

**REPORT ON THE
SECTION 430
INVESTIGATION INTO
WAGGA WAGGA CITY COUNCIL
May 2007**

Departmental representatives:

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1 EXECUTIVE SUMMARY

This report results from an investigation into Wagga Wagga City Council, undertaken under section 430 of the *Local Government Act 1993* (the Act).

Wagga Wagga City Council has been the subject of complaints to the Minister for Local Government and the department about the performance of council over a period of time. This resulted in departmental officers visiting council in 2003 and again in 2005.

The concerns raised with the department related to:

- the councillors' understanding of their obligations under council's code of conduct,
- the councillors' understanding of their role and responsibilities under the *Local Government Act 1993*,
- the interpretation and application of the Model Code of Conduct for Local Councils in NSW,
- the relationship between councillors and council's General Manager and senior staff,
- the working relationship between the Mayor and the General Manager,
- concern that the performance of council was affecting the community's confidence in council,
- planning instruments and decision making,
- tendering issues relating to a number of projects.

The Minister and the department continued to receive concerns from complainants about the performance of council, culminating in the decision to undertake an investigation of council under section 430 of the Act.

The terms of reference authorised for the investigation were:

To investigate and report on:

1. *Whether the relationship between elected representatives of council (whether individually or collectively as the governing body of council), senior council officers and council staff, has prevented the provision of efficient, effective and appropriate standards of governance for Wagga Wagga City Council.*
2. *Whether the elected representatives of council are fulfilling their role and responsibilities under the Local Government Act 1993 and have adequately carried out their responsibilities in the best interest of all ratepayers and residents.*
3. *Whether the council commands the community's confidence and support, particularly in relation to its capacity to deliver services and facilities to the local community in accordance with the council's Charter.*
4. *Whether the council's administration and management has met its responsibilities under the Local Government Act 1993 and has fulfilled its other statutory functions.*
5. *Any other matter that warrants mention, particularly where it may impact upon the effective administration of the area and/or the working relationship between the council, councillors and its administration.*

The investigation team found:

- That the relationships between the elected representatives of council (individually or collectively), senior council officers and council staff has on occasions deteriorated to the extent that it has prevented the provision of efficient, effective and appropriate standards of governance for Wagga Wagga City Council which has impacted on:

- i. the management of the General Manager's contract (resulting in a breach of contract)
 - ii. the General Manager's ability to implement management actions to rectify governance problems
 - iii. the ability of elected representatives, senior staff and managers to undertake their responsibilities without conflict
 - iv. the capacity of elected representatives to meet their obligations under council's code of conduct
 - v. the affording of the proper respect between elected representatives and senior staff.
- That councillors are not fulfilling their roles and responsibilities under the Act and have not adequately carried out their responsibilities in the best interests of all ratepayers and residents. This was demonstrated in our review of the following:
 - i. the handling of the General Manager's performance reviews
 - ii. the Mayor's ability to adequately undertake his role
 - iii. the application of council's code of conduct
 - iv. council's application of its planning instruments and controls
 - v. councillors' understanding of their role under the 1993 Act
 - vi. councillor actions in rectifying governance problems.
 - The community's confidence and support in the council, particularly in relation to its capacity to deliver services and facilities to the local community in accordance with the council's charter has been eroded. There are a number of indicators that

we have found to raise concerns about whether council commands the community's confidence and support:

- i. the large number of submissions from community members received by us
 - ii. community concerns raised under council's code of conduct in relation to councillor conduct
 - iii. written complaints on council's files
 - iv. concerns raised in the media
 - v. the imprudent use of the media by councillors.
- We find that there have been administrative problems faced by council for a considerable period of time. Specifically, there are procedural inadequacies that result from the way council administration has dealt with:
 - i. tendering processes
 - ii. consultation with the United Services Union and council's consultative committee
 - iii. records management
 - iv. management of projects.
 - That under the present administration, we find that many of the long standing issues and problems facing council are being actively addressed to the extent that it can be stated that council's administration and management is on the whole meeting its responsibilities under the Act and is, on the whole, fulfilling its statutory functions to the required standard.

We have made a number of recommendations. In determining what recommendations to make, we have had regard to the following:

- The next Local Government election is in the third week of September 2008;
- In 2008, the number of councillors will be reduced to 11;
- The current General Manager inherited a number of outstanding and long standing problems;
- Council is required to prepare and adopt an LEP consistent with the standard template;
- Council has commissioned a number of reviews of its organisation to assist in determining its way forward;
- There are a number of new staff at the senior levels of the organisation;
- The amount of assistance provided to councillors in understanding and undertaking their role;
- Apparent resistance from councillors to training and change;
- Council moving to resolve some of the issues raised after it received the draft report.

The recommendations from our investigation and findings are:

Recommendation 1: That Wagga Wagga City Council be given six (6) months from the date council provides its response to this report, as required by section 434 of the Local Government Act 1993, to take the appropriate steps to do such things arising from the recommendations contained in this report.

Recommendation 2: That the department conducts a review under the Promoting Better Practice Program to be undertaken six (6) months from the date council provides its response to this report, as required by section

434 of the Local Government Act 1993. The review should consider and report on council's progress in implementing the recommendations of this investigation.

Recommendation 3: That in the event the Promoting Better Practice Review reveals a situation whereby council has not made satisfactory progress in implementing the recommendations, the Minister considers holding a Public Inquiry into Wagga Wagga City Council under section 740 of the Local Government Act 1993.

Recommendation 4: That the Minister requests the Minister for Planning to consider revoking Wagga Wagga City Council's planning powers under section 118 of the Environmental Planning and Assessment Act 1979 and appoint a planning administrator or panel to determine development applications where an amendment to the DCP is required until such time as the council's new LEP is adopted. In considering this recommendation the Minister should take into account the planning issues raised in this report and any other pertinent planning concerns the Minister or the department may have.

Recommendation 5: That the Minister considers an amendment to the Local Government Act 1993 that prohibits senior staff from standing for election as councillors at the council at which they were employed for a minimum period of four years after leaving council's employment.

Recommendation 6: That the Director General considers investigating and reporting to the Minister regarding enforcement options for breaches of the tendering provisions of the Local Government Act 1993 and Local Government (General) Regulation 2005.

Recommendation 7: That the Minister considers amending the legislation in the event the report referred to in recommendation 6 provides an option that is practically and procedurally viable.

Recommendation 8: That the Director General refers the matter of the outsourcing of the Commercial Response Unit to the Independent Commission Against Corruption for its consideration.

Recommendation 9: That the delegation to the Mayor under section 377 of the Act:

'To, on behalf of the Council, supervise the General Manager in terms of the Local Government Act 1993 and council's policies and delegations and the General Manager's contract of employment.'

be rescinded and instead undertaken by the elected representatives in total.

Recommendation 10: That, in the alternative, the delegation be amended to allow it to be undertaken by a panel of councillors to be selected from their number.

Recommendation 11: That council prepare, as a matter of priority, a written policy and set of procedures to govern the communication between councillors and council staff that takes into account the salient issues raised in this report.

Recommendation 12: That, within the guidelines to govern communication between councillors and council staff, council include protocols to guide the interaction of elected representatives with the public and council's planning professionals in relation to planning matters.

Recommendation 13: That council's senior staff and elected representatives undertake training and/or workshops to discuss and learn about appropriate interactions by reference to the relevant legislation and policies such as the code of conduct.

Recommendation 14: That all existing council staff and elected representatives undertake formal training regarding the code of conduct.

Recommendation 15: That council's management develops guidelines for the assessment and management of complaints under council's code of conduct.

Recommendation 16: That council conducts a review of its tendering procedures and practices as a priority to be undertaken by its newly formed audit committee.

Recommendation 17: That council tender assessment panels consist of a majority of persons independent of council where council has a significant interest in a tender; for example, where council staff or a business unit tender to provide a council service.

Recommendation 18: That council provides training to council staff and councillors so that they gain an understanding of their role and obligations in relation to tendering processes.

Recommendation 19: That council's management develops a system for the management and monitoring of council's projects.

Recommendation 20: That all relevant council staff undertake formal training regarding project management.

Recommendation 21: That council's management improves its relationship between the management team, particularly the General Manager, and the United Services Union representatives by meeting to discuss issues on a regular basis, at least quarterly.

Recommendation 22: That council ensures that it is effectively consulting with the consultative committee in accordance with the purpose for which it is established under the Award.

Recommendation 23: That council establishes a development assessment panel that consists of planners from other councils in the region.

Recommendation 24: That council reviews its delegations on development application decisions with a view to providing greater delegation on development matters and develops procedures to govern how contentious development matters will be dealt with.

2 INTRODUCTION

2. This is our report as Departmental representatives concerning an investigation under section 430 of the *Local Government Act 1993* (the Act) into Wagga Wagga City Council and is presented to the Minister for Local Government and the Director General of the Department of Local Government, and copied to the council, pursuant to section 433(1) of the Act.

2.1 Terms of Reference

3. On 29 August 2006 the Director General of the Department of Local Government, Mr Garry Payne, approved an investigation under section 430 in respect of Wagga Wagga City Council. Mr Chris Rowe, Legal Officer and Ms Lyn Brown, Senior Investigations Officer, were authorised to act as Departmental representatives to conduct the investigation. The Terms of Reference authorised for the investigation were:

To investigate and report on:

1. *Whether the relationship between elected representatives of council (whether individually or collectively as the governing body of council), senior council officers and council staff, has prevented the provision of efficient, effective and appropriate standards of governance for Wagga Wagga City Council.*
2. *Whether the elected representatives of council are fulfilling their role and responsibilities under the Local Government Act 1993 and have adequately carried out their responsibilities in the best interest of all ratepayers and residents.*
3. *Whether the council commands the community's confidence and support, particularly in relation to its capacity to deliver services and facilities to the local community in accordance with the council's Charter.*
4. *Whether the council's administration and management has met its responsibilities under the Local Government Act 1993 and has fulfilled its other statutory functions.*

5. *Any other matter that warrants mention, particularly where it may impact upon the effective administration of the area and/or the working relationship between the council, councillors and its administration. [B1]*
4. On Tuesday 29 August 2006 council's Mayor and General Manager were formally notified of the investigation.

2.2 The investigation process

5. Section 430 of the *Local Government Act 1993* provides:
 - (1) *The Director General may, at the request of the Minister or on the Director General's own initiative, authorise any person (referred to in this Part as a "**Departmental representative**") to investigate any aspect of a council or of its work and activities.*
 - (2) *An authority may be given generally or in respect of a particular matter.*
 - (3) *The functions of a Departmental representative are set out in the authority.*
 - (4) *The Director General is, by virtue of holding office as Director General, a Departmental representative with power to investigate all matters. [B2]*
6. Section 431 provides:
 - (1) *For the purpose of exercising his or her functions, a Departmental representative may direct a person to do any one or more of the following:*
 - a) *to appear personally before the Departmental representative at a time and place specified in the direction;*
 - b) *to give evidence (including evidence on oath);*

- c) *to produce to the Departmental representative any document that is in that person's custody or under that person's control;*
- d) *to grant to the Departmental representative such authorities as may be necessary to enable the Departmental representative to gain access to any document that is in the custody or under the control of any bank, building society or credit union or other person.*

(2) *For the purposes of this section, a Departmental representative may administer an oath.*

(3) *A Departmental representative may take copies of or extracts from any document to which the Departmental representative gains access under this section. [B2]*

7. The Departmental representatives attended Wagga Wagga City Council administration centre between 16 October 2006 and 3 November 2006 to review documents and conduct interviews.
8. This report is based on evidence generated from:
 - Information provided in direct interviews with councillors, senior managers, current and former staff members of Wagga Wagga City Council and community members.
 - The information provided by complainants in written form.
 - Written materials provided by community members as submissions to the investigation.
 - The Departmental representatives' observation of council meetings and processes.
 - Council documents.

9. In this report, relevant evidence is identified by code in square brackets. Evidence tables are provided at the end of the report. The findings are based on the evidence set out in the text of this report and the evidence tables. Much of the information obtained during the investigation was not relevant to the matters under consideration. The evidence tables should not be seen as a comprehensive list of evidence obtained during the investigation.

2.3 Confidentiality obligations

10. At the commencement of the investigation, we formed the view that we would not be required to remind councillors individually of their obligations regarding confidentiality. At each interview we undertook a detailed uniform approach to the procedural fairness aspects. Because of this formality, we did not deem it necessary to further advise of the requirement that each councillor not discuss their interview with anyone.
11. Confidentiality in the process is important to ensure that we obtain the interviewees untainted views which can then be tested.
12. It became obvious to us that some councillors had discussed their interview amongst themselves. Because of this we then needed to remind councillors not to discuss the investigation and interview process.
13. Many councillors confirmed that they had spoken to other councillors. During some interviews the interviewees ran through our question topics in order without any direction from us. It is evident to us that there are strong alliances within each of the factions in council to the point that faction members discuss matters to protect and support each other.
14. Even though we had directly requested that it not occur, it was acknowledged by a number of councillors and senior staff that they had discussed the interview process and issues pertaining to the investigation overall.
15. We have had regard to such discussions when considering the information provided by those staff and councillors during their interviews. We have formed the opinion that councillors and staff who did so did not take the

investigation seriously. In our view it was an endeavour to manipulate the process. As a result, it is difficult for us to lend credibility to some of the information given to us during some interviews.

2.4 Statutory requirements relating to the investigation report

16. Section 433 provides:

(1) *A Departmental representative must report to the Minister and the Director General on the results of the investigation and must send a copy of the report to the council.*

(2) *The report may comment on any matter which, in the Departmental representative's opinion, warrants special mention and may contain such recommendations as the Departmental representative 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.*

[B2]

17. Clause 244 of the *Local Government (General) Regulation 2005* provides in this regard:

When a report of a Departmental representative 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.* **[B3]**

18. In accordance with section 434 of the Act council is required, within 40 days after presentation of the report, to give notice to the Minister of the things done or proposed to be done to give effect to any recommendations in the report. There are also provisions in that section that enable legal proceedings to be instigated to enforce compliance. **[B2]**

2.5 Procedural fairness

19. In accordance with the principles of procedural fairness, council, as the subject of the investigation, received a draft of the report (excluding the executive summary and recommendations) prior to finalising the report. This provided council with the opportunity to provide any comments and submissions in respect of the draft. The departmental process also involved providing draft excerpts of the report to those people potentially adversely affected by the section 430 investigation and inviting them to comment on the relevant sections of the draft report.
20. We received 10 submissions from affected individuals and two submissions from Wagga Wagga City Council. We considered each of the submissions received and made changes to the report where appropriate.
21. We note that the issues raised in submissions made by legal representatives allege that the investigation has used an unfair process in preparing the draft report. The issues raised relate to a number of different aspects of the investigation. We have reviewed these submissions and noted the issues raised.
22. In addition, it should be noted that council has indicated in its submission on the draft report that it has already taken action to rectify a number of matters raised by us. Council has indicated that it has already taken action on the following:
 - To enquire into establishing compulsory ongoing training for the Mayor and Mayoral aspirants
 - To investigate changes to the General Manager's performance review process
 - The development of a binding policy on interaction between staff and elected representatives
 - The implementation of an internal audit function
 - The issue relating to the contract process for bus shelters

- Compliance issues by approving funding for a temporary compliance officer position
- Provided additional funds to assist with planning and development processes
- Proposed training on tendering processes
- Project management expertise in the organisation with the appointment of staff with this expertise.

2.6 The role of councillors and the General Manager

23. The *Local Government Act 1993* requires that councillors as a group direct and control the council's affairs, allocate resources, determine policy, and monitor the council's performance. As individuals, councillors communicate council policy and decisions to the community, exercise community leadership and represent the views of residents and ratepayers to council (see section 232 of the Act).
24. The Act makes it clear that the General Manager is responsible for the day to day operations of council. Under section 335(2) of the Act the General Manager has the following particular functions:
- the day to day management of 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.

25. Section 439 of the Act requires that every councillor, member of staff of a council and delegate of a council must act honestly and exercise a reasonable degree of care and diligence in carrying out his or her functions under this or any other Act.

2.7 Background to the investigation

26. The Minister for Local Government and the department have received a number of complaints about the performance of Wagga Wagga City Council over a period of time. This resulted in departmental officers visiting council in 2003 and again in 2005.

27. The concerns raised with the department related to:

- the councillors' understanding of their obligations under council's code of conduct,
- the councillors' understanding of their role and responsibilities under the *Local Government Act 1993*,
- the interpretation and application of the Model Code of Conduct for Local Councils in NSW,
- the relationship between councillors and council's General Manager and senior staff,
- the working relationship between the Mayor and the General Manager,
- concern that the performance of council was affecting the community's confidence in council,
- planning instruments and decision making,
- tendering issues about a number of projects.

28. Two senior officers of the department visited council on **5 and 6 November 2003**. The officers interviewed all councillors and the (then acting) General Manager. Each councillor and the acting General Manager were

asked to consider ways in which they could improve the performance of council to assist in maintaining the community's confidence in council. At that time, it was thought that the permanent appointment of a General Manager and the election outcome in 2004 might rectify the problem. The department continued to monitor council's activities through media reports, complaints and other information.

29. Two senior officers of the department visited council on **10 October 2005**. The officers interviewed the Mayor and General Manager and made a presentation to councillors in relation to their roles and the code of conduct. The issues raised by the departmental officers with council included the councillors' understanding of their role, particularly in relation to their involvement in day to day management matters. At this time, there were emerging difficulties in the working relationship between the Mayor and the General Manager. The department continued to monitor the council following this visit through media reports, complaints and other information.
30. The Minister and the department continued to receive concerns from complainants about the performance of council, culminating in the decision to undertake an investigation of council under section 430 of the Act.

2.8 Council background

31. Wagga Wagga City Council is located in central New South Wales and covers an area of 4,886 square kilometres. It is geographically located midway between Sydney and Melbourne. The population within the city is approximately 57,600 persons. The major towns within the local government area are Wagga Wagga, Collingullie, Currawarna, Galore, Uranquinty, Mangoplah, Humula, Tarcutta, Ladysmith and Oura, with over 90% of the city's population centred in the urban areas.
32. Wagga Wagga City Council employs approximately 440 full time equivalent staff (report to extraordinary meeting of council, 19 June 2006). In the past six years there have been five different people in the position of General Manager. This includes two people acting in the position. The current General Manager, Mr Phillip Perram, was appointed in March 2004.

33. During this time council has undertaken three organisational restructures. The first two having resulted in changes in the senior staff positions in the organisation and the latest restructure resulting in more widespread changes in the organisation. However, the latest restructure proposal made no change to the staffing levels or employee costs (as at June 2006).
34. In 2001, council undertook a major restructure of the management of the organisation. This resulted in a reduction in the number of senior staff positions. It also resulted in conflict with some directors who were unsuccessful in gaining a position.
35. In 2004, council undertook a 'mini' restructure that again led to a change of senior staff positions and ultimately the outsourcing of the Commercial Response Unit and the disbanding of the directorate in 2005.
36. In 2006, council undertook a major restructure that reduced the number of senior staff positions to three and has widely affected the organisational structure. A number of redundancies were offered to staff that has resulted in the departure of many long serving individual staff members, including senior managers.
37. Wagga Wagga City Council has 15 elected representatives. There are currently 14 serving councillors (due to the resignation of Clr Kolhagen in June 2006). Council conducted a constitutional referendum at the 2004 election that resulted in community agreement to reduce the number of councillors to 11 at the next local government elections in 2008. Council successfully made application to the Minister under section 224A of the Act to decrease the number of councillors to 14. This has meant that the casual vacancy caused by the resignation of Clr Kohlhagen does not have to be filled.
38. Council has one ordinary meeting each month and one standing committee, the Policy and Strategy Committee, which meets two weeks before the council meeting.

39. According to Wagga Wagga City Council's Annual Report, council's mission is:

"To provide a safe, clean, attractive and healthy environment in which all people have equal rights and the opportunity to participate and share in the Wagga Wagga City Council's services and facilities."

2.9 Council charter and functions

40. Councils are guided by a charter containing a number of principles, as provided by section 8 of the *Local Government Act 1993*. 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.

41. Sections 21 and 22 of the *Local Government Act 1993* state that a council has the functions conferred or imposed on it by or under this Act or under any other Act or law.

3 FINDINGS AND RECOMMENDATIONS

42. We make the following findings and recommendations in relation to each Term of Reference. Our examination of each of the individual issues is contained in the analysis section of the report.

3.1 Findings

3.1.1 Term of Reference 1

Whether the relationship between elected representatives of council (whether individually or collectively as the governing body of council), senior council officers and council staff, has prevented the provision of efficient, effective and appropriate standards of governance for Wagga Wagga City Council.

43. The efficient and effective operation of a council is largely reliant on the relationship between elected representatives of council (individually or collectively), senior council officers and council staff. As such, the elected representatives have a duty to defer to and rely on the professional and specialised knowledge and skills of the staff employed.
44. Councils are large and complex organisations with vast responsibilities. In order to fulfil these responsibilities in the correct manner, councillors are required by reference to the *Local Government Act 1993*, to undertake their role and responsibilities with all the due care, skill and diligence that is reasonably required of a person of that standing.
45. At Wagga Wagga City Council, we find that councillor relationships are governed by two distinct groups; one that is comfortable with and promotes progress and change, the other that does not readily embrace change. This has caused conflict between the elected representatives.
46. We find that Wagga Wagga City Council is an organisation that had not changed significantly during the 1990s and many of its practices were insular (particularly regarding, but not exclusive to, planning and project management for example). Some councillors recognised that the organisation needed to change. The opportunity to implement change was taken through the appointment of particular individuals to the position of General Manager.

47. These appointments have been fraught with conflict as successive General Managers attempted to implement change programs.
48. We find that the present General Manager, since his employment in March 2004, has set in place a change in direction for the organisation based on what he believes are sound management principles, to deal with the findings of various reviews of the organisation.
49. It is our view that while the previous General Manager, Mr Faulkner, may have understood the nature and scope of the problems that he had inherited, it was not he who set a change of course for the organisation, but rather the present General Manager.
50. There are a number of current elected representatives who have been councillors for a long period of time and who do not appear to want the organisation to change.
51. We find that there has been conflict between councillors for some time. In this regard, the council had been visited by senior officers from the Department of Local Government on two occasions.
52. The relationship between elected representatives has been guided by the strong political and social bonds of some councillors. The result is that some councillors support their respective group views without regard for the best interests of council. Previous issues between councillors have also affected current relationships.
53. A significant concern we have is former senior staff members being elected to council in a relatively short period of time following the completion of their employment relationship with council.
54. We find that the delineation between the two roles, senior staff member and councillor, in circumstances where a person goes from one to the other in a short period of time, becomes blurred. It is our view that the former Town Clerk/General Manager and the former Director Recreation and Cultural Services, who are now councillors, have not sufficiently distanced themselves

from their former role in order to undertake their present roles to the required standard.

55. We observed conflict between the present General Manager and elected representatives. There is evidence conflict also occurred between the previous General Manager, and the previous Acting General Manager, and elected representatives.
56. We find the strained relationship between the current General Manager and the Mayor has prevented the provision of an efficient, effective and appropriate standard of governance. As such we find the relationship to be ineffective and bordering on dysfunctional.
57. We find the Mayor to be inexperienced and appears to struggle to understand and perform his role to the appropriate standard. Despite concerns expressed about the weaknesses of the Mayor's performance in his role, councillors continue to re-elect him to the detriment of good governance.
58. The Mayor's consistent failure to undertake the General Manager's performance review as required by his contract of employment is one example of the Mayor's failure to carry out his Mayoral duties and falls below the required standard.
59. The consistent inaction of the Mayor's fellow elected representatives to resolve the situation regarding the General Manager's performance review also shows a disregard of the General Manager's role, the responsibilities of councillors and falls below the required standard.
60. It is our view that council is not being led by the Mayor. This allows other councillors to act as de facto leaders and undermine the role of the Mayor.
61. The strained relationship between the current General Manager and Mayor has placed council in a position where it has been from time to time legally vulnerable and has contributed to additional costs to council which ultimately are settled by the ratepayers.

