

File No.  
RML No.  
DTS No.

subject

**INFORMATION REGARDING FORMER MURRURUNDI SHIRE COUNCIL**

As requested, please find attached the information received from Mr Bulford regarding his recent visit to the former Murrurundi Shire Council.

  
A/ **Director General** 13/10/04

1. Minister
2. Director General

File No.  
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## subject

### **VISIT TO FORMER MURRURUNDI SHIRE COUNCIL – PRELIMINARY ADVICES RE OUTCOME**

In response to issues raised, a visit was conducted, on Wednesday, 8 September 2004 and Thursday, 9 September 2004, to Murrurundi and Scone townships for the purposes of meeting with those persons and inspecting books and records relating to the former Murrurundi Shire Council. The visit was made by Mr Robert Bulford, an officer of the Executive Branch, and by Mr Scott Wallace, an officer of the Finance Branch of the Department.

The visit was conducted by way of a mini “flying squad” visit and entailed the making of preliminary enquiries only. There was no formal investigation conducted, for example pursuant to section 430 of the Act.

#### **Background**

The visit essentially came about because of a critical audit report regarding the state of finances of the former Murrurundi Shire Council (now subsumed into, respectively, the Liverpool Plains Shire Council and the Upper Hunter Shire Council, following the proclamation of those Councils on 17 March 2004) and regarding its financial and other management. That report has received considerable publicity and local or regional media attention.

The audit report was from the firm of Chartered Accountants and Auditors, Forsyths (Mr Robert Finch, Principal) and is dated 12 August 2004. A copy is at Tab A. That report is an interim report only. The report was jointly commissioned by Upper Hunter and Liverpool Plains, following the bringing to light of a number of concerns by an officer (Mr Tony Perkins) temporarily engaged by the two Councils to work on finalising the financial statements and affairs of the former Council, with a view to a division being made of assets and liabilities, following and for the purposes of the creation of the new Councils. Mr Perkins was until November 2001 the Manager Corporate Services of the former Council.

The Auditors of the former Murrurundi Shire Council were a different firm, namely Warton Thompson & Co. (the partner responsible being Mr Phillip Webster).

### **Ambit of the visit and enquiries made**

While the issues examined in the visit were prompted by the Forsyths' audit report, they were not limited by that report and extended to other select governance and management aspects of the operations of the former Council.

A number of select documents and records of the former Council were inspected, with assistance being provided to the Departmental Officers in that regard by Mr Perkins and other senior officers of the two new Councils. No full audit or examination was undertaken of all the former Council's documents, books and records, and in many cases the examination was limited to an inspection of copies of such documents as provided to the Departmental Officers for the purpose.

Nor were interviews conducted of former staff of the Murrurundi Shire Council. In particular, the former General Manager, Mr John Griffiths, and the former Manager, Finance and Administration, Mr Ken Arbuckle, were not questioned or interviewed. Given that the nature of the visit was to undertake preliminary enquiries and to report back to the Director General and Minister on the matter, it was not considered necessary to do so at this time.

### **Overview of visit findings**

These submissions represent the preliminary, and in some cases untested, findings of the Departmental Officers in respect of their visit to examine certain documents, books and records of the former Murrurundi Shire Council. As noted, no formal investigative process was undertaken. No witnesses were interviewed, and no opportunity has been accorded to former Councillors or staff of the Murrurundi Shire Council to answer any potentially adverse findings or inferences, based on the prima facie evidence to date, that may be made or drawn against them.

Separate submissions on financial and financial audit matters have been prepared by Mr Scott Wallace, and a copy of these is attached at Tab B.

An executive summary of the visit findings is contained in separate submissions, attached at Tab C.

Suffice it to say that the visit brought to light serious concerns regarding the governance and management, both financial and otherwise, at the former Murrurundi Shire Council. Most of the key concerns of Forsyths were determined to be warranted.

If the Murrurundi Shire Council was a Council still in existence, the level of concerns is such that, if a public inquiry under section 740 had been held, a recommendation for the dismissal from civic office of the elected Councillors would be warranted.

There are also serious concerns about the performance of both Mr Griffiths and Mr Arbuckle.

### **Detailed visit preliminary findings and issues of concern**

#### **Concerns over the re-negotiation of the contract of Mr John Griffiths, the General Manager of the former Murrurundi Shire Council**

On 12 August 2004, the respective Acting General Managers of the Liverpool Plains Shire Council and the Upper Hunter Shire Council had already written to the Director General (DTS 97003) seeking advice (later orally explained to be a purported or intended implementation of the dispute resolution provisions of the proclamation creating the new Councils (para 25)) from the Department as to the status or legality of certain termination payments made to Mr John Griffiths, the now former General Manager of Murrurundi Shire Council, allegedly pursuant to his contract as General Manager. The Department's intervention was sought because of conflicting legal opinions obtained by the two new Councils.

Ms Alice Leslie, the Acting Manager, Legal Services of the Department's Legal Services Branch is dealing with this correspondence. However, as the payments and their legality were also issues raised by Forsyths in their interim audit report, those issues were examined as part of the visit and subsequent analysis of materials and information collected in the course of that visit.

The termination payments, (before tax) totalling \$106,348.56 (\$97,116.61 after tax), were made to Mr Griffiths on 25 June 2004. These purported to be made pursuant to the terms of his contract of employment as General Manager with Murrurundi Shire Council, as in force at the time.

The evidence is that this was a contract dated 29 September 2003, and that this contract replaced, just over one year before it had otherwise been due to expire, his earlier contract of 12 September 2000.

Moreover, the new contract gave Mr Griffiths substantially improved terms and conditions over and above those applying under the old contract. Not only was his term of employment extended by an additional three years, so that it now was not due to expire until 8 October 2007 (instead of 8 October 2004 under the old), but the new contract gave him substantially improved rights to more moneys, not only in respect of his total remuneration package, but also in other aspects.

In particular, clause 9.1.6 was amended to provide expressly, for the first time, that a termination of the contract could occur, due to "redundancy arising from amalgamation of councils". Both under the new and the old contract, there was an entitlement to termination payments, in the event of one of the relevant circumstances provided for in that clause occurring, payable by reference to the unexpired term of the contract.

In that context, the extension of the term of Mr Griffiths' contract by some three years takes on a considerable significance. Even if he was entitled, whether under the contract or otherwise by law, to a termination payment on redundancy under the old contract, he would under that contract have only three and a bit *months* (instead of three years and three months) of the contract term to run, when he did leave on 25 June 2004.

In addition, clause 8.3.1 was amended so that Mr Griffiths would get substantially improved long service leave payments and entitlements, payments he would not have got at all under the old contract, when he left on 25 June 2004.

The advice of the LGSA had been sought by Council in respect of this clause, following a resolution of the elected body on 16 September 2003, in Committee of the Whole. The advice of Mr Jim Mitchell of the LGSA is contained in an email of 16 October 2003.

In that email, he advised that Griffiths and Council were free to negotiate whatever they wanted to agree to, but he warned Council that if Council agreed to what was provided for in clause 8.3.1, Council would face a greater cash liability over the last two years or so of the renewed contract. He also pointed out that the formula in clause 8.3.1 for a long service leave payment calculated by reference to 2.2 weeks' pay for each year of service was greater than the current standard or "model contract" in use at most councils, which provides only for 1.3 weeks' pay for each such year of service.

To return to Council's resolution of 16 September 2003: It is interesting to note that the terms of that resolution were:

1. To increase the remuneration by 4.3%.
2. Subject to that, to "renew the contract ... under the *same conditions*, remuneration level and performance agreement as exists at present *with the exception of Clause 8.3.1 ...*". (my emphasis)
3. That this be "subject to checking with Industrial Officer at the" LGSA.

As noted, the only exception or changes to the former contract contemplated and approved by Council were to the remuneration level and to clause 8.3.1. No mention is made of clause 9.1.6 (the clause amended to specifically refer to redundancy following amalgamations). Nor is any mention made of changes to other clauses. A comparison of the new and old contracts reveals a significant number of substantial changes and differences between the two.

One possible explanation is that this was just an oversight, and that Council was aware that not only were there other substantial amendments to various clauses, also, and in particular to clause 9.1.6. But, given the language of the resolution, this does not seem a plausible or likely scenario.

Rather, another possible explanation, which in the absence of further evidence to the contrary seems the more likely outcome, is that Council was not aware of the change in clause 9.1.6, or even of the other substantial changes to the many other clauses, and that these amendments somehow got in under the wire and moreover got in without their approval.

It is possible that the legal effect of this is that, in addition to any impact of section 354E of the Act, as to which see below, and absent any other or further authorising resolution, the new contract is not one that was approved by Council and was signed without the requisite authority and is not binding on Council (or its successor in title, in this case the Upper Hunter Shire Council). At the very least, that part of the renewed contract as relates to redundancy payment entitlements may not be legally binding.

It is noted, on the other hand, that the contract as signed bears a note that the common seal of Council (affixed by an impressed stamp) was affixed to that contract "in pursuance of a resolution passed on the 21<sup>st</sup> September 2003". However, despite a special search being commissioned to find this resolution, no record of it has come to light.

The question of the legal right of Griffiths to these payments is also considered further under the next section of these submissions.

But, before proceeding further, another area of substantial concern in the whole saga of this new contract needs to be noted. This relates to the apparently secret way the new contract was brought in. There is no evidence to indicate that the contract was negotiated, approved, and signed in an open and transparent process. All the indications are the other way.

It is noted in particular that the resolutions of 17 June 2003 (to move towards a renewal of Griffiths' contract) and of 16 September 2003 (ostensibly to approve a renewed contract, having minimal changes) were all ones passed in Committee of the Whole. That is to say they were passed behind closed doors, in closed session, with the public and other non-essential attendants out of the room.

The Act (section 7 (a)) provides for a system of open government. It is only in limited cases that decisions can properly be made by the Councillors to close a meeting to the public and to proceed to deal with business behind closed doors. And even then, this can only be done provided that certain steps are taken and procedures, mandated in sections 10A to 10D of the Act, followed. Not the least of these is the requirement in section 10B (5) that "in deciding whether part of a meeting is to be closed to the public, the council or committee concerned must have regard to any relevant guidelines issued by the Director General". Such guidelines have been issued – for example see the Departmental Circular to Councils No. 98/51 of 10 July 1998 and the revised guidelines on open meetings referred to in that Circular.

The evidence is that this Council has, in this case, as well as others (as to which see later in these submissions), repeatedly failed to comply with its

obligations in this regard, and these failures are considered to be major systemic failures of governance and of Council's Charter obligations. One of those Charter obligations is to "keep the local community and the State Government (and through it, the wider community) informed about its activities" (section 8 (1) dot point 10).

Section 10A (2) (a) certainly permits a Council, if it so chooses, and Council must be mindful of the need to demonstrate that it has made appropriate and defensible decisions in that regard, to close so much of a meeting that is dealing with "personnel matters concerning particular individuals (other than councillors)". A motion to renew a General Manager's contract on certain particular terms may in most instances reasonably be considered to be such a matter.

However, very importantly and relevantly for present purposes, there are two requirements in particular that Council has failed to comply with in relation to the closing of meetings and the business transacted and decisions made in a closed meeting. These are section 10D (1) of the Act, and clause 26 of the Local Government (Meetings) Regulation 1999.

Section 10D (1) requires that "the grounds on which part of a meeting is closed must be stated in the decision to close that part of the meeting and must be recorded in the minutes of the meeting". Section 10D (2) (a) goes on to require that "the grounds must specify ... the relevant provision of section 10A (2)" and paragraph (c) of the same subsection requires that "the reasons why the part of the meeting is being closed" must equally be stated and recorded.

For each of the meetings of 17 June and 16 September 2003, the minutes of the meeting merely state that the resolution was to "move into Committee of the Whole for the purpose of discussing matters of a sensitive and financial nature". These minutes manifestly fail to comply with the requirements mentioned.

Clause 26 of the Regulation requires that "if a council passes a resolution during a meeting, or part of a meeting, that is closed to the public, the chairperson must make the resolution public as soon as practicable after the meeting or part of the meeting has ended" (emphasis added). This means that the exact resolution as passed in closed session must, and no exceptions are allowed in this regard, be reproduced and disclosed in open session.

At the meeting of 17 June Council in fact dealt with some 4 items of business allegedly "of a sensitive and financial nature". Item 4 related to the possible renewal of the General Manager's contract. The language and terms of the resolution passed leave considerable doubt as to whether it was in fact appropriate and justified for the matter to be discussed in closed session, and therefore out of the public gaze, at all. What was so sensitive and private about a discussion and resolution that in principle the General Manager's contract might be renewed? What was so sensitive and private about a discussion and resolution that "the General Manager be asked to notify Council of his intentions for continuation of employment with Council by June 2003"? What was so

sensitive and private about a discussion and resolution that “the General Manager’s salary review be conducted in October 2003”?

The minutes of the meeting, in open session, after the Councillors moved out of the Committee of the Whole, merely record, or rather purport to record (as to which see further below), the language of some 3 “recommendations presented to Council from the Committee of the Whole”, and these glaringly did not include those regarding the General Manager’s contract renewal. To all intents and purposes, and apparently as far as the public were concerned, the Councillors never dealt with any business behind closed doors relating to the General Manager’s contract. The brazen misrepresentation and suppression of the truth to Council’s community is obvious.

As to the meeting of 16 September 2003, the position is not quite as bad, as the minutes of the open session of the meeting, and hence those that would be available for public inspection under section 12 (1) dot point 14, did record that a resolution was passed regarding the General Manager’s contract renewal, with that resolution being in three parts, as quoted above, but the trouble is that the first part is presented in a censored version with the words and figures “by 4.3%” being omitted, so that the exact pay rise that the General Manager was being authorised to get was being kept suppressed. There is absolutely no justification for this. Not only is it in clear breach of clause 26 of the Regulation, which requires, as has been noted, that the exact terms of the resolution passed in closed session be reported in open, but it is also in clear conflict with the intent and requirements of section 428 (2) (g) of the Act, which requires that the Council publicly disclose, in its Annual Report, a “statement of the total amount of money payable in respect of the employment of senior staff, including money payable for salary, for the provision of fringe benefits and for all other on-costs connected with their employment”. At Murrurundi Shire Council there was only one member of “senior staff”, so it is clear that what the General Manager was being paid was a matter that the public are entitled to know about. Sure, this is in the Annual Report, when that comes out, but why play ducks and drakes in the meantime?

As an aside, it is noted that when, during the course of the Peel Regional Review, Mr Bulford sought, on behalf of the Facilitator, Mr Chris Vardon, copies of the contracts of all General Managers of the affected Councils, Mr Griffiths replied in a somewhat belligerent fashion, declining to co-operate, and making a number of demands. In doing this he failed to understand the role of Departmental officers and the role of the Department as the oversight body of local government in this State, and their consequent entitlement to access to all Council documents and records, even those considered to be confidential.

The failure to keep Council’s community properly informed about what was going on takes on an even more sinister connotation when the following is noted.

The timing of the negotiation and signing of the new contract, relative to the present local government reform process, started in earnest in 2003-2004, by announcements by the Premier and Minister at the LGSA conference in June

2003, and in particular the release in early July 2003 of a proposal from the then Quirindi Shire Council for a substantial boundary alteration between it and the Murrurundi Shire Council area, is a matter of considerable concern.

Section 354E of the Act provides, for present purposes, that a renewal of or alteration or improvement to the terms and conditions of an employment contract, entered into “during the proposal period”, is not binding on a “transferee council” (in this case the transferee Council, to whose payroll Mr Griffiths was transferred after the proclamation, is Upper Hunter Shire Council), unless approved by the Minister, or unless it is not required to be so approved, coming within the terms of an applicable exemption under the Act or Regulation.

It appears that no exemption is applicable in the present case, and there is no evidence of the Minister’s approval being sought or granted.

