Now I assume that you've got some level of knowledge of reading financial statements?*

A: Yes.

Q735: *The financial statements I think indicate that the current assets are in the order of approximately \$62,000?*

A: Correct.

Q736: *Were you aware that council was negotiating a licence fee of about \$40,000 per month?*

A: *I think that did come back to us, yes.*

Q737: *Would you agree that the current assets then disclosed would properly represent about one and a half month's rent?*

A: *It would.*

Q738: *Would it be your view that council would be wise to seek a bank guarantee to support the payment?*

A: *We would normally have sought a bank guarantee for a some form of deposit and I'm aware now that didn't occur with them.*

Q739: Were you aware that the previous licensee, Stacy Holdings, had provided a guarantee for \$75,000?

A: Yes I am, yes.

584. If Council had sought a bank guarantee, Titanium either would or would not have been able to provide it. This, in turn, would have provided the Council with an indication as to whether to issue it with a licence. The inclusion of a guarantee would have provided a litmus test of the financial capacity of Titanium to fulfil the terms of the licence.
585. Council failed to recognise Titanium's financial frailty and to take reasonable steps to ensure that independent resources were available should Titanium default.
586. It is not known why Council did not require a guarantee from Titanium but in not securing one, it exposed the Trust to a greater risk of financial loss.

Council's ongoing management of Hudson Park

587. Council has pursued a 2 pronged approach to the management of Hudson Park, while divesting the commercial aspects; it continued to remain responsible for the maintenance of the golf course. It was a somewhat unusual arrangement, emphasised by Chaloner Valuations in its review of market rent:

We note the circumstance of Hudson Park whereby the license fee covers both a golf course and a driving range is atypical. The majority of agreements examined and discussed with licensors or licensees are either one or the other rather than a combined facility.

We note the licence fees for golf courses are generally on the basis that the licensee will carry out the maintenance of the golf course. In regard to the subject, we note the trading figures of Hudson Park are such that income generation does not cover indicated annual maintenance fees. As such the Licence Agreement contained a provision for the Licensor being Strathfield Council to maintain responsibility for ongoing maintenance of the golf course. The Licensee in respect of Hudson Park assumes the role of collection of fees for both the golf course and the driving range and provides professional advice via a golf professional and operates the kiosk and the pro-shop including any retailing therein in return for payment of the licence fee.

588. Council's continuing responsibility for maintaining the course generated particular issues. While Council had attempted to define Titanium's responsibilities in the licence, it made no attempt to define its own

responsibilities in maintaining Hudson Park. This lack of definition served as a barrier to effective administration of the licence.

589. In a letter dated 29 April 2010 Titanium's solicitors drew Council's attention to the maintenance issue in the following terms:

A more difficult question arises in respect of the licensors (Sic. Council) obligation to maintain. We are instructed that the agreement between our respective parties is that in consideration for our client entering into the licence agreement and paying the licence fee that the licensor will maintain the golf course to a suitable standard. The question that of course arises is; what is the standard and what are the consequences in the event that the licensor fails to maintain the course.

Would you please advise the manner in which the licensor proposes to honour its obligations to maintain the golf course throughout the course of the license agreement.

590. On 3 May 2010 Council's Director Operations, Robert Bourke wrote:

Council intends to meet its obligations through the preparation of a service agreement that outlines the service levels undertaken. This agreement would be prepared during the interim period and may be appended to the final licence agreement.

591. No such agreement is appended to the licence and there is no evidence that Council developed a service agreement as anticipated. Similarly, there is no evidence that an operations manual for the golf course, that Council had developed, was ever incorporated into the arrangements between Council and Titanium.

592. In September and November 2011 Council wrote to Titanium advising that it would be undertaking re-turfing work. The letter outlined the nature of the work. While Council sought and obtained an indemnity against compensation from Titanium; the works were to form the basis of a claim against Council.

593. On 15 December 2011 Titanium wrote to Council asserting:

Titanium is aware that in its contractual arrangement that it is entitled to receive compensation has [as] a result of the greens been [sic] unplayable to a reasonable standard. I stress at this stage this is not Titanium's intentions.

594. As Council pressed its claim for the then outstanding amount of \$168,259.35, Titanium asserted its claim for compensation. As noted earlier, Mr Bourke

authored a memorandum dated 20 June 2012 that lent weight to Titanium's claim that it had suffered player loss over the period. This claim served to operate as a bar against resolute action by the Council in the face of substantial and continuing default by Titanium.

595. Council's lack of response to the claim highlights the underlying weaknesses of the arrangement, where its responsibilities in maintaining Hudson Park remained undefined.

596. Mr Bourke was the Director responsible for the oversight of Hudson Park.

When interviewed, he described his role in the following terms:

My job is to ensure that the licensee, he's managed the land in accordance with the Crown's requirements and council's guidelines.

597. Notwithstanding this, Mr Bourke also sought to distance himself from Council's failure to adequately monitor and to respond to the various defaults. An extract of the evidence he provided that goes to his abrogation of his responsibilities has been provided as an appendix.

Appendix 44 - Extract from Record of Interview – Robert Bourke

598. Council has now taken over responsibility for Hudson Park. It operates the golf course and driving range. In order to move forward, Council convened a committee (task force) comprised of all councillors and relevant staff.

599. The Council engaged a consultant to provide it with advice as to how it might proceed. It has subsequently invited expression of interests from parties who may wish to seek a licence to operate a business at Hudson Park. The outcome of this process is not known. However, Council must ensure that it does not repeat the maladministration detailed in this report if it decides to call for new tenders or otherwise issue a licence.

600. As at 4 November 2014, the task force convened to give consideration to the future of Hudson Park was no longer in place.

