

REPORT OF THE

SECTION 430

**INVESTIGATION INTO “BODY HIRE”
ARRANGEMENTS OPERATING AT
WYONG SHIRE COUNCIL BETWEEN
JANUARY 2007 AND MAY 2010**

July 2011

Departmental representative:

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1 EXECUTIVE SUMMARY

This investigation has identified evidence of serious and systemic maladministration that occurred over a number of years at Wyong Shire Council in relation to the procurement and management of temporary contract personnel services.

This maladministration has since been addressed by the Council.

Between 2007 and 2010, Council engaged temporary contract personnel under 68 "body hire" contracts. However, there is evidence to suggest that Council's "body hire" practices also predate this period. Total expenditure under the 68 "body hire" contracts was \$17,813,449 including GST.

This investigation demonstrates that the Council's practices in relation to the engagement and management of "body hire" contractors did not only, in some respects, fail to comply with the Council's statutory obligations, but more fundamentally failed to meet basic probity and good governance requirements or to provide any assurance that the Council had received best value for money in relation to the services provided under the contracts.

Thirty four of these contracts involved expenditure that exceeded \$150K and were thereby subject to a statutory requirement that they be entered into pursuant to a competitive tendering process unless otherwise exempt from the requirement. None of these "body hire" contracts were entered into pursuant to a competitive tendering process. Only 3 of the contracts were exempt from the tendering requirement by virtue of the fact that the contractor was engaged under a State Contracts Control Board standing contract. Council failed to comply with its statutory obligations to tender in the remaining 31 cases.

There is evidence to suggest that in the case of a number of other contracts where expenditure did not exceed \$150K, the contracts formed part of a single seamless engagement and had been "split" thereby avoiding any single transaction that exceeded \$150K. This was notably the case with respect to the contracts Council entered into with respect to the delivery of the Leadership Development Program. While that Program was delivered under six separate contracts each with an initial approved value of under \$150K, total expenditure with respect to the delivery of the Program was in fact \$886,200.57.

In addition to the failure to comply with its statutory obligations in relation to tendering, there is also evidence of a systemic failure to comply with Council's own policy and procedural requirements in relation to the procurement and management of "body hire" contracts. Most engagements were made and managed in what could best be described as a procedural vacuum. Most engagements were made "directly" without the benefit of any competitive process.

Many engagements appear to have been made on the basis that the contractor was previously or currently engaged by Council or had been recommended by another contractor engaged by Council. The 68 "body hire" contracts were shared among a total of 26 contractors. Seven of the contracts were awarded to 4 former employees of the Council. In one case the employee was still working for Council at the time the contract was awarded to them.

In two cases, temporary contract personnel were appointed to positions in Council's organisational structure and held those positions for a period exceeding 12 months without a competitive recruitment process in breach of Council's statutory obligations. In one case, given the contractor's qualifications, employment history and skill set, it is unclear on what basis the appointment was made.

Nowhere are the above issues better exemplified than in the delivery of the Leadership Development Program by two "body hire" contractors. This investigation has found the following:

- As described above, the delivery of the Program cost \$886,200.57. Despite this, the "body hire" contractors that delivered the Program were not engaged pursuant to a competitive tendering process.
- The Program was inadequately scoped. There was no overarching program or budget for the delivery of the Program. No clearly identifiable objectives were set for the Program or benchmarks established to measure the achievement of objectives. There was no formal documented review undertaken of the Program.
- As described above, the Program was delivered under six separate contracts. While this raises the question of whether this was done to avoid Council's statutory tendering obligations, an alternative explanation is that it was done to

avoid the requirement to seek the approval of the governing body of Council for the Program.

- The contracts under which the Program was delivered were poorly managed. One of the contractors often invoiced Council for services provided months or even years after they were delivered.
- Given its poor scoping and the absence of any formal review, it is difficult to ascertain or verify what benefit Council obtained from the Program.

The justification used by Council for its failure to comply with its statutory obligations and indeed the requirements of its own Procurement Policy and associated procedures with respect to "body hire" contracts was that they were employment contracts and thereby exempt from these requirements. This view appears to have been initially formed without the benefit of any legal advice. This suggests a reckless indifference to the need to comply with the Council's statutory obligations in relation to the engagement of contractors under "body hire" arrangements. Even if it were to be accepted that the Council was genuine in its belief that "body hire" contracts were employment contracts and thereby exempt, it would not be unreasonable to expect that as a matter of appropriate governance practice, it would ensure that "body hire" contractors were nonetheless engaged pursuant to an open transparent and competitive process. As described above, this did not occur and the engagements were made in a procedural vacuum.

It was only when questions began to be asked within the Council about its "body hire" practices that the Council subsequently sought legal advice on their status. However, in the absence of clear instructions the advice received was understandably qualified. The weight of evidence examined by this investigation tends to support the view that "body hire" contracts were contracts for services and not employment contracts and were therefore subject to the statutory tendering requirements and the requirements of Council's Procurement Policy and associated procedures. Council now accepts this view.

The Council's failure to comply with its statutory tendering obligations can be attributed as much to the practice of entering into contracts with an approved value that fell below the \$150K tendering threshold and allowing expenditure under the

contracts to escalate above the threshold as it can to the maintenance of the legal fiction that "body hire" contracts were employment contracts. Of the 68 "body hire" contracts only 7 had an initial approved value of \$150K. In another 27 cases, the total value of expenditure escalated from an initial approved value of under \$150K to a value that exceeded the tendering threshold.

All but 15 of the "body hire" contracts were varied. On my assessment, the propensity to vary contracts can be attributed to poor or non-existent planning or scoping of engagements, open-ended arrangements with undefined or poorly defined deliverables, poor cost controls and the ready availability of the option to extend or vary engagements. I have made recommendations in this report that are designed to minimise the potential for this practice to continue.

I have not identified evidence of "body hire" contracts being awarded for improper or corrupt purposes. However, given the corruption risks associated with the award of contracts without the benefit of a documented transparent and competitive procurement process, I have recommended that the Chief Executive of the Division of Local Government furnish a copy of this report to the Independent Commission Against Corruption for its information.

There is no evidence to suggest that the Council did not receive the services it paid for under "body hire" contracts or that the services provided were unsatisfactory. In the absence of a competitive procurement exercise, it is difficult to ascertain whether the Council received the best value for money outcome in relation to services provided under "body hire" contracts. However it should be noted that in the one case where the services provided under a "body hire" contract were subsequently subjected to market testing through a competitive tendering process, the outcome of the process indicated that the value of the services provided under the previous "body hire" contract was competitive compared to the tenders received.

The systemic nature of the maladministration revealed by this investigation suggests the existence of a culture of indifference towards the Council's statutory obligations and appropriate governance practices in relation to "body hire" arrangements prior to the commencement of the current General Manager in his role in May 2010. It is unclear whether, and to what extent, such a culture existed or continues to exist in other parts of the organisation. It falls outside the Terms of Reference of this

investigation to determine this. In view of this, I have recommended that the Division of Local Government conduct a further full Promoting Better Practice review of the Council within the next 12 months with a view to identifying any other potential areas of concern in relation to the exercise by the Council of its functions.

While much of the content of this report will reflect poorly on Wyong Shire Council, in fairness it is perhaps appropriate to also acknowledge the positives disclosed by this investigation. In particular, the checks and balances that exist within a council's corporate governance framework operated as they are required to in the case of Wyong Shire Council. Firstly, many of the issues of concern examined by this investigation were first identified by Council's Internal Auditor and subsequently by its Contract Services Coordinator. Their recommendations have since been implemented by the Council. Secondly, the governing body of the Council exercised its role diligently, applying rigorous scrutiny to the Council's "body hire" practices, taking the step to report them to the former Department of Local Government and resolving to end the practices.

In addition to this, on his appointment in May 2010, the current General Manager took immediate steps to resolve the compliance issues raised by this investigation. Following the current General Manager's appointment, Council has either phased out or 'regularised' the remaining "body hire" engagements and conducted a recruitment process and appointed staff to perform the functions formerly undertaken by temporary contract personnel. It has also put in place a new procedural framework applying to the procurement and management of temporary contract personnel. It has also engaged Deloitte to undertake a gaps analysis of Council's procurement and contract management policies and procedures to ensure compliance with best practice.

Finally, it should be noted that the focus of this investigation and this report is the former practices of the Council in relation to "body hire" arrangements and not the conduct of individuals. As this report demonstrates, individuals and entities (including Council staff, contractors and contract personnel) were simply operating and exercising functions in a context in which these practices were deemed to be acceptable. For this reason, I have refrained as far as is appropriate and practicable from naming persons or entities in this report. This is in the interests of minimising

the potential for undue prejudice to be suffered by such persons or entities as a result of their being identified in this report.

In this report I have referred to Council staff involved in making decisions or undertaking actions in connection with the issues considered by this investigation by reference to the position they held within the Council at the relevant time. It should be noted that a number of different persons may have occupied the positions referred to in this report during the period of time considered by this investigation.

Nothing in this report should be interpreted as implying that a person or entity who may be identifiable from information disclosed in this report has in any way acted inappropriately. Such persons and entities are referred to in this report for contextual purposes only. Accordingly, no adverse inference should be drawn from the fact that a reference is made to a specific person or entity in this report.

2 INTRODUCTION

1. This is my report as Departmental representative arising from my investigation under section 430 of the *Local Government Act 1993* ('the Act') into Wyong Shire Council ('the Council') and is presented to the Minister for Local Government and the Chief Executive of the Division of Local Government, Department of Premier and Cabinet ('the Division'), in his capacity as the delegate of the Director General, Department of Premier and Cabinet and copied to the Council, pursuant to section 433(1) of the Act.

2.1 Terms of Reference

2. On 14 January 2010, the Deputy Director General of the Division, Mr Ross Woodward, in his capacity as the delegate of the Director General, approved an investigation under section 430 of Wyong Shire Council. Mr John Davies and Mr Grant Astill, Senior Investigations Officers, were authorised to act as Departmental representatives to conduct the investigation. The Terms of Reference authorised for the investigation were as follows:

To investigate and report on

1. *The processes used by Council to select, engage, manage and pay consultants, contractors or other persons/entities, having particular regard to the following:*
 - *any arrangements that Council has entered into in the last 3 years, involving payments to a single entity or individual totalling \$150,000 or more, for the provision of services with a high labour content*
 - *any arrangements referred in Council documents as a "body hire" arrangement*
 - *whether persons engaged under or pursuant to such arrangements should be properly classified as independent contractors, employees of Council and/or as employees of another entity*

- *the systems and processes the Council has in place to properly deal with its different statutory obligations arising for each class of person engaged under such arrangements.*
2. *The engagement of a contractor/consultant to temporarily fulfil the role of Manager of Customer and Community Services for an extended period, having particular regard to the following:*
- *whether this person was or should have been engaged as an employee of Council*
 - *the process of selecting and appointing the person to undertake the role in a temporary/acting capacity*
 - *whether a contract existed between this person and the Council and if so, whether that contract was subject to the tendering provisions of section 55 of the Act.*
3. *The selection and engagement of contractors or other persons to deliver a program described in Council documents as the Leadership Development Program, having particular regard to the following:*
- *the scoping, planning and budgetary process used to inform the decision to approve and control the delivery of the program*
 - *the approval of the program*
 - *the identification and assessment of potential service providers*
 - *whether tenders were or should have been called for the delivery of the program*
 - *whether the program was or should have been approved by the elected Council*
 - *whether the program was or should have been disclosed in the Council's annual management plan and/or reported on in the Council's annual reports*

- *the adequacy and manner of reporting of expenditure associated with the delivery of the program.*
4. *The adequacy of the Council's policies, procedures and delegations governing tendering and the procurement and payment of services, having particular regard to those services with a high labour content such as consultants and those for provision of professional services.*
 5. *The level of compliance with Council's policies, procedures and delegations governing tendering, the procurement and payment of services and the adequacy of controls to ensure such compliance.*
 6. *Any other matter that warrants mention particularly where it may impact upon the effective administration of the area.*
3. On 14 January 2010, the then Mayor, Cllr Bob Graham and the former General Manager, Mr Kerry Yates ('the former General Manager') were formally notified of the investigation.

2.2 The investigation process

4. Section 430 of the Act provides as follows:
 - (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 as 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.*
5. Section 431 of the Act provides as follows:

- (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, 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.*
6. After undertaking an exhaustive review of the substantial documentary evidence previously gathered by the Division in relation to the matter, (see below), on 19 May 2010, I served on the current General Manager of the Council, Mr Michael Whittaker ('the current General Manager') a 'Notice of Direction for Production of Evidence and Documents' ('the Notice'). This required the Council to respond to a large number of questions and requests for information and to provide documents.
7. Council was required to respond to the 'Notice' by 25 June 2010. Council subsequently requested an extension of time to respond until 6 August 2010. Given the significant impost that compliance with the 'Notice' imposed on Council's time and resources, and in the interests of ensuring that Council had sufficient opportunity to provide a comprehensive and complete response, this

extension was granted. Council provided the information and documents requested on 6 August 2010.

8. This report was prepared after I completed a comprehensive review of the information and documents Council provided in response to the 'Notice'.

2.3 Statutory requirements relating to the investigation report

9. Section 433 of the Act provides as follows:

- (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.*
- (4) *Section 14B of the Royal Commissions Act 1923 applies in relation to any report that the Minister wishes to lay before both Houses of Parliament in the same way as it applies to a report made by a commission under that Act.*

10. Clause 244 of the *Local Government (General) Regulation 2005* ('the Regulation') provides as follows:

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.*

11. Section 434(1) of the Act imposes the following obligation on a council:

A council must, within 40 days after presentation to it of a Departmental representative's report, give written notice to the Minister of the things done or proposed to be done to give effect to any recommendations contained in the report.

12. Section 434(1) also confers the power on the Minister for Local Government to issue orders with respect to recommendations made in the report and imposes an obligation on councils to comply with any such order.

2.4 Procedural fairness

13. In accordance with the principles of procedural fairness, Council, as the subject of the investigation, received a draft of this report prior to it being finalised. Council was invited to respond to the report prior to it being finalised.
14. A draft of this report was also separately provided to the former General Manager and he too was invited to comment on it prior to it being finalised.
15. In the interests of fairness and in view of my comments below about the Leadership Development Program, I also provided the contractors who were engaged by Council to deliver that Program with extracts of this report that pertained to them and invited them to comment on it prior to the report being finalised.
16. In finalising this report I have considered all submissions I received in relation to the drafts of the report provided to the above parties.

2.5 References to persons and entities in this report

17. It should be noted at the outset that the focus of this investigation and this report is the former practices of the Council in relation to "body hire" arrangements and not the conduct of individuals. As this report demonstrates individuals and entities (including Council staff, contractors and contract personnel) were simply operating and exercising functions in a context in which these practices were deemed to be acceptable.
18. Accordingly, in this report, I have refrained as far as is appropriate and practicable from naming persons (including Council staff and contract

personnel) or entities (including contractors). This is in the interests of minimising the potential for undue prejudice to be suffered by such persons or entities as a result of their being identified in this report. The only staff members actually named in this report are the former and current General Managers.

19. I have referred to Council staff involved in making decisions or undertaking actions in connection with the issues considered by this investigation for contextual purposes only. I have identified such persons by reference to the position they held within the Council at the relevant time. Where the relevant person no longer holds the position, the position is preceded by the words "the then" or "the former" (eg "the then/former Director Shire Services"). It should be noted that a number of different persons may have occupied the positions referred to in this report during the period of time considered by this investigation.
20. Nothing in this report should be interpreted as implying that a person (including contract personnel, Council staff and former staff), or entity (including contractors) who may be identifiable from information disclosed in this report has in any way acted inappropriately. Such persons and entities are referred to in this report for contextual purposes only. Accordingly, no adverse inference should be drawn from the fact that a reference is made to a specific person or entity in this report.

2.6 References to contracts in this report

21. In this report, I have identified specific contracts and contractors lists by reference to the numbers Council uses to designate the contracts. These are preceded by the letters CPA and are followed by a reference number (eg: CPA/166101).

2.7 Background to the investigation

2.7.1 Initial correspondence with the Department of Local Government

22. The former Department of Local Government first became aware of the issues that have given rise to this investigation when the former General Manager wrote to the former Director General of the Department, Mr Garry Payne on 11

June 2008. In his letter, the former General Manager provided the following advice:

- For a number of years, Council had used "body hire" arrangements to provide additional staff resources to fill gaps in the organisation structure where there had been difficulty recruiting permanent employees to carry out short to medium term projects or to deal with increased work load. Persons appointed under these arrangements were selected because of their particular expertise, were paid on an hourly basis (in some cases including travel or accommodation costs), did not accrue leave entitlements and their services could be dispensed with at short notice. Persons engaged under these arrangements worked at Council premises under the control and direction of Council management.
- Council had taken the view that such "body hire" arrangements were employment contracts and as a result were not subject to the tendering provisions of section 55 of the Act. The former General Manager enclosed advice from Council's legal advisors that he maintained supported this view.
- The former General Manager also enclosed a report that had been prepared for the Council meeting of 28 May 2008 about a Leadership Development Program that had been conducted for the Council's senior management team over the preceding two years. He advised that the Council had expressed concern about the "*governance around [the] program*" and about the overall concept of "*body hire*".
- The former General Manager sought the advice of the former Department in relation to the above matters.

23. On 4 July 2008, the then Mayor of the Council, Clr Warren Welham, also wrote to the Department pursuant to a resolution adopted at the Council meeting of 25 June 2010 enclosing a copy of a report on existing "body hire" arrangements considered at the Council meeting of 25 June 2010 together with copies of Council's legal advice on the matter. Clr Welham advised that "*Council is concerned with the governance of the Leadership Development Program and*

the overall concept of "body hire"". Clr Welham sought the Department's advice in relation to the matter.

2.7.2 Council's concerns

24. The former General Manager's and Clr Welham's letters to the former Department seeking its advice had been prompted by concerns raised by the governing body of the Council about a Leadership Development Program that had been conducted for the Council's senior management team over the preceding two years.

25. At its meeting of 26 March 2008, Council resolved, pursuant to a Notice of Motion, as follows:

That Council receive a report on the Leadership Consultant's Program (sic) including detailed information on total costs to Council and outcomes achieved.

The report should include;

- *detailed costings for the consultants including fees, travel, accommodation, meals and other incidentals.*
- *positions of staff members and total numbers of staff involved in the program.*
- *benchmark criteria used to assess the success or otherwise of this program.*
- *an explanation as to why this program has not been subject to public tender requirements.*
- *the justification used in renewing the program on a reportedly three monthly basis.*
- *the credentials of those involved in delivering the program.*
- *examples, if any, of their work in other Local Government areas.*
- *what outcomes have been achieved from staff participating in this program.*
- *what percentage of staff, that have participated in this program are still employed by Wyong Shire Council.*

- *that given the budgetary impact of this program on the 2008/2009 Management Plan, this report be included in the Council Business Paper for the meeting of 28 May 2008.*

26. Pursuant to Council's resolution of its meeting of 26 March 2008, a report on the Leadership Development Program was submitted to the Council meeting of 28 May 2008. Having considered that report, Council unanimously resolved as follows:

- 1 *That Council express concern regarding the governance around the Senior Leadership Development Program in particular the perception that the project has breached Section 55 of the Local Government Act and ICAC Guideline 1:*

"Managing Risk: Reducing Corruption Risks in Local Government – Taking the Con out of Contracting: Guidelines for Managing Corruption Risks in Local Government Procurement and Contract Administration" issued September 2001"

by order splitting the project into Contracts 1A to 1F with variations and that Council refer this matter to the Department of Local Government for advice.

- 2 *That Council express concern around the concept of "Body Hire".*
- 3 *That the General Manager provide a report to Council by 25 June 2008 on existing "Body Hire" arrangements and their cost to Council.*
- 4 *That following this report a briefing be held to discuss "Body Hire" with a view to establishing processes for the General Manager to advise Council of "Body Hire" arrangements.*

27. Pursuant to Council's resolution of its meeting of 28 May 2008, a report on the then existing "body hire" arrangements and their cost, was submitted to the Council meeting of 25 June 2008. The report enclosed copies of legal advice from Council's legal advisers on the nature of "body hire" arrangements (discussed below) and a list of persons engaged under those arrangements in 2007/08. Having considered that report, Council unanimously resolved as follows:

- 1 *That the report be received and the information noted.*
 - 2 *That the Mayor be called upon to refer this report as an addendum to the General Manager's earlier report to the Department of Local Government for their advice.*
28. On 25 February 2009, the Director of Corporate Services provided a further report to Council on the Council's use of persons hired under short-term contracts and consultant services for filling short-term needs of professional expertise over the preceding six months. Appended to the report was a list of "body hire" contractors used by Council between 1 July 2008 and 31 December 2008. The report recommended that Council "*receive the report on Council's use of short-term contract hired people and consultant services*". Instead, Council resolved as follows:
- 1 *That Council only use short term contract hired staff on an extraordinary basis and only where conventional employment prospects have been exhausted and where the circumstances are fully reported to and authorised by Council.*
 - 2 *That contracts for employment that exceed the government tender limit be tendered.*

2.7.3 The Department's and Division's preliminary enquiries

29. Having previously made informal enquiries into the issues raised, on 21 May 2009, the Department of Local Government wrote to the former General Manager formally requesting certain documents.
30. On 19 August 2009, the former General Manager responded. In his letter, he made the following observations:
- Council had used "body hire" arrangements for a number of years because of Council's inability to attract staff to fill positions, to provide specialised skills and knowledge not required on a permanent ongoing basis, or to manage peak loads. The Leadership Development Program and project management of capital works were two examples of this.

- Council held the view that such arrangements were contracts of employment rather than a contract for services and as such were not subject to the tendering requirements of the Act. In forming that view, Council had relied heavily on the fact that the persons engaged under the arrangements worked in Council's premises and under Council's control and direction on a day to day basis.
 - That in relation to the Leadership Development Program, Council had not engaged in "order splitting" as a means of avoiding the tendering requirements. Discrete orders or extensions of orders were merely used as part of a project management approach or for administrative purposes as dictated by the constraints of the Oracle software.
 - Council accepted that these issues were not beyond doubt and had now called tenders to address these doubts. The tender process referred to was the one conducted with respect to the CPA/166101 contractors list. This is discussed in more detail below.
31. On 27 October 2009, the Deputy Director General of the Division responded to the former General Manager, advising him that the Division had reviewed the information Council had provided and had the following concerns:
- The possible failure to comply with the tendering provisions of section 55 of the Act with regard to the contract/s relating to the delivery of the Leadership Development Program.
 - The possible failure to comply with section 55 of the Act with respect to contracts between Council and other providers of services under "body hire" arrangements.
 - The probity of processes used by Council to engage consultants and independent contractors and in particular the processes used by Council to select and engage the consultants detailed in the summary table provided to the Council meeting of 25 June 2008.

- How Council managed its ongoing contractual arrangements with such contractors and the probity and documentation of the selection and engagement process.
 - The level of compliance with Council's Procurement Policy and the adequacy of controls to ensure such compliance.
 - How Council may have dealt with its statutory obligations in relation to those "contractors" who Council asserted were employees of Council.
32. The Deputy Director General also requested further information on the tenders that had recently been called, referred to by the former General Manager in his letter of 19 August 2009 (ie in relation to the CPA/166101 contractors list discussed below).
33. From 16 to 19 November 2009, two officers of the Division, Senior Investigations Officers, Mr Richard Murphy and Mr Grant Astill visited the Council. They inspected files, interviewed a number of staff and gathered a substantial body of documentary evidence.
34. On 8 December 2009, Council provided the Division with a copy of the report on the Tender for the Provision of Temporary Professional Services (CPA/166101) requested by the Division in its letter of 27 October 2009. The report was due to be considered at a Council meeting the following day. The report made the following recommendation:
- 1 *That Council note the information provided in this report.*
 - 2 *That Council endorse monthly reports on changes to the arrangements and number of temporary professional resources as a mechanism to comply with Resolution 1 from the meeting of 25 February 2009 on "Body Hire."*
 - 3 *That Council accept all tenders for Contract No. CPA/166101 identified as eligible for inclusion on a panel of approved temporary service providers for the provision of temporary professional services for a period of two years with a one year extension option.*

- 4 That Council concur with the use of contracts for the engagement of temporary resources as arranged through the State Contracts Control Board and Local Government Procurement as a means of complying with the Local Government tendering regulations.
- 5 That Council endorse the continuing engagement by the General Manager of existing consultants working on ongoing critical projects, including the Mardi to Mangrove Link project, until the earlier of completion of these projects or their services are no longer required.

35. On 9 December 2009, the Deputy Director General wrote to Council raising concerns about the report on the Tender for the Provision of Temporary Professional Services (CPA/166101). Amongst other things, the Division identified the following concerns:

- Recommendation 3 in the report recommended that Council accept all tenders including those that were non-complying. The Division expressed the concern that the apparent inability to rank the tenders may indicate that the evaluation criteria and/or process for assessing the tenders may have been inadequate and that a decision by Council to accept all tenders may leave Council open to legal challenge.
- The selection of successful contractors was to be done by Council staff rather than the Council. This appeared to be inconsistent with the prohibition in the Act on the delegation by Council of the acceptance of tenders.
- Recommendation 5 appeared to ask Council to endorse the continuing engagement of contractors who may have been engaged in a manner that contravened the requirements of section 55 of the Act.
- The report stated that "legal advice had been received that Council's previous body hire arrangements constituted contracts of service". The Division took the view that this advice was qualified in what it said about such arrangements.

- The report indicated that further legal advice was being sought in relation to this matter. The Division questioned the prudence of determining the matter pending the receipt of such advice.
36. The former General Manager responded on 10 December 2009 advising that in light of the concerns raised by the Division he withdrew the report from the Council meeting and that Council had made no decision in relation to the matter.
37. As stated above, on 14 January 2010, the Deputy Director General of the Division approved an investigation under section 430 of the Act into this matter.

2.8 Council context

38. The Wyong Local Government Area ('LGA') is located in the Central Coast region of NSW. It covers an area of approximately 830 km². It borders on Lake Macquarie City Council in the north, Gosford City Council in the South and Cessnock City Council in the north-west.
39. The Wyong LGA has one of the larger populations in the State. As at the 2006 census, the population of the Wyong LGA was 139,800. It was ranked 15th out of 152 LGAs as measured by estimated resident population. As at 30 June 2008, the estimated resident population of the LGA exceeded 146,000. According to Council's Community Plan, between 2001 and 2006, the Wyong LGA experienced the 8th largest growth (in numbers) of all LGAs and was ranked 33rd in terms of rate of growth. Between 2001 and 2006, the LGA's population increased at an average annual growth rate of 1%. The LGA's population is projected to increase to over 200,000 by 2031.
40. The Wyong LGA is divided into two wards. Each ward is represented by 5 councillors. At the September 2008 local government elections there was a significant turnover in elected representatives. Of the ten current serving councillors, only three served on the previous Council.
41. The Mayor and Deputy Mayor are elected by councillors. The current Mayor is Cllr Doug Eaton. He was elected Mayor on 15 September 2010. The current

Deputy Mayor is Cllr Bob Graham. Cllr Graham served as Mayor in the year preceding Cllr Eaton's election.

42. The current General Manager, Mr Michael Whittaker, commenced in the role on 17 May 2010 following the former General Manager's retirement. It is important to note that the current General Manager was appointed to the role after the issues the subject of this investigation arose. The former, General Manager, Mr Kerry Yates, served in the role for 6 years.
43. At the time this investigation was commenced, Council was divided into three departments:
 - Shire Services, comprising of Asset Management, Business Units, Contracts and Special Projects, Plant and Fleet, Roads and Drainage, Water and Sewerage and Water Supply Head Works.
 - Shire Planning, comprising of Development Assessment, Estuary Management, Future Planning, Legal and Policy, Natural Resources, Regulation and Compliance and Sustainability.
 - Corporate Services, comprising of Business Improvement and Information Services, Communications, Corporate and Administration Services, Financial Services and Human Resources.
44. In addition to the three above departments, there was also a stand-alone General Manager's Department that reported directly to the General Manager, comprising of Business Development, Economic and Corporate Planning, Internal Audit and the Internal Ombudsman.
45. Since this investigation has been commenced, Council has been restructured. It now comprises of five departments; Community and Recreation Services, Infrastructure Management, Environment and Planning Services and Corporate Services. The former Shire Services Department in which most of the "body hire" practices occurred, no longer exists.

FINDINGS AND RECOMMENDATIONS

46. I have made the following findings and recommendations in relation to each of the Terms of Reference. A discussion of the considerations that have formed the basis of my findings is contained in the analysis section of this report.

2.9 Findings

2.9.1 Term of Reference 1

The processes used by Council to select, engage, manage and pay consultants, contractors or other persons/entities, having particular regard to the following:

- *any arrangements that Council has entered into in the last 3 years, involving payments to a single entity or individual totalling \$150,000 or more, for the provision of services with a high labour content*
- *any arrangements referred in Council documents as a "body hire" arrangement*
- *whether persons engaged under or pursuant to such arrangements should be properly classified as independent contractors, employees of Council and/or as employees of another entity*
- *the systems and processes the Council has in place to properly deal with its different statutory obligations arising for each class of person engaged under such arrangements.*

47. In relation to Term of Reference 1, I have found that:

- "Body hire" contracts are contracts for services and as such are subject to the requirements of section 55 of the Act and Council's Procurement Policy.
- Persons engaged by Council under "body hire" contracts were not employees of the Council.
- Council's view that persons engaged under "body hire" contracts were employees of the Council was not correct. That view was initially formed without the benefit of legal advice.
- Council had no system or process in place to determine the legal status of persons engaged under "body hire" contracts.

- Most of the 68 “body hire” contracts Council entered into during the period between 14 December 2007 and 5 August 2010 were made by way of ‘direct appointment’ without the benefit of any competitive process.
- Council appears to have utilised a limited pool of “body hire” contractors. The 68 contracts were shared among 26 contractors. In the case of 7 “body hire” contracts, the persons engaged to perform services under the contracts were former employees of the Council.
- The Council’s practices in relation to the engagement and management of “body hire” contractors did not meet basic probity and good governance requirements and failed to provide any assurance that Council received best value for money in relation to the services provided under the contracts.
- Council entered into at least 34 “body hire” contracts involving expenditure in excess of \$150K without first undertaking a formal tender process prescribed under the Act and the Regulation in breach of its statutory obligations.
- “Body hire” contracts involving expenditure in excess of \$150K also were not reported in the Council’s Annual Report in breach of section 428(4)(b) of the Act and clause 217(1)(a2) of the Regulation.
- Council also failed to comply with its own policy and procedural requirements in the appointment and management of “body hire” contractors.

2.9.2 Term of Reference 2

The engagement of a contractor/consultant to temporarily fulfil the role of Manager of Customer and Community Services for an extended period, having particular regard to the following:

- ***whether this person was or should have been engaged as an employee of Council***
- ***the process of selecting and appointing the person to undertake the role in a temporary/acting capacity***

- ***whether a contract existed between this person and the Council and if so, whether that contract was subject to the tendering provisions of section 55 of the Act.***

48. In relation to Term of Reference 2, I have found that:

- Council appointed a "body hire" contractor to fill the vacant Manager of Customer and Community Services position for a period of 1 year and 9 months.
- The Manager and Customer Services position is an identified position in Council's organisation structure.
- Total expenditure in relation to the contract under which the contractor in question was appointed was \$1,106,592.33. (It should be noted that only a portion of this expenditure related to the contractor's appointment to the Manager of Customer and Community Services position.)
- The contractor in question was not appointed pursuant to a competitive tendering process in breach of section 55 of the Act.
- The contractor was not appointed to the position of Manager of Customer and Community Services pursuant to a formal recruitment process in breach of sections 348 and 349 of the Act.
- It is unclear on what basis the contractor was appointed to the position.
- The cost to Council of filling the Manager of Customer and Community Services position with a "body hire" contractor was approximately \$280,800 per annum compared to a cost of employing a staff member of \$219,500 per annum.

2.9.3 Term of Reference 3

The selection and engagement of contractors or other persons to deliver a program described in Council documents as the Leadership Development Program, having particular regard to the following:

- ***the scoping, planning and budgetary process used to inform the decision to approve and control the delivery of the program***
- ***the approval of the program***
- ***the identification and assessment of potential service providers***
- ***whether tenders were or should have been called for the delivery of the program***
- ***whether the program was or should have been approved by the elected Council***
- ***whether the program was or should have been disclosed in the Council's annual management plan and/or reported on in the Council's annual reports***
- ***the adequacy and manner of reporting of expenditure associated with the delivery of the program.***

49. In relation to Term of Reference 3, I have found that:

- The Leadership Development Program was delivered under six "body hire" contracts but formed part of a single seamless transaction that should have been delivered under a single contract.
- Total expenditure in relation to services provided with respect to the delivery of the Leadership Delivery Program was \$886,200.57.
- The contractors Council engaged to deliver the Leadership Development Program were appointed by way of 'direct appointment' and without the benefit of a competitive process.
- Given the level of expenditure in relation to the delivery of the Leadership Development Program, the failure to appoint the contractors pursuant to a competitive tendering process constitutes a breach of section 55 of the Act.
- Each of the six contracts under which the Leadership Development Program was delivered was approved by the former General Manager. However,

given the total cost of the Program, it should have been approved by the governing body of Council.

- The Leadership Development Program was inadequately scoped or planned. The proposals developed for the Program failed to clearly articulate goals or set benchmarks against which the achievement of goals could be measured.
- No holistic budget was established for the Leadership Development Program making it difficult to control costs.
- No formal documented review has been conducted to determine the success or otherwise of the Leadership Development Program.
- The Leadership Development Program was delivered over a far longer period and at a far greater cost than was originally proposed.
- Payments of fees and disbursements to one of the contractors engaged to deliver the Leadership Development Program were made on the basis of invoices that were not rendered in a timely fashion and which failed to satisfactorily account for the services provided and costs incurred.
- It remains unclear precisely what benefits Council obtained from the Leadership Development Program.

2.9.4 Term of Reference 4

The adequacy of the Council's policies, procedures and delegations governing tendering and the procurement and payment of services, having particular regard to those services with a high labour content such as consultants and those for provision of professional services.

2.9.5 Term of Reference 5

The level of compliance with Council's policies, procedures and delegations governing tendering, the procurement and payment of services and the adequacy of controls to ensure such compliance.

50. In relation to Terms of Reference 4 and 5, I have made the following findings:

- The Council failed to comply with its own Procurement Policy and associated procedures and business rules in engaging and managing "body hire" contractors.
- The failure by the Council to comply with its statutory obligations and appropriate procurement and contract management practices in relation to "body hire" contracts cannot therefore be attributed to deficiencies in Council's policies, procedures and business rules.
- Notwithstanding this, since this investigation has commenced, Council has put in place a new procedural framework to govern the procurement and management of temporary contract personnel services. This addresses most of the issues of concern identified by this investigation.
- There remain vulnerabilities in the Council's policy and procedural framework that allow expenditure under contracts with an initial approved value under the \$150k statutory tendering threshold to escalate beyond this threshold. I have made recommendations in relation to this.

2.9.6 Term of Reference 6

Any other matter that warrants mention particularly where it may impact upon the effective administration of the area.

51. In relation to Term of Reference 6, I have found that:

- Council appointed a "body hire" contractor to fill a development engineer position. The position was an identified position in Council's organisation structure.
- The contractor occupied the position under 3 different contracts for a period of at least two and a half years and possibly longer.
- Total expenditure under the three contracts was \$523,208.40.
- The contractor in question was not appointed pursuant to a competitive tendering process in breach of section 55 of the Act.

- The contractor was not appointed to the development engineer position pursuant to a formal recruitment process in breach of sections 348 and 349 of the Act.

2.10 Recommendations

Recommendation 1:

Council should establish a procedural requirement that ensures that former staff may only be engaged by the Council as a contractor or consultant pursuant to a competitive process and that the appointment process is independently reviewed.

Recommendation 2:

Council's Internal Auditor should undertake regular audits to ensure compliance with Council's current procedures governing the engagement and management of temporary contract personnel.

Recommendation 3:

Council should amend staff delegations to ensure that the delegation to vary contracts is defined by reference to the total value of expenditure under a contract (inclusive of all variations) and not just the value of the variation being approved.

Recommendation 4:

Council should ensure that staff delegations, the Procurement Policy and all associated procurement and contract management procedures are consistent with the Division's Tendering Guidelines by requiring estimated contract values to include on-costs such as GST.

Recommendation 5:

Council should amend the "Instruction to Extend Temporary Contract Personnel" form prescribed under *Procurement Procedure P251: Contract Management – Provision of Temporary Contract Personnel* to require the following additional information:

- What other options have been considered for completing the outstanding work required and why they have been discounted; and

- What the cumulative value of the contract will be with the approval of the extension.

Recommendation 6:

Council should amend *Procurement Procedure P251: Contract Management – Provision of Temporary Contract Personnel* to require contract managers to undertake a review of the contractor's performance prior to determining whether to extend their allowable hours.

Recommendation 7:

The Chief Executive of the Division of Local Government should furnish a copy of this report to the Independent Commission Against Corruption for its information.

Recommendation 8:

The Division of Local Government should conduct a further full Promoting Better Practice review of Wyong Shire Council within the next 12 months.