Subject to whether or not section 354E of the Act applies to render the new contract, and hence the increased termination payment obligations, if any, not binding on the relevant transferee council, the advice of Ms Leslie that section 354E could well render the new contract not binding on the Upper Hunter Shire Council is noted. The evidence shows that the following were the principal events and steps taken in relation to the termination payments (there were quite a number of others, all of which have been plotted in a table – see Tab D – setting out a full chronology, created as part of the process of examining and analysing the large number of documents obtained during the visit and later):

1. Overtures were made by the Quirindi Shire Council to the Murrurundi Shire Council at a meeting on 10 September 2002 about a possible major boundary alteration between the two Councils’ areas. The discussions were in very general terms. The overtures were rebuffed.
2. On 3 April 2003 the NSW Government unveiled a new strategy it said it hoped would lead to the amalgamation of some smaller councils. No Councils were named.
3. On 20 May 2003, the Minister issued a press release calling for Councils to consider voluntary amalgamations. He noted that a number of Councils in rural and regional areas were facing financial difficulty, due to a decline in population and a small rate base. Murrurundi Shire Council had been on the Department’s financial monitoring list since 17 June 2002, but it was not named in the press release.
4. The local government industry in general was put on notice about the need for local government reform, and possible amalgamations of small councils were foreshadowed, by both the Premier and the Minister in speeches delivered at the LGSA conference in Sydney on 4 June 2003. In speaking about the performance of local government generally, the Premier noted that there were in the State some 43 Councils with less than 5,000 residents, and that there were 47 country Councils with a total income of less than \$10 million per year. He stated that “bigger and more robust” councils would be better placed to face the future, and questioned the need for small councils to continue, saying that the number of local government authorities needed to be reduced. Again, no

Councils were named. While this was widely misrepresented in the press and the industry as the setting of thresholds for the required size of councils, the fact is that the Murrurundi Shire Council for the year ended 30 June 2003 had revenues from ordinary activities of less than \$4 million and a population of not much more than 2,000.

5. On 11 June 2003 the General Manager of Quirindi Shire Council telephoned Mr Griffiths to invite Murrurundi Shire Council representatives to a meeting to discuss a possible merger of or boundary alterations between their respective Councils. This invitation was confirmed by a letter of 12 June. In the letter Griffiths was told that Quirindi was starting to draft a proposal.
6. The performance of Mr Griffiths under his then contract (the first contract) was reviewed on 17 June 2003. Mr Mitchell of the LGSA was involved in that process. The question of a possible renewal of the contract was discussed at that meeting (clause 3.1 allowed Mr Griffiths to notify Council "at least 9 months before 8 October 2004" – i.e. *at any time* before 8 January 2004 - whether he was seeking "re-appointment with Council"; but it also allowed Council some time to respond, its response being required "at least 6 months before 8 October"). In some respects, particularly having regard to the anecdotal evidence that early renewals, well before the due date, of contracts of employment of general managers is relatively common in the industry, this very early discussion of a possible renewal is unexceptional. But, following, as it did, hard on the heels of the Shires Association Conference and other earlier events noted above, questions arise as to the timing and motives. On the other hand, the documentary evidence indicates, supposedly, that the Mayor, Earl Kelaher, agreed to finalise the renewal of the contract before the March 2004 local government elections (which is what Murrurundi Shire Council was facing, at least at that time) "as no time exists after [those] elections". An implication of this is that it was anticipated that if there was a differently constituted Council after the elections, a majority in support of Mr Griffiths and the renewal of his contract might not be found, let alone that there might be a new Mayor.
7. On the same day, at a Murrurundi Shire Council meeting, which was closed to the public, Council resolved that Griffiths "be asked to notify Council of his intentions for continuation of employment with Council by June 2003 (sic: no date mentioned)" and that, on agreement on this being reached, "Council respond by September 2003". The minutes of that meeting went on to note that "if agreement is reached for Mr Griffiths to continue then a new contract of employment be drawn up **to commence in February 2004**" and "the General Manager's salary review be conducted in October 2003". This resolution was not reported in open meeting, as required under the Act.
8. **But, the clear inference is that the Quirindi Shire Council proposal and contacts and meetings with that Council, plus the other moves by the NSW Government, in the meantime, precipitated a rush to renew Griffiths' contract and have it start earlier – see below and note 29 September 2003.**

9. The Bill foreshadowing the employment protection amendments to the Act, including such provisions as sections 354A and 354E, was introduced by the Minister into Parliament on 24 June 2003.
10. On 1 July 2003 a meeting took place between the respective Mayors, Deputy Mayors and General Managers of the Quirindi Shire Council and the Murrurundi Shire Council, about a proposal for possible major boundary alterations between the two Councils. These overtures were again rebuffed, and the meeting resulted in a strongly worded letter of protest from the Mayor of Murrurundi to the Minister. That proposal, not put in writing, entailed the splitting of the Shire along the Liverpool Range, with that part of the Shire above the Range being transferred to Quirindi Shire. A clear likely outcome of this would be to put at risk the continued viability of the rest of the Murrurundi Shire as a stand alone proposition. If the Shire was at risk of continuing, it is clear that this would also impact on the likely continuation of Mr Griffiths' job as General Manager. On the other hand, as noted at para 6 above, the renewal of Griffiths' contract was already being mooted on 17 June.
11. On 3 July 2003 the Quirindi Shire Council formally made a written proposal along the lines discussed, and sent it to the Minister. This formally started the clock running on the "proposal period" for the purposes of section 354E, having regard to the definition of that term in section 354B.
12. On 3 July 2003, the Minister referred the proposal to the Boundaries Commission.
13. The local government Regional Review process, part of the Local Government Reform Program, was announced by the Minister on 4 September 2003.
14. On 5 September 2003 the amending Act was proclaimed to commence.
15. On 16 September 2003 Council's Committee of the Whole purported to approve the renewal of Griffiths' contract of employment. The wording of the resolution is quoted above. Mr Griffiths' total remuneration package was increased to \$95,240 [contrast the resolution of Council of 17 June 2003, contemplating that the salary review not be conducted until October]. As already noted, the 16 September resolution contemplated that, apart from the salary package increase, only one amendment to the previous contract was to be made and was approved, namely to the clause relating to long service leave entitlements. However, the contract as later signed contained a significant number of quite substantial additional amendments. In particular there was an amendment (bringing the wording, so it is understood, into line with the then standard contract recommended by the LGMA) to clause 9.1.6, specifically referring to a possible termination of the contract, at the behest of the Council, in the event of "redundancy arising from amalgamation of councils".
16. Allegedly, on 21 September 2003 Council resolved to affix the seal to Griffiths' new contract. But, after a search by Mr Perkins of the minutes and records of Council, no evidence of such a resolution or such a meeting has been found. It is noted that Council meets only once a month, on the third Tuesday, and it had already held a meeting on Tuesday 16 September 2003. The delegations to the General Manager from Council gave him no delegated power to approve the affixing of the

seal. Nor, in any event, could they lawfully do so. Section 377 (1), dot point 20, prohibits the Council from delegating to its General Manager “any function under this or any other Act that is expressly required to be exercised by resolution of the Council”, and clause 48 (3) of the Local Government (Meetings) Regulation 1999 requires that Council’s seal only be affixed to a document that “relates to the business of the Council and the Council has resolved (by resolution specifically referring to the document) that the seal be affixed”. **It is clear, therefore, that the signing of the new contract (see next item) was done without authority, and was of a document that was not approved by the Council, even by its 16 September 2003 resolution.**

17. On 29 September 2003 that new contract was signed. This was clearly done inside the “proposal period” referred to in section 354E. The fact that moves towards the creation and signing of this contract had commenced before the proposal period commenced is not considered to the point, and does not appear to save the new contract from the impact of section 354E. **Even if the contract had been lawfully signed and was, as a matter of general law, binding on the old Murrurundi Shire Council, which it is submitted it was not, it would not, by virtue of section 354E, be binding on the Upper Hunter Shire Council (the “transferee council”), unless and until adopted or affirmed by that Council. In all the circumstances, it is strongly recommended and considered that it would not be appropriate for the Upper Hunter Shire Council to adopt and affirm that contract.**
18. On 1 October 2003, the Minister announced the Peel Regional Review (which included the Murrurundi Shire Council area).

In summary, therefore, it would appear that section 354E operates, given the lack of any Ministerial approval to date for the new contract, to render that contract potentially unenforceable against and not binding on the Upper Hunter Shire Council. It is noted that this is the advice and conclusion of Ms Leslie.

For the purposes of section 354E (3), the question is whether any or all of the sequence of events outlined above would result in the Minister having power, if an application for approval of the renewal of the contract were now to be made, or were to have been made to him, to determine to refuse to grant such approval, on the grounds that “the determination [i.e. the renewal of the contract] *arises from* or is *in anticipation of* the proposal”, let alone “result in an unjustifiable increase or decrease in the obligations of the [relevant] transferee council” in relation to Mr Griffiths.

This may not be an easy question to determine, but it is noted that on 17 June 2003, that is to say, some 15 to 16 days before the proposal of Quirindi Shire Council was made, renewal of the contract was already being discussed. On the other hand, it might also be said that the writing was on the wall for Murrurundi Shire Council, and therefore for Griffiths’ job, before 17 June, when on 4 June, the Premier and Minister signalled that Councils which had populations of less than 5,000 and total income of less than \$10 million were Councils that the Government contemplated could not be justified or be allowed to continue in existence as separate local government entities or areas. The

population of Murrurundi Shire Council was then approximately 2,170 and its annual turnover less than \$4 million, so it clearly and without question came under the threshold, and was at risk, on both accounts. Furthermore, there is the impact and relevance of the overtures and moves from the Quirindi Shire Council, and its proposal of 3 July 2003, noted above.

Therefore, it would appear to be arguable that Mr Griffiths' contract was renewed "in anticipation of" a proposal for the Murrurundi Shire Council to be amalgamated with another Council, or at least affected by a major boundary alteration proposal that might impact on the continued viability of the Council as a stand alone entity thereafter.

It is submitted that this conclusion strengthens the case supporting a recommendation that the Upper Hunter Shire Council should decline to adopt and affirm Mr Griffiths' new contract.

#### Concerns over termination payments made to Mr John Griffiths

As noted in the last section of these submissions, on 25 June 2004 Mr Griffiths was paid termination payments totalling \$106,348.56, before tax. These purported to have been made pursuant to his rights under his then contract of employment, which was the written contract of 29 September 2003 between he and the Murrurundi Shire Council under which he had been performing the role as General Manager of the Council.

If, as appears to be the case, this contract was not binding on the Upper Hunter Shire Council, post the 17 March 2003 proclamation, either due to it not having been properly authorised and approved, in the first place, by the Murrurundi Shire Council, or due to the impact of section 354E of the Act, or both, then the result would appear to be that any payments made to Mr Griffiths to which he would not have been entitled under the general law, or under a relevant statutory provision, such as the Annual Holidays Act, or Long Service Leave Act, or under his original contract of 12 September 2000, would not be properly payable to him, and should be retained by and apportioned amongst the new Councils.

It is noted that, after a meeting that took place with Mr Griffiths on 4 July 2004, he agreed to pay part of the termination payments back, and that the amount to be repaid should be held in the Liverpool Plains Shire Council trust account, pending a resolution of the question as to his entitlements, if any. It is understood that at least some of the moneys were so repaid and continue to be held in that trust account.

The Acting General Manager of the Upper Hunter Shire Council, Mr Darryl Dutton, wrote to the Independent Commission Against Corruption on 28 July 2004 about the termination payments, informing it of the matter, on a for information basis only. The Commission replied by letter of 10 August 2004 and advised Council that it had determined not to take any action in respect of the matter.

The termination payments made on 25 June 2004 comprised the following components:

<u>Type of payment</u>	<u>Amount</u>
	\$
Redundancy payment	77,382.50
Backpay	486.86
Annual leave	13,706.01
Long Service leave	14,773.19

The only amount which has been repaid and is held in the trust account is part of the \$77,382.50 redundancy payment, namely the sum of \$75,000. The Department has been advised that the smaller, round figure, sum, only, was paid by agreement with Mr Griffiths. There was apparently no tax deducted in respect of this part of the total termination payments, so steps will need to be taken to recover the balance of the redundancy payment from Mr Griffiths. It is recommended that the Upper Hunter Shire Council take steps immediately to recover such moneys.

However, given the conclusions regarding the new contract of 29 September 2003, it would seem that not only is the redundancy payment one to which Mr Griffiths was not entitled, but also that he had no entitlement to the long service leave payment. Steps will need to be taken by the Upper Hunter Shire Council to seek the repayment and recovery of this amount (\$14,773.19, less tax which was deducted before payment at a rate of 31.5%) from Mr Griffiths. It is recommended that this be done.

Dealing first with the long service leave payment, it is noted that under the old contract, clause 8.3.1, Mr Griffiths had no entitlement to long service leave at all, unless and until he had completed 10 years' service. As of 25 June 2004, the date he left, Mr Griffiths had completed less than 3 years and 9 months service only. This length of service would give him no statutory entitlement to long service leave payments either, under the Long Service Leave Act.

It is presumed that if, under section 354E of the Act, the new contract is not binding on, and is not adopted and affirmed by, the Upper Hunter Shire Council, then the old contract must remain on foot. It had not been due to expire, by effluxion of time, until 8 October 2004.

No doubts as to Mr Griffiths' entitlement to the back pay and annual leave would appear to arise.

As to the redundancy payment, there would appear to be a number of grounds for concluding that this was not properly payable to Mr Griffiths, and that he had no entitlement to such payments. Reference is made to the advice from Ms Leslie in that regard.

First, there is the impact of section 354E, working in the same way as for the long service leave payment. Again, if the new contract is not binding on the Upper Hunter Shire Council, then the old contract remains on foot. But under

the old contract clause 9.1.6 made no mention of redundancy, let alone on the grounds of or as a result of amalgamation.

In any event, clause 9.1.6, whether in its version in the old contract, or the version in the new contract, requires that there be a notice from Council to the General Manager (and not the other way round), before any entitlement to a termination payment might arise under that clause. The evidence is that at no time has any such notice been given by either the Murrurundi Shire Council or the Upper Hunter Shire Council.

Mr Griffiths purported to serve a letter on the Upper Hunter Shire Council on 3 June 2004. This letter does not speak, on its face, of resignation (but see further below), and purports to be an attempt to invoke the terms of clause 9.1.6 of the new contract, and make a claim for redundancy. But, such a letter cannot be effective to trigger clause 9.1.6 because it was not a letter from the Upper Hunter Shire Council.

Mr Griffiths appears, from the evidence to date, to argue that he became redundant by force of the proclamation of 17 March 2004, which abolished the Murrurundi Shire Council. The legal opinion of the Upper Hunter Shire Council also appears to espouse such a view.

But, such a view, it is submitted, is manifestly wrong and insupportable.

The reason is that clause 14 (1) (b) of the proclamation expressly (and, so it is understood, deliberately) provided that “any position that, immediately before the proclamation date, was a senior staff position of ... the former Murrurundi Shire Council is transferred to a Council of the Areas of Liverpool Plains or Upper Hunter as determined by agreement between the new Councils ...”. That is, Mr Griffiths’ employment by the former Murrurundi Shire Council was not, by force of the proclamation, terminated on 17 March, and as the position of a General Manager is automatically, by force of section 334 (2) of the Act, a senior staff position, he became an employee of whichever of Liverpool Plains and Upper Hunter Shire Councils agreed to take him onto its payroll. As noted above, the agreement between the two Councils provided for Mr Griffiths to become an employee of the Upper Hunter Shire Council. Clause 14 (2) of the proclamation also provided that “the senior staff of each former Council ... are taken to be the senior staff of the [relevant] new Councils ...”.

Clause 8 of the proclamation also reinforces the position, in that it provides that the appointment of Acting General Managers for the new Councils was not to be taken as a breach of contract between Murrurundi Shire Council and/or the Upper Hunter Shire Council and Mr Griffiths. If it could not operate as a breach, nor could it trigger any right to termination payments.

Under clause 10 of the proclamation, delegations in force before the proclamation date remained in force afterwards, unless and until revoked or amended by the relevant new Council. Clause 6 of the Memorandum of Understanding signed by the two new Councils reinforced this. Before 17 March 2004 Mr Griffiths held a number of delegations from the elected body

of the Murrurundi Shire Council, which would allow and facilitate his fulfilment of the role of General Manager. On 18 March 2004 the Acting General Managers of both of the two new Councils signed a form of delegation of authority giving Mr Griffiths the authority "to exercise and perform ... the powers, authorities, duties and functions of Council in relation to the role of the General Manager of the former Murrurundi Shire local government area ...".

Therefore, it is clear that, even if technically or strictly speaking from a legal perspective, Mr Griffiths was no longer functioning or performing the job of General Manager of the former Murrurundi Shire Council (if only because that Council ceased to exist on 17 March), Mr Griffiths was de facto, if not legally, continuing to perform that role, and therefore his job was not redundant, whether on 17 or 18 March.

While this was not set out in the instruments of delegation, the understanding by all concerned was that this would continue until 30 June 2004, at the least.

Now, clause 14 (3) of the proclamation also provided that the clause (14) would "ceas[e] to have effect when a new organisation structure is determined by the new Council under Part 1 of Chapter 11 of the Act". The effect of this would be that the provisions of the proclamation, keeping Mr Griffiths' job as a senior staff member with the relevant new Council, would cease to operate as and when the relevant Council to which he was transferred determined a new organisation structure. By the same token, unless and until the relevant new Council created such a new organisation structure which made it clear that there was to be no role for Mr Griffiths, it could not be said that the role that Mr Griffiths was to perform with the new Council was or was likely to become redundant.