62. We find that council has developed a culture of inappropriate interactions between councillors and staff at all levels of the organisation. It is detrimental to the effective functioning of management. It also shows a level of disrespect to council staff by councillors.
63. We find that some councillors and staff have formed the view that people who are not from Wagga Wagga are professionally inferior. This affects council's ability to provide services to the appropriate standard of governance. It also has a detrimental effect on some relationships and has retarded attempts at effective change by council's management.
64. We find the relationship between elected representatives and council's planning staff to be very poor.
65. We find the interference by councillors in the director's appointments detrimental to the process and inconsistent with the role of councillors.
66. The relationship issues have impacted on:
- the management of the General Manager's contract resulting in a breach of contract by council
 - the General Manager's ability to implement management actions to rectify governance problems
 - the ability of elected representatives, senior staff and managers to undertake their responsibilities without conflict
 - the capacity of elected representatives to meet their obligations under council's code of conduct
 - the affording of the proper respect between elected representatives and senior staff.
67. We find that the relationships between the elected representatives of council (individually or collectively), senior council officers and council staff has deteriorated to the extent that on occasions it has prevented the provision of efficient, effective and appropriate standards of governance for Wagga Wagga City Council.

3.1.2 Term of Reference 2

Whether the elected representatives of council are fulfilling their role and responsibilities under the Local Government Act 1993 and have adequately carried out their responsibilities in the best interest of all ratepayers and residents.

68. Councillors have two roles. One as a member of the governing body of council and the other as an elected person (section 232 of the Act). It can be problematic for councillors to balance these roles. We find that the role as an elected person dominates at Wagga Wagga to the detriment of the councillors' governing role.
69. Through the Mayor's mishandling of the management of the General Manager's contract, council has been placed in a position where it is in breach of contract.
70. We find that the Mayor is unable to adequately undertake his role and has not carried out his responsibilities as required by the delegations given to him by council.
71. We find that the elected representatives have not fulfilled their role and responsibilities by allowing the situation in relation to the General Manager's contract to continue despite their awareness that this was a problem.
72. We find evidence of ongoing misuse of the code of conduct whereby councillors use the code of conduct as a "sword" rather than a "shield".
73. In addition, it is our view that councillors misunderstand the inappropriate interaction provisions of the code of conduct and regularly breach these provisions.
74. We find at least one occasion where councillors have directed staff in relation to the content of advice to be provided to council; which is a breach of section 352 of the Act.
75. In contradiction to the requirements of the code of conduct, councillors have exhibited a lack of impartiality when making decisions, particularly in relation to the issue of the outsourcing of the Commercial Response Unit.

76. We find that some councillors apparently disregard the 1993 Act because they prefer to use the 1919 Act which provided councillors with more authority regarding operational matters.
77. We find councillors involve themselves in operational matters in contravention of the 1993 Act.
78. Councillors inconsistently apply planning standards to matters before council. As a result, inappropriate planning decisions have been made by council.
79. We find council readily accepts the information provided by applicants over that provided by council's professional staff and legal representatives regarding planning matters.
80. Some councillors have been involved in local government for many years and have had time to familiarise themselves with the requirements of the various legislation that applies.
81. However, while councillors are responsible for the overall governance of council, they are in the main not "experts" in the requirements of the local government and related legislation and should be guided by the advice of council staff on technical matters.
82. Council cannot escape from the fact that the overall role of the governing body is to direct and control the affairs of council in accordance with the *Local Government Act 1993*. It is clear from the available evidence that there has been a number of breaches of the 1993 Act and the related Regulations by council. Some councillors choose to ignore the changes in their role brought about by the introduction of the Act in 1993.
83. The governing body must take some responsibility for the breakdowns and failures of council's systems and processes. We have no confidence that these problems will be fixed in the short term by council. This view is based on the fact that council has allowed this situation to develop and continue under previous administrations. Also, this council has actively hampered the

actions of the current General Manager in attempting to rectify these problems.

84. We find a number of aspects of councillor governance that demonstrates a lack of understanding of their role and responsibilities arising from our review of:

- the handling of the General Manager's performance reviews
- the Mayor's ability to adequately undertake his role
- the application of council's code of conduct
- council's application of its planning instruments and controls
- councillors' understanding of their role under the 1993 Act
- councillor actions in rectifying governance problems.

85. Councillors are not fulfilling their role and responsibilities under the Act and have not adequately carried out their responsibilities in the best interests of all ratepayers and residents.

86. It is not clear what remedial action could be taken to resolve the councillors' lack of understanding of their role. It appears that:

- councillors had previously undertaken extensive training regarding the practice and procedure of their role under the 1993 Act,
- the role of councillors was discussed with individual councillors by departmental officers in 2003,
- the role of councillors was discussed with councillors as a group by departmental officers in 2005.

87. It appears councillors are resistant to training and change. The utility of further training is questionable without a fundamental change in the attitude of the councillors.

3.1.3 Term of Reference 3

Whether the council commands the community's confidence and support, particularly in relation to its capacity to deliver services and facilities to the local community in accordance with the council's Charter.

88. As previously outlined, council operates according to a charter that is defined by section 8 of the *Local Government Act 1993*.

89. We have identified examples where council has not met its obligations under the following charter principles:

- 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 (as evidenced by the analysis in project management, tendering, outsourcing of the Commercial Response Unit and organisational restructures),
- To exercise community leadership (as evidenced by the analysis in relationship between councillors; relationship between councillors, General Manager and staff; code of conduct and role of councillors),
- To bear in mind that it is the custodian and trustee of public assets and to effectively account for and manage the assets for which it is responsible (as evidenced by the analysis in project management and outsourcing of the Commercial Response Unit),
- To ensure that, in the exercise of its regulatory functions, it acts consistently and without bias, particularly where an activity of the council is affected (as evidenced by the analysis in planning and development processes), and
- To be a responsible employer (as evidenced by the General Manager's performance review and communication of the 2006 restructure).

90. The department does not call for public submissions as part of a section 430 investigation process. However, the public interest in the investigation generated by its announcement resulted in the department accepting written submissions.
91. The department received a large number of submissions. Although previous investigations have received some complaints from the public, the volume that we received in comparison was much greater. This indicates a level of concern in the community regarding council's operations that has not been previously observed in response to such an investigation.
92. Many of the issues raised in these submissions are ones we have examined.
93. There have also been complaints raised with council by members of the community in relation to councillor behaviour under the code of conduct.
94. When we examined council's files, we found they contained written concerns from members of the community. This was particularly evident in relation to the issues of the Wagga Wagga Exhibition Centre and the outsourcing of the Commercial Response Unit.
95. One of the main concerns raised by the community, in the media (letters to the editor etc) and with us, was in relation to council's project management and its ability to get projects off the ground within budget.
96. Further, concern was raised by the community regarding issues such as delays in development application processing and access to council staff to discuss these delays. This was particularly the situation prior to council's recent restructure. Until the restructure is bedded down and important positions such as planning positions are re-filled, the situation continues. However, as we have observed, councillors have not assisted in providing a decision which may have resolved the situation in the short term.
97. Specifically, we found that in the meeting of October 2006 councillors declined to provide the necessary resources to assist in dealing with the significant backlog of unresolved applications left by former planning staff.

98. In effect, council's action in not providing the necessary resources could reasonably be perceived as a step in the process of setting council's management up to fail and inhibiting council's capacity to deliver services.

99. Councillor comments that have been recorded in the media further erode community confidence in council's management. We find many of these comments to be ill informed and lacking in any acceptance of responsibility for council's decisions.

100. This imprudent use of comment in the media further leads to a reduction in community support for council. This further erodes the community's confidence in the overall governance of council.

101. Particularly, there are a number of indicators that we have found to raise concerns about whether council commands the community's confidence and support:

- the large number of submissions from community members received by us
- community concerns raised under council's code of conduct in relation to councillor conduct
- written complaints on council's files
- concerns raised in the media
- the imprudent use of the media by some councillors.

102. It is our view that the community's confidence and support in the council, particularly in relation to its capacity to deliver services and facilities to the local community in accordance with the council's charter, has been eroded.

3.1.4 Term of Reference 4

Whether the council's administration and management has met its responsibilities under the Local Government Act 1993 and has fulfilled its other statutory functions.

103. The efficient and effective operation of a council is largely reliant on the professional and specialised knowledge and skills of the staff employed. In order to fulfil its responsibilities in the correct manner, council is required to be advised by senior staff who have a clear knowledge and understanding of the requirements of the *Local Government Act 1993*, other legislation and policies.
104. We reviewed a number of council's processes as a result of complaints raised with the Minister for Local Government and the department.
105. As a result of this review we find some of the processes to be inadequate.
106. In response to issues identified on his commencement with council, the present General Manager has provided a specific direction for council resulting in the preparation of reports from expert consultants in relation to the practices and procedures within council.
107. We find it commendable that the present General Manager has set in place programs of change and reform to address the findings of those reports, the net results of which are becoming apparent over time. It is our view that it will take some further time to remedy the situation that the present General Manager found since his employment in March 2004.
108. Council carried out a restructure in 2001, a mini restructure in 2004 and a further major restructure in 2006. The latter resulted in the turn over of a number of senior staff. However we did not find that the loss of these staff has negatively affected the level of corporate knowledge within the organisation. Senior management found that the level of corporate knowledge across the board was not up to the current industry standards due to, among other things, the insular mentality of council over a number of years.

109. Many of the issues that were inherited from previous administrations have not been allowed to continue unresolved or remain undetected under the current administration. The Faulkner administration and present management discovered a number of breaches of the Act, associated Regulations and council policy, the seriousness of some of which may have left council open to liability issues, for example, the Oasis contract.
110. We find that, although there was generally sufficient communication on council's major restructure in 2006 to councillors and council staff, there was insufficient communication with the relevant unions which was a contributing factor to the unprecedented staff protest at council's Policy and Strategy Committee meeting on 14 August 2006.
111. We find that council's consultative committee may not have been effectively used for the purpose for which it is established.
112. Some of the problems we experienced during the investigation relate directly to inappropriate and ineffective systems of work, for example, document handling and retrieval and information systems. We understand and acknowledge that this has been a long standing problem for council and that the current administration is attempting to rectify a number of deficiencies.
113. We find the management of council projects and tendering processes to be of particular concern. While many of the problems with these processes occurred during previous administrations, there is evidence that poor practices continue. Particular recent examples are the processes undertaken for the outsourcing of the Commercial Response Unit, the tendering for legal services and the Red Hill Road project.
114. We find that there have been problems faced by council for a considerable period of time.

115. Specifically, there are procedural inadequacies that result from the way council administration has dealt with:

- tendering processes
- consultation with the USU and council's consultative committee
- records management
- management of projects.

116. However, under the present administration, we find that many of the long standing issues and problems are being actively addressed to the extent that it can be stated that council's administration and management is on the whole meeting its responsibilities under the Act and is, on the whole, fulfilling its statutory functions.

3.1.5 Term of Reference 5

Any other matter that warrants mention, particularly where it may impact upon the effective administration of the area and/or the working relationship between the council, councillors and its administration.

117. We have not found it necessary to comment on any other matters outside of the specific Terms of Reference one to four.

118. An allegation of a breach of the pecuniary interest provisions of the Act was brought to our attention during the draft submission process. This matter will be referred to the department separately for further enquiry.

3.2 Recommendations

119. In determining what recommendations to make, we have had regard to the following:

- the next local government election in 2008
- in 2008 the number of councillors will be reduced to 11
- the current General Manager inherited a number of outstanding and long standing problems
- council is required to prepare and adopt a LEP consistent with the standard template
- council has commissioned a number of reviews of its organisation to assist in determining its way forward
- there are a number of new staff at the senior levels of the organisation
- the amount of assistance already provided to councillors in understanding and undertaking their role
- the apparent councillor resistance to training and organisational change
- council moving to resolve some of the issues raised after it received the draft report

120. Recommendation 1: That Wagga Wagga City Council be given six (6) months from the date council provides its response to this report, as required by section 434 of the Local Government Act 1993, to take the appropriate steps to do such things arising from the recommendations contained in this report.

121. Recommendation 2: That the department conducts a review under the Promoting Better Practice Program to be undertaken six (6) months from the date council provides its response to this report, as required by

section 434 of the Local Government Act 1993. The review should consider and report on council's progress in implementing the recommendations of this investigation.

- 122. Recommendation 3: That in the event the Promoting Better Practice Review reveals a situation whereby council has not made satisfactory progress in implementing the recommendations, the Minister considers holding a Public Inquiry into Wagga Wagga City Council under section 740 of the Local Government Act 1993.**
- 123. Recommendation 4: That the Minister requests the Minister for Planning to consider revoking Wagga Wagga City Council's planning powers under section 118 of the Environmental Planning and Assessment Act 1979 and appoint a planning administrator or panel to determine development applications where an amendment to the DCP is required until such time as the council's new LEP is adopted. In considering this recommendation the Minister should take into account the planning issues raised in this report and any other pertinent planning concerns the Minister or the department may have.**
- 124. Recommendation 5: That the Minister considers an amendment to the Local Government Act 1993 that prohibits senior staff from standing for election as councillors at the council at which they were employed for a minimum period of four years after leaving council's employment.**
- 125. Recommendation 6: That the Director General considers investigating and reporting to the Minister regarding enforcement options for breaches of the tendering provisions of the Local Government Act 1993 and Local Government (General) Regulation 2005.**
- 126. Recommendation 7: That the Minister considers amending the legislation in the event the report referred to in recommendation 6 provides an option that is practically and procedurally viable.**
- 127. Recommendation 8: That the Director General refers the matter of the outsourcing of the Commercial Response Unit to the Independent Commission Against Corruption for its consideration.**

128. Recommendation 9: That the delegation to the Mayor under section 377 of the Act:

'To, on behalf of the Council, supervise the General Manager in terms of the Local Government Act 1993 and council's policies and delegations and the General Manager's contract of employment.'

be rescinded and instead undertaken by the elected representatives in total.

129. Recommendation 10: That, in the alternative, the delegation be amended to allow it to be undertaken by a panel of councillors to be selected from their number.

130. Recommendation 11: That council prepare, as a matter of priority, a written policy and set of procedures to govern the communication between councillors and council staff that takes into account the salient issues raised in this report.

131. Recommendation 12: That, within the guidelines to govern communication between councillors and council staff, council include protocols to guide the interaction of elected representatives with the public and council's planning professionals in relation to planning matters.

132. Recommendation 13: That council's senior staff and elected representatives undertake training and/or workshops to discuss and learn about appropriate interactions by reference to the relevant legislation and policies such as the code of conduct.

133. Recommendation 14: That all existing council staff and elected representatives undertake formal training regarding the code of conduct.

134. Recommendation 15: That council's management develops guidelines for the assessment and management of complaints under council's code of conduct.

135. **Recommendation 16:** *That council conducts a review of its tendering procedures and practices as a priority to be undertaken under its newly formed audit committee.*
136. **Recommendation 17:** *That council tender assessment panels consist of a majority of persons independent of council where council has a significant interest in a tender; for example, where council staff or a business unit tender to provide a council service.*
137. **Recommendation 18:** *That council provides training to council staff and councillors so that they gain an understanding of their role and obligations in relation to tendering processes.*
138. **Recommendation 19:** *That council's management develops a system for the management and monitoring of council's projects.*
139. **Recommendation 20:** *That all relevant council staff undertake formal training regarding project management.*
140. **Recommendation 21:** *That council's management improves its relationship between the management team, particularly the General Manager, and the United Services Union representatives by meeting to discuss issues on a regular basis, at least quarterly.*
141. **Recommendation 22:** *That council ensures that it is effectively consulting with the consultative committee in accordance with the purpose for which it is established under the Award.*
142. **Recommendation 23:** *That council establishes a development assessment panel that consists of planners from other councils in the region.*
143. **Recommendation 24:** *That council reviews its delegations on development application decisions with a view to providing greater delegation on development matters and develops procedures to govern how contentious development matters will be dealt with.*

4 ANALYSIS

4.1 Relationship between councillors

4.1.1 Background

144. As previously stated, Wagga Wagga City Council has 15 elected representatives. At the local government elections in March 2004, seven councillors were elected for the first time.

145. The current councillors are: Clrs Andrews, Dale, Geale, Georgiou, Gooden, Harding, Hay, Kendall, Klemke, Pascoe, Simpson, K. Vidler, L. Vidler and Wales.

146. There are currently 14 serving councillors, due to the resignation of Clr Kohlhausen in June 2006.

147. Among the current elected representatives there are a number of councillors who have held senior staff positions with council or held the office of Mayor. They are as follows:

- Clr Brian Andrews, previous Town Clerk/General Manager
- Clr Kerry Geale, previous Director
- Clr Peter Dale, previously served as Mayor
- Clr John Harding, previously served as Mayor
- Clr Kevin Wales, previously served as Mayor

148. In 2004 the Ratepayers and Citizens Association registered as a political party and ran candidates for the local government election. [\[A1\]](#) We are advised that although this party was supported by the Wagga Wagga Ratepayers Association, this group did not endorse the candidates. Four councillors were elected from this political party: Clrs Hay, Kendall, Klemke and Pascoe.

149. According to the State Electoral Commission website, the Ratepayers and Citizens Association is not currently a registered local government political party. [\[A2\]](#)

150. There was only one candidate at the 2004 election that was elected from the ungrouped position on the ballot paper, Clr Kohlhagen. The remainder of the successful candidates were from groupings on the ballot paper.

4.1.2 Election of Mayor

151. The Mayor of council is elected annually by the councillors. In April 2004, the councillors elected Clr Pascoe as Mayor. This was notable in that Clr Pascoe had not served on council before. Clr Pascoe was again elected as Mayor by the councillors in 2005 and 2006.

152. Nearly all the people we interviewed commented on the fact that Clr Pascoe had no local government experience prior to being elected as Mayor. We were told that the Mayor has struggled with his role since his election in 2004.

153. Most councillors, including the Mayor, acknowledged that he has struggled with meeting practice, but this has improved more recently. Many interviewees commented that the Mayor is trying hard.

154. It was evident to us that the Mayor struggles with many aspects of his role. He freely admitted that he did not have an up to date knowledge of the *Local Government Act 1993*, had contacted both staff members and developers directly on a number of occasions and had limited practical experience in meeting procedure prior to his election. [\[11\]](#)

155. He also advised that he had limited experience regarding the day to day operational dynamics of an organisation such as council. [\[11\]](#) Other interviewees commented that the Mayor was also inexperienced. [\[12-15\]](#) An example that some interviewees referred to was when it came to the Mayor's public speaking duties.

4.1.3 Councillor groups

156. It appears that from 1999 two distinct groups had formed on council.
157. We are informed that there was a progressive group led by Clr Wales, who was Mayor at that time. We believe Clr Dale was the leader of the other group. However, a few councillors did not agree with that line of thinking.
158. Following the departure of Brian Andrews as General Manager, Graeme Faulkner was appointed as General Manager to provide the momentum required to change the organisation. At the time of his appointment, we were advised that Wagga Wagga was losing industry and the area was declining. We were also advised that Mr Faulkner's key responsibility was to position council to be involved in economic development in the city.
159. We were advised that in 1999 the Dale group lost control of the numbers.
160. Clr Dale stated that this century had not been good for this council due to the amount of change. He stated he is not a slave to change and that the change that has taken place over the last five or six years has adversely affected the operation of council. [\[14\]](#)
161. We discussed the voting patterns and alignment of councillors on matters before council. Many of those with whom we discussed this issue could identify clear groups within the current elected council.
162. The councillor groups were identified as the 'Dale' group and the 'Wales/Simpson' group. The Dale group consists of approximately 8 councillors: Andrews, Dale, Geale, Georgiou, Hay, Klemke, Pascoe and Lindsay Vidler. The Simpson group consists of Clrs Gooden, Kendall, Simpson, Wales and Karen Vidler. Clr Harding appeared to not be part of either group.
163. Interviews indicated that council is led by Clr Dale in what may be perceived to be a de-facto leadership. Clr Dale has been a councillor for 23 years and is the most experienced councillor on Wagga Wagga City Council.

164. Clr Andrews also has a very long association with Wagga Wagga City Council, which dates back approximately 45 years. In that time he worked his way through the ranks of council to the position of Town Clerk, becoming General Manager when the new Act was introduced in 1993. He was only the third Town Clerk in 61 years. He retired as General Manager in 2001 and was elected in 2004 as a councillor.
165. Clr Andrews stated in his interview that if the current General Manager had been appointed following his retirement, he would not have stood for council in 2004. He believed that it would have been inappropriate for him to stand as a councillor if his successor as General Manager was still acting in that role. However, because there was a change in General Manager he decided he would stand. The reason he decided to run for council was because the situation had changed and he wanted to be involved and to give back to the community. [\[13\]](#)
166. From our observations in the interviews and at the council meetings we attended, Clr Andrews together with Clr Dale form the nucleus of the group which contains the majority of councillors.
167. Their working relationship commenced in 1983 when Clr Dale was elected. This continued until Andrew's retirement as General Manager in 2001. Between 1995 and 1997, Clr Dale and Clr Andrews worked together in the capacity of Mayor and General Manager, respectively. Their previous relationship has continued as councillors on the current council. Clr Andrews has stated that his opinion of Clr Dale is that he is an articulate, knowledgeable and experienced councillor. He regarded him as a family friend. This relationship is powerful and one which has been long-term. [\[13\]](#)
168. The conversations between us and Clr Dale and Clr Andrews that took place on 20 October 2006 are indicative of the close relationship between the two councillors.

169. In the morning of 20 October 2006 at the interview with Clr Dale we had cause to question whether Clr Dale had any conversation with anybody in relation to the conduct of the investigation. He advised that he had spoken with Clr Andrews about the topics discussed at his interview.
170. We rang Clr Dale later in that afternoon to request that he not discuss his interview with anyone else. He advised us that he understood the integrity of the process and the confidential nature of the interview and gave an undertaking that he would not do so.
171. However, when we immediately rang Clr Andrews on his mobile phone after talking to Clr Dale to make the same request, we overheard Clr Andrew's wife answering his landline in the background. We heard her say *'hang on Peter I will just get him for you'*. It appeared that Clr Dale was ringing Clr Andrews immediately after we had spoken with him. In effect, it appeared that he was doing precisely what we asked him not to do, and what he had given us as an express undertaking that he would not do. [\[FN1\]](#)
172. This illustrates the tight bond between the two and a disregard of the investigative process.
173. Clr Andrews provided a response to this issue which, by reference to our contemporaneous file notes and recollection, contradicts in some instances what we say occurred. We do not dispute certain aspects of Clr Andrew's recollections. However, other very important aspects of what we state took place are disputed by him.
174. Clr Andrews stated in his submission that we did not advise him he was not to discuss the matters and interview with anyone. This is not technically correct. At the commencement of each interview we undertook a uniform approach regarding procedural fairness, advising as to the scope and procedure of the interview and process. At each interview we asked the interviewee whether he/she had any questions. Clr Andrews did not. This, combined with Clr Andrew's approximately 45 years experience in local government was suggestive enough to us that we did not have to advise on

such an issue. Indeed, Clr Dale, who has less than half Clr Andrew's experience, understood this.

175. Both Clr Andrews and Clr Dale in their responses to the draft report advised that they did not discuss the detail of their interviews and only rang to discuss a social event that was occurring that evening.

176. Our observation by reference to interviews and attending council meetings was that the Dale group consistently drove council decisions and therefore the business of council.

177. An example of this is the support for the current Mayor, even though during interviews most people informed us that they thought the Mayor was not an effective leader.

178. Given that the Dale group commands the majority of votes, we can only conclude that it is that group that continues to support the Mayor despite concerns about his performance.

4.1.4 Councillor relationships

179. It was evident that there was some animosity between members of the factions. This was particularly evident by reference to the relationship breakdown between Clr Lindsay Vidler and his former daughter-in-law Clr Karen Vidler. [\[I13, I14\]](#)

180. There is also concern that previous actions of councillors have affected the current councillor relationships.

181. We give as an example the code of conduct process against Clr Dale in 2003 that was managed by Clr Wales when he was Mayor. While Clr Dale states he does not hold any animosity towards Clr Wales, he believes that the previous conduct matter has affected the relationship. He states that he was relentlessly pursued. [\[I4\]](#)

182. In addition, while Clr Wales was Mayor, a number of councillors expressed no confidence in him. Three of those councillors are members of the current council: Dale, Harding and Georgiou. [\[A3 and A4\]](#)

183. The unrest among councillors resulted in the visit to council in 2003 by departmental officers. Every councillor was interviewed and reminded of their important role as councillors.
184. Cllr Wales was also Mayor at the time when Cllr Geale was a director at council and at the time when Cllr Andrews' role as General Manager was coming to an end.
185. Most councillors advised us that they thought the current conflicts were not sufficiently detrimental to conclude that council was dysfunctional. However we believe that the relationships within the factions are so strong that political relationships and loyalties prevail over good governance. There is a loyalty displayed despite any individual concerns about important issues.
186. The support of the Mayor despite his mishandling of the General Manager's performance review is an example (this is discussed in detail further in the report). This left council exposed to litigation and appears to have resulted in additional costs to council.