Recommendation 9:

In conducting future Promoting Better Practice reviews of councils, the Division of Local Government should monitor the following council practices with a view to ensuring compliance with statutory obligations:

- The treatment of the status of temporary contract personnel
- The variation of contracts
- The appointment of temporary contract personnel to identified positions within a council's organisational structure

Recommendation 10:

The Division of Local Government should issue a circular to councils:

- to raise awareness of the issues identified by this investigation,
- to invite them to reflect on their own practices in relation to those issues, and

- to advise them that the Division intends to monitor these practices in future Promoting Better Practice reviews of councils.

Recommendation 11:

In its next review of the *Local Government Act 1993* and *Local Government (General) Regulation 2005*, the Division of Local Government should consider the following issues:

- Whether there is a need for the Act (and/or the Regulation) to provide clearer guidance on what constitutes a contract for services as distinct from an employment contract for the purposes of section 55,
- Whether, in a competitive market for the use of professional, consultancy and other services required for the delivery and maintenance of infrastructure, the current requirements of the Act and Regulation unduly inhibit councils' capacity to compete with other organisations for the use of such services,
- Whether the current tendering threshold of \$150K is appropriate.

3 ANALYSIS

3.1 Background

3.1.1 What are "body-hire" arrangements?

52. "Body hire" arrangements are the arrangements under which the Council engaged persons under short-term contracts or consultancies for the purposes of fulfilling Council's short-term needs for professional expertise.

53. In his letter of 11 June 2008 to the former Department of Local Government, the former General Manager advised that Council had, for a number of years, used what he termed as "body hire" arrangements to provide additional staff resources to fill gaps in the organisation structure where there had been difficulty recruiting permanent employees to carry out short to medium term projects or to deal with increased work load.

54. The former General Manager described the arrangements in the following terms:

These people are selected because of their particular expertise and are paid on an hourly basis (in some cases including travel or accommodation costs), do not accrue leave entitlements and their services can be dispensed with at short notice. They work at Council premises under the control and direction of Council management.

55. The former General Manager maintained the view that such arrangements were employment contracts and as such was not subject to the tendering provisions of the Act. He was ostensibly initially supported in this view by Council's legal advisors, though as will be discussed in more detail below, their advice in this regard was qualified.

56. In a report to the Council meeting of 25 June 2008, "body hire" arrangements were distinguished from contracts for services in the following terms:

A major difference between "Body Hire" and contracted services ... is that a "Body Hire" resource is under the direction of internal staff and for all intents and purposes behaves as an employee of Council ... "Body Hire" are similar to a casual employee and can be 'hired and fired' on an hourly basis. Similar

services provided under a formal contract ... require additional internal resources to administer the actual contract and interface with relevant internal staff to ensure that internal processes and legal requirements are maintained. This type of arrangement also has the increased risk associated with being locked into a potentially unproductive contract for a number of years compared to the flexibility of “hire and fire” under “Body Hire”.

3.1.2 The rationale for “body hire” arrangements

57. In the report to the Council meeting of 25 June 2008, the then Director of Shire Services offered the following explanation of the need for “body hire” arrangements:

The use of ‘Body Hire’ has been essential in making up shortfalls in professional internal staff numbers to undertake key capital works projects. Specialist skills and knowledge are required as much in the pre-construction phase of these projects as in the construction phase. This has resulted principally from increased regulation and development approval process.

In many cases, “Body Hire” is the only option available to address professional staff shortfalls...

58. The report offers a number of specific reasons for making use of “body hire” arrangements, namely:

- An inability to attract full time permanent staff
- An increasing capital works program
- Specific project requirements
- Specific skill requirements
- The benefits offered by “body hire” arrangements

59. In relation to the inability to attract full time permanent staff, the report stated that Council had over the previous five years increasingly been unable to attract and retain professional permanent staff to meet its requirements. It was suggested that this was because local government operates in a constricted

labour market and that there was an industry and Australia-wide skills and labour shortage in a number of functional areas in local government, especially for professional engineers, project managers, development and planning professionals.

60. In relation to the increasing capital works program, the report stated that major components of Council's Management Plan, such as the capital works program, could not be achieved without resorting to the "body hire" of professional staff. Additional resources were required within the organisation to support new and increasing numbers of projects. The more projects and contracts that were established, the more project managers and contract administrators were required to fulfil all of the internal probity and regulatory requirements and to provide an interface with other sections and stakeholders within Council. The report asserted that Council had no option but to "body hire" professional engineers and project managers to enable the completion of the capital works program in the Management Plan. It was suggested that due to the ongoing inability to recruit permanent professional staff, *"this arrangement may need to continue on an indefinite basis if the Management Plan is to be achieved"*.
61. In relation to specific project requirements, the report stated that it had been necessary to "body hire" appropriately skilled and experienced professionals to meet peaks in demand driven by specific large capital works projects such as the Hunter Link pipeline and the Mardi to Mangrove pipeline. The report advised that engagements to meet needs in this area were typically on a fixed term or project duration basis. The spike in professional resources needs of such large and complex projects could not be met by internal permanent staff levels. Internal professional staff levels were inadequate to meet base needs, notwithstanding the peaks caused by such projects. To fill these positions, Council had to draw from the limited pool of skilled project managers and contract administrators in Australia. "Body hire" provided the opportunity to expand the professional labour resource to meet the need as and when required.
62. In relation to specific skill requirements, the report stated that it was necessary to engage persons at times with high levels of specialist skills. These

engagements were typically intermittent or short term or project specific and it would either be not possible or not appropriate to create a permanent staff position and recruit a suitably qualified person to deliver those skills.

63. In relation to the benefits offered by “body hire” arrangements, the report described these benefits as follows:

Labour resources can be acquired and terminated (in the event of an unsuitable appointee) at short notice. This provides maximum responsiveness to changing circumstances in the organisation that create the need to increase or decrease labour resources. This has been a major factor in the ability of Council to quickly ‘gear-up’ with appropriately skilled resources for projects such as the Hunter and Mardi to Mangrove pipeline projects and initiate route investigations and other pre-construction activities for the project. Trying to recruit part-time or casual staff to meet the need through Council’s normal processes would take at least three months, assuming that such an exercise would be successful, which in the present market is very unlikely.

3.1.3 An overview of the “body hire” arrangements

64. In the period between 14 January 2007 and 5 August 2010 (‘the relevant period’), Council has been a party to 68 separate contracts under what it has termed “body hire” arrangements. Each contract and its key attributes are listed in the table which appears in the Appendix to this report.
65. The earliest of the contracts in force during the relevant period commenced on 2 September 2005. As of 15 August 2010, duties were still being performed under 16 of the contracts. All of these engagements have since been terminated.
66. Total expenditure under all 68 contracts, including GST was \$17,813,449.
67. Most contracts had a relatively short duration. In 30 cases, duties were performed over a period of less than a year. In 20 cases, duties were performed over a period of between 1 and 2 years. In 13 cases duties were performed over a period of between 2 and 3 years. In 3 cases, duties were performed over a period of 3 years. In 2 cases, duties were performed over a period of more than 4 years.

68. The 68 contracts in force during the relevant period involved a total of 26 separate contractors. Council engaged most of the contractors on a number of occasions. One contractor was engaged to perform duties under 8 separate contracts, another under 6 separate contracts. Two contractors were engaged under 5 separate contracts. Five were engaged under 4 separate contracts.
69. In 52 cases the contractor engaged under the "body hire" arrangement was an incorporated entity. In 8 cases the contractor was a trust. In the remaining 8 cases, the services were provided by a person operating as an independent contractor with an Australian Business Number (ABN) (and in 2 cases, operating under a business name) supplying consultancy services.
70. In some cases, a number of persons were engaged to perform duties under a single contract. In one case one person performed duties on behalf of two different contractors. In some cases persons engaged under several contracts performed duties under the contracts concurrently.
71. The initial approved value of 41 contracts excluding GST was less than \$100K. In 20 cases, the initial approved value of the contract including GST exceeded \$100K. In the case of 7 contracts, the initial approved value of the contracts including GST was \$150K or higher.
72. In 34 cases, the total value of expenditure under contracts, including GST, exceeded the \$150K tendering threshold. In 10 cases, the total value of expenditure under the contract including GST was between \$150K and \$250K. In 16 cases, the total value of expenditure was between \$250K and \$500K. In 5 cases, the total value of expenditure was between \$500K and \$1M. In 3 cases, the total value of expenditure exceeded \$1M.
73. In 52 cases, the contractor was appointed directly without the benefit of a competitive process. In 13 cases, the contractor was appointed from a prequalified list of contractors established by Council, (*CPA/95093 – Provision of Temporary Professional Services – Skilled Engineering Personnel*). This is discussed in more detail below. In 3 cases, the contractor was appointed under a standing contract established by the State Contracts Control Board, (*Contract 025/755 – Temporary Professional, Technical and Industrial Staff*). All three

contracts exceeded the \$150K threshold but were exempt from the tendering requirements of the Act by virtue of the fact the contractors were appointed from a State Contracts Control Board contract. This is discussed in more detail below.

74. All but 15 contracts were varied or extended. 31 contracts were subject to two or more variations. Of these, 11 were subject to 5 or more variations. Three of these were subject to 10 or more variations. One contract was subject to 18 variations. In 34 cases, variations involved increments to the value of the relevant contract of \$100K or more. In 5 of these cases, the variations involved increments to the value of the contract of \$150K or more.
75. In the case of 7 contracts, the persons engaged to perform duties under the contract were former employees of the Council. Four former employees were involved.
76. In four cases, contractors were engaged to perform duties in relation to an established position in Council's organisational structure. In three of these cases, the same person was retained. This is discussed in more detail below.
77. As far as I have been able to ascertain, most, if not all of the contractors provided services that could reasonably be characterised as being professional or consultancy services. Twenty-one contracts involved the provision of engineering services. Twenty-one involved the provision of project management services. Six involved the provision of stakeholder management services. Two involved the provision of project management accounting services. Thirteen involved the provision of organisational consultancy services. Three contracts involved the provision of audit services. Hydrology services were provided under 2 contracts. An architect was retained under 1 contract. At least 21 of the contracts directly related to services provided with respect to the delivery of the Mardi to Mangrove pipeline project.

3.2 Regulatory context

3.2.1 Overview

78. Ultimately, the question of whether "body hire" arrangements constituted employment contracts is relevant for the purposes of determining what statutory requirements applied to the arrangements. As described above, the former General Manager maintained the view that "body hire" arrangements were employment contracts and as such were exempt from the tendering requirements under the Act.

79. The relevant statutory requirements that apply to procurement of contracts for services on the one hand and the appointment of employees on the other are outlined below.

3.2.2 Statutory tendering requirements

3.2.2.1 The obligation to tender

80. Under section 55(1) of the Act councils must invite tenders before entering into any of the following contracts:

- (a) *a contract to carry out work that, by or under any Act, is directed or authorised to be carried out by the council,*
- (b) *a contract to carry out work that, under some other contract, the council has undertaken to carry out for some other person or body,*
- (c) *a contract to perform a service or to provide facilities that, by or under any Act, is directed or authorised to be performed or provided by the council,*
- (d) *a contract to perform a service or to provide facilities that, under some other contract, the council has undertaken to perform or provide for some other body,*
- (e) *a contract for the provision of goods or materials to the council (whether by sale, lease or otherwise),*
- (f) *a contract for the provision of services to the council (other than a contract for the provision of banking, borrowing or investment services),*

- (g) a contract for the disposal of property of the council,
- (h) a contract requiring the payment of instalments by or to the council over a period of 2 or more years,
- (i) any other contract, or any contract of a class, prescribed by the regulations.

81. Subsection (3) exempts a number of different types of contracts from the requirement to tender. Of particular relevance to this investigation are the following exemptions:

- *subject to the regulations, a contract for the purchase of goods, materials or services specified by a person prescribed by the regulations made with another person so specified, during a period so specified and at a rate not exceeding the rate so specified.* (Clause 163(1A) of the Regulation prescribes the following persons for the purposes of this exemption: Local Government Procurement Partnership (as of 18 August 2006) and MAPS Group Limited trading as Strategic Purchasing (as of 9 April 2010))
- *a contract for the purchase of goods, materials or services specified by the State Contracts Control Board or the Department of Administrative Services of the Commonwealth, made with a person so specified, during a period so specified and at a rate not exceeding the rate so specified*
- *a contract for the employment of a person as an employee of the council*
- *a contract involving an estimated expenditure or receipt of an amount of less than \$100,000 or such other amount as may be prescribed by the regulations.* (Clause 163(2) of the Regulation provides that section 55 does not apply to a contract involving an estimated expenditure or receipt of an amount of less than \$150,000). It should be noted that in its *Tendering Guidelines for NSW Local Government*, the Division of Local Government stipulates that the \$150,000 expenditure threshold includes on-costs such as GST.

3.2.2.2 Prescribed tendering methods

82. Section 55(2) of the Act imposes the following requirement in relation to the conduct of tenders:

Tenders are to be invited, and invitations to tender are to be made, by public notice and in accordance with any provisions prescribed by the regulations.

83. The Regulation prescribes two methods of tendering:

- open tendering, and
- selective tendering

84. Open tenders are usually used for the supply of goods and services, property purchase or disposal, minor building works, or where it is inefficient to establish recognised contractor lists through selective tender.

85. Section 55(4) of the Act and clauses 168 and 169 of the Regulation provide for two types of selective tendering:

- Those invited by expressions of interest through public advertisement
- Those invited from a council's list of recognised contractors, which has been prepared following public advertisement.

86. Selective tender lists of recognised contractors are often established where there is a continuing workload in a particular category of work and this workload justifies the cost of setting up and maintaining the list; or in some cases, where innovative solutions are sought.

3.2.2.3 The Tendering Guidelines

87. The Division of Local Government issued *Tendering Guidelines for NSW Local Government* ("the Guidelines") in October 2009 to assist councils to meet their statutory obligations in the conduct of tenders.

88. The Guidelines encourages councils to use tenders in certain additional circumstances other than those required under section 55(1). The Guidelines state that in doing so, councils will be able to provide an assurance of openness and accountability, build anti-corruption capacity and achieve the best value for

money. Of particular relevance to this investigation, the Guidelines encourage councils to use the tendering process in the following circumstances:

- Where estimated expenditure (including on-costs such as GST) is close to the tendering threshold specified in the Regulation (currently \$150,000). The Guidelines further state that the calculation of estimated expenditure should be a critical element of planning and contract scoping.
- Councils should not invoice or order split to avoid tendering requirements as such activities would be contrary to the requirements of a council's charter under the Act.
- Where the aggregated or cumulative cost of a contract conducted over more than one accounting period is likely to exceed the tendering threshold specified in the Regulation.

3.2.2.4 The availability of 'standing contracts'

89. As described above, 'standing contracts' maintained by the State Contracts Control Board, the Commonwealth Department of Administrative Services, Local Government Procurement Partnership (as of 18 August 2006) and MAPS Group Limited trading as Strategic Purchasing (as of 9 April 2010) are exempt from the tendering requirements under section 55(3).

90. During the relevant period, the State Contracts Control Board had a 'standing contract' in place for temporary professional, technical and industrial staff (*Contract 025/755 – Temporary Professional, Technical and Industrial Staff*). As stated above, Council appointed three contractors from this contract during that period.

91. From 20 April 2009, Contract 755 was merged with two other contracts, (*1078 – Administration and Finance* and *881 IT Contracting Personnel*) to establish *Contract 100 – Temporary Staff (Contingent Workforce) Contract*. The contract contains a number of categories of temporary staff including:

- Administrative personnel (including clerical and office support positions) (*Category A*)

- Finance personnel (including accounting and audit professional positions) (Category B)
- Specialist personnel (including communications, media, promotion and public relations) (Category C)
- Professional personnel (including engineers) (Category E)
- Technical personnel (including technical officers) (Category F)

92. The NSW Buy website indicates that the *Contingent Workforce State Contract* offers the following benefits:

- *Best Price Contract – a single price per supplier per role. Small and large NSW Government agencies, NGO's and local councils will all receive the same rates, to help track and control your contingent staff purchasing.*
- *A choice of NSW's top recruitment agencies, with the ability to source and retain quality personnel, at the best government rates, and that will enhance NSW Government as an "employer of choice".*
- *One contract with up-to-date job descriptions that meets a variety of staffing needs, including technical, finance, IT, blue collar, managerial and specialist.*
- *Ability for NSW Government Agencies to negotiate Service Level Agreements for value added services such as consolidated invoicing, permanent recruitment services, induction services, and HR Consultancy Services.*
- *Full coverage of all NSW regional areas. (This includes Far Western, New England, North West, Northern Rivers, Holiday Coast, Central Western, Riverina, Murray and South Eastern NSW)*

93. Local Government Procurement Pty Ltd is a wholly owned subsidiary of the Local Government and Shires Associations of New South Wales ('LGSA'). Local Government Procurement was formed in 2006 by the LGSA on behalf of its members to create a procurement operation dedicated to meeting the specific needs of Local Government. According to the Local Government Procurement

94. Local Government Procurement has a standing contract in place for engineering and other professional services, (*LGP1208 - Engineering, Planning and Development and Community Professional Consulting Services*). It also has a standing contract in place for temporary employment placements, (*LGP808 - HR Temporary Placements and Associated Services*).

3.2.2.5 Restrictions on the delegation of the decision to accept tenders

95. Under section 377(1) of the Act, councils are amongst other things, precluded from delegating to the general manager or any other person or body, the acceptance of tenders which are required to be invited by the council under the Act. This means that where the council is obliged to tender under section 55, the decision to accept a tender may only be made by the governing body of the council.

3.2.3 Statutory reporting requirements

96. Under section 428(4)(b) of the Act and clause 217(1)(a2) of the Regulation, councils are required to publish the following information in their annual reports:

details of each contract awarded by the council during that year (whether as a result of tender or otherwise) other than:

(i) *employment contracts (that is, contracts of service but not contracts for services), and*

(ii) *contracts for less than \$150,000 or such other amount as may be prescribed by the regulations,*

including the name of the contractor, the nature of the goods or services supplied by the contractor and the total amount payable to the contractor under the contract

3.2.4 Statutory requirements applying to employees

3.2.4.1 Recruitment

97. Under section 348 of the Act, where a council is proposing to appoint a person to a position within the organisational structure of the council for a period of more than 12 months, the council is required to advertise the position. Section 348 provides as follows:

- (1) *When it is proposed to make an appointment to a position within the organisation structure of the council, the position must be advertised in a manner sufficient to enable suitably qualified persons to apply for the position.*
- (2) *If the position is a senior staff position, the requirement of this section is satisfied if the position is advertised at least twice in a daily newspaper circulating throughout the State.*
- (3) *This section does not apply to:*
 - (a) *the re-appointment, under a new contract, of a senior staff member, or*
 - (b) *the appointment of an employee if the term of employment is for:*
 - (i) *not more than 12 months, or*
 - (ii) *two or more periods that together are not more than 12 months in any period of 2 years.*

98. Section 349 requires councils to appoint persons to positions within the council on merit. Section 349 provides in part:

- (1) *When the decision is being made to appoint a person to a position:*
 - (a) *only a person who has applied for appointment to the position may be selected, and*
 - (b) *from among the applicants eligible for appointment, the applicant who has the greatest merit is to be selected.*

(2) *The merit of the persons eligible for appointment to a position is to be determined according to:*

(a) *the nature of the duties of the position, and*

(b) *the abilities, qualifications, experience and standard of work performance of those persons relevant to those duties.*

99. Section 351 allows temporary appointments to be made in certain circumstances. Section 351 provides as follows:

(1) *If a position (including a senior staff position) within the organisation structure of the council is vacant or the holder of such a position is suspended from duty, sick or absent:*

(a) *the council, in the case of the general manager’s position, or*

(b) *the general manager, in the case of any other position,*

may appoint a person to the position temporarily.

(2) *A person who is appointed to a position temporarily may not continue in that position:*

(a) *if the holder of the position is on parental leave—for a period of more than 24 months, or*

(b) *in any other case—for a period of more than 12 months.*

100. Sections 348 and 349 only apply in cases where a person is to be appointed to a position within the organisation structure of the council and the term of the appointment exceeds 12 months.

101. As noted above, “body hire” contractors were engaged to perform duties in relation to an established position in Council’s organisational structure in only four cases. In three of these cases, the same person was retained. In two cases, the period of engagement exceeded 12 months. In another, it exceeded three years, though it is unclear that the person retained performed duties with respect to the position for the whole period they were retained. These cases are examined in more detail below.

102. Because the persons retained in other cases were not performing duties with respect to established positions within the organisational structure, sections 348 and 349 will not have applied in those cases.

3.2.4.2 Secondary employment

103. Section 353 of the Act imposes restrictions on the ability of council staff to undertake secondary employment. Section 353 provides as follows:

- (1) *The general manager must not engage, for remuneration, in private employment or contract work outside the service of the council without the approval of the council.*
- (2) *A member of staff must not engage, for remuneration, in private employment or contract work outside the service of the council that relates to the business of the council or that might conflict with the member's council duties unless he or she has notified the general manager in writing of the employment or work.*
- (3) *The general manager may prohibit a member of staff from engaging, for remuneration, in private employment or contract work outside the service of the council that relates to the business of the council or that might conflict with the member's council duties.*
- (4) *A member of staff must not engage, for remuneration, in private employment or contract work outside the service of the council if prohibited from doing so under subsection (3).*

3.2.4.3 Other statutory requirements that apply to council employees

104. Where applicable, councils are also required to comply with the requirements of the *Local Government (State) Award 2007* ('the Award').

105. In addition to this, as with other employers, councils are required to comply with a range of other statutory obligations including those that relate to:

- 'Pay as You Go' withholding with respect to income tax,
- the payment of superannuation contributions and

- the payment of workers compensation premiums.

3.3 Procedural context

3.3.1 Procurement Policy

106. Council's Procurement Policy, which applied for most of the relevant period, was adopted on 16 April 2007.

107. The scope of the policy is described as follows:

This Procurement Policy applies to all procurement processes and activities undertaken by Council, including purchasing, ordering, tendering, contracting and disposals. It applies to all types of goods and services but does not apply to real property acquisitions and other non-procurement expenditure, such as sponsorships, donations and employment contracts.

108. The policy stipulates that procurement decisions must be made by an officer with a delegation limit sufficient to cover the value of the procurement exercise. The applicable delegation limits for the relevant staff are outlined below. The policy states that procurement decisions "*shall not be divided or restricted, nor any other process engaged in, for the purpose of circumventing delegation limits*". The policy further states that a decision with a value in excess of the General Manager's delegation limit must be made by Council resolution. The policy states that for most exercises, the relevant value, for delegations purposes, is the face value of the contract inclusive of GST. In the case of period contracts, the delegations value is defined as the anticipated total expenditure under the contract.

109. The policy distinguishes between two types of contract variations:

- Discretionary, and
- Non-discretionary

110. According to the policy, discretionary variations involve a decision to increase the scope of a contract and thereby increase the level of financial commitment. The policy states that discretionary variations must be approved by an officer (or Council where the variation exceeds \$150K) with a delegation limit sufficient to

cover the value of the variation. In the case of contract variations, the delegations value is defined as *"the value of the variation being approved. Not the new total contract value."*

111. Non-discretionary variations are described as those that arise in circumstances where the contract price alters due to the application of pre-agreed terms, such as through a price adjustment formula, a measured quantity clause, a latent condition clause or an expense reimbursement clause. The policy states that such variations do not involve a 'decision' to increase the scope of the contract. However, such non-discretionary variations should also be subject to delegation limits up to \$150K in value. Non-discretionary variations over \$150K in value do not need to be approved by Council but must be approved by the General Manager.

112. The policy requires the preparation of contract development plans for the following contracts:

- Contracts with a value that exceeds \$150K
- Contracts involving a public invitation, and
- Contracts of sufficient risk or complexity to warrant a formal planning approach.

113. Contract development plans are required to, at a minimum, document the procurement objectives, risk assessment, funding source, tendering method and evaluation criteria.

114. The policy prescribes a hierarchy of procurement methods based on the value of the contract. The policy provides the following procurement methods for the following contracts:

- Contracts with an estimated value up to \$3K – restricted invitation (1 to 5 firms)
- Contracts with an estimated value of between \$3K - \$50K – restricted invitation (2 to 6 firms)

- Contracts with an estimated value of between \$50K - \$150K – restricted invitation (3 – 8 firms) or public invitation
- Contracts with a value that exceeds \$150K – public invitation.

115. The policy provides some flexibility in the application of the prescribed procurement processes. It suggests that in some cases, such as where it may be necessary to test assumptions in the broader market, it may be appropriate to invite more than the usual range of offers. In other cases, such as where there is a limited market, it may be appropriate to invite less than the usual range of offers. The policy requires that where circumstances make it advantageous for Council to invite more or less than the standard range of firms, the justification should be documented and approved by a delegated officer on the level above the delegated officer who would normally be expected to approve the contract.

116. Invitations in excess of \$50K in value of a complex nature are required to be made in writing. Invitations are required to detail Council's requirements, the evaluation criteria, the closing time and instructions for submitting offers. Subsequent clarifications are required also to be made in writing to all participants.

117. Where the estimated value exceeds \$1K, offers are required to be made in writing. Offers made in response to a public invitation or for a contract with an estimated value that exceeds \$150K must be received via the formal tender box process regardless of whether the statutory tendering provisions apply to the contract.

118. The policy requires offers to be evaluated by an evaluation panel. Evaluation panels may include non-staff members such as consultants or client representatives but must include at least one staff member. The policy prescribes the membership of evaluation panels by reference to the estimated value of the contract as follows:

- Contracts with an estimated value up to \$50K – one member
- Contracts with an estimated value of between \$50K - \$150K – two members

- Contracts with a value that exceeds \$150K – three members, one of whom should preferably be a person who does not report to the manager overseeing the procurement exercise.

119. Contract recommendations over \$150K are required to be independently reviewed by a Council officer who is separate to the evaluation panel.

120. The policy requires all communications with suppliers, contractors and tenderers to be in writing. Where this is not practicable, file notes or formal minutes are required to be recorded.

121. For contracts with an estimated value in excess of \$150K, the following events are required to be reported to Council:

- The early termination of the contract (including circumstances, reasons and consequences)
- Emergency procurement exercises (including circumstances, reasons and consequences)
- When the cumulative value of variations exceed the contingency amount set by Council.

122. The policy appears to treat common use government procurement arrangements or standing contracts established by the State Contracts Control Board, Local Government Procurement or MAPS as a last resort option to only be used where Council does not have its own procurement arrangement.

123. In April 2009, draft amendments were made to the Procurement Policy. The proposed amendments appear not to have been subsequently adopted. The more significant amendments proposed include the following:

- The dollar thresholds against which delegation limits and other procedural requirements are set are expressed to be exclusive of GST. This is inconsistent with the principle expounded in the Division's Tendering Guidelines that the estimated value of contracts is to include on-costs such as GST.

- The amendments distinguish between contracts awarded by Council and contracts awarded under staff delegations in prescribing procedures for the variation of contracts. For contracts awarded under staff delegation, (ie those with value less than \$150K excluding GST), under the proposed amendment, staff may approve variations up to the value of their delegation limit. However, variations to such contracts under staff delegation may only be made to the extent that the total contract value remains less than \$150K (excluding GST). Where staff awarded contracts exceed, or are expected to exceed the \$150K limit, then such contracts and variations are to be reported to Council. In reporting to Council, contingency funds are to be sought where necessary to cover expected or possible future variations. Where reporting such contracts and variations to Council, the report is to list all variations with associated explanations and the need or otherwise of additional contingency funds.

124. The policy is supported by a suite of business rules, procedures and document templates. The procedures that relate to the management of contracts for professional and consultancy services are examined in detail below.

125. *Procurement Procedure 101: Contract Development* sets out the procedures to be followed in the procurement process. The procedure is expressed to apply to "all contract development exercises". The procedure is to be used by the contract manager, (ie the person responsible for developing the contract). It prescribes the procedures and templates to be used over 5 stages of the procurement process:

- Planning the exercise, (including the registration of the contract and the preparation of a contract development plan)
- Inviting tenders, (including drafting and issuing the request for tender ('RFT') documents and capturing them on the document management system)
- Receiving tenders, (including opening, registering and capturing tenders)
- Selecting a tender, (including convening an evaluation committee, evaluating offers, undertaking financial and referee checks, preparing an evaluation

report and actioning to the appropriate person or body for approval, being in the case of contracts under \$150K, an officer with an appropriate purchasing delegation and in the case of contracts over \$150K, the Contract Services Coordinator, the Director and then Council)

- Executing the contract, (including completing an instruction to raise a contract to be actioned by the senior purchasing officer, preparing a letter of acceptance and advising unsuccessful tenderers in writing and where the contract value exceeds \$150K or where the contract documentation is particularly complex, creating a bond copy of contract documentation)

126. Council's contract development procedures are supplemented with a procedure for the conduct of the expressions of interest phase of the tender process where a selective tendering method is used (*Procurement Procedure 103: Contract Development – EOI Phase*).

127. Since this investigation has commenced, Council has adopted a procurement procedure that specifically applies to temporary contract personnel (*Procurement Procedure 150: Contract Development – Provision of Temporary Contract Personnel*). It would appear that this was initially developed in connection with the tender process for the CPA/166101 contractors list which is discussed below. This procedure is examined in detail below.

3.3.2 Delegations

128. As of 16 November 2009, the General Manager had the following delegations which are relevant to this investigation:

- *The exercise of all discretionary functions which Council is capable of delegating and is not statutorily prohibited from doing, but excluding any function which may, by resolution of Council or direction of the Mayor be reserved to Council.*
- *Sign orders to engage consultants, obtain quotations and authorise the purchase of goods, works and services to the limits authorised in the Manual of Standard Procedures – Purchasing.*

- *In accordance with the provisions of the Local Government (Tendering) Regulation 1999, determine whether tenders are to be called by open tender, or selective tender after advertising for expressions of interest or selective tendering from recognised contractors.*
- *In accordance with the adopted procedure appoint consultants and/or firms/persons to contractual positions to undertake functions or arrangements approved by budget and/or created for particular purposes.*
- *Purchase goods, works and services in accordance with the requirements of the Purchasing Manual and the following monetary limits (excluding GST)*

Limit of authority for any one purchase

\$150,000.00 or such greater sum as may be necessary to purchase goods and services for works already approved by Council where such goods or services are purchased pursuant to the provisions of the Local Government Act 1993

All capital and consumable items

129. The Director Shire Services had the following delegations:

- *In the role of Superintendent of Contracts authorise variations to a contract provided such variations are within funds voted by Council. (NB this appears to primarily relate to construction contracts).*
- *In accordance with the provisions of the Local Government (Tendering) Regulation 1999, determine whether tenders are to be called by open tender, or selective tender after advertising for expressions of interest or selective tendering from recognised contractors.*
- *In accordance with the adopted procedure appoint consultants and/or firms/persons to contractual positions to undertake functions or arrangements approved by budget and/or created for particular purposes.*

- *Purchase goods, works and services defined in the budget within your area of responsibility and in accordance with the requirements of the Purchasing Manual and the following monetary limit (excluding GST): \$150,000.00.*

130. The Manager Contracts and Special Projects had the following delegations:

- *In the role of Superintendent of Contracts authorise variations to a contract provided such variations are within funds voted by Council. (NB this appears to primarily relate to construction contracts).*
- *In the role of Superintendent’s Representative and/or Principle’s (sic) Representative, authorise variations to contracts provided that funds have been authorised.*
- *In accordance with the provisions of the Local Government (Tendering) Regulation 1999, determine whether tenders are to be called by open tender, or selective tender after advertising for expressions of interest or selective tendering from recognised contractors.*
- *Purchase goods, works and services defined in the budget within your area of responsibility and in accordance with the requirements of the Purchasing Manual and the following monetary limit (excluding GST): \$100,000.00.*

131. Senior Project Managers had a delegation to purchase goods, works and services to a value of \$30K excluding GST. Engineers – Contracts and Special Projects had a purchasing authority to a value of \$40K excluding GST.

3.3.3 Contract management procedures

132. During the relevant period, Council had in place a contract management procedure that applied specifically to contracts for professional services (*Procurement Procedure 201: Contract Management – Professional Services*). Given the nature of the services provided under “body hire” arrangements described above, these appear to be the procedures that applied to the management of most, if not all the contracts entered into under those arrangements.

133. The Procedure prescribes procedures and document templates for all aspects of contract management. These include:

- The use of the document management system for capturing of documents relating to the contracting function
- Preparation for contract commencement, (including reviewing contract documents, obtaining certificates of currency for the consultant's insurances, reviewing the consultant's program for providing the services, conduct of a 'kick off' meeting and completing site induction, risk assessment and specific risk assessment checklists and a work site safety inspection.)
- Contract supervision (including the recording of all interactions with the consultant, regularly monitoring and comparing progress against the agreed program of services, and verifying the consultant has completed each stage of services to the Council's satisfaction, particularly where subsequent stages are contingent on the quality of services provided at earlier stages.)
- Variations and extensions, (requires the determination of the value of the variation, preparation of a variation/extension of time letter to be signed by an officer with sufficient delegation for the value of the variation under the officer's 'purchasing' delegation and completion of an 'Instruction to Vary or Extend Contract' signed by an officer with an appropriate delegation and referred to a Senior Purchasing Officer for action.
- Local content verification
- Progress payments (requires review of consultant's payment claim against payment intervals specified in the contract if any, and check of completeness of the claim including required documents submitted, and in the case of complex/high value contracts the issue of a payment certificate issued by Principal's Representative to be processed by Senior Purchasing Officer)
- Finalisation of complex/high value contracts (requires review of contractor's final payment claim to ensure that the contractor has performed all obligations under the contract and the issue of a final certificate to be processed by Senior Purchasing Officer.)

134. It should be noted that the procedures relating to the variation and extension of contracts were amended in October 2008.

135. Since this investigation has commenced, Council has adopted a contract management procedure that specifically applies to temporary contract personnel (*Procurement Procedure 251: Contract Management – Provision of Temporary Contract Personnel*). This is examined in detail below.

3.4 Organisational context

3.4.1 The Contracts and Special Projects Unit

3.4.1.1 Overview

136. The Council has a specialist Contracts and Special Projects Unit ('the CSPU') that formerly operated within its Shire Services Division.

137. The role of the CSPU is to manage projects and contracts on behalf of other units of Council across a broad range of works. The CSPU manages projects considered to be outside the expertise or resourcing capacity of the relevant client unit, and are usually of significant financial value (typically in excess of \$100K). Although the majority of projects undertaken tend to be civil construction works, the CSPU also handles multi-disciplinary projects at any stage from preliminary design or concept phase, through detailed design to construction/completion and handover to the client.

138. The CSPU currently has 51 persons working in it. Of these, during the relevant period, only a small number were permanent staff. As stated above, during the relevant period, the CSPU managed additional workloads through the engagement of temporary professional staff or contracted external companies who had the necessary skills and experience in the required disciplines under "body hire" and other arrangements. The CSPU directly engaged numerous external project managers over the relevant period to assist it in delivering a wide range of capital projects for Council.

139. The most notable example of this is a contract (CPA/94424) that Council entered into with the Department of Commerce – Office of Public Works and Services, (now Department of Services, Technology and Administration) in 2005

to assist the CSPU by providing project management services for approximately \$90 million in capital infrastructure projects. For the sake of convenience, notwithstanding its subsequent change of name, the contractor is referred to as the Department of Commerce below.

140. It should be noted that the Department of Commerce contract was entered into pursuant to a public tender process and was not considered by Council to be a "body hire" arrangement. The contract was expected to be completed in January 2011. This contract is examined in more detail below. Additional projects have since been allocated to the Department of Commerce to project manage. The total value of projects managed by the Department of Commerce is now approximately \$184M.
141. Staff within the CSPU manage CPA/94424. Rather than alleviating the need to engage further "body-hire" contractors, it would appear that CPA/94424 has generated such a need. A report to the Council meeting of 25 February 2009 in relation to "body hire" arrangements made the observation that Council had engaged project co-ordinators to manage the contract and provide a liaison role between the then Department of Commerce and the various internal clients involved in projects managed by the Department. The report noted that these project coordinators were typically consultants engaged to work within the CSPU.
142. The CSPU has supplemented the project management services provided by the Department of Commerce with "body hire" contractors. As of July 2010, of 15 project managers working in the Unit, 8 were "body hire" contractors.
143. The CSPU is also involved in all stages of the contract management of "body hire" contracts. This includes procurement, assessment of payment claims, variations to the contracts, performance assessment through to finalisation of the contracts.
144. In its Operational Plan for 2010/11 to 2014/15, the CSPU contended that the use of temporary contract staff *"ensures that Council's requirements for time, cost, quality and probity are met without the need to engage and accommodate large numbers of in-house staff. This allows short-term peaks in demand to be*

handled for complex project management services." However, the Plan also alluded to the possibility that this strategy may be revisited suggesting that *"alternative staffing models are possible opportunities to be pursued in 2010/11 but are market dependent."*

145. Indeed, notwithstanding this reliance on temporary contract staff, the Plan suggested that one of the strengths of the CSPU lay in the *"experience of the permanent professional and support staff currently employed within the Unit. This broad range of experience means that technical problems can be assessed and solutions sought either in-house or externally in an effective manner. The Unit is also able to review solutions put forward by contractors and external consultants more objectively, and in many cases ensure that the most appropriate results are adopted."*

146. However, the Plan suggested that one of the weaknesses for the CSPU in the job market is *"the low supply of qualified and experienced personnel available to fill positions of temporary project management staff, or to replace permanent staff as they leave. This is a particular issue on the Central Coast and for this Council, which traditionally has offered lower salaries than comparable organisations in the larger metropolitan areas. A further issue is the age of senior staff and necessary replacements in coming years."*

147. The operational plan identified this as a corporate risk. The Plan indicated that the CSPU intended to address this risk by meeting part of its staffing needs through recruiting less experienced staff and developing their skills through *"appropriate training, skills development and motivation"* to become more experienced project managers and to *"develop new staff into senior positions through appropriate training, skills development and motivation."* The Plan also indicated an intention to investigate the feasibility and implement the engagement of additional project managers on contract. The plan appeared to imply this would be done by the recruitment of additional staff.