There is evidence to indicate that Mr Griffiths appears to assume that the publication in the Quirindi papers of some materials in relation to the Liverpool Plains Shire Council and its managerial staff positions amounted to a declaration or indication that that he had been made redundant, even if he was not already, as of 17 March, so.

This is an incorrect and unwarranted position.

The simple answer is that the transferee Council, or relevant new Council, to which Mr Griffiths' employment had been transferred and continued, was not the Liverpool Plains Shire Council, but the Upper Hunter Shire Council.

In any event, what was published, so the Department has been advised by the General Manager of Liverpool Plains, was merely a photo of certain persons (which excluded Griffiths) who held senior or managerial positions with the Council on the day of the photo, and was not, as appears to have been claimed in some quarters, any formal notice of Council's actual determination of an organisation structure, let alone an intent to create such a structure.

It is certainly true that on 19 May 2004 the new Liverpool Plains Shire Council resolved to determine an organisation structure, and Griffiths' name was not mentioned. Nor, for that matter, was anyone else's name mentioned, as such,

in that structure. In any event, what the Liverpool Plains Shire Council did was irrelevant to Griffiths' position and job. It is noted that the Acting General Manager of Upper Hunter Shire Council (in an email of 21 July 2004 to his counterpart) appears to conclude that the failure to provide for a position for Griffiths at Liverpool Plains resulted in a redundancy arising, but it is submitted, for the reasons set out in these submissions, that this is not correct.

Moreover, as Mr Hunt pointed out in his emailed reply of the same date, as the Liverpool Plains organisation structure did not place any name against the role of General Manager, and as Mr Hunt was (as of 17 March 2004 and right up to at least the date of those emails) still only an Acting General Manager, and as his Council had not made a determination to fill the position of full time and permanent General Manager without advertising (as it was free to do by virtue of clause 4 (2) of the proclamation) it technically remained open for Griffiths to apply for that position, if as and when it was advertised, and perhaps even secure the position, after the relevant competitive recruitment process was undertaken, so that it could not be said that he had no chance, and therefore it could not be said that even vis a vis Liverpool Plains Shire Council there was definitely no position for Griffiths in that organisation.

The evidence shows that the Upper Hunter Shire Council has also determined an organisation structure, but this was not done until 28 June 2004, that is to say, until three days after Griffiths left the employment of that Council, so that event, too, is irrelevant.

The evidence does show that during April 2003 there were discussions between the then Acting General Managers of the two new Councils about which staff of the former Murrurundi Shire Council would transfer to which Council. There was also an exchange of emails between them between 16 and 19 April. For example, at 9:41 am on 16 April Robert Hunt told Darryl Dutton that "I have left the GM out of this and depending on what you want to do we can split his cost equally if he is to become redundant" (emphasis added). Dutton emailed Hunt at 11:01 am on 19 April to say "Agree to split gm costs equally. ... The former Murrurundi held very minor unrestricted funds, wont pay for costs for redundancy of gm." But, it is equally clear that it was yet to be agreed whether there would or would not be a role for Griffiths at one or either of the new Councils.

It is clear, therefore, that as of 25 June, and indeed as of any date between 17 March and 25 June, when Griffiths left his job at Upper Hunter Shire Council, he had not been made redundant. This is quite apart from the fact that, as noted above, it required a notice from Council to him under clause 9.1.6 of his new contract, before he had any redundancy entitlements.

The next aspect of the supposed right of Mr Griffiths to redundancy payments to note is that his letter of 3 June 2004 was addressed to the "Acting General Manager Upper Hunter Shire Council" and the address used was "PO Box 90 Murrurundi". Patently, that was not the address of the Upper Hunter Shire Council, even if the former administration office of the Murrurundi Shire Council was being kept open and used as a transaction centre for Upper Hunter Shire

Council at the time. Mr Dutton's desk and office were at Scone, in the offices of the Upper Hunter Shire Council, formerly the offices of the former Scone Shire Council.

The evidence is that Mr Dutton did not receive the letter, nor did he even know about it until 2 July 2004 (when he was told about what had been discovered to have happened by Tony Perkins). While the evidence is that the letter, as received from Mr Griffiths, bears a stamp of the former Murrurundi Shire Council, witnessing that it was received on 3 June 2003, the stamp bears no witnesses' initials or name, in the spot provided, of the person who accepted receipt.

The evidence, further, is that it was Mr Arbuckle, the former Murrurundi Shire Council Finance and Administration Manager, who handled and processed the letter. It was he who purported to authorise the termination payments that were made.

There is no evidence that Mr Arbuckle had any authority to do so. The evidence indeed suggests that he had no such authority. There are indications that he was the staff member of the former Murrurundi Shire Council who signed off on the payroll each week or month, but this role (and no evidence of even this delegated authority has been sighted) would not extend to authorising termination payments of the nature made to his former General Manager and boss. Searches have been made for evidence of delegated authorities, for example from the General Manager, to Mr Arbuckle, to no avail.

It was plainly obvious to anyone who thought about it that any request for such payments needed to be referred to Mr Dutton personally for his approval. This was not done, and raises serious questions of major system and governance failures. Mr Arbuckle, despite being requested to do so, has not provided any satisfactory explanation to date regarding this serious failure on his part. On the other hand, there is at this time no evidence to suggest that there was any malfeasance, collusion, criminal conduct or corruption on the part of either Mr Griffiths or Mr Arbuckle in the matter.

The letter of 3 June 2003 purported to be, as noted above, an implementation of the provisions of clause 19.1.6 of his new contract. The letter is poorly worded, and in many respects unclear. For example, it is headed "Position of Executive General Manager – Murrurundi", the title of the role that, post the proclamation and the delegation of the next day from the two new Councils to him, Mr Griffiths was then fulfilling. Yet, the body of the letter purports to relate to his role as General Manager of the former Murrurundi Shire Council and to the redundancy of *that* position.

The main paragraph of the letter reads as follows:

Advice is now given that **I wish to complete my duties on 25 June 2004** under the provisions of the termination clause of my contract, as my *previous* position is redundant. [emphasis added in each case]

No specific reference is made to any particular clause number, let alone to clause 9.1.6.

It is submitted that, despite the unclear wording of this paragraph, and the rest of the letter, and largely because of the wording highlighted in bold above, set in the context of the events to which reference is made below, this letter amounted, as a matter of law, to a resignation. That is to say, Mr Griffiths was leaving, not because of having been made redundant, but because he was going voluntarily.

Under clause 9.1 (specifically clause 9.1.2) of his contract, if he proposed to resign and leave or terminate his contract voluntarily and unilaterally, he needed to give one month's notice in writing, and he had no entitlement whatsoever to any termination payments calculated by reference to the unexpired portion of his contract, as was the redundancy payment that was made to him, in supposed reliance on clause 9.1.6.

The context of what was happening is as follows.

On 17 March 2004 the Murrumbidgee Shire Council ceased to exist, due to the proclamation. The next day Griffiths was given delegations continuing his role as General Manager over the area of the former Council, but only until 30 June. On 23 April 2004 he lodged a written application with the Coonamble Shire Council applying for the position of General Manager of that Council. Only days later, possibly on or about 29 April, Mr Dutton had discussions with Griffiths about a possible reduced but continuing role with Upper Hunter Shire Council. These were followed up with further discussions between these two men, again about possible further employment for Griffiths with Upper Hunter. Griffiths, perhaps understandably, made no mention of his application to Coonamble.

On 19 May Liverpool Plains Shire Council determined its organisation structure. There was no obvious position for Griffiths there at that Council, short of his applying for and getting the job of General Manager, should it be advertised (see above). Only days later, some time between 24 and 28 May, Griffiths telephoned Dutton to tell him that he had been offered the position of General Manager at Coonamble, though Griffiths said that he had not formally accepted the position, but proposed to do so. Griffiths therefore advised Dutton that he was not interested in any further discussion about a possible continuing role at Upper Hunter.

On 1 June 2004 Coonamble Shire Council formally wrote to Griffiths offering him the General Manager job. On 3 June, Griffiths wrote back, and accepted the position. He told the Coonamble Mayor that he would start on 1 July. On the same day he rang Dutton and told him that he intended to accept the position at Coonamble, and asked if he could cease his job on 25 June. Dutton said this was okay. Griffiths made no mention of redundancy, and did not say anything about having sent or intending to send a letter to him that day.

That same day he sent the letter, the details of which are already recorded.

In the context of all this, as already noted, it is submitted that it is clearly arguable that at least by the phone call of 3 June to Dutton, if not also by the letter of the same day (even if it was misdirected and never got to Dutton until many days later), Griffiths was resigning because he had another job, and was not leaving because his job had been made redundant. It is submitted that this is the result, even if the evidence (and at present it does not) showed that what prompted Griffiths to apply for the Coonamble job in the first place was the fear or even realisation that there was going to be no suitable position for him at either of the new Councils, or at least on terms which included a salary package as great as he had been getting at Murrurundi Shire Council.

It must not be overlooked that Griffiths left Murrurundi on a package of just over \$95,000. He started, without hiatus in employment of more than just a couple of days, on a package of \$110,000. And he manoeuvred things so he got a cheque for over \$97,000 (moneys that Murrurundi Shire Council did not have in its reserves) in termination payments to boot.

There is one further aspect of the legal situation of the termination payments that needs to be mentioned before moving on to other concerns encountered during and as a result of the visit to Murrurundi. It is noted that section 354A of the Act, inserted into the Act, with effect from 5 September 2003, that is to say some 24 days before Griffiths new contract was signed, and at least 9 months before Griffiths walked away with his generous termination payments, a provision requiring Ministerial approval for certain termination payments to senior staff. Senior staff, it has already been noted, clearly include General Managers.

It was quite clear, therefore, that as a matter of law, any termination payments to be made to Griffiths in the month of June 2004 potentially were affected by the provisions of section 354A.

In that context it is simply astounding that no one at the Council appears to have even given thought to whether the payments that were made to Griffiths on 25 June could lawfully be made to him. Then, again, it is noted that the payment processing and authorisation was done by those in the former Murrurundi Shire Council offices at Murrurundi, and without the knowledge and approval of relevant senior persons, such as the Acting General Managers of either Liverpool Plains Shire Council or the Upper Hunter Shire Council, or for that matter the Administrator of the latter Council.

What is even more astounding is that, despite both new Councils commissioning legal opinions from two Sydney law firms on the legality or otherwise of the termination payments, neither of those opinions even adverts to or mentions section 354A, whether to consider its possible application, or even to dismiss its relevance.

As noted, section 354A only applies to certain termination payments. For example, subsection (4) provides that the prohibition on the making of termination payments to a General Manager or other senior staff member

without first having obtained the Minister's approval does not apply to "payments of a kind exempted from this section by the regulations".

In fact, there are such regulations, though they did not come into operation until some time after section 354A commenced effect, namely 12 March 2004. Nonetheless, it was clearly in operation by the time the payments were made to Griffiths in late June 2004.

This is clause 43C of the Local Government (General) Regulation 1999, which provides that certain kinds of termination payments to senior staff are exempted from section 345A of the Act. These are:

- (a) a termination payment that does not exceed the value of the senior staff member's total remuneration package over the 12 months preceding his or her termination of employment.
- (b) a payment to which the senior staff member is entitled, on termination of employment, under any Act.

Now, as noted and as set out in the table above, the total gross termination payment made to Griffiths on 25 June 2004 was \$106,348.56. At the time of his termination his total remuneration package, at least that payable under his new contract, was \$95,240 (again a gross figure). This latter figure was of course that to which he only became entitled on and from 9 October 2003, and before then the package was worth \$91,314. Therefore, apportioning these two amounts over the relevant part of the 12 months leading up to 25 June 2004, it is estimated that the total remuneration package in that period was actually approximately \$94,360.78, and it is this figure that is the benchmark for the purposes of clause 43C (a) of the Regulation.

So, it is clear that, without more, and on its face, section 354A potentially applied to outlaw the termination payments to Griffiths. Yet, no one seems to have bothered to note that. Or even to go through the process of analysing and determining whether one of the paragraphs of clause 43C applied.

The total gross termination payment comprised four components. Two of these were, respectively, back pay and annual leave. The latter component, in any event, is one to which paragraph (b) is applicable. On the other hand, given that what was purported to be paid to Griffiths in the way of long service leave was not a statutory entitlement, but an entitlement allegedly under his new contract and the revised clause 8.3.1 in that contract, none of the long service leave component is exempt under that paragraph.

So, from the total termination payment made to Griffiths needs to be deducted the annual holiday and the back pay components, leaving a net gross payment of \$92,155.69.

This amount is in fact less than the total remuneration package Griffiths was getting over the previous 12 months, so this balance of the termination payment was, accordingly, exempt from the need to get a Minister approval under section 354A, as it happens. The point is that this deduction and calculation process needed to be followed to determine and clarify this. And it is clear that

the payment was only less by a pretty small margin, or a mere \$2,205.09. Mr Griffiths' termination payments only just escaped the potential outlawing impacts of section 354A.

That being so, it is submitted that there is a good argument that the spirit and intent of section 354A, and the facts of this case, mean that it would not be reasonable or defensible for Upper Hunter Shire Council to play generous with ratepayers' funds and agree to ratify and confirm the new contract of 29 September 2003.

For all these reasons, it is concluded that Mr Griffiths had no legal entitlement to the redundancy payment made to him, and the moneys (or relevant part) held in the trust account of Liverpool Plains Shire Council should be accounted for to the Upper Hunter Shire Council. It is understood that all the payments actually came, in the first instance, out of accounts of the former Murrurundi Shire Council being administered by the Upper Hunter Shire Council.

#### Concerns over special leave or allowances granted to Mr Griffiths

In the course of examining Mr Griffiths' personnel file during the visit it was noted that he had applied for and been granted special leave. He claimed leave of some 63 hours (or 9 days), and the reason was expressed by him to be "time accrued due to amalgamation issue".

He took that leave between 20 February 2004 and 8 March 2004, inclusive. He applied for the leave with a bare two days notice, and it was approved by the Murrurundi Shire Council Mayor, Mr Earl Kelaher.

The granting of special leave was clearly at the expense of the ratepayers of the Murrurundi Shire Council, and entailed the grant to him of benefits and moneys over and above those to which he was entitled either by law or under the terms of his contract. That leave was worth some \$2,348 to him.

In those circumstances, it must seriously be questioned whether the grant of leave, and its approval by Mr Kelaher, were appropriate and proper.

It is noted that Murrurundi Shire Council was the leader amongst nearly all Councils in the State of the resistance to local government reform and amalgamations in particular. It coined and pushed the "Bugger Off Bob" campaign, that got some notoriety.

No doubt Mr Griffiths, and others, such as Mr Kelaher, did put a lot of time and effort into that campaign, but as the evidence gathered during the visit to Murrurundi demonstrated, it is clear that this resulted in those in charge taking their eyes off the main game and not properly devoting the required time and attention to or discharging their statutory responsibilities in respect of management and governance matters. This is a matter for serious concern.

The community and ratepayers may, at the time, have thought that what their leaders were doing was in their interests, but it has now been demonstrated that

their leaders were not being honest and open with them, and it is now clear that it is that same community and those same ratepayers that have to pick up the tab and pay the price of the failings of their leaders. This is unfortunate, to say the least.

But, the fact is that, so far as Mr Griffiths is concerned, his contract clearly required him, for the remuneration and benefits and entitlements provided for in that contract itself, to put whatever time and effort was required to do his job and to do what Council demanded and expected from him.

Clause 4.1 (n) of the contract of 29 September 2003 provided that it was Griffiths' responsibility to "devote all of [his] time and attention to the business and interests of Council as is reasonably required to achieve successful work outcomes and requisite performance standards". Clause 7.1 provided that he "shall work such hours as are reasonable and necessary to carry out the responsibilities of the position".

Certainly, clause 8.5.1 contemplated that "special leave, with or without pay, may be granted to the employee by the Council to cover any specific matter approved *by Council*". This would mean approved by the Councillors, as the governing body of Council. This, it is submitted, is unaffected by the provisions of clause 7.2 providing that "where the employee is not available to work on any weekday or part thereof such absences shall be approved by the Mayor". It is submitted that this latter clause covers different circumstances than those that might be encompassed in any special leave.

Therefore, even the approval by Mr Kelaher, as opposed to the full Council, of the special leave, is considered to be questionable and without power or authority. An examination of the delegations in place to the Mayor has not brought to light any delegated power from the full Council to the Mayor in this regard. And section 226 of the Act does not plug the gap.