4.2 Relationship between councillors, the General Manager and staff

4.2.1 Background

187. Since the beginning of the new century, council has had three General Managers acting in a full time permanent role and two on a temporary basis. The General Managers and periods during which they acted were:

- Brian Andrews – Town Clerk/General Manager: June 1984 – January 2001;
- Graeme Faulkner – General Manager: (designated) November 2000 – July 2003;
- Brian Pearson – Acting General Manager: July 2003 – December 2003;
- Bryan Short – Acting General Manager: December 2003 – February 2004;

- Phillip Perram – General Manager: March 2004 – current.

188. It is evident that there have been strained relationships between some councillors and senior management of council from time to time during the past five years.

4.2.2 Previous General Managers and councillor relationships

189. 1999 represented what was essentially the twilight of Brian Andrews' career as Town Clerk/General Manager with council.

190. Brian Andrews was appointed to the position of Town Clerk in 1984. He was in that position for a period of 17 years.

191. Brian Andrews, as then General Manager, was required to have his performance reviewed periodically by the Mayor. We were advised the this was a term of his contract. After the resignation of Brian Andrews and prior to Mr Faulkner becoming General Manager, Clr Wales, in his capacity as Mayor, completed a total overhaul of the performance review process.

192. It is apparent that Clr Wales, as (then) Mayor, and Mr Faulkner, as (then) General Manager, had a productive working relationship. We were advised that Mr Faulkner had the majority support of councillors. [\[115\]](#)

193. During his time as General Manager, Mr Faulkner undertook a restructure of the senior management of council. This resulted in two directors being displaced. One of those, Kerry Geale, is now a councillor on Wagga Wagga City Council.

194. Kerry Geale left council under difficult circumstances. We were advised that the relationship between Mr Faulkner and Kerry Geale was not good.

195. A specific example of strained relationships between General Managers and councillors is the matter of the code of conduct complaint against Clr Dale in 2002/2003 that involved Clr Wales, when he was Mayor, and made by the then General Manager Graeme Faulkner.

196. The outcome of the code of conduct complaint saw Clr Dale reprimanded by Clr Wales. Clr Dale advised us that he refused to accept the reprimand. Mr Faulkner made the complaint as he believed that Clr Dale had been externally critical of him in the media. This did not bode well for the relationship between Clr Dale and Mr Faulkner. [\[A5 and A6\]](#)
197. Clr Dale advised that he was able to continue a reasonable relationship with Mr Faulkner thereafter and move on from his then feelings about Clr Wales.
198. Mr Faulkner left council in 2003. From our discussions with councillors who were there at the time, a number believed he left due to pressures resulting from professional conflict, for example, the dynamic between Mr Faulkner and Clr Dale that resulted in the complaint referred to above.
199. However, Mr Faulkner advised us that at the time when the opportunity arose for him to take up another job offer, he could see that Kerry Geale may become a councillor and so took the opportunity to leave. [\[I16\]](#)
200. Clr Wales was also Mayor when the current General Manager, Phillip Perram, was appointed in 2004. At that time, Mr Perram's appointment had the majority support of councillors, with the Wales group being the dominant group at that time.

4.2.3 Relationship between current Mayor and General Manager

201. We are concerned that the tenor of many of the interviews undertaken reflected a lack of professional respect for the current General Manager. As referred to previously, we formed the opinion that some of the interviews were rehearsed. As such, this detracted from the credibility of those interviews and impacted on the usefulness of the information obtained.
202. Clr Pascoe advised us that he has professional respect for the current General Manager and values his management of the council. Despite this, it was evident that the relationship between the Mayor and General Manager is problematic.

203. The clearest example of what might be perceived to be an unproductive working relationship between the Mayor and General Manager is the ongoing difficulties with the General Manager's performance review. This is discussed in detail later in this report.
204. A further example of the strained relationship between the Mayor and the General Manager is that a considerable amount of communication between them seems to be in writing. Management's response to this is that discussions are only recorded in writing where it is appropriate to do so for the purposes of good governance and so there is a retrievable corporate memory of these discussions. However, we believe it is reflective of the professional, yet problematic, relationship between the Mayor and the General Manager.
205. We were advised by the General Manager that the regular briefings that are held with the Mayor are strictly minuted. In the General Manager's view, this was required as the Mayor and General Manager frequently have different recollections of events.
206. According to council's draft policy on councillor access to information and staff, the General Manager is responsible for keeping the Mayor informed of all matters relevant to his responsibilities. We were advised that this draft policy has not been considered by MANEX (executive management group) and therefore has no status. [\[A7\]](#)
207. However, we are of the opinion that the General Manager takes all reasonable steps to comply with the intent of this draft policy in so far as it pertains to the Mayor's responsibilities.
208. A majority view among councillors was that the General Manager is a controlling manager and accordingly micromanages issues thereby keeping a tight rein over the operational aspects of council. We were advised and we observed that he achieves this by producing and accessing an extremely detailed paper trail in relation to every issue pertaining to council.
209. The Mayor stated to us that he essentially does what he is told. He stated he believes he has a good reputation in the community and this is important to him. This is his focus and what drives him. He stated that if he

had to “run to the letter of the law” by putting everything through the General Manager, then he wouldn’t be able to operate and there would be anarchy in the community. [\[11\]](#)

210. This complete contrast in style has affected their working relationship to the point where observers see it as dysfunctional. Some observers have stated that the relationship has broken down to an extent that it is irretrievable. Cllr Pascoe, in his response to the draft report, denied that the relationship is dysfunctional or irretrievable.

211. While both parties state they have a professional relationship, the Mayor states this is a good relationship while the General Manager states that this is an ordinary relationship. However, we have received feedback that the relationship is ineffective, bordering on dysfunctional.

212. Some councillors told us that the General Manager does not provide sufficient support to the Mayor in order for him to carry out his functions. The Mayor advised us that he is weighed down with paperwork.

213. It is important for any council that the General Manager and Mayor work well together. Having an ordinary, yet professional relationship does not satisfy the standard required. We are of the opinion that the relationship should be a good professional relationship. It should be one that clearly demonstrates the requirements of good governance that is ultimately reflected through the confidence of the ratepayers, councillors and council staff.

4.2.4 Access to council information

214. In general we were told that excessive paperwork was an issue for many councillors. But, many contradicted themselves on this, saying they got insufficient information and then at the same time complaining about the volume of information they received.

215. Given these contradictions we cannot place great weight on that evidence. We can only conclude on what we have observed as investigators.

216. What we have observed is that there is consistently a more than satisfactory provision of information on the issues before council and to ourselves.
217. This is to the extent that many councillors raised the same issue and presented the same papers as an example of the overproduction of information. This strongly suggested that some councillors had colluded as to what would be said to us at their interviews. It is also suggestive of a course of action illustrating councillors' "ganging up" on the General Manager in order to discredit him.
218. Councillors are provided with extensive details in relation to many issues that come before council and there is a ready reliance to refer matters for legal opinion when necessary.
219. We found that council's records management systems were poor. Council commissioned a review of its governance, which was undertaken by Maurie Daly. The Daly report found that there appeared to be a lack of accountability in relation to information management processes, records management systems and management of complaints. [\[A10\]](#)
220. The Daly report recommended the implementation of formal systems of management in relation to these three areas. It is our understanding that council has taken on board the recommendations of the Daly report and is in the process of setting in place formal systems regarding these three areas.
221. The lack of a formal bedded-down system regarding information and records management hindered our investigation in so far as the ready access and retrieval of documents upon request. On some occasions we were advised that certain information could not be provided, as it could not be located.
222. We acknowledge that council has recently created a new position and employed a person in the capacity of governance officer whose role is to set in place further improvements to council's systems and processes. As part of the organisation restructure, new positions of a Manager of Governance, an

Internal Auditor and a Risk Analyst have been established to focus on governance issues.

223. We are aware that since the draft report was prepared, council resolved, on 26 February 2007, to establish an audit committee. In addition, council has commissioned a risk analysis of the organisation as a foundation for a three year audit program.

4.2.5 Councillor interaction with staff

224. We discussed the procedures that are in place for councillors to interact with staff, with every councillor. The majority of councillors knew that their communication with the staff of council was to be through the General Manager or directors. However, the majority were not sure as to whether there was a written policy to guide this process.

225. We were provided with a copy of a draft policy that was consistent with the provisions of the Model Code of Conduct for Local Councils in NSW. Although there is a draft policy on councillor access to information and staff, it has not been to council for adoption as yet. [\[A7\]](#)

226. The draft policy provides that councillors can make enquiries through not only the General Manager and directors, but managers as well. Additionally, we note that the policy has a specific clause that states that the Mayor may communicate with council staff in the course of fulfilling his responsibilities. The level of those staff in the organisation is not defined.

227. The understanding of how and to whom the Mayor may communicate is not accurately reflected in the draft policy. The understanding that has been communicated to us is that the Mayor may not communicate with staff below the director level. However, the draft policy clearly states at clause 4.2.7 that the Mayor may communicate with council staff in the course of fulfilling the Mayor's responsibilities.

228. We were advised by senior staff of council that they were concerned about the amount of contact made with council staff by councillors. In particular, concern was raised about the Mayor's contact with staff.

229. We acknowledge that this is a draft policy and has not been adopted by MANEX (management executive group) or council. However, what has been communicated to us as council's current position is not reflected in council's draft policy. On that basis council needs to investigate the practice and procedure on this issue and determine the standard on which it will rely. Council should then communicate and implement this policy.

[Recommendation 11]

230. The current unwritten council position requires that the Mayor does not contact staff directly below director level. The Mayor stated that even though he understands the channels through which he is to forward requests for information from staff, he does not necessarily follow those channels. We note that the Mayor's response to the draft report states that this contact is not on sensitive or controversial matters.

231. In fact, the Mayor acknowledges that he has a lot of good friends in the council establishment as a result of his development activities in the city. He believes that those friendships have been there from his role as a builder and does not see why he should change them. While the Mayor does not need to change his friendships, he does need to be mindful about how he uses those friendships.

232. We were provided with a number of examples where it is alleged that the Mayor has used inappropriate means to obtain information from staff. However, on the whole it does not seem to us that the Mayor has acted in breach of the current un-adopted policy or code of conduct. To the contrary, by reference to clause 4.2.7 of the draft policy, the Mayor has acted in accordance with that policy. [\[A8\]](#)

233. However, what is of concern is that the Mayor is acting contrary to council's current practice. There was at least one example provided whereby it could be stated that the Mayor had acted inappropriately. That example related to the Mayor contacting a third level manager late at night. [\[I2\]](#)

4.2.6 Previous senior staff as councillors

234. Concerns were raised with us about the relationship between Cllr Andrews and staff of council. It is alleged that due to Cllr Andrews' involvement with council over a long period of time, he has built up friendships and alliances within the staff of council.
235. We are concerned about the impact on relationships between councillors and staff when senior staff become councillors within a short period of time of leaving their positions at council. We are especially concerned when councillors have previously served in influential positions such as general managers and senior staff or equivalent positions as defined by section 332 of the *Local Government Act 1993*.
236. As previously outlined, both Cllrs Andrews and Geale were previously senior staff at Wagga Wagga City Council.
237. Cllr Geale in his response to the draft report advised that many of the staff he had direct involvement with during his time as a Director were no longer employees of council. He also advised that since he was elected, he has not inappropriately contacted council staff.
238. However, Cllr Geale in his interview advised that his reasons for standing for council included a sense of civic duty as well as, in some measure, revenge.
239. It is our view that the networks and staff relationships that are built up during their time in influential positions can be detrimental to the effective functioning of a management team that follows.
240. Concern was raised with us that other councillors deferred to Cllr Andrews for advice rather than the current General Manager. The net effect is that this undermines the position of General Manager.
241. We are of the opinion that former senior staff of councils should not be able to be elected as councillors for at least four years after leaving that council. This will provide a break of at least one election.

242. In the present circumstances, Clr Andrews' resignation became effective in January 2001 and Clr Geale left council in December 2001. The local government elections were held in March 2004. Therefore, Clrs Andrews and Geale were not employed or involved in council business for periods of only three years and two and one half years respectively.

243. As a result we are of the opinion that had the four year period been in place, neither party would have been involved in the current restructure and resultant redundancies and the issues that have flowed from this. (The restructure is discussed in detail further in this report.)

244. For some time the department has been concerned about the disruptive effect of former senior staff who become elected representatives. The department has been aware of a number of issues that have occurred, particularly following decisions not to re-appoint the senior officers concerned.
[Recommendation 5]

4.2.7 Councillor and senior staff interaction

245. We are concerned about the level of disrespect shown to the senior staff of council. We observed two council meetings while undertaking our investigation. We witnessed some councillors "grilling" senior staff members. We were advised that this was a normal occurrence. Our observation was that some councillors appeared to enjoy "point scoring" against the senior staff.

246. From our observations, some councillors have an unhealthy perspective that council staff cannot be trusted and that council as an organisation is separate from them.

247. All councillors acknowledged that Mr Perram communicates with them prior to council meetings to ensure they have no issues of concern. Mr Perram also advised us that he has an open door policy for councillors, which most councillors also acknowledged.

248. We were informed by some councillors that they did not support the appointment of Bronwyn Jones as the Director of Strategic and Community Services. Many councillors expressed concern that "she was from out of

town". It was apparent to us that councillors viewed anyone from out of town with scepticism.

249. This is evident from the comments many councillors made about the loss of "local" people from the organisation through redundancies and their concern about the engagement of consultants that were not from the local area. There was a recurring theme that people from out of town were no good.

250. It is apparent to us that the relationship between the General Manager and Ms Jones and some councillors has deteriorated.

251. It is evident that the General Manager and Ms Jones are the target of the most pressure from councillors. This has resulted in the defensive strategy of producing extensive documentation to protect themselves. This is not a criticism, but merely an observation.

252. It is apparent that Mr Dunshea, Director of Asset Services, is not under the same level of scrutiny by councillors as the General Manager and Ms Jones. Evidence of this is the discussion between Cllr Andrews and Mr Dunshea where Cllr Andrews mentioned "can I tell you off the record that you'll be OK". [\[A9\]](#)

253. Cllr Andrews provided a reply to the issues raised in relation to this discussion which did not sufficiently rebut the evidence provided by council.

254. Further evidence of the lack of support for the General Manager and Ms Jones by some councillors is the issue relating to the director's appointments in 2006. This issue is discussed in detail further in this report. However, we believe that the efforts made by some councillors to intervene in the appointment process was an attempt to remove Ms Jones from the position.

255. From our observations and based on the groups as they presently stand, it appears that the relationship between the General Manager and some of the councillors, and some of the councillors and Ms Jones, are beset by seemingly irreconcilable differences.

4.3 Role of councillors

4.3.1 Governance role vs political role

256. Councillors have two roles. One as a member of the governing body of council and the other as an elected person (section 232 of the Act). It can be problematic for councillors to balance these roles. Our observation of councillors undertaking their role at Wagga Wagga is that the role as an elected person seems to dominate.

257. We make this observation based on our interviews with councillors and the way councillors undertake their decision making. Many councillors appear to be more concerned about how they are perceived by ratepayers rather than about the good governance of council.

258. The most striking example of the dominance of the elected role is the issue of council's restructure. The restructure is discussed in more detail in this report. As discussed in that section, the decision to restructure council was unanimous. Many councillors went to lengths to stress this to us.

259. However, they then went on to blame the General Manager for any problems with the restructure and seemed reluctant to accept any accountability for the decision. It was as though councillors were not part of council. In fact, some seemed to view themselves as separate from the council organisation.

260. A specific example is the email to the General Manager, the Mayor and other councillors dated 20 August 2006 from Clr Geale in which he raises concerns about the restructure and states that he will issue a statement to the press in relation to this.

261. The press statement was provided to us by Clr Geale. We cannot confirm whether this article was printed in the media or distributed by any other form of media. In any event, it shows Clr Geale either lacks understanding or disregards his role. [\[E1\]](#).

262. Cllr Geale's statement acknowledges his support for the restructure, but only based on certain advice given by the General Manager. In the article, he airs his concerns about the implementation of the restructure and that he holds the General Manager accountable.
263. While Cllr Geale states that he has discussed his concerns with the General Manager, he seems to be "hedging his bets" in stating that the decision he was a party to will be at fault, because he has been given the wrong advice by the General Manager.
264. There is no indication that he, as an elected representative, accepted responsibility for the decision he assisted in making as part of the governing body of council. It was qualified. His ending paragraph highlighted the importance he placed on his role as an elected person.
265. The other clear example where councillors place priority on their elected role above their governance role is in the area of planning. There are many examples (see separate section for detail) where councillors do not accept the recommendations of planning staff. While the Act does not prevent them from doing so, it is evident that this is in favour of the particular interests of applicants. We say that the elected role takes precedence as councillors choose to ignore the planning standards that council itself has in place.
266. Examples include the Gumly Gumly Muffler Factory, the Collingullie sign issue and Lakehaven development. Council's Local Environmental Plan and Development Control Plan have been developed to allow flexibility in planning decisions (discussed separately). However, this flexibility can be abused if councillors are not mindful of the objectives that the planning standards have been developed to achieve.
267. We observed an instance where councillors determined that they wished to approve a development and directed staff to return to them with a section 79C (*Environmental Planning and Assessment Act 1979*) evaluation that would enable them to approve the application.

268. There is no problem if council officers are requested to provide a set of conditions should council wish to approve a development. However, council officers should not be directed as to the content of any advice (refer to section 352 of the *Local Government Act 1993*). That is, it is inappropriate for council to direct staff as to the content of the section 79C evaluation and a breach of the *Local Government Act 1993*.

269. This may leave council legally vulnerable. It also leaves us with the question as to whether the decision is taken in the best interests of the community as a whole.

4.3.2 Involvement in operational matters

270. Councillors are undertaking their role to provide a strategic direction for council. Councillors have participated in workshops and the development of a strategic direction document. However, the fact that this is only happening now suggests that it is as a result of a new General Manager rather than any impetus from councillors.

271. Despite this recent involvement in setting the strategy and policy direction for council, we are advised that many councillors continue to involve themselves in the day to day operational matters of council.

272. The role of the General Manager, as previously discussed, is the day to day management of council. In this regard councillors should not be discussing operational matters with council staff. However, some councillors admitted that they have regular contact with staff on operational matters.

273. Concerns were expressed that some councillors are still operating under the previous Act that did not provide the distinctions between the roles of councillors and the General Manager. This is demonstrated by an email conversation between Cllr Andrews and council's General Manager, Phillip Perram on 25 June 2006 and 2 August 2006. [\[E2\]](#)

274. In this email Cllr Andrews acknowledges that councillors are reluctant to relinquish their association with staff following the introduction of the 1993 Act. The General Manager concurs with this view.

4.3.3 Role of Mayor

275. In our interview with the Mayor, we also gained the impression that he saw his “office” as separate to the council organisation. This came about in relation to the issue of his access to advice from staff. He stated that it was his belief that his sources had been cut off and therefore he has difficulty running his office. [\[I1\]](#)
276. As previously discussed, we believe that the Mayor struggles with his role. Section 226 provides that the role of the Mayor is to exercise, in cases of necessity, the policy making functions of council between meetings; to exercise such functions as council determines; to preside at the meetings of council; and to carry out the civic and ceremonial functions of the Mayoral office.
277. The Mayor is new to local government and new to the role of Mayor. He told us in his interview that he did not know what his delegations were until March 2005. While he understood that he had the role of policy making in cases of necessity, to chair meetings and undertake ceremonial responsibilities, he did not know what other functions had been delegated to him by council. [\[I1\]](#)
278. This is difficult for us to reconcile as council itself is responsible for determining and delegating any functions to the Mayor by resolution. This would mean that the Mayor must have known what those delegations were at the time the resolution was debated. This occurred at the meeting held on 21 April 2004. The minutes record that Clr Pascoe was present and voted on the matter. [\[E4\]](#)
279. Further, the item of the delegations of authority to the Mayor was listed on the agenda paper for the meeting. Given this, any councillor proposing to stand for the position of Mayor would have had the information pertaining to the delegations to the office prior to the meeting. [\[E5\]](#)
280. In his response to the draft report, Clr Pascoe advised that, upon reflection after the interview, he was in fact aware of other functions that had been delegated.

281. The Mayor has not effectively undertaken his delegation of managing the General Manager's performance. This is discussed in detail in a separate section of this report. The Mayor indicated that he was uncomfortable with the delegation of managing the General Manager's performance.
282. The Mayor advised us that he was not familiar with the *Local Government Act 1993*, although he had read the basics in relation to his role some time ago. He had requested a copy for his office, but was told he could use the copies that were available in the General Manager's office. We were advised by council management that the Mayor was provided with a copy of the Act on 28 September 2006.
283. He also advised us that he does not use the internet and although computers have been provided to councillors he does not use one. He is not computer literate and appears to have made no attempt to acquire skills in this area. The benefit, should he do so, is that he could readily avail himself of council information. He could also have availed himself of the current versions of the Act via the internet. Cllr Pascoe advised us that he has made efforts to attend courses to acquire these skills.
284. However, we find these poor excuses for his lack of knowledge of his delegations and the Act.
285. The area of meeting practices has also been one where the Mayor has not fulfilled his role effectively. As we have discussed, this may largely be due to the fact that the Mayor is inexperienced in local government and meeting procedures.
286. The General Manager has provided guidance to the Mayor in undertaking his role as chairperson of council meetings. We observed this process at the meetings that we attended. It was acknowledged by all councillors that the Mayor struggled with effective meeting procedures. However, most people interviewed observed that the Mayor has improved.

4.3.4 Conclusion

287. It is not clear what remedial action could be taken to resolve the councillors' lack of understanding of their role. It appears that:

- councillors had previously undertaken extensive training regarding the practice and procedure of their role under the 1993 Act,
- the role of councillors was discussed with individual councillors by departmental officers in 2003,
- the role of councillors was discussed with councillors as a group by departmental officers in 2005,

288. It appears councillors are resistant to training and change. The utility of further training is questionable without a fundamental change in the attitude of the councillors.

4.4 General Manager's performance reviews

289. We have put into evidence a chronology of events and supporting documentation (approximately 152 annexures) relating to the course of events from 28 May 2004 to on or about 9 November 2006 regarding the performance review aspect of the General Manager's contract. [\[D1\]](#)

290. The management of the General Manager's performance reviews is delegated to the Mayor in accordance with section 377 of the *Local Government Act 1993*.

291. By reference to clause 5 of the General Manager's contract of employment, the General Manager's performance as required by Schedule E of that contract is to be monitored on a three monthly basis and reviewed annually by the Mayor commencing from 1 September 2004 and annually thereafter.

292. By reference to the same clause, the Mayor is required to give the General Manager 15 working days notice in writing that a performance review is to be conducted.

293. Clause 5.4 also states that at the conclusion of the performance review the Mayor shall prepare and send a statement to the General Manager and council for report at the September council meeting. This statement shall set out:

- the Mayor's conclusions about the General Manager during the period the subject of the performance review
- any recommendation to the council to vary the performance measures as a consequence of the performance review
- any directions or recommendations made by the council to the General Manager in relation to the employee's future performance of the duties of the position.

294. From our observations and by his own admission it is clear that the Mayor does not understand what is required of him regarding this delegation. More specifically, he has only recently become fully aware of his requirement to undertake the performance review of the General Manager as per clause 5 of the General Manager's contract.

295. He stated in his interview that he initially did not understand that there had been a delegation of this role to him until some time after the General Manager was employed. This issue is discussed in this report under '*Role of Mayor*'. We noted that the Mayor clarified his position further in response to the draft report. [\[11\]](#)

296. It is our observation by reference to the annexed documents to the chronology and by direct conversation with the Mayor and council staff that the Mayor did require and was provided with assistance to undertake the performance review of the General Manager. This is evidenced by the provision of assistance from the following:

- council's Human Resource department,
- the Local Government & Shires Associations,

- a council director, and
- consultants.