148. These alternative staffing strategies were explored further by the CSPU's Manager through a review he undertook of the CSPU's staffing needs in late 2009. The outcome of this review is examined in more detail below.

3.4.2 Contract Systems Coordinator

149. The position of Contract Systems Coordinator was created in 2007, but the position was not filled until March 2008.

150. The role of the Contract Systems Coordinator was to ensure that all Council contractual arrangements are administered from commencement to finalisation in a manner consistent with approved policies and procedures. The position existed outside the Shire Services Division and reported directly to the Manager Governance and Administration.

151. According to the position description, amongst other things, the Contract Systems Coordinator undertook the following functions:

- oversight and reporting on all existing and new contracts from the tender stage through to finalisation of the contract
- design, implementation and monitoring the processes for the various stages of contracting conducted by Council including providing support and guidance to the initiating section
- providing advice at the tender development and contract preparation stages to ensure that the Council's position was not adversely impacted by the wording of the contract or the arrangements under the contract.
- reviewing recommendations pertaining to the award of contracts arising from public tender processes
- in conjunction with Internal Audit and the various user sections, conducting ongoing audits of contractual arrangements to ensure that they were meeting the Council's desired standards and taking appropriate corrective interim actions as required to minimise Council's exposure
- training sectional staff on all aspects of contract management
- providing on a scheduled basis contract management reports to Council, Senior Management and contract owners

- developing and maintaining supporting policies and procedures and contract document templates for a wide range of contract based procurement activities
- to proactively identify opportunities for costs savings and reducing exposures to Council through improved contract terms and conditions, negotiation of rates, greater utilisation of buying power groups, expert input and challenging the need for the expenditure
- ensuring that the tender and contract documents are prepared in a manner that meets statutory requirements
- to serve as a preventative mechanism for fraudulent activity in respect of contractual and service arrangements entered into by Council

152. According to the position description, one of the functions of the Contract Systems Coordinator was described as follows:

A considerable proportion of Council's annual expenditure is for services that have not been through the tender and contract process. The incumbent will need to review the arrangements that have been put in place for these services to ensure that they have been established in an appropriate and cost effective manner.

153. However, it would appear that scrutiny of such contracts by the Contract Systems Coordinator was limited by Council's contract development procedure. Step 3 of Stage 4 ('Selecting a Tender') of *Procurement Procedure 101: Contract Development* only required the referral of contracts exceeding the \$150K tender threshold to the Contract Systems Coordinator.

154. Asked in the Notice what role the Contract Systems Coordinator had in the review of "body hire" contracts, Council advised in its response that as all of the "body hire" contracts were initially raised for amounts under \$150K, they were not reviewed by the Contract Systems Coordinator.

155. After the commencement of this investigation and following the appointment of the current General Manager, Council undertook a service delivery review which resulted in the substantial changes to Council's organisational structure referred

to above. Consistent with a recommendation of the Deloitte review (referred to below), one of those changes was to co-locate procurement and contract functions within one service unit to allow for a more centralised approach to procurement and contract management. In its submission to the draft of this report, Council advised that there is currently no position titled "Contract Systems Coordinator" in the organisation structure of the Council, though this is currently under review.

156. The audit function formerly exercised by the Contract Systems Coordinator is currently exercised by Council's Internal Auditor and its external Auditors.

3.5 Meeting Council's professional staffing needs

3.5.1 Overview

157. Over the past five years, Council has been confronted with the challenge of having to deliver a significant number of large infrastructure and other capital works projects. A memorandum dated 27 October 2005 prepared by the then Director of Shire Services, and the then Manager, Contracts and Special Projects, with respect to the CPA/95093 contractors list (which is discussed in more detail below), identified 30 projects with a value in excess of \$200M to be undertaken and completed over the following five-year period.

158. A memorandum prepared by the then Director Shire Services two years later, on 18 December 2007, with respect to the CPA/130159 contractors list (which is also discussed in more detail below), identified 20 projects from the earlier list due to be undertaken and completed over the following 3 year period. The value put on these projects in the memorandum was in excess of \$300M.

159. Five years later, the infrastructure delivery program faced by Council appears to remain just as challenging. A memorandum prepared on 16 December 2009 by the then Director Shire Services and current Manager Contracts and Special Programs with respect to the CSPU's future staffing needs indicated that during the 2009 to 2013 period, the number of projects managed by the CSPU was anticipated to vary between 55 and 96 projects per annum with project values ranging between \$25M and \$100M. These figures excluded the Mardi to Mangrove Pipeline Project. The memorandum stated that the project workload

was expected to peak during 2009/10 and 2010/11 with 96 and 77 projects respectively.

160. The 2005 memorandum outlined the following strategy for obtaining the staff resources required to deliver these projects over the ensuing five year period:

It is proposed that the above projects be managed using a combination of internal Contracts and Special Projects staff resources and externally sourced project management providers including those to be sourced through the recently closed tenders for CPA 94424 – The Provision of Project Management Services for the Delivery of Capital Works (the Department of Commerce contract)...

Whilst award of the Project Management Services contract will relieve internal staff from much of the detailed management of the targeted projects, the administration of the Project Management Services Contract will itself absorb a significant proportion of existing internal staff resources. Given the extent of the other projects, (i.e. those not included in the scope of the Project Management Services contract), existing staff resource levels will not be sufficient to guarantee delivery of the entire project programme within the required time frames.

It is therefore proposed to further augment existing internal staff resources with externally sourced contract staff on a temporary or casual basis.

161. As the 2005 memorandum anticipated, Council has sought to augment its existing internal staff resources to deliver its capital works program over the last five years by a number of means:

- Through contracts for project management and other professional services entered into following a formal tender process
- Through the establishment of prequalified lists of professional service providers ('contractors lists')
- Through "body hire" arrangements
- Through recruitment of permanent or temporary staff

- Through the establishment of 'cadetships' to develop professional staff internally.

162. The implementation of these strategies is examined in detail below.

3.5.2 Formal tenders for professional services

163. Council has, on at least two occasions over the last five years, procured project management and other professional services by way of a formal tender process. These were as follows:

- CPA/94424 – Provision of Project Management Services to Deliver Capital Works, (the Department of Commerce contract) and
- CPA/130386 – Professional Engineering Consulting Services – Mardi to Mangrove Creek Link

164. CPA/94424 related to the provision of project management services with respect to 16 separate projects over a five-year period. Under the contract, the project manager was obliged to:

- Provide all necessary resources, including managerial, technical and administrative personnel and office accommodation
- Establish office accommodation within the Wyong Shire boundaries
- Nominate key personnel at time of tender and not change key personnel without the approval of Council.
- Provide the services in accordance with Council's established procedures and processes, including the Procurement Manual and associated standard templates.

165. A Request for Tender (RFT) was advertised in late July and early August 2005. Tenders closed on 1 September 2005. 9 tenders were received. Tenders were assessed by a three member evaluation panel. A report on the tender went to the Ordinary Council meeting of 14 December 2005. Council unanimously resolved to accept the recommendation made in the report, resolving as follows:

1 That Council accept the tender of the NSW Department of Commerce in the lump sum amount of \$6,360,777.00 (excluding GST) or \$6,996,855.00 (including GST) for Contract No CPA/94424 for the Provision of Project Management Services to Deliver Capital Works.

2 That Council approve a contingency amount of \$700,000.00, representing approximately 10% of the tender amount, to provide for any unforeseen additional works that may become necessary during the course of the works.

166. CPA/130386 related to the provision of professional engineering consultancy services for design through to implementation of the Wyong River to Mardi Dam and Mardi Dam to Mangrove Creek Dam links. Design, approvals, supply and construction were key project delivery elements for which Council did not have the in-house expertise or resources available to deliver. Accordingly, it was resolved by the Project Control Group to outsource these elements of work, and to resource other elements of work in-house as much as possible. The professional services to be provided under the contract included the design and approval aspects of the relevant Transfer System Components. The contractor was also required to undertake construction contract documentation and the tendering, supervision and administration of physical works contracts for construction/installation of contract packages for the project.

167. Tenders were sought by way of public invitation in August 2007. As well as advertising in a metropolitan and local newspaper, an advertisement was placed on e-Tender. The advertised closing date was 4 October 2007. This was extended to 11 October 2007 during the tender period to allow additional time for tenderers to consider reports that had become available from ongoing investigations and updates to project specifications. Six tenders were received. Tenders were assessed by a tender evaluation panel comprising of 3 persons. A report on the tender went to the Ordinary Council meeting of 12 December 2007. Council unanimously resolved to accept the recommendation made in the report, resolving as follows:

1 That Council accept the tender from GHD in the:

- a lump sum amount of \$3,874,350.00 including GST (\$3,522,136.36, excluding GST); and*
- b schedule of rates (inclusive of provisional sums) estimated total amount of \$2,664,574.00 including GST (\$2,422,340.00, excluding GST).*

2 That Council approve a contingency amount of \$652,000 including GST (\$592,727.27, excluding GST), representing approximately 10% of the contract value, to provide for any unforeseen additional works that may become necessary during the course of the project.

3.5.3 Attempts to establish prequalified lists of contractors

168. Council has sought to establish prequalified lists of contractors ("contractors lists") for the provision of temporary professional services on three occasions in the last five years. The relevant contractors lists are as follows:

- CPA/95093 – Provision of Temporary Professional Services (October 2005)
- CPA/130159 – Provision of Temporary Professional Services (December 2007)
- CPA/166101 – Provision of Temporary Professional Services (December 2009)

3.5.3.1 CPA/95093

169. Tenders were called with respect to CPA/95093 for the purposes of establishing a prequalified list of professional service providers. A memorandum prepared by the then Director of Shire Services and then Manager Contracts and Special Projects dated 27 October 2005 indicated that the contractors list was not intended to replace the formal statutory tender process for major professional services and consultancy contracts with a value exceeding \$150K. Rather, it was intended that appointments would be made from the contractors list for short term contracts with a value below \$150K. The memorandum explained the rationale for the establishment of the contractors list in the following terms:

Traditionally, professional or consultancy services of a significant nature in terms of resource input, time and/or cost have been procured through a tendering process conducted under the Local Government Act. It is not proposed to change that practice for significant professional or consultancy engagements.

Where the services are of a minor nature in terms of resource input, time and/or cost, usual practice is to procure them in accordance with Council's internal purchasing policies. Generally, that entails obtaining at least three competitive quotes and the vetting of offers to ensure that the preferred provider has in place appropriate OH & S systems and public liability, professional indemnity and Workers Compensation insurances. That process can often be time consuming for Council and the provider.

In order to streamline the process for minor or short term engagements of specialist professional service providers it is often beneficial to have available a predetermined panel of service providers, of known qualification, skill and experience, from which appropriate selections may be made at predetermined rates. Such systems are already employed in the case of casual plant hire and the engagement of trade contractors for works of a minor nature.

Accordingly, in an effort to establish a panel of suitably qualified, skilled and experienced professional service providers that can be called upon, at short notice, to assist in the delivery of the capital works programme, public tenders have been invited for the provision of professional services.

170. The Request for Tender was advertised in metropolitan and regional newspapers. Tenders were specifically sought for those disciplines considered to be the most essential in assisting in the successful delivery of Council's capital works program. However, applicants of any other professional discipline that considered they could offer services that might be of value to Council were also encouraged to submit a tender.

171. Council received tenders from 56 firms nominating a total of 409 personnel. Tenders were evaluated by two staff members from the CSPU. Tenders were initially sorted and categorised on the basis of the type of service being offered.

Those tenderers that offered personnel in multiple categories were listed in each category applicable.

172. Tenders were then subject to two levels of culling to reduce the number of tenders to be assessed in detail to a manageable number. The first cull was made on the basis of those tenderers that could not (or expressed an unwillingness to) meet the specified requirements in terms of Public Liability, Professional Indemnity and Workers Compensation Insurance (or, in the case of sole traders and partnerships, Income Protection Insurance). Only one tenderer was eliminated as a result of this cull.

173. The second cull involved the elimination of any tender that met any following criteria:

- It was the sole tender in a particular service category and therefore could not be competitively assessed against other tenders offering similar services.
- The service offered was one for which there was no realistic expectation of being required during the contract period, e.g. railway engineering services.
- The service being offered was not of a recognised professional nature, e.g. administrative support services.
- The tenderer was unable to nominate the identity, qualifications, skills or the experience of the personnel being offered.

174. Six tenderers were eliminated as a result of this cull. The remaining 49 tenderers were then ranked within the various categories on the basis of the rate offered for each of the personnel nominated. Within each category, final selection of tenderers for inclusion on the list of prequalified service providers was made on the basis that a minimum of 4 and a maximum of 12 of the most competitively priced suitably skilled personnel was available.

175. The memorandum observed that the list of recommended tenderers provided Council with a selection of *"296 competitively priced personnel with a wide range of qualifications, skills and experience drawn from 38 firms."*

176. The memorandum estimated the annual or total expenditure that would be incurred on services to be provided under the contract would exceed \$150K per annum and \$450K over the life of the list.

177. Notwithstanding this estimation of the cost and the fact that the list was established by way of a public tender process, the decision to establish the list appears to have been made by the then Director of Shire Services under a delegation and was not subject to a determination by the Council. On my assessment however, the decision to establish the contractors list was not one that was required under the Act to be made by the Council for the following reasons:

- As far as I can ascertain, no consideration passed between the Council and the firms appointed to the list of contractors established under CPA/95093 prior to their being engaged to provide services. In the absence of consideration, there was no contract between the Council and those firms for the purposes of section 55. Rather than being a contract, CPA/95093 would be more accurately characterised as a 'standing offer' or a list of 'recognised contractors' for the purposes of clause 166(c) of the Regulation.
- The restriction on delegation under section 377 that applies to the acceptance of tenders is expressed to apply only to those tenders that are required under section 55 of the Act to be invited by the Council.

178. As a corollary to this, it should be noted that the point at which Council will have entered into a contract with any of the firms on the list of contractors is when Council engaged the contractor to provide services and paid consideration for those services. In such circumstances, the fact that Council had previously appointed a firm to its list of contractors pursuant to a public tender process, will not obviate the need to undertake a separate tender process before entering into a contract with that firm as required under clause 169 of the Regulation where the estimated value of the contract exceeds the statutory tendering threshold of \$150K. It should be noted however that it was Council's intention to only engage contractors under CPA/95093 for contracts that did not exceed \$150K. It was Council's stated intention that where it intended to enter into a contract for professional or consultancy services that exceeded the statutory

tendering threshold, it would do so pursuant to a separate public tender process.

179. Council adopted business rules to inform the engagement, performance management, payment and termination of contractors engaged under CPA/95093. The rules made the following stipulation with respect to the appointment of contractors under CPA/95093:

The services available under the contract are intended to be used for short term, low value, low risk engagements. Please note that any engagement with an estimated value of \$150,000 or more is regulated under the Local Government Act and separate tenders must be invited in accordance with the provisions of the Act. Officers utilising the Temporary Professional Services contract must not engage in order splitting or repeat ordering for the sole purpose of keeping order values below the \$150,000 threshold.

180. In relation to the engagement of contractors from the list, the business rules required amongst other things, the following:

- That staff review the list of available contractors and select those contractors that best suited their needs having regard to their tendered rates and the skills each brought to the proposed project. In particular, the rules required that; *"the selection of a particular Contractor must be made having regard to the fact that each has competitively tendered its services. Therefore selection of a particular contractor must be based on the principle that the preferred contractor brings all the necessary skills to your project at the lowest tendered rate."*
- They recommended that two or more suitable contractors with the necessary skills to perform the required service be selected and ranked in order of preference. The criteria and rationale for the selection and ranking of suitable contractors being considered were to be documented and forwarded to the Departmental Director for approval prior to any offers of engagement being made. If a higher priced contractor was preferred over a lower priced contractor, the reasons for this were to be documented.

- That advice be sought from a designated staff member as to the currency and adequacy of the insurance cover held by any contractors being considered.

181. Once a contractor had been engaged, staff were required to document the offer to the contractor detailing all pertinent conditions of the engagement such as:

- The nature of the services to be provided and the expected outcomes or deliverables
- The hourly rate that is payable
- The location where the services are to be performed
- The anticipated commencement date and duration of the engagement
- The working hours and days that will apply;
- The identity of the person to whom the contractor is responsible;
- Any other special conditions that apply to the engagement such as any training that the contractor will be required to undertake.

182. The business rules required that a staff member be nominated as the contractor's supervisor. The contractor was to be instructed to keep a timesheet detailing the name of the contractor, the daily start and finish times, any meal or other breaks taken and the project number to which the contractor's time was to be charged. The timesheet was to be submitted to the supervising officer weekly, endorsed as "Approved" and a copy scanned into Council's document management system.

183. Under the business rules, claims for payment were to be made by the contractor on a monthly basis. The supervising staff member was to review the contractor's payment claim for completeness and ensure that the times claimed agreed with the timesheets lodged for the payment period. If the payment claim was correct, the supervising staff member was to authorise payment and reassign it via Council's document management system to the Contracts and Tendering Officer for processing.

184. The CPA/95093 contractors list commenced on 3 November 2005. It was intended to operate for the following three years (ie a term of two years plus an option to extend for a year).
185. Thirteen of the "body hire" contracts identified by Council were engaged under the CPA/95093 contractors list. In addition to these, I have identified at least 4 other engagements under CPA/95093 contractors list that were not established under separate contract numbers. However, these appear to have been comparatively minor engagements with values that did not exceed \$150K (though one of these involved payments in excess of \$110K).
186. During the period in which the CPA/95093 contractors list operated, Council engaged 22 other contractors under "body hire" arrangements by 'direct appointment', outside of the CPA/95093 contractors list.
187. Of the identified "body hire" contracts that were engaged under the CPA/95093 contractors list, all but two had initial approved values below \$150K. Two, (CPA/142042 and CPA/108808) had approved values of \$150K excluding GST (\$165K including GST).
188. In relation to CPA/142042, Council appears to have undertaken a competitive selection process as contemplated by the business rules and provided a case for selecting the preferred candidate. However, the offer was not documented as required under the business rules. It is of greater concern that notwithstanding the stipulation in the business rules that long term, high value contracts be procured by way of a separate tender process, the contract appears to have been approved without any objections. This oversight was compounded by the fact that having sought approval for a contract with an estimated value that exceeded \$150K, initial correspondence about the proposal to engage the preferred contractor also suggested *"that by mutual agreement, the contract be extendable by three-monthly increments in accordance with the needs of the project and performance of the incumbent."* The contract was subsequently extended on seven subsequent occasions and, as of July 2010 remained ongoing. As of July 2010, total expenditure under the contract was \$824,763.50. It has since been extended further following the conduct of a tender process. As is discussed in more detail below, the conduct

of the tender has had the effect of 'regularising' the appointment in terms of Council's obligations under section 55.

189. In the case of CPA/108808, Council appears to have requested a brief from only one contractor. Nor was the offer documented as required under the business rules. The instruction to raise a contract sought approval for a contract with a value of \$150K and a \$20K contingency amount. Again, this appears to have been approved without objection. A further 18 variations to the contract have been approved. As with CPA/142042, as of July 2010 it remained ongoing. It has since been terminated. The total value of payments made under the contract as of July 2010 was \$1,861,541.

190. Of the 20 contracts entered into under the CPA/95093 contractors list that had an initial approved value below \$150K, in the case of 7 contracts, expenditure subsequently escalated far in excess of that threshold. The question of the control of expenditure under contracts and the variation of contracts is examined in more detail below.

191. A review of documents held in Council's document management system with respect to the 22 contracts entered into under the CPA/95093 contractors list appears to indicate that staff generally did not rank two or more firms prior to engaging contractors as recommended under the business rules (or that if they did, they did not document it). While in some cases staff documented offers made to contractors as required under the business rules, this did not occur in a majority of cases.

192. Compliance with the requirements that applied to the performance management of contractors and approval of payments under contracts is examined in more detail below.

3.5.3.2 CPA/130159

193. In late 2007, Council undertook another procurement exercise to establish a new list of prequalified contractors under CPA/130159.

194. The CPA/95093 contractors list was to conclude in November 2008. It appears that it was expected that there would be a certain degree of overlap between it

and the new CPA/130159 contractors list. It was proposed that Council write to those contractors engaged under the CPA/95093 contractors list advising them that it did not propose to make any further appointments under that list. Those contractors that had been engaged under the CPA/95093 contractors list were to be continued to be retained under that list until their services had been completed. Subsequent engagements were to be made under the CPA/130159 contractors list. As far as I can ascertain, no such letters to contractors were subsequently issued.

195. A memorandum from the then Director of Shire Services dated 18 December 2007 indicated that, as with the CPA/95093 contractors list, the CPA/130159 contractors list was to be used for short term appointments with a value of less than \$150K. The procurement of professional or consultancy services with a value in excess of \$150K was to be undertaken utilising a formal tender process as required under section 55 of the Act. The memorandum also stated that the list of contractors established under CPA/130159 could also be used for the purpose of utilising the selective tendering method from a list of recognised contractors permitted under the Regulation.

196. As with the CPA/95093 contractors list, the Request for Tender was advertised in metropolitan and regional newspapers. Tenders were specifically sought for those disciplines considered to be the most essential in assisting in the successful delivery of Council's capital works program. However, applicants of any other professional discipline that considered they could offer services that might be of value to Council were also encouraged to submit a tender. Tenderers were invited to submit suitably qualified and experienced personnel at a tendered hourly rate inclusive of travel and accommodation costs for the provision of services to be undertaken at Council premises under the direct management of permanent Council staff.

197. Council received 67 responses offering 629 individuals for engagement across a range of disciplines. Tenders were evaluated by a panel of three staff members using the following threshold and weighted criteria:

- Conformance with the requirements of the tender documents.

- Ability to manage financial and safety risk.
- Tendered rates.
- Quality of the proposed professional personnel offered based on their qualifications, skill and experience

198. The Contract Development Plan anticipated a 6-step evaluation process. The evaluation process was to be as follows:

- 1 Assessment of receipt of tenders.
- 2 Assessment of conformance of tenders.
- 3 Shortlisting of tenders.
- 4 Detailed weighted evaluation of shortlisted tenders.
- 5 Due diligence checks on preferred tenderers.
- 6 Independent review of the tender selection process.

199. Two tenders were rejected at the first step on the basis that they were submitted in a non-compliant manner. A further two tenders were rejected at the second step on the basis that they did not conform to the general tender requirements. Given that tenders were invited on the basis of resourcing projects over a three year period and the difficulty in anticipating Council's actual resource requirements over the period of the contract, the evaluation panel was of the opinion that all the remaining conforming tenders should be progressed to the next stage of evaluation.

200. It would appear however that having progressed all the conforming bids to the fourth step, the evaluation panel found it was unable to undertake a weighted evaluation. In its evaluation report, the panel offered the following explanation for this:

The nature of the tenders, whereby tenderers nominated personnel for engagement without specific detail of which project they might be engaged for rendered meaningless any attempt to weight the offers of individual tenderers or the personnel nominated. Accordingly the Tender Evaluation Panel agreed that

the most appropriate time to undertake a weighted evaluation of appropriately skilled personnel was immediately prior to engagement when the functions and tasks to be undertaken could be adequately scoped and an informed decision as to the suitability of available personnel could be made. The Evaluation Panel determined to progress all conforming tenders to the next stage of evaluation.

201. The fact that the evaluation panel was unable to undertake a detailed weighted evaluation of tenders utilising the selection criteria would tend to indicate that the design of the selection process and the criteria to be used in the evaluation of tenders was flawed.
202. The panel undertook a due diligence check of all conforming tenderers in terms of the adequacy and currency of their worker's compensation and public liability insurance policies, the competitiveness of their submitted rates against current market rates and their ability to perform services that might be reasonably required by Council during the currency of the contract. The evaluation panel was of the opinion that all the conforming tenderers satisfied all the insurance requirements of the tender documents, offered hourly rates that were within the current range of market rates and that their nominated personnel possessed an appropriate level of skills and knowledge to perform satisfactory services to Council within their respective fields of expertise at a reasonable cost.
203. The evaluation process and the panel's recommendations were subsequently reviewed and endorsed by the Manager Contract Systems.
204. It was originally intended that the evaluation panel's report was to be reported to either the Council meetings of 31 October or 14 November 2007. It was intended to simply recommend that a selected list of contractors be approved for engagement. As stated above, the expectation was that the list would only be used for engagements of under \$150K in value. However, in an email of 3 October 2007, the then acting Manager of the Contracts and Special Projects Unit made the observation that if the engagements were under \$150K, approval could be given "internally" under delegation.
205. On 17 December 2007, the then acting Manager Contracts and Special Projects sent an email to the officer who was managing the procurement process

advising that it was to be approved by the then Director of Shire Services as an "internal matter" and was not to go to full Council. A note made in Council's document management system on 12 February 2008 by the officer who managed the procurement process stated that the report to Council was pulled by the former General Manager at the 11th hour who had indicated that he wanted the tenders to be accepted under delegation.

206. It would appear that this request triggered a debate within the senior management about how the CPA/130159 contractors list should be approved. In response to concerns flagged by Council's Internal Auditor, on 31 January 2008, the then Director of Corporate Services sent an email to the former General Manager raising concerns about the failure to report the matter to Council:

I recall a discussion last year on this matter and I believe you indicated that "body hire" arrangements should not be reported to Council as there is a tendering exemption under the Act regarding employment contracts.

After a closer look at the tenderers on this list I recommend that the tender submissions attached here be reported to Council to comply with the Act. Whilst some may be argued that they are "body hire" arrangements I am not confident that this extends to all.

Given that the annual spend on the list of contractors is in the order of \$1.5m to \$2.0m it is my view that to be on the safe side the list should be reported to Council for endorsement. This approach also addresses the potential that an officer's delegations may not extend to cover the size of some of the engagements during the term of the contract.

As a further demonstration of transparency and efficiency I think it would also be preferable to include in the Council Report a commentary about how the contractors will be chosen during the period of the contract to ensure that Council is receiving good value for money.

Please indicate your agreement or otherwise that the list be reported to Council so that I can respond to [the Director of Shire Services'] original request to finalise the matter.

207. At the same time Council's Internal Auditor sought the advice of a probity auditor. The probity auditor raised a number of concerns about the process followed. Of particular relevance to this investigation were the following observations:

4. *The submission purports to defer consideration of relative suitability of most tenders until such time as there is a specific need. This recommendation, if accepted, may represent a failure by Council to make decisions required of it by the RFT. (Again, I haven't seen the specific wording of the RFT.) I note also that, while the submission seeks to defer the decisions, it does not indicate how the assessment will be made at that time.*
5. *The submission is not clear as to whether it is proposed that Council's standard policies/procedures for procurement less than \$150,000 (e.g. 3 quotes to be obtained over a certain specified amount etc.) are to apply to the tenderers included in the selected panel (They should, in my view)*

208. The probity auditor recommended that the *"process be suspended, and that the process be examined closely in order to clarify and resolve the issues referred to here."*

209. On 13 February 2008, the then Director of Corporate Services forwarded the probity auditor's advice to the former General Manager and requested that he agree to the list of contractors being reported to Council so that the matter could be finalised.

210. On 19 February 2008, the then Director of Corporate Services sent an email to Council's Internal Auditor advising that the former General Manager now agreed with the concerns that had been raised:

I have just met with Kerry and discussed the above tender. Kerry now accepts that some of those firms listed could not be regarded as "body hire" and therefore cannot avoid the tender process.

Kerry also agreed that it would be good to understand the decision making process for engaging each contractor at the time to be sure we are getting value for money.

Kerry was going to discuss with [the Director of Shire Services] the possibility of separating out those "body hire" agreements and reporting the balance to Council.

If this is done properly this should address our legal requirements and a documentation of our engagement process should satisfy our probity & efficiency requirements.

211. It would appear that the issues raised with respect to the reporting of the CPA/130159 contractors list to Council were confused with broader questions associated with the status of "body hire" contracts. As a result, the concerns flagged by the then Director of Corporate Services about the CPA/130159 contractors list were somewhat misconceived. As with the CPA/95093 contractors list, the CPA/130159 contractors list was not a contract as such, but a standing offer. As stated above, the stated intention was that the list of contractors compiled under CPA/130159 would be used only for engagements with a value under \$150K or for the purposes of selective tendering. It was intended that engagements with an expected value in excess of \$150K would be made by way of a separate tender process. In such circumstances, there was no requirement under the Act to report the CPA/130159 contractors list to Council. This is not to say however that it should not have been reported to Council.

212. Having said that, in my opinion, the concerns flagged by the probity auditor about the need for the development of business rules or for a further competitive process for the selection of contractors from the list were well founded.

213. However, it would appear that there was an intention to develop business rules long before the probity auditor became involved. An email from the officer who managed the procurement process to the then acting Manager Contracts and

Special Projects dated 2 October 2007 flagged the need to develop such a process:

...we still need to give some thought as to the probity of how individual engagements are made as I don't believe that merely having an approved panel of consultants negates the obligation to ensure that we're getting the best value for money on each engagement.

214. In an email of 14 April 2008, the same officer appeared to flag the possibility of using the rules developed for the engagement of contractors under the CPA/95093 contractors list as a possible model. However no business rules were subsequently developed or approved. In my opinion such business rules should have been developed before tenders were called. On my assessment, the failure to do so, together with the failure to develop and apply a clear and workable evaluation methodology, is indicative of poor planning and a lack of clarity of purpose in relation to the procurement exercise.

215. The CPA/130159 contractors list was never reported to Council and appears never to have been used. It would appear however, that engagements continued to be made under the CPA/95093 contractors list throughout 2008.

3.5.3.3 CPA/166101

216. In mid 2009, Council undertook a further procurement exercise to establish a new list of prequalified contractors under CPA/166101. It should be noted that this coincided with concerns being raised by the Division of Local Government with the Council about its procurement practices in relation to "body hire" arrangements.

217. It was proposed to establish a list of suitably qualified and experienced professional project management, civil engineering, mechanical engineering, electrical engineering, chemical engineering, process engineering, project scheduling, hydrological, land surveying, quantity surveying, geotechnical, archaeological, environmental and urban planning and other consultant service providers from which the Council could select suitably skilled temporary personnel. It was proposed that the list would have a term of two years with a one year option for extension.

218. The tender was advertised in a local and a metropolitan newspaper and on the then Department of Commerce's E- tendering site. In addition to advertising the request for tender, Council sent an email to existing "body hire" contractors advising them of the tender and inviting them to submit tenders. Tenders were to be submitted by 3 September 2009.
219. 137 tenders were received by the due date offering the services of 1550 individuals from a range of disciplines.
220. The Contract Development Plan indicated that the same six step evaluation process would be undertaken as had been proposed in relation to the CPA/130159 contractors list. This was despite the fact that in the case of the CPA/130159 contractors list, the evaluation panel had found that it was not practicable to undertake a weighted evaluation as had been anticipated by the fourth step of the evaluation process that had been proposed for that tender.
221. However, it would appear that no further evaluation of tenders was undertaken beyond the initial assessment of the receipt of tenders and no formal evaluation report was prepared. As with the CPA/130159 contract list, it would appear that the evaluation panel found the evaluation methodology to be unworkable.
222. A report prepared for the Council meeting of 9 December 2009 in relation to the tender offered the following insights into the process followed:

The tender documents provided for non-conforming tenders to be considered at the absolute discretion of Council. All tenders not received late, including non-conforming tenders, will be accepted. Only late tenders will be rejected. Typical non-conformances in the received tenders are matters such as the required level of Professional Indemnity Insurance (\$1 million) is not possessed by the tenderer or the hourly rate does not include travel time, etc. Whether the non-conformance is significant enough to represent unacceptable risk to Council will be dependent on the task, project or duties intended to be performed under the intended engagement and will be assessed at the time of engagement.

.....

It is proposed to undertake a weighted evaluation on possible candidates at the time of engagement. This is the most appropriate time to undertake the assessment as the suitability of the candidate can best be determined when the requirements of the specific task or project are known. The assessment will follow the procedure identified above which identifies the selection criteria (hourly rate, qualifications, skills, experience, availability, referees and local content) to ensure Council receives the best value for money for the services to be provided.

223. The report to Council alluded to the fact that a procedure had been developed in consultation with the Internal Auditor for the appointment of contractors from the list and the administration of contracts. The report stated:

A procedure has been drafted to guide the appointment and ongoing administration of temporary resources under CPA/166101 and other standing contracts available to Local Government for temporary resources managed by SCCB and LGP. The procedure covers matters such as:

- the selection criteria to be used (hourly rate, qualifications, skills, experience, availability, referees and local content),*
- financial limits and authorisation of the engagement,*
- a preferential order of sourcing from CPA/166101 before SCCB contract before LGP contract,*
- appropriate review periods and probity controls around re-appointment,*
- other procedural and contractual measures to ensure an open and transparent process and that Council receives the best value for money.*

224. The procedure referred to in the report is the one Council subsequently adopted with respect to the engagement of temporary contract personnel (*Procurement Procedure 150: Contract Development – Provision of Temporary Contract Personnel*). This is examined below.

225. The report to the Council meeting of 9 December 2009 made the following recommendation (recommendation 3) in relation to the tender for the CPA/166101 contractor list:

That Council accept all tenders for Contract No. CPA/166101 identified as eligible for inclusion on a panel of approved temporary service providers for the provision of temporary professional services for a period of two years with a one year extension option.

226. As described above, on 9 December 2009, the Division of Local Government wrote to Council raising a number of concerns about the contents of the report to the Council meeting of that day. In relation to the portions of the report relating to the CPA/166101 contractors list, the Division raised the following concerns:

- *Recommendation 3 in the report recommends that Council accept all tenders including those that are non-complying. I am concerned that the apparent inability to rank the tenders may indicate that the evaluation criteria and/or process for assessing the tenders may have been inadequate. I am also concerned that a decision by Council to accept all tenders may leave Council open to legal challenge.*
- *It appears that the selection of successful contractors (that is, those which Council will enter into a contract with) will be done by Council staff. This would appear to be inconsistent with the stipulation in the Act which prohibits the delegation of acceptance of tenders.*

227. As stated above, I agree with the view expressed in the first of the above dot points that the process used for evaluating tenders with respect CPA/166101 was deficient.

228. However, the second dot point requires further examination in light of the additional information and evidence identified by my investigation. As with the CPA/95093 and CPA/130159 contractors lists, the CPA/166101 contractors list was not a contract as such, but a standing offer. In my opinion, provided engagements made under the CPA/166101 contractors list had a value under \$150K, they could be made by Council staff with an appropriate delegation and

did not need to be reported to Council. However, any such engagements still needed to be made in accordance with requirements of Council's Procurement Policy or any specific procedure developed for the engagement of contractors under the CPA/166101 contractors list.

229. However, as the second dot point alludes to, notwithstanding the previous tender process for the CPA/166101 contractors list, the Act requires that any contracts with a value exceeding \$150K (that are not otherwise exempt under section 55) be awarded by the Council, (and not by staff) and only following a separate competitive tendering process under section 55.

230. It should be noted that where the stated intention in relation to CPA/95093 and CPA/130159 was that the list of contractors compiled would be used only for engagements with a value under \$150K or for the purposes of selective tendering, no such stipulation was made with respect to the CPA166101 contractors list.

231. In response to the Division's concerns, the former General Manager withdrew the report and Council made no decisions in relation to the matter. The former General Manager subsequently sought further legal advice in relation to the matters raised in the Division's letter. This is addressed further below. Council subsequently wrote to those who submitted tenders with respect to the CPA/166101 contractors list advising them that the tender may not be "actioned".

232. The tender for the CPA/166101 contractors list was subsequently formally abandoned by Council resolution on 26 May 2010.

3.5.4 Attempts to directly recruit professional staff

233. A report prepared for the Council meeting of 9 December 2009 noted that Council only had a small number of permanent professional staff with project and contract management skills. The report noted that some of these were approaching retirement age over the next two years.

234. The report referred to a number of unsuccessful attempts over the last few years to attract suitable project/contract managers through Council's normal

recruitment procedures. The report also referred to two recent recruitment processes conducted in February and November 2009 with respect to project managers' positions.

235. In relation to the February 2009 recruitment exercise, expressions of interest were invited for project and contract managers under a flexible range of engagement options from permanent employment to contract engagement. The proposed salary for the position included a market loading to bring it up to a "market level" and make it more attractive. A large response of 109 submissions was received, and categorised as follows:

- eight applications were received from individual contractors/consultants,
- 24 from companies/organisations,
- 47 from individuals who had no preference for the basis of engagement (full-time, part-time, contract etc),
- 30 which were culled immediately as not acceptable (ie they did not comply with mandatory criteria).