#### Concerns over records management generally at the Murrurundi Shire Council

Any visit to a Council to determine the extent of its compliance with its governance, financial management, general management and other obligations, is largely dependent on the state of the Council's records.

In this instance an attempt was made, with the assistance of Mr Perkins, to examine and locate a number of key records and documents of the Council. This proved to be difficult, and in some cases futile. This exercise, as was much of the work generally of the Departmental Officers, let alone Forsyths and Mr Perkins, was hampered by the extremely poor state of Council's record keeping.

Many records simply cannot be traced. In many instances the minute book of the Council does not contain copies of the minutes of its meetings, and the only source of the same was Council's computer based records, and then there is a question as to whether what was examined was the final version of a document, or simply an earlier draft.

Some records were able to be traced, by means of the secondary evidence of the same, found in files and records of a former staff member. This is not as it should be.

Members of the public are, by virtue of section 12 of the Act, entitled, at any time, and on request, to have immediate access to most Council records and documents for the purpose of inspecting them. Council cannot begin to discharge its responsibilities in this regard if its records are all over the place, or untraceable.

The section 12 (1) documents that the community are entitled to inspect include Council's minutes of its meetings (dot point 14), and its agendas and business papers (dot point 13).

What resolutions that were found in the minutes were considered in many instances to be very poorly and unclearly worded. In many cases the minutes do not reflect what was in fact provided to the Councillors by way of reports and tabled documents.

Section 13 of the Act provides that a Council "must retain, [and] preserve ... its records in accordance with any approved standards". Section 375 provides that a Council "must ensure that full and accurate minutes are kept of the proceedings of a meeting of the Council". A similar rule applies in respect of meetings of certain Council committees under clause 39 of the Local Government (Meetings) Regulation 1999.

It is clear that potential breaches of many of these requirements, on the evidence to date, may exist. Under section 666 of the Act there are offences for the wilful destruction, without reasonable excuse, of Council documents.

#### Knowledge of the Mayor and Councillors as to the financial health of the former Murrurundi Shire Council

An examination was made of the records of the former Murrurundi Shire Council, and in particular as to its business papers (which would be expected to contain reports of the General Manager and his staff to the Councillors) and the minutes of its meetings, to determine the extent to which the Mayor and Councillors were aware of Council's true financial situation. Comments as to the difficulties encountered in this regard are noted above.

The audited financial statements of the Council for 2002-2003 were apparently tabled for the information of Councillors at Council's meeting of 18 November 2003. Council's minute book, however, does not contain a copy of the minutes of that meeting, let alone of documents presented to the Councillors or otherwise tabled at the meeting. Secondary evidence of these minutes (retrieved from Council's computer records, and therefore with the potential problem that that document may not be a complete and accurate record) was sighted.

Also so tabled, was the annual audit report of Warton Thompson & Co, dated 31 October 2003. The report letter is peppered with words such as “considered adequate”, “considered to be satisfactory”, and “prudent and commendable”. The overall assessment was in the following terms:

In my opinion Council is in a sound financial position with working capital and debt servicing commitment in excess of accepted industry benchmarks. Council's internal restrictions (reserves) have increased substantially, which should enable Council to finance future expenditure on capital projects as and when required.

The only negative note was sounded, as it had been in previous years, for example, as early as 12 September 2001, in respect of the level of outstanding rates and charges. In 2003 it was stated that “the arrears (13.58%) are still in excess of the industry benchmark of 10% and it is recommended that Council adopt more stringent debt recovery procedures to reduce debts due to Council”.

The corresponding advice and assessment from 2001 was “stringent debt recovery procedures need to be maintained during 2001/2002 year to ensure that arrears are reduced to a more acceptable level”.

In 2002 an increase in the percentage outstanding was noted and it was observed that the figure was above the industry benchmark. It was noted:

Council's management has indicated that a number of reasons have contributed to the increase in receivables. Debt recovery throughout the year has been greatly effected (sic) by constant staff changes, particularly within Council's Finance Section. The Shire was also declared a drought area earlier in the year and consequently (sic) some ratepayers have had difficulty in meeting their financial obligations.

The so-called excuse relating to staff problems seems lame. The final statement, if taken literally, seems curious. The auditors advised that, in their view, “Council is in a sound financial position” for the 2001-2002 year.

So, it is clear that, whatever, the General Manager and his staff, and in particular his Manager Finance and Administration, had been telling the Council (the evidence on that being largely absent), it would appear that the Councillors believed, in reliance on what the auditor was telling them, that Council was “in a sound financial position”.

On the other hand, the General Manager and the Mayor and Councillors could hardly, properly, ignore the repeated warnings and concerns of Council's auditors, on Council's poor performance on the question of rates and charges outstanding. Yet the evidence suggests that they did so. Notwithstanding these repeated warnings they even brought in a drought relief policy for the benefit of farmers and their rates in 2002 and extended its operation subsequently, as to which see below.

This suggests a very poor level of understanding on the part of Council's governing body and a poor performance on their part in respect of governance and other financial management and Charter obligations. What the Councillors

should have done, of course, was to hold the General Manager accountable and demand that he ensure that Council's performance be improved on that score.

This applies equally for the failure to have timely quarterly budget reviews presented to the Councillors in accordance with the requirements of the Act and Local Government (Financial Management) Regulation 1999. See further below on this.

There is no evidence that, on any such score, they did so.

One of the performance measures of the General Manager's performance used in his December 2001 performance appraisal was, in respect of rates income, to "ensure continued effort put into collection of outstanding amounts", yet he was granted an "A" ("more than satisfactory") rating. In fact, on his managerial performance objective he got an "A" on all seven areas.

The next performance appraisal was conducted by the full Council (with one Councillor absent) on 20 August 2002. The report of that appraisal stated "specifically, Council was more than pleased with the GM's performance" in a number of areas, including "budgeting/financial control". Overall he was given an "A" rating. On the other hand, for reasons which are not explained in the report, he was given a "B" ("satisfactory") in relation to the need to "keep Council informed of its financial position".

Certainly, there is evidence that at Council's later meeting of 17 November 2002, that is to say several months after the General Manager's performance appraisal had been conducted, and following a resolution passed at its meeting of October requiring that this be done, a report was presented to the Councillors about "the level of outstanding rates and charges". But it must be stated that the measures noted as having been taken or proposed to be taken to reduce the admittedly "high" level of outstandings that had continued "for a number of years", seem to be somewhat nebulous and hardly earth shattering, let alone calculated to put a real dent into and result in an improvement of the situation. The report noted that a very high 21.71% of all outstandings had been outstanding for "greater than 5 years". No real explanation was given as to why this should be so and have been allowed to continue.

It is also noted that, "in response to a number of enquiries", a report, in tabular form, was also presented to Council's meeting of 19 February 2002, but that report contained no recommendations for remedial action, and all that the Councillors saw fit to do was to "receive and note" the report.

The next appraisal was conducted on 17 June 2003, once more by the full Council. Quite why it was appropriate for an appraisal of the General Manager's performance for the whole year to be carried out before that year was complete is not clear. Once more he was given an overall "A", and the report of the appraisal stated "Specifically, the GM was assessed as performing particularly well in financial management", amongst other aspects, and that "there were no areas of concern identified in this review" Mr Griffiths was this

time given an “A” in relation to the need to “keep Council informed of its financial position”.

All this suggests that the Councillors who conducted the performance appraisal of Mr Griffiths each year were not doing their job properly and failed to discharge their overall governance obligations. They were clearly giving Mr Griffiths an assessment and good report that he was not entitled to.

Councillors, as are everyone, are assumed to know the law, and therefore, for example, to know that quarterly budget reviews and reports were required to be presented to them “not later than 2 months after the end of each quarter”. As is noted below, there are repeated examples of a failure to comply with this requirement. The General Manager is the staff officer ultimately responsible for this and he is ultimately accountable to the Councillors for any inadequate performance or failings in that regard. Any such failings must, *a fortiori*, mean that he cannot properly be granted a report which says that his performance on financial reporting matters is “more than satisfactory”.

It is noted that in Council’s draft annual Management Plan for 2003-2004, considered by the Councillors at their meetings of 20 May and 17 June 2003, one of the financial performance targets set by Council for itself was to “reduce the level of outstanding rates and charges”, Council’s declared strategy being to “ensure that ratepayers observe the credit terms relating to the payment of rates. Take necessary recovery action where needed”, but it must be questioned whether this sort of declared aim was going to be sufficient to meet the repeated warnings and concerns of Council’s auditors.

#### Actual financial health of the former Murrurundi Shire Council

For the years ended 30 June 1999, 2000, 2001 and 2002, the Murrurundi Shire Council had a deficit, whether before or after capital amounts.

For the 2003 year, it was still in deficit before capital, but after capital amounts, just managed a very small surplus. Council received capital grants and contributions in the year totalling \$640,000 [a very considerable increase over previous years – 6 times that of 2002], and claims that this meant that it was making a profit or surplus for the year, after capital amounts, of \$339,000.

A so-called surplus of this magnitude is very marginal or slight, and just exceeds a break even level.

But, in any event this misrepresents the position. Grants are usually earmarked for expenditure on specified projects; they don’t represent profit from the ordinary day to day operational activities of a Council.

And whatever might be one’s view or assessment as to the impact of having a deficit, to the average person, however, running a consistent deficit meant that the Council was clearly living beyond its means.

It is true that the deficit from ordinary activities before capital for the years ended 2002 and 2003 represented a substantial improvement or decrease on the corresponding figures for 2001, 2000 and 1999, but the indications are that this was achieved in large part due to a substantial reduction in the amount Council was setting aside each year by way of depreciation to cover the cost of maintaining and replacing important infrastructure, such as roads and bridges.

2003	2002	2001	2000	1999
\$736 K	807	1,762	1,849	1,905
17%	19%	35%	35%	36%

In an audit report to Council (letter of 30 Jan 2004) presented by the then auditors, for the purposes of reviewing the proposal for the creation of an Upper Hunter Shire local government area, referred to the Boundaries Commission by the Minister and presented in turn to him by the Facilitator of the Peel Regional Review, those auditors even said:

Murrurundi Council was one such Council that reviewed its depreciation rates in relation to infrastructure assets (in particular transportation assets) in year 2002 resulting in a reduced deficit for that year and a surplus for year 2003. Murrurundi Council anticipates that future surpluses will be recorded as a result of the review of its depreciation rates. It is noted that the Vardon Report does not acknowledge the surplus achieved by Murrurundi Council in year 2003 nor does it recognise that, because of the reduction in depreciation charges, surpluses are highly likely to be achieved in future years.

This is not something to be proud about. It evidences an approach that the Department considers to be dangerous and that fails to recognise the need to provide adequately for the maintenance and eventual replacement of important infrastructure, provided for the benefit of the community, that Councils are responsible for.

In Council's Annual Report for 2002-03 (p. 49) it told its community that it set for itself a performance target of "asset management system established", and that its strategy for achieving this was to "review the value of assets and estimated replacement cost and depreciation rates". Yet, in reporting on the extent to which it achieved these goals, Council told its community that it had "not achieved" them.

In that case, it is questionable how Council could have properly reduced the level of depreciation it was putting aside, and justify what it was doing.

The written down value (WDV) of roads infrastructure for the year ended 2003 was at 28% of its total cost, which is a very adverse level and required immediate attention, which was not given. Council's own figures (Annual Report p. 56) indicate that it needed to spend \$14.060 million to bring just its local roads and bridges infrastructure up to a satisfactory standard.

In June/July 2002, moreover, Council was placed on the Department of Local Government's Financial Monitoring List. In the Department's *Annual Report for 2002-2003* the matter was described as follows:

We monitor the financial position of councils who do not submit their financial reports within a reasonable period after the due date or who generate some level of concern in the financial area. The following councils were identified as having issues of concern with their financial operations.

Then follows a table of some 30 Councils, of which Murrurundi Shire Council was one.

The Department's letter of 4 July 2002 to Council first advising it that it was being financially monitored, did not specify the grounds on which this was occurring. However, the letter followed a visit to Council by Departmental Officers from the Department's Financial Management Branch on 17 June 2002, and it was made clear to the General Manager, Mr Griffiths, what the Department's various concerns were. These included concerns over the level of rates and charges outstanding, Council's depreciation rates in respect of its assets, its assets condition and what Council was doing about provision for maintenance and replacement of those assets, and so on. By any standards, Council was far from being "in a sound financial position".

What did General Manager tell Council about this letter and visit? He presented a written report to the Councillors the very next day in fact, at their meeting of 18 June 2002. It is worth noting and quoting the entire report, as taken from the minutes of that meeting:

The General Manager advised that he had met with the Department of Local Government concerning Council's finances and the Department had advised they were quite happy with Council's position overall and the direction Council was taking.

Items of concern were asset depreciation, rate debtor recovery level and loan funding of plant replacements. The last item has been addressed and the others are in the process of rectification.

This audacious piece of spin-doctoring is simply astounding. It was in important respects not true. It grossly misled the Councillors as to the correct position, and it clearly failed even to mention that Council was to be placed on the Department's Financial Monitoring List. Perhaps the General Manager failed to appreciate the seriousness and implications of Council's being on that List. Other explanations are equally possible. Being in the minutes, of course, this "information" was also publicly available.

In Council's Annual Report to its community for 2002-2003, the General Manager quoted from the above-quoted auditor's report for that year and made the following comment:

Surely the Department of Local Government will this removed Murrurundi from the Financial Watch List following this sound result. [sic]

And in Murrurundi Shire Council's regular newsletter to its community, The Links, in the January 2004 issue (at p. 5) the General Manager put the following combative and non-accepting position to Council's community and ratepayers:

#### Financial Watch List

The Minister for Local Government has again attempted to discredit 30 Councils across the State by naming them in Legislative Council (sic). The "Shame" file mentained (sic) this Council along with Merriwa and Port Stephens from the Hunter. To date I have had contact from Evans Shire, Young Shire and Merriwa objecting to being listed. All those Councils are in a sound position as is this Council. For the financial year ended 30<sup>th</sup> June 2003 we had a surplus of \$339,000 and have just under \$3.4 million in cash and investments.

Council's auditor came to this conclusion in his report to Council:

[He then again quoted from the auditor's report]

It is inconceivable that the Minister and the Department can arrive at any other conclusion and it is suggested that the list has political motives connected with boundary adjustments and amalgamations.

Local member the Hon George Souris has made representations on Council's behalf to the Minister and Council will be taking the matter up with the Department in the near future.

It is very frustrating to have this type of statement made with no recourse to reply available.

It is not appropriate for a General Manager to be playing politics in this manner, and Mr Griffiths' advice and stance to the community are to be rightly and soundly criticised.

It is clear that those in charge at Council would not accept the Department's advice and verdict on the matter, and made this position well known to Council's community.

#### What the community were told as to the financial health of the former Murrurundi Shire Council

The Quirindi Advocate of 26 November 2003 carried a report, under a banner headline, "Council in good financial position", as to the former Murrurundi Shire Council's meeting of 18 November 2003, when the report of Council's then auditor regarding its financial statements was tabled.

At page 6 of the Annual Report for 2002-2003 of the former Murrurundi Shire Council, the General Manager, Mr Griffiths, opened his report for that year with the following claims:

For the financial year ended 30<sup>th</sup> June 2003 we had a surplus of \$339,000 and have just under \$3.4 million in cash and investments. The Financial Indicators reported upon in Council's Financial Statements for the 2002/3 year showed the strength of position.

At the same page he claimed that this was a “sound result”. This claim was made in apparent reliance on the passage, quoted above, from the report of Council’s then auditor, Warton Thompson & Co.

Likewise, in his report for the year at p. 5 Mr Kelaher, as Mayor, stated:

I am very proud that we are sound financially, thanks to those Councillors and senior staff who keep a watchful eye on where our money is spent and where it comes from.

Of course, if the average person, or member of Council’s community, were to examine Council’s financial statements, they would see for themselves that Council was running a deficit, and might therefore begin to question some of this glowing advice. But, in the main, and on average, it must be questioned whether the average ratepayer and member of Council’s community would undertake such an analytical task. More likely, they would accept at face value what their Mayor and General Manager were telling them.

As noted above, Council’s community were also being told that the Department’s placing of Council on its annual Financial Monitoring list was unjustified.

Were there misrepresentations as to the financial health of the former Murrurundi Shire Council?

It is clear from the evidence that this was so.

The evidence shows that Council’s community were being misled by its Mayor, its Councillors and its General Manager as to its true financial position and health.

Council’s misinformation and misrepresentation also continued in other arenas. Council repeatedly told the Minister and the NSW Boundaries Commission that everything was rosy, when the facts and evidence are that it was clearly not.