297. The Mayor has by his own admission not carried out his delegated function as required regarding the performance review aspect of his role.

298. This is evidenced by the fact that the performance reviews for September 2004 and September 2005 were not undertaken as required until November 2005.

299. The performance review required to be undertaken for the year to September 2006 was not undertaken and finalised until December 2006.

300. There have been difficulties in relation to the Mayor even presenting the outcome of the performance review to council. The Mayor was provided with assistance to prepare a Mayoral Minute to council in relation to the outcome of the performance review in November 2005. The matter was deferred for consideration to an extraordinary meeting held on 5 December 2005. When the Mayor attended the meeting he provided a handwritten Minute to replace the one prepared and provided to councillors. He then declined to move his own Mayoral Minute.

301. This provides another example of the Mayor's inability to undertake and complete his role, particularly in relation to the performance review. It is also an example of the Mayor's poor understanding of the protocols relating to meetings practice.

302. The net result of this failure to understand and fulfil this most important aspect of the Mayoral role has resulted in the council being in breach of the General Manager's contract. By virtue of the conduct of the Mayor it left the council legally vulnerable.

303. It is our opinion that where the Mayor has so blatantly acted in breach of the General Manager's contract, council as a whole should have acted expeditiously to resolve the situation. This should have occurred even if ultimately the net result was the removal of that particular delegation from the Mayor to thereafter be undertaken by council as a whole.
304. This was not done. Council as a whole are equally accountable regarding this aspect of the breach of the General Manager's contract.
305. It is another example of both the Mayor and councillors failing to show an understanding of their role and act in the best interests of the ratepayers.
306. This ongoing course of conduct undertaken by the Mayor and council as a whole also shows a complete lack of respect for the General Manager's role.
307. We have not observed any evidence to this date that the councillors have taken any action to remedy the situation or prevent it from happening again. The delegation remains with the Mayor and the Mayor has been re-elected for a third term.
308. Despite his mishandling of this matter, councillors still vote for him as Mayor. One councillor stated to us that it was the intention of that person to vote for Clr Pascoe again as Mayor even though he has not effectively managed this delegated responsibility.
309. It is clearly evident from our observations and discussion with the councillors, the Mayor and the General Manager that this issue has affected the relationship between the Mayor and the General Manager. Significantly, we were advised by the General Manager that the relationship is ordinary but professional. On the issue of whether ordinary is or is not good enough we refer to our comments made in section 4.2.3. **[Recommendations 9 and 10]**

4.5 Code of conduct

310. Section 440 of the Local Government Act 1993 provides that councils must adopt a code of conduct. Prior to 1 January 2005 the onus was on council to develop this code. In 1994 the department released a practice note to assist councils in this regard.
311. Prior to 1 January 2005 council had in place a code of conduct document as required by the Act. [\[J1\]](#)
312. In 2004 section 440 was amended. Section 440(1) of the Act now provides that the regulations may prescribe a model code of conduct applicable to councillors, members of staff of councils and delegates of councils.
313. Section 440(3) requires that councils adopt a code of conduct that incorporates the provisions of the model code. This section also enables councils to include provisions that supplement the model code. However, any supplementary or more onerous provisions will have no effect to the extent that they are inconsistent with the model code.
314. The regulations prescribed the Model Code of Conduct for Local Councils in NSW, dated December 2004. The Model Code took effect from 1 January 2005.
315. Wagga Wagga City Council discussed the Model Code of Conduct at its Policy and Strategy Committee meeting held on 14 February 2005 and recommended the adoption of the Wagga Wagga City Council Code of Conduct dated January 2005. [\[J2\]](#)
316. Council considered this report at its meeting on 28 February 2005 and adopted the recommendation.
317. The code of conduct adopted by council is largely the Model Code prescribed by the regulation. However, council has taken the opportunity to supplement the Model Code. The supplementary provisions are largely taken from the optional better practice suggestions provided in the department's

guidelines that were developed to assist councils to implement the Model Code. In addition, council has provided a section with examples that are taken from the department's guidelines. Council's code of conduct is consistent with the Model Code. [\[J3\]](#)

318. Council's code indicates that it was adopted in January 2005 and, while the Model Code provision applied from that time, council did not adopt its code until 28 February 2005.

4.5.1 Complaints under council's codes

319. Council has dealt with complaints under its code of conduct that was in place prior to 1 January 2005 as well as under its current code.

320. The most significant complaint dealt with by council prior to January 2005 related to alleged breaches of council's code by Cllr Dale in 2003. This matter received considerable media attention and was the subject of concerns raised with the department.

321. It was largely this issue that led to the visit by departmental officers in 2003.

322. The complaint led to strained relationships between the Mayor at that time, Cllr Wales, the General Manager at that time, Mr Faulkner and Cllr Dale. This issue is also discussed elsewhere in this report under the heading '*Previous General Manager and councillor relationships*'.

323. The outcome of the complaint was the reprimand of Cllr Dale. However, as discussed previously, Cllr Dale refused to accept the reprimand.

324. Of most concern to us is that the complaint and conflict was fought out in the media.

325. Up until 7 September 2006, council has dealt with 12 complaints under the Code of Conduct that was adopted in February 2005. Of these, four have been referred to the conduct committee. The remainder were declined by the General Manager, and in one case the Mayor. [\[J4\]](#)

326. On the whole, the complaints have been dealt with in accordance with the Model Code provisions. The exception is the one complaint that was made about council's General Manager and dealt with by the Mayor.

327. From the information we were provided it is evident that the Mayor investigated this complaint and declined it. The Model Code provides at clause 10.4 that complaints about the General Manager should be directed to the Mayor who will report the matter to the conduct committee. The Mayor does not have any discretion to deal with or decline the complaint.

328. Of the matters referred to the conduct committee, two were declined with no further enquiries, the conduct committee made enquiries into one and, to our current knowledge, one is still in progress.

329. The matter that was the subject of enquiries was reported to council on 27 June 2005. This matter related to Cllr Geale and comments that he had made in the media. Council adopted the conduct committee's report that concluded that there was no breach of the code of conduct for one allegation and that no further action should be taken in regard to the other.

330. Again, this complaint was reported on in the media.

331. We have reviewed the matters of the complaints received about breaches of council's code of conduct. Half of the 12 complaints were made by councillors and the others made by other persons.

332. The matters raised by the complaints are:

- Five complaints raised conflict of interest issues
- Three related to public comments by councillors or criticism of council decisions
- Two related to a delay, inequitable treatment or not properly considering the complaint
- One complaint alleged a breach of confidentiality

- One complaint was a list of questions about a council decision and was subsequently declined as it was not in the form of a complaint.

333. In reviewing the nature of the complaints, we are concerned that many of the complaints raised by councillors may have been made for political motives. Further, it is apparent that councillors freely discuss the fact that complaints have either been made by them or lodged against them.

334. This is evident in letters provided to us that were written by councillors in relation to these complaint processes, which express concern that knowledge about the complaint is widespread within council.

335. It is unacceptable that complaints made under the code of conduct can be the subject of public debate before being finalised.

336. We spoke to all councillors about their understanding of their obligations under the code of conduct and their view of the implementation of the code. Most councillors agreed with our observation that the code is being used as a "sword" rather than a "shield". If this is the case, then it is an inappropriate application of the code of conduct.

337. Some councillors blamed the code of conduct for the problems rather than looking at their behaviour.

338. The code of conduct is provided to set the standard of behaviour that is expected of council officials. It should not be used as a tool for political point scoring.

339. To be the subject of a conduct complaint is a serious matter and stressful for the person complained about. Therefore, it is an imperative that the code of conduct is appropriately used. Complaints that are made should be carefully considered so as not to undermine the integrity of the code and its application.

340. Caution should be exercised in using the code of conduct to govern a councillor's ability to express a political view that may be critical of council. The manner in which this is undertaken is the issue for the code of conduct.

341. Some of the complaints under the code of conduct that we have reviewed appear to only raise concern that a view is expressed rather than the manner in which this is done.

342. The conduct committee, in assessing complaints about councillor's views, has also identified that there are no provisions within the code of conduct preventing a councillor from being externally critical of council or another councillor. This finding of the conduct committee should put an end to complaints of this nature being made.

343. It is evident that the General Manager is able to apply a common sense approach to the initial assessment of complaints and thereby only refer the matters warranting further enquiry to the conduct committee.

344. However, council should consider developing guidelines to assist the General Manager in his initial assessment of the complaint. These guidelines could identify alternate ways of resolving the complaint if it is not appropriate to refer the complaint to the conduct committee for its consideration.

[Recommendation 15]

4.5.2 Understanding of obligations under the code of conduct

345. Our greatest concern is the general understanding of some of the provisions of the code of conduct, particularly the provisions relating to the interaction of councillors and staff.

346. This is no more evident than in the press articles relating to the staff protest at the Policy and Strategy Committee meeting on 14 August 2006. Both the staff and the Mayor refer to the fact that they cannot talk together.

[Q9]

347. There is no provision in the Model Code that prevents councillors discussing industrial matters with representative bodies of council staff, eg unions or staff associations, as long as those matters do not relate to individual staff members.

348. We are aware that the Mayor was offered the opportunity to address staff on the restructure issue by the General Manager. He declined. His attendance at that meeting would have been appropriate.
349. We have discussed councillor/staff interaction previously in this report under the heading 'Councillor interaction with staff'. The Model Code does not prevent councillors and staff communicating. It prevents inappropriate interactions and specifically those that are listed in clause 8.8.
350. Some of the inappropriate interactions that we have been informed about relate to council staff or councillors approaching each other on individual staffing matters. That is, councillors should not be involved in individual employment issues. These are employment matters and matters for the General Manager. Staff have access to a range of services to assist them with individual employment matters.
351. A further example of a councillor approaching a staff member outside of hours of work to discuss council business was provided in the section '*Councillor interaction with staff*'. Where this occurs, we are concerned that this interaction breaks down the delineation of the roles of councillors and staff as provided by the 1993 Act.
352. We were advised that council staff were fearful of being seen talking to councillors. We were also made aware of a personal situation involving a councillor and staff member that we were told ultimately led to the staff member leaving council. If this is the case, we are concerned that the Model Code has been incorrectly interpreted and may, by this interpretation, drive councillor and staff interaction "underground".
353. We need to stress that the Model Code does not prevent staff and councillors from communicating. It is intended to prevent inappropriate interactions that are outlined in clause 8.8. It is a normal part of rural community life that council staff and councillors would be present at the same social situations. The Model Code does not prevent this. It also does not prevent those persons communicating socially. The Model Code governs the interactions relating to council business.

354. Council has yet to adopt a policy to provide more specific guidance on the interaction of councillors and staff. We have recommended that the draft policy that we were provided with is reviewed and takes into account the discussion in this report.

355. Some council staff we have spoken to advised us that they had not received training on the code of conduct. This should happen as a matter of priority. We acknowledge that council includes a session on the code of conduct in its induction program. However, council should ensure that existing staff have all undergone some instruction in their code of conduct obligations.
[Recommendation 14]

356. We also believe that councillors and senior staff would benefit from discussing and receiving expert advice on appropriate interactions and the application of the code of conduct. This discussion should form the basis of council's policy to guide that interaction. **[Recommendation 13]**

4.6 Organisation restructures

357. Section 332 of the Local Government Act 1993 requires that council determine its organisation structure, the positions within that structure that are senior staff positions and allocate resources towards the employment of staff.

358. Section 333 of the Act provides that a council may re-determine its structure from time to time and must re-determine its structure within 12 months after any ordinary election of the council.

359. Council has reviewed and determined its organisation structure on three occasions in 2001, 2004 and 2006.

4.6.1 The 2001 restructure

360. In 2001, Mr Graeme Faulkner was appointed as the new General Manager following the retirement of the long serving General Manager, now councillor, Brian Andrews.

361. Cllr Andrews advised that, in his capacity as former General Manager, he provided a report to council outlining council's obligations under the Act regarding a review of the organisation's structure. He provided the option to council regarding the determination of the organisation restructure to be finalised before or after the appointment of a new General Manager.

362. Council took the option of reviewing the organisation's structure after the appointment of a new General Manager.

363. A restructure of the organisation in 2001 reduced the number of director positions from six to four and the number of manager positions from 32 to 17. The restructure was essentially carried out at the top level of the organisation. [\[Q1 and Q2\]](#)

364. Mr Faulkner told us that it took 12 to 18 months to achieve this restructure as he achieved the change in positions through natural attrition. [\[116\]](#)

365. Mr Faulkner advised us that he felt that his relationship with the union was good during the restructure process. This was confirmed by union representatives.

366. The six directorships prior to the restructure were:

- Corporate Services
- Engineering and Technical Services
- Community Services
- Recreation and Cultural Services
- Environmental Services
- Commercial Response

367. The four directorships after the restructure were:

- Asset Management
- External Services
- Support Services
- Commercial Strategy

368. We were advised that all four director positions were advertised and a merit based selection process was undertaken.

369. The 2001 restructure was the cause of some concern for two directors who unsuccessfully applied for a position in the new structure. These directors were Tony Elphick, who was the Director of Corporate Services prior to the restructure and, Kerry Geale, who was then the Director of Recreation and Cultural Services. Mr Geale is now a councillor.

370. We were advised that both these directors were offered project work with council for the same remuneration and that redundancies and pay reductions were not on offer. [\[116\]](#)

371. Cllr Geale advised us in his response to the draft report that no offer of a position with council was made to him. He further advised that the only advice he received that he did not have a job was through the media.

372. Both these directors were implicated in the criticism of the management of the theatre renovations, amphitheatre and Oasis projects in the findings of the Ernst and Young report. See separate section in this report for more detail on council's management of projects.

373. Ultimately, the employment of both directors discontinued.

4.6.2 The 2004 restructure

374. In 2004, council appointed a new General Manager, Mr Phillip Perram, following the resignation of Mr Faulkner.

375. There were two changes to the organisation structure made in 2004 and they were implemented in 2004 and 2005. [\[Q3 and Q4\]](#)

376. The first change was the creation of a new directorate to co-ordinate and manage organisational development and strategic planning. This increased the number of director positions, temporarily, to five:

- Commercial Strategy
- External Services
- Support Services
- Asset Management
- Strategic Development

377. The second was a decision by council to outsource its Commercial Response Unit, thereby disbanding the Commercial Strategy Directorate, which would then leave four directorates. The other functions under the Commercial Strategy Directorate were distributed to the External Services Directorate.

378. The reduction to four directorates occurred in April 2005 following the tender process to outsource the Commercial Response Unit. See separate section in this report for more detail on the outsourcing of the Commercial Response Unit.

379. The new director position of Strategic Development was advertised along with the vacant director position of Support Services. Bronwyn Jones and Stephen Dunshea, respectively, were successful in being appointed to the positions.

4.6.3 The 2006 restructure

380. The most extensive and far-reaching restructure of the organisation was undertaken in 2006.
381. The discussion of corporate performance improvement opportunities commenced at a councillor workshop held in Albury in October 2005.
382. Council's General Manager, Mr Perram, had identified a number of issues facing council based on feedback from staff, councillors and the community. We were advised that based on this feedback, council had commissioned three independent reviews. The reviews were completed in May 2006.
383. On 17 May 2006 a workshop was provided for councillors with presentations on the findings of the independent reviews and a proposal for the way forward for the organisation.
384. A further workshop was held with councillors on 13 June 2006 that proposed a specific organisational structure. The feedback and the outcomes of the reviews formed the basis of the proposed restructure of the organisation.
385. Reports on the new structure identify that it aims to:
- Strengthen project management capabilities
 - Address slow response times and poor communication
 - Create a business group
 - Implement a corporate complaints management system
 - Review and improve information systems
 - Provide specialist strategic planning within the Asset Services Directorate
 - Review the development application process

- Remove the client/provider split in asset services
- Improve communication, consultation and feedback
- Provide workforce planning
- Create cross functional teams
- Reduce the number of hierarchical levels across the organisation.

386. Many of the concerns to be addressed by the restructure proposal were expressed to us in interviews and submissions as well as problems that we had identified from our observations.

387. We commend the General Manager and council on commissioning the reports to look into the functioning of the organisation. The reports were undertaken by experienced and well respected consultants who have provided council with well founded recommendations to assist it to improve its efficiency and effectiveness.

388. The outcomes of these reports leaves us in no doubt that the assertions made by many people to us that, in some areas, council was an inefficient and outdated organisation have some basis.

389. The General Manager's response to these reports was to implement a three directorate model. The directorates would be:

- Strategic and Community Services
- Asset Services
- Corporate Services [\[Q5\]](#)

390. The report to council on 19 June 2006 identified that, following the restructure, the number of positions in the organisation would remain the same at 439.94 full-time equivalent positions. The wages budget was also to remain the same. [\[Q6\]](#)

391. The intention of the restructure was to improve service delivery standards and efficiencies. The restructure affected 93 positions in the organisation at a range of levels including redesigned and new positions. 79 staff were occupying the affected positions and had to apply for redesigned, created or vacant positions within the organisation. Further, we were advised that a number of vacant positions had been deliberately held over to maximise the opportunities for affected staff.
392. The costs of the restructure, that is advertising and human resource staff time, were to be accommodated in the 2005/06 operating budgets. Given that the implementation of the new structure was not proposed until the 2006/07 financial year, we are not sure that this is an accurate reflection of how these costs would be met. However, we are aware that there were unspent salary and wages monies in the 2005/06 budget that were transferred to the new financial year to accommodate these costs. [\[Q6\]](#) [\[I2\]](#)
393. The report indicated that it was expected that redundancies would be minimal. However, as at the 20 November 2006, there had been 26 redundancies from the organisation at an overall cost of \$1,098,299.60. [\[Q7\]](#)
394. The General Manager advised that these payments were funded from unspent salary and wages monies that were voted to an internally restricted reserve. [\[I2\]](#) It was apparent that council had sufficient reserves to cover the cost of the redundancies.
395. Many councillors expressed concern at the number of redundancies that were taken and that they were not provided with sufficient information in this regard.
396. Our assessment of the information provided to councillors leads us to conclude that councillors should have been aware of what was going on and what was being offered to staff. We believe councillors knew there would be a restructure and that there would be redundancies, but it was unclear how many staff would take up the redundancy offer.

397. By reference to the report to council on 19 June 2006, the General Manager himself couldn't provide such a response to that question. Indeed he was anticipating fewer voluntary redundancies. However, this may have been unrealistic. [\[I2\]](#)

398. Once it became clear that staff were taking advantage of the redundancy offer, the General Manager kept councillors updated through regular memoranda. This was confirmed by some of the councillors we spoke to.

399. Many people we interviewed expressed concern at the loss of corporate knowledge brought about by the acceptance of redundancy offers, retirement or resignation. Of most concern to people, was the number of senior managers and long-term employees who were leaving the organisation.

400. We discussed this issue with councillors and senior council officers and we have formed the view that the alleged problem of the loss of corporate knowledge is not able to be substantiated.

401. The findings of the review reports indicate that the organisation needed to change.

4.6.4 Communication of the 2006 restructure

402. One of the main issues raised with us was the manner in which the organisation restructure was communicated.

403. The documents that have been provided to us indicate that council had a plan in place to ensure the restructure was informed by feedback from staff and that staff views on the structure of the organisation were canvassed.

404. For example, a restructure working group was established that included representatives from human resources, finance and the asset management directorate to develop and implement the new structure for that division. [\[Q8\]](#)

405. Documents provided to us show that directors, key managers, all asset staff, support services directorate and town planning staff were consulted as part of the development of the new organisation structure.
406. These documents indicate that from April 2006 staff should have been aware that work was being undertaken on a restructure of the organisation. Information on the restructure was provided to all staff in staff bulletins. Staff briefings were also held on 14 June 2006. Staff were requested to attend at least one of the briefing sessions provided on this day.
407. We were advised that the 79 staff who were to be directly affected by the restructure were informed of the status of their positions and that they would receive a letter to this effect.
408. Following the resolution of council at its meeting on 19 June 2006, staff briefings were held on 22 June 2006 and staff were provided with a handout on the restructure. We were advised that letters to those 79 staff were sent out on 26 June 2006. Letters were also sent to staff whose positions remained unchanged, those who were to be laterally transferred, those with positions that were to be renamed and those whose reporting arrangements were to change.
409. The General Manager was of the view that everyone who was affected by the restructure should have been aware of the status of their position due to the project management and consultation processes that were in place. [\[12\]](#)
410. However, we are concerned that insufficient consultation and communication occurred with the relevant unions. [\[117\]](#)
411. Graeme Kelly, Southern Region Manager for the United Services Union told us that he tries to keep a good rapport with council management and believes he has a good rapport with most general managers in his region. He advised us that he has not met council's General Manager. He stated he has met the directors and other managers, but not the General Manager. [\[117\]](#)

412. We believe that insufficient communication with the relevant Union was a contributing factor to the unprecedented staff protest at council's Policy and Strategy Committee meeting on 14 August 2006. [\[Q9\]](#) [\[Q19\]](#)
413. Before this protest was held, all staff whether they had been affected or not by the restructure, had been informed by letter about their positions. It was also evident that by this date the Union and the council were nearing agreement on many of the positions through the hearings in the Industrial Relations Commission.
414. We conclude from the media coverage that this was one way for the union and individual staff to inform councillors about their concerns about the restructure. From comments in the media, and through interviews, there is a perception that councillors and staff cannot talk together. This is explored more in other sections of this report.
415. Concern was also raised with us that council's consultative committee was not effectively included in the consultation process. It was difficult to determine what consultation occurred from an examination of the minutes of the consultative committee meetings since August 2005. [\[Q10\]](#)
416. The restructure is mentioned in the minutes of the consultative committee on 3 May 2006, 14 June 2006, 2 August 2006, 12 September 2006 and 5 October 2006.
417. The minutes of 3 May 2006 reflect that the restructure information related to the implementation of the recommendations from the asset management review.
418. The next mention of the restructure is in the minutes of the 14 June 2006 and this relates to a presentation on the organisation review given by the General Manager and the chairperson of the consultative committee.
419. The most substantial information provided on the restructure in the minutes is not until the meeting of 12 September 2006. Meetings were held on 12 July 2006 and 2 August 2006. The meeting of 2 August 2006 mentions that

the restructure is to be addressed at each meeting in the matters arising from previous minutes. From this, we assume that the restructure was discussed at the meeting held on 12 July but that this was not minuted.

420. However, this substantial information was provided after the implementation of the restructure had commenced.

421. The *Local Government (State) Award 2004* provides that each council shall establish, and properly maintain, a consultative committee which shall meet regularly. The aims of the consultative committee are to:

'(i) provide a forum for consultation between council and its employees;

(ii) positively co-operate in workplace reform to enhance the efficiency and productivity of the council and to provide employees with access to career opportunities and more fulfilling, varied and better paid work.'

422. Additionally, the Award provides that the scope of the consultative committee includes consultation with regard to any organisation restructure. The consultative committee should have been a key participant in the restructure proposal and process. This is not evident from the minutes.

423. From this it is difficult to confirm that effective consultation has occurred.

424. We are concerned that the consultative committee was not effectively used during the 2006 organisational restructure for the purpose for which it is established. **[Recommendation 22]**

425. We were also advised that Wagga Wagga City Council has had the most disputes filed with the NSW Industrial Relations Commission for councils in the Southern Region during the last five years. Figures given to us by the United Services Union indicate that in the last five years Wagga Wagga City Council has had 26 disputes heard in the Commission. The next nearest council in the Southern Region is Wollongong with 16 disputes. [\[Q11\]](#)

426. However, council management advised that, according to their records, there had been 30 disputes during the period 2001-2006. It was also noted that there had been no disputes lodged since October 2006.
427. Concern was expressed that there was not a good rapport between Union representatives and council's General Manager. The General Manager advised us that he had met with the local Union organiser and the Union representatives who attended the consultative committee, but had not met the regional Union officials. [\[I2\]](#) **[Recommendation 21]**
428. A view was expressed to us that councillors may not have been fully informed about the restructure. This was a view expressed to us by many councillors. On the other hand, many councillors also complained about the vast amount of documentation and information given to them by council officers.
429. Our assessment of the process and information provided to us on the restructure, is that councillors have had ample opportunity to assess and seek clarification on the issues involved in the restructure.
430. It is difficult for us to reconcile comments from individual councillors, who express concern about not knowing the extent of the restructure, with comments that they felt they received adequate communication about the restructure. In addition, some councillors continued to refer to the redundancies as "job losses". There is no evidence to support that the organisation lost any jobs from its full time equivalent establishment. Reports to council indicate that the number of full time equivalent positions remained the same.
431. Some councillors expressed the view that they wanted to know which individual staff had been affected by the restructure. This was evident in the email from Clr Geale to the General Manager on 20 August 2006. [\[E1\]](#) The General Manager also acknowledged this interest in his email to Clr Andrews on 2 August 2006 that:

'...Councillors still appear to be reluctant to relinquish their direct association with staff and staff matters after the implementation of the 1993 Local Government Act.' [\[E2\]](#)

432. In our interviews with councillors it was also obvious to us that many councillors knew particular events about individual staff. It was clear that councillors were discussing the specifics of the restructure with particular staff or with staff who had taken the opportunity to leave council.