236. The report stated that the skills and experience of many of the applicants were below expectations. After interviews only one permanent senior project manager was recruited through the process. The report stated that more than one person would have been appointed if there were other suitable applicants, but no other applicants offering temporary or contract basis appointment presented apparent benefits over those individuals already engaged by Council. As a result, no other permanent or temporary appointments were made from this process.

237. The report stated that a further recruitment exercise for project and contract managers was undertaken in November 2009. Invitations were called for permanent staff project managers to ascertain the level of interest in the market with a view to engaging a number of new permanent staff project managers to fill core resource needs, which could offset a number of contracted staff. Again the salary had a "market loading" applied to it to make the position more

attractive. Notwithstanding this, it would appear that this process led to the appointment of only one permanent contract manager.

238. The report also referred to the practice, in recent years, of employing a number of permanent junior staff in the position title of "Project Officer". This position was structured as a developmental role leading to the capability to become a "Project Manager". The report also noted however that one of the incumbents in this position had resigned and that the position had been filled by a "body hire" contractor. The report noted that recruitment of a permanent staff replacement was being pursued.

3.5.5 The 2009 review of the CSPU's staffing needs

239. In late 2009, the Manager of the CSPU undertook a review of the future projects and staffing requirements of the Unit. The review included an assessment of the projects being managed by the CSPU, from 2008/09 to 2012/13. Due to uncertainties in the number of future projects provided by other units, a 10% contingency increase was allowed for the next 2 years, and 20% for 2012/13 project numbers.

240. The review found that during the 2009 to 2013 period, the number of projects is anticipated to vary from 96 to 55 projects, with project values varying from \$100K to \$25M (excluding the Mardi to Mangrove pipeline project). With the information able to be provided by client units the project workload was expected to peak during 09/10 and 10/11 with 96 and 77 projects respectively.

241. The review recommended that Council employ an additional two program leaders, three project management staff (including 2 senior project managers and 1 project manager) and two administrative support staff. The review recommended that consultant project managers continue to be used to supplement Council staff during peak workload periods, or when specialist expertise is required and that their numbers be adjusted to suit the variations in project workload. It was proposed that the two senior project manager positions be advertised internally and the project manager position advertised internally and externally. The program leader positions were to be advertised internally as a contract or non-contract position and externally for a 4 year contract position.

242. The review report outlined the following rationale for these recommendations:

d A review of current senior permanent PM staff in the Unit indicates that there is likely to be several retirements in the next five years (e.g. four of the seven Council PM staff are over 55 years old). The proposed additional PM staff would reduce the risk to Council from senior PM staff leaving over the next few years.

e The Unit has employed contract consultants over the last several years to deal with Council’s increasing workload. The Unit currently has nine contract consultants working as SPM, versus Council’s four SPM staff. Council’s PM staff are slightly less expensive than contractors; and therefore, Council should reduce contracted PM as required and give more work to Council’s PM staff.

f It is expected that existing Council staff will apply for and obtain some of the recommended positions. This will create vacancies in the number of permanent project manager positions. To address this, it is proposed to call advertisements to allow a list to be prepared to fill these expected vacancies, as well as to create two new project manager positions.

243. In late 2010, Council undertook a further recruitment exercise with respect to Project Director and Project Manager Positions. This resulted in the recruitment of three Project Directors and six Project Managers on fixed term contracts. This is discussed in more detail below.

3.6 The nature of the “body hire” arrangements

3.6.1 Council’s legal advice

244. As described above, the former General Manager maintained the view that “body hire” arrangements were employment contracts and as such were exempt from the tendering requirements under the Act. However, his advice to the Council meeting of 25 June 2008 indicated that he first formed the view that “body hire” arrangements were “employment contracts” without the benefit of legal advice.

245. A notation made in Council's document management system on 15 August 2007 with respect to CPA/110714, appears to suggest that there was some discussion between a number of Council staff including the former General Manager, the former Director of Corporate Services and Council's Internal Auditor about the status of the arrangements. In response to a question about whether a request for a variation to that contract (which if approved would have taken the value of the contract above \$150K) should be reported to Council, Council's former Director of Corporate Services advised as follows:

...this variation should proceed so long as appropriate delegations have been exercised as this practice is currently in accordance with our purchasing procedures. [The Internal Auditor], Kerry Yates and myself have considered the requirement to tender for "labour hire" arrangements and it was agreed that tendering was not required in accordance with the tendering regs.

246. Additional information provided in response to the draft of this report suggests that the above notation may not accurately reflect the views of the Internal Auditor and the then Director of Corporate Services at the time in relation to the status of "body hire" arrangements. Further information provided suggests that both the Internal Auditor and the then Director Corporate Services had doubts at the time over the treatment of "body hire" contracts as employment contracts and had suggested that legal advice be sought. The concerns raised by the Internal Auditor and the then Director Corporate Service in late 2007 and early 2008 in relation to the reporting of the tender for the CPA/130159 contractors list to Council, which is discussed above, would tend to lend weight to this view.

247. Council appears not to have sought legal advice on the status of "body hire" arrangements until April or May 2008. It should be noted that this followed the Council meeting of 26 March 2008 at which concerns were raised about the Leadership Development Program. At that meeting Council resolved that it be provided with a report on the Leadership Development Program. Amongst other things, Council required that the report provide *"an explanation as to why this program has not been subject to public tender requirements"*.

248. That this was the first time Council had sought legal advice on this question, is of concern. It suggests that Council had formed the view that "body hire"

arrangements were employment contracts without the benefit of any legal advice or indeed any informed analysis of the nature of the relationship. This suggests a reckless indifference to the need for the Council to comply with its statutory obligations in relation to "body hire" arrangements.

249. Council subsequently sought legal advice on a number of occasions from its legal advisors on the status of the relationship established under "body hire" arrangements.

250. In my Notice I requested that the Council provide copies of all legal advice it had obtained in relation to the status of "body hire" contracts as employment contracts **and** its instructions to its solicitors with respect to that advice. While Council has provided copies of the advice that was provided, it has not provided copies of the instructions. The inference I have drawn from this is that the instructions were not given in writing.

251. In their written advice of 8 May 2008, addressed to the former General Manager, Council's legal advisors indicated that the instructions they had been given were as follows:

Your instructions indicate that Council retains (for want of a neutral description) persons for the application of their personal skills and services so as to meet Council's variable demand for labour.

Your instructions reveal that sometimes Council meets its need by retaining persons on a fixed term contract or alternatively, on a contract of indefinite duration, terminable by either party on notice.

It is common for such persons (particularly those with an Australian Business Number (ABN)) to render invoices with respect to the applications of their skills and labour and Council pays on those invoices which, in their terms, delineate Goods and Service Tax (GST) payments.

The question for Council is whether or not these arrangements offend the provisions of the Act with respect to the requirement for tenders.

For reasons which are explored below, Council's ability to operate flexibly in these respects, which is to say in a manner that does not bind Council, on each

*occasion, to a tender process, involves an analysis as to whether or not these relationships are a **contract of service** (employment) or **contracts for services** (independent contracts).*

252. Council's legal advisors offered the following advice:

Although not beyond doubt, in our opinion, the best view of the arrangements, as have been described to us in your instructions, is that Council is entitled to assert the relationships are properly characterised as contracts of service (employment) and not contracts for services (independent contracts).

Consequently, in meeting these labour demands, Council is not, in our opinion, obliged to enter into the tender process.

So stated, it is necessary to explore, in some detail, the basis upon which we hold our opinion, as it is indicated below, the proper legal categorisation of these relationships invariably turns upon the facts in each individual case. In this respect, at least, our opinion must be qualified for reasons which we explore below.

253. Council's legal advisors went on to provide a survey of the common law tests for employment relationships outlining the indicia of employment as identified in the relevant legal authorities. Council's legal advisors further advised that the mere fact that persons engaged by Council under "body hire" arrangements may purport to have an ABN and submit tax invoices requiring payment of a GST uplift did not in itself disturb their view that those persons were employees. However, Council's legal advisors went on to offer the following important qualification to their view:

Prudence would dictate that each individual case should be examined on its own facts to determine whether or not the indicia under consideration lead to the conclusion that the relationship is one of employment or independent contract.

For example, if an individual provides services to Council through the individual's own proprietary limited company and Council remits payments to

that company, then that arrangement is more likely to be categorised as an independent contract.

254. As I demonstrate below, this qualification carried significant implications with respect to the "body hire" arrangements Council had entered into. In most cases, the services were provided to Council through proprietary limited companies and payments were remitted to the companies.

255. It may have been this consideration that prompted Council to subsequently seek clarification of this legal advice. In a letter dated 23 May 2008, Council's legal advisors, in effect, confirmed their earlier advice in this regard:

[In] our earlier advice we noted that if an individual provides services to Council through the individual's own proprietary limited company and Council remits payments to that company (presumably on deduction of tax invoices) then that arrangement is indicative of an independent contract and not an employment relationship.

However, as also noted in our earlier advice no single indicia of the relationship is necessarily determinative. It used to be the case that the obligation to withhold tax on a capital PAYG or PAYE basis was a strong indicator of the relationship of employment. However in recent times the tax legislation itself has legitimised other tax withholding or payment obligations, for example the use of Australian Business Numbers and Goods and Services Tax (GST).

It is not therefore impossible, as a matter of law, that a relationship in which payments are made to a proprietary company with respect to the labour and skills applied by an individual will be categorised as a matter of general law as a contract for services (independent contract). Whilst it is true that on the face of such arrangements the presumption might favour independent contract that presumption is rebuttable depending upon the other indicia relevant to the relationship....

As such each case is to be examined on its facts. Even in circumstances where a proprietary limited company is the recipient of payments under the GST regime the relationship on proper examination may well be one of employment.

In this respect it will be necessary for Council to consider the facts and circumstances surrounding each engagement by having regard to the indicia of the type mentioned [in]...our earlier letter.

256. The letters of 8 and 23 May 2008 from Council's legal advisors were subsequently appended to the report to the Council meeting of 25 June 2008 relating to "Existing "Body Hire" Arrangements".

257. A letter from Council's legal adviser dated 21 December 2009 refers to further advice being provided by them to Council on this or related issues in November 2008 and January 2009. I have been unable to locate these advices.

258. Council subsequently sought further advice on this question from the Local Government and Shires Association ("LGSA"). On 5 November 2009, an officer engaged in Council's Human Resources section sent an email to the LGSA seeking 'urgent' advice on the employment status of persons engaged under "body hire" arrangements. It should be noted that this email was sent shortly before officers of the Division of Local Government attended Council to make enquiries into the issues that have formed the subject of this investigation. The officer provided the following background information in her email:

We employ people who create their own company name and invoice Council under their company name for the payment of their services. These people are typically Project Managers or Engineers.

....

Each of these categories provide services under the following practices:

- *We supply the workplace*
- *We direct the work they perform*
- *They are subject to Council policies and procedures*
- *We provide regulatory training*
- *In some cases (Engineers, Project Managers) we provide the resources. Desk computer etc.*

259. In its response of 6 November 2009, the LGSA provided a similar survey of the common law as had previously been provided by Council's legal advisors. The LGSA provided the following qualified advice:

In respect of council's 'body hire' staff, I would like to make the following observations, bearing in mind that these observations are made vis-à-vis the limited information provided:

- *In our telephone conversation, you mentioned that the 'body hire' staff have absolutely no discretion over when and how the work is performed, ie, that all control is exerted by Council in this regard;*
- *The 'body hire' staff are subject to council policies and procedures;*
- *You also mentioned that the level of integration or involvement of the 'body hire' staff with the rest of council is quite high due to the fact that they are mainly working on- site and are provided with the mandatory regulatory training;*
- *You pointed out that they often remain with council for a number of years working on multiple projects and the arrangement is often of an open-ended nature;*
- *You mentioned that the 'body hire' staff come with their own insurance and they thus bear the risk of any costs associated with their work;*
- *They are not paid any leave entitlements or superannuation contributions;*
- *Whilst most of time, they use their own materials and resources, you acknowledge that they sometimes also use council resources such as desks and computers; and*
- *Finally, the termination of their engagement and task allocation is at the sole discretion of council.*

Based on the information provided, in the Association's opinion, it is likely that a court or tribunal would find that the contracts under which these workers are operating are contracts of service, ie, an employer/employee relationship.

260. As stated above on 9 December 2009, the Division of Local Government wrote to Council raising a number of concerns about the contents of the report to the Council meeting of that day relating to the provision of temporary professional services. In that letter, among other things, the Division flagged concerns about Council's compliance with its statutory obligations with respect to any contractors that may be classified as employees. The Division stated that, *"Council should review whether it and its contractors have complied with their obligations in regard to income tax, payroll tax and superannuation, particularly given Council's apparent ongoing assertion that a number of the contractors and consultants have effectively been employees of Council."*

261. In response to these concerns, Council sought further legal advice about the *"possible deeming of contractors engaged by Council as employees of Council"*. In particular, Council sought advice on the following questions:

- Whether there is any liability to Council arising from engagements with the successful tendering entities/individuals.
- Where there is a potential or actual liability, what actions Council may take to ensure it minimises or removes this liability.

262. In its letter of 21 December 2009, Council's legal advisors advised that Council faced a potential liability arising from its engagements of contractors arising from the fact that its contractors may be deemed to be employees for some purposes. They advised that such liability may relate to matters including remuneration, negligence, superannuation, workers compensation and/or taxation.

263. Crucially for the purposes of this investigation, Council's legal advisors made the following observation about the extent of that liability in the case of incorporated contractors:

Where a contractor is engaged by Council through an interposed entity, there is typically no employment relationship at common law between Council and the individual or individuals performing the work. The employment relationship, if any, exists between the individual and the contractor company.

264. Council's legal advisors added that *"where Council uses labour hire entities to retain workers....the issue of independent contracting does not arise. The workers, in these circumstances, are typically employees of [the] labour hire entity and the issue of categorising them as independent contractors does not arise."*

265. Notes made by the former General Manager on 13 January 2010 and a letter from Council's legal advisors dated 21 January 2010 indicate that Council received further and separate advice from its legal advisors on this issue on 22 December 2009. This advice is not held on Council's file and I have been unable to locate it. The former General Manager's notes and the letter from Council's legal advisers of 21 January 2010 both appear to indicate that this advice related to the tendering processes that led to the retention of persons under "body hire" arrangements.

266. On 18 January 2010, Council retained its legal advisors to provide advice with respect to the following:

- (a) *The proper category (in as much as that is possible) of arrangements whereby persons, firms or corporations provide skills and services to Council;*
- (b) *Further to (a), where Council retains, so called "direct subcontractors" whether such arrangements are employment or independent contracts in order to determine:*
 - (i) *Council's liabilities as an employer;*
 - (ii) *Council's obligation to enter into such arrangements only after a competitive tender in circumstances where the individual contracts have a value exceeding \$150,000.*

- (c) *Reviewing arrangements which might be described as involving "incorporated subcontractors" to ensure they are best categorised as relationships of independence (as distinct from employment) and to advise on the compliance (or not) with tendering obligations in those circumstances;*
- (d) *Reviewing the processes resulting in the engagement of and implementation of labour hire arrangements so as to identify compliance (or not) with Council's tendering obligations;*
- (e) *Further to (d) to focus on the selective tendering processes recognised under the Regulations and in particular Regulation 166 and following, of the Regulations.*
- (f) *Assisting Council in its response to the investigation by the DLG under Division 1 of Part 5 of Chapter 13 of the Act. In particular in advising Council as to how it might best assist the investigators appointed by the DLG in completing their investigation, and to the maximum extent permitted by the law, assisting Council in minimising any adverse consequences;*
- (g) *Assisting Council in identifying for the DLG the patent difficulties that Council has in meeting its labour market needs in a competitive labour market and in circumstances where the Act and the Regulations may be interpreted to constrain Council's ability to compete in an open labour market particularly in circumstances where it must adopt the tender process in order to secure the services of, for example, independent contractors whose tenure may well exceed the regulatory threshold of \$150,000 per contract;*
- (h) *To advise Council in relation to any legal or extralegal issues that may arise incidental to any of the issues canvassed above.*

267. On 3 February 2010, Council provided its legal advisors with a matrix to assist them in their task of categorising persons engaged under "body hire" arrangements. The matrix proposed three categories:

- Individuals who are direct employees of Council
- Individuals who are employees of another entity engaged by Council (including labour hire or recruitment agency, incorporated contractor, or a trust)
- Individuals who are engaged directly by Council (including non-incorporated contractor or a trust where the individual is not an employee of the trust).

268. As far as I can ascertain, the matrix was never populated.

269. On 8 February 2010, Council's legal advisors wrote to Council providing a list of 23 indicia to test the categorisation of independent contractor versus employment. These are outlined below.

270. The file contains no evidence of further communications between Council and its legal advisers in relation to the tasks they were retained to undertake on behalf of the Council and it is unclear whether the advice sought was ever provided by them.

3.6.2 Are "body hire" arrangements employment contracts?

271. The description of "body hire" arrangements provided in reports to Council, advices to the Division and in Council's instructions to its legal advisors suggest that the Council's view that those arrangements were employment contracts was informed by a fundamental misconception. This misconception was reflected in the instructions Council provided to its legal advisors and the LGSA and as a result the legal advice Council has received in relation to this question has to some extent been informed by it.

272. The Council's descriptions of "body hire" arrangements provided in reports to Council, advices to the Division and in its instructions to its legal advisors focuses on the nature of the Council's relationship with the persons engaged under the contracts. For example the report to the Council meeting of 25 June 2008 refers to the fact that persons engaged under the contract are "*under the direction of internal staff and for all intents and purposes behave as an employee of Council*".

273. While many persons engaged under "body hire" contracts may have superficially appeared to be and behaved as employees, it is apparent that in all but eight cases, Council had no contractual relationship with those persons. The relationship with those persons could at best be described as a managerial or supervisory one.
274. Council's contractual relationship in relation to "body hire" arrangements was not with the individuals engaged under the contract but with the entity that supplied the labour or services of those persons under the contract. It is the nature of this relationship that needs to be considered for the purposes of determining whether it was an "employment" relationship, not the relationship with the persons engaged under the contract.
275. As Council's legal advisors stated in their advice to Council of 8 May 2008, there is no simple test for determining whether a contract is a "contract of service" (an employment contract) or a "contract for services". In their advice, Council's legal advisors noted that recent High Court decisions in relation to this question such as *Hollis v Vabu* (2001) 207 CLR 21 and *Sweeney v Boylan Nominees Pty Limited* (2006) 226 CLR 161 require the application of an indicia test.
276. In their advice of 8 February 2010, Council's legal advisors suggested the following indicia to test the categorisation of persons as an independent contractor versus employee:
1. *Is the worker operating a separate business?*
 2. *Does the worker operate through a business name?*
 3. *Does the worker seek payment through an Australian Business Number (ABN)?*
 4. *Does the worker advertise his or her services?*
 5. *Is the worker in a position to declare a profit or loss from the work?*
 6. *Is there an intervening entity (usually a corporation or a family trust) interposed between the worker and Council?*

7. *Has the worker separate workers' compensation insurance (or has the obligation been imposed upon the worker by Council in the arrangements)?*
8. *Has the worker separate public liability or professional negligence insurance (or has that obligation been imposed upon the worker by Council under the arrangements)?*
9. *Do the contractual arrangements oblige the worker to undertake remedial work at the workers' own risk and expense?*
10. *Does the Council direct and control the worker in the performance of the work?*
11. *Are the hours of work set by Council (other than so as to ensure work is undertaken during times work may be performed by others)?*
12. *Is overtime recorded and paid?*
13. *Are penalty rates of pay recorded and paid?*
14. *Is the work paid for in accordance with the Local Government (State) Award or any other industrial instrument?*
15. *Does the worker provide the worker's own tools and equipment?*
16. *Is the worker entitled to perform work for others during the period of the contract or arrangement with Council?*
17. *Can the worker delegate or subcontract the work?*
18. *Does Council have a direct power to suspend or dismiss the worker?*
19. *Does Council hold the worker out as an "employee"?*
20. *Does Council withhold PAYE or PAYG tax?*
21. *Does the Council pay on tax invoices?*
22. *Is the contract expressed to be of employment (contract of service)?*
23. *Is the contract expressed to be independent (contract for services)?*

277. In the Notice I put a number of questions to Council framed with reference to each of the "body hire" contracts designed to elicit information to assist in the identification of each of those contracts as either a "contract of service" or "contract for services". These questions were informed by the relevant common law principles and are consistent with many of the above indicia suggested by Council's legal advisors. Amongst other things, I asked that Council advise with respect to each person engaged under a "body hire" contract:

- Whether a position description was created for the role fulfilled by the person and whether they occupied an identified position in Council's organisational structure
- Whether the person was engaged exclusively by Council
- Who was responsible for complying with statutory requirements in relation to 'Pay as You Go' withholding with respect to income tax, the payment of superannuation contributions and the payment of workers compensation premiums with respect to the person
- Whether Council paid GST with respect to the services provided under the contract
- Who rendered invoices for the services performed under the contract
- Who payments for services performed under the contract were made to.

278. The balance of evidence provided by the Council in response to my questions tends to indicate that all of the "body hire" contracts are "contracts for services". In forming this view I have placed particular weight on the following:

- In 52 cases, the contractor engaged under the "body hire" arrangement was an incorporated entity. In 8 cases the contractor was a trust.
- In the remaining 8 cases, the services were provided by a person clearly operating as an independent contractor with an Australian Business Number (ABN) (and in 2 cases, operating under a business name) supplying consultancy services.

- In every case the contractor rendered an invoice for the services supplied under the contract and payments were made to the contractor, not the person engaged under the contract.
- Council paid GST in relation to every contract
- Council was not responsible for complying with statutory requirements in relation to 'Pay as You Go' withholding with respect to income tax, the payment of superannuation contributions and the payment of workers compensation premiums with respect to any person engaged under the contract
- The terms of the briefs drafted with respect to each of the contractors lists that Council sought to establish for the supply of consultancy and professional services described above expressly contemplated that engagements made from the list would not be an employment relationship. It is not unreasonable to infer from this that Council similarly did not contemplate that engagements of contractors to supply such services outside of these lists would be employment relationships.

279. Council now concedes that the "body hire" contracts were not employment contracts. In the Notice, I asked Council to advise which of the persons engaged under what it termed as "body hire" arrangements it regarded as being an employee of Council for the purposes of section 55(3) of the Act. In its response, Council advised as follows:

Council acknowledges that each "body hire arrangement" person[s] identified [by Council] was a contractor to Council. These were not employees for the purposes of S55(3) of the Act.

280. On my assessment the contracts could be most accurately described as "labour hire" contracts, something that is alluded to by the terminology that Council itself has used to describe the contracts, (ie "body hire").

281. The conclusion that "body hire" contracts were in fact "contracts for services" and not "employment contracts" as previously asserted by Council in turn leads to the conclusion that they are not exempt from the requirements of section 55

of the Act in relation to tendering and that they are subject to the requirements of Council's own Procurement Policy. This in turn raises a number of significant questions about Council's compliance with both statutory and indeed its own procedural requirements with respect to the procurement of those contracts. These questions are examined in detail below.

282. As stated above, Council appears to have first formed the view that "body hire" contracts were employment contracts without the benefit of any legal advice on their status. As stated above, Council did not seek legal advice in relation to this question until May 2008. Even if it were to be accepted that Council was genuine in its belief that "body hire" contracts were employment contracts and thereby not subject to the requirements of the Act and its own Procurement Policy, it would not be unreasonable to expect that, as a matter of appropriate governance practice, it would ensure that persons were nonetheless engaged under those contracts pursuant to an open, transparent and competitive process and that their performance was periodically reviewed. However, as will be demonstrated below, having dispensed with the need to comply with the requirements of the Act and its own Procurement Policy and contract management procedures by designating the contracts as employment ones, it is evident that Council failed to develop or apply *any* process to the procurement and management of "body hire" contracts.

3.7 Compliance issues

3.7.1 The procurement of "body-hire" contracts

283. As "contracts for services", the procurement of "body hire" contracts was required to be undertaken in accordance with the requirements of both section 55 of the Act in relation to competitive tendering and Council's Procurement Policy.

284. As stated above, under section 55 of the Act, Council is required to undertake a competitive tendering process before entering into a contract for services with an estimated value of over \$150K unless otherwise exempt under section 55(3). Council's Procurement policy also required the following in relation to contracts with a value that exceeded \$150K:

- The development of a contract development plan that documents the procurement objectives, risk assessment, funding source, tendering method and evaluation criteria
- Evaluation by an evaluation panel comprising of three persons including one functionally independent person
- An independent review by a person who is not a member of the panel.

285. Of the 68 "body hire" contracts, 7 had an initial approved value of \$150K. Five of these contractors were engaged directly without a public tender process as required under section 55. In two cases, Council undertook a competitive selection process but this did not comply with the formal technical requirements of the Act and Regulation. I have been unable to identify any evidence that a contract development plan was prepared in relation to any of the 7 contracts. In two cases, an interview panel was convened comprising of the number of persons required under Council's Procurement Policy and a number of candidates were interviewed. In the cases of the other 5 contracts, there appears to have been no evaluation process. There is no evidence that the process was independently reviewed in any case as required.

286. Two of the contracts with an initial approved value of \$150K were engaged under the CPA/95093 contractors list. However, as described above, it was never intended that the CPA/95093 contractors list would be used for contracts that exceeded \$150K in value. It was Council's stated intention that such contracts would be only entered into pursuant to a separate tendering process. In one case, Council appears to have undertaken a competitive procurement exercise, albeit one that did not meet the technical requirements of section 55 and the Regulation. In the other case, I have been unable to find any evidence of any competitive procurement exercise.

287. In all but one of these cases, the contract was approved by the then Director of Shire Services. The upper limit of the Director's delegation to approve expenditure was \$150K. The approved value of each of the contracts was \$150K. In the remaining case, approval was granted by the then Manager, Water and Waste. The upper limit of that officer's delegation is not known. In all

but one case, expenditure under the contracts escalated far beyond the initial approved value. In two cases, expenditure under the contracts exceeded \$1M. In the other case, expenditure fell short of the initial approved value.

288. In a further 27 cases, the total value of expenditure under contracts, including GST, escalated from an initial approved value of under the \$150K tendering threshold to a value that exceeded that threshold. In total, 34 of the "body hire" contracts involved expenditure that exceeded the \$150K tendering threshold. The practice of the variation of contracts is examined in more detail below. However, it is pertinent to observe here that Council's failure to comply with its statutory tendering obligations can be attributed to the practice of entering into contracts with an approved value that was below the tendering threshold without undertaking a competitive tendering process and allowing expenditure under the contracts to escalate above the threshold as much as it can to the incorrect characterisation of those contracts as employment contracts.

289. In 17 of the 27 cases where costs escalated above the tendering threshold, the contractor was engaged by direct appointment. In 7 cases, the contractor was engaged under the CPA/95093 contractors list. In none of these cases was a formal tender process conducted or the requirements of Council's Procurement Policy complied with.

290. In 3 of these cases, the contractor was engaged under State Contracts Control Board Contract – 025/755 – Temporary Professional, Technical and Industrial Staff. These contracts were exempt from the requirement to tender under section 55(3). Notwithstanding this, better practice would require that in the interests of obtaining a best value for money outcome, contractors only be engaged under a standing contract following a further quotation process. In two cases Council interviewed the persons proposed by the contractor for placement at the Council prior to their engagement, but this does not appear to have been pursuant to a competitive process. In one case, I have not been able to find any evidence of a further competitive selection process.

291. As described above, Council's Procurement Policy prescribed a hierarchy of procurement processes that were required to be undertaken depending on the estimated value of the contract. On the evidence, it would appear that Council

also failed to comply with the requirements of its own policy in the procurement of services with a value below the \$150K tendering threshold.

292. Under Council's Procurement Policy, contracts with an estimated value of between \$50K and \$150K are required to be procured by way of a restricted invitation of between 3 to 8 firms or by public invitation. It also requires the evaluation of quotes or bids by a panel of two members.

293. Forty-seven of the "body-hire" contracts had an initial approved value that fell within the \$50K and \$150K band (inclusive of GST). Thirty-four of these were directly appointed. Ten were engaged under the CPA/95093 contractors list. Three were appointed under State Contracts Control Board Contract – 025/755 – Temporary Professional, Technical and Industrial Staff.

294. In relation to the direct appointments, it would appear that only one of the appointments was made following a process that arguably complied with the requirements of Council's policy. Appointments made under the CPA/95093 contractors list and State Contracts Control Board Contract – 025/755 – Temporary Professional, Technical and Industrial Staff are discussed separately below.

295. Under Council's Procurement Policy, contracts with an estimated value of between \$3K and \$50K are required to be procured by way of a restricted invitation of between 2 to 6 firms. Fifteen of the "body hire" contracts had an initial approved value that fell within this threshold. Fourteen were engaged by direct appointment and one contractor was engaged under the CPA/95093 contractors list. In only one case was a competitive process used. In 6 cases, expenditure under the contract exceeded \$50K. In one case, (CPA126756), expenditure under a contract with an approved value of \$14K escalated to \$370,301.

296. As stated above, where the contractor was engaged under the CPA/95093 contractors list, subject to the requirements of section 55, the procurement of the contract was required to be undertaken in accordance with the requirements of the business rules that Council adopted for engagement of contractors from the list. A review of documents held in Council's document management system

with respect to the 22 contracts entered into under the CPA/95093 contractors list appears to indicate that staff did not rank two or more firms prior to engaging contractors as recommended under the business rules (or if they did, they did not document it). While in some cases staff documented offers made to contractors as required under the business rules, this did not occur in a majority of cases.

297. It seems apparent that expediency and convenience dictated the award of contracts. Many contracts appear to have been awarded because the contractor had been previously or was currently engaged by Council, was known to the Council or had been recommended by another contractor engaged by the Council. In some cases contracts were awarded to former (and current) Council staff. This is discussed in more detail below. Contractors were engaged on multiple occasions. The 68 contracts were shared among 26 separate contractors. One contractor was engaged on 8 separate occasions and another on 6 occasions. 2 contractors were engaged on 5 occasions. Five were engaged on 4 occasions. In some cases, contractors were engaged simply on the basis that they were available.

298. At first blush, it is not difficult to have some sympathy with the view that in a constrained labour market and confronting an urgent need for specialist professional and consultancy services, it was not unreasonable for Council to go with the contractors it knew and could rely on and who were familiar with Council's projects, needs and operating environment. However, this view carries less weight in light of Council's apparent reluctance to test the market.

299. Flawed though they may have been, the processes followed in relation to the CPA/95093, CPA/130159 and CPA/166101 contractors lists revealed a broader range of professional and consultancy services providers than was utilised by Council. In the case of the CPA/95093 contractors list, Council received bids from 56 firms. In the case of the CPA/130159 contractors list it received bids from 67 firms. In the case of the CPA/166101 contractors list, it received bids from 137 firms.

300. The CPA/95093 contractors list was the only one of these processes to be fully implemented. However, having gone to the trouble of establishing a prequalified

list of contractors, Council appears to have been reticent about using it. During the three years it was in operation between late 2005 and late 2008, only 13 contractors were engaged under the CPA/95093 contractors list. During the same period, Council engaged another 22 contractors outside of the CPA/95093 contractors list by way of 'direct appointment'.

301. In addition to this, during the relevant period, Council was able to draw on the service providers available under the State Contracts Control Board Contract 025/755 – *Temporary Professional, Technical and Industrial Staff* and Local Government Procurement contract LGP1208 – *Engineering, Planning and development and Community Professional Consulting Services*. Despite this, during that period, Council only engaged three contractors from the State Contracts Control Board Contract.

302. By properly testing the market for professional and consultancy services, Council may have been able to identify other contractors who were better placed to meet its specific needs than may have been the case with the small pool of contractors it commonly called on, and at a better price.

303. I have not identified evidence of "body hire" contracts being awarded for improper or corrupt purposes. However, the award of the contracts without the benefit of a documented competitive and transparent process gave rise to a corruption risk.

3.7.2 The variation of contracts

304. As described above, Council's failure to comply with its statutory tendering obligations can be attributed in part to the practice of entering into contracts with an approved value that fell below the tendering threshold without undertaking a competitive tendering process and allowing expenditure under the contracts to escalate above the threshold.

305. All but 15 of the "body hire" contracts were varied or extended. Thirty-one contracts were subject to two or more variations. Of these, 11 were subject to 5 or more variations. Three of these were subject to 10 or more variations. One contract was subject to 18 variations. In 34 cases, variations involved increments to the value of the relevant contract of \$100K or more. In 5 of these

cases, the variations involved increments to the value of the contract of \$150K or more.

306. On my assessment the propensity to vary contracts can be attributed to the following factors:

- Poor or non-existent planning or scoping of engagements
- Open ended arrangements with either poorly defined or undefined outcomes or deliverables
- Poor cost controls
- The ready availability of the option to extend or vary contracts should it be required.

307. As described above, under Council's Procurement Policy, discretionary variations are to be approved by an officer with a delegation limit sufficient to cover the value of the variation. The delegations value is defined under the policy as being the value of the variation being approved not the cumulative total value of the contract. Only variations with a value that exceed \$150K are to be reported to Council under the Policy. *Procurement Procedure 201: Contract Management – Professional Services* requires the preparation of a variation/extension of time letter to be signed by an officer with a sufficient delegation for the value of the variation under the officer's 'purchasing' delegation and completion of an 'Instruction to Vary or Extend Contract' signed by an officer with an appropriate delegation and referred to a Senior Purchasing Officer for action.

308. Proposed amendments to the Procurement Policy drafted in early 2009, sought to limit the capacity of staff to approve variations to contracts. Under the proposed amendments, staff were only permitted to approve variations up to a cumulative value of \$150K. Where a proposed variation took the cumulative value of the contract over \$150K, the proposed amendments required such a variation to be reported to Council. As discussed above, these amendments to the Policy were not subsequently adopted.

309. There is no specific staff delegation to vary contracts other than in the capacity as Superintendant of Contracts, Superintendant's Representative and Principle's Representative. The role of Superintendant appears to have been one that related specifically to construction contracts and therefore has limited relevance to the contracts examined by this investigation. The approval of variations to contracts appears to have been undertaken under the general 'purchasing' delegation.
310. The General Manager's and Director of Shire Service's "purchasing" delegation extended to purchases with a value of up to \$150K. While I have not sighted other Directors' delegations, I have assumed they had a similar 'purchasing' delegation. The Manager Contracts and Special Projects had a delegation to make purchases of up to \$100K. Engineers in the CSPU had a purchasing delegation of \$40K and Senior Project Managers \$30K. As stated above, Council's Procurement Policy permitted the approval of contract variations up to the value of these delegations irrespective of the impact this had on the cumulative value of the contract. Most variations appear to have been granted by these persons up to and including the limit of their delegations. There is one case where an Engineer in the CSPU approved a variation of \$100K which, on its face would appear to have exceeded his 'purchasing' delegation.
311. Contract variations appear to have been approved either to cover specific invoices rendered by the contractor that increased the level of expenditure above the initial approved value of the contract, or to extend the term and approved value of the contract to allow services to continue to be provided and invoiced under it.
312. The approval of contract variations appears in most cases to have been a mere formality. Documentation relating to the approval of variations is minimal and variations appear to have been approved with little scrutiny. Often the only documentation that attended the approval of a variation was a completed 'Instruction to Vary or Extend Contract'. Reasons for the need for the variation to the contract were rarely documented and there appears to have been no formal reviews conducted of the performance of contractors prior to approving extensions to the term of the contract.

313. The ready availability of the option of obtaining an approval for the variation to contracts potentially rendered meaningless the requirement to tender under the Act and to comply with the procurement methods prescribed under Council's Procurement Policy for certain levels of expenditure. It was technically permissible to circumvent the need to conduct a formal tender process by entering into a contract with an initial approved value of \$50K and having it extended or varied until expenditure under the contract exceeded the \$150K tendering threshold.

314. In my opinion, this issue can be overcome by limiting Council's delegation to the General Manager to authorise purchases. In my opinion the General Manager (and staff below him) should only be permitted to authorise expenditure on a single contract up to a cumulative value of \$150K. This would prevent staff from being able to authorise any variations to a contract that escalated expenditure under the contract to a level that exceeded the \$150K tendering threshold. This would serve as a trigger for consideration of the need to undertake a formal tender process for the services provided under the contract. It should be noted that under section 55, Council too would be limited in its ability to approve such expenditure in the absence of a formal tendering process. By limiting the availability of the option for seeking approvals to the variations of contracts that escalate expenditure above the tendering threshold, it is to be hoped that staff will be forced to determine at the outset the likely expenditure over the full life of a contract (including all possible contingencies) and to utilise an appropriate procurement method for entering into a contract of that value. This is explored in more detail below.

3.7.3 Engagement of former staff under "body hire" arrangements

315. In the case of 7 contracts, the persons engaged to perform duties under the contract were former employees of the Council. Four former employees were engaged under these contracts. The contracts in question were as follows:

- CPA/175304, CPA/117313 and CPA/141072
- CPA/156252
- CPA/151639

- CPA/136917 and CPA/152722.