As indicated, perhaps the Councillors, judging by what they appear to have been told by their General Manager, and by the auditor, genuinely believed this. But the evidence is that the General Manager certainly, at the very least from the Department’s visit of June 2002 and its letter of July 2002, knew otherwise. Moreover, as the General Manager Mr Griffiths would be expected to clearly know and understand the truth, and was responsible and accountable for Council’s performance, to the Councillors.

The failure of the Councillors to carry out an appropriate and proper performance appraisal of the performance of Mr Griffiths as General Manager has already been noted.

Council also told the Boundaries Commission that its financial position was “very sound” (submission dated 25 Aug 2003, and jointly signed by Mayor and

General Manager). It also maintained in its later submission of 10 February 2004 (p. 12) that its surplus for 2002-03 was “a respectable surplus”.

Mr Andrew Fraser MP told the Lower House that Murrurundi Council was “a small, well-run Council, it makes a profit” (Hansard LA: 2/4/2004).

The independent audit from Forsyths has now revealed that what Mr Andrew Fraser was saying, what Council’s Mayor was saying, what Council’s General Manager was saying, and what Council was telling its community and ratepayers, were far from true.

Other concerns re openness and transparency of Council’s operations – closed meetings

In the course of examining the minutes of various meetings of the former Murrurundi Shire Council, it has been noted that there are numerous examples of failures to comply with the requirements of the Act and Local Government (Meetings) Regulation 1999 regarding the conduct of closed meetings, that is to say, meetings where members of the public are denied access.

However, no systematic search or examination of all of the minutes of Council’s meetings has been made, but, it would seem, from the somewhat ad hoc examination that has been made, that there would appear to be a systemic problem of failures of the Council in that regard.

The two key failings that have been noted relate to (a) a failure to close the meeting in the first place in accordance with the requirements of the Act, in that inappropriate and unrecognised reasons have been given in the minutes for the reason for the closure of the meeting, and (b) the failure to publicly report what was decided or resolved in the closed part of the meeting after the meeting goes back into open session.

As to the first problem, section 10A (1) of the Act provides that a meeting can only be closed to the public to deal with one of the limited and specific matters referred to in the list in subsection (2). Section 10D then goes on to require that:

- (1) The grounds on which part of a meeting is closed must be stated in the decision to close that part of the meeting and must be recorded in the minutes of the meeting.
- (2) The grounds must specify ... (a) the relevant provision of section 10A (2) ...

None of the minutes examined that contain examples of business being dealt with behind closed doors, or in closed meetings, with members of the public denied access, appear to comply with these requirements.

As to the second problem, clause 26 of the Local Government (Meetings) Regulation 1999 provides that “if a council passes a resolution during a

meeting, or a part of a meeting, that is closed to the public, the chairperson must make the resolution public as soon as practicable after the meeting or part of the meeting has ended”.

It is noted that this clause clearly refers to “the resolution”. This means that the actual resolution, and not an edited or censored version, must be publicly disclosed. If a Council is concerned about the disclosure of confidential matter that comes within one of the proper grounds for closure in section 10A (2), then it must ensure that the resolution is worded in such a way that does not disclose that confidential information.

For example, if the resolution is to accept a tender or offer to purchase a parcel of Council land for \$x million, and it is appropriate that that amount not be publicly disclosed at least for the time being, the problem can be managed by the simple expedient of wording the resolution in the following terms – “That approval be given for the sale by Council of [name of land] at a price and on the terms and conditions set out in the form of agreement for sale of land tabled at the meeting, and that approval be given for the affixing of the common seal to that contract”.

Whatever a Council does, it should be mindful of the advice and information provided to Councils generally by the Department in its guidelines on open meetings, issued in a revised format in July 1998 – see Circular to Councils 98/51. Heed needs also to be taken of the guidelines and advice given to Councils in respect of the statutory requirements for public access to Council documents and the interaction of such requirements with the Privacy laws – see e.g. Circular No. 01/14 of 3 May 2001.

Some specific examples of the problems noted can be seen in Council’s minutes of its meetings of 16 June and 17 June 2003. Another example is the meeting of 15 April 2003 re the Murravale Hostel loan (as to which see later in these submissions).

As to the first-mentioned examples, concerns over the minuting and disclosure of matters relating to Mr Griffiths and his contract of employment and so on are noted under the headings relating to those matters.

The minutes of the Council meeting of 17 June 2003, in Committee of the Whole, i.e. in closed session, show that some four items of business were apparently dealt with behind closed doors. One of these related to the “Rosedale subdivision”; one to a road closure through a property called “Tarrayarra”; one to the sale by Council of a property in Munro Street; and the last concerned the possible renewal of Mr Griffiths’ contract.

As to the first three items, resolutions were passed in closed session containing specific details and information about dollar amounts. But, when it came to reporting these resolutions in open session later, the resolutions as reported were censored and not reported fully as required by the Regulation.

As has already been noted, the resolution regarding Mr Griffiths and his contract was not even reported at all.

And, as to the alleged reasons for having to deal with the four items in closed session, behind closed doors, the only reason, given in respect of all items as a group, was “for the purpose of discussing matters of a sensitive and financial nature”. This is a formula that it has been noted is frequently used in the Murrurundi Shire Council minutes. It patently does not comply with the requirements of the Act.

Other examples could be given.

There has therefore been what appears to be a systemic failure at this Council to adopt practices and procedures that not only comply with the Act and Regulation but are also open and transparent and in accordance with the required Charter obligations of Council.

#### Concerns over Council’s handling of a Drought Relief Policy and outstanding rates and charges

This is another of the concerns raised by Forsyths in their interim audit report. Forsyths were very critical of Council’s record and performance in relation to rates recovery, describing Council as having “a poor rates recovery record” in the past three years. The level of rates outstanding for 1998-99 was 15.97%, for 1999-2000 it was 19.69%, for 2000-2001 it was 17.11%, for 2001-2002 it was 13.29% and for 2002-2003 it was 11.98%.

All of these figures are considered by the Department to be too high, despite the improvement trend from 1999. They are an indication that, at least on this account, the financial management of this Council was poor. It was at least one of the factors leading to this Council being on the Department’s Financial Monitoring List.

The percentage of rates, charges and fees outstanding is one of the key performance indicators used to gauge the financial performance of a Council. Specifically, this percentage is an indicator of the effectiveness of a Council’s revenue collection and of how well the Council is managing debt recovery. The Department’s publication, *Comparative Information on New South Wales Local Government Councils 2002-2003*, states at page 42 that “there is no benchmark for the level of outstanding rates, charges and fees. The lower the percentage, the less income is tied up in receivables and the more revenue there is available for council purposes”.

It is submitted that any percentage in excess of 7 to 8% is a cause for concern. That has certainly been the view of a number of the Facilitators in the recent Regional Reviews. The Group average of group 9 Councils (of which Murrurundi Shire Council was one) for 2002-2003 was 10.40%.

The Murrurundi Shire Council Annual Report for 2002-2003 sought to excuse Council’s admittedly poor performance on the grounds of the impact of the

current worst drought in 100 years that has affected most of the State. But, Forsyths comment that “we note that other Shire Councils in drought declared areas have been able to achieve far better recovery rates”.

It is noted that the former Coolah Shire Council (another Group 9 Council, and a Council very close to Murrurundi Shire) had a figure of 4.91% for 2002-2003, Merriwa Shire Council (also a Group 9 Council and again close by) had 4.58%, Gloucester Shire Council had 4.62%, while the former Quirindi Shire Council 10.04%. On the other hand, the former Scone Shire Council (a Group 10 Council) had a figure of 15.29% (the group average of that group being 12.53%). The performance of the former Nundle Shire Council (a Group 8 Council) was even worse at 21.48%.

Council told its community and ratepayers in its Annual Report for 2002-03 that it had “introduced a drought relief deferred payment scheme” and that “the Scheme is a credit to Council” [p. 6, in General Manager’s report]. However, Forsyths, in their independent audit report made a number of serious adverse comments and findings – e.g. departures from accepted accountability measures and failures to comply with the Act and Regulations - in respect of the operation and management of this scheme [letter 12 Aug 2004 pp 2-3].

It is also interesting that, contrary to predictions, the degree of take up on the Council drought relief scheme (adopted originally on 20 August 2002) has in fact been very low. This raises questions as to whether the scheme was in fact needed, and certainly puts doubts on Council’s reliance on the drought as a supposed excuse for its poor rates collection record, let alone on the extent to which some at Council trumpeted the scheme as a major initiative and achievement. It is noted that Council’s Management Plan for 2003-2006 in fact appears to contemplate that there will be no ongoing take up on the scheme at all (p.67).

Even more telling is the language of the original report to the Council meeting of 20 August 2002 about setting up the scheme, a report which did not in fact recommend the scheme, but simply provided information about it and gave the Councillors three options of adopting the scheme, doing nothing, or deferring a decision until a later date.

The opening words of the report are “The Murrurundi Shire area has not yet been drought declared ...” (emphasis added). Later in the report it is declared that the aim of the scheme was apparently “in order to relieve the pressure on the cash reserves of rural producers”. There was no mention being made of representations having been received by Council urging the implementation of such a scheme for the benefit of straightened ratepayers of any particular class. Nor was any information given as to any historical or other evidence regarding difficulties in collecting rates from farmers. It was also predicted that “the take-up rate may be around 30% to 40%” and could even have an (adverse) “potential cash flow impact of \$300,000 for the first instalment”. This on a total then rate income from the farmland category of just \$1.2 million, out of a total rate income for 2001-2002 of \$1,882,000.

In fact detailed information about outstanding rates and charges was not presented to the Councillors until several months after they approved the scheme. This information was presented to Council's meeting of 17 November 2002, and showed that of the total of outstanding rates and charges as of 30 June 2002 (\$340,356) only \$69,145 represented rates and charges payable in respect of farmland. Therefore, it is clear that the farmers were not in fact the ones only or even principally having difficulty in meeting their rates and charges obligations.

Despite all this, the Councillors saw fit to approve the scheme for the benefit of farmers immediately. There was and never has been, at least for five years, a corresponding policy providing rate or other relief to other categories of land holders (other than new arrivals to the area). It seems clear that the scheme was approved by a group of Councillors, many of whom were farmers themselves, who wished to benefit their compatriots, if not themselves. See further below on this.

Officers of the former neighbouring Scone Shire Council told the Departmental Officers that that Council had a hardship policy, but that there had not yet been an occasion on which it had to be invoked.

Forsyths went on to comment, in respect of Murrurundi Shire Council, that "Council's reluctance to recover outstanding rates is apparent from the Drought Relief Policy adopted by Council on 20<sup>th</sup> August 2002". They also found that Council's administration of that policy entailed a number of "departure[s] from the original resolution or accepted accountability".

The policy, as originally adopted on 20 August 2002, was that Council would defer (to when is not stated, though the implication is that it was indefinite, or at least until the Council later decided when the payment needed to be made) the need to pay the first rate instalment for 2002-2003 (due on 31 August 2003) and that no interest was to be charged in the meantime on overdue rates. The relief was granted to lands only in the farmland rating category. By later resolutions Council extended the relief also to the second, third and fourth instalments.

The Council policy required that the approved intended rate relief only be granted to those who applied for that relief and whose applications were approved. This reflects the requirements of section 564 of the Act. The policy was to be administered by a "Hardship Committee" of three, comprising two Councillors and a staff member.

The language of the resolution setting all this up is very poor and unclear. For example, the Terms of Reference of and any delegated powers to be granted to the Committee are not stated. Was the Committee to have full decision making power and authority? Or was it only able to make recommendations to the full Council, which retained the decision making power and authority? The fact that, in practice, it would appear that Council has (mostly – the early evidence is to the contrary) administered the scheme in the latter fashion does not provide a formal or sufficient answer to these questions.

It is also not stated how the Committee is to meet and how its meetings are to be conducted. In the absence of this, it would appear that the Committee was free to regulate itself on this (compare clause 38 (1) of the Local Government (Meetings) Regulation 1999). Good management practice, however, it is submitted, would decree that the Council should have set up some rules and procedures about all this.

Regardless of this, good management practice, and the overriding requirement for openness and transparency in local government (section 7 of the Act), would, it is further submitted, require that the proceedings of the Committee be minuted in a full and accurate manner, despite the fact that clause 39 of that Regulation would not strictly speaking apply. No evidence of any minuting of the proceedings of the Committee has been able to be found.

The members of the Hardship Committee were apparently chosen in such a way that one of the Councillors would be familiar with the eastern part of the Shire and the other the western part. Accordingly Clr Smith (with Clr Doonan as alternate) and Clr Martin (with Clr Kelaher as alternate) were appointed to the Committee. The staff member was the "Accounting Officer".

The Department has been advised that Clrs Doonan, Martin and Kelaher (out of a total of only seven Councillors in all) all owned lands in the Shire which were classified as farmland. This meant that they were potentially beneficiaries of the rate relief scheme set up by the Policy. The appointment of such persons to the Committee is therefore considered to be questionable, as at the very least there was a reasonable likelihood of a perception that they may have a conflict of interest in serving on the Committee, let alone in voting to approve the terms of the policy.

These views are put, despite the fact that under section 448 (b) of the Act (in the pecuniary interest provisions) they were exempted from having to disclose any pecuniary interest and accordingly were exempt from the requirement of having to leave the Chamber and not to participate in the consideration or discussion of or any voting on the matter (section 451).

It was not appropriate, nor in the public interest, nor a fulfilment of the overriding concept of open and transparent local government, that persons who might stand to gain by a rate relief policy serve on a Committee administering that policy and handling applications for relief. It was just unwise to select such persons.

Forsyths raised concerns about the lack of documentation in relation to the determinations made by the Committee and the relief granted to relevant ratepayers. Since the issue of their interim report further searches of Council's records have been undertaken, and some of the missing documentation found, but not all. All applications and letters of approval issued to the applicants are now understood to have been located.

What is still missing are minutes of the meetings of the Committee. It seems clear from the minutes of Council's meetings (of the full Council) that the

Committee, at least in most cases, only made recommendations, because a number of examples of the acceptance and adoption of recommendations made by the Committee have been found in those minutes. Some inconsistent evidence was also noted. But, lacking any documentation as to the deliberations and processes of the Committee, concerns must be held as to whether proper, open and transparent, let alone consistent (note Charter obligation section 8 (1) dot point 11), processes and procedures were followed.

The writing off of interest requires a resolution of Council – section 567 and clause 14 of the Local Government (Rates and Charges) Regulation 1999. Forsyths found no evidence of such a resolution, nor have the enquiries undertaken by the Departmental Officers brought one to light.

Clause 15 (not clause 12 as Council's Annual Report for 2002-2003 suggests, at p. 64) of the Rates and Charges Regulation requires that Council, in its Annual Report, include information as to the amount of rates and charges written off during the year. The only such information given in that Annual Report (at that page) relates to an amount written off "for the mandatory pensioner rate rebate".

This, therefore, is another aspect in which Council failed to adopt proper and open and transparent procedures in respect of this rates relief scheme.

On the other hand, it is noted that some mention of the existence of the scheme is made in the General Manager's report at p. 6 of the Annual Report. This, of course, fails to meet the requirements of the Regulation. Mr Griffiths claimed that "the scheme is a credit to Council".

The evidence is that this was far from so.

#### Concerns over the poor state of financial controls and financial management at the former Murrurundi Shire Council

Comment has already been made of the overly high percentage of rates, charges and fees outstanding. Likewise, re concerns re Council's drought relief policy and its administration.

Concerns regarding the very poor handling of the loan to the Murravale Hostel are considered separately below, but are but one other example of the general poor state of financial controls and financial management at this Council. The whole thrust of the interim audit letter from Forsyths is to this effect, and these concerns are considered to be justified.

The Local Government (Financial Management) Regulation 1999 requires that quarterly budget statements or reports be presented by Council's "responsible accounting officer", "not later than 2 months after the end of each quarter". Refer to clause 7 (1) in this regard.

Forsyths, in their interim audit report, raised concerns about the failure of Murrurundi Shire Council to comply with this requirement. They noted,

presumably on the basis of the evidence then available to them, that “the only reference in Council’s minutes to the Quarterly Budget Review for 2003/04 was a standard resolution” about the reports of the Manager Finance and Administration being received and noted or dealt with.

Since Forsyths conducted their audit, a further examination and search has been made by Mr Perkins of Council’s minutes and other records, and the results of that search were provided to the Departmental Officers subsequent to the visit to Murrurundi. It now seems clear that there is some evidence, albeit disclosing certain defects, that a quarterly budget review report was presented on a number of occasions in the 2003-2004 year.