433. Councillors told us that the restructure was a unanimous decision. However, this did not stop some of them from blaming the General Manager and directors for any concerns that they had about the restructure. In the view of many councillors, the decision was right, but the implementation was lacking. The councillors did not seem to have ownership of the decision. A more detailed example of this is discussed in this report under the heading *'The role of councillors'*.

434. In our review of media reports, we find it commendable that the Mayor takes a leadership role in relation to minor local issues, such as a recent problem with "budgie smugglers". Apart from one media conference, we were unable to find any press releases from the Mayor on behalf of council to attempt to explain far more important issues like the restructure to the broader community. [\[Q18\]](#)

435. As a result of this, the media reports that we have reviewed have contributed to the uncertainty that must have been in the community at that time. It was also left to the General Manager to do all the explaining of the council decision. This is a further example of councillors not taking responsibility for their decisions.

4.6.5 Directors appointments - 2006

436. Some councillors raised concerns with us in relation to the manner in which the new director's positions under the restructure had been recruited.

437. The Act makes it clear that the General Manager is responsible for the day to day operations of council. Under section 335(2) of the Act the General Manager has the following particular functions in relation to the employment of staff:

- to appoint staff in accordance with an organisation structure and resources approved by the council
- to direct and dismiss staff

438. Section 337 of the Act further provides that the General Manager may appoint or dismiss senior staff only after consultation with the council.

439. The positions that are to be determined as senior staff are defined under section 332(2) of the Act. In summary, this requires that those positions have equivalent responsibilities, skills and accountabilities to those applicable to the Executive Band of the Local Government (State) Award and the total remuneration package meets a minimum requirement. Currently that minimum is \$137,800.

440. The positions at Wagga Wagga City Council that meet the definition of senior staff positions are the General Manager, Director of Strategic and Community Services, Director of Corporate Services and Director of Asset Services. [\[Q12\]](#)

441. It appears to us that the attempt by some councillors to interfere in the selection process for the directors is an example of a lack of understanding of the councillor's role. At issue is the interpretation of the word 'consultation' in section 337 of the Act.

442. In accordance with the resolution to adopt council's new structure, the newly created director positions were advertised. Section 348 of the Act requires that senior staff positions are to be advertised at least twice in a daily newspaper circulating throughout the State.

443. The recruitment process for a number of management positions was co-ordinated by Hays Consulting, a specialist recruitment agency.

444. We have reviewed all the advertisements for all the positions that council has advertised relating to the restructure from 1 July 2006 up to 23 September 2006. [\[Q13\]](#)
445. Our observation from this is that the director and manager advertisements are the only ones that do not have closing dates. This was an issue raised with us. Nevertheless, even though there are no dates provided, Hays received in excess of 35 enquiries about the three positions. This resulted in 13 applications, the most applications being for the Director, Corporate Services position.
446. The issue of the selection of directors was raised in the questions and statements section of the Policy and Strategy Committee meeting held on 10 July 2006. The General Manager was requested to advise council on the composition of the selection panel for the directors. He advised that the panel was to consist of himself, the Mayor, the Deputy Mayor and the General Manager of Albury City Council.
447. This was followed by a statement made by Cllr Andrews that council should consider appointing the Mayor and three former Mayors to the recruitment panel. [\[Q14\]](#) Given that councillors had just been informed that the Mayor and Deputy Mayor were to be part of the selection panel we cannot understand why a request for further councillor representation was made.
448. It is apparent that this led to a notice of motion to this effect being submitted by Councillors Hay and Klemke. [\[Q15\]](#) The General Manager provided advice to these councillors that the motion was not able to be implemented by council and therefore was unlawful.
449. The wording of the notice of motion was such that it gives an unequivocal indication that these councillors, at least, wanted to participate in and influence the selection of directors and states (in part):

'Council cannot mitigate its responsibility by opting not to play a direct and influential part in the selection of the Directors whom (sic) will be

the Most Pivotal Point as to the success of the whole restructure now and in the future.'

450. Following the advice from the General Manager, Councillor Hay tabled a reworded notice of motion at council's extraordinary meeting on 14 July 2006. This motion was also signed by Clr Klemke. This motion again requested the involvement of the three former Mayors on the selection panel and that they be provided with copies of all applications received, should sit in on all the interviews and be present during the General Manager's determination of the applications. [\[Q16\]](#)
451. This motion was never put to the meeting as it was also ruled as unable to be implemented by council and therefore unlawful.
452. We were advised that council's General Manager obtained legal advice on both notices of motion that supported his initial assessment.
453. Councillors were advised in a memorandum from the General Manager on 21 July 2006 that he proposed to consult with council on the appointment to the director positions at council's meeting on 24 July 2006. He provided a briefing at this meeting of the recruitment process undertaken and the range of applications that were received. [\[Q17\]](#)
454. However, the matter did not rest there. Clr Andrews, who had initially raised the question of the involvement of additional councillors in the selection process, sent an email to the General Manager and councillors questioning the legal advice that had been obtained from Dr Lindsay Taylor. He sought clarification as to why the motions were unlawful.
455. We conclude that the answers he was provided satisfied his questions as we were not provided with any further communications on the subject.
456. Our concerns are twofold. First, that the councillors do not have a clear understanding of their role and have attempted to intervene in the day to day management of council's operations. Specifically, it is the role of the General

Manager to appoint, direct and dismiss staff; after consultation with council in the case of senior staff.

457. Second, we are concerned that some councillors have attempted to intervene in the appointment of directors. They did not support the appointment of Bronwyn Jones. We have discussed this issue in this report under the heading '*Councillor and senior staff interaction*'.

4.7 Project management

4.7.1 Overview

458. Wagga Wagga City Council undertakes the management of the development and construction of facilities for the community. Wagga Wagga City Council has proposed or developed numerous large projects since 1999. Among these are:

- the construction of a new civic centre
- renovations to the civic theatre
- the development of an amphitheatre
- the Oasis leisure complex
- refurbishment of the main street
- Wagga Wagga Exhibition Centre
- Robertson Oval
- Red Hill Road

459. Many of these large projects have been fraught with problems and budget overruns.

460. Community members raised concerns with us about the Wagga Wagga Exhibition Centre (also called Equex) and in particular the length of time taken for any decisions on this project. In addition, community members expressed

frustration about the decision making process in relation to Robertson Oval. Council is currently actively pursuing both these projects.

461. We are concerned that council's history of poor management of large projects has eroded the community's confidence that council can undertake any projects in an efficient and effective manner.

462. We were advised by council management in its response to the draft report that council has taken steps to improve its management of capital projects. Steps taken by council management since 2003 have included the implementation of the Australian Business Excellence Framework and the use of external project managers for specified projects.

4.7.2 Independent review of council's project management

463. In 2000 council was the subject of legal action from the builder of council's civic centre. It settled after a mediation hearing. The dispute appears to have centred around disagreement over variations to the contract. The final cost of the project was around \$22 million.

464. In 2001 concerns about the management of the amphitheatre, civic theatre and aquatic centre projects were the subject of an independent review due to budget overruns.

465. Ernst and Young were engaged to perform a limited scope review of council's general financial controls relating to the project management of these three projects.

466. Ernst and Young provided its report to council in November 2001. In summary the report found that:

'The three projects under review highlighted poor planning, budgeting, reporting and overall managing of project costs. Financial policies and procedures are not in place to ensure general internal controls are adhered to.' (Special Financial Review – Wagga Wagga City Council, Ernst and Young, Business Risk Consulting, November 2001) [\[L5\]](#)

467. As a result of this report, council was placed on the department's financial monitoring list.
468. Council reported to the department in December 2003 on the actions taken to implement the recommendations made in the Ernst and Young report. Following this report, council was removed from the department's monitoring list in April 2004.
469. However, council's project management practices still remain problematic. (See the Red Hill Road project information below). In addition, council's management of large projects also raises concerns about its tendering practices. (See the Oasis aquatic centre project information below and the CRU issue discussed elsewhere in this report).
470. Council should develop a project management system for the effective planning and management of its capital projects as well as developing project management expertise in the organisation. **[Recommendation 19 and 20]**

4.7.3 Oasis aquatic centre project

471. The estimated cost of the Oasis aquatic centre project was projected to be \$7.8 million in the feasibility study undertaken for council in June 1998. In a report to council in July 1998, council officers advised that council should provide an estimate of \$9.3 million to provide facilities of an Olympic standard.
472. By December 2000 council had allocated \$10 million to the building of the complex due to variations to the proposal.
473. Concerns raised by council's internal auditor, that led to the commissioning of the Ernst and Young review, indicated that the true project costs for the Oasis project were in the vicinity of \$14.8 million to \$18 million.
474. At council's meeting on 17 December 2001 council resolved to increase the budget for the project to \$15.1 million. This increase was largely due to the change in the project over time.

475. The total capital cost of the Oasis project, at the time of its opening in 2003, was \$16.897 million. Since that time additional capital costs have been accrued. The total capital costs of the Oasis project as at the financial year 2005/06 is \$17,404,948 million (as advised as per council's audited financial records). [\[L1\]](#)
476. During our review of the files on the Oasis project we became aware of anomalies in the awarding of tenders for the Oasis project.
477. The first was the awarding of the tender for the management of the project to the late Paul Hagenbach, Director of Rocky Falls Pty Ltd. Although council had resolved, on the advice of a memo from its Indoor Aquatic Centre Steering Committee, to appoint Paul Hagenbach as the project manager on 28 February 2000, council did not enter into a formal agreement with Mr Hagenbach at this time.
478. It was not until after the appointment of Graeme Faulkner as General Manager that it was discovered that a formal contract did not exist with Mr Hagenbach. [\[L2\]](#)
479. Council entered into a formal agreement with Mr Hagenbach on 5 November 2001. This was nearly two years after the time that Mr Hagenbach was appointed. [\[L3\]](#)
480. Second, Mr Hagenbach was the project manager used for the civic theatre renovations and the amphitheatre projects. The tender price provided by Mr Hagenbach for the Oasis project included a discount of 50% of the fee on the amphitheatre project. [\[L4\]](#)
481. We are concerned that Mr Hagenbach was in a separate contractual arrangement with council for the amphitheatre project and the offer of a 50% discount on an unrelated project was not relevant to the awarding of this contract. On its face, this was outside the tender criteria and could be seen as a non-complying tender. It may also be seen as an attempt to provide an advantage to council and the tenderer that was not available to other tenderers.

4.7.4 Red Hill Road project

482. A further example of difficulties with the management of large projects is the development, extension and upgrading of Red Hill Road.
483. Red Hill Road is a staged arterial road project that has been identified in council's planning instruments since 1985. From May 1996 council's works committee considered a recommendation to include the project in council's section 94 budgets. This report also identified project cost increases in the vicinity of \$200,000. [\[L6\]](#)
484. In September 1997, council's works committee received a report in relation to the Red Hill Road project that identified a number of problems with the project. Briefly, these related to deficiencies in the process of estimating project costs without detailed designs and investigation, and deficiencies in council's accounting and funding arrangements. Particularly, at that time, contingencies were not included in budget costings which meant that many council projects over-expended. This report identified a further shortfall of \$200,976. [\[L6\]](#)
485. The report recommended that council note the management changes that were going to be implemented to address these deficiencies.
486. The Red Hill Road project was again discussed by council in 2003. Minutes of MANEX meetings in late 2003 and early 2004 indicate that Red Hill Road was a regular item on the agenda giving updates on the progress of the construction of the road.
487. At the meeting on 23 March 2004, the minutes reflect that the Director of Asset Management reported that the budget was "looking OK". We believe this to be a general reflection on all projects in council's works program. [\[L7\]](#)
488. In the minutes of the meeting on 30 March 2004, the report indicated that works were in a holding pattern. We again must assume that this relates to all council's works program. [\[L8\]](#)

489. In the minutes of the MANEX meeting of 14 September 2004, there is mention that the Red Hill Road project has a shortfall of \$500,000. [\[L9\]](#)
490. In his response to the draft report Mr Perram advised that he believed that this discussion on Red Hill Road occurred at the MANEX meeting held on 6 September 2004.
491. We have reviewed the MANEX meeting minutes provided to us by council and have found that we have two sets of minutes headed as 14 September 2004 and one set of minutes as 6 September 2004. There is no mention of the Red Hill Road project in the minutes identified as minutes for the meeting of 6 September 2004.
492. As part of the review of its section 94 fund, council resolved to fund the shortfall at its meeting on 25 October 2004.
493. In the minutes of the MANEX meetings in 2005, there are only a few references to the Red Hill Road project. These mainly relate to meetings with the Australian Rail Track Corporation and progress on design work.
494. The minutes of meetings prior to July 2006 again refer to discussions with the Australian Rail Track Corporation and the requirement for reports to be made to a council meeting. We have reviewed the council meeting agendas from February 2006 to May 2006 and cannot find any reports to council on the Red Hill Road project, other than a report on awarding a tender for the management of the project. There is no indication of the reporting of any budget difficulties with this project.
495. The minutes of the MANEX meetings of 4 July 2006 and 11 July 2006 indicate that the General Manager was waiting for a report on costs for the rail bridge aspect of the project. [\[L10\]](#)
496. We are aware that the General Manager had concerns about the management of this project in May 2006 when he identified a \$300,000 underfunding on construction works. The General Manager commissioned an

investigation into the management of a number of council's capital works projects including the Red Hill Road project.

497. The General Manager was already aware that the project had previously had shortfalls in funding, as the MANEX meeting on 14 September 2004 had minuted that the Red Hill Road project had a shortfall of \$500,000 at that time, which he had already had to address.

498. At the extraordinary meeting of council in 14 July 2006 councillors were advised that the project was underfunded by \$2.4 million. The reason given for this increase was to fund the \$300,000 shortfall, the duplicating of a section of rail line by the Australian Rail Track Corporation requiring an increase in the size of the underpass for the Red Hill Road project and a contingency of \$580,000. [\[L11\]](#)

499. The report to council indicated that council had been in negotiations with the Australian Rail Track Corporation for two years and that original construction estimates were based on advice from the Rail Infrastructure Corporation.

500. We were provided with a copy of a letter from Sinclair Knight Merz, written on behalf of the Australian Rail Track Corporation dated 12 October 2005, that indicates that council should have been aware of the requirement to increase the size of the underpass since that time. [\[L12\]](#)

501. It is apparent to us that the Red Hill Road project has suffered from budget overruns since 1996. [\[L6\]](#)

502. Council officers had identified deficiencies in council's management of large construction projects such as Red Hill Road as early as 1997. However, council continued to make similar project management mistakes with many of its large capital projects.

503. The Ernst and Young report bears this out. The errors in council processes highlighted in that report are similar to those identified in the report of the (then) Director of Engineering and Technical Services to council's

works committee on 15 September 1997 in relation to the Red Hill Road project.

504. We conclude that this has left council's current management to "clean up the mess". However, we also observe that there were obvious budgeting problems with the Red Hill Road project discussed at MANEX meetings as early as September 2004, which should have caused closer scrutiny of this project.

4.8 The outsourcing of the Commercial Response Unit

4.8.1 History

505. By reference to our discussions with the Mayor, his fellow councillors, council's General Manager and perusal of council's web page, it is evident that the role of the CRU is to encourage, foster and nurture new developments in the city by simplifying the process for new developments and working with council to ensure the most seamless approach is taken.

506. The council web site states that in 2001 it decided it was time to focus on fostering business growth in the city. [\[C1\]](#)

507. Council had established the Wagga Wagga Economic Development Board in 1997. It replaced this Board with the e-Commerce Committee, which we were advised was renamed in 2004 to the Commercial Strategy Committee. The Commercial Strategy Committee assists in developing and then implementing strategies to promote economic growth in the city. [\[C2\]](#)

508. The committee was initially supported by a department known as the Commercial Response Unit (CRU). The department did not initially have a director until the re-classification of Gary Wells to that position in 2001. It also had 2 other staff, Victoria Dalglish and Tracey Lonergan, who with Gary Wells, ultimately formed the department and the later outsourced CRU.

509. The CRU is engaged by the council to work on short, medium and longer-term strategies for the city aimed at ensuring that the city continues to prosper.

510. Council stated that its objective in utilising the CRU *'is to be regarded as the pre-eminent regional city in Australia in the next 5 years.'* [\[C1\]](#)

511. We make no adverse comment in relation the CRU about Mr Perram or Mr Dunshea for any conduct that pre-dated their arrival at the Wagga Wagga City Council.

4.8.2 Proposal to outsource the Commercial Response Unit function

512. Prior to 2 December 2003, Gary Wells had confidential discussions with the chairman of the eCommerce Committee regarding the future operation of the CRU. We are aware that this issue was also discussed with the Mayor at that time (Kevin Wales), Tom Watson, Tracey Lonergan and Victoria Dalglish. In any event, we are aware that this issue was discussed in the 3-4 days prior to the 2 December 2003 MANEX meeting. [\[C3\]](#)

513. Following on from those discussions Mr Wells was requested to submit to the eCommerce Committee a confidential report on that issue. We were given a copy of the confidential report which appears to have been intended to be presented to an eCommerce Committee meeting regarding the future operation of the CRU.

514. The minutes of the MANEX meeting on 2 December 2003 indicate that a confidential proposal was discussed at this meeting. The then acting General Manager, Brian Pearson, reduced his concerns to writing regarding the proposal. However, this report does not appear to have been submitted to any management or committee meetings. [\[C5\]](#) [\[C31\]](#)

515. We asked for a copy of the report referred to as item 66 to the Chronology to the Commercial Response Unit ("CRU") provided by council. [\[C4\]](#)

516. Item 66 was referred to as:

'Confidential – Comments on draft report presented by Mr Gary Wells from Acting general manager Brian Pearson – Tuesday 2 December 2003 at 11:35 am – Copy provided to Stephen Dunshea by Phillip Perram on 14 March 2005'

517. Specifically, we wanted to sight the report to which the then Acting General Manager, Brian Pearson was replying.

518. The report we were provided with did not and could not be the report that Mr Pearson was replying to. It did not 'marry' up with the report provided by council. For example, it did not have the 8 points Mr Pearson referred to in his reply. [\[C5\]](#) [\[C32\]](#)

519. The report provided as the draft report to which Mr Pearson was replying did not refer to a number of significant issues regarding Mr Well's sentiment.

520. Among those are the following examples:

- the fact that Mr Wells stated it was time to pursue a change of direction in his career
- an opportunity had arisen for him to establish a consulting business providing services to a range of national and multi-national companies
- the fact that Mr Wells had discussed the CRU issue with his staff and they were of the view that there was a structure which could be established which would enable continuity of the economic growth strategy while allowing Mr Wells to pursue his other commercial interests
- the provision of a fixed cost 3 year contract with an external company for the provision of all the services currently provided by the CRU.

521. The fact that the report provided was not the one Mr Pearson was replying to, is significant. Council was not able to locate or provide us with the report to which Mr Pearson replies. We have, however, obtained what we believe to be a legitimate copy.

522. In the confidential report, Mr Wells outlined his desire to pursue a change of direction in his career. He stated that this would allow him to utilise his legal and consulting background in establishing a business providing services to a range of national and multi-national companies. He also stated that this would provide him with an opportunity that was not available at that time for him at council.

523. He went on to propose that as he was deeply interested in the ongoing progress of the eCommerce Committee and the CRU, he, with Victoria Dalglish and Tracey Lonergan, would be willing to establish an entity to oversee the continuation of the Acceler8_Wagga Wagga economic growth strategy.

524. Mr Wells stated in his report that both he and his staff were of the opinion there was a model that could achieve this while still allowing him to pursue his other commercial interests.

525. Mr Wells proposed that council consider contracting out the CRU function of council by entering into a 3 year fixed cost, outcome based contract with an external company for the provision of all of the services currently provided by the CRU.

526. Mr Wells proposed that the outcome based contract would prescribe the performance required by council, which he went on to suggest might broadly involve the implementation of the Acceler8_Wagga Wagga strategy, which had been adopted by council as its blueprint for economic growth through to 2008, together with all services currently provided by the CRU.

527. Mr Wells provided 8 reasons why he suggests his proposal was viable. They were:

(i) A fixed cost contract for the provision of the service which is likely to generate an annual 10% to 20% saving for Council (based on UK and Victorian experience) – this amounts to \$80,000 and \$160,000 per annum based on the current funding of the CRU;

(ii) Continuity of the CRU profile within the city (the current personnel have created relationships with business and have achieved a level of credibility with business through the delivery of new businesses and processes in the city eg. Salmat/Cargill Upgrade/Patricks Intermodal/RiverinaTelco/Biotech developments with CSU and ATPi within the first 18 months of operation.);

(iii) Extension of the CRU and Wagga Wagga's profile in the metropolitan business sector (in the first 18 months of operation, the following companies have been visited in Sydney and Melbourne by the CRU on business for Council – Austrak, Westpac Institutional Bank, HPA Kodak, Optus, Fosters Group, Visy, Federation of Automotive Products Manufacturers, ING, Bovis Lend Lease, Kraft Foods International, Mars Group, Lion Nathan, The Warehouse Group, Hagenmeyer, Southern Cross Tyres, Capral, Mobius Inc);

(iv) Continuation of Government linkages at both State and Federal level – strong ties have been established with the Deputy Director General of State and Regional Development in NSW, the Director General of Department of Infrastructure in Victoria, Senior Policy Advisor to the Deputy Prime Minister and Assistant Secretary to DOTARS;

(v) The new entity being a private company will be less restricted in its ability to respond to market demands;

(vi) Business is even more likely to engage with the CRU if it is a commercially focussed business in its own right, with strong links to and a formal relationship with the Council but not directly part of the Council;

(vii) The linkages through other business activities, which will involve consulting to major corporates on logistics, tax and cross border activities, will provide marketing opportunities for Wagga Wagga to those companies. This is very much the cornerstone of the success of the CRU to date, which focuses on the commerciality of doing business in Wagga rather than the traditional economic development focus of Government support for business establishment;

(viii) The entity would continue to engage with Council through the eCommerce Committee as it does now – there would be no change to these arrangements other than my attendance as the current Director of Commercial Strategy at Council meetings. As I would be a director of a private company, part of the agreement with Council would need to specify the reporting arrangements with Council.'

528. Mr Wells stated further that the CRU staff Victoria Dalglish and Tracey Lonergan had both indicated a willingness to join his company as a contractor to the council. He further stated that he believed that the proposed model provided benefits to the council, himself and his staff and would also reduce costs for council without diminishing the level of service. Mr Wells actually believed that the level of service would be enhanced by his proposal.

529. Mr Wells prepared a proposed resolution for council in the following terms:

'That Council:

(i) Agree in principle to outsource the functions of the Commercial Response Unit (CRU).

(ii) Prepare and call open tenders for the provision of services currently provided by the CRU, with a view to entering into a 3-year contract with the successful tenderer.

(iii) Receive a report on the outcome of the process in February 2004.'