316. In the cases of CPA/175304, CPA/117313 and CPA/141072, the former employee appeared to be the principal of the contractor. In the case of CPA/175304, Council sought two quotes. However, the quotes were sought from two former Council employees, one of whom appeared to be currently engaged as a contractor by the Council at the time the quote was sought. In the case of CPA/117313, the contractor was engaged on the basis of a single proposal. In the case of CPA/141072, the contract was awarded on the basis that the contractor had previously been engaged by Council. The initial approved values of these contracts were \$50K, \$33K and \$22K respectively. Total expenditure under these contracts was \$27,406.50, \$24,865.50 and \$64,735 respectively.

317. In the case of CPA/156252, the former employee also appears to have been the principal of the contractor. It would appear from the documents reviewed that the contractor was engaged on the basis of a single proposal. The initial approved value of the contract was \$78K. Total expenditure under the contract was \$278,850. The engagement was subsequently terminated on 2 June 2010.

318. In the case of CPA/151639, the former employee was also the principal of the contractor. While it would appear the principal was interviewed, there is no documentary evidence of a competitive procurement exercise being undertaken with respect to the contractor's appointment. The contractor's engagement was approved on 2 September 2008, while the principal was still employed by the Council. An email from the Project Director of the Mardi to Mangrove pipeline project to the then Manager Water and Waste dated 2 September 2008 seeking his approval for the contractor's appointment observed that the principal "*leaves the employment of Council on 11 September and is establishing a consulting business in [their] own right*". A note made in Council's document management system on the same day indicated that the former General Manager had verbally approved the appointment. The initial approved value of the contract was \$150K. Total expenditure under the contract was \$301,609. The engagement was subsequently terminated on 7 June 2010.

319. In the cases of CPA/136917 and CPA/152722 the person engaged under the contract was also a principal of the contractor. In addition to these contracts, the contractor was also engaged by Council and supplied the services of other persons under CPA/126756 and CPA/142042. In the case of each of these contracts, the contractor was engaged under the CPA/95093 contractors list.
320. Notwithstanding this, CPA/136917 appears to have been awarded without further quotes being obtained as required under the business rules. Indeed, the contractor had rendered invoices with respect to services provided before the contract had been approved. CPA/152722 appears to have been granted as an extension to CPA/136917 and arguably forms part of the same contract. An evaluation was undertaken with respect to CPA/152722 and a report prepared, but this appears to indicate that the contractor's proposal was the only one considered. The initial approved value for CPA/136917 was \$98,400. The initial approved value for CPA/152722 was \$97,500. Total expenditure under each of these contracts was \$208,494 and \$237,094 respectively.
321. In all cases, the services provided by the former employees under the above contracts were similar in nature to the duties they had previously performed as employees of the Council.
322. With the arguable exception of the engagements made with respect to CPA/136917 and CPA/152722 which were made under the CPA/95093 contractors list and had therefore been made pursuant to an earlier procurement exercise (albeit an open-ended one), in the cases of the other contracts, the engagement of former staff raises a number of questions.
323. Firstly, these contracts were awarded by Council staff to former staff who had established themselves as consultants (or in the case of CPA/151639, a then current employee of the Council who intended to establish himself as a consultant) without the benefit of an open, transparent and competitive procurement process. In the absence of such a process, this will invariably give rise to questions about the probity of the engagements.
324. Secondly, by awarding work to former employees who had set themselves up as consultants that they would have otherwise undertaken in the course of their

duties as Council employees without a competitive procurement process, Council was in effect offering an inducement to its existing staff to leave its employment and set themselves up as consultants. In an environment where the Council was unable to recruit professional staff and was required as a result to engage consultants and contractors to meet its staffing needs, the strategic wisdom of allowing this practice to take place is questionable.

325. This is not to say that Council should be precluded from engaging former staff as consultants. What is being suggested however is that former employees should not have been engaged as consultants or contractors by Council without the benefit of an open, transparent and competitive procurement process whereby Council could demonstrate that the offer made by the former employee was the best one made and offered the best value for money outcome. In the interests of probity, Council should establish a procedural requirement that ensures that former staff may only be engaged by the Council as a contractor or consultant pursuant to a competitive process and that the appointment process is independently reviewed. **(Recommendation 1)**

326. Since this investigation was commenced, the current General Manager has advised that the contracts with the two former employees then currently engaged by Council as contractors have been terminated. CPA/156252 was terminated on 2 June 2010 and CPA/151639 was terminated on 7 June 2010. As far as I can ascertain there are no former employees currently engaged by Council as contractors or consultants.

3.7.4 Compliance with contract management requirements

327. As described above, during the relevant period Council had in place a contract management procedure that applied specifically to contracts for professional services (*Procurement Procedure 201: Contract Management – Professional Services*). This prescribed a number of requirements in relation to the management of professional contracts including the following:

- The recording of all communications in Council's document management system

- Monitoring progress against any agreed program for carrying out the services
- The review of the contractor's payment claims
- The review of the contractor's final payment claim to ensure all obligations have been performed and the completion and issue of a final certificate.

328. I have undertaken an audit of ten random contracts to verify compliance with these requirements. The contracts reviewed are the following: CPA/99319, CPA/117313, CPA/165381, CPA/162134, CPA/130805, CPA/131394, CPA/110714, CPA/135910, CPA/156186 and CPA/145983.

329. The audit has indicated the following:

- In a number of cases the terms of engagement of the contractor and the particulars of the services to be provided were not adequately documented.
- In a number of cases, 'instructions to raise a contract' appear to have been prepared and approved as an afterthought after the contractor had already been retained and had rendered an invoice for services provided for which payment was being sought.
- The retention of documents in Council's document management system was better in some cases than others.
- Some contractors failed to provide sufficient detail in their invoices of services provided and the days and hours over which they were provided to enable a proper assessment. On the other hand some contractors were commendably diligent in providing this information. Formal timesheets were often not required to be completed.
- In none of the contracts reviewed was there any documentary evidence of regular performance reviews being undertaken. In many cases, the failure to document the terms of engagement or to particularise the services to be provided under the contract at the outset would have made it difficult to undertake such reviews.

- In some cases, payments appear to have been approved without a documented evaluation of the invoice being undertaken by Council staff.
- In no case was there any documentary evidence of a review of the contractor's final payment claim being made to ensure all obligations had been performed and or of a final certificate being completed and issued as required under Council's contract management procedures.

330. CPA/165381 warrants special mention. The documentation stored in Council's document management system with respect to the contract in question is wholly inadequate and appears to have been created after the event to 'regularise' the contractor's engagement. An 'Instruction to Raise a Contract' was approved by the former General Manager on 22 June 2009. However the 'Instruction to Raise a Contract' was expressed to relate to services provided between 1 July 2008 and 30 June 2009. The total approved value of the contract was \$75K. An 'evaluation' (in which the contractor's proposal appears to have been the only one considered) was stored in the document management system on 24 June 2009. A proposal dated 30 May 2008 was stored on 26 June 2009. An undated letter of acceptance from Council was stored in the system on 30 June 2009.

331. On the same day, a series of invoices rendered by the contractor were stored in the system. One was described as relating to services provided between July 2008 and June 2009 for \$28,235.10 and disbursements incurred. Another was rendered for unspecified services over an unspecified timeframe for \$49,500. The invoice contained the following statement: *"The above charges are an approximate estimate and a precise itemised invoice will be forwarded in the next financial year. Any difference in costing will be at that time paid by Wyong Shire Council or reimbursed by [the contractor]."* The invoices did not provide any detailed information of the precise nature of the services provided or the days on which they were provided or evidence of the disbursements incurred by the contractor. Both invoices were approved for payment on 26 June 2009. There is no documentary evidence of the invoices being formally reviewed.

332. A variation to the contract to the value of \$1,889.63 was subsequently approved by the former General Manager on 10 December 2009. A further variation for \$3K was approved on 18 December 2009. The variations were expressed to

apply to services provided in June 2009. The contractor subsequently rendered a series of handwritten invoices, one for \$9762.50 for services provided in June 2009 and the other \$183.56 for disbursements. The invoice for \$9762.50 provided the following statement: *"The above charges are an approximate estimate and a precise itemised invoice will be forwarded in 2010. Any difference in costing will be at that time paid by Wyong Shire Council or reimbursed by [the contractor]."* The invoice for disbursements did not contain any receipts or other evidence of expenditure. Both invoices were approved for payment on 4 January 2010. Again, there is no documentary evidence of the invoices being formally reviewed.

333. The contractor apparently subsequently submitted spreadsheets to the Council in 2010 describing various services provided to the Council over the previous five years. However, these disclose insufficient information to identify precisely what services the costs referred to in the spreadsheets related to or indeed whether any related specifically to services provided under CPA/165381.

334. In a number of cases, staff responsible for authorising payments queried the payment of invoices that took expenditure under a contract over \$150K suggesting that these be reported to Council. Where this occurred they were advised by senior staff that the contract in question was a "body hire" contract and that this was not required in relation to such contracts.

335. As described above, business rules were developed specifically for engagements made under the CPA/95093 contractors list. These included rules relating to the management of contracts. These included the following requirements:

- Claims for payment were to be made by the contractor on a monthly basis
- Contractor's payment claims were to be checked for completeness and to ensure the times claimed agreed with the timesheets lodged for the payment period.

336. Thirteen "body hire" contracts were engaged under the CPA/95093 contractors list. I have conducted a random audit of five of these to verify compliance with

the business rules. The contracts reviewed are CPA/131815, CPA/134599, CPA/126470, CPA/136917 and CPA/114728.

337. The same general observations made with respect to the ten contracts reviewed above could be made with respect to the five contracts engaged under the CPA/95093 contractors list that have been reviewed. In addition to these observations, I have noted the following in relation to the compliance of those contracts with the CPA/95093 contractors list business rules:

- The same contractor was engaged under CPA/131815 and CPA/134599. In relation to CPA/131815, while invoices were rendered monthly, for much of the period in which the contract operated, detailed timesheets were not provided. In relation to CPA/134599, invoices were not always submitted monthly, but detailed timesheets were provided.
- CPA/126470 was fully compliant with the business rules.
- In relation to CPA/136917, invoices were regularly rendered but provided little information about the specific services provided. Timesheets were not provided. Payments appear to have been approved without a documented evaluation process.
- In relation to CPA/114728, monthly invoices were rendered providing detailed information about specific services provided. However no formal timesheets were submitted.

3.7.5 Compliance with statutory reporting requirements

338. As stated above, under section 428(4)(b) of the Act and clause 217(1)(a2) of the Regulation, Councils are required to report in their annual report each contract awarded during the relevant year other than employment contracts and contracts with a value of less than \$150K.

339. As stated above, 7 "body hire" contracts had an initial approved value of \$150K. In a further 27 cases, the total value of expenditure under contracts, including GST, escalated to over \$150K. Despite this, none of the "body hire" contracts were reported in Council's 2006/07, 2007/08 or 2008/09 annual reports.

3.7.6 Appointment of contractors to staff positions

340. As described above, under sections 348 and 349 of the Act, a person cannot be appointed to a position within the organisation structure of a council for a period of more than 12 months without the position being advertised and the appointment being made on merit. Under section 351, a person appointed to a temporary position in a council's organisation structure, cannot hold the position for more than 12 months.

341. As noted above, "body hire" contractors were engaged to perform duties in relation to an established position in Council's organisational structure in only four cases. The relevant contracts are CPA/132156, CPA/154455, CPA/162134 and CPA/110714.

3.7.6.1 Development engineer's position

342. In the case of CPA/132156, CPA/154455 and CPA/162134 the same person was retained. The person, a development engineer, was engaged to fill vacant positions in the Development Engineering Section of the Development Assessment Unit which was in Council's Shire Planning Department. Council had experienced difficulties in replacing vacancies in the Development Engineering Section for a number of years. A development engineer position had been vacant in the Development Engineer Section since 2005. In its response to the Notice, Council advised that the inability to recruit an appropriate replacement had led to stress being placed on remaining officers and concerns raised by the development industry. According to Council, *"The engagement of [the contract development engineer] was an effective means of filling the gap, taking into account his level of senior experience and his knowledge not only of engineering, but of Wyong – its systems, policies and procedures"*.

343. The contract development engineer undertook all the functions that a permanent development engineer would fulfil including assessment of construction certificates, engineering comments on development applications, general engineering advice and administration tasks.

344. It would appear that the development engineer's engagement by Council predated CPA/132156, CPA/154455 and CPA/162134. According to Council he was originally engaged in 2004. For the purposes of this investigation, I have focussed on his engagements under the above three contracts.
345. It would appear that the contractor was engaged by way of direct appointment and without the benefit of a formal procurement process. There is no documented evidence of his being appointed pursuant to a formal recruitment process.
346. The development engineer commenced work under CPA/132156 on 1 August 2007. However, as stated above it would appear that his engagement by Council predated this. As often occurred, approval for CPA/132156 was not sought until after the contractor had already invoiced the Council for services provided under the contract. Approval was sought for a contract with an estimated value of \$110K. However the engagement was described as 'ongoing' and no end date was specified. There is no documented evidence of the contract being formally approved by the relevant Director.
347. Invoices rendered by the contractor appeared to indicate that the services were not always provided on consecutive days and appeared to indicate the engagement was 'casual' in nature. However the invoices indicate that services were generally provided over 3 to 4 days a week at between 9 and 12 hours a day.
348. On 11 June 2008, a variation to the contract was approved by the relevant Director. The variation request sought an extension in time to the contract. The value of the variation was \$80K taking the total approved value of the contract to \$190K. Again, no end date to the engagement was specified.
349. On 2 September 2008, the contractor rendered an invoice that exceeded the approved contract amount. The invoice related to services provided between 4 and 28 August 2008. A further variation was sought for \$40K and approved on 5 September 2008. This took the total approved value of the contract to \$230K. The variation request was the last document to be placed on the relevant file

suggesting that it had been approved to cover the amount invoiced that exceeded the previously approved value of the contract.

350. On 7 October 2008, the contractor rendered a further invoice for services provided from 1 September 2008, two days after the last day services were provided under CPA/132156. The covering letter enclosing the invoice referenced CPA/132156. Despite this, the invoice was filed under CPA/154455. The services provided appear to have been similar in nature to those provided under CPA/132156. Notes made on Council's document management system stated that there was only \$4300 left on the contract and that a new contract would need to be created so that the invoice could be paid. An 'Instruction to Raise a Contract' was placed on the document management system on 31 October 2008. This would tend to suggest that the invoice related to services provided under CPA/132156 and that CPA/154455 had been created for the purposes of continuing the previous engagement.

351. The relevant Director approved CPA/154455 with a start date of July 2008 and an end date of June 2009. The estimated value of the contract was \$110K.

352. A variation to the contract was subsequently sought in May 2009 and approved on 22 June 2009 to permit payment from a different cost centre. The variation did not add to the approved value or term of the contract. There was a gap of 4 months in the period during which the contractor rendered invoices between 7 March 2009 (for services provided to 27 February 2009) and 16 July 2009 (for services provided from 12 July 2009).

353. A further variation to CPA/154455 was approved on 11 December 2009, extending the engagement until January 2010 and increasing the approved value of the contract by \$60K to \$170K. The last invoice in relation to CPA/154455 was rendered on 1 February 2010. Services were provided under the contract up until 28 January 2010.

354. CPA/162134 was approved on or around 15 April 2009 by the relevant Director. The contract was to run for a period of six months and had an approved value of \$110K. It operated concurrently with CPA/154455. The first invoice under CPA/162134 was rendered on 3 April 2009 for services provided from 2 March

2009. This coincided with the period over which no invoices were rendered under CPA/154455. The last invoice was rendered on 9 September 2009 for services provided to 31 August 2009. There was a period of overlap between CPA/154455 and CPA/162134. Invoices were rendered under CPA/162134 for services provided on days during July and August 2009 on which services were not provided under CPA/154455. The service provided under CPA/154455 and CPA/162134 were ostensibly the same but appear to have been charged to different cost centres.

355. The inference I have drawn from this is that the services provided under CPA/132156, CPA/154455 and CPA/162134 were essentially the same and that the person who provided these services performed the same role under each of the contracts. In effect, these contracts constituted a single, seamless engagement. It would appear the engagement commenced on 1 August 2007 (and possibly as early as 2004), ending on 28 January 2010 running for a period of between two and a half and six years. Total expenditure under CPA/132156, CPA/154455 and CPA/162134 was \$523,208.40. Given the engagement dates back to 2004, it is likely that total expenditure in relation to it exceeded this sum substantially.

356. The failure to conduct a tender process in relation to a contract involving this level of expenditure constitutes a clear breach of section 55. However, given the person engaged under these contracts was appointed to a position within Council's organisation structure and held that position for a period exceeding 12 months, the failure to appoint that person to that position pursuant to a formal competitive recruitment process also constitutes a breach of sections 348 and 349 of the Act. The failure to conduct such a process after the person had occupied the position for a period of 12 months constitutes a breach of section 351.

3.7.6.2 Manager Customer and Community Services position

357. The other instance in which a person was engaged under a "body hire" contract to fill an identified position in Council's organisational structure was CPA/110714. A contractor was engaged under that contract to fill a temporary vacancy in the Manager Customer and Community Services position.

358. The vacancy in the position first arose on 8 May 2007. Between 14 May and 2 December 2007, two Council staff members acted in the position, the first from 14 May to 7 October 2007 and the second from 8 October to 2 December 2007. The contractor was appointed to the position on 3 December 2007 and held it until 3 September 2009, a period of 1 year and 9 months.
359. During the period in which the position was vacant, Council undertook two recruitment processes to fill the position. The first commenced on 22 June 2007. The position was widely advertised. Applications closed on 13 July 2007. Interviews were scheduled on 3 August 2007. Seven applicants for the position were to be interviewed. Four applicants subsequently withdrew their applications after being interviewed. The three remaining applicants were referred for psychological testing. However for reasons that are neither documented nor apparent, the process was abandoned.
360. The position was subsequently readvertised on 12 September 2007. Applications closed on 8 October 2007. Five candidates were selected for interview. The interview was scheduled for 22 October 2007. However, for reasons that are neither documented nor apparent, the process appears not to have proceeded beyond this point.
361. In late November, it was announced that a contractor previously engaged by Council under CPA/110714 would be transferred from the Shire Services Department to act in the Manager Customer and Community Services position effective from 3 December 2007. It was advised that the contractor was to act in the position for up to 6 months during which time the recruitment process to permanently fill the manager's position would continue. The recruitment process was not subsequently recommenced until April 2009, more than a year later.
362. It is unclear on what basis the decision to appoint the contractor to the position of Manager Customer and Community Service was made. In particular, it is difficult to reconcile the contractor's qualifications, experience and skill set disclosed in his resume with the requirements of the position disclosed in the position description. This is not to say that the contractor was not suited to the position.

363. It was also more expensive for the Council to appoint a contractor to that position than it was to make a permanent appointment or transfer an existing staff member into the position on a temporary basis. An email from the then Director Shire Services to the former General Manger dated 17 December 2007, after the appointment had been made, calculated the cost of appointing a contractor to that position as \$280,800 per annum compared to a cost of \$219,500 per annum for a staff member.
364. CPA/110714 predated the vacancy arising in the Manager Customer and Community Services position. The contractor provided contract management services in the CSPU under CPA/110714 prior to his appointment as Manager Customer and Community Services. The contract was initially approved on 28 June 2006. The contract was approved for an initial term of 6 months and had an initial approved value of \$116,160. As with most "body hire" contracts, the engagement was not made pursuant to a formal procurement process. Total expenditure under the contract subsequently escalated through 12 separate variations to \$1,106,592.33. It should be noted that some of this expenditure related to the contract management services the contractor provided to the CSPU under the contract prior to his appointment as Manager Customer and Community Services. The contract finally ended on 25 September 2009. However the contractor was re-engaged under CPA/169582 to provide project management services for the Mardi to Mangrove Pipeline Project on 4 September 2009. A further \$269,280 was paid under that contract. CPA/169582 ended on 3 June 2010.
365. As stated above, the contractor engaged under CPA/110714 initially worked in the CSPU providing project management services with respect to various capital works projects. On 11 December 2007, a variation to the contract (the 5th to that date) was approved to incorporate the contractor's new role as Manager Customer and Community Service. The 'Instruction to Vary or Extend a Contract' indicated that the appointment was to be for 6 months. However the revised end date was stated to be 31 December 2007, within a matter of weeks of the date of approval. The additional amount approved for the contract under the variation was \$100K. Subsequent variations to the contract were approved

on 1 February, 18 April and 8 July 2008 and 14 February, 30 June, 15 July 2009 and 13 October 2009.

366. The contractor's role in the Manager Customer and Community Service position concluded on 3 September 2009. In total the contractor served in the position for 1 year and 9 months. As with CPA/132156, CPA/154455 and CPA/162134, given the person engaged under CPA/110714 was appointed to a position within Council's organisation structure and held that position for a period exceeding 12 months, the failure to appoint that person to that position pursuant to a formal competitive recruitment process constitutes a breach of sections 348 and 349 of the Act. The failure to conduct such a process after the person had occupied the position for a period of 12 months constitutes a breach of section 351.

3.8 The Leadership Development Program

3.8.1 Background

367. The concerns about Council's "body hire" arrangements that have given rise to this investigation were first raised in the context of the Leadership Development Program. This was a training/mentoring program that was delivered by two contractors to senior Council staff between May 2006 and August 2008 under six separate contracts. The following table outlines the contractual arrangements under which the program was delivered:

Contract No.	Description	Approved value	Start Date	End Date	Total expenditure
CPA/105514	Phase 1A	\$40,200.86	May 2006	September 2006	\$99,000
CPA/114372	Phase 1B	\$96,250	9 August 2006	October 2006	\$48,375
CPA/117142	Phase 1C	\$99,000	1 November 2006	February 2007	\$108,900

Contract No.	Description	Approved value	Start Date	End Date	Total expenditure
CPA/122085	Phase 1D	\$99,000	29 January 2007	November 2007	\$106,381
CPA/126992	Phase 1E	\$74,250	30 April 2007	August 2008	\$335,238.32
CPA/142126	Phase 1F	\$99,000	1 January 2008	July 2008	\$188,306.25
Total		\$507,700.86			\$886,200.57

368. Concerns about the delivery of the program were first raised by Council's Internal Auditor as a result of his review of expenditure during the period of July 2006 to April 2007. In his preliminary report of June 2007, Council's Internal Auditor raised the following concerns:

Is it noted that certain contracts have commenced at less than \$150,000 and either through scope variation to the contract or through new contracts, the cumulative total value exceeds \$150k. The issue is that these contracts are then not being reported to Council....

A contract which highlights the "value creep" issue is that for the Senior Management Team Development Program [ie the Leadership Development Program]....

Life to date payments total \$236k to the [contractors]. This includes \$18k during 05/06 financial year and \$218k during July 2006 to April 2007. It is understood that over \$150k for [one of the contractor's] services remains unbilled under this arrangement, taking the total incurred to date to in excess of \$380k. It should also be noted that the expenses related to this program are approximately \$75k to date. The expenses are made up of flights, accommodations, car hire and meals.

369. Concerns about the delivery of the program were again raised by the Internal Auditor in his review of the CSPU. In his report of June 2008, the Internal

Auditor noted that the program had been delivered under six separate contracts with a then total value of \$667K.

370. Concerns about the program were also raised by the governing body of the Council. As outlined above, at its meeting of 26 March 2008, Council resolved, pursuant to a notice of motion as follows:

That Council receive a report on the Leadership Consultant's Program including detailed information on total costs to Council and outcomes achieved.

The report should include;

- *detailed costings for the consultants including fees, travel, accommodation, meals and other incidentals.*
- *positions of staff members and total numbers of staff involved in the program.*
- *benchmark criteria used to assess the success or otherwise of this program.*
- *an explanation as to why this program has not been subject to public tender requirements.*
- *the justification used in renewing the program on a reportedly three monthly basis.*
- *the credentials of those involved in delivering the program.*
- *examples, if any, of their work in other Local Government areas.*
- *what outcomes have been achieved from staff participating in this program.*
- *what percentage of staff, that have participated in this program are still employed by Wyong Shire Council.*
- *that given the budgetary impact of this program on the 2008/2009 Management Plan, this report be included in the Council Business Paper for the meeting of 28 May 2008.*

371. Pursuant to Council's resolution of its meeting of 26 March 2008, a report on the Leadership Development Program was submitted to the Council meeting of 28 May 2008. Having considered that report, Council unanimously resolved in part as follows:

1 That Council express concern regarding the governance around the Senior Leadership Development Program in particular the perception that the project has breached Section 55 of the Local Government Act and ICAC Guideline 1:

"Managing Risk: Reducing Corruption Risks in Local Government – Taking the Con out of Contracting: Guidelines for Managing Corruption Risks in Local Government Procurement and Contract Administration" issued September 2001"

by order splitting the project into Contracts 1A to 1F with variations and that Council refer this matter to the Department of Local Government for advice.

372. On 11 June 2008, the former General Manager wrote to the former Department seeking its advice on "body hire" arrangements. He enclosed a copy of the report on the Leadership Development Program prepared for the Council meeting of 28 May 2008. In his letter, the former General Manager advised the Department that:

...the Program has been carried out in a number of phases as it was not possible to map out the breadth and extent, or even to fully identify every element of the program at commencement. The program is, by its nature, a dynamic one needing to respond on an individual and team basis depending on the progress being made and problems being identified. For that reason, consultants were engaged on a "body hire" arrangement, similar to other such arrangements throughout the Council....Detailed planning of the project has, and continues to be, carried out on a three or six monthly basis in order to respond to issues.

373. On 4 July 2008, pursuant to a Council resolution of 25 June 2008, the then Mayor of the Council, Clr Warren Welham, also wrote to the Department pursuant to a resolution adopted at the Council meeting of 25 June 2008. In his

letter, the former Mayor advised the former Department that "*Council is concerned with the governance of the Leadership Development Program and the overall concept of "body hire"*". Clr Welham sought the Department's advice in relation to the matter.

374. Having made informal enquiries into the issues raised, on 21 May 2009, the Department wrote to the former General Manager formally requesting certain documents. In its letter, the former Department expressed the following concern about the manner in which the program had been delivered:

I am concerned that the arrangements that have been entered into suggest an overall process conducted as a number of discreet contracts. I am also concerned that the arrangements are for consultancy and training services and are not short term staff employment arrangements. This view is supported by:

- *the description of the services as "consulting services"*
- *the providers' description of themselves as "consultants"*
- *the budget referring to "consulting days"*
- *the provision of daily pay rates*
- *the requirement that the Council pay GST in addition to the daily rates*
- *the requirement that the Council pay travel expenses in addition to the daily rates.*

375. On 19 August 2009, the former General Manager responded. In relation to the Leadership Development Program, the former General Manager maintained that Council had not engaged in "order splitting" as a means of avoiding the tendering requirements. He advised that discrete orders or extensions of orders were merely used as part of a project management approach or for administrative purposes as dictated by the constraints of the Oracle software.

376. On 27 October 2009, the Deputy Director General of the Division responded to the former General Manager, advising him that the Division had reviewed the information Council had provided. He advised that amongst other things, the

Division was concerned about a possible failure to comply with the tendering provisions of section 55 of the Act with regard to a contract/s relating to the delivery of the Leadership Development Program.

3.8.2 The origins and development of the Program

377. Council has advised that the Leadership Development Program was primarily the initiative of the former General Manager with input from the then Director Shire Services and one of the persons ("the sub consultant") subsequently engaged by Council as a contractor to deliver the program.

378. In his letter to the former Department of 19 August 2009, the former General Manager outlined the history of the Leadership Development Program as follows:

In 2004/2005 [a consultant ("the first consultant")] ... had assisted the Councillors and myself in arriving at an agreed new structure for the organisation.

During 2005 Council implemented an organisational restructure and it was agreed with the then Council that there needed to be a significant change in the culture of the organisation, particularly with regard to the senior management team.

The Leadership Development Program would act as a major change agent for the senior team and [the first consultant] attempted to prepare a program for commencement of this process...[A] project plan [was] prepared by [the first consultant] for the first part of this ... involving [two sub consultants] both of whom had done work for Council. However, it was clear that this would not start to achieve the necessary change in behaviours and the necessary change in culture and also that it was not possible to map out the breadth and extent of the program at commencement. The program would need to be a dynamic one needing to respond on an individual and team basis depending on progress being made and problems being identified. This did not lend itself to a specified tender process.

It was also clear that, for the program to be successful, it was necessary for the people involved to have rapport with, and the respect of, the senior management team. Unfortunately [the first consultant], while having the respect of the Council and myself, did not enjoy the respect of the management team. On the other hand [one of the sub consultants] had established both rapport with, and respect of, the team.

It was decided to build on the relationship established by [the sub consultant] provided additional skills in leadership development could be brought in to assist [the sub consultant]. Following discussions with [a second consultant ("the second consultant")] it was agreed that the project would proceed based on the phase 1 outline as developed by [the second consultant and the sub consultant] and the project team. Again, it was clear that it was not possible to specify full details upfront even for Phase 1. Hence, Phase 1A project was developed and this commenced implementation in the first half of 2006. Detailed planning by the project team (consisting of myself, certain senior staff and [the second consultant and sub consultant]) was carried out on a 3-6 monthly basis with direction on a daily basis being given by myself and other senior staff in order to respond to issues as they arose.

[The second consultant and sub consultant] were engaged on a "body hire" arrangement similar to other such arrangements throughout Council where particular individuals are employed on hourly or daily basis and perform most, or all, of their work at Council and under direction as for award employees.

The project then proceeded on a step by step basis in line with various project phases developed as the project proceeded. The Council was briefed as the project proceeded and provided feedback on the progress.

379. As the former General Manager's above history of the matter indicates, Council had two proposals for the delivery of the program, one developed by the first consultant and another by the second consultant with input from the sub consultant. However, there was no formal competitive process by which proposals were invited and assessed against predetermined criteria or Council's needs. It would appear that a proposal was sought from the first consultant as a

result of her previous involvement in the organisational restructure of the Council.

380. The first consultant developed a detailed package and project plan for the delivery of the program she designed. A document entitled "*The Leadership Package*" prepared in August 2005 identified the project goals, all phases of the proposed program from start to finish, obstacles and risks, teams and team responsibilities and clearly defined deliverables. A document dated 28 July 2005 which appears to be a project plan identified 109 separately defined tasks, the time frames for the delivery of each task and the personnel involved in the delivery of each task. The project plan had a clearly defined start date and an end date.

381. The former General Manager has advised that he rejected the first consultant's proposal on the basis that it was too "simplistic". He has advised that the Council did not consider that a "*simplistic program like* [the one developed by the first consultant] *would achieve any substantial change in behaviour*".

382. It would appear that the second consultant's and sub consultant's proposal was developed only after the first consultant's proposal had been rejected. The sub consultant advised that the former General Manager had requested that the second consultant and sub consultant submit a proposal to undertake the Leadership Development Program utilising the principles of "shared leadership".

383. The second consultant and sub consultant were not engaged pursuant to any formal procurement process. Prior to the commencement of the Leadership Development Program in March 2006, the sub consultant had been engaged by Council as a consulting organisational psychologist to provide psychological testing and other advice in relation to human resources matters. This occurred on an as needs basis related to specific recruitments over a period extending back to the mid 1990's. No formal contractual arrangement was entered into in relation to these services. The sub consultant had also been involved in the initial development of the first consultant's proposed Leadership Development Program from early 2005. The second consultant was first introduced to the former General Manager and the then Director Shire Services on 31 October 2005 via a conference call with the sub consultant.

384. The former General Manager forwarded a copy of the first consultant's *Leadership Package* document to the sub consultant on 15 September 2005. The sub consultant has advised that in the five months between September 2005 and February 2006 there were numerous discussions between the second consultant and the sub consultant with the former General Manager and the then Director Shire Services. On 19 September 2005 the former General Manager forwarded a copy of the organisational structure to the sub consultant. On 4 November 2005, he also provided a list of his and the then Director of Shire Service's senior executive "assessment criteria".

385. On 21 February 2006, the sub consultant submitted to Council a first iteration of the second consultant's and sub consultant's proposal for the Leadership Development Program. Comments made in an email from the former General Manager to the then Director Shire Services dated 21 February 2006 appeared to indicate that there may have been some anxiety over the delivery of a formal proposal. The former General Manager said; *"I haven't read it yet but at least we've got something."*

386. The proposal, which was described as being "phase 1" of a senior management team development program outlined the following steps to be taken during the phase:

- Diagnostic interviews with members of the senior management team
- Executive "Leadership Communications" Coaching Session involving only the former General Manager and the then Director of Shire Services
- A senior management team "foundation setting" workshop
- Coaching sessions for each member of the senior management team

387. The proposal identified objectives for phase 1 and objectives and outputs for each of the above steps. However, the objectives and outputs identified for the delivery of phase 1 were somewhat intangible and it is difficult to see how the achievement of the objectives and delivery of the outputs could be objectively verified. The ambiguities that attended the development of the proposal were further reflected in the absence of any clearly defined end date for phase 1 of

the program. According to the proposal, phase 1 would be completed when the project leadership team were satisfied that it was completed. The proposal identified the following criteria for determining when phase 1 was completed:

Phase 1 can be considered complete upon the official assessment of the WSC Project Leadership Team. That assessment can be based on either a) the [senior management team ("SMT")] as individuals and as a group have demonstrated the desired level of foundational competencies, qualities, and characteristics as established in the Foundational Setting Workshop, or b) the SMT as individuals and as a group are solidly progressing in their personal and professional development to the degree that the Project Leadership Team is confident that the Phase 1 objectives will be achieved, and a strong enough foundation exists to progress to Phase 2 without any unnecessary delay.

388. The proposal contemplated that there would be a "phase 2" of the program. The proposal indicated that phase 2 would focus on the development of "strategic leadership" within the senior management team but shed no further light on what the second phase involved. Elsewhere, the proposal states that "[t]he design of Phase 2 (Strategic Leadership Development) will be emergent and based on the current states at the end of Phase 1."

389. The sub consultant has maintained that the proposal for the program submitted to the Council in February 2006 was fully formed. However the ambiguities of the proposal suggest that this may not have been the case. Further support for this view may be derived from the fact that while the proposal nominated a consultant team for the delivery of the program comprising of the second consultant and sub consultant with two other sub consultants in a support role, at the time the proposal was developed, the two other sub consultant's roles were yet to be defined and they had not even been contacted to ascertain their willingness and availability to participate in the delivery of the program. It would appear these sub consultants did not ultimately participate in the delivery of the program.

390. Following discussion with the Council, the proposal was further modified on 27 February 2006. The modified proposal contained more clearly defined timeframes and a budget. The modified proposal contemplated a timetable of

85.75 consulting days for the delivery of phase 1. At \$2750 per day the proposal contemplated a total cost for phase 1 alone of \$235,812.50 plus GST and travel expenses.

391. A further modified proposal was submitted on 14 March 2010, now proposing the delivery of a program comprising of 54.25 consulting days at a substantially lower total cost of \$149,187.50 plus GST and travel expenses. It should be noted that this projected cost (minus on costs) fell just short of the tendering threshold and was within the General Manager's purchasing delegation. The reduced proposed cost was achieved through a redesign of the program. The redesigned program "*place[d] greater responsibility and accountability of each SMT member for their own personal and professional development.*" The sub consultant has advised that the redesign of the program resulted from consultation with and direction from Council staff and the former General Manager.

392. A further modified proposal was submitted on 17 March 2006. Now labelled, Phase 1A, the proposal contemplated the delivery of a program comprising of the first three steps of the originally proposed program. The proposal document indicated that it was to be read in conjunction with the Phase 1 outline. While the proposal made no reference to subsequent "phases" of the program or the potential cost of these phases, I have interpreted this to mean that Phase 1A comprised the first part of a broader Phase 1 program as outlined in the consultants' original proposal.

393. The proposal for Phase 1A did not identify objectives for the phase or benchmarks against which the achievement of these objectives could be measured. In its response to the Notice, Council explained this as follows:

Given that the program was predominantly around individual senior management staff and senior management team development the program was one which would reflect benefit over time. Its nature therefore did not necessarily lend itself to precise objective assessment criteria. Breaking the program into phases enabled a review process to be undertaken every 3-6 months.

394. The proposal for Phase 1A contemplated a budget of 14.875 consulting days at a total cost of \$40,906.25 plus GST and travel expenses. However this did not include the fees for the psychological assessments and profiling tools conducted by the sub consultant. The proposal indicated that any additional use of these services was to be contracted separately and directly with the sub consultant. The former General Manager approved the program on the same day.
395. The contract under which Phase 1A was delivered (CPA/105514) had an initial approved value of \$50K. The contract was subsequently varied to raise the approved value of the contract by a further \$40K. The total value of expenditure under the contract was \$99K, well in excess of the initial budget for the phase.
396. The second consultant and sub consultant (hereafter referred to collectively as the consultants) submitted a proposal for "Phase 1B" of the Program to Council on 14 August 2006. This appeared to pick up at the last step of the original proposal and comprised of "coaching" for the senior management and executive teams. It also included work on the "redesign" of senior management team meetings and the development of a 360° feedback system. As with the Phase 1A proposal, the proposal did not identify objectives for the phase or benchmarks against which the achievement of these objectives could be measured. It was contemplated that Phase 1B would run from 24 August to 27 October 2006 or 35 consultancy days at a total cost of \$96,250 plus GST and travel expenses. A PowerPoint© presentation titled "Work Scope Process Flow" submitted with the proposal appeared to indicate that the next step in the process would be Phase 2. The former General Manager formally approved Phase 1B on 20 September 2006 after the delivery of the phase had commenced.
397. The contract under which Phase 1B was delivered (CPA/114372) had an initial approved value of \$96,250. While this was the same as the proposed budget for the delivery of the phase, it did not include on costs such as GST and travel expenses. Expenditure under the contract was significantly less than the approved value. Total expenditure under the contract was \$48,375.