Specifically, it is noted from those materials that a quarterly review report was presented to Council’s meeting of 16 December 2003 and also its meeting of 17 February 2004. The latter was in respect to the quarter ended 31 December 2003, so was within the required deadline. However, the former was in respect of the quarter ended 30 June 2003, and therefore not only out of time, but clearly was not a report for the 2003-2004 year. Council’s records have failed to bring to light any quarterly review report for the quarter ended 30 September 2003. The implication is that there was, in patent breach of the Regulation, no such report presented to the Councillors for their consideration. Strictly speaking, if the Council had not ceased to exist on 17 March 2004, a quarterly report for the quarter ended 30 June 2004 would also exist.

As to earlier years, it is noted that a report was presented to Council’s meeting of 15 April 2003 (covering the quarter ended 31 March 2003, and therefore on time), 18 February 2003 (covering the quarter ended 31 December 2002, and again on time), 17 December 2002 (quarter ended 30 September 2002, and therefore late), 15 October 2002 (quarter ended 30 June, and therefore even more late), 21 May 2002 (quarter ended 31 March 2002, and so on time), 19 February 2002 (quarter ended 31 December 2001, and also on time) and 16 October 2001 (quarter ended 30 September 2001, and again on time).

Clause 7 (2) of the Regulation goes on to require that the budget review statement must include or be accompanied by:

- (a) a report as to whether or not the responsible accounting officer believes that the statement indicates the financial position of the council is satisfactory, having regard to the original estimate of the income and expenditure [in Council’s Management Plan], and
- (b) if that position is unsatisfactory, recommendations for remedial action.

The reports presented to the Council meetings of 16 December 2003 and 17 February 2004, under the name of Mr Ken Arbuckle as Council’s Manager Finance and Administration, are in both cases missing and not able to be found.

The reports presented to Council’s meetings of 15 April 2003, 18 February 2003, 17 December 2002, 15 October 2002, 21 May 2002, 19 February 2002 and 16 October 2001 are available. With the single exception only of the

19 February 2002 report, they all clearly demonstrate a failure to comply with the requirements of clause 7 (2).

Each year Council's auditors conduct, in around March to May, an annual "interim audit" and provide a report to Council on this audit, often referred to as "Management Letters". The Management Letters for May 2001, 2002 and 2002 have all been sighted. Each was from Warton Thompson & Co.

According to those letters the audit "centred on an appraisal of Council's financial systems and involved an examination of the internal controls that are currently in place. We also conducted an examination of Council's financial transactions, on a test basis, to determine the extent to which the systems were functioning and whether they were being adequately maintained". It is also stated "The purpose of our review of the procedures adopted ... was to determine what weaknesses, if any, existed, and to inform management of any such weaknesses so that appropriate action can be taken".

Each of the letters is addressed to the General Manager. Each letter does raise a number of concerns, or "weaknesses", coming out of the audit in question.

For example, in the 2003 letter, concerns were raised, in respect of the issue of "collection and banking of income" in relation to the reconciliation of cashiers' takings and in relation to cash security, including concerns about the "cashier will often leave the receipting area without locking the cash tray and/or drawer". On debtors, and in particular "excess water debtors", it was noted that "major debt recovery action has not been undertaken for a considerable time". In relation to "private works debtors" it was noted that "there were some debtor accounts, which showed costs were incurred over 12 months ago, but no charges or invoices have been raised. The implementation of stringent debt recovery procedures is strongly recommended." Later they added "We recommend that Council critically review it's (sic) current debt recovery procedures to ensure that appropriate action is taken to promptly recover debts due to Council especially in relation to Excess Water Debtors and Private Works Debtors".

There is no evidence from Council's minutes or other records of these letters, and the concerns they raised, ever having been reported to the Councillors. They should have been. Unless this is done the Councillors have no way of knowing whether or not the General Manager and his staff are performing properly, and no useful information with which to conduct the required annual performance appraisal of the General Manager's performance.

As noted, the General Manager's performance, particularly in relation to financial matters and management, was assessed in nearly all instances as being "more than satisfactory". Once more, given the concerns raised by the auditors, sometimes more than once, it would appear that the assessment given by the Councillors was misplaced.

One of the various and many concerns raised by Forsyths in their interim audit letter of 12 August 2004 they expressed concern about was about "the overall

control weaknesses that existed during the reign of the former Murrurundi Shire Council". Concerns about Council's "poor rates recovery record" have already been noted above. Likewise regarding the need for quarterly budget reviews. They were "concerned that payments have been made through Electronic Funds Transfer ... without appropriate control functions ...". They noted, in relation to daily cash reconciliations that they were undertaken "without the involvement of authorising staff" (this had been a recommendation of Warton Thompson in their May 2003 letter), and they expressed a number of concerns about poor controls in relation to the cashier's draw, including its being left unattended (again a matter raised by Warton Thompson in their May 2003 letter). Numerous other concerns in relation to internal controls and financial management were raised, not all of them mentioned in these submissions.

It is clear that Mr Griffiths was not heeding advice and recommendations made by Warton Thompson in their letters, as well as failing to disclose those letters to the Councillors. He should have, and accordingly failed badly in his duties as General Manager.

#### Concerns re policy making and directions of the former Murrurundi Shire Council

It is the role and responsibility of Council's elected body, the Councillors as a whole, to play a key role in the creation and review of Council's policies and objectives – section 232 (1) of the Act. As the leader of the elected body, the Mayor of the day has a particular responsibility and role to play in this regard, over and above his limited role, under section 226, in respect of policy making, in cases of necessity, between meetings of the Council.

And under section 8 of the Act, it is a key Charter obligation, for which the Councillors as the governing body of Council are primarily responsible, to "exercise community leadership". This is one of the key governance obligations that are imposed on them under the Act.

The evidence is that the former Murrurundi Shire Council, led by its Councillors and Mayor, Mr Earl Kelaher, failed adequately to discharge that role and those responsibilities.

During the visit, it was requested that Council's policy register (the normal place where in a well run and managed Council Council's current policies will be gathered together and stored, not the least to be able to discharge Council's responsibility under section 12 to allow members of the community free access to such policies) be provided to the Departmental Officers for inspection and examination.

This proved to be a largely futile request.

Mr Perkins provided valuable assistance to the Departmental Officers in that regard, and with his help a tattered and battered loose leaf volume was found with documents that at first sight might have been a set of Council's current

policies. But this proved not to be the case, and many such documents were clearly out of date. Forsyths also expressed concerns about this.

Moreover, many policy documents that in a well governed and managed Council one would reasonably expect to find were missing. The implication is that there were no such policies. The absence of such policies suggests that the Councillors had failed to put their minds to the need for proper and up to date and appropriate policies for the orderly and good governance of their local government area.

For example, for many years the Department has stressed the need for a written and appropriate complaints handling policy. This has been backed by similar advice and guidelines from the NSW Ombudsman. No such complaints handling policy was sighted.

Nor was there evidence of any tendering policy. Nor of any policy for interaction between Councillors and staff, a policy that is so important in ensuring that Councillors and staff understand and manage their respective roles and responsibilities and can work together harmoniously for the benefit of the community and ratepayers. See the 1997 joint publication of the Department and the Independent Commission Against Corruption in this regard entitled *Under Careful Consideration: Key Issues for Local Government*.

Other examples could be given.

#### Concerns regarding the statutory duty to determine an organisation structure

Section 332 of the Act requires Council (done through its elected body) to determine an organisation structure in respect of the Council staff. Section 333 allows Council to re-determine that structure at any time, but it is mandatory for Council to re-determine its organisation structure within 12 months after an ordinary election of the Council. For relevant purposes the last date of an ordinary election at the former Murrurundi Shire Council was 11 September 1999. This meant that Council was required to re-determine its organisation structure by no later than 11 September 2000.

The evidence is that Council did not do so in this case until 21 November 2000, some two months out of time. The minutes of that meeting purport to explain the reason for this delay being due to an earlier decision to defer the matter "until the replacement of the previous General Manager commenced duties". Mr Griffiths, the last General Manager of Murrurundi Shire Council, commenced duties on 9 October 2000.

The delay in this case, while in strict breach of the terms of the Act, does seem potentially reasonable in the circumstances, given the pivotal and key role of a general manager, as opposed to the elected body, under the Act in respect of staffing matters. It would be reasonable for any new structure to be determined having regard to the views of, and after consultation with, a new General Manager, particularly one about to commence duties.

### Concerns re failure of Council to review its Code of Conduct

Section 440 (3) of the Act requires a Council to review its Code of Conduct within 12 months after each ordinary election. The last ordinary election for the former Murrurundi Shire Council was in September 1999.

The evidence is that on 15 August 2000, on the recommendation of the then Acting General Manager, who was Mr Perkins, Council resolved that this be deferred until the appointment of a General Manager.

As is the case for the failure in respect of the requirement to determine an organisation structure, given that Mr Griffiths had not then commenced his duties, and did not do so until 9 October 2000, and while this was still in strict breach of the Act, it can at least to some extent be understood why the deferral was made. On the other hand, it must equally be stated that there is a difference between an organisation structure, relating to the staff, for which a General Manager is directly responsible for managing, and a Code of Conduct, which is the primary responsibility of the elected body, albeit with advice from the full time staff. The fact that a Council is missing a full time and permanent General Manager at any particular time does not mean that all required decisions and the business of the Council can be placed in abeyance. After all, that is why Acting General Managers are appointed.

In any event, despite Mr Griffiths having commenced his duties in October, there is no evidence that anyone ever got round to following the matter up, and the Code of Conduct, in breach of the Act, failed to be reviewed at any time between then and when the Council ceased to exist in March 2004. Given the pivotal role and importance of a Code of Conduct in terms of the governance and management of the Council, this is therefore considered to be a serious failure, not only on the part of the General Manager, but also on the part of the Mayor and the whole elected body.

### Concerns re delegations

Subject to the division of powers made under the Act between Council's governing body, its elected body, the Councillors, on the one hand, and its General Manager, on the other, decisions on matters that are the proper responsibility of the elected body can, and subject to any contrary provisions in sections such as sections 377 and 379, by a resolution of the Council be delegated to the General Manager (but not to other Council staff) – section 377 (1) and (2). Section 378, in turn, allows the General Manager to sub-delegate to others, such as his or her senior and other managers.

Delegations may also be made in appropriate cases to the Mayor, Deputy Mayor and/or other Councillors, or even Council committees, and so on.

Section 380 of the Act requires the delegations in force to be kept under review, and this must be done “during the first 12 months of each term of office”. In practice, most well run Councils review their delegations every 12 months,

usually at the same time as or shortly after the annual election of Mayor and Deputy Mayor.

A well-managed Council will have all its delegations recorded properly, not only in its minutes and other documents, but in a register of delegations. Such a document or register is expressly referred to in section 12 (1) of the Act, which makes that register one of the key documents that members of the public are entitled to inspect, free of charge.

As with other documents and registers (see below as to the Register of Returns of Interests), at a well-managed Council such inspection is facilitated by having a register maintained in a proper and orderly manner such as an updated folder or some such format.

No evidence of such a clearly identifiable or formal register or folder was sighted at this Council. A series of somewhat battered lever arch binders containing what purported to be Council policy documents was located and examined. No register of or other record of delegations appeared to be included in these folders. Moreover many of the documents in the binders appeared to be clearly out of date. See further under Council policies above.

A search of Council minutes has brought to light a resolution passed at its meeting of 18 September 2001, when a new Mayor and Deputy Mayor were elected to hold office for the next 12 months. Those minutes do record a resolution approving a set of delegations to the Mayor and General Manager (only), and a copy of those delegations has been located.

However, no evidence of any sub-delegations by the General Manager to his managers and other relevant staff has been able, despite considerable search, to be located. As noted above, there is a considerable question and issue arising in this case as to certain actions of and purported authorisations granted by Mr Ken Arbuckle in respect of termination payments made to Mr Griffiths after the former Murrurundi Shire Council, of which they were officers, ceased to exist on 17 March 2004. It is considered highly unlikely that staff, other than the General Manager, did not purport to exercise delegated powers and make decisions, from time to time, so that would appear to provide no explanation for the lack of apparent documentation on the matter.

No evidence has been sighted, again despite a considerable effort on the part of Mr Perkins in searching for them, and despite similar efforts by Mr Finch of Forsyths, of any other periodic review of delegations, let alone that required to be made by 11 September 2000.

#### Failures by the General Manager to conduct required performance appraisals in respect of management staff at the former Murrurundi Shire Council

This is another concern that was highlighted by Forsyths in their interim audit report. An examination was made by the Departmental Officers of some of the personnel files of management staff of the former Murrurundi Shire Council, and

it was found that there was no evidence of any performance appraisals having been carried out by Mr Griffiths.

For example, Council's Manager of Finance and Administration was Mr Ken Arbuckle, appointed as from 5 July 2002 for a four year period under a performance based written contract dated 5 July 2002. Clause 6.1 of that contract required that Mr Arbuckle's performance be reviewed annually. Clause 6.2 made this the express responsibility of the General Manager. No evidence of such an appraisal was found.

Given the concerns as to Mr Arbuckle's performance and his role in Council's having reached some of the depths to which Forsyths reported it had descended, this is a matter of serious concern.

### Pecuniary interest returns and related issues

The enquiries made and documents of the former Murrurundi Shire Council examined by the Departmental Officers have brought to light a considerable number of concerns, some serious, in respect of these matters.

### The maintenance of the Pecuniary interest Register

Section 450A of the Act requires the General Manager of a Council to keep a Register of Returns of interests that are required to be lodged with Council pursuant to section 449. That Register is one of the key documents that, in the interest of openness and transparency of local government, Council is required to have available at all times for inspection by the public (section 12 (1) dot point 11).

An old leather bound volume, purporting to be that Register, was sighted and inspected. That volume has, since the 1960s, variously functioned as the book or register in which a record of the use of Council's seal, its entry into certain major works contracts, and disclosures of interests made orally at Council meetings, amongst other things, has been made.

The form of the Register is not prescribed, but Circular No. 97/41 issued by the Department to all Councils in July 1997, and which has remained in force until it was recently (April 2004, and therefore after the former Murrurundi Shire Council ceased to exist) re-issued, sets out certain guidelines about the Register. More specifically the guidelines deal with the need to have a formal system in place to record the receipt of returns lodged with Council, the filing of those returns in the Register, as well as the tabling, by the General Manager, of the Register, at a meeting of Council by a certain date (see further section 450A).

No return of interests examined by the Departmental Officers bore evidence of any date of receipt or formal receipting by the Council of those returns, as required by the guidelines. Mr Griffiths therefore appears to have failed badly in his duties in that regard.

Evidence of the date of receipt of a return may be important in any investigation as to a potential breach to lodge a return of interests in the required time, and in any subsequent proceedings or process before the Local Government Pecuniary Interest Tribunal. Ordinary returns of interests must, for example, be lodged with the Council by 30 September each year (section 499 (3)).

Given the lack of evidence in respect of the date of receipt of returns lodged with Murrurundi Shire Council, no assurances exist that returns were in fact lodged in time. For present purposes it has been assumed that returns were lodged on the date that they appear to have been signed, or more importantly, dated. This may not be a correct assumption.

A number of returns were not even dated at all, and the guidelines make it quite clear that it is the responsibility of the General Manager to ensure that this has occurred.

The date of signature purporting to be on a number of returns is later than 30 September. The clear inference, in the absence of evidence to the contrary, is that these returns were lodged out of time, and therefore in breach of the Act. There were three such returns for the 2001-2002 and 2002-2003 years (the returns examined were limited to the returns for these years). Two belonged to Councillors (Clrs Carter and Biffin), and one to a staff member (or assumed designated staff member – Mr Greg Brook, actually an employee of the former Scone Shire Council, but performing functions in respect of planning and development matters for the Murrurundi Shire Council). See further below on this.

In two cases no return of interests appears to have been lodged at all, and while the primary responsibility and prospective liability for this rests with the person who should have lodged the return, again under the guidelines it is clear that the General Manager had certain responsibilities to fulfil to ensure that all required returns were lodged and on time. The missing returns relate to Clr Doonan and staff member Ms Donna Rea (a member of the Council management team at the time, and who did lodge a return for the following year).

Nor does the state of the so-called Register give much cause for assurance that a Register along the lines required by the Act and guidelines has been kept by this General Manager. As noted, the returns inspected were contained in an old multi-function leather volume, but nearly all were just poked in loosely, and somewhat all over the place, between bound pages. Such a “filing” system, if it could be called that, leaves open all sorts of possibilities for returns to fall out, be lost, or even removed and tampered with.

As to the returns themselves, all of the returns examined have been completed in handwriting, some of it not particularly legible. There is a suspicion that in a number of cases the handwriting is the same, raising the inference that the return was not completed by the person whose return it purported to be, even if it did appear to be signed by that person. The pre-completion of returns before they are signed and dated by the relevant persons is a course that the

guidelines do leave open, at the same time sounding certain warnings. The guidelines, however, speak in terms of *typing* in information in pre-completed returns.