530. We understood that providing services to national and multi-national companies was already a function of the CRU in its present structure and role as a department of council. Moreover, we understood that this was the role of the employees of the department and thereby council.
531. On that basis, and from the content of the 2 December 2003 confidential report, we can only infer that Mr Wells would either seek to use the contacts he had established to his own benefit or continue what was, as we understood to be the role of the present CRU as a private enterprise, thereby utilising the intellectual property of council for his own gain.
532. By reference to both reports and the reports to council on 24 May 2004, 26 July 2004 and 23 August 2004, we are of the opinion that a reasonable person would find it very difficult to understand how the proposal would reduce costs without diminishing the level of service to council, if Mr Wells is seeking to pursue his other interests at the same time. [\[C6, C7 and C8\]](#)
533. Council has stated that outsourcing would anticipate savings to council in the order of 10% to 20%.
534. However, in our view, by reducing the level of service, ie the number of hours available to do the job and allowing staff to pursue other interests, might reasonably be seen to not be in the best interest of council financially or from any other perspective.
535. We believe the proposal to allow the successful tenderer, ultimately Mr Wells, to pursue other commercial interests while maintaining a salary through the fixed priced, fixed term contract was not in council's long-term interests. It essentially went no further than as provided by the CRU as a department at that time.
536. Finally, having read evidence attachments C3 and C5, being confidential comments on the draft report presented by Mr Wells on 2 December 2003, we agree with the arguments raised by the then Acting

General Manager rebutting Mr Well's proposal to outsource the CRU for the economic development growth within the city.

537. By reference to the evidence provided, and importantly C3 and C5, we are of the opinion that council should not have pursued the outsourcing of the CRU. However, we acknowledge council's right to make commercial and operational decisions so long as these are in the public interest.

4.8.3 Decision to outsource the CRU

538. A chronology regarding the decision to outsource the CRU is as follows:

Date	Event
Prior to December 2003	Discussion with Chair of the eCommerce Committee
Received at council 2 December 2003	Confidential report from Gary Wells to the eCommerce committee discussed at MANEX meeting
3 December 2003	Comments on the Draft Report by the Acting General Manager, Brian Pearson
24 May 2004	Decision to restructure made by council at its meeting and agreement to explore the outsourcing of the economic development function
1 June 2004	MANEX meeting minutes indicate that the General Manager and Gary Wells are in Sydney on business
1 June 2004	The application to register the business name 'The Commercial Response Unit' lodged with the NSW Office of Fair Trading
2 June 2004	The business name 'The Commercial Response Unit' is registered by the NSW Office of Fair Trading

Date	Event
2 June 2004	Council receives written advice from ICAC on the outsourcing process
26 July 2004	Council resolved to outsource the CRU
23 August 2004	Council resolved to invite tenders for the economic development function
9 November 2004	MANEX meeting – CRU outsourcing mentioned in minutes – minutes indicate Gary Wells present
30 November 2004	MANEX meeting – outsourcing tender specifications mentioned in minutes – minutes indicate Gary Wells present
11 December 2004	Tender advertisement appeared in the Daily Advertiser and Sydney Morning Herald

539. At council's meeting in May 2004, council's General Manager, Phillip Perram, presented 2 confidential reports to council dealing with an organisation restructure and a proposal to outsource the Commercial Response Unit. [\[C6\]](#)

540. At that meeting, council agreed in principle to explore the outsourcing of the CRU. The report indicated that among other things the ICAC guidelines and protocols would be investigated.

541. The records provided to us by council indicate that email advice was sought from ICAC on this matter by the Workplace Relations Manager on 13 May 2004 and further information was provided on 21 May 2004. [\[C9\]](#)

542. The MANEX minutes of 1 June 2004 indicate that the General Manager and Mr Wells were both in Sydney on business on that day. The note in the minutes indicates that Mr Wells was attending meetings with the General Manager. [\[C10\]](#)

543. We were advised by the General Manager in his response to the draft report that he and Mr Wells only attended one meeting together in Sydney on that day.

544. The only written advice provided regarding the practice and procedure to be undertaken regarding the outsourcing was provided by ICAC dated 27 May 2004 and received by council on 2 June 2004. [\[C11\]](#)

545. The NSW Office of Fair Trading registered the Business Name 'The Commercial Response Unit' on 2 June 2004 following an application lodged by Mr Wells on 1 June 2004. This was prior to the outsourcing decision being ultimately made by council. [\[C12\]](#)

546. The Weekend Advertiser article on 5 and 6 March 2005 quotes Mr Perram as saying that:

'...he had no prior knowledge the commercial response unit's name had been registered as a business.' [\[C13\]](#)

547. In this article, Mr Wells states that:

' "Clearly, at that stage we (the three members of the CRU team) were interested in lodging a tender...We anticipated we would want to continue with the commercial response unit name so I secured the name commercial response unit in my name so it would be available to us should we secure the tender. I was also talking with (former general manager) Graeme Faulkner at the time who was setting up a commercial response unit in Hawkesbury. I was keen to keep the name in Wagga. I was a bit concerned someone from out of town would register the name and it would not be usable down here. The whole idea of continuing the name is important." Mr Wells said he would be prepared to hand the name back to council if his company did not get the contract again after three years.' [\[C13\]](#)

548. We are concerned that Mr Wells would take this upon himself without discussing the registration of the business name with council's General

Manager. We also find it difficult to comprehend that Mr Wells did not make council's General Manager aware of this action when he was with Mr Perram on the day that the application to register the business name was lodged.

549. While council had not registered the name itself, ethically it would seem that the name should have belonged to council, not an individual who worked for council. This is because, if for no other reason, the intellectual property regarding the work undertaken by the CRU at that time belonged to council.

550. We find the action presumptive in that the course of action undertaken by Mr Wells is suggestive of a mindset by him that he already had been or was likely to be awarded the contract before the tender process had even commenced.

551. The word 'back' (as stated in the article) that was used by Mr Wells, illustrates the perception of ownership by council of the name and that he had taken the name off them. We are concerned that in the event that he didn't win the contract as to whether he would have handed the name to the successful tenderer. Mr Wells, in his response to the draft report, denies that he had any other motivation other than as outlined in the newspaper article referred to above.

552. The contract entered into in early April 2005 (following the Weekend Advertiser interview) contains a clause that requires the name to be transferred to council.

553. Further, based on the reasons provided by Mr Wells we do not understand the rationale for registering the business name. The NSW Office of Fair Trading website states;

'Registration of a business name does not give the exclusive rights to use words contained in a name. Another name may be registered containing the same words as your business name, prefixed or suffixed by a distinguishing word or words. For example, the registration of the name 'Professional Plumbing' would not stop someone registering the name 'Cut-price Professional Plumbing.' Also, registering a business

name will not prevent the name being used by somebody who has registered it as a trademark.' [\[C14\]](#)

554. Given this, the registration of the name 'The Commercial Response Unit' would not prevent anyone else from using it as part of another business name.
555. Council resolved at its August 2004 meeting, to call for tenders for the provision of economic and business development services to council for a period of 3 years. [\[C8\]](#)
556. The tender was advertised locally in the Wagga Wagga Daily Advertiser and state wide (in the Sydney Morning Herald) from 11 December 2004. Council noted that the then Local Government (Tendering) Regulation stated that the deadline for the receipt of tenders must be at least 21 days after the date of the first publication of the advertisement.
557. Due to the fact Christmas and New Year fell within this period, council decided to extend the Tender period to 33 days. The closing date for tenders to be submitted was 12 January 2005.
558. We were advised by some councillors that the outsourcing of the CRU was raised by Mr Wells. Some councillors expressed the view that they went along with the proposal of Mr Wells regarding the outsourcing of the CRU so as not to lose his expertise and to keep him working with council.
559. We are of the view that the only way that councillors could have had that knowledge was if either Mr Wells had advised of his intention to leave or that they were made aware of the contents of the confidential report to the eCommerce Committee in or around December 2003.
560. The evidence that this information was known by at least some councillors was provided in their interviews with us.

561. Issues were raised with the department late in 2005 regarding the probity of the process. We are aware that the department conducted preliminary enquiries into the matters raised and was provided with information from council regarding those matters.

562. The information provided to the department did not disclose any evidence that proper processes had not been followed. However, we have now been provided with documents from an earlier period of time that led us to review a wider scope of information and matters regarding the outsourcing of the CRU.

563. From that information it is clear to us that there are issues as to the probity of the process regarding the outsourcing.

4.8.4 Separation of CRU staff from process

564. There is nothing in the minutes of the MANEX meetings from 2003 to 10 August 2004 recording the issue of the outsourcing of the CRU as being discussed. This is an important issue for council and formed part of the 2004 mini-restructure.

565. Although the activities of the CRU and the council restructure are mentioned in the minutes, the specific issue of outsourcing of the CRU is not. If this was discussed, this shows a lack of attention to detail in the recording of minutes.

566. However, the minutes of the MANEX meetings held following the council decision to outsource the CRU function and invite tenders, indicate that Mr Wells may have attended MANEX meetings at which this matter was discussed without declaring his interest.

567. Examples of this are the MANEX meetings of 9 November 2004 and 30 November 2004, a time at when the tendering process was being prepared. The minutes indicate that Mr Wells was present at both meetings and neither a disclosure of interest nor his being absent from the meeting has been recorded in the minutes. [\[C15 and C16\]](#)

568. The 30 November minutes identify that there was discussion on the fact that the specifications (for the tender) were to be finalised and were scheduled to be advertised in the Wagga Wagga Daily Advertiser on 4 December 2004.
569. By reference to the minutes of MANEX meetings from 2003 to 2006, it is apparent that it is the practice to record people coming and going from the meetings.
570. Mr Dunshea and Mr Perram advised us that the MANEX minutes are kept as a record of information provided and actions to be taken. They are not a 'Hansard' standard recording of events and speakers. In addition, they advised that the minutes were taken by a series of different persons explaining the diversity of the minute taking.
571. By reference to the minutes of the MANEX meeting of 25 January 2005, there appears to be a practice of identifying when a person left a meeting (John Duffy left the meeting at approx 11:00AM).
572. By reference to the minutes of the MANEX on 1 February 2005, the minutes clearly identify when people arrive and leave.
573. We were advised by the General Manager, Mr Perram and the Director of Asset Services (as he is now), Stephen Dunshea, that Mr Wells was to be separate from the process and was to have no input into the development of the tender specifications. This may be the case, however, the records of discussions on this matter do not reflect this separation.
574. The MANEX minutes of 18 January 2005 state that the heading is 'Director of Support Services Departmental Update' with a subheading entitled 'CRU Outsourcing Tender – Progressing well'. According to the minutes, Gary Wells attended that meeting. There is no indication that he disclosed an interest nor is there an indication that he left the meeting at that time. [\[C17\]](#)

575. The minutes of the MANEX Meeting on 18 January 2005, as they stand, indicate that:

- Mr Wells was present at the meeting; and
- He knew he was a tenderer; and
- Both Stephen Dunshea and Phillip Perram would have also known that; and
- There is no evidence in the minutes to suggest that Mr Wells either disclosed an interest or left the meeting when the outsourcing tender item was discussed.

576. We were provided with statutory declarations by Mr Dunshea, Mr Perram and Ms Jones that Mr Wells was not present at any time when they were present when the outsourcing of the CRU was discussed. Mr Wells also advised us that this was the case.

577. The minutes taken at the MANEX meetings do not record what Mr Perram, Mr Dunshea, Ms Jones and Mr Wells state occurred. In our view, council's record keeping is poor in this regard.

4.8.5 Tender documentation

578. The tender document, dated December 2004, comprises 35 pages exclusive of header pages and tables of contents. [\[C18\]](#) It is broken down into the following two parts:

- Request for Tender Part 1: Overview
- Request for Tender Part 2: Conditions of Tender

579. The tender documents contained three schedules:

- Schedule 1: Tender Form: Tender details; Terms of Tender; Business Experience and Lodgement of tender;
- Schedule 2: Assessment Criteria;

- Schedule 3: Agreement

580. We found the request for tender overall to be circular, impractical and confusing.

581. The request for tender required that tenderers submit a number of documents. However, our initial analysis of the request for tender left us unclear as to what was required to be submitted in order for a tender to be regarded as a complying tender. [\[C30\]](#)

582. After considerable time taken to analyse the request for tender, it is our view that a complying tender consisted of the following documents:

- a statement in the form of Schedule 1 providing accurate and precise detail regarding each specific issue raised; and
- a separate statement referring to each of the specific issues raised in Schedule 2.

583. The significance of the provision of a separate statement in the form of Schedule 2 is that it refers to issues that are quite distinct from those referred to in Schedule 1.

584. By reference to the assessment criteria used by the assessment panel, Schedule 2 was the scorecard by which the submitted tenders were assessed.

585. We formed the view that Schedule 2 that outlined the assessment criteria upon which council may rely was an important schedule to address in a tender submission.

586. Therefore, it was important that tenders separately and comprehensively addressed those issues identified in that schedule.

587. Any tenderer which did not address Schedule 2 considerations was a non-complying tender and should be identified as such.

588. We noted that the successful tender did not address the Schedule 2 considerations as a separate document and was therefore not a complying tender.

589. While the assessment panel had the jurisdiction to consider a non-complying tender, by reference to the request for tender, the onus was placed upon the party submitting such a tender to comply with certain obligations.

590. In the event that a tenderer sought to submit a non-complying tender, they were required to submit a complying tender together with an unmarked copy of the non-complying tender and a marked up copy of the non-complying tender outlining all changes to the tender documentation.

591. Where a tenderer sought to submit a non-complying tender and did not comply with the terms of the request for tender, then in our opinion, that tender was a non-complying tender and should have been identified as such.

592. The successful tenderer did not comply with these terms of the request for tender. On that basis we say that it showed a distinct lack of formality and regard to the requirements of the request for tender and should not have been considered.

593. We cannot reconcile how the CRU tender could be considered a complying tender or that it was superior to those other tenders that were clearly compliant.

594. It was not a requirement that a tender be submitted as a fixed price tender. However, in the report submitted by Gary Wells on or about December 2003, he stated that it was his view that it should be a fixed price tender. None of the other tenderers had this background knowledge. None of the other tenderers sought to submit a fixed price contract. However, the CRU staff tender purported to be a fixed price tender.

595. The report to the council meeting on 24 January 2005 regarding the tender process stated that the CRU tender was a fixed price tender. The CRU tender purported to be, on the face of it, for a fixed price. However, we do not

believe this was the case. It was misinterpreted as such, because we believe there were costings not included in the tender rendering it incomplete as to the tender price.

596. The request for tender provided that the three employees who were employed by council at the CRU were not only entitled to submit a tender, but were also to be employed by the successful tenderer. This was identified in the documents as being by way of transfer of employment.

597. Mr Dunshea and some councillors commented that they found it unusual that there was the clause regarding employment of the CRU employees in the contract. Mr Dunshea advised that it was unusual because it was not something he had been involved with previously. However, he said he did not see any issues of concern as ICAC had provided guidelines to enable the proposal to proceed. [\[118\]](#)

598. In effect, their employment would continue whether they won the tender or not. This clearly placed them in a win/win situation.

599. This also placed other tenderers at a disadvantage as they would have to factor into their bid, not only their own employment, but that of the three council employees.

600. An issue arose where council failed to include the CVs of the council employees in the tender information. This placed prospective tenderers in a difficult situation as they would not necessarily know the experience and suitability of the persons to be employed.

601. In addition, concerns were raised by potential tenderers with council during the tender process that insufficient information was provided on the council employees' contracts. The request for tender required that the council employees were employed in accordance with the same conditions as their contracts with council. This information was not initially provided. Information on leave entitlements was sent on 7 January 2005.

602. On this issue, it is interesting to note that, of the actual tenderers, the only one that was not sent the information on leave entitlements was the successful tenderer. [\[C33\]](#)

4.8.6 Tender process

603. Council sought advice from the ICAC in relation to the process to be followed because employees had indicated an interest in tendering to provide the service.

604. The ICAC stated in its letter of 27 May 2004:

'The tender specifications to be prepared should fully stipulate the information and resource supply responsibilities, performance requirements and obligations of both the council and the successful tenderer and should disclose that an in-house bid would be acceptable. In respect of staffing, the requirements you specified and which are referred to above should clearly be stipulated in the specifications and should be adhered to by the successful tenderer.' [\[C11\]](#)

605. The ICAC also noted that council advised it that the director and staff would be excluded from any involvement in the tender process. The ICAC went on to suggest that this would be essential to ensure the transparency and probity of the process.

606. We are concerned that this may not have occurred, as it is apparent from the MANEX meeting minutes that Mr Wells did not disclose his interest on at least two occasions at meetings at which he was in attendance and it is not recorded that he left the meeting room (as previously discussed).

607. Interest in the tender was received from 27 parties. Further to the information provided, resumes of the council employees were sent to prospective tenderers on 24 December 2004. Additional information regarding the council employees' leave entitlements was sent on 7 January 2005. This put prospective tenderers that did not already have this information at a distinct disadvantage.

608. It is our opinion that council did not comply with ICAC's advice because it failed to satisfactorily supply the employee details; specifically regarding the status of their employment and contract conditions.

609. Of the 27 parties that initially showed interest, three submitted a tender. The tenderers were:

- The Commercial Response Unit [\[C19\]](#)
- Tachyonics Technology Pty Ltd [\[C20\]](#)
- Julie Briggs Management Services [\[C21\]](#)

610. The CRU, as the successful tenderer, was the only tenderer that did not submit a separate document addressing the Schedule 2 assessment criteria. On this basis we are of the opinion that the CRU tender was a non-complying tender and should not have been considered.

611. We have examined the assessment process followed by council and have observed some anomalies.

612. The tenders were assessed by council's General Manager, Phillip Perram, council's current Director of Asset Services, Stephen Dunshea; council's Manager of Financial Services, Craig Richardson and an independent appointee from the Charles Sturt University, former Chancellor David Asimus.

613. The decision of all assessors in their assessment of the tenders was to rank the CRU as the highest scoring tender followed by Julie Briggs Management Services and Tachyonics Technology P/L.

614. However, the tender assessment sheets indicate that Mr Perram and Mr Dunshea assessed the tenders in a different way overall to Mr Richardson and Mr Asimus. [\[C22\]](#)

615. Mr Dunshea and Mr Perram stated that they approached the assessment in an impartial manner.

616. Evidence of the opinions of some prospective tenderers regarding the provision of information and the manner in which the tender was run in relation to time and other matters was provided to us. These prospective tenderers were so concerned about the process that they put these concerns in writing to council. [\[C23, C24, C25 and C26\]](#)
617. Those involved could not have been seen to engender the community's confidence in this tender process. The net result is an erosion of the public trust in such processes. The concerns raised with council and ourselves by members of the community indicate a level of community concern with the process.
618. A report on the tender process and a recommendation to accept the tender from the CRU was presented to council's ordinary meeting on 24 January 2005. [\[C27\]](#)
619. The motion to accept the CRU tender was lost on the casting vote of the Mayor. This left council with no decision on the tender.
620. As a result, a further report was presented to council's extraordinary meeting on 14 February 2005. A motion to decline to accept any tender was lost. A subsequent motion to accept the CRU tender was won. [\[C28\]](#)
621. It is clear that there was uncertainty about this course of action and the CRU tender with some councillors. This may be due to inappropriate contact from potential tenderers.
622. We were advised that a number of councillors had discussions with at least one of the tenderers. On raising the issue with one of the councillors involved, Cllr Brian Andrews, he denied that he had spoken with any of the tenderers. He stated that he knew of no other councillors having discussions with any of the tenderers.
623. This contradicts the observation of a number of other councillors who state that they heard Cllr Andrews admit at a council meeting that he had been contacted by one of the tenderers.

624. Clr Andrews denied the discussion to us. He did not subsequently disclose a conflict of interest at meetings at which the CRU tender was discussed and determined. He attended and voted on the issue.
625. Clr Peter Dale admitted that he had participated in conversations with two of the tenderers and one prospective tenderer prior to the decision to accept the tenders being made by council. However, he stated that at no time did any tenderer discuss their individual tender proposal with him. Nor did any personnel from the then CRU team contact him about their proposal.
626. He further stated that no attempts were made by prospective tenderers to improperly influence his decision making. He did not consider that listening to their concerns was outside the bounds of appropriate or lawful behaviour.
627. He does not recall advising the General Manager about having contact from tenderers, but he states he felt sure he would have done so. There is no record provided to us that he did.
628. Clr Dale did advise in his response to the draft report that he emailed the General Manager in relation to his concerns. This was on 6 March 2005. However, this email does not make reference to any contact from any tenderers. There is no record in the council minutes that Clr Dale declared that interest. He also voted on the issue.
629. Therefore, neither Clr Andrews nor Clr Dale removed themselves from the decision making process once they had been contacted by tenderers.
630. We were advised by a number of other councillors that they recall being made aware of the fact that tenderers had contacted one or more of their own.
631. The minutes of the Policy and Strategy Committee meeting on 14 March 2005 indicates that Clr Dale raised concerns about the outsourcing of the CRU at that meeting. [\[C29\]](#)

4.8.7 CRU conclusion

632. On the basis of what has been provided, it is our opinion that Mr Wells had participated in discussions with committee members, councillors and council staff regarding the outsourcing of the CRU prior to it being discussed and determined by council.

633. By reference to the evidence provided Mr Wells proposed the outsourcing of the CRU in the manner in which it was ultimately outsourced.

634. It is not apparent from minutes of MANEX meetings that Mr Wells disclosed his interest at all relevant times as council and the ICAC had agreed. This is evidence of poor record keeping.

635. On the basis of all of this evidence it is our view that the CRU staff tender should not have been considered.

636. Council did not manage this process transparently, effectively or fairly. Council did not comply with the advice from the ICAC on some issues.

637. This process reflects extremely poorly on council because:

- conversations took place with Mr Wells and council later accepted what we believe was a non-complying tender from him, and
- council's record keeping does not reflect council's assertion that Mr Wells was excluded from the process, and
- it did not comply with all the advice from the ICAC to council, and
- there was a community perception of partiality in favour of the existing employees. **[Recommendation 17]**

638. The tender process had also been "tainted" by the approach to some councillors by potential tenderers prior to council determining the matter.

639. It is reasonable to conclude that some councillors and senior staff may not have undertaken the process with the care and diligence required for the reasons outlined in paragraphs 637 and 638. Council's codes of conduct (before and after 2005) have therefore been breached in regard to the consideration of the tenders for the CRU function.

640. We will recommend that the Director General refer the whole matter to ICAC in accordance with section 11 of the *ICAC Act 1988* for its consideration. **[Recommendation 8]**

4.9 Tendering

4.9.1 Overview

641. We have discussed concerns about council's tendering processes in other sections of this report, (see the section on the outsourcing of the Commercial Response Unit and the Oasis project).

642. The tendering practices of council and its ability to meet its obligations under the tendering provisions of the Local Government Act 1993 remain of concern to us.

643. We have discussed below some specific examples of the deficiencies in council's tendering procedures. In addition, we find that there is evidence that council understands its obligations under the tendering provisions but does not always meet them.

644. Council must take actions to improve its performance in meeting these obligations. Evidence provided by council acknowledged the fact that there are continuing problems regarding tendering issues. **[V18]**
[Recommendations 16 and 18]

645. In summary, evidence we have examined suggests that:

- council has misapplied the exceptional circumstances exemptions provided in section 55(3) of the Act on at least one occasion
- council has split projects so that the costs fall under the tendering threshold in section 55 on at least one occasion

- council has failed to call tenders when required on at least one occasion
- it is questionable as to whether council has entered into a contract following a tender process on at least one occasion

646. Council has acted in a manner that is directly contrary to the spirit of the tendering sections of the legislation. **[Recommendations 6 and 7]**

4.9.2 Bus shelters contract

647. In September 2000 council considered a proposal by the operator of McDonalds Restaurants in Wagga Wagga, Cawthorne Pty Ltd, to supply and advertise on bus shelter structures in the city. Council resolved to advertise for expressions of interest to supply bus shelters with the retention of advertising rights by the supplier. [\[V1\]](#)

648. This report identified that advice had been sought from the ICAC. The ICAC advised that council should call for expressions of interest to ensure that fairness was achieved by giving other businesses the opportunity to submit a proposal.

649. Council placed an advertisement in the Daily Advertiser on 30 September 2000. Council received four objections to the proposal. However, council did not receive any other expressions of interest in the provision of the shelter except for that of Cawthorne Pty Ltd. [\[V1\]](#)

650. The value of the contract was identified in the report to council on 20 October 2000 as between \$160,000 and \$240,000. This is well above the tendering threshold at that time of \$100,000. There was no mention in the report to council of the tendering requirements or any exemptions that may have applied to this contract. [\[V2\]](#)

651. Council subsequently negotiated with Cawthorne Pty Ltd and entered into a contract on 18 December 2001. [\[V3\]](#)

652. In May 2002, council's General Manager at that time, Mr Faulkner, sought legal advice about some specific aspects of the contract and an offer made by council to Cawthorne Pty Ltd. In this advice, council's legal adviser raises the issue of the tendering requirements of the *Local Government Act 1993*. [\[V4\]](#)

653. The legal advice proposed the case that the contract was subject to the provisions of section 55(1) of the Act and a tender process was required.