398. On 25 October 2006, a staff member of the project leadership team noted in an email that the contract under which Phase 1B was delivered was due to run out. She enclosed a proposal from the consultants for a Phase 1C of the program and asked that a new contract be set up. The content of the program to be delivered in Phase 1C was identical to the one delivered under Phase 1B. The only additional component identified was the design and delivery of senior management team "Management Development Workshops". As with previous proposals, the proposal did not identify objectives for the phase or benchmarks against which the achievement of these objectives could be measured. It was proposed that the Phase would be delivered between 30 October and 15 December 2006 and 15 and 26 January 2007. The estimated budget was \$99K plus GST and all travel expenses. The former General Manager formally approved Phase 1C on 31 October 2006.
399. The contract under which Phase 1C was delivered (CPA/117142) had an initial approved value of \$99K. Total expenditure under the contract including GST was \$108,900.
400. In January 2007, the consultants submitted a proposal for a "Phase 1D" of the program. On its face, the substance of what was proposed to be delivered under Phase 1D appears to have been identical to previous phases and appeared to be an extension of activities conducted under previous phases. It was proposed that Phase 1D would be delivered between 29 January and 30 March 2007. As with previous proposals, the proposal did not identify objectives for the phase or benchmarks against which the achievement of these objectives could be measured. The proposed budget for Phase 1D was \$99K plus GST plus expenses. Phase 1D was approved by the former General Manager on 16 February 2007.
401. The contract under which Phase 1D was delivered (CPA/122085) had an initial approved value of \$99K. Total expenditure under the contract including GST was \$106,381.
402. In April 2007, the consultants submitted a proposal for "Phase 1E". As with Phase D, on its face, the substance of what was proposed to be delivered under Phase 1E appears to have been identical to the steps delivered under previous

phases and appeared to be an extension of activities conducted under previous phases. It was proposed that Phase 1E would be delivered between 30 April and 30 June 2007. As with previous proposals, the proposal did not identify objectives for the phase or benchmarks against which the achievement of these objectives could be measured. The proposed budget for Phase 1D was \$74,250 plus GST plus expenses. Phase 1E was approved by the former General Manager on or around 18 May 2007.

403. The contract under which Phase 1E was delivered (CPA/126992) had an initial approved value of \$74,250. Again, while this was the same as the proposed budget for the delivery of the phase it did not include on costs such as GST and travel expenses. The contract was subsequently the subject of 4 variations to increase the approved value of the contract. The total approved value of the contract after these variations was \$304,762.11. Total expenditure under the contract including GST was \$335,238.32, far in excess of the original proposed budget for the phase of \$74,250.

404. The consultants submitted a proposal for "Phase 1F" in January 2008. Phase 1F continued the work of previous phases. One new activity involved providing input into the design of a human resources strategy. It was proposed that Phase 1F would be delivered between 1 January and 18 April 2008. As with previous proposals, the proposal did not identify objectives for the phase or benchmarks against which the achievement of these objectives could be measured. The estimated budget for the phase was \$99K plus GST and expenses.

405. The contract under which Phase 1F was delivered (CPA/42126) had an initial approved value of \$99K. Again, while this was the same as the proposed budget for the delivery of the phase it did not include on costs such as GST and travel expenses. The contract was subsequently subject to 1 variation to increase the approved value of the contract by a further \$75K. The total approved value of the contract after these variations was \$174K. Total expenditure under the contract including GST was \$188,306 far in excess of the original proposed budget for the phase of \$99K.

406. Asked in the Notice what steps Council took to periodically review the delivery of the program, Council advised in its response that:

At the end of each phase of the program a new proposal was developed for the next range of activities to be covered by the program. This provided an opportunity for consideration of whether the program should continue. At each review stage the decision was made to continue.

407. In the absence of defined objectives or deliverables for each phase to serve as benchmarks against which the delivery of the phase could be assessed it is unclear on what basis such reviews were conducted. Tender/quotation evaluation reports were prepared for each phase of the Program. These were template documents containing minimal information. From Phase 1B on, these reports contained the following statement: *"Phase 1 of work was completed satisfactorily and Phase 1B proposal covers all issues required by Council. The proposal represents value-for-money for Council."* The identical phrase was used in each report prepared for each successive phase with only the details altered to reflect the current phase. In one instance the detail was not altered suggesting that each report had simply been 'copied and pasted' from previous reports. There is no other documented evidence of such reviews being conducted.
408. Council also advised that other tools used to assess the effectiveness of the program included use of 360 degree feedback and establishing a project control group. As part of the Leadership Development Program, in 2007 a 360 degree feedback process was implemented for the senior management team members. According to Council, this provided an opportunity for self, manager and staff evaluation with the results being used to target areas requiring further attention or additional learning. Council also maintained that it also provided an opportunity to assess the effectiveness of the wider program through monitoring of personal development at a senior management team level. However, there is no documented evidence of the 360 degree feedback process being used to evaluate the effectiveness of the Leadership Development Program.
409. Council has acknowledged there was no formal evaluation made of the Program as a whole once it was completed.
410. The incremental manner in which the program was developed, together with the absence of clearly defined objectives or benchmarks against which to measure

the achievement of these objectives, tend to lend weight to the view that the Program was conceived without a clear set of objectives in mind, delivered without the guidance of an overarching plan and lacked a defined end point.

411. In such circumstances, it is perhaps not surprising that the timeframe and cost for the delivery program far exceeded those foreshadowed in the original proposal for the Program. As stated above, the originally proposed timeframe over which Phase 1 of the Leadership Development Program was to be delivered was 54.25 consulting days. The original proposed budget for Phase 1 was \$149,187.50 plus GST and travel expenses. Phase 1 was eventually delivered over a 2-year period commencing in May 2006 and ending in July 2008 at a total cost of \$886,200.57. While the original proposal contemplated a Phase 2 of the Program, this was never delivered.

412. I have noted the explanation of the former General Manager that the "*program need[ed] to be a dynamic one needing to respond on an individual and team basis depending on progress being made and problems being identified*" and that it "*was not possible to map out the breadth and extent of the program at commencement*". However, the amorphous nature of the program developed by the second consultant and sub consultant is to be contrasted with the one that the first consultant had previously developed for the Council which had a defined end point and a clear set of objectives and measurable deliverables.

3.8.3 Budgeting and reporting on the Program

413. As described above, initial estimates of costs were included in each of the six individual proposals prior to the commencement of each phase. These estimates were based on the expected number of hours to be charged by the consultants. Initial estimates did not include expenses such as airfares, accommodation, mileage, tolls and meals.

414. The absence of any overarching plan in relation to the delivery of the Program and the incremental manner in which it was developed impacted on Council's capacity to set a budget for the Program as a whole. Because the full extent of the work involved in the delivery of the Program was not fully known at the commencement of the program in early 2006, the budget for the Program was

not set in any holistic way. The absence of a predetermined budget covering the whole Program limited Council's capacity to monitor and control costs arising from the delivery of the Program with the result that the actual cost of delivering the program far exceeded the cost estimate identified in the original proposal.

415. Council's capacity to monitor the cost of the Program was further impeded by the manner in which it was reported. The cost of the Leadership Development Program was not separately identified within the management plan or annual reports. A budget within the management plan was established within a rolled up budget line called "Employee Overheads" which contained a component called "General Manager's restructure". A non-specific budget for Leadership Development Program work was incorporated into the total budget established for "General Manager restructure".

416. The "Employee Overheads" line was described within the adopted management plan for 2006/07 as follows:

"this item includes employee leave entitlements, workers compensation and superannuation. 2006/07 includes the end of the employer's superannuation contribution "holiday" and provision for the award increases in salaries and wages"

417. A similar description was used in subsequent years without any mention of the "General Manager's restructure" line or the Program.

418. The costs of the Program did not constitute a significant component of total employee overheads. In each of the years the actual costs attributed to the program were less than the budget for the "General Manager's restructure" line. It therefore did not elicit any budget variation comment in the quarterly financial reports to Council.

419. In the annual financial statements, the costs associated with the Program were included in the reporting line called "Contractors and Consultancy Costs" in note 3 to the accounts. This is because the Program costs were mostly (98%) allocated to the natural account called "Consultants" which rolls up into the financial statements "Contractors and Consultancy Costs" reporting line. The

costs were therefore not included in the training costs line which is also disclosed in note 3 to the financial statements.

420. In a letter to the Division of 19 August 2009 the former General Manager provided the following explanation for not reporting the costs of the Program under the training costs line:

Organisation wide programs are costed under "employee overheads" in order to apportion costs across all Council activities and funds. Other examples of this include the current organisation wide project management training and the development of the HR Strategy and workforce plan.

421. While the former General Manager maintained that the costs associated with the program were of an overhead nature rather than training, Council's Finance staff apparently took a different view. In its response to the Notice, Council advised that its Finance staff had indicated that the Program costs were more correctly related to training. Council also advised in its response that this was also the view of the Staff Services Manager. Finance staff also apparently expressed the view that the nature of the expense did not fit the description of employee overhead as detailed in the annual management plan financial information referred to above. As quoted above, this was described as including such items as employee leave entitlements, workers compensation and superannuation.

422. Council advised in its response to the Notice that as a compromise it was agreed that the Program would be reported separately internally as from August 2006. However Council has also advised that Finance staff were required at the direction of the former General Manager to include the Program costs in the "Employee Overheads" line when reported to the elected Council.

423. As stated above, the absence of a specific budget item limited Council's capacity to monitor and control costs associated with the delivery of the Program. While I have noted the former General Manager's explanation for why the program was reported under the "employee overheads" line, the views of Council's Finance staff and Staff Services Manager that the Program would have been more appropriately reported under the training line is compelling.

424. The fact that the former General Manager agreed to the program being reported separately internally but insisted that it be included under the "employee overheads" line when reported to the elected Council raises the question of whether this was done for the purpose of disguising the cost of the Program from councillors.

425. The former General Manager has disputed this view. The former General Manager has provided the following explanation for his insistence on the separate treatment of the reporting of Leadership Development Program costs to the Council and for internal purposes:

The Council had for some time been complaining about too many items in the management plan so it was clearly not the thrust of the then Council to expand the level of detail in the annual management plan.

On the other hand, the budget was separated into many thousands of line items internally. These line items were reported internally in various summaries for the purposes of internal management and control. It is therefore not surprising that internal reports are quite different from reports to Council. It was certainly not done in order to hide costs as there was no reason to do so ... as [the Leadership Development Program] was within budget allowances and did not constitute a significant component of total employee overheads.

None of the costs of the total restructure were separately reported to Council as far as I can recall for the reasons outlined above.

426. The former General Manager's above explanation is not an unreasonable one. On balance, I am unable to find that his decision was motivated by a desire to disguise the costs of the Program from the Council.

3.8.4 Contract management practices

427. The Council engaged the second consultant as the principal contractor/consultant in the delivery of the Leadership Development Program. The sub consultant was engaged by the second consultant as a sub contractor. Within this arrangement, the sub consultant was required to submit invoices to

the second consultant who would then invoice the Council for the services provided by the sub consultant under his name and format.

428. The second consultant was diligent in submitting invoices for his services and expenses. Separate invoices for services and expenses were submitted. These were usually submitted at regular intervals within days of the services being provided and expenses incurred. Invoices usually related to services provided over periods of up to three days. While he did not submit a formal timesheet, the second consultant's invoices itemised in detail the activities they related to and the days on which they occurred. Invoices for expenses contained detailed particulars of the expenses incurred and were apparently supported by receipts (though these are not retained in Council's document management system).

429. In contrast with the second consultant, the sub consultant's invoices were submitted in a haphazard fashion and often sought payment for services provided and expenses incurred months and sometimes years earlier often without the benefit of substantiating evidence. This practice was not limited to the services provided to the Council in connection with the Leadership Development Program.

430. This is not to suggest that the sub consultant was guilty of anything other than disorganised invoicing practices. The purpose of outlining these practices in detail below is to highlight the deficiencies in the Council's project management of the Leadership Development Program and its contract management practices. Indeed, the sub consultant has advised that the former General Manager had agreed to permit her to render interim invoices with respect to work undertaken for the Council when she was able to do so. This was apparently done on the understanding that the sub consultant would render final invoices later.

431. The sub consultant first submitted an invoice for her services on 1 September 2006, some months after the Program had commenced (in May 2006). The invoice appears to have been rendered and submitted on her behalf by the second consultant. The invoice related to services provided over six days between 18 May and 13 June 2006, nearly three months earlier. The invoice sought payment of \$12,100 including GST for these services. The email from

the second consultant submitting the invoice advised that the sub consultant was yet to provide receipts for her expenses and so an invoice had not been rendered with respect to these.

432. The sub consultant did not render another invoice until 28 November 2007, more than a year later. With the exception of the payment of \$12,100 invoiced by the sub consultant on 1 September 2006 all invoices rendered and payments made under the first four contracts for Phases 1A to 1D of the Program (CPA/105514, CPA/114372, CPA/117142 and CPA/1122085) related to services provided by the second consultant.

433. On 28 November 2007, the second consultant submitted an invoice on behalf of the sub consultant for services provided between 15 January and 30 September 2007. The invoice sought payment of \$127,050 including GST. The invoice contained minimal information. It simply stated that payment of \$11K was being sought for services provided during Phase 1C over 4 unspecified days in the period between 15 and 26 January 2007, \$35,750 for services provided during Phase 1D over 13 unspecified days in the period between 29 January and 30 March 2007 and \$68,750 for services provided during Phase 1E over 25 unspecified days in the period between 1 April and 30 September 2007. The invoice contained no timesheet and, given the elapse in time since many of the services invoiced were provided, it is difficult to see how Council was able to verify that the services in question were provided. The email containing the invoice referred to the fact that the sub consultant intended to submit further invoices.

434. On 7 December 2007, the second consultant rendered a further invoice on behalf of the sub consultant for services provided in relation to Phase 1E. The invoice sought payment of \$72,600 for services provided over 24 unspecified days between 1 October and 30 November 2007. Again, no timesheet was provided.

435. On 4 April 2008, the second consultant rendered a further invoice on behalf of the sub consultant seeking payment of \$39,325 for services provided in relation to Phase 1F and expenses of \$2,373.80 for the period between January and March 2008. The invoices stated that the invoice was for services provided over

13 days but did not specify the days. After Council identified a discrepancy in the invoice a revised invoice was issued seeking a revised payment of \$36,300 for services provided over 12 days (rather than the previously stated 13). A number of emails I have reviewed indicate that this was not the only error Council identified in the sub consultant's invoices.

436. On 6 May 2008, the second consultant rendered a number of expenses invoices on behalf of the sub consultant. One sought payment of \$6,955.20 for expenses incurred between January and September 2007 during Phases 1C, D and E. Another sought payment of \$2,815.20 for expenses incurred between September and October 2007. Another sought payment of \$973 for expenses incurred in April 2008.
437. On 28 May 2008, the second consultant rendered a further invoice on behalf of the sub consultant. However, this related to services provided and expenses incurred in relation to the preparation of the Program between 21 July and 4 November 2005, some three years prior. The total payment sought was \$8007.20. In this instance the sub consultant did provide a detailed timesheet.
438. On the same day, the second consultant rendered an invoice on behalf of the sub consultant for services provided and expenses incurred in relation to Phase 1E during December 2007 seeking payment \$15,953. This invoice was also supported by a detailed timesheet.
439. On 12 August 2008, the second consultant rendered an invoice on behalf of the sub consultant for services provided over two periods some two years earlier between 1 January and 31 December 2006. The invoice appeared to relate to services provided in relation to Phases 1A, 1B and 1C. The first periods specified in the invoice commenced on 1 January and ended on 17 May 2006. The second period commenced on 18 May and ended on 31 December 2006. The sub consultant sought payment of \$114,087.88 including GST for these services and \$4503.40 in expenses. No timesheet was submitted in support of this and the invoice did not specify the days for which payment was sought.
440. From mid 2008 on, after the former General Manager was required to report to Council on the Leadership Development Program, Council became more

proactive in chasing outstanding invoices from the sub consultant and investigating and verifying her payment claims. A review of emails generated by this exercise indicates that this has been a fraught and resource intensive process that is still ongoing. It was evident that in preparing the report for Council, staff had difficulty in establishing the actual costs to date of the program because of the sub consultant's outstanding invoices. One staff member made the observation in an email that the Council had been *"lucky that the end of year last year was not questioned by the external auditors"*.

441. The manner in which the sub consultant rendered her invoices posed a number of administrative challenges for the Council in meeting payments. Firstly, as described above, the sub consultant's invoices were rarely accompanied by formal timesheets and often contained insufficient information to identify the services provided and the specific days on which they were provided. This was particularly problematic given the services had often been provided some months and sometimes years before invoices were rendered. Detailed daily programs were developed in relation to the delivery of most phases of the Program which identified the days and times sessions were held and which of the consultants was involved. It may have been possible to reconcile some of the sub consultant's invoices against these though no such documented reconciliation exists on Council's document management system. It is evident from the emails I have reviewed that Council identified a number of errors in the sub consultant's invoices and was unable to verify a number of her payment claims.

442. Secondly, the delivery of the Program under six separate contracts meant that the sub consultant's invoices were often rendered after the contracts that the invoiced services were delivered under had been completed and closed off. For example, in one case, on 21 July 2008 an attempt was made to vary CPA/114372, relating to Phase 1B to increase the approved value by \$55K in order to pay an invoice submitted by the sub consultant in relation to services provided under that contract. The former General Manager approved the variation on 23 July 2008. However Phase 1B had been completed in October 2006, nearly two years previously and the contract had been closed off. A note made in Council's document management system dated 24 July 2008 stated

that it was not possible to vary a closed contract. A further note made in the system on 28 August 2008 stated that CPA/126992 relating to Phase 1E had been varied instead to accommodate the payment of the invoice. An email dated 26 August 2008 indicated that this was because this was the only contract with any funding left on it. Records on Council's document management system relating to CPA/126992 confirm that the former General Manager approved a variation to that contract on 1 September 2008 to increase the approved value by \$57K to accommodate the payment of an invoice rendered with respect to CPA/114372. Another variation was approved with respect to CPA/126992 around the time that the sub consultant began to render invoices with respect to services she had provided under previous contracts. On 21 July 2008, the former General Manager approved a variation to that contract of \$74K. It is unclear whether this variation was also approved to support payment of the sub consultant's invoices for services provided under previous contracts.

443. Thirdly, the manner in which the sub consultant rendered her invoices will have served to further inhibit Council's capacity to monitor and control costs associated with the delivery of the Program. As described above, the sub consultant only rendered one invoice prior to Phase 1E of the Program. This must have been apparent to the Council. And yet no attempt was made to require the sub consultant to at least render invoices at the conclusion of each phase of the Program with respect to the services provided under that phase. The failure to do so represents a fundamental failure to manage or exercise appropriate control over the delivery of the Program.

444. It would appear that the sub consultant also did not invoice Council for other services she provided to Council in a timely manner. In its response to the Notice, Council advised that in June 2008, it was necessary to take up an accrual of \$201,057 for invoices not received from the sub consultant for services dating back to 2005. This has continued to be an issue with significant claims for undercharged consultancy costs now being made by the sub consultant subsequent to the termination of all arrangements with her on 2 June 2010. The total claimed as outstanding is over \$280K with some of the claims going back to 2005. More recent charges are also due and are in the process of being invoiced. Council advised in its response to the Notice that it is disputing

the old claims and they will not be paid unless adequately substantiated. Council also advised that a full reconciliation of invoices paid, underpaid and not yet charged is still being undertaken by it and the sub consultant.

3.8.5 One contract or six?

445. One of the concerns that prompted this investigation was that by spreading the Leadership Development Program across six separate contracts, the Council may have engaged in "order splitting" to avoid the tendering requirements under section 55 of the Act. As stated above, the *Tendering Guidelines for NSW Local Government* issued by the Division in October 2009 to assist councils to meet their statutory obligations in the conduct of tenders state that councils should not invoice or order split to avoid tendering requirements.

446. As stated above, in his letter to the Division of 19 August 2009, the former General Manager maintained that Council had not engaged in "order splitting" as a means of avoiding the tendering requirements. He advised that discrete orders or extensions of orders were merely used as part of a project management approach or for administrative purposes as dictated by the constraints of the Oracle software.

447. On my assessment, the six contracts formed part of a single seamless engagement. This assessment is based on the following considerations:

- All six contracts related to the delivery of a single program, not six single programs. Each of the phases of the Program was not severable from the others. This is evidenced by the fact that the Leadership Development Program was originally conceived by both the Council and the consultants as a single program. This was further reflected in the fact that each proposal developed with respect to each successive phase referenced, continued and built upon activities undertaken in the previous phase.
- Each of the contracts operated consecutively. As one contract ended the other commenced. As demonstrated above, invoices for services provided under earlier contracts were on occasion paid under subsequent contracts.

- The same contractors were engaged under each of the contracts to provide the same services. Council appeared not to contemplate the possibility that any of the phases could have been delivered by anyone other than the two contractors engaged to deliver previous phases of the Program.
- The program could just as readily have been delivered under a single contract and, in my opinion, should have been. By the former General Manager's own admission, the only reason the program was split across six contracts instead of one was apparently purely for administrative, software and project management purposes.

448. As described above, the consultants were engaged by way of direct appointment and without the benefit of any competitive procurement process. The sub consultant appears to have been engaged on the basis of her previous work for the Council. It was the sub consultant who introduced the Council to the second consultant.

449. The total approved value of all six contracts was \$507,700.86. Total actual expenditure under all six contracts was \$886,200.57. Both sums far exceeded the tendering threshold of \$150K. By failing to tender for the delivery of the Program, Council breached section 55 of the Act.

450. Even if one were to accept the view that each of the Phases were properly delivered under separate contracts, two of the contracts, (CPA/126992 relating to Phase 1E and CPA/142126 relating to Phase 1F) involved expenditure in excess of \$150K and should have been the subject of a formal tender process.

451. Apart from the need to comply with its statutory obligations under section 55, by undertaking a formal competitive tender process for the delivery of the Program, Council would have been able to seek a range of proposals from a number of potential service providers. In doing so, Council would have had the opportunity to select a proposal that best met its needs at the best possible value for money. A formal tender process would also have given the Council the basis to establish an overarching contractual framework that would have enabled it to better manage contractor performance and costs. By instead directly appointing

contractors and engaging them on an incremental basis, Council effectively denied itself these opportunities.

452. The question remains whether the engagement of the contractors to deliver the Leadership Program over six contracts instead of one was motivated by an attempt to avoid the tendering requirements by "order splitting". While I have noted the former General Manager's explanation for structuring the engagement over six separate contracts as being necessitated by administrative, software and project management requirements, it remains unclear why these should have dictated a need to deliver the Program under six contracts instead of one.

453. Furthermore, it is also unclear why a Program that was initially conceived as a single proposal was subsequently split into different phases that were developed and delivered incrementally. Indeed, it is perhaps noteworthy that having initially developed a proposal that had a projected cost of at least \$235,812.50, the consultants were apparently required to submit a modified proposal with a projected cost of \$149,187.50, just below the tendering threshold. This proposal was subsequently further modified to the "phased" approach to developing and delivering the program. This suggests the possibility that the Council may have been anxious to avoid the need to go to a formal tender process and had explored a number of options for structuring the Program in a way that brought it under the tender threshold.

454. On the other hand, given that Council had openly disregarded the need to comply with its statutory obligations under section 55 in the case of other "body hire" contracts on the basis of the legal fiction that the contractors were employees, it is difficult to see why it would go to the trouble of seeking to avoid these obligations in the case of the Leadership Development Program by means of "order splitting".

455. Another possible explanation is suggested by the fact that the former General Manager's purchasing delegation was restricted to \$150K. Any purchase above this sum, whether made pursuant to a formal tender process or not, would need to be authorised by the Council. This in turn raises the question of whether the structuring of the Program in a way that ensured that no single purchase made in relation to it exceeded \$150K may have been motivated by the need to avoid

reporting the Program to Council and to seek its approval for the Program rather than to avoid the tendering requirements under section 55.

3.8.6 What did the Program achieve?

456. As described above, pursuant to Council's resolution of its meeting of 26 March 2008, a report on the Leadership Development Program was submitted to the Council meeting of 28 May 2008. The report sought to defend the Program, describing its achievements.

457. As a preliminary observation, it is perhaps worth noting that the report prepared for the meeting of 28 May 2008 failed to address all the issues that the Council resolution of 26 March 2008 required it to address. In particular, the report failed to disclose the following information required by the Council resolution:

- detailed costings for the consultants including fees, travel, accommodation, meals and other incidentals
- benchmark criteria used to assess the success or otherwise of the Program
- an explanation as to why the Program had not been subject to public tender requirements
- what percentage of staff, that had participated in the Program were still employed by Wyong Shire Council.

458. A draft of the report prepared for the Council meeting and an email from the staff member responsible for drafting the report to the former General Manager dated 2 May 2008 enclosing the draft, indicated that she had difficulty in addressing a number of the issues the report was required to cover and sought the input of the former General Manager. Among the issues she had difficulty addressing were the following:

- The achievements of the Program; (*"The achievements section at the end still needs quite a bit of work, but I need some fresh eyes on it."*)
- The cost of the Program per participant; (*"Kerry still waiting on [the sub consultant]'s invoices but this is the ball park"*)

- Why the Program was not the subject of a public tender process (*"This project has not been subject to public tender because.....Kerry can you help with this....."*)

459. The report provided the following assessment of the estimated cost per participant of the program to 30 June 2008 and compared this with the cost of similar programs:

Thirty three senior managers have participated in the Leadership Development Program to date...

In addition, other staff such as the Internal Auditor and Project Executives have been included in parts of the Program.

In any organisation where there is change, there will certainly be individuals who are not receptive or suited to the desired change. However, Wyong's Leadership Development Program is proving to be an effective tool for retaining talented managers with an annual turnover rate of 7% (including two retirements). This is in line with the organisation's overall turnover rate currently running at 7.2% and below the overall turnover average in local government of 9%.

Costs over three financial years to 30 June this year will be:

<i>Consultants</i>	<i>\$692,088</i>
<i>Travel Accommodation</i>	<i>\$134,197</i>
<i>Incidentals</i>	<i>\$7,928</i>
<i>TOTAL</i>	<i>\$834,213</i>

This equates to an average of \$12,640 per Manager per year in its Leadership Development Program. Given the intensive, hands on nature of this program and the practical benefits of the on-the-job action coaching, this is considered a worthwhile investment. It is also comparable with in-house programs conducted by government agencies, such as (although, clearly, they would not have accomplished the necessary cultural change):

- *The Australian Institute of Police Management, Executive Leadership Program - a two week residential program plus distance education (\$16,940 pp).*
- *The NSW Premiers Department Executive Development Program – a five day workshop program (\$9,460 pp).*

This investment also compares favourably with externally-provided leadership development programs, such as:

- *University of Melbourne's Business School, Leadership Development Program – over five days (\$9,854 + travel pp).*
- *The Australian Graduate School of Management, Middle Manager Program - a five day program, (\$7,590 + travel pp).*

460. Given that at the time the report was prepared, many of the sub consultant's invoices for services provided in connection with the delivery of the Program were yet to be submitted to Council, it is unclear on what basis the cost of the Program to 30 June 2008 was calculated. However, the estimated cost of \$834,213 is not inconsistent with the subsequent calculation of total actual expenditure under all six contracts of \$886,200.57.

461. The report does not specifically disclose how many of the senior managers who participated in the Program had since left Council as the Council resolution of 26 March 2008 required it to. Of the 33 managers who participated in the Program, at least 13 have since left the employment of Council.

462. The report described the achievements of the Program as follows:

Over the past twelve months there has been evidence of improved quality of interaction at individual and team level, as well as significant system and process enhancements. Examples include:

- *Evidence of significant improvement in communication throughout the SMT – across, up and down, utilising skills developed through action coaching.*

- *Facilitation of Forums by SMT managers – no longer consultants or GM required to facilitate productive conversations.*
- *Strategy Forum and Organisational Management Forums working well and delivering results e.g. Shire Strategic Vision, HR Strategy, Emergency Response Plan, Information Management Methodology, Project Management.*
- *Organisational project teams have good inter-departmental representation and cooperation – breaking down inter-departmental competitiveness.*
- *There are staff that are on these project teams who are not SMT members, providing exposure to staff on the concept of shared leadership.*
- *A group of staff, who have been identified as having particular skills, are receiving training as “mappers” to capture and make sense of strategic conversation for the Shire Strategic Vision. This will enable staff from various levels and departments within Council to contribute to a major organisational project*
- *Willingness of managers to take up the opportunity of acting positions, even though it may be outside their normal area of expertise or Department, this in turn provides other staff with an opportunity to step up.*
- *Existing managers are supporting these managers and staff who are taking up the challenge of “acting” - offering collegial support both formally & informally.*
- *Managers are offering themselves to provide mentoring for aspiring managers within the organisation.*
- *Improved communication and facilitation skills utilised during departmental managers meetings.*

- *Action coaching is now being conducted at the next level down i.e. managers with their staff - getting informal feedback that staff are seeing changes*
- *Increased acceptance of responsibility and accountability by managers*
- *Ownership of issues lower in organisation*
- *Transition from a "blame game" to identifying and implementing solutions*
- *Increased willingness to embrace change and accept new ideas*
- *Increasing identification of and responsiveness to emerging issues*
- *Better quality and less rework*
- *Starting to transition down into organisation with next level (team leaders/supervisors) – driven by Managers*

463. As with the objectives and outputs established for the Program in the second consultant's and sub consultant's original proposal, these achievements are somewhat intangible. Furthermore, it is somewhat difficult to ascertain precisely whether the described achievements can be solely attributable to the Program and to what extent these could have been achieved by other means without the Program being delivered.

464. In its response to the Notice, Council advised that anecdotal feedback provided by participants in the Program varies from it being very beneficial to that of limited value. Council further advised that the *"program has facilitated the progress of several staff within the organisation to operate in an effective manner at a higher level. Individual outcomes have however been largely a factor of capacity to change and personal effort put into the program. As a result of the program some senior staff were managed out of the organisation."*

465. I acknowledge that the Program may indeed have delivered benefits to both the organisation and individual staff. However in the absence of objectively verifiable goals and deliverables established at the outset and a formal evaluation of the achievements of the Program against these goals and

deliverables, it is impossible to establish whether this is in fact the case. Furthermore, while I have noted the Council's comparisons of the costs of the Program with the costs of similar programs, in the absence of a formal tender process, Council can never be confident that the Program that it paid over \$800K for was the one that best met the needs of the organisation and represented the best value for money.

3.9 Internal concerns about Council's "body hire" practices

3.9.1 Background

466. It should be noted that many of the issues of concern discussed above have previously been identified by Council's Internal Auditor and the Contract Systems Coordinator. The Internal Auditor has reviewed Council's procurement and contract management practices on two occasions in the last three years. The Contract Systems Coordinator has also reviewed these in light of reports issued by the Independent Commission Against Corruption (ICAC) with respect to corrupt activities at Railcorp and the NSW Fire Brigades. To its credit, Council has since acted to implement most of the recommendations arising from these reviews.

467. The findings and recommendations made as a result of these reviews relevant to the Terms of Reference of this investigation and the actions Council has taken to implement the recommendations are discussed in more detail below.

3.9.2 Internal Audit review of expenditure – June 2007

468. Internal audit undertook a review of expenditure during the period of July 2006 to April 2007. A preliminary internal audit report was issued in June 2007 containing findings and recommendations arising from the review. One of the key areas focussed on in the review was procurement. Amongst other things, the review identified practices associated with the variation of contracts as being of concern. In particular, the review raised concerns about the variation of contracts with an initial estimated value of under \$150K that were not approved by Council and either through scope variation to the contract or through new contracts, resulted with a cumulative total value that exceeded \$150K without ever being reported to Council.

469. The report focussed on three cases:

- The delivery of the Leadership Development Program which, to that point had been undertaken under 5 separate contracts with a cumulative value, (to that point) of \$418K
- A contract to undertake consultancy work with the Shire Services Division since October 2004, which had been extended every six months and had a cumulative value of \$441K
- A contract to undertake consultancy work with the Shire Services Division since June 2006, which had been extended five times and had a cumulative value of \$654K

470. The report quoted a statement made in the request for the approval of one of these contracts that indicated that it was expected the estimated value of the contract would exceed the initial estimated value for which approval had been sought. The following statement was made:

Although it is difficult to accurately pre-estimate the annual or total expenditure that will be incurred on services to be provided under the contract, it is anticipated that annual expenditure will exceed \$150,000 per annum and \$450,000 over the life of the contract.

471. The report noted that notwithstanding this statement, the contract was approved for an initial estimated value under \$150K.

472. The report made the following observations about the practice:

It is not suggested that the services outlined above are not required by Council. However the risk to Council with the current process is that information is not being disclosed to management or Council in relation to variations to contract expenditure and thereby not allowing appropriate organisational decisions to be made.

The current process of not reporting cumulative payments of this nature is in accordance with the relevant legislation and the procurement policy. However

the reporting of cumulative totals which substantially exceed the \$150k limit would be a more prudent process.

A quarterly "Variations" report should be compiled by the Contract Systems Manager to ensure Senior Management and Council are aware of contracts which have exceeded the amount of \$150k due to variations. ...

Council's Procurement Policy should include a requirement that when contracts with an initial estimated value of <\$150k exceed \$150k due to variations or related contract, the Contract System Manager is informed of the arrangement.

It is important to note that the report would be for information purposes only, as it is understood that the approval for the expenditure would have already occurred within delegation. The implementation of such a requirement would provide the following benefits:

- Greater transparency in relation to contractual arrangements*
- Discourage variations/new contracts being used to avoid delegation limits*

473. The report made the following recommendation in relation to this issue:

A quarterly "Variations" report be prepared and issued to Senior Management and Council detailing the following information on all contracts exceeding \$150k:

- Contract Number*
- Contract Title*
- Contractor*
- Brief Description of Purpose of Contract*
- Original Contract Value*
- List of Variations*
- Cumulative Contract Value*
- Factors Resulting in Significant Variations*

474. Special systems reports were subsequently developed by the Contracts Systems Coordinator to facilitate a quarterly reporting process on contracts to Council. The process of reporting to Council has since been extended to include contracts which initially were not expected to exceed \$150k. Monthly variation reports are now being provided to Council.

475. While I generally concur with the Internal Auditor's above concerns about the need to enhance the accountability mechanisms applying to decisions to vary and extend contracts, in my opinion his above analysis does not identify and address all the issues of concern raised by this practice. In particular, it does not address the fact that Council's Procurement Policy, delegations and procedures permitted it to effectively bypass its statutory obligation to enter into contracts for services involving expenditure exceeding \$150K pursuant to a public competitive tender process through the variation of contracts as described above. This does not only pose statutory compliance risks but also probity and corruption risks. The requirement that contract variations that escalate expenditure under a contract above \$150K be reported for information purposes only, does not satisfactorily address these risks. I have proposed an alternative mechanism for addressing this issue below.

476. In addition to the above issue, the review identified concerns and made recommendations about the following:

- Finalisation reports for contracts - (Recommendation 66: *"Council's Procurement Policy should be amended to require a finalisation report to be prepared semi-annually by the Contract Systems Manager and be reported to Council."*)
- Auditing of Procurement procedures – (Recommendation 3: *"Audits be re-introduced by the Contract System Manager to ensure procedures are being followed in relation to procurement under contractual arrangements"*)

477. Each of the above recommendations has since been implemented.

3.9.3 Internal Audit review of the CSPU – June 2008

478. Internal Audit subsequently conducted an audit of the CSPU. The audit report was issued in June 2008.

479. In its report, Internal Audit flagged concerns about practices associated with the retention of service providers under "body hire" arrangements. The report alluded to a growing debate within Council about the status of the arrangements and whether they were subject to the tendering provisions of the Act. It should be noted that this report coincided with concerns being raised by the governing body of Council about the practice. The report made the following observations:

It is noted that there is debate within council as regards whether certain professional services contracts for services such as contract management and human resources activities provided by corporations should be subject to a tendering process.

An extract of 20 such contracts covering 11 suppliers is attached to this report based on data as at 26 May 2008. It highlights that in relation to these contracts which have not gone to tender and council:

- *All have been established within the contracts system with an original estimated expenditure of less than \$150,000.*
- *Only two of the twenty contracts have a current estimated expenditure of \$150,000 or less. One arrangement is expected to reach \$1.2 million*
- *The total original estimated value of these contracts was \$1.937m*
- *The estimated value of these contracts as at April 2008 was \$5.597m*
- *The total expenditure with these 11 suppliers since April 2004 to May 2008 was \$6.997m*

The above contracts do not include the ... arrangements [relating to the delivery of the Leadership Development Program] which have been established under six separate contracts with a total contracts systems value of \$667,000. (A later reported contract value to council has been \$834,000).

It is noted in respect of the [Leadership Development Program] contract that a significant proportion of costs were not billed to council within a reasonable timeframe. This lead to difficulty in verifying times billed given the extended time involved and staff turnover in the responsible position.