Conclusions Regarding Council's Management of Hudson Park

601. Council has demonstrated systemic failures in its management of Hudson Park in the 5 years since the request for tender was advertised.

- 602. At the outset, Council failed to adequately consider, develop and scope the tender for the redevelopment and management of Hudson Park. Council's management of the tender process was significantly flawed and involved breaches of the *Local Government (General) Regulation*.
- 603. Council failed to adequately scrutinise and review Titanium's proposal, its history and its claimed alliances. Council failed to recognise Titanium's financial frailty. It failed to take reasonable steps to ensure that independent resources were available should Titanium default.
- 604. The licence required Ministerial consent before it became operable. Ministerial consent was not obtained for a significant period. The processes outlined in the *Reserve Trust Handbook* were not followed.
- 605. Titanium was allowed to take over the operation of the golf course and driving range without a licence having been granted.
- 606. Both the interim licence and the licence were poorly drafted. Despite being warned that it needed to do so, Council failed to define its maintenance responsibilities and this in turn, served as a barrier to effective administration of the licence.
- 607. Council failed to implement the terms of the licence. Council failed to enforce Titanium's obligation to provide audited financial statements and did not adjust the licence fee annually.
- 608. Council failed to take reasonable steps to agree to and to ensure that all of the anticipated capital works were both enshrined in the licence and provided by Titanium. Council failed to enforce the licence requirement that Titanium construct the kiosk and further, failed to undertake the necessary steps to ensure that Titanium undertook a program of capital works anticipated in the business plan.
- 609. Council failed to respond to Titanium's initial and subsequent defaults by taking decisive action. Council's failure to take decisive action has contributed to its current position where it is seeking to recover a debt exceeding \$400,000.
- 610. Council failed to enforce Titanium's obligation to insure.

Other matters

i. Compliance with the Notice of Direction for Production of Documents

611. The investigation relied on Council records that were supplied pursuant to a *Notice of Direction for Production of Documents*. During the course of the investigation, it became apparent that some of the requisite Council records were not provided when the Council responded to the Direction.
612. The existence of additional records that had not been supplied became apparent upon review of the documents that were provided, which indicated that other relevant records existed. The existence of further documents was also adduced from further enquiries, on attendance at the Council and from the review of submissions received on the content of the draft report.

ii. Audit of 2011/2012 annual financial statements

613. Council's 2011/2012 annual financial statements were audited by Council's previous auditor, notwithstanding that their term as Council's auditor had expired.

iii. Half yearly inspection of accounting records for 2012/2013 financial year

614. Council is required to have its accounting records subject to a half-yearly inspection i.e. in between the annual audit of its accounts.³⁴ Council's accounting records do not appear to have been subjected to the required half-yearly inspection during the 2012/2013 financial year.
615. The requirement for the inspection was foreseeable. However, as noted earlier, the process for appointing the auditor was not commenced until January 2013 and wasn't completed until July 2013. Given this, the Council did not have an auditor to conduct the required inspection during the course of the 2012/2013 financial year.
616. The regulatory requirement for such inspections reflects the importance of the regular and timely external review of the Council's accounting records. Council's auditor would normally provide a council with valuable written feedback and advice following such inspections.

³⁴ Pursuant to the section 426(b) of the Act and the stipulated by clause 228 of the Regulation.

617. The failure on the part of the Council to appoint its auditor in a timely manner meant it did not have the benefit of this advice and feedback between the 2012 and 2013 annual audits. The maladministration which gave rise to the circumstance where this important assurance activity was not undertaken is therefore serious.
618. The need to complete the audit tender process in a timely manner, in order to enable the interim audit to be undertaken, was brought to Mr Redman's attention by Ms Bourke. Given this, and as the responsible Director, Mr Redman must bear a substantial degree of responsibility for the non-compliance with the Act.

iv. Conduct of the General Manager

619. The investigation identified matters pertaining to the conduct and performance of Mr Backhouse which warrant consideration by the elected Council. A recommendation has been made to this effect.
620. The evidence in this regard indicates that on 17 May 2010 a letter was signed by the General Manager, Mr Backhouse, accepting IPG's offer of 6 May 2010 for a period of 12 months.
621. When interviewed, Mr Backhouse expressed doubt as to whether the signature on the letter was his but did not deny it. He acknowledged that:
- he was aware of the proposed retainer arrangement,
 - that he would have been happy to sign the letter,
 - that he agreed with the proposition put to him, that Council had entered into a contract with the International Property Group, when it issued the letter to them on 17 May 2010, and
 - that on the advice he had received, he had no concern with Council entering into such a contract.
622. It is significant to note that none of Mr Backhouse's subordinates had the requisite delegation to enter into the contract.
623. While Mr Backhouse advised that he had received advice from both Mr Redman and Mr Wong that IPG or a related entity was under a "government contract", he did not check that himself, or require proof that it was the case.

624. Again, as has been indicated earlier in this report, the investigation has formed the view, on the entirety of the evidence available to it, that Mr Backhouse did accept IPG's offer of 6 May 2010. In coming to this conclusion the investigation expresses itself to be satisfied on the "Briginshaw" standard.
625. On 3 May 2011, Council's General Manager, Mr Backhouse, sent an email to Mr Elvy of IPG advising Council's agreement to extend the contract for a further 12 months. The authorship of this email has not been disputed. Given this, the investigation has similarly formed the view, on the entirety of the evidence available to it, that Mr Backhouse did accept IPG's further offer of 3 May 2011. In coming to this conclusion the investigation expresses itself to be satisfied on the "Briginshaw" standard.

v. Council's response to the draft report

626. Council, as a body politic, was provided with the opportunity to make a submission on the content of this report prior to it being finalised. Its response³⁵ has been included as the final appendix to this report.

Appendix 45 - Councillors' response dated 14 August 2015

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