654. On 2 July 2002 a memo was provided to the General Manager from the Director of Asset Management in relation to a number of questions relating to the contract. The reason given for not calling for tenders was:

'The calling of tenders is not mentioned in the file during the September/October period. It is however understood that the technique of calling for tenders implies that Council has a firm proposal to offer to a potential contractor. This was not the case. Council did not have a firm proposal but did have a concept offer to supply a service from Cawthorne Pty Ltd. The file does contain a press clipping of 19 September 2000 which reported that Mr Achinger was reported as saying that "it was unfair if this goes to public tender. I have shown my entire hand here today." It is not known whether this statement had influenced Council in reaching its decision on 25 September 2000.'

[\[V5\]](#)

655. Mr Faulkner wrote to the department on 8 July 2002 seeking advice as to whether or not the tendering provisions of the Act applied to the bus shelter contract. The department responded on 1 August 2002 that in its view section 55 of the Act would apply unless the contract is exempted under subsection (3). The General Manager has indicated on the letter from the department that the advice had been noted. [\[V6\]](#)

656. The remaining documents provided to us from the file relate to an extension of the contract, following an expression of interest process, to include taxi shelters.

657. There appears to be no further documents on the file after 6 November 2002.

658. When providing the file to us, council's current General Manager, Mr Perram, noted that he could not find any evidence that the legal and department advice provided in 2002 had been reported to council. He advised us that he is currently seeking legal advice in relation to the contract and would provide that to us. [\[V7\]](#)

659. We believe this is an example where council has failed to call for tenders as required by section 55 of the Act.

4.9.3 Refurbishment of Gurwood Street building

660. In 2002 council was successful in negotiating the establishment of a call centre operation in Wagga Wagga. The centre was to be operated by Salmat on behalf of Telstra.

661. We reviewed the entire file on this matter. Council made a decision regarding the Salmat proposal at its meeting on 26 August 2002. [\[V8\]](#)

662. Memoranda attached to the report to council discussed the possibility of Salmat utilising the Gurwood Street building and the cost of refurbishing this building if this site was chosen. The preliminary estimate for the refurbishment of the building was \$1.1million.

663. The announcement to establish the call centre was made on 19 December 2002. This project was managed by the Commercial Response Unit.

664. On 7 January 2003 an email was sent to council's legal advisors requesting advice in relation to the exemptions from tendering under section 55 of the Act. The email specifically requested information as to whether council was entitled to rely on these in the circumstances where:

- the total cost of the refurbishment was in the order of \$800,000 to \$850,000

- the job was being undertaken through a series of contracts for various trades which were to be co-ordinated by an external project manager
- all of these contracts were well within the \$100,000 limit with the exception of the air conditioning contract which was likely to be just over this amount
- the timeframe for the completion of the project did not give time to call for tenders for the air conditioning. [\[V9\]](#)

665. We make the following observations about the information provided in this email.

666. First, a formal fee proposal for the external project manager, John D. D'Anvers and Associates, was confirmed by letter on 7 January 2003. [\[V10\]](#) The letter states that this company had been working on the project since September 2002.

667. It appears that council officers had used the services of a consultant without a written agreement in place. It was also evident from the file that this project management company had undertaken some substantial work in providing estimates on the refurbishment work prior to having any written agreement from council. Therefore, the company would have been working with council in good faith that council would honour any verbal agreements that may have been made.

668. Second, full estimates of the work with trade break-up were provided by John D D'Anvers and Associates by 7 January 2003. These estimates indicate that the building refurbishment costs, with consultants fees, contingencies and margins, were \$1.05 million, rather more than \$800,000 - \$850,000. [\[V11\]](#)

669. The email to council's legal advisor indicates that the refurbishment is to be undertaken through a series of contracts relating to various trades. The email indicates that all the contracts are well within the \$100,000 tendering threshold with the exception of the air conditioning.

670. The electrical aspect of the trade break-up provided in the estimates is \$110,000.
671. The email also states that the air conditioning contract was likely to be just over the \$100,000 amount. The trade break-up estimates indicate the likely costs were to be \$250,000.
672. A further document of trade contracts located on the file do not bear out the statement that the contracts are well within the \$100,000 limit. For example, the plasterworks price is identified as \$99,700 and the construction management package is almost \$95,000. We do not consider these amounts to be well within the \$100,000 limit. [\[V12\]](#)
673. We believe that the cost of the project has been misrepresented to council's legal advisor.
674. It appears that council has split the proposed contract for the refurbishment of the building. We are of the view that this approach was taken so as to avoid the necessity to meet council's public obligations to tender for the works to be undertaken.
675. Third, in our view the necessity for haste in undertaking the work is not a legitimate use of the extenuating circumstances provisions of section 55(3) of the Act.
676. Council's legal advisor provided advice in response to this request in relation to the use of extenuating circumstances for the air conditioning aspect of the contract only. It appears that council's legal advisor may not have been provided with all the information we have viewed. In the event that council did not provide complete instructions in relation to the advice sought, or provided instructions that might be regarded as misleading, it might reasonably be perceived that council purchased the legal advice it required to achieve its goals.

677. The resolution adopted by council at its meeting on 28 January 2003 uses the extenuating circumstances provisions as a reason not to invite tenders for any work associated with the upgrade of the building and not just the air conditioning component. [\[V13\]](#)
678. If council officers were of the view that other contracts associated with the refurbishment were outside the tendering provisions, because they did not reach the amount of \$100,000, then it raises a question as to why the council resolution used the extenuating circumstances provision for all the work associated with this project. It appears to us that council knowingly disregarded its obligation to call for tenders for this project.
679. On 17 February 2003 council received a letter of complaint from an air conditioning engineering company. [\[V14\]](#)
680. The letter raised concerns about the process of quoting for the air conditioning works. The letter stated that this company had been approached by the company managing the refurbishment project, John D'Anvers and Associates, to assist in preparing a budget price for the air conditioning. They also undertook research and a site visit following this to identify savings.
681. The letter stated that when they received the final design for the system they provided a bid for that work. The same letter stated that they were asked to revise that bid as their original price was too low. However, on 12 February 2003 they were informed that they were unsuccessful due to their price being higher. Also, there was an issue with the timeframe for their proposed installation.
682. The company was concerned that it had been used without being able to recover the costs incurred in providing council with the basic research for the design of the system.
683. This is a further example of the inadequacies in the management of this process. It is our view that council should have tendered for the refurbishment of the Gurwood Street building.

4.9.4 Legal services

684. Council invited tenders for the provision of legal services to the city in May 2004. Tenders closed on 17 June 2004.

685. A report on the tenders was presented to the council meeting on 26 July 2004. Council resolved to:

'a That subject to further negotiation, Council enter into contracts with the following legal firms in a panel arrangement for the provision of legal services for the period ending 30 June 2007:

- *Marsdens Law Group*
- *Lindsay Taylor Lawyers*
- *Sparke Helmore*
- *Commins Hendriks*

b That independent legal advice be sought.' [\[V15\]](#)

686. On 27 July 2004 the General Manager, Mr Perram, provided a memo to council's directors in relation to the awarding of the tender and the provision of legal services. That memo indicated that council had entered into contracts with the firms identified in council's resolution. [\[V16\]](#)

687. Letters were sent to the above legal firms indicating that council was preparing a contract for the services.

688. Council was unable to provide us with copies of these contracts. It is questionable as to whether council entered into contracts with the successful tenderers at the time the acceptance letters were sent. Council uses the legal panels on a rotating basis according to their specialties. [\[V17\]](#)

4.10 Planning and development processes

4.10.1 Planning instruments and controls

689. The *Environmental Planning and Assessment Act* was introduced in 1979. This enabled councils to make and adopt local environmental plans (LEPs). Wagga Wagga City Council has two LEPs, an urban LEP and a rural LEP. The urban LEP was gazetted in 1985. Wagga Wagga has applied to amend this plan on a number of occasions since 1985, the latest amendment was gazetted in February 2007.

690. Council's Rural Local Environmental Plan (RLEP) was gazetted in 1991. This plan has had a number of applications for amendments, the latest being gazetted in February 2007.

691. Councils seek to amend LEPs through a process of public exhibition and application to the Department of Planning. This process is set down in the *Environmental Planning and Assessment Act 1979*. This process can take some time to complete.

692. LEPs have the effect of law. The provisions in a LEP take precedence over any other local planning documents such as council policies and development control plans.

693. Council's LEPs are not lengthy documents. They essentially provide a list of zones that indicate the objectives for development in zone areas. In addition they identify development that is allowed without development consent or only with development consent. There are also a number of special provisions that apply to all or specified areas. Most LEPs provide a range of zoning categories within any particular zone. For example, residential zone (2) is usually broken down to additional zonings such as 2(a), 2(b), 2(c) etc. The objectives of these zones generally differ. Wagga Wagga's LEP does not do this.

694. At Wagga Wagga, council refers to sub-zones in its DCP rather than its LEP. The DCP provides a land use guide for each of the zones and a table that identifies land uses that do need and do not need council consideration,

and land uses that are generally not suitable. The DCP is being used as a zoning instrument.

695. Council has now developed one Development Control Plan (DCP), adopted in 2005, that brings together all its planning controls into one document. This plan complements the enabling provisions of the LEPs that set the planning objectives for the various areas covered by the plans.

696. A DCP is a planning policy document. DCPs are developed to guide development decisions and although they do not have the same weight at law as LEPs, are still part of the statutory considerations when determining development matters.

697. Council's DCP is a complex document. As stated, DCPs should guide development decisions. However, at Wagga Wagga City Council it is the DCP that tends to "control" development decisions through "sub-zones". Council is free to amend its DCP as it wishes. Where a formal amendment is required, the DCP with the proposed amendments, is required to be placed on public exhibition.

698. Council's approach to its LEPs and DCP was innovative in its day.

699. However, it is our view that the way in which the LEP has been formulated has left the planning framework open to misuse by council.

700. The zonings in council's LEP are guided by set objectives for each zone. These are broad. The urban LEP does not identify any prohibited development in any zones. The rural LEP has two zones: Rural 1 and Village 2: that list a few prohibited developments in those zones.

701. Using a DCP to "control" development, as Wagga Wagga City Council appears to do, provides flexibility, but also enables ad hoc decisions to be made that, when combined, can culminate in an undermining of the planning objectives established by an LEP.

702. A development that is proposed should meet the objectives of the relevant zone identified in the relevant LEP for council to consider it. If council wishes to approve it contrary to the LEP, then this should cause a re-examination of the zoning for the area. Otherwise, council may be subject to legal challenge and will undermine the planning objectives it has established for the area.

703. There are a number of examples that illustrate an undermining of planning objectives by council; in a development at Gumly Gumly, a sign at Collingullie and a development at Lakehaven. These are examined under separate headings below.

704. Every LEP in NSW is required to have a clause that ensures that councils only approve development consistent with objectives of relevant zones. This is at clause 9(3) of the Wagga Wagga LEP and RLEP. It states:

'Except as otherwise provided by this plan, the Council shall not grant consent to the carrying out of development on land to which this plan applies unless the Council is of the opinion that the carrying out of the development is consistent with one or more of the objectives of the zone within which the development is proposed to be carried out.'

705. Therefore, council should not approve any development that is inconsistent with the objectives of the zoning of the particular area in which it is to occur.

706. In determining development applications, council and council officers are required to take into consideration the matters referred to in section 79C of the *Environmental Planning and Assessment Act 1979*. This includes the provisions of the LEPs and DCP.

707. An indication of the difficulties being experienced at Wagga Wagga City Council is that councillors appear to need to be reminded that they are required to take the matters referred to in section 79C into consideration in determining development applications. This requirement was presented in

reports to council on 25 September 2006 and 23 October 2006. Council adopted the following resolution:

‘That the requirements of Section 79C of the Environmental Planning and Assessment Act 1979 be taken into consideration when evaluating development applications.’ [\[G1\]](#)

708. Council is currently reviewing its LEPs, like all councils in NSW, in accordance with the changes to the *Environmental Planning and Assessment Act 1979*.

709. This will mean that council’s LEPs will be required to comply with the template issued by the Department of Planning.

710. This should rectify the difficulties that have arisen in the application of council’s LEPs and its DCP. See examples following (Muffler Factory at Gumly Gumly and Lakehaven development).

4.10.2 Development application processes

711. Council may delegate its development decision-making function to the General Manager who may then delegate this function to council officers. If this occurs, council usually stipulates the criteria to be used in determining whether or not a development decision should be referred to council for its determination. In most cases the criteria for referral to council for a decision includes: where there have been objections to the development; development that is significant for the area and; development that does not meet planning requirements but may merit consideration.

712. In the delegations provided to us by council, we note that council officers have been given delegated authority to approve development applications and construction certificates subject to the development complying with *‘the Environmental Planning and Assessment Act and Regulations and council’s codes and policies’*.

713. Additionally, council officers have delegations to engage consultants for assessment of a development application where applications are commercial, significant or controversial. In this circumstance a recommendation is made to council. There is a further delegation that stipulates that where a contribution from council's funds for the development is necessary and is outside of council's budget allocation, then the development application is to be determined by a decision of council. [\[G2\]](#)

714. It is clear from these delegations that council's intent is to give council officers a high degree of autonomy in determining development applications to ensure that processes move quickly and smoothly. We had a number of people raise concerns with us that the development application processes at council were slow and that staff were not helpful.

715. We were advised that following a review of the planning and development sections of council, staff located a large number of outstanding development matters. This amounted to over 200 outstanding matters. Council's report identifies these as either development applications, construction certificates or section 149D applications. Most of these matters appeared to be inactive and some dated back to 1997. Following the departure of a manager it was found that the applications had accumulated with no follow up process in place. [\[G3\]](#)

716. This information lends weight to the concerns raised by members of the public in relation to inefficiencies in council's development section. Two examples below illustrate difficulties with council's handling of development processes.

717. The department's comparative data collection publication reports on a number of indicators for councils, including the speed with which development applications are determined by council's in NSW. Wagga Wagga City Council is categorised in group 4 for this data collection. While the council has a slightly lower mean time than the group average, this mean has continually risen since 2001, going up from 22.35 days to 35.01 days in 2004/05.

718. We are aware that the General Manager is moving to address this issue. A report was presented to council on 23 October 2006 requesting additional funds to assist to clear up the backlog of outstanding development applications and to progress a number of planning projects that were identified from the planning review. [\[G3\]](#)
719. However, council voted to take no action for 6 months to give time for council's new structure to gain efficiency. [\[G4\]](#) One of the arguments put forward by the General Manager for the need for additional funds was that the current budget was based on the expected number of development matters to be processed. Council had not budgeted for the additional 200 outstanding matters that had been found. We are concerned that by making this decision, council is effectively setting its planning and development services up to fail.
720. Following on from this we have found that the management of council has continued to implement council's action plan following the planning review, which has included the purchasing of services that are readily available from another council in Sydney.
721. The use of consultants by council was reported in an article in the Wagga Wagga Daily Advertiser on Saturday 20 January 2007 which stated:
- 'How is it that in October last year, the council clearly voted against using outside consultants, yet somewhere along the line what was a clear resolution has become a little foggy.'* [\[G18\]](#)
722. The report on this matter as referred to above was presented to council to continue the course of action already set in place by management to address the deficiencies in council's planning processes. Council was not voting to use outside consultants. Council was already utilising the services of consultants to assist in the process. The report to council sought additional funding to finalise the projects referred to in the report and identified in the action plan. It was this additional funding that was rejected, not specifically the use of consultants as referred to in the article.

723. In the same article it was stated:

'Legally, the pencil pushers may be able to send this work out to the lucrative consultant market, but morally such a decision of policy surely rests with the councillors.'

724. The progress report presented to council's meeting on 23 October 2006 indicates that council was already using planning consultants 'Civic Approvals' to undertake work on assessing development applications. [\[G3\]](#)

725. The fact that the paper reports that they spoke with 11 of the 14 councillors in relation to this issue and that those councillors seemed unaware of this can only lead us to conclude that councillors may not have read the report carefully enough. The only exception to this was Clr Wales who indicated in his comments that he was aware that this information was included in a report. [\[G19 and G20\]](#)

726. It is our view that council management has acted appropriately in taking action to deal with the significant backlog of development applications and other planning matters.

727. The management of council is provided with the authority to undertake the day to day operational functions of council in accordance with the requirements of the relevant Acts, Regulations, council's management plan and budget. While it might have been prudent to have advised councillors of the decision to purchase such services in order to meet council's service obligations, there is no requirement to involve councillors in these day to day decisions unless they are outside of the policy framework provided by council.

728. The evidence that 11 of 14 councillors appear to have not read the report carefully enough and have commented to the newspaper without confirming the status of the matter from all perspectives shows a readiness to blame management; a willingness to protect themselves; and a failure to undertake their role to the required standard.

729. Further, to the issue of the use of local consultants, it is our view that there is no requirement in policy or legislation that the work must be undertaken by local people.

730. Councillors appear to be very willing to entertain the use of local consultants on these issues when it is clear that the local consultants have openly stated that they act for developers. This could give rise to conflicts of interests if they were to assess council development matters. The failure of councillors to perceive these potential conflicts of interests is of some concern.

731. It is our view that the management of council, in purchasing the services of an external planning consultant, has protected council's interests. This ensures there is a separation between the role in representing developers and council's assessment role that local planning consultants would likely have. The newspaper quotes two Wagga Wagga planning consultants as acting on behalf of developers while stating that they can also act for council. [\[G21\]](#) **[Recommendations 23 and 24]**

4.10.3 Relationship between councillors and council planning officers

732. Our observation of council meetings in October and discussions with councillors, staff and members of the public lead us to conclude that the relationship between councillors and council officers from the planning and development sections is poor.

733. Many councillors expressed concern at the loss of a number of senior planning and development staff. However, an alternate view was expressed that in fact only three planners had left. It was also pointed out that those planners who remain had been held back in the past by poor management.

734. The current senior management team has brought in people with good credentials to assist with the change that is occurring at council. Council has commissioned a number of reports as part of its restructure and has used reputable consultants to undertake this work. See separate section on council's restructure for more detail.

735. Our view is that there are a number of councillors and ex-council officers who do not want to see change taking place at council.

736. We witnessed the belittling of staff by councillors at the public council meeting. One comment by a councillor was very telling: *'all would be OK if town planners didn't stuff people around'*. There appeared to be a definite "us and them" attitude between councillors and council officers.

737. We are also aware that council officers have been accused of being the cause of all the problems with development in Wagga Wagga. Councillors and community members are also critical of council officers who are from "out of town".

738. If a council officer's recommendation does not suit the councillors or the applicants, then from what we have observed, councillors may utilise the flexibility of their planning regime in a manner in which it might reasonably be perceived to be incongruous with the intention of the legislation. Our concern is that this undermines the planning principles set down by the LEP, RLEP and DCP and puts at risk the future sustainable development of Wagga Wagga. An example is the Collingullie sign issue discussed below.

739. The Planning Professionals Working Group to the Minister for Planning has recently released its report (November 2006) on potential actions to address the shortage of planning professionals in NSW.

740. The report discusses workforce issues for the supply and retention of planners in local government. The report identifies that there is an increasing use of the term 'toxic work environment' to describe the workplace pressures faced by planning professionals.

741. The report suggests that protocols need to be developed to guide the interaction of elected representatives and the public with planning professionals. We see the need for such action at Wagga Wagga.

[Recommendation 12]

4.10.4 Planning and development examples

4.10.4.1 Example 1 of development processes – Butterbush Road tourist development

742. We are aware of issues of concern in relation to the way the planning and development sections of council have carried out their work in the past. One example that illustrates these concerns is the development application relating to a dual occupancy residence, swimming pool, farm stay units, public maze, tea rooms, wholesale plant nursery and gift shop received by council in November 2004.

743. Council officers recommended approval of the dual occupancy residence, swimming pool and farm stay units, however recommended refusal of the tea rooms and associated coach and car parking. On 28 February 2005 council resolved to approve all of the development.

744. It came to light after council had issued its consent that one of the adjoining neighbours had not been notified of the development application. Council sought legal advice on this situation and was advised that it left itself open to legal action if it did not rectify the situation.

745. In this regard council was offered two options. One was to take itself to the Land and Environment Court to rectify the breach of the rules of procedural fairness and seek orders to validate the consent. The other was to wait and see if any action would be taken by a third party objector and then respond to that action.

746. However, the applicants consented to submitting a new development application and not acting on the existing consent. This alleviated the need for council to go to court. A report on the new development application was presented to council on 27 February 2006 with the same recommendation from council officers as before. Whereas council had previously resolved to approve the entire development, on this occasion it only consented to part of the development as previously recommended by council officers.

747. This inconsistency in council's decision is perplexing. It has also disadvantaged the applicants. We were advised that council received more objections to the development on the second occasion. From this we assume that the concerns of the adjoining neighbours, who were not previously informed of the development, and other objectors were so significant that council saw its way clear to support the staff recommendation on the second occasion.

748. We were advised by the applicants in their submission that they agreed to re-submit their development application in order to save time and the cost of council going to court. However, the applicants also advised that they were not informed of the second option of taking no action other than acting on the existing development consent. [\[G5\]](#)

749. We are concerned at this turn of events and the poor council processes that have enabled this situation to occur. We are also concerned about the alleged lack of information given to the applicants in this instance. The applicants would have been better served to have been advised to seek their own legal advice in relation to the matter.

4.10.4.2 Example 2 of development processes – Quarry operation

750. We received a submission from residents adjoining a quarry currently operating in a rural area. The residents were concerned that the quarry operation may not have been operating within the conditions of consent issued to it in 1995. In particular, concerns were raised that the quarry appeared to have excavated too close to the boundary.

751. The residents advised us that they had raised their concerns with council, initially by telephone on a number of occasions since April 2006, and then by letter. They were dissatisfied with the response from council.

752. We requested and viewed the file on the quarry development. The file shows that a complaint was made by a neighbouring resident about the quarry operation in February 2002. The complaint related to concerns that the quarry was operating too close to the boundary. (The same issue raised by the current residents.) This appears to have resulted in a site inspection in

February 2002 that indicated that there may be some problems with the steepness of the boundary batters and therefore compliance with consent conditions.

753. The file is silent after this inspection report until the latest correspondence from the current residents.

754. Council officers are now making enquiries into this matter and following up on the concerns raised by the residents.

755. We are concerned that the systems in place that enable council to monitor and enforce the conditions of consent that it issues are not as robust as they should be.

756. We note that council management has advised us that council approved funds in February 2007 for a temporary compliance officer position. This should assist in monitoring the implementation of council's development consents.

4.10.4.3 Example 3 of planning and development processes - Proposed factory and showroom for exhaust systems

757. The development application process for the proposed muffler factory and showroom is a good example of the confusion created by the way council's planning instruments have been developed.

758. A development application for an industrial development, a proposed factory and showroom for exhaust systems, in a rural zone was lodged with council in June 2005. The relevant zone, zone 1 Rural under the RLEP and sub-zone Rural 1f under the DCP, applies to the land in question.

759. There were a number of objections to this development.

760. At the time when council was considering the development, council's planning and development sections were separate. In a memo from City Planning to Development Services, Garry Salvestro raised a number of concerns with the proposal to amend the DCP to allow the development to proceed. [\[G6\]](#)

761. Among these was the fact that there was suitably zoned and serviced land available, the site was not one that was being considered for urban use, the land was subject to flooding and the site fronts a major arterial road.
762. In addition, council was in the process of undertaking an industrial lands study with the outcome to guide future industrial development in the city. Council was also in the process of completing a floodplain risk management study that would apply to this property.
763. City Planning raised concerns that the development was inconsistent with the objectives of the rural zone and was premature. Further, amending the DCP was being viewed by the community as an ad hoc decision.
764. Council officers recommended refusal of the amendment to the DCP and the development application. In their report they provided conditions of consent should council not adopt their recommendation and resolve to support the proposed DCP amendment and development application. [\[G7\]](#)
765. At its meeting on 19 December 2005, council resolved to approve the development application and the amendment to the DCP. [\[G8\]](#) The amendment to the DCP (Amendment 9, adopted on 27 March 2006) permits a special provision over the subject site that allows an industrial factory and showroom for the production, sale and installation of motor vehicle exhaust systems.
766. As part of the consultation process, council advised the RTA of the application and proposed amendment to the DCP. The RTA, while raising no objection to the application, required specific conditions to be provided in council's consent. One of these was that vehicular access was to be from a side road rather than the major arterial road. [\[G9\]](#)
767. These conditions were included in the conditions of consent provided in the report to council.