The extent of these arrangements gives rise to concerns as regards initial planning, value for money and legislative compliance. Council needs to have in place clear guidelines for when contractual arrangements are not to go to tender on the basis of exemption under Section 55(3) of the Local Government Act 1993 and to what degree such exemptions are to be reported to council.

Council also needs to strengthen overall organisational control over the management of professional services arrangements where contractors are hired to fill temporary positions.

480. Internal Audit made two recommendations in relation to these concerns. Recommendation 35 was as follows:

Council needs to have in place clear guidelines when contractual arrangements are not to go to tender on the basis of exemption under Section 55(3) of the Local Government Act 1993 and to what degree such exemptions are to be reported to council. (Risk Rating: Extreme)

481. In its response to the recommendation, Council management advised as follows:

It is understood that this will be elaborated upon in the Procurement Manual once formal advice is received from the Department of Local Government in relation to body hire contracts. Clear criteria for the determination of whether contractual arrangements are to be excluded from normal tendering processes will be set. Any exclusion where the life time cost is expected to exceed \$150,000 will be reported to Council for approval.

482. Internal Audit's assessment of compliance with the recommendation as of July 2010 was as follows:

Procedures have now been prepared as regards how temporary contract personnel will be engaged by Council. These were introduced in draft form in

April 2010 and are currently going through further revision prior to formal adoption. This process is expected to be completed in August 2010.

483. It would appear that the procedures referred to are *Procurement Procedure 150: Contract Development – Provision of Temporary Contract Personnel* and *Procurement Procedure 251: Contract Management – Provision of Temporary Contract Personnel*. These are examined in detail below.

484. It should be noted that given that there is no longer any debate over the status of "body hire" contracts and that Council now accepted that they are contracts for services and thereby subject to the requirements of section 55 and Council's Procurement Policy, the need to establish criteria for identifying whether or not they are subject to these requirements no longer arises.

485. Recommendation 36 was as follows:

Council needs to strengthen overall control over the management of professional services arrangements where contractors are hired to fill temporary positions. (Risk Rating: Extreme)

486. In its response to the recommendation, Council management advised as follows:

This would be important where the contractor is with council for a period of greater than 3 months. More formal performance monitoring processes could be put in place for contracted personnel services personnel. It is [a] matter which might be considered further at an Executive level.

487. Internal Audit's assessment of compliance with the recommendation as of July 2010 was as follows

Current processes in place for contract management of project managers address performance issues. These include monthly project reviews and informal interactions with management. A performance review process prior to contract variation for project managers was put in place with effect from April 2010 as part of the new procurement procedures for temporary contract personnel. Action to terminate the contracts of unsatisfactory performance of certain project managers has been taken as required.

488. As will be discussed in more detail below, performance management requirements are now reflected in *Procurement Procedure 251: Contract Management – Provision of Temporary Contract Personnel*.

3.9.4 Internal Audit review of the CSPU's staffing needs – June 2008

489. In its June 2008 report of its audit of the CSPU referred to above, Internal Audit also identified concerns about the staffing of the Unit. The report made the following observations:

The Contracts & Special Projects Unit utilises a combination specialised project manager employees and contracted project managers engaged through a number of agencies. It has also entered into two major professional services contracts with DOC [the Department of Commerce] and GHD to provide contract management services primarily on the major water related projects.

This structure allows Council to manage its major projects within the one operational unit. It also helps facilitate the transfer of knowledge and develop project management skills within Council. As the Unit's workload can vary depending on the number of major projects that Council is currently undertaking the use of contractors also provides flexibility to easily increase or decrease resources as appropriate.

The use of contractors is also partly in response to the difficulty in recruiting and retaining permanent contract management staff as there is a shortage of engineering skills across the sector. This is placing pressure on existing staff to meet the operational demands of Council let alone manage at a more strategic level.

The use of a significant number of contractors is a short term solution to Council's shortage of qualified engineering staff. A longer term HR strategy needs to be developed to ensure that Council can meet future projects management needs without having to rely so heavily on contractors. It is noted that to help overcome this issue for the future two younger staff have been employed in the unit with a view to Council growing their own. A succession planning project is also being coordinated through Workplace Strategies.

Several of the permanent contract management staff expressed concerns regarding the disparity between their salaries and those paid to the contractors especially where the contractors are engaged for an extended period of time. One contractor commented that he would not work at Council as a permanent employee as the salary is not attractive enough! This highlights the difficulties that Council has in attracting and retaining suitably qualified staff.

When a contractor who has been working with Council for an extended period leaves they also take with them the knowledge they had of the projects that they were working on. If they are Council's key person on a contract and they leave before the contract is finished a knowledge and familiarity gap can arise. ... Effective management of Council's contractors is crucial to ensure that Council does not suffer any skills and knowledge deficiencies.

The use of contractors comes at a higher cost. The contractors are usually costed to specific projects and are therefore not included in the salaries budget. This can hide contractor cost increases as the contractors can work fully chargeable hours exceeding the 35 hours for full time staff who often work unpaid extra hours. This has also caused some disquiet among the permanent staff as the gap in remuneration is further exacerbated.

Discussion with various areas of Council including Staff Services, Contracts and Special Projects and Finance did not find anyone seeing it to be their responsibility to monitor the overall use of contractors across council. No formal performance monitoring of the contractors across council is therefore in place.

It is important to manage and monitor the performance of the contractors in relation to productivity and remuneration as any other employee. This is especially so when they are engaged for an extended period of time. Processes need to be implemented to better understand the full cost of all contractors, the details of their individual arrangements and levels of performance to enable council to make better informed decisions on the continued use of contractors.

An effective process is needed for managing staff suggestions for improvement. With the number of contractors within the Contracts & Special Projects Unit having wide industry experience there is also an opportunity for Council to

capitalise on their knowledge as well. An effective process that provides feedback on the suggestions will encourage staff and contractors to continue to look for ways in which Council can improve performance.

490. Internal Audit made several recommendations in relation to the above concerns. Recommendation 12 was as follows:

A longer term HR strategy for Contracts & Special Projects be developed to meet future project management needs of Council. (Risk Rating: High)

491. In its response to recommendation 12, Council management advised as follows:

Council has adopted a strategy of hiring contractors to fill the professional level staff void in a time of abnormally large number of projects. As well some junior engineering staff have been engaged to help grow our own in-house skills. It is also noted that most of the senior staff in the unit are nearing the end of their careers and that succession planning has been initiated. Other uncertainties also exist including Water Corporation and a Central Coast Regional Council. In such an environment it is difficult to plan for the longer term. Departure of the senior staff positions is the highest shorter term risk and this will need to be appropriately addressed through the succession planning process.

492. Internal Audit's assessment of compliance with the recommendation as of July 2010 was in part as follows:

In the past there has been limited success in making full time permanent employee appointments to the Unit. In some instances even high profile State contract project manager providers were unable to provide any projects managers to Council. Council has therefore continued to utilise alternative sources of project managers.

A much more definitive approach has been taken under the new General Manager. Council is now adopting an employment approach to project management. Recruitment has commenced for a number of project manager and project director positions. Contracted project managers were advised in May 2010 that their services would be terminated within 3 to 6 months. All

arrangements involving previous employees acting as contractors have now been terminated.

493. The steps recently taken by Council to phase out "body hire" contracts and to recruit project directors and project managers is examined in more detail below.

494. Recommendation 13 was as follows:

A review of the management of Council's professional services contractors should be undertaken to ensure, in particular, that Council is receiving value for money and achieving an appropriate level of knowledge transfer. (Risk Rating: High)

495. In its response to recommendation 13, Council management advised as follows:

It is agreed that a more formal process of review of performance should be in place especially where the contractors are engaged for longer periods. A more formal performance review process will be considered in conjunction with the proposed Unit restructure.

496. Internal Audit's assessment of compliance with the recommendation as of July 2010 was as follows:

Contract and Special Projects management have recognised both issues as part of their normal management processes. New procedures are now in place which more formally document performance and variation management issues.

497. As stated above, performance management requirements are now reflected in *Procurement Procedure 251: Contract Management – Provision of Temporary Contract Personnel*. These are examined in more detail below.

498. Recommendation 14 was as follows:

Council should endeavour to recruit staff for vacant technical and management positions as fast as possible. (Risk Rating: High)

499. In its response to recommendation 13, Council management advised as follows:

Council is trying to solve its resourcing issues in a variety of ways. It is however hindered by unprecedented competition for qualified staff. Aspects of the

Human Resources strategy are addressing this key issue. Management are actively participating in this process.

500. Internal Audit's assessment of compliance with the recommendation as of July 2010 was in part as follows:

A recruitment process has commenced for the appointment of project directors and project managers. There have been 90 responses to the position of project director and 70 to the project manager positions. Suitable applicants in each category are now going through an interview process. Previous attempts to engage fixed term project managers have been largely unsuccessful. A process to recruit project officers was terminated in 2009 due to the poor quality of the applicants.

501. The outcome of Council's recruitment of project directors and project managers is discussed in more detail below.

3.9.5 The Contract Systems Coordinator's review– March 2009

502. Following the release in January 2009 of the ICAC's reports into corrupt activities at Railcorp and the NSW Fire Brigades, at the request of the former General Manager, the Contract Systems Coordinator undertook a review of Council's practices, structures and operating environment in relation to external contracting for the provision of goods and services having regard to ICAC's findings in those investigations.

503. One issue of particular relevance to this investigation identified by the Contract Systems Coordinator was the corruption risks associated with the award of contracts with a comparatively low face value. A significant proportion of the corrupt behaviour identified by ICAC at both Railcorp and the NSW Fire Brigades arose from the award of comparatively low value transactions. The Contract Systems Coordinator made the following observations in relation to this:

Whilst Council's procedures for expenditure over \$150k are robust to align with legislative requirements, there is potential to improve transparency and reduce costs by publicly calling for tenders where expenditure is below the \$150k

threshold prescribed in the Local Government Act. In this regard, it is recommended to call public tenders for procurement activities with expenditure >\$50k.

The proposed increased use of the eTender system would operate only for publicly advertising tenders for requirements in the range \$50k - \$149k. Where the estimated cost is within this range, the full requirements of the Local Government Regulations as they relate to public tenders such as, minimum advertising periods, tender box close and dealing with late tenders etc. would not apply.

It is recognised that in some cases there will be constraints such as limited specialist suppliers. In such cases it will be necessary to make a discretionary decision as to whether the proposed eTender process is worthwhile. To provide a point in time for making this determination, the Contract Development Plan template (used at the formative stages of a procurement exercise) would be amended to reflect the need or otherwise to use the eTender system for requirements in the estimated \$50k - \$149k range. The relevant Manager would have authority to select the appropriate method i.e. Selective tenders only or publicly advertise via the eTender system.

(Note: it would still be appropriate to selectively approach suppliers notwithstanding that a tender is publicly advertised via the eTender system).

Additionally, previous analysis has shown that 95% of Council's expenditure occurs across 300 suppliers (total suppliers being approx. 4,000). Generally, expenditure for each supplier is totally incurred within one operational area of the organisation.

Periodic review by Managers of expenditure with their major suppliers will assist to identify suspect cumulative transactions and potentially identify areas to reduce costs.

504. The Contract Services Coordinator made the following recommendations for improving control of expenditure under minor contracts:

- *Make greater use of the "e-Tender" system by publicly advertising contracts greater than \$50k.*
- *Develop and implement organisational reporting on expenditure at an individual supplier level to identify areas where expenditure could be better managed and/or suspect cumulative transactions are occurring.*

505. In his comments on the report, the Contracts and Special Projects Manager acknowledged the merit of the recommendations but flagged a number of concerns about their practicality. In relation to the proposal to use e-tendering in relation to contracts with a value greater than \$50K, he expressed the concern that this would potentially cause delays in urgent works that are currently going out to selected tenderers. He used as an example of this, expert consultants in a limited field.

506. I acknowledge the concern about the practicality of utilising e-tendering in relation to contracts exceeding \$50K.

507. However, given the previous propensity of Council to split contracts and to reuse the same contractors evident from the above discussion, I believe there is merit in the recommendation that Council develop and implement organisational reporting on expenditure at an individual supplier level to identify areas where expenditure could be better managed and/or suspect cumulative transactions are occurring. In its submission in response to the draft of this report, Council maintained that such a system is already in place. Council advised in its submission that it has a sophisticated reporting and transactional based accounting system in place that allows for reporting of expenditure to individual suppliers across all transactions.

508. The Contract Services Coordinator also echoed the concerns previously raised by Internal Audit with respect to the control of costs and performance management of contractors. In particular, he made the following observations about the failure to make a prior estimation of the hours to be worked by contractors prior to their engagement:

Due to current and future capital works projects that are of a significant nature, Council currently employs 50(+) individuals under various contractual

arrangements. A significant proportion of these arrangements (min. 50%) would be paid on a time basis, authorised via submission of weekly claims for hours worked.

An estimate of costs for contract staff paid under an hourly basis is \$2 million p.a.

While the approval process used by Council has rigour which was not evident in the ICAC report on Railcorp, there is potentially scope to improve the overall control of these arrangements.

Payments for contract staff are currently processed as claims are received. There is no prior estimation of required hours for each project or financial commitment raised. It is suggested an estimation of hours and the raising of a financial commitment based upon the estimation would provide greater control and ability to monitor and measure contract staff performance.

509. The Contract Services Coordinator also raised concerns about the potential disparities between the application of performance management and accountability requirements between permanent staff and contractors. He made the following observations in this regard:

Council currently employs around 30 staff in contract positions. Many of these contract staff are in positions directly responsible for implementing and subsequently managing high-value procurement projects.

Around a third of these people are engaged by NSW Dept. of Commerce under a specific contract with Council for project management services, as such, there would be an expectation that those contract staff are conversant with the principles of public sector expenditure requirements. However, there are a number of contract staff who have come to Council directly from the private sector where matters of probity and procedure are less relevant.

Essentially these people work in staff positions, but there is no similar formalisation of roles & responsibilities as occurs with employed staff via a Position Description. Similarly, performance monitoring is not commensurate with that applied to employed staff.

It is also noted that the majority of Council's contract staff undertaking procurement transactions complete an annual pecuniary interest declaration but are not required to advise of secondary employment before they take such positions on.

510. The Contract Services Coordinator made the following recommendations in this regard:

- *Develop position descriptions for Project Managers engaged under contract arrangements*
- *Improve the understanding of roles & responsibilities and monitor performance in a formalised manner.*
- *Improve time management and cost control.*
- *Provide detailed training in Council's procurement systems and public administration principles.*
- *Consider alternate engagement arrangements for Project Managers e.g. fixed term (as opposed to current ad hoc extended engagements).*
- *Require declaration of any secondary employment to avoid / identify conflicts of interest.*

511. The Contract and Special Projects Manager indicated his support for most of these recommendations.

512. The Contract Systems Coordinator provided his report in draft form to the Director Corporate Services on 11 March 2009 with a request for "*feedback and consent to proceed*". No formal consent was received by the Contract Systems Coordinator from the then Director Shire Services to take further action and a final version of the report was never issued.

513. Notwithstanding this, Council has advised that action has been taken to implement most recommendations. In relation to the recommendations most relevant to this investigation, Council advised in its response to the Notice of the following actions that have been taken:

- Position descriptions were developed during the second half of 2009 for project managers based on the description for the permanent position of contract engineer.
- Current processes are in place for the performance management of project managers including monthly project reviews and informal interactions with management. A performance review process prior to contract variation for project managers was put in place with effect from April 2010. Action to terminate the contracts of unsatisfactory project managers has been taken as required. These procedures are examined in detail below.
- Resource planning procedures are now in use to identify hours and dollars by project and by contracted project manager. These are regularly updated as part of normal operational management.
- Contracted project managers are included in corporate training as considered necessary. They also receive as much as possible/appropriate, specific CSPU updates along with permanent staff (eg environmental management). The contracted project managers go through a shortened induction process which excludes staff specific matters. The interaction with the contracted project managers is a two way process as well with feedback on improvements to council's procedures encouraged.
- As discussed below, actions have recently been taken to significantly reduce the extent of use of contracted project managers. A recruitment process has now been completed for the appointment of Project Directors and Project Managers.
- A process to seek information on secondary employment of contracted project managers was never put in place. Ultimately the question of whether this is required is dependent on the status of contractors as employees. As discussed above, Council now takes the view that the contractors are not employees. This is therefore now not considered a mandatory requirement given the contractual nature of the arrangements.

- Procurement arrangements which are expected to exceed \$120K are usually now being put to tender (using e-Tender) in order to avoid the need to do so if costs exceed \$150K.
- Council has undertaken various reviews of expenditure as part of normal operational processes. The current service delivery review being undertaken by Council has however identified the need to apply more resources to implementing appropriate procurement strategies across the organisation.

3.10 Recent Developments

3.10.1 Background

514. Following the appointment of the current General Manager, the Shire Services Department prepared a report for the ordinary Council meeting of 26 May 2010 on "*Future Directions for the Body Hire Services for Wyong Shire Council*". The report outlined the Council's proposed strategy for meeting its future professional staffing needs and addressing the issues that have given rise to this investigation.

515. In the report, the Shire Services Department proposed the following strategies:

- Reviewing all existing "body hire" arrangements with a view to phasing them out
- To only use public tender processes, State Contracts Control Board and Local Government Procurement in future to engage temporary professional resources. It was further proposed to use *Procurement Procedure P150: Contract Development – Provision of Temporary Contract Personnel* and *Procurement Procedure P251: Contract Management – Provision of Temporary Contract Personnel* to guide the appointment and ongoing administration of temporary resources secured under the above standing contracts. These are examined in more detail below.
- To adopt a strategy to target employing as staff, 80% of the resources needed for project managing Council's core activities. It was anticipated that this would require the employment of seven additional staff including permanent project managers and support staff of varied skills and

experience. It was also proposed to recruit graduates to junior positions with a view to "growing" them into future project managers to fill core positions. It was anticipated that in future, all temporary professional resources would be engaged as employees, recruited through Council's usual recruitment processes on a full-time permanent basis or a fixed term employment contract with a term of up to five years at an Executive Level 1 rate of remuneration to be competitive with the commercial sector. It was proposed that junior positions would be remunerated under the Award.

- To procure resources for the provision of project management services for the remainder of the work for large specific projects or for a package of smaller projects utilising a public tender process in accordance with the requirements of section 55 and the Regulation. It was proposed that the tenders would be structured on a fixed cost and fixed term (ie project duration) basis.
- To review the ongoing engagement of former staff under "body hire" arrangements.
- To decline the acceptance of any tenders submitted with respect to the CPA/166101 contractors list discussed above and to cancel the proposal to establish the list.
- To provide Council with a quarterly report as part of the quarterly Management Plan report identifying the engagement of independent contractors and whether they were made under the State Contracts Control Board or Local Government Procurement standing contracts or other complying options.

516. The report also addressed proposed interim arrangements pending the implementation of the above strategy. The report outlined the following reasons for the need to maintain existing "body hire" arrangements as an interim measure:

The current "body hire" resources are each typically working on up to four or more projects at various stages of completion. They have detailed knowledge of

each project and are providing skilled management and control of these projects. Each project may typically be valued from a hundred thousand dollars to several million dollars. Some of these larger critical projects include the Mardi to Mangrove Link and the Mardi Dam augmentation works, where some of these specialist consultants have been engaged for varying or non-specified durations....

It will be necessary to transition from the current "body hire" arrangements and to continue the personnel performing project management duties under those arrangements until suitable alternatives as detailed above can be established. It is not possible to immediately cease engagement of the current "body hire" personnel without putting the projects and the capital works program at serious risk.

Whilst some of the strategies identified above can be implemented quickly, others such as open public tendering for project management services and the recruitment of project managers as staff under fixed term employment contracts cannot. Both take several months to prepare documentation, advertise, close, assess submissions and in the case of public tenders to report to Council. It is also an assumption that the recruitment exercise will attract suitable applicants. It is therefore imperative that, whilst every effort will be made to act urgently to minimise any interim period, an interim period is unavoidable.

517. At its meeting of 26 May 2010, Council unanimously resolved as follows:

- 1 *That Council endorse the proposed corrective actions to:*
 - a *Phase out the current "Body Hire" arrangements and only use a public tender process and/or the tendering exempt State Contract Control Board and Local Government Procurement contracts for any new temporary professional services.*
 - b *As a matter of urgency, advertise to recruit specialist Project Managers as staff under fixed term employment contracts or the Award.*

- c As a matter of urgency, ensure project management services contracts for specific projects or groups of projects are on a fixed time and price basis by either open public tender or tender exempt Crown entities.
- 2 That Council decline to accept any of the tender/s dated 3 September 2009 for contract CPA/166101 – Provision of Temporary Professional Services and cancel the proposal for the contract.
- 3 That Council report to the Department of Local Government on its actions associated with the current “Body Hire” arrangements.
- 4 That a further report be provided to Council on the implementation of the corrective actions in July 2010.
- 5 That Council reaffirm its position of preferring standard wage based employment and avoiding so called “Body Hire” arrangements.

518. At its meeting of 25 August 2010, Council subsequently resolved amongst other things to “endorse the process to phase out the use of General “Body Hire” contractors by 31 October 2010 and Mardi to Mangrove Link contractors by 30 November 2010”.

519. Regular progress reports on the implementation of Council’s resolution of 26 May 2010 have subsequently been made to the Council meetings of 28 July, 25 August, 22 September, 10 November, 8 December 2010 and 9 February 2011. These reports outline the steps described below that have since been taken to implement Council’s resolution.

520. On my assessment, the steps taken by Council as described below have satisfactorily addressed all the compliance issues I have identified above.

3.10.2 The phasing out of “body hire” arrangements

521. In relation to resolution 1a adopted by Council on 26 May 2010, (the phasing out of “body hire” arrangements), all current engagements of “body hire” contractors within Council (with the exception of those engaged on the Mardi to Mangrove Link projects) were terminated by 31 October 2010.

522. No further temporary staff have been sought under the State Contracts Control Board or Local Government Procurement standing contracts (or any other source) to manage workload requirements.

523. The services of the two consultants then engaged by the Council who had previously been Council staff members were terminated on 10 and 11 June 2010 respectively.

524. The Leadership Development Program had not been delivered beyond 2 June 2010 and no current contract exists with the two consultants engaged to deliver the program.

525. In relation to the Mardi to Mangrove Link project, a number of key management positions continue to be filled under "body hire" arrangements. To effect the resolution made by Council at its meeting of 25 August 2010 to phase out all of the current contractors engaged on that project by 30 November 2010, public tenders were invited in September 2010 for the provision of a Project Management team to fill all positions currently occupied by "body hire" personnel on that project. The positions in question related to specialist areas including property management, project management and accounting services. Tenders closed on 14 October 2010.

526. The report to the Council meeting of 8 December 2010 in relation to the evaluation of the tender proposals advised that:

- The preferred offer (after the application of the Local Preference Policy) was from an existing "body hire" contractor.
- Four of the personnel offered by the preferred tenderer were the current incumbents of the positions of Project Manager, Project Accountant, Project Property Manager and Landholder Liaison Manager currently engaged under a "body hire" arrangement.
- Award of the proposed contract to the preferred tenderer would incur an additional cost to Council of \$161,360.00 to retain the same personnel performing the same services. This additional cost represented a 25% increase over the cost to Council of the current "body hire" arrangements.

527. The report identified two possible options for the Council to consider. The first was to award the proposed contract to the preferred tenderer. The second was to decline to accept any of the tenders received and enter into negotiations with the preferred tenderer and such other entities as may be considered appropriate with the aim of forming a contract at prices more favourable to Council and more in line with the rates currently being paid. The report suggested that an associated consideration with this course of action was to engage an independent probity expert, not involved with the tender assessment to date, to advise on the probity of Council embarking on such action.

528. At the meeting of 8 December 2010, Council resolved as follows in relation to the tender:

1 That Council defer its decision to award a contract until it next meets in February 2011 to allow time to consider alternative options.

2 That Council endorse the continuation of the current project management arrangements due to the material public benefit.

529. A report to the Council meeting of 9 February 2011 made the observation that there was a risk that negotiations with the preferred tenderer or any other entity would not produce a better commercial outcome than the present tenders under consideration and may not be as commercially advantageous as the present "body hire" arrangements.

530. The report observed that the present open public tender exercise clearly demonstrated that retaining the existing incumbents under the present "body hire" arrangements resulted in the most favourable expenditure of public monies and best value-for-money for Council.

531. The report proposed that Council take the following course of action in accordance with the requirements of the Regulation with respect to the acceptance of tenders:

- To not accept any tenders
- To cancel the proposal for the contract

- To continue the current project management arrangements under "body hire" arrangements to Easter (ie April 2011).
- To continue to utilise staff resources to finalise the project beyond April 2011. Where there is an insufficient short fall of resources, Council would call for competitive quotes to deal with any outstanding contract/property matters.

532. At its meeting of 9 February 2011, The Council resolved as follows:

- 1. That Council decline to accept any of the tenders for the proposed contract.*
- 2 That Council cancel the proposal for the contract.*
- 3 That Council endorse the continuation of the current project management arrangements to Easter 2011 due to the material public benefit.*
- 4 That Council call for competitive quotes to deal with any outstanding contract/property matters.*

533. On my assessment, the above course of action is consistent with Council's statutory obligations in relation to competitive tendering. By calling tenders with respect to the services provided by the existing "body hire" contractor and by making a value for money assessment of the services provided by that contractor under existing "body hire" arrangements against other proposals submitted pursuant to an open competitive tender process, Council has in effect 'regularised' the ongoing arrangements with that contractor in terms of the requirements of the Act and Regulation.

3.10.3 The recruitment of staff

534. In relation to resolution 1b adopted by Council on 26 May 2010, (the recruitment of staff), advertisements for specialist Project Manager and Project Director positions as temporary and fixed term contract Council staff within the Contracts and Special Projects Unit were placed and closed on 5 July 2010. Approximately 164 applications were received. Interviews were conducted in July. Offers were subsequently made to three applicants for the Project Director positions and six applicants for the Project Manager positions. All six Project Manager positions and two Project Director positions have since been filled.

535. The progress reports to Council flagged concerns about the impact of transitional arrangements on Council's capacity to meet the scheduled timeframes for delivering its capital works program. The report to the Council meeting of 22 September 2010 noted that;

There is a risk the phasing out of "Body Hire" contractors and their replacement by staff Project Directors and Project Managers may result in a net reduction in capacity, depending upon the success of the recruitment drive. Should Council be unsuccessful in attracting sufficient Project Directors and Project Managers to staff positions, it may be necessary to adjust the rolling works program to match the proposed work to Council's project management capacity."

536. This risk was confirmed by a subsequent report to the Council meeting of 10 November 2010. The report advised that as the final engagement of several new project management staff was not achieved until 1 November 2010, after the termination of all "body hire" contractors, there would be a period where projects were delayed as the new staff become familiar with Council's processes and procedures and progress these projects. The report stated that a future report to Council would be provided to consider any implications on current and future works programs. No such report has been made to Council in relation to this to date.

3.10.4 Procedural improvements

537. In relation to resolution 1c adopted by Council on 26 May 2010 (fixed time and price project management services contracts), the report to the Council meeting of 28 July 2010 advised that action was being taken to prepare suitable project management contract documents to be used for calling tenders for management of larger construction projects as these projects became available. These would be exercised once the outcome of the recruitment process was known.

538. The report also advised that as a further improvement to Council's current contracting and tendering arrangements, a review of Council's procedures would be undertaken by an independent external consultant. The report advised that this consultant would be sourced through the NSW Government Pre-Qualification Scheme; Performance and Management Services. Proposals were requested from three service providers from the panel. Deloitte was subsequently engaged to undertake the review.

539. The scope of services requested was to:

- Identify the most appropriate Government best practice guidelines to benchmark Council's performance.
- Undertake a gap analysis of Council's present organisational competency.
- Where appropriate, to liaise with and work collaboratively with the Division, to identify complimentary work to ensure the most positive outcome possible for improvements to Council's policies and procedures.
- Undertake a "top-down" strategic overview of the governance and the control mechanisms needed to ensure best practice and continuous improvement.

540. Deloitte has since completed its review.

3.11 The adequacy of Council's policies and procedures

3.11.1 Some preliminary observations

541. Term of Reference 4 require me to consider *"the adequacy of the Council's policies, procedures and delegations governing tendering and the procurement and payment of services, having particular regard to those services with a high labour content such as consultants and those for provision of professional services"*. In doing so, I have not sought to undertake a comprehensive review of Council's policies, procedures and delegations, but rather, as required by the Term of Reference, have reviewed them in the context of the issues of concern I have identified with respect to "body hire" contracts above. As stated above, Council has engaged Deloitte to undertake a comprehensive review of its

procurement and contract management policies and procedures. I therefore do not propose to replicate that process here.

542. As a preliminary observation, as the above discussion would indicate, the issues of concern identified by this investigation have not arisen as a result of deficiencies in Council's Procurement Policy and associated procedures so much as a failure to apply the Policy and procedures. It would appear that Council took the view that "body hire" arrangements fell outside the scope of the Policy because, in its opinion, they were employment contracts. As discussed above, this view was not correct and the procurement and management of these contracts should have been undertaken in accordance with the Policy and its associated procedures. As a result, it would appear that the procurement and administration of these contracts occurred in what could best be described as a procedural vacuum.

543. It seems likely that had the procurement and management of "body hire" contracts been undertaken in accordance with Council's Procurement Policy and associated procedures, many of the issues of concern that I have identified above would not have arisen. Nevertheless, some of the issues I have identified above do highlight some deficiencies in the Policy and associated procedures.

544. As discussed above, many of these deficiencies have previously been identified in the audits and review conducted by Council's Internal Auditor and the Contract Services Coordinator. Subject to my following observations, I generally concur with the observations and recommendations made in connection with these. As my below survey and discussion of Council's current procedures for the procurement and management of temporary contract personnel would indicate, I believe most of the issues of concern identified in the audits and review have since been satisfactorily addressed. In particular, and as will be discussed in more detail below, the procedural framework that Council has put in place with respect to the engagement and management of temporary contract personnel goes some way towards addressing many of these concerns.

3.11.2 Council's current procedures

545. The report to the Council meeting of 26 May 2010 referred to the fact that an internal procedure had been drafted to guide the appointment and ongoing administration of temporary resources secured under State Contracts Control Board and Local Government Procurement standing contracts. The report stated that these were developed in consultation with Council's Internal Auditor and were guided by the Division's "*Tendering Guidelines for NSW Local Government*". The report states that the procedures cover matters such as:

- *the selection criteria to be used (hourly rate, qualifications, skills, experience, availability, referees and local content)*
- *financial limits and authorisation of the engagement*
- *appropriate review periods and probity controls around reappointment; and*
- *other procedural and contractual measures to ensure an open and transparent process and that Council receives the best value-for-money for each engagement.*

546. It would appear this is a reference to *Procurement Procedure P150: Contract Development – Provision of Temporary Contract Personnel* and *Procurement Procedure P251: Contract Management – Provision of Temporary Contract Personnel*. It should be noted that these were initially drafted to guide and manage engagements made under the CPA/166101 contractors list. Issues surrounding the development of the CPA/166101 contractors list are examined in more detail above. The process for the establishment of the CPA/166101 contractors list was subsequently abandoned by Council resolution on 26 May 2010.

547. *Procurement Procedure P150* stipulates that it is only to be used to engage contractors to provide professional services as a last resort and only after alternate options had been considered and abandoned. The alternate options that are suggested include secondment of existing staff, recruitment of permanent (full-time or part-time) or temporary staff or fixed term contracts of employment.

548. *Procurement Procedure 150* only permits engagement to be made under the CPA/166101 contractors list, State Contracts Control Board Contract (100 – *Temporary Staff (Contingent Workforce) Contract*) and Local Government Procurement Contract (LGP808 – *HR Temporary Placements and Associated Services*). With the abandonment of the process to establish the CPA/166101 contractors list, the Procedure now in effect only permits engagements to be made under the State Contracts Control Board and Local Government Procurement standing contracts, something that is acknowledged in the report to the Council meeting of 26 May 2010 (see above). These contracts are referred to below as the "prescribed contracts".

549. *Procurement Procedure 150* stipulates a number of ground rules that apply to engagements. Of particular relevance to this investigation are the following:

- The Procedure is to be followed each time temporary contract personnel are to be engaged, including any re-engagements.
- The maximum period that an engagement can operate over is 12 months. Where an engagement requires extension past the maximum period, a performance review must be conducted and approval of Director or General Manager obtained.
- Regard is to be had to the potential efficiencies and benefits of considering existing contract personnel for re-engagements where there is unused capacity and availability. This does not preclude considering other candidates where other potentially suitable candidates exist.
- All engagements must be approved by the relevant Departmental Director or General Manager.
- All engagements with expenditure greater than \$150K (either via initial engagement or through the cumulative effect of re-engagements) will be reported to Council for information on a periodic basis by the Director Corporate Services. (It should be noted that, as described above, engagements under the two "prescribed contracts" are exempt from tendering requirements under section 55(3) and as such, expenditure over

the \$150K tendering threshold does not carry the same significance for engagements made under these contracts as it would for other contracts).

- Any requirements that cannot be acquired via the two "prescribed contracts" must be sourced under a separate tender conducted in accordance with Council's standard *Contract Development Procedure P101*. This includes professional services that are otherwise available via the two "prescribed contracts".

550. Prior to engaging temporary contract personnel from the two "prescribed contracts", the contracting officer is required to prepare a "*request to engage Temporary Contract Personnel*" form. This is required to be submitted to the Departmental Director or General Manager for approval. Amongst other things, the form requires the officer making the engagement to specifically address the following issues:

- Details of the project for which the services are required
- Why it is necessary to use temporary contract personnel rather than alternate options
- Qualifications, skills and experience that are required
- Estimated start and finish dates, the expected duration of the engagement in hours and estimated cost
- The source of the engagement

551. Consistent with Council's Procurement policy, the Procedure stipulates that the number of invitations required where the estimated cost is under \$50K is 2 to 6 invitations and 3 to 8 where the estimated cost is over \$50K. The "*request to engage Temporary Contract Personnel*" form requires the engaging officer to specify the evaluation criteria and weighting to be used to determine the appointee.

552. The following 'threshold criteria' are mandatory:

- availability for duration of the requirement and

- appropriate insurances.

553. The following ‘weighted criteria’ are mandatory:

- Price (hourly rate over estimated allowable hours – 45%;
- Quality of proposed professional personnel based on their qualifications, skills and experience – 35% (this criteria can be broken into sub-components totalling 35%)
- Local content – 10%

554. After obtaining the Director or General Manager’s approval, the contracting officer may commence sourcing a contractor in accordance with the approval. The officer is required to complete a Temporary Contract Personnel – Brief and returnable schedule. This is to be issued to the Personnel providers approved under the “*request to engage Temporary Contract Personnel*”. The brief template sets out the following:

- The scope of the engagement
- The contractor’s role
- The specific activities the contractor will be required to undertake and for each activity specified the commencement date, the conclusion date and the allowed hours
- Expected qualifications and experience and the insurances required

555. The contracting officer is then required to evaluate the responses from personnel providers, conduct interviews with shortlisted candidates and prepare a “*recommendation for engagement – Temporary Contract Personnel*” form. This requires the contracting officer to justify the recommendation for the preferred candidate and to provide details of the other candidates considered and reasons for why they were not recommended.

556. *Procurement Procedure P251: Contract Management – Provision of Temporary Contract Personnel* was established for the specific purpose of managing engagements made under *Procurement Procedure P150*.

557. *Procurement Procedure P251* requires that contractors undergo a formal induction process and contains an induction checklist. This is stated to vary depending on a number of factors including where the contractor will work from, access requirements to Council's information and communication systems and the level of interaction with staff. However training on the code of conduct and the completion of pecuniary interest returns is mandatory.

558. In relation to the processing of payments, *Procurement Procedure P251* requires temporary contract personnel to submit a weekly timesheet detailing hours worked against assigned projects. The Procedure prescribes a template timesheet. The timesheet must be checked by Council's representative. The service provider is required to submit the timesheet with claims for payment. Each payment claim is to be compared to the relevant timesheet to validate its accuracy.

559. *Procurement Procedure P251* only permits the extension of the allowed hours approved in relation to the engagement after the following options have been considered and discounted:

- The balance of the work being completed by full-time or temporary staff within the relevant section
- The secondment of a person from another area of Council to complete the work
- The use of other temporary contract personnel whose allowed hours permit capacity to complete the work.

560. It is a notable omission that *Procurement Procedure P251* does not require contract managers to undertake a performance review prior to determining whether to extend the allowable hours.

561. Where it is determined that the most effective method of completing the work is to extend the temporary contract personnel's hours, the contract manager is required to complete an "*Instruction to Extend Temporary Contract Personnel*" form. This may be approved by a Manager or Director. The form requires the contract manager to specify the following:

- The current allowed hours and the requested increase to the hours
- The justification for the extension including what the extension involves, why it was necessary and what the beneficial outcomes of the extension would be
- The budget implications
- The total cost of the extension

562. However the form does not require the contract manager to specify the following:

- What other options have been considered for completing the work and why these have been discounted (As stated above, contract managers are required to make this assessment under *Procurement Procedure P251* before extending the contract)
- What the cumulative value of the contract will be with the approval of the extension. (Under *Procurement Procedure P150* engagements involving expenditure over \$150K need to be reported to Council)

563. *Procurement Procedure P251* requires contract managers to undertake regular performance reviews of temporary contract personnel who are engaged for periods of over three months. It requires that the frequency and timing of performance reviews should be discussed and agreed to during the induction process. It states that performance reviews should be conducted on quarterly/six-monthly basis. The procedure prescribes a "*Temporary Contract Personnel – Review of Performance*" template. Amongst other things, the template requires the performance review process to address the following issues:

- Quality of work and application of skills
- Problem resolution
- Ability to meet program timelines
- Inter-personnel skills

- Specific instances of high or low performance
- Assimilation level with Council's systems, policies and procedures.