The manner of completion of these returns raises suspicions as to their accuracy and reliability, let alone as to whether Council officers engaged in that process, as well as the persons whose returns they purported to be, sufficiently appreciated the significance and importance of what they were signing and were required to do. There is an air of slapdashness about it all.

Of the 30 returns that should have been lodged and placed in the Register of Returns, some 15, or 50%, have questions that could be raised as to their accuracy and completeness. On top of this, as noted, two returns appeared not to have been lodged at all.

Section 450A (2) also requires the General Manager to table returns lodged with Council. In respect of ordinary returns this has to be done at the first Council meeting held after 30 September.

No evidence of this having occurred in October 2002 has been able to be located in the minutes of Councils meetings. In 2001, but then only as a late item, the tabling of returns lodged at Council's meeting of 20 November 2001 was minuted. That tabling therefore took place out of time and in breach of section 450A.

As to 2003, there is evidence of a resolution in the minutes of Council's meeting of 21 October 2003 recording the tabling of all returns lodged by Councillors and Designated Staff (only). 21 October was the date of the first meeting in October 2003.

The inference, however, from the resolution is that all required returns had in fact been lodged, and on time, let alone in good order. As noted above, and as will be noted further below, this was not the case, and it was incumbent on the General Manager to report this matter to the elected body and for this to be recorded in the minutes of that meeting. This was not done. Both Councillors and Council's community and ratepayers have been potentially misled accordingly. The General Manager failed to discharge his role and responsibilities in that regard.

#### Pecuniary interest returns of Councillors

For the 2001-2002 year, questions arise as to the accuracy or completeness of the returns of the following Councillors: Clrs Kelaher, Biffin, Burraston and Carter. There is no evidence of a return having been lodged by Clr Doonan at all. Clr Carter's return appears to have been lodged three days late. The return of Clr Burraston is undated, and therefore it is not clear whether it was lodged in or out of time.

For the 2002-2003 year, questions also arise as to the accuracy or completeness of the returns of the following Councillors: Clrs Kelaher, Biffin,

Burraston, Carter and Doonan. The returns of Clrs Burraston and Doonan and both undated, so once more it is not clear whether they were lodged in or out of time. The return of Clr Biffin appears to have been lodged 10 days late.

The question of whether any Councillor failed to lodge the required "primary return" under section 449 (1) of the Act within 3 months of first becoming a Councillor has not been examined.

#### Failures re the identification of staff as "designated persons"

The duties of disclosure set out in Part 2 of Chapter 14 of the Act relate not only to Councillors, but also to "designated persons", amongst others. Under section 441, a General Manager is automatically, and without further action on the part of the Council, a designated person. So are other "senior staff" (within the limited meaning accorded to that term in the Act). According to Murrurundi Shire Council's Annual Report for 2002-2003 (at p. 64), the General Manager was the only member of staff classified as "senior staff".

As to other persons, section 441, for good reasons, contemplates that Council needs periodically to identify other (non-senior) staff, as well as delegates and members of Council committees, of the Council as designated persons, because of a potential for such persons to have conflicts of interest in the exercise of their functions. See dot points 3 and 4 of that section.

The act of identifying such persons as designated persons does not have to be conducted in any particular way prescribed by the Act or Regulations under the Act, as such. However, having regard to such sections as 371 of the Act, and in the interests of openness and transparency generally in local government, it is considered that such identification should be made by means of a resolution of Council's elected body, presumably on the recommendation of the General Manager.

An examination of the records and minutes of the former Murrurundi Shire Council has to date failed to bring to light any documented identification of persons as designated persons for the purposes of section 441. The clear inference, in the absence of evidence to the contrary, is that in fact Council has not in fact formally, or properly and adequately, undertaken any such identification process.

It is noted that the Pecuniary interest Register, as inspected by the Departmental Officers (see further below), showed that a number of staff members of the former Murrurundi Shire Council, as well as two members of the staff of the former Scone Shire Council, who by arrangement between those two Councils have been providing planning and development services to the Murrurundi Shire Council, have in fact lodged written returns of interests under section 449 of the Act. Such returns are only formally required by the Act in respect of staff and other persons who are "designated persons".

No returns of persons who might have served as delegates of Council or on committees of Council were sighted.

The failure, therefore, to document or evidence any determination by Council as to which staff (and for that matter other persons) have been identified as designated persons is a matter of concern. It shows a clear failure by Council to have in place the desired and appropriate systems and procedures so that it might be able to discharge its Charter (e.g. dot point 11 and possibly also dot point 12 of section 8) and other obligations under the Act in respect of open and transparent local government (e.g. under section 7 (a)).

An inference is that those returns from persons who were not, apparently, formally so designated, came to be lodged by Council on a purely ad hoc, and unmanaged, basis.

A further inference is that the General Manager failed, in this regard, in his obligations under the Act in respect of managing and guiding the discharge of pecuniary interest obligations and the Register of Returns (section 450A). Guidelines, for the benefit of Councils, and General Managers in particular, were issued by the Department in the form of a Departmental Circular to Councils on 14 July 1997 – Circular No. 97/41. More recently, these were re-issued in Circular No. 04/16, on 22 April 2004.

The guidelines set out and explain a number of statutory and other duties that the General Manager is expected to discharge in respect of pecuniary interest and returns of interests matters. The evidence is that Mr Griffiths, as General Manager of the former Murrurundi Shire Council, singularly failed to discharge many of these responsibilities. See further, below, as well as above, on this.

It is noted that enquiries to both the Upper Hunter and Liverpool Plains Councils have resulted in assurances from their respective General Managers that steps were taken at a very early stage after the proclamation of the new Councils to formally identify (and to document that process) persons as designated persons for the purposes of the Act.

#### Pecuniary interest returns of senior and other designated staff

For the 2001-2002 year, questions arise as to the accuracy or completeness of the returns of the following staff: Mr Phillip Dunn, the Director of Engineering Services. While Ms Donna Rea commenced employment on 1 May 2000, and did lodge a return for 2002-2003, there is no evidence as to her having done so for 2001-2002, and there is no apparent explanation, on the evidence to date, for this apparent failure.

For the 2002-2003 year, questions also arise as to the accuracy or completeness of the returns of the following staff: Mr Dunn, Mr Ray Hynes, Council's Economic Development Officer, and Mr Ken Arbuckle, the Manager Finance and Administration. In addition, returns lodged by Scone Shire Council staff performing roles at Murrurundi Shire Council, namely Mr Greg Brook and Mr David Casson, would appear to have questions arising in respect of their accuracy and completeness and the return of Mr Brook was lodged some 21 days late.

Section 449 (1) of the Act requires that a staff member must lodge a return of interests (often called a primary return) within 3 months of becoming a designated person. As noted, there is no evidence that any designation of staff was ever undertaken, but from the fact that some staff, not “senior staff”, within the narrow meaning of that term under the Act, have in fact lodged returns, it is presumed that these persons were “designated persons”.

It is noted that Mr Arbuckle commenced duties at Murrurundi Shire Council on 5 July 2002, and there is evidence of a primary return having been lodged by him, apparently within the required time. As indicated above, returns for the years after 1 July 2001 only were examined, and Mr Griffiths commenced duties as General Manager on 9 October 2000.

#### Secondary employment issues re members of staff

The return of interests of Mr Ray Hynes, Council’s Economic Development Officer, for each of the 2001-2002 and 2002-2003 years discloses that, in addition to his income earned as a Council employee, he also had as a source of income a “consultancy” of an undisclosed nature. In doing this Mr Hynes was apparently self-employed, though the disclosure as to the name under which this business was conducted suggests that it was a partnership between Mr Ray Hynes and Ms Judy Hynes.

Section 353 (2) of the Act provides that 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. Subsection (3) also gives a General Manager power to prohibit staff from doing outside contract work or engaging in outside employment, and subsection (4) provides that if there is such a prohibition then staff must not engage in such work or employment.

An examination was made of Mr Hynes’ employment file, now held by the Liverpool Plains Shire Council, to which he transferred after 17 March 2004. He subsequently resigned with effect from 23 July 2004.

That file contained only one letter from Mr Hynes to the Murrurundi Shire Council’s General Manager about outside work or consultancies. It was dated 28 November 2001, and informed Mr Griffiths about a one-off “request from a bio-dynamic (organic) grower group in the lower Hunter”. The “group” was not named. It was stated that the group “are based in the Dungog Shire”, but it was not clarified whether or not the group operated in the Murrurundi Shire area. Mr Hynes advised Mr Griffiths that “this information is to clarify the position as it is close to my role with the shire and deal with any issue should there be one”.

The letter bears a handwritten endorsement “approved”, together with a set of initials (which would appear to be those of Mr Griffiths). The endorsement is not dated.

Just how an approval could be defensibly and properly granted on the basis of the information in the letter, particularly having regard to the absence of information as to the identity of the “group”, is far from clear. For example, without such and further information, how could a proper analysis and determination be made as to whether or not there was a conflict of interest (which Mr Hynes’ own words would appear to suggest may potentially exist) and if so whether or not it was appropriate to give Mr Hynes the go ahead, notwithstanding?

Even if Mr Griffiths sought and obtained further oral clarification and information, this should have been documented, so that there could be an appropriate paper trail, and to ensure that what was done was open and transparent.

Mr Griffiths’ handling of the matter appears to leave a lot to be desired.

Furthermore, given the disclosure in the 2002-2003 return of continuing income from consultancy work, serious questions arise as to whether that work generated conflicts of interest that needed to be disclosed and dealt with in an appropriate manner (for example, pursuant to Council’s Code of Conduct), and properly and adequately managed by the General Manager. Questions equally arise as to potential breaches of section 353 by Mr Hynes.

The question of secondary employment engaged in by the former Manager Finance and Administration, Mr Ken Arbuckle, is considered later in these submissions.

### Tendering

With the assistance of Mr Perkins, an examination was made of Council’s records to determine, in a preliminary way, the extent of compliance by Council with its obligations under the tendering laws, namely section 55 of the Act and the Local Government (Tendering) Regulation 1999.

As a first step, this entailed obtaining a printout, from Council’s financial records, of its creditors ledger for the period 1 July 2002 to 30 June 2004, in relation to payments made to creditors in excess of \$100,000, the benchmark under section 55 (3) for whether or not a tendering process must, by law, be undertaken, before Council enters into a contract of certain types.

This process revealed a number of creditors who received payments in excess of \$100,000 in that two year period. For example, in that two year period, Lowes Petroleum Service was paid a total of \$280,627.25. The provision to Council of petrol or other related motor vehicle expense services may or may not have been pursuant to a contract entered into between Council and that organisation, or merely as a result of ad hoc day to day purchases of fuel, for example. The former may attract the requirements of section 55; the latter would not. However, in the time available, no further enquiry about these payments has been made.

Two creditors were also paid large amounts over the \$100,000 threshold. These were The Williams River Steel Group (\$178,781), in respect of the construction of Council's much vaunted Rural Transaction Centre. The Departmental Officers were advised that a tendering process was undertaken in respect of this transaction and contract, but no complete extensive review of Council's records has been able to be made to date to verify this, or to verify fully whether the correct processes and procedures were at all times followed.

Copies of some Council documents were provided to the Department in respect of this transaction. They clearly did not comprise all documents that would be expected to have been found on the Council file. For example, tenders from the two tenderers were not amongst the documents provided to the Department. The Departmental Officers requested Mr Perkins to provide to them copies of all documents relating to the Rural Transaction Centre. Mr Perkins advised, when despatching what he did send, that he was "forwarding all information that I can locate". It would therefore appear that Council's records are defective in that documents which must have been received by Council can no longer be found. This is not satisfactory.

An examination of the documents that were provided to the Department shows a number of things that are of concern.

It would appear that Council determined, apparently in accordance with clause 9 of the Tendering Regulation, to follow a selective tendering method whereby it advertised for expressions of interest for the proposed contract for the Centre. This is an assumption only, as no evidence has been sighted that Council in fact consciously chose to follow this route.

The advertisement was sighted. It is a very small advertisement, placed only once in the Scone Advocate of 28 May 2002. It must be questioned whether this was a sufficiently wide and appropriate means of seeking out expressions of interest. For example, an advertisement in the Newcastle Herald may well have brought to light other firms interested in the job, and who knows if they might have been cheaper tenders. Clearly, Council's procedures were not calculated to ensure that the ratepayers were getting best value for money.

The wording of the advertisement is also incredibly scant, and even unclear. No where in the advertisement was it actually stated, in so many words, that Council was in fact calling for expressions of interest. The only allusion to this was in the words "Parties have until 4.00 pm on the 15<sup>th</sup> June, 2002 to register their interest", in small print, towards the bottom of the advertisement. In the last lines also appear the words "Tenders, suitably endorsed, should be addressed to John Griffiths ...". So, it was not even clear what Council were calling for – mere expressions of interest, or the lodging of a formal tender.

Readers of the advertisement were directed to contact Mr Ray Hynes or Mr Griffiths at Council if they wanted more information. No mention was made of the availability of any information brochure of other specification. In fact, such a document, of sorts, was available, and a copy has been sighted. It is only a short document, of a mere 11 pages, headed "Information relating to the

submissions for Conceptual Drawings and Construction Proposals of the Murrurundi Business and Community Centre”.

Very little information was provided in that document as to what precisely the Council was expecting to build in terms of size and what was in it and so on. It was, however, specified that Council wanted to “achieve the design of stage 1 & 2 [it was not stated what these stages were] and construction of stage one only, under a \$310,000 project budget”. It was therefore not clear whether expressions were being invited just for stage one, or what.

Apparently only two “tenders” - the words used in what purport to be minutes of a “Rural Transaction Centre (RTC) Committee” meeting of 18 June 2002 – were received. One was from Simon Miller, apparently a local, and the other from Williams River Steel. It would appear from the minuted recommendations of the Committee that the Miller “tender” was inadequate and did not contain “an accurate preliminary budget and pre-tender estimate for the total cost associated for the design and construction of the plans submitted”. Given the vagueness of the advertisement, let alone the so-called Information document, this is no wonder.

The recommendation was to give Mr Miller a further 7 days to fix things up, and this recommendation was adopted by resolution of the Council the same day. This was presumably communicated to him – there is no documentation or other correspondence apparently on this. Typed notes, not attributable to any particular member of staff, have been sighted, relating to a meeting apparently held with Mr Miller on 19 June 2002. Mr Griffiths and Mr Hynes were apparently present. These notes record that “Simon commented on inability to gain a construction firm able to commit to construction or firm estimate”.

There is no evidence that the other tenderer was advised of the extension of time or accorded any similar concession. This would appear to be in breach of clause 13 of the Tendering Regulation and not in accordance with the ICAC guidelines on local government tendering, which Council should have been aware of and should have endeavoured to comply with. Appropriate probity and transparency standards were not obtained, therefore.

A report to and minutes of the next Council meeting of 16 July 2002 have also been sighted. The papers included a letter from Mr Miller advising that he was unable to commit to the project and asked to not be further considered.

The minutes record Council’s resolution that, by default, the Williams River Steel tender became the successful tender. As noted, no documents from that firm have been sighted, so it is not clear whether it submitted a mere expressions of interest document, or a full tender. It is noted that clause 1.4 of the Information document only appeared (under the heading “Submissions and tender process”) to call for the provision of a “sketch design for the facilities on the site” and clause 1.5 indicated that a “final plan and costings” were not required until 30 June. Clearly Council did not follow the process it told its prospective applicants it was proposing to follow. The suspicion is that no one at Council really knew what they were doing.

In fact, Council charged on and at that same meeting approved the commencement of construction with a “budget of \$377,700”. It is not clear if this is the amount “tendered” by Williams River Steel, though that may not be the case. It is possible that the amount quoted by that company was \$309,987, under the amount of \$310,000 flagged by Council in its Information paper. The wording of the Council resolutions is very poor and unclear.

Furthermore, with Council having quite naively and inappropriately disclosed its hand by disclosing its budget limit, it is no wonder that the quote came in for an amount just under that limit – in fact by a mere \$13 !!.

There is no evidence that the tender documents were tabled or otherwise presented or made available to the Councillors, so that they might make an informed and appropriate decision on the matter. The only document tabled that is referred to in the minutes was “the annual operating budget” for the Centre, and this would appear to have been no more than half a page of rough figures set out in the report of the Economic Development Officer, Mr Hynes.

The DA for the Centre was also approved by Council at the meeting of 16 July 2002. A mere 6 conditions were attached to that approval. This seems incredibly short. In fact, a number of those conditions are such that, given that they leave details and further conditions of the approval to be determined at a later date by various officers, the legality of the “approval” must seriously be in doubt and breach principles enunciated by the Land and Environment Court. This, accordingly, was a seriously flawed approval.