768. The conditions of consent approved by council removed this condition and allowed vehicular ingress from the major arterial road in contradiction to the RTA advice. There is no explanation provided in the resolution to explain why this change was made. As a result, the RTA wrote to council on 25 January 2006 to advise that it did not give its concurrence to the development approval. [\[G10\]](#)
769. Council issued consent to the development on 31 January 2006, prior to the adoption of the DCP amendment and the concurrence from the RTA. This raised a legal issue as to the validity of council's consent.
770. The issuing of the development consent, as approved by council and without the concurrence of the RTA, resulted in discussions between council officers and the RTA in relation to the issue of vehicular access to the site. The RTA, while still concerned about direct access to the major arterial road from the site, agreed on a compromise position. [\[G11\]](#)
771. This required council to consider an amendment to the development application to alter the conditions of consent relating to vehicular access to the site. The amended development application was approved by council on 25 September 2006 and incorporated the conditions agreed to between council and the RTA. By this time, the amendment to the DCP had been adopted and therefore the development was permitted on the site.
772. The involvement of councillors in this development application is an issue that was raised with us.
773. It was alleged that Cllr Georgiou was a personal friend of the developer and had not declared this interest during consideration of the development application. We asked Cllr Georgiou about this. He stated that he knew the applicant only through a friend of his and only got to know him after he (the applicant) made enquiries to relocate to Wagga Wagga and through the development application process. Cllr Georgiou stated a friendship developed from that time, over the next 3 years. Cllr Georgiou advised us that he considered the applicant a friend. [\[I6\]](#)

774. Further, it was pointed out to us that Clr Lindsay Vidler derived his income from an automotive repairs, a competitor with the intended development, which may have been viewed as a conflict of interests.

775. Clr Vidler responded in his submission on the draft report that his company does not manufacture or supply exhausts but specialises in transmission and other mechanical repairs. While we acknowledge this, the situation remains that Clr Vidler's business interests might be perceived to be in similar fields to the extent that a reasonable person might perceive a conflict of interest to the standard required under the Model Code of Conduct.

776. Clr Georgiou and Clr Lindsay Vidler moved and seconded, respectively, the approval of the amended development application on 25 September 2006. [\[G12\]](#)

777. Neither councillor declared a conflict of interests in the matter.

778. While a non-pecuniary conflict of interest does not preclude councillors from voting on matters in which they have an interest, the minimum that is required by council's code of conduct is the disclosure of a conflict or a potential conflict of interests. It is our view that this disclosure should have been made by both councillors.

**4.10.4.4 Example 4 of planning and development processes –
Lakehaven development**

779. The history of development in the Lakehaven area goes back some time. Consent was issued for a 122 lot rural residential subdivision and some ancillary activities. In 1988 development consent was issued for the first stage of the development. This approval was conditional.

780. Essentially, the development potential for the entire Lakehaven site was transferred to the 122 lot subdivision area. This left a residue lot that only had the ability to be subdivided into a further five lots. A condition was placed on the development approval in 1988 that subdivision above the remaining entitlement, would not be allowed on the residue lot.

781. The applicant applied to council to rezone the residue lot to allow further rural residential subdivision of the site in 2002.

782. Given that council had a policy of not allowing re-subdivision of residue lots, council officers were concerned that the approval of this application could provide a precedent for owners of other residue allotments to approach council to subdivide those areas.

783. However, the residue lot issue and the nature of council's planning regime has provided council with a drawn out and complex process to resolve. We do not intend to go into the detail of this in the report. Suffice to say that council itself appears to have been confused about which of its planning documents apply to this rezoning application.

784. The nature of council's LEP and the flexibility provided in its DCP have contributed to this confusion, as previously discussed.

785. It is of some surprise and concern that council resolved in July 2006 to request the applicant to provide legal advice as the legality and validity of its own resolution. While council is within its rights to rely on legal advice that it considers appropriate, we are perplexed as to why council would seek legal advice from the applicant's legal advisers rather than its own in relation to its own decision.

786. Council did subsequently obtain its own legal advice and has now progressed the matter. The legal advice was needed to clarify the status of its planning documents and its decision.

**4.10.4.5 Example 5 of planning and development processes –
Collingullie sign**

787. Council received a development application to construct a three sided illuminated sign on an allotment zoned 1 rural under the RLEP. This allotment had a sub-zone of 1(f) arterial road frontage (rural living area) under the DCP.

788. Council officers assessed the application and in a report to council on 25 September 2006, recommended that council refuse it as it was not consistent with the DCP and State Environmental Planning Policy 64. Council

officers also expressed concern that approval could create a precedent for similar developments in rural areas.

789. The council officer's assessment was based on consideration of the requirements of section 79C of the *Environmental Planning and Assessment Act 1979*.

790. Council did not adopt the officer's recommendation, but adopted the following resolution:

'That consideration of DA06/0473 Proposed Billboard sign and DCP Amendment Lot 42 DP 716008 Lockhart Road Collingullie be deferred until the next Policy and Strategy Committee Meeting and further that a report be prepared addressing the Section 79C evaluation to enable consideration of approval of the application.' [\[G13\]](#)

791. We have two concerns with this resolution. First, the council officer's report had considered section 79C and provided that evaluation in the report to council. It was at this very meeting that council considered and adopted a resolution to ensure that section 79C requirements were considered in evaluating development applications. Council officers had already undertaken this evaluation and reported on the relevant considerations in relation to section 79C.

792. In the publication from the ICAC, *Lobbying local government councillors, August 2006*, it is pointed out that '*...the Land and Environment Court has made it clear that where council determines a development application, councillors should not rely exclusively on council officers to consider all matters relevant to the determination but must also consider the relevant matters themselves.*'

793. Councillors could have determined the application based on their own consideration of the section 79C requirements without requiring a second assessment of the 79C requirements by council officers.

794. Second, section 352 of the *Local Government Act 1993* provides that a member of staff of a council is not subject to direction by the council or by a councillor as to the content of any advice or recommendation made by the member. We are of the view that this resolution does just that.
795. Council officers have provided their advice based on an evaluation of the section 79C requirements. To ask council officers to bring back a report that provides an evaluation that '*enabled consideration of approval of the application*' is directing them as to the content of their advice. In our view council has prima facie breached section 352 of the Act.
796. Council has considered legal advice from the applicant and its own legal advice in this matter. However, council appears not to have been satisfied with its own legal advice and resolved to refer the matter to an alternate council panel lawyer, requesting a lawful resolution to allow the matter to proceed.
797. The Department of Planning wrote to council on 15 January 2007 raising concerns about council's approval based on its assessment of the planning officer's advice and council's legal advice. The Department also stated that it was of the view that the application did not provide enough justification to use SEPP1 to approve this sign. We were advised that this matter was the subject of a further report to council at its February 2007 meeting, at which time the application was refused. [\[G17\]](#)
798. It is evident from newspaper reports, our observation of the council meeting of 23 October 2006 and file notes that there has been a great deal of lobbying of councillors in relation to this sign. In one file note it is recorded that the applicant suggested to a council officer that the issue is a power struggle between staff and councillors. We agree with this observation.
799. This is an example where we believe councillors are partial in the exercise of their planning powers.

4.10.4.6 Example 6 of planning and development processes – SEPP1 variation

800. Council received a development application to erect a dwelling and request under State Environmental Planning Policy 1 to vary the 200 hectare standard within the RLEP to permit this dwelling to be built.
801. A report was presented to council on 25 September 2006 that recommended refusal of the application because it was inconsistent with various requirements of the RLEP. [\[G14\]](#)
802. Council did not adopt this recommendation and resolved to support an objection to the Department of Planning under SEPP1 to vary the 200 hectare standard and permit the dwelling on the site.
803. The Department of Planning determined not to concur to the variation. This was reported to the council meeting on 18 December 2006. Council officers advised council that it could not issue a development consent for approval as the concurrence of the Department of Planning with the SEPP1 variation was required.
804. Councillors did not accept this advice. Instead, council resolved to request the Department of Planning to reconsider its decision. [\[G15\]](#)
805. While council is able to make this request, it provides further evidence that council will support development regardless of its own planning controls and with the risk of undermining its own planning principles.
806. An observer at the council meeting provided us with some comment made by councillors during the debate on this matter. They reflect the current attitude of many of the councillors:

‘sick and tired of planning issues affecting the city; what is the point of being elected?’

‘has no concept why here dealing with planning issues; section 79C is no use.’

'this is costing applicants a lot of money; all they want to do is build a house.'

'planning has become a sham.'

'something wrong that council makes a decision and it doesn't go through.' [\[G16\]](#)

4.10.5 Conclusion

807. This report has discussed the relationship between council LEPs and its DCP. We have provided a number of examples to illustrate the particular concerns that we have with the way council makes planning and development decisions.

808. Council is able to modify its DCP easily. Council's DCP acts as a defacto LEP by setting sub-zone objectives. It is our view that many of the modifications made to council's DCP undermine the planning objectives set in its LEPs. This is inconsistent with the requirement of clause 9 of the LEPs.

809. It will be 18 months before council has developed its new LEP in accordance with the template issued by the Department of Planning. The issuing of the template should rectify the difficulties with council's planning regime.

810. However, in this time council is still able to modify its DCP without approval from the Department of Planning. We are concerned that council can continue to make decisions that undermine the objectives set in its LEPs over the next 18 months.

811. On this basis, we are of the opinion that the Minister for Planning should consider revoking council's planning powers under section 118 of the *Environmental Planning and Assessment Act 1979* and appoint a planning administrator or panel to determine development applications where an amendment to the DCP is required until such time as the council's new LEP is adopted. **[Recommendation 4]**

EVIDENCE TABLES
INTERVIEWS AND FILE NOTES

Evidence Code	Evidence Topic
FN1	File notes of conversations between us and Clrs Dale and Andrews on 20 October 2006
I1	Interview transcript with Mayor, Clr Pascoe
I2	Interview transcript with General Manager, Mr Perram
I3	Interview notes – Clr Brian Andrews
I4	Interview notes – Clr Peter Dale
I5	Interview notes – Clr Kerry Geale
I6	Interview notes – Clr Michael Georgiou
I7	Interview notes – Clr Mark Gooden
I8	Interview notes – Clr John Harding
I9	Interview notes – Clr Jan Hay
I10	Interview notes – Clr Rod Kendall
I11	Interview notes – Clr Ken Kelmke
I12	Interview notes – Clr Diana Simpson
I13	Interview notes – Clr Karen Vidler
I14	Interview notes – Clr Lindsay Vidler
I15	Interview notes – Clr Kevin Wales
I16	Interview notes – Mr Graeme Faulkner, previous General Manager

Evidence Code	Evidence Topic
<u>I17</u>	Interview notes – Graeme Kelly, Southern Region Manager, United Services Union
<u>I18</u>	Interview notes – Mr Stephen Dunshea, Director Asset Services

A – RELATIONSHIP BETWEEN COUNCILLORS/GENERAL MANAGER/STAFF

Evidence Code	Evidence Topic
<u>A1</u>	Ballot paper and candidates for the 2004 local government election – Wagga Wagga City Council
<u>A2</u>	Local government registered political parties as at 7 July 2006
<u>A3</u>	Letter to Clr Wales from 6 councillors expressing no confidence dated 23 October 2003
<u>A4</u>	Media story, Daily Advertiser, 24 October 2003, re Mayor asked to resign
<u>A5</u>	Confidential Mayoral minute – April 2003 re code of conduct matter Clr Dale
<u>A6</u>	Media story, Daily Advertiser, 9 April 2003, re Dale code of conduct matter
<u>A7</u>	Draft policy – councillor access to information and staff
<u>A8</u>	Examples of emails sent by the Mayor seeking information from staff
<u>A9</u>	Email to General Manager from Stephen Dunshea re Clr Andrews comments, 17 July 2006
<u>A10</u>	Overview of Wagga Wagga City Council's governance structures, Daly Research Systems, May 2006

B - ADMINISTRATIVE

Evidence Code	Evidence Topic
<u>B1</u>	Instrument of authorisation including the Terms of Reference
<u>B2</u>	Sections 430 – 434 of the Local Government Act 1993
<u>B3</u>	Clause 244 of the Local Government (General) Regulation 2005

C – OUTSOURCING OF THE COMMERCIAL RESPONSE UNIT

Evidence Code	Evidence Topic
<u>C1</u>	Website information on the Commercial Response Unit
<u>C2</u>	Constitution of the Wagga Wagga Economic Development Board
<u>C3</u>	Undated confidential report to the eCommerce Committee – noted as received by council on 2 December 2003
<u>C4</u>	Chronology, The Commercial Response Unit (CRU) from 24 August 1998
<u>C5</u>	Response to the confidential draft report presented by Mr Gary Wells by the Acting General Manager, Mr Brian Pearson
<u>C6</u>	Minutes of the ordinary meeting of council, 24 May 2004 re organisation restructure and outsourcing of the commercial response unit
<u>C7</u>	Minutes of the ordinary meeting of council, 26 July 2004, re outsourcing the commercial response unit
<u>C8</u>	Minutes of the ordinary meeting of council, 23 August 2004, re outsourcing of the commercial response unit
<u>C9</u>	Outsourcing of Commercial Response Unit chronology from 13 May 2004
<u>C10</u>	Minutes of the MANEX meeting, 1 June 2004

Evidence Code	Evidence Topic
<u>C11</u>	Letter to council from ICAC, 27 May 2004
<u>C12</u>	ASIC records and file notes of enquiries made with NSW Office of Fair Trading on registration of business name
<u>C13</u>	Article in Weekend Advertiser, 5 and 6 March 2005 re CRU tender process
<u>C14</u>	Website information on business names from NSW Office of Fair Trading
<u>C15</u>	Minutes of the MANEX meeting, 9 November 2004
<u>C16</u>	Minutes of the MANEX meeting, 30 November 2004
<u>C17</u>	Minutes of the MANEX meeting, 18 January 2005
<u>C18</u>	Tender documents for the provision of economic and business development services, December 2004, Tender 14/2005
<u>C19</u>	Tender for the provision of economic and business development services for Wagga Wagga City Council, The Commercial Response Unit
<u>C20</u>	Tachyonics Technology Pty Ltd, response to tender 14/2005, provision of economic and business development services

Evidence Code	Evidence Topic
<u>C21</u>	Tender 14/2005, provision of economic and business development services for Wagga Wagga City Council, Julie Briggs Management Services
<u>C22</u>	Assessments of the provision of business and economic development services tenders
<u>C23</u>	Letter of concern re CRU tender process
<u>C24</u>	Letter of concern re CRU tender process
<u>C25</u>	Letter of concern re CRU tender process
<u>C26</u>	Letter of concern re CRU tender process
<u>C27</u>	Report to and minutes of council meeting 24 January 2005 re tender for provision of economic development services
<u>C28</u>	Minutes of the extraordinary council meeting 14 February 2005 re tender for provision of economic development services
<u>C29</u>	Report of Policy and Strategy Committee meeting submitted to council meeting 14 March 2005
<u>C30</u>	The CRU analysis of tender documentation and process
<u>C31</u>	Minutes of MANEX meeting 2 December 2003
<u>C32</u>	Proposal for council to outsource the Commercial Response Unit – not dated.
C33	CRU tender responses log

D – GENERAL MANAGER’S PERFORMANCE REVIEWS

Evidence Code	Evidence Topic
D1	Chronology of events – General Manager’s performance review

E – ROLE OF COUNCILLORS

Evidence Code	Evidence Topic
E1	Email from Clr Geale, dated 20 August 2006, to Phillip Perram (GM), Clr Kerry Pascoe (Mayor), Bronwyn Jones and councillors re restructure Attached is a copy of a draft press statement
E2	Emails dated 25 June 2006 and 2 August 2006 between General Manager and Clr Andrews re organisation structure
E3	Newspaper article, Daily Advertiser, 31 August 2006 – councillors’ opinion about the Department of Local Government’s investigation of council
E4	Minutes of extraordinary council meeting 21 April 2004
E5	Business paper for extraordinary council meeting 21 April 2004

G - PLANNING

Evidence Code	Evidence Topic
<u>G1</u>	Report to ordinary meeting of council, 25 September 2006, evaluation of development application 79C
<u>G2</u>	Council list of General Manager and director delegations
<u>G3</u>	Progress report on planning and development review, 23 October 2006
<u>G4</u>	Resolution of council on progress report on planning and development review, minutes, 23 October 2006
<u>G5</u>	Submission in relation to Butterbush Road tourist development
<u>G6</u>	Memorandum from Garry Salvestro, city planning to Cameron Collins, development services not supporting amendments to DCP re muffler factory, 9 December 2005
<u>G7</u>	Report to council meeting 19 December 2005 re DA 05/0660 – installation of motor vehicle exhaust systems Lots 2 and 3 DP 842774 Sturt Highway, Gumly Gumly
<u>G8</u>	Minutes of council meeting 19 December 2005 re DA 05/0660 – installation of motor vehicle exhaust systems Lots 2 and 3 DP 842774 Sturt Highway, Gumly Gumly

Evidence Code	Evidence Topic
<u>G9</u>	Letter from RTA , 11 November 2005, to council re conditions of consent
<u>G10</u>	Letter from RTA, 25 January 2006 re refusing concurrence
<u>G11</u>	Letter from RTA, 9 June 2006 re traffic access to site
<u>G12</u>	Minutes of ordinary meeting of council, 25 September 2006, resolution re proposed factory and showroom for exhaust systems
<u>G13</u>	Minutes of ordinary meeting of council 25 September 2006, resolution re proposed billboard sign and DCP amendment Lot 42 DP 716008 10 Lockhart Road, Collingullie
<u>G14</u>	Report submitted to the ordinary meeting of council, 25 September 2006 re DA06/0438 proposed rural dwelling entitlement and request under provisions of SEPP 1 to vary the 200 hectare standard within the Wagga Wagga Rural LEP 1991
<u>G15</u>	Minutes of ordinary meeting of council, 18 December 2006 resolution re SEPP 1 variation
<u>G16</u>	Confidential file note on councillor debate at meeting 18 December 2006
<u>G17</u>	Letter from Department of Planning, 15 January 2007 to council re Collingullie sign

Evidence Code	Evidence Topic
<u>G18</u>	Daily Advertiser article, 20 January 2007, Outsourcing shows they're not on the ball
<u>G19</u>	Daily Advertiser article, 19 January 2007, Wagga council reacts to outsourcing with anger
<u>G20</u>	Daily Advertiser article, 20 January 2007, Payne joins in debate
<u>G21</u>	Daily Advertiser article, 19 January 2007, Wagga has the knowledge and expertise

J – CODE OF CONDUCT

Evidence Code	Evidence Topic
<u>J1</u>	Wagga Wagga City Council code of conduct – prior to 1 January 2005
<u>J2</u>	Minutes of Policy and Strategy Committee meeting submitted to the council on 28 February 2005
<u>J3</u>	Wagga Wagga City Council code of conduct – adopted January 2005
<u>J4</u>	Detail of code of conduct complaints received since 1 January 2005

L – PROJECT MANAGEMENT

Evidence Code	Evidence Topic
<u>L1</u>	Costs of Oasis project – email from Manager, Financial Services
<u>L2</u>	Minutes of council meeting 23 July 2001, re contract with Rocky Falls Pty Ltd
<u>L3</u>	Agreement with Rocky Falls Pty Ltd for management of aquatic centre project – contract number 9/2002
<u>L4</u>	Tender price comparisons for aquatic centre project management
<u>L5</u>	Special financial review – Wagga Wagga City Council – November 2001 – Ernst and Young
<u>L6</u>	Bundle of documents – Red Hill Road project re communications, costings and minutes
<u>L7</u>	Minutes of MANEX meeting, 23 March 2004
<u>L8</u>	Minutes of MANEX meeting, 30 March 2004
<u>L9</u>	Minutes of MANEX meeting, 14 September 2004
<u>L10</u>	Minutes of MANEX meetings, 4 July 2006, 11 July 2006
<u>L11</u>	Report to extraordinary council meeting, 14 July 2006 regarding Red Hill Rd extension
<u>L12</u>	Letter from Sinclair Knight Merz re rail line, 12 October 2005

Q – ORGANISATION RESTRUCTURE

Evidence Code	Evidence Topic
<u>Q1</u>	Organisation structure prior to restructure in 2001
<u>Q2</u>	Organisation structure after restructure in 2001
<u>Q3</u>	Organisation structure 2004
<u>Q4</u>	Organisation structure following outsourcing of the Commercial Response Unit in 2005
<u>Q5</u>	Organisation structure 2006
<u>Q6</u>	Report to the extraordinary meeting of council on 19 June 2006
<u>Q7</u>	Minutes of ordinary meeting of council on 20 November 2006 re organisational review 2006 cost of redundancies
<u>Q8</u>	Organisational review project plan for Asset Management Directorate, April 2006
<u>Q9</u>	Press report on staff protest at Policy and Strategy Committee meeting, Daily Advertiser, 15 August 2006
<u>Q10</u>	Minutes of consultative committee, August 2005-October 2006
<u>Q11</u>	Memo from United Services Union re number of disputes in Industrial Relations Commission
<u>Q12</u>	Senior management remuneration packages, 2005/06 Annual Report

Evidence Code	Evidence Topic
<u>Q13</u>	Email from Phillip Perram dated 17 January 2006 to the department referring to advertising dates – director’s positions and copies of advertisements
<u>Q14</u>	Minutes of Policy and Strategy Committee meeting , 10 July 2006
<u>Q15</u>	Notice of motion from Clrs Hay and Klemke, 11 July 2006
<u>Q16</u>	Notice of motion (2) from Clrs Hay and Klemke, 14 July 2006
<u>Q17</u>	Memorandum from General Manager to all councillors in relation to senior staff appointments, 21 July 2006
<u>Q18</u>	Daily Advertiser article, 19 January 2007, Pascoe unconcerned
<u>Q19</u>	Media transcript re council restructure – 17 August 2006

V- TENDERING

Evidence Code	Evidence Topic
<u>V1</u>	Report to Environmental Services committee, 18 September 2000, and to council 25 September 2000 and EOI advertisement
<u>V2</u>	Memorandum to council from Director Environmental Services on bus shelters, 20 October 2000
<u>V3</u>	Deed between Wagga Wagga City Council and Cawthorne P/L regarding bus shelters, 18 December 2001
<u>V4</u>	Legal advice provided to council on the Bus Shelter Agreement, 1 July 2002
<u>V5</u>	Memorandum from Director Asset Management to General Manager, 2 July 2002
<u>V6</u>	Correspondence between council and the department on the applicability of section 55 of the Act, 8 July 2002 and 1 August 2002
<u>V7</u>	Letter from General Manager to investigators regarding the Bus Shelter Contract, 15 December 2006
<u>V8</u>	Report and minutes of council meeting held on 26 August 2002 in relation to call centre opportunity
<u>V9</u>	Email to Dr Lindsay Taylor from Gary Wells, 7 January 2003
<u>V10</u>	Letter from John D. D'Anvers and Assoc P/L, 7 January 2003 regarding fees

Evidence Code	Evidence Topic
<u>V11</u>	Estimates of refurbishment costs – printed on 7 January 2003
<u>V12</u>	Sub-contract pricing schedule – not dated regarding Gurwood Street refurbishment
<u>V13</u>	Minutes of council meeting, 28 January 2003, regarding lease to Salmat
<u>V14</u>	Letter of concern from air conditioning engineering company re quoting process for refurbishment, 14 February 2003
<u>V15</u>	Minutes of council meeting, 26 July 2004, regarding tender provision of legal services
<u>V16</u>	Memorandum to directors from General Manager regarding legal services, 27 July 2004
<u>V17</u>	Note that legal contracts appear not to have been entered into
<u>V18</u>	Email from Lindsay Taylor Lawyers to Stephen Dunshea re tendering issues at council – 8 September 2006