564. Finally, *Procurement Procedure P251* requires the contract manager to complete a checklist to conclude engagements. Amongst other things, the checklist requires the officer to check that all timesheets have been received and that all pay claims have been received, checked and processed.

565. As stated above, these procedures go some way towards addressing the issues of concern identified above. In particular:

- Council is permitted to only utilise temporary contract personnel as a last resort where there are no existing internal staff able to meet the need and where alternative options such as recruitment have been considered and dismissed
- Appointments are limited to 12 months
- Contract personnel may only be appointed in a manner consistent with Council's statutory obligations either under exempt standing contracts or by way of a tender process
- Council is required to undertake a competitive selection process for contracts under \$150K
- The procedures require the clear specification at the outset of the scope of the engagement, the start and end dates and allowable hours
- Contractors are required to undergo a formal induction process
- Contractors are required to submit completed timesheets with payment claims
- Contractors are required to undergo regular performance reviews.
- The procedures limit (but do not prevent) the extension or variation of contracts

566. Notwithstanding the implementation of the new procedural framework with respect to the engagement and management of temporary contract personnel, given the systemic failure to comply with Council's previous procedural requirements, I recommend that Council's Internal Auditor undertake regular audits to ensure compliance with the new procedures. **(Recommendation 2)** Council has advised in its submission in response to the draft of this report that one of the current audits in the 2011/2012 internal audit program includes procurement with a focus on appropriate management of temporary personnel contract arrangements.

3.11.3 Ongoing deficiencies

567. Despite the establishment of the new procedural framework for the engagement and management of temporary contract personnel, a potential significant vulnerability remains in the policy and procedural framework in relation to the variation of contracts. As described above, while all but 7 "body hire" contracts had an initial approved value of under \$150K, 34 of the contracts subsequently involved expenditure in excess of \$150K as a result of variations to the contracts.

568. The only restriction that Council's Procurement Policy currently places on the variation of contracts is that the value of the variation is within the approving officer's delegated purchasing limit. A Council officer is therefore permitted under the Policy, to authorise variations to a contract that had an initial approved value under \$150K, that have the effect of escalating the cumulative value of the contract over the tendering threshold. Provided the approved variations are within the approving officer's delegated purchasing limit, this may be done without any requirement that the contract be subject to a formal tender process as required under section 55, and without the approval or indeed knowledge of the governing body of the Council (unless the cumulative value of the variations escalated above the amount of any budget and/or contingency approved by the Council for the contract).

569. As discussed above, while the concerns identified by Council's Internal Auditor in relation to this appeared to primarily relate to the need to ensure such variations are reported to Council, the Internal Auditor's recommendations do

not satisfactorily address the risks associated with the potential misuse of variations to avoid the statutory tendering requirements. Similarly, while the proposed amendments to the Policy described above were clearly framed to address this risk, they are not entirely successful in doing so. Under the proposed amendments, variations to staff approved contracts with a value under \$150K are only required to be reported to Council for its information. The proposed amendments to the Policy do not prevent such variations being made or compel compliance with the requirements of section 55.

570. While this risk is somewhat mitigated by the requirements under Council's current contract management procedures for temporary contract personnel described above, in my opinion, this risk may only be satisfactorily addressed by amending staff delegations to require discretionary variations to be approved by an officer with a delegation limit sufficient to cover the cumulative value of expenditure under the contract rather than the value of each individual variation and, where this exceeds the General Manager's delegation, by the Council. This would have the effect of preventing staff from approving contract variations that escalate total expenditure under contracts above the value of the General Manager's delegated purchasing limit. **(Recommendation 3)**

571. Delegated purchasing limits ought also to be expressed as being inclusive of GST to reflect the requirements of the Division's Tendering Guidelines. Council should also ensure the Policy and all associated procurement and contract management procedures continue to be consistent with the Tendering Guidelines by requiring estimated contract values to include on-costs such as GST. **(Recommendation 4)**

572. To assist in monitoring the reasons for and effects of variation requests, Council should also amend the "Instruction to Extend Temporary Contract Personnel" form prescribed under *Procurement Procedure P251: Contract Management – Provision of Temporary Contract Personnel* to require the following additional information:

- What other options have been considered for completing the outstanding work required and why they have been discounted; and

- What the cumulative value of the contract will be with the approval of the extension. **(Recommendation 5)**

573. *Procurement Procedure P251* should also be amended to require contract managers to undertake a review of the contractor's performance prior to determining whether to extend the allowable hours. **(Recommendation 6)**

3.12 Conclusions

574. This investigation has identified evidence of serious and systemic maladministration that occurred over a number of years at Wyong Shire Council in relation to the procurement and management of temporary contract personnel services.

575. This maladministration has since been addressed by the Council.

576. Between 2007 and 2010, Council engaged temporary contract personnel under 68 "body hire" contracts. However, there is evidence to suggest that Council's "body hire" practices also predate this period. Total expenditure under the 68 "body hire" contracts was \$17,813,449 including GST.

577. This investigation has demonstrated that the Council's practices in relation to the engagement and management of "body hire" contractors did not only, in some respects, fail to comply with the Council's statutory obligations, but more fundamentally failed to meet basic probity and good governance requirements or to provide any assurance that the Council had received best value for money in relation to the services provided under the contracts.

578. Thirty four of these contracts involved expenditure that exceeded \$150K and were thereby subject to a statutory requirement that they be entered into pursuant to a competitive tendering process unless otherwise exempt from the requirement. None of these "body hire" contracts were entered into pursuant to a competitive tendering process. Only 3 of the contracts were exempt from the tendering requirement by virtue of the fact that the contractor was engaged under a State Contracts Control Board standing contract. Council failed to comply with its statutory obligations to tender in the remaining 31 cases.

579. There is evidence to suggest that in the case of a number of other contracts where expenditure did not exceed \$150K, the contracts formed part of a single seamless engagement and had been "split" thereby avoiding any single transaction that exceeded \$150K. This was notably the case with respect to the contracts Council entered into with respect to the delivery of the Leadership Development Program. While that Program was delivered under six separate contracts each with an initial approved value of under \$150K, total expenditure with respect to the delivery of the Program was in fact \$886,200.57.
580. In addition to the failure to comply with its statutory obligations in relation to tendering, there is also evidence of a systemic failure to comply with Council's own policy and procedural requirements in relation to the procurement and management of "body hire" contracts. Most engagements were made and managed in what could best be described as a procedural vacuum. Most engagements were made "directly" without the benefit of any competitive process.
581. Many engagements appear to have been made on the basis that the contractor was previously or currently engaged by Council or had been recommended by another contractor engaged by Council. The 68 "body hire" contracts were shared among a total of 26 contractors. Seven of the contracts were awarded to 4 former employees of the Council. In one case the employee was still working for Council at the time the contract was awarded to them.
582. In two cases, temporary contract personnel were appointed to positions in Council's organisational structure and held those positions for a period exceeding 12 months without a competitive recruitment process, in breach of Council's statutory obligations. In one case, given the contractor's qualifications, employment history and skill set, it is unclear on what basis the appointment was made.
583. Nowhere are the above issues better exemplified than in the delivery of the Leadership Development Program by two "body hire" contractors. This investigation has found the following:

- As described above, the delivery of the Program cost \$886,200.57. Despite this, the "body hire" contractors that delivered the program were not engaged pursuant to a competitive tendering process.
- The Program was inadequately scoped. There was no overarching program or budget for the delivery of the Program. No clearly identifiable objectives were set for the Program or benchmarks established to measure the achievement of objectives. There was no formal documented review undertaken of the Program.
- As described above, the Program was delivered under six separate contracts. While this raises the question of whether this was done to avoid Council's statutory tendering obligations, an alternative explanation is that it was done to avoid the requirement to seek the approval of the governing body of Council for the Program.
- The contracts under which the Program was delivered were poorly managed. One of the contractors often invoiced Council for services provided months or even years after they were delivered.
- Given its poor scoping and the absence of any formal documented review, it is difficult to ascertain or verify what benefit Council obtained from the Program.

584. The justification used by Council for its failure to comply with its statutory obligations and indeed the requirements of its own Procurement Policy and associated procedures with respect to "body hire" contracts was that they were employment contracts and thereby exempt from these requirements. This view appears to have been initially formed without the benefit of any legal advice. This suggests a reckless indifference to the need to comply with the Council's statutory obligations in relation to the engagement of contractors under "body hire" arrangements. Even if it were to be accepted that the Council was genuine in its belief that "body hire" contracts were employment contracts and thereby exempt, it would not be unreasonable to expect that as a matter of appropriate governance practice, it would ensure that "body hire" contractors were

nonetheless engaged pursuant to an open, transparent and competitive process. As described above, this did not occur and the engagements were made in a procedural vacuum.

585. It was only when questions began to be asked within the Council about its "body hire" practices that the Council subsequently sought legal advice on their status. However, in the absence of clear instructions, the advice received was understandably qualified. The weight of evidence examined by this investigation tends to support the view that "body hire" contracts were contracts for services and not employment contracts and were therefore subject to the statutory tendering requirements and the requirements of Council's Procurement Policy and associated procedures. Council now accepts this view.

586. The Council's failure to comply with its statutory tendering obligations can be attributed as much to the practice of entering into contracts with an approved value that fell below the \$150K tendering threshold and allowing expenditure under the contracts to escalate above the threshold, as it can to the maintenance of the legal fiction that "body hire" contracts were employment contracts. Of the 68 "body hire" contracts only 7 had an initial approved value of \$150K. In another 27 cases, the total value of expenditure escalated from an initial approved value of under \$150K to a value that exceeded the tendering threshold.

587. All but 15 of the "body hire" contracts were varied. On my assessment the propensity to vary contracts can be attributed to poor or non-existent planning or scoping of engagements, open-ended arrangements with undefined or poorly defined deliverables, poor cost controls and the ready availability of the option to extend or vary engagements. I have made recommendations in this report that are designed to minimise the potential for this practice to continue.

588. I have not identified evidence of "body hire" contracts being awarded for improper or corrupt purposes. However, given the corruption risks associated with the award of contracts without the benefit of a documented, transparent and competitive process, I recommend that the Chief Executive of the Division

of Local Government furnish a copy of this report to the Independent Commission Against Corruption for its information. **(Recommendation 7)**

589. There is no evidence to suggest that the Council did not receive the services it paid for under "body hire" contracts or that the services provided were unsatisfactory. In the absence of a competitive procurement exercise, it is difficult to ascertain whether the Council received the best value for money outcome in relation to services provided under "body hire" contracts. However it should be noted that in the one case where the services provided under a "body hire" contract were subsequently subjected to market testing through a competitive tendering process, the outcome of the process indicated that the value of the services provided under the previous "body hire" contract was competitive compared to the tenders received.

590. The systemic nature of the maladministration revealed by this investigation suggests the existence of a culture of indifference towards the Council's statutory obligations and appropriate governance practices in relation to "body hire" arrangements prior to the commencement of the current General Manager in his role in May 2010. It is unclear whether, and to what extent, such a culture existed or continues to exist in other parts of the organisation. It falls outside the Terms of Reference of this investigation to determine this. In view of this, I recommend that the Division of Local Government conduct a further full Promoting Better Practice review of the Council within the next 12 months with a view to identifying any other potential areas of concern in relation to the exercise by the Council of its functions. **(Recommendation 8)**

591. While much of the content of this report will reflect poorly on Wyong Shire Council, in fairness it is perhaps appropriate to also acknowledge the positives disclosed by this investigation. In particular, the checks and balances that exist within a council's corporate governance framework operated as they are required to in the case of Wyong Shire Council. Firstly, many of the issues of concern examined by this investigation were first identified by Council's Internal Auditor and subsequently by its Contract Services Coordinator. Their recommendations have since been implemented by the Council. Secondly, the governing body of the Council exercised its role diligently, applying rigorous

scrutiny to the Council's "body hire" practices, taking the step to report them to the former Department of Local Government and resolving to end the practices.

592. In addition to this, on his appointment in May 2010, the current General Manager took immediate steps to resolve the compliance issues raised by this investigation. Following the current General Manager's appointment, Council has either phased out or 'regularised' the remaining "body hire" engagements and conducted a recruitment process and appointed staff to perform the functions formerly undertaken by temporary contract personnel. It has also put in place a new procedural framework applying to the procurement and management of temporary contract personnel. It has also engaged Deloitte to undertake a gaps analysis of Council's procurement and contract management policies and procedures to ensure compliance with best practice.

593. It is unclear to what extent the practices identified by this investigation occur in other councils. While the Division of Local Government's Promoting Better Practice reviews examine councils' procurement and contract management policies and procedures and audit tendering practices, there may also be a need to focus on some of the issues identified by this investigation to ascertain whether these practices occur in other councils. I therefore recommend that Promoting Better Practice reviews monitor the following practices with a view to ensuring compliance with statutory obligations:

- The treatment of the status of temporary contract personnel
- The variation of contracts
- The appointment of temporary contract personnel to identified positions within a council's organisational structure **(Recommendation 9)**

594. In addition to this, I recommend that the Division of Local Government issue a circular to councils to raise awareness of the issues identified by this investigation, to invite them to reflect on their own practices in relation to those issues and to advise them that the Division intends to monitor these practices in future Promoting Better Practice reviews of councils. **(Recommendation 10)**

595. Finally, an examination of the practices of a single council forms an insufficient basis upon which to draw any conclusions about whether there is a need for amendment to the statutory framework governing the procurement of professional and consultancy services. However, the issues identified by this investigation raise questions that perhaps warrant further consideration. Accordingly, I recommend that, in its next review of the *Local Government Act 1993* and *Local Government (General) Regulation 2005*, the Division of Local Government consider the following issues:

- Whether there is a need for the Act (and/or the Regulation) to provide clearer guidance on what constitutes a contract for services as distinct from an employment contract for the purposes of section 55,
 - Whether, in a competitive market for the use of professional, consultancy and other services required for the delivery and maintenance of infrastructure, the current requirements of the Act and Regulation unduly inhibit councils' capacity to compete with other organisations for the use of such services,
 - Whether the current tendering threshold of \$150K is appropriate.
- (Recommendation 11)**

4 Appendix

4.1 Table - Summary of "Body Hire" Arrangements

Contact No.	Services provided	Procurement Method	Initial approved value (excl. GST)	Start Date	End date	Number and value of variations (excl. GST)	Total value of payments (incl. GST)
CPA/144593	Provision of Probity Services for Mardi to Mangrove Link Project	Direct - Due to previous engagements	\$80,000.00	1 April 2008	Ongoing	(1) \$20,000	\$84,302.90
CPA/162345	Review of Council's Environmental Management Practices	Direct - Due to previous engagements	\$40,000.00	1 March 2009	2 October 2009	(1) \$30,000	\$77,990.00
CPA/99319	Probity Auditor - Warnervale Town Centre Development & Aquatic Centre plus general Probity Advice	Direct	\$100,000.00	26 November 2005	31 August 2008	(1) \$10,403.08	\$98,512.61
CPA/175304	Provision of Professional Services - Water & Sewerage Projects	Direct - Contractor was approached directly for a quote (in addition to one other). They were approached due to previous engagements with Council. Personnel previously employed by Council.	\$50,000.00	7 December 2009	Ongoing	N/A	\$27,406.50

Report of the Section 430 investigation into "body hire" arrangements operating at Wyong Shire Council between January 2007 and May 2010

Contact No.	Services provided	Procurement Method	Initial approved value (excl. GST)	Start Date	End date	Number and value of variations (excl. GST)	Total value of payments (incl. GST)
CPA/117313	Hunter Water Connection - Consultant Advice on Contract Issues	Direct - Personnel previously employed by Council	\$33,000.00	26 October 2006	January 2007	(1) \$11,000	\$24,865.50
CPA/141072	Consultancy Support for Functional Specification of Strategic Asset Management System	Direct - Personnel previously employed by Council	\$22,000.00	1 March 2008	February 2009	(1) \$75,000	\$64,735.00
CPA/108726	Provision of temporary professional architectural services for a range of projects. Engaged under CPA 95093 (D00361249).	Contractors list - CPA/95093 - Provision of Temporary Professional Services - Skilled Engineering Personnel	\$130,000.00	Feb/ March 2006	Ongoing	(1) \$80,000 (2) \$100,000 (3) \$100,000 (4) \$90,000 (5) \$90,000 (6) \$90,000 (7) \$36,000	\$637,307.48
CPA/163433	Leadership and Management Development Program - Shared Leadership	Direct	\$86,778.49	1 July 2008	June 2009	N/A	\$106,893.12

Report of the Section 430 investigation into "body hire" arrangements operating at Wyong Shire Council between January 2007 and May 2010

Contact No.	Services provided	Procurement Method	Initial approved value (excl. GST)	Start Date	End date	Number and value of variations (excl. GST)	Total value of payments (incl. GST)
CPA/165381	Psychological Testing & Feedback Services - Recruitment Process	Direct	\$73,559.15	1 July 2008	June 2009	(1) \$1,889.63 (2) \$3,000	\$95,298.47
CPA/165384	HR Strategy Project Development - Consulting Services	Direct	\$24,894.38	1 July 2008	May 2009	N/A	\$31,268.57
CPA/170134	Ongoing Consulting Services - Shared Leadership, HR Strategy and Recruitment processes	Direct	\$93,500.00	1 July 2009	October 2009	(1) \$21,000	\$77,372.48
CPA/132156	Provision of Development Engineering Management - DAU	Direct - Recommended by Shire Services. Contractor had previously provided services to Shire Services Department since approx. 2004.	\$110,000.00	1 August 2007	28 August 2008	(1) \$80,000 (2) \$40,000	\$248,325.00
CPA/154455	Provision of Development Engineering Management - DAU	Direct - Due to previous engagements.	\$110,000.00	1 September 2008	28 January 2010	(1) 0 (2) \$60,000	\$203,339.40

Report of the Section 430 investigation into "body hire" arrangements operating at Wyong Shire Council between January 2007 and May 2010

Contact No.	Services provided	Procurement Method	Initial approved value (excl. GST)	Start Date	End date	Number and value of variations (excl. GST)	Total value of payments (incl. GST)
CPA/162134	Provision of Development Engineering Management - DAU	Direct - Due to previous engagements.	\$110,000.00	2 March 2009	31 August 2009	N/A	\$71,544.00
CPA/142206	Hydrology Services to the Natural Resources Unit	Direct - Due to previous engagements.	\$35,000.00	21 January 2008	April 2008	N/A	\$29,722.00
CPA/133154	Provision of Stakeholder Management Services for Mardi-Mangrove Link	Direct - Engaged by the M2M Team - otherwise unknown.	\$68,250.00	13 July 2007	September 2008	(1) \$16,000 (2) \$50,000 (3) \$120,000	\$256,575.00
CPA/131042	Provision of Stakeholder Management Services for Mardi-Mangrove Link	Direct - Engaged by the M2M Team - otherwise unknown.	\$51,000	13 July 2007	1 August 2008	(1) \$80,000	\$138,490.00
CPA/131815	Wyong River Environmental Flow Study	Contractors list - CPA/95093 - Provision of Temporary Professional Services - Skilled Engineering Personnel	\$63,636.00	1 August 2007	August 2008	(1) \$50,000	\$112,909.17

Report of the Section 430 investigation into "body hire" arrangements operating at Wyong Shire Council between January 2007 and May 2010

Contact No.	Services provided	Procurement Method	Initial approved value (excl. GST)	Start Date	End date	Number and value of variations (excl. GST)	Total value of payments (incl. GST)
CPA/151620	Provision of Temporary Professional Services - Mardi to Mangrove Link - Pre-construction process	Contractors list - CPA/95093 - Provision of Temporary Professional Services - Skilled Engineering Personnel	\$70,500.00	16 September 2008	28 August 2009	(1) \$15,000	\$89,925.00
CPA/97431	Provision of Project Management Services - Joint Water Authority	Contractors list - CPA/95093 - Provision of Temporary Professional Services - Skilled Engineering Personnel	\$46,300.00	September 2005	February 2008	(1) \$68,900	\$126,940.00
CPA/134599	Provision of Temporary Professional Services - Contract Engineer	Contractors list - CPA/95093 - Provision of Temporary Professional Services - Skilled Engineering Personnel	\$100,000.00	7 October 2007	Ongoing	(1) \$100,000 (2) \$90,000 (3) \$90,000 (4) \$90,000 (5) \$90,000	\$515,894.50

Report of the Section 430 investigation into "body hire" arrangements operating at Wyong Shire Council between January 2007 and May 2010

Contact No.	Services provided	Procurement Method	Initial approved value (excl. GST)	Start Date	End date	Number and value of variations (excl. GST)	Total value of payments (incl. GST)
CPA/156252	Provision of Project Management Services including Porters Creek Stormwater Harvesting Project, Sparks Road Subdivision	Direct - Personnel previously employed by Council. Council received a proposal from contractor, possessing key skills for a number of projects.	\$78,000.00	2 December 2008	10 June 2010	(1) \$90,000 (2) \$90,000	\$278,850.00
CPA/163874	Provision of Project Management Accounting for Mardi-Mangrove Project	Direct - Select group approached	\$70,000.00	1 June 2009	Ongoing	(1) \$90,909 (2) \$90,909	\$229,113.62
CPA/133829	Provision of Team Leader and Stakeholder Engagement Services - Mardi to Mangrove Transfer Link Project	Direct - Previous engagement for Joint Water Authority	\$134,545.00	1 June 2007	Ongoing	(1) \$60,000	\$211,104.65
CPA/130805	Provision of Temporary Professional Services - Contract Engineer	Direct - Referred to Council by another consultant; and appointed after interview.	\$96,000.00	30 July 2007	11 April 2008	(1) \$96,000	\$175,527.00

Contact No.	Services provided	Procurement Method	Initial approved value (excl. GST)	Start Date	End date	Number and value of variations (excl. GST)	Total value of payments (incl. GST)
CPA/159632	Provision of Project Management Services for a range of projects including Link Road - Warnervale and Estuary Management Plan	Standing Contract - State Contracts Control Board - Contract 025/755 Temporary Professional, Technical & Industrial Staff	\$90,000.00	16 February 2009	Ongoing	(1) \$90,000 (2) \$90,000 (3) \$38,115	\$290,071.49
CPA/153128	Provision of Project Management Accounting for Mardi-Mangrove Project	Direct - Position of M2M Project Management Accountant was publicly advertised. Recruitment agency was approached for a potential applicant.	\$150,000.00	7 October 2008	8 May 2009	N/A	\$113,287.81
CPA/146014	Specialist Services in Roads & Drainage Unit	Standing Contract - State Contracts Control Board - Contract 025/755 Temporary Professional, Technical & Industrial Staff	\$100,000.00	30 May 2008	12 February 2010	(1) \$90,000 (2) \$90,000	\$266,582.99

Report of the Section 430 investigation into "body hire" arrangements operating at Wyong Shire Council between January 2007 and May 2010

Contact No.	Services provided	Procurement Method	Initial approved value (excl. GST)	Start Date	End date	Number and value of variations (excl. GST)	Total value of payments (incl. GST)
CPA/151109	Provision of Project Management Services	Standing Contract - State Contracts Control Board - Contract 025/755 Temporary Professional, Technical & Industrial Staff	\$100,000.00	22 August 2008	Ongoing	(1) \$90,000 (2) \$90,000 (3) \$90,000 (4) \$40,180 (5) \$40,180	\$371,051.08
CPA/131394	Communications Consultant for Mardi to Mangrove Link Transfer Project	Direct - Recommended by M2M Team	\$79,090.90	19 July 2007	31 August 2009	(1) \$53,272 (2) \$90,910 (3) \$90,910 (4) \$41,000 (5) \$25,000	\$374,219.40

Report of the Section 430 investigation into "body hire" arrangements operating at Wyong Shire Council between January 2007 and May 2010

Contact No.	Services provided	Procurement Method	Initial approved value (excl. GST)	Start Date	End date	Number and value of variations (excl. GST)	Total value of payments (incl. GST)
CPA/151639	Project Communications Manager - Mardi to Mangrove Link Project	Direct - Previously employed by Council	\$150,000.00	15 September 2008	11 June 2010	(1) \$90,909 (2) \$90,909 (3) \$90,909	\$301,609.00
CPA/105514	Senior Management Team Development	Direct	\$40,200.86	May 2006	September 2006	(1) \$40,000	\$99,000.00
CPA/105514	Senior Management Team Development	Direct	As above	May 2006	September 2006	(1) \$40,000	As above
CPA/146302	Provision of property land access & management for Mardi to Mangrove Pipeline Project	Direct - Engaged by the M2M Team - otherwise unknown.	\$150,000.00	5 June 2008	Ongoing	(1) \$90,909 (2) \$90,909 (3) \$90,909 (4) \$90,909	\$553,103.88

Report of the Section 430 investigation into "body hire" arrangements operating at Wyong Shire Council between January 2007 and May 2010

Contact No.	Services provided	Procurement Method	Initial approved value (excl. GST)	Start Date	End date	Number and value of variations (excl. GST)	Total value of payments (incl. GST)
CPA/151637	Landholder Liaison Manager - Mardi to Mangrove Link Project	Direct - Six people interviewed. Recommended by M2M Team.	\$150,000.00	14 October 2008	Ongoing	(1) \$90,909 (2) \$90,909 (3) \$90,909 (4) \$40,000	\$435,435.00
CPA/130548	Design Team Leader for Mardi to Mangrove Link Transfer Project	Direct - contractor previously engaged.	\$127,272.00	12 July 2007	July 2008	(1) \$127,272 (2) \$25,000 (3) \$100,000 (4) \$20,000	\$433,932.41
CPA/115268	Processes review of project management of five year program of water supply works	Direct - Contractor submitted proposals to Council and supplied a number of Project Managers.	\$12,000.00	1 September 2006	30 September 2006	(1) \$3,000	\$16,060.00

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Contact No.	Services provided	Procurement Method	Initial approved value (excl. GST)	Start Date	End date	Number and value of variations (excl. GST)	Total value of payments (incl. GST)
CPA/118289	Provision of Project Management Services - Implementation of Project Processes Improvement Plan	Direct – Due to previous engagement	\$48,000.00	1 October 2006	December 2006	(1) \$2,158 (2) \$9,320	\$65,425.78
CPA/128290	Provision of Project Management Services for Mardi to Mangrove Link	Direct – Due to previous engagement	\$140,000.00	22 May 2007	22 September 2007	(1) \$38,667.63	\$168,908.14
CPA/131813	Provision of Project Director Services - Mardi to Mangrove	Direct – Due to previous engagement	\$135,000.00	22 August 2007	March 2008	(1) \$136,363 (2) \$35,000 (3) \$100,000	\$412,732.49

Contact No.	Services provided	Procurement Method	Initial approved value (excl. GST)	Start Date	End date	Number and value of variations (excl. GST)	Total value of payments (incl. GST)
CPA/138772	Provision of Project Management Services - Mardi to Mangrove Link Project	Direct – Due to previous engagement	\$150,000.00	7 January 2008	June 2009	(1) \$150,000 (2) \$150,000 (3) \$150,000 (4) Nil (5) \$90,000 (6) \$136,000 (7) \$90,909 (8) \$90,909 (9) \$30,000 (10) \$60,000	\$1,138,479.56

Contact No.	Services provided	Procurement Method	Initial approved value (excl. GST)	Start Date	End date	Number and value of variations (excl. GST)	Total value of payments (incl. GST)
CPA/110714	<p>Project Management for various capital works projects - two major ones include, CPA/99940 Wadalba Sports fields; and CPA/115479 Rehabilitation of Bateau Bay Landfill</p> <p>Manager of Customer & Community Services from 3 December 2007</p>	<p>Direct – Contractor approached Council directly and offered project management services. Personnel was interviewed and offer was accepted.</p>	\$105,600.00	3 July 2006	25 September 2009	<p>(1) \$95,040</p> <p>(2) \$100,000</p> <p>(3) \$100,000</p> <p>(4) \$100,000</p> <p>(5) \$100,000</p> <p>(6) \$100,000</p> <p>(7) \$100,000</p> <p>(8) \$100,000</p> <p>(9) \$90,000</p> <p>(10) \$90,000</p> <p>(11) \$90,000</p> <p>(12) \$38,960</p>	\$1,106,592.33

Contact No.	Services provided	Procurement Method	Initial approved value (excl. GST)	Start Date	End date	Number and value of variations (excl. GST)	Total value of payments (incl. GST)
CPA/169582	Project Management Services for Mardi to Mangrove Pipeline Project	Direct – Due to previous engagement	\$136,363.63	4 September 2009	3 June 2010	(1) \$90,000 (2) \$90,000	\$269,280.00
CPA/151108	Provision of Project Management Services	Direct – Due to previous engagement	\$100,000.00	1 August 2008	Ongoing	(1) \$90,000 (2) \$90,000 (3) \$90,000 (4) \$90,000	\$488,422.00

Contact No.	Services provided	Procurement Method	Initial approved value (excl. GST)	Start Date	End date	Number and value of variations (excl. GST)	Total value of payments (incl. GST)
CPA/148532	Provision of Project Management Services	Direct – Due to previous engagement	\$100,000.00	10 December 2007	Ongoing	(1) \$100,000 (2) \$90,000 (3) \$90,000 (4) \$90,000 (5) \$90,000 (6) \$45,150 (7) \$45,150	\$684,217.05
CPA/135910	Provision of Pipeline Specialist - M2M Link	Direct - Offers were made directly to 17 different consultants - the response from the contractor was the only response received	\$40,000.00	November 2007	12 September 2008	(1) \$45,314 (2) \$18,600 (3) \$41,125 (4) \$40,000 (5) \$40,000	

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Contact No.	Services provided	Procurement Method	Initial approved value (excl. GST)	Start Date	End date	Number and value of variations (excl. GST)	Total value of payments (incl. GST)
CPA/136920	Provision of Project Management Services - Mardi to Mangrove Link Project under CPA 95093	Direct	\$51,000.00	28 November 2007	5 September 2008	(1) \$25,500	\$72,462.50
CPA/126470	Provision of Temporary Project Management Services for a range of projects under CPA 95093	Contractors list - CPA/95093 - Provision of Temporary Professional Services - Skilled Engineering Personnel	\$135,200.00	29 January 2007	4 April 2008	(1) \$100,000 (2) \$100,000	\$324,489.00
CPA/147394	Hydrology Services to the Natural Resources Unit	Direct - Became known to Council through Local Industry Networks	\$60,000.00	12 May 2008	October 2008	(1) \$13,000	\$76,054.00
CPA/156182	Engineering Services to the Natural Resources Unit	Direct - Due to previous engagement.	\$25,000.00	July 2008	June 2009	N/A	\$18,579.00
CPA/156186	Engineering Services Development Assessment Projects in Natural Resources	Direct - Due to previous engagement.	\$45,000.00	July 2008	June 2009	N/A	\$47,905.00
CPA/156187	Contract Engineering Services Estuary Management Stormwater Improvement Plan	Direct - Due to previous engagement.	\$25,000.00	July 2008	June 2009	N/A	\$21,802.00

Contact No.	Services provided	Procurement Method	Initial approved value (excl. GST)	Start Date	End date	Number and value of variations (excl. GST)	Total value of payments (incl. GST)
CPA/170010	Engineering Services to the Natural Resources Unit	Direct - Due to previous engagement.	\$101,280.00	1 August 2009	Ongoing	N/A	\$54,681.00

Contact No.	Services provided	Procurement Method	Initial approved value (excl. GST)	Start Date	End date	Number and value of variations (excl. GST)	Total value of payments (incl. GST)
CPA/126756 & CPA/177129	Provision of temporary professional contract engineer services for a range of projects under CPA 95093 CPA 177129 set up only to pay outstanding invoice on first contract	Contractors list - CPA/95093 - Provision of Temporary Professional Services - Skilled Engineering Personnel	\$14,000.00	7 May 2007	October 2009	(1) \$80,000 (2) Cannot locate T181 document on TRIM records; however value of variations on third variation; indicates that there was a second variation. (3) \$90,000 (4) \$90,000	\$370,301.80

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Contact No.	Services provided	Procurement Method	Initial approved value (excl. GST)	Start Date	End date	Number and value of variations (excl. GST)	Total value of payments (incl. GST)
CPA/142042	Provision of Project Management Services - Mardi to Mangrove Transfer Link Project	Contractors list - CPA/95093 - Provision of Temporary Professional Services - Skilled Engineering Personnel	\$150,000.00	17 March 2008	Ongoing	(1) 150,000 (2) \$90,909 (3) \$90,909 (4) \$90,909 (5) \$90,909 (6) \$90,909 (7) \$40,000	\$824,763.50
CPA/136917	Consultancy Services for Water & Waste	Contractors list - CPA/95093 - Provision of Temporary Professional Services - Skilled Engineering Personnel	\$98,400.00	5 November 2007	October 2008	(1) \$97,500	\$208,494.00

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Contact No.	Services provided	Procurement Method	Initial approved value (excl. GST)	Start Date	End date	Number and value of variations (excl. GST)	Total value of payments (incl. GST)
CPA/152722	Provision of Professional Services - Water & Waste	Contractors list - CPA/95093 - Provision of Temporary Professional Services - Skilled Engineering Personnel	\$97,500.00	6 October 2008	March 2010	(1) \$97,500 (2) \$10,000 (3) \$24,000	\$237,094.00
CPA/114372	Leadership and Management Development Program - Shared Leadership Phase 1B	Direct	\$96,250.00	9 August 2006	October 2006	N/A	\$48,375.00
CPA/117142	Leadership and Management Development Program - Shared Leadership Phase 1C	Direct	\$99,000.00	1 November 2006	February 2007	N/A	\$108,900.00
CPA/122085	Leadership and Management Development Program - Shared Leadership Phase 1D	Direct	\$99,000.00	29 January 2007	November 2007	N/A	\$106,381.00
CPA/126992	Leadership and Management Development Program - Shared Leadership Phase 1E	Direct	\$74,250.00	30 April 2007	August 2008	(1) \$40,000 (2) \$70,000 (3) \$74,000 (4) \$57,000	\$335,238.32

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Contact No.	Services provided	Procurement Method	Initial approved value (excl. GST)	Start Date	End date	Number and value of variations (excl. GST)	Total value of payments (incl. GST)
CPA/142126	Leadership and Management Development Program - Shared Leadership Phase 1F	Direct	\$99,000.00	1 January 2008	July 2008	(1) \$75,000	\$188,306.25
CPA/143908	Shire Strategic Vision Appreciation Process - Networking Consultancy	Direct	\$42,000.00	July 2008	September 2008	N/A	\$37,650.80
CPA/153284	Shire Strategic Vision - compilation of final SSV program	Direct	\$40,000.00	1 October 2008	February 2009	N/A	\$31,260.90
CPA/145983	Provision of Project Management Services - Mardi to Mangrove Suite of Works	Direct - Proposal received from the contractor.	\$100,000.00	14 May 2008	Ongoing	(1) \$90,000 (2) \$90,000 (3) \$90,000 (4) \$42,000	\$387,948.00

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Contact No.	Services provided	Procurement Method	Initial approved value (excl. GST)	Start Date	End date	Number and value of variations (excl. GST)	Total value of payments (incl. GST)
CPA/114728	Water Supply Capital Works - Project Programming	Contractors list - CPA/95093 - Provision of Temporary Professional Services - Skilled Engineering Personnel	\$76,660.00	11 September 2006	November 2007	(1) \$2,562.10 (2) \$1,421 (3) \$1,872 (4) \$1,300	\$67,874.73
CPA/108808	Provision of Project Management Support Staff for Capital Works Program – Contractors list CPA/95093.	Contractors list - CPA/95093 - Provision of Temporary Professional Services - Skilled Engineering Personnel	\$150,000.00	2 August 2006	Ongoing	(1) \$100,000 (2) \$50,000 (3) \$100,000 (4) \$100,000 (5) \$100,000 (6) \$100,000 (7) \$100,000	\$1,861,541.00

Contact No.	Services provided	Procurement Method	Initial approved value (excl. GST)	Start Date	End date	Number and value of variations (excl. GST)	Total value of payments (incl. GST)
						(8) \$100,000	
						(9) \$100,000	
						(10) \$70,000	
						(11) \$100,000	
						(12) \$100,000	
						(13) \$100,000	
						(14) \$90,000	
						(15) \$90,000	
						(16) \$90,000	
						(17) \$43,750	
						(18) \$43,750	

Contact No.	Services provided	Procurement Method	Initial approved value (excl. GST)	Start Date	End date	Number and value of variations (excl. GST)	Total value of payments (incl. GST)
CPA/145823	Temporary Professional Services - Mardi to Mangrove Project	Contractors list - CPA/95093 - Provision of Temporary Professional Services - Skilled Engineering Personnel	\$100,000.00	28 April 2008	March 2010	(1) \$150,000 (2) \$136,000 (3) \$90,909 (4) \$90,909 (5) \$90,909 (6) \$90,909 (7) \$40,000	\$780,725.00