Evidence has been sighted of a contract document, of sorts, signed on Council’s behalf by the General Manager on 19 July 2002. There was no Council resolution authorising this.

In fact, a variation to contract (one of a number) was signed only a few days later, on 26 July 2002, by Mr Arbuckle. There is no evidence of a Council resolution authorising this variation, or giving Mr Arbuckle any such signing authority. In addition, attached to that variation authorisation (given, apparently, by Mr Arbuckle) is a set of terms and conditions which he also signed, adding “in absence of J Griffiths”. One wonders how or why Williams River Steel accepted such a signature.

Some of the later variations were signed by Mr Griffiths. Again, it is not clear where he got the authority from to do this. Two of these variations added to the price. The total price now became \$328,586. Given the very unclear wording of the Council approval accepting the Williams River Steel quote, it is not clear whether the addition to price was authorised by Council – the reasonable inference is that it was not, particularly given that the Councillors would not have known of the later variations at the time.

In short, Council’s handling of this transaction was nothing short of abysmal.

The words “amateur hour” come to mind.

Yet, the building of this Centre has been trumpeted far and wide as one of this Council's major achievements.

Another major payee referred to in the creditors ledger document provided to the Department was Bridgeworks Pty Ltd, for \$159,520, and a resolution of Council approving the acceptance of a tender from this company for bridgeworks was sighted. Beyond that no further enquiries have been undertaken to date in respect of that transaction.

However, in respect of another major payee, Boral Asphalt, some questions would appear to arise as to whether Council did comply with its obligations in respect of tendering. In the two year period in question Council did pay this company amounts totalling \$209,229.08. In addition payments were noted amounting to a further \$93,530.75 to a payee described as "Boral Construction Materials", which may be just a division of the same company.

As to the former payments, advice was received by the Departmental Officers that this comprised three payments. Two were for sums of approximately \$1,300 only, on different occasions. But the other payment was made in one payment of \$206,498.67. Questions therefore clearly arise in respect of this payment. While a search was undertaken of Council records, this failed to bring to light any documentation which might establish that Council did undertake a tendering process before the purchase of what is described as "sealing". Goods and/or services of this nature are ones that Council would be expected to ensure that it is getting best value for money on by undertaking an appropriate tendering process.

#### Concerns over financial assistance re the Murravale Hostel

One of the concerns raised by Forysths in their interim audit letter relates to a loan made, out of Council's Sewerage Fund, to the Murrurundi Retirement Homes Association Inc, the independent operator of the Murravale Hostel. Those concerns appear to be well-founded, and an examination of Council's files and records in relation to this transaction raises a number of other serious financial mismanagement issues.

Councils raise moneys for sewerage works or services by way of levying a charge under section 501 of the Act. Under section 409 (3), these moneys are required to be used only for the purpose for which they are levied. And under section 409 (4) these moneys must be held, pending their expenditure for that purpose, in an account with a bank, building society or credit union, or invested in an authorised investment. In other words, moneys raised by way of a charge for sewerage services must not be spent on other purposes and pending their expenditure must be banked or invested, and cannot be lent out to third parties.

This is all subject to section 410, which does provide an alternative. Under section 410 (3) the moneys can be transferred out of Council's Sewerage Fund and temporarily (until such time as the moneys are needed to be spent on the intended sewerage works or services) lent out – but, only "internally" (i.e. to

another part of Council or to another Council owned and operated fund) and then only with the approval of the Minister, who in the normal course will attach conditions to such a loan.

One of the concerns raised by Forsyths relates to the lack of any such Ministerial approval. Technically, once let out internally to, say, Council's General Fund the moneys could be on-lent, even to an external third party. But this is the theory, and in practice, if the Minister knew that the intent of moving the moneys about in Council's accounts or funds was to facilitate such an external loan exercise it is unlikely, failing a very good case, that the Minister would grant such an approval in the first place.

There is perhaps another more important section of the Act to which Forsyths did not advert in their letter. This is section 356. This section places a number of clear restrictions and controls on the ability of a Council lawfully to lend moneys or otherwise give financial assistance to third parties. It is a section that in the experience of the Department can often be overlooked and therefore breached by local government. For example, it is often overlooked that the making of a loan, even on commercial terms, is the granting of financial assistance. Financial assistance is not limited to mere grants or donations.

Providing financial assistance to private operators and others in the community may well be a laudable aim, but it must be done in a way that is open and transparent, and in accordance with any relevant statutory requirements.

Section 356 does allow a Council to financially assist others, but only if the conditions and requirements of that section have been duly complied with. The overriding requirement is first that the financial assistance must be made with a view to and for the purpose of allowing the Council to exercise and discharge *its own* functions – section 356 (1). Mere philanthropy for the benefit of the community or a particular section of the community is not enough.

Furthermore, from a procedural perspective, the overriding condition to be fulfilled is one of public knowledge of and acquiescence in the proposed financial assistance. There are two routes to achieve this – either by means of a special, ad hoc, public notice of the proposal being given, at least 28 days before the Council resolution approving the grant of financial assistance has been passed (section 356 (2)), or via and in accordance with the Council's annual Management Plan and process (section 356 (3)).

One of Council's Charter obligations, for which the Councillors as a whole, as well as Council's General Manager and his staff, are responsible, is "to bear in mind that it is the custodian and trustee of public assets and to effectively account for and manage the assets for which it is responsible" (section 8 (1) dot point 7). Moneys raised by Council from rates and charges are such public assets.

This means that the Councillors, before they approve any financial assistance to others outside Council, must be satisfied that in so doing they are discharging

their responsibilities in respect of Council's Charter obligations, amongst other things.

It is likewise incumbent on the General Manager and his or her staff to ensure that advice and recommendations are not made to the Councillors for such financial assistance that would entail a breach of Council's Charter obligations or other provisions of the Act and/or Regulations.

The discharge of Council's Charter obligations as custodian and trustee of public assets entails a significant burden and responsibility, such as of prudence and proper financial management and control.

For example, there is a need to ensure that there is a proper case, in the general public's and the ratepayers' interests, that the financial assistance be granted, and that the granting of such assistance is not just for one minor section of the community, at the expense of others or of Council's ability to provide a proper and adequate, equitable and appropriate level of services and facilities to its community generally (compare Charter obligation section 7 (1) dot point 1).

Where the financial assistance is made by way of loan, there must be a proper appraisal of the capacity of the lender to repay and so on. Proper and adequate due diligence needs to be undertaken.

Likewise, once the loan has been made, there is a need properly and diligently to manage that loan, and to ensure that the borrower complies with all terms and conditions of the loan, and in particular repays principal and/or interest on time and in accordance with the approved contractual terms.

On all fronts the Murrurundi Shire Council and its Councillors and General Manager failed, it is submitted, dismally in respect of this loan to the Murravale Retirement Homes.

Furthermore, the approval of this loan came only some 10 months after the Councillors had approved, at their meeting 18 June 2002, a loan to Council from the National Australia Bank for \$212,000, to be repaid over 8 years. The minutes fail to explain the purpose of that loan, though it is disclosed in the staff report to the Councillors (part for plant replacement, and part towards the cost of a rural transaction centre). There is some discrepancy as to what amount was to be borrowed in respect of each. The staff report spoke of \$160,000 for the former and \$52,000 for the latter, and noted that the borrowing was in accordance with the approved intentions of Council, as set out in its Management Plan for 2001-2002. On the other hand, it is noted from the Management Plan for the following year, 2002-2003, actually approved by the Councillors at this same meeting of 18 June 2002, that (at p. 10) it is flagged that the borrowings for the first-mentioned purpose were to be \$177,000. Another example, in passing, of the poor financial management at Murrurundi Shire Council.

If Council needed to borrow such an amount at that time, questions must arise as to how the Councillors saw fit to be lending out even more money a short time later, when the loan to Council was still outstanding, and Council was having to pay interest at over 7%, no doubt a higher rate than Council could get from the Association.

There is no evidence that the making of the loan to the Murravale Homes was publicly notified before it was approved by the Councillors, as required by section 356 (2).

Nor is there any evidence that the provisions of section 356 (3) were complied with in terms of the loan being part of a specific program, details of which were included in Council's draft Management Plan for either of the 2002-2003 or the 2003-2004 financial years. The making of any loan, or the provision of any other form of financial assistance, were not provided for or mentioned in the 2002-2003 Management Plan. The target (at p. 31) of providing assistance to community groups was not such a program, particularly given that the declared "strategy" for implementing that target was merely to provide that assistance in terms of administrative support. Nor were the quite meaningless and uninformative "targets" and their corresponding "strategies" at p. 32 of "improved management of aged housing" and "aged housing plan". Equally, the general "target" of "community has access to a range of health, community and aged care services according to existing and emerging needs" (p. 33) could not be described as a specific program for the purposes of section 356 (3).

Section 356 was therefore breached, and the loan, quite apart from having been made out of the Council's Sewerage Fund without Ministerial approval under section 410 (3), was therefore unlawful and improperly approved and made.

On 9 April 2003 the Chairperson of the Murrurundi Retirement Homes Association Inc wrote to Mr Griffiths as General Manager of the Murrurundi Shire Council requesting a loan from Council "to assist in the development of Murravale". The Hostel had secured a licence for 10 new low care beds and some Federal funding, to the tune of \$700,000.

In support of the application it was put to Council that:

As 2 of the 10 new beds have been designated as respite only beds, this redevelopment of Murravale brings with it a new service for local residents – access to residential respite care, which is hard to get in Scone due to the high demand.

The rationale for the redevelopment was to both flexibly meet the needs of increasing numbers of frail aged people within our community, specifically those with dementia, and to ensure the long term viability of Murravale and concurrently boost the local economy and generate more job and educational opportunities for local residents.

On its face therefore, there would appear to be a potential case for the Council to get involved, in principle, in providing this loan, given Council's own Charter

obligations regarding the provision of services and facilities for the purposes of its community (compare section 356 (1)).

It is noted that Council in fact has had a long history of association with and support for this facility. In early 1993 Council extended its sewer main to service the Murravale Hostel, which was then under construction, at a cost which was funded as to 50% by a State Government grant, and as to part of the remainder by a contribution from the Association itself (recommended by the Shire Engineer at an amount of \$9,000, but changed by resolution of the then Councillors to be \$12,000). On 16 June 1992 Council had approved a loan (secured by mortgage over the Hostel lands) of up to \$340,000 to the Association to assist it in funding the construction costs of the Hostel itself. It appears that this loan was repaid in full about two years later.

However, it must be stated that the fact that Council had made such a previous loan, on terms in many respects quite similar to those applicable to the loan some 11 to 12 years later, does not mean that, without more, and without question, it was appropriate for Council on the later date to make such a loan.

The Council file also contains evidence of other financial assistance provided to the Association in 1994 and 1995, for the purposes of the Hostel, outside the terms of this first secured loan, as to which see further below.

The letter of 9 April 2003 went on to advise that the total expansion project was expected to cost about \$1.2 million, and that the Association was seeking other government grants to cover the costs, over and above the Federal funding they already had. For various reasons the Association wished to start building in May 2003, before the shortfall in government funding was met, and the Association was "seeking a financial safety net from Council in the form of an interest bearing loan".

Attached to that letter was a "loan application" of the same date. It was proposed that "the loan will attract interest at the latest available investment rates" (whatever that meant), that the Association "cove[r] the legal costs involved in the development of the formal loan agreement", and that (under a heading "Ability to repay the loan") funds to meet repayments would come out of bond moneys received from incoming new residents, respite income coming in fortnightly for the 2 respite beds and "sponsorship money" and "grants".

It was maintained that the Association "is financially in a good position". Reference was made to the Association's financial statements in alleged support of this assertion.

The application sought "a flexible line of credit" and that the loan be made "in increments of \$100,000".

These documents were copied to the Councillors as part of a very short – a mere one page – report to the Councillors under Mr Griffiths' name as General Manager, for the purposes of its meeting of 15 April 2003.

The Councillors were merely told about a previous loan that had been made by Council to the Association, now repaid, and that "Council has sufficient cash reserves in Sewerage Fund to advance the funds and given the offer of interest at investment rates there should be no loss of income to Council". It was proposed that Council take security by way of first mortgage, but that "no repayment rests have been suggested".

It is interesting to note from the Council records relating to the earlier loan (made in instalments commencing in early 1993) that the solicitors preparing the loan and mortgage documentation on Council's behalf issued a number of clear warnings to Council. First, they stressed "we trust that Council accepts that there is no warranty given by us as to the value of the security and whether it is sufficient to meet the amount of the advance. If Council does seek such evidence we would recommend that a value be retained." There is no evidence that Council bothered to do this at the time.

Second, the solicitors stressed "we have made no investigation into the capacity of the Association to meet its commitments as to Principal and invest (sic – interest?) under the mortgage ... we make no warranty in regard to the Association's capacity to repay and trust that the Council understands that it relies on its own assessment in this regard". Once more, there is no evidence on the file that Council undertook any enquiries or made other due diligence examinations in this regard.

As noted above, further financial assistance was granted by Council in 1994 and 1995. Apparently, some time prior to February 1994, Council had carried out certain works for the benefit of the Hostel, and had billed the Association \$30,248.12 (apparently including \$18,248.12 for the cost of constructing a car park at the Hostel) for this. The Association's response was to write to Council in February asking Council to contribute the same amount back to it, effectively writing off the outstanding account.

The matter came before Council at its meeting on 15 February 1994, when Council considered the application, but determined not to accede in full to the request. It is submitted that Council was understandably and appropriately cautious on this occasion, having regard to its Charter obligations as custodian and trustee of public moneys. According to a later report to Council in March 1995, "Council resolved to write off \$12,000 of that amount to the sewer fund with the balance of \$18,248.12 to be classified as an interest free loan and reviewed after December, 1994". On the other hand, why the loan was to be interest free, and why it was not apparently secured and treated as a further advance under the 1993 mortgage is not clear.

The evidence shows that the situation was reviewed in March 1995, when at the Council meeting of 21 March 1995 the Councillors received a report from the Manager of Community Services examining in some detail (and despite the fact that the report was only one page long) the Association's financial track record and position. The point is that the report is clear documentary evidence that due diligence was at least and on this occasion attempted. The tone of the report was to raise some concerns and warnings, though the recommendation

made was to give consideration to “contributing the remaining \$18,248.12” to the Association. After debate and an amendment being moved and carried to the motion, the Councillors resolved that the Association be given until the end of that year only to repay the loan, but without interest. The then General Manager followed up advice to the Association about this decision with a later letter of 27 October 1995 reminding the Association about its repayment obligation.

All this should be contrasted, however, with what occurred in 2003 and 2004 under Mr Griffiths as General Manager, and under the then Councillors, led by Council’s Mayor, Mr Kelaher.

Mr Griffiths’ one page report to the meeting of 15 April 2003 gave no indication of any due diligence having been conducted by he and/or any of his staff, either regarding the capacity of the prospective borrower to repay the new loan and the interest on it, or regarding the adequacy of the security to be offered to secure the loan. It is reasonable to expect that, if such due diligence and enquiries had been undertaken and made, a report on the matter would have been presented to the Councillors. Due diligence is not simply taking what the borrower or applicant says, at face value.

Nor, at least from the minutes and documentary record of the meeting, is there any evidence that any queries about such matters were raised by the Mayor or any of the Councillors, as they properly should have been.

Nor does the General Manager’s report mention anything about the legal implications or consequences of taking the moneys out of the Council’s Sewerage Fund, as his report recommended. Press reports, contemporary with the press coverage about the release of Forsyths’ audit report, (Newcastle Herald, 4 September 2004, p. 17) indicate that the former Murrurundi Shire Council Mayor, Mr Kelaher, commented on the findings of Forsyths regarding the Murravale Hostel loan in the following terms:

“The biggest problem was the loan to Murravale Hostel because we wouldn’t [lend] it to someone if we didn’t have the funds for it ourselves,” he said. “We asked our senior staff if we could do that without the Minister’s approval and they said ‘yes’ and now we’re in the doghouse for that too.”

In the Northern Daily Leader of the same day (p.5), Mr Kelaher was reported as saying:

“When the Murravale loan arose the council asked general manager [John Griffiths] and finance manager [Ken Arbuckle] to find out if the council needed permission to approve that funding and the councillors were told we could press on.”

It is understood, though this is not minuted and is not in the General Manager’s report to the Councillors, that it was believed that the moneys in the Sewerage Fund, earmarked for specific projects, were in fact not going to need to be called on in the immediate future.

It can reasonably be stated that it would be expected of both the General Manager and his staff, as well as from the Mayor and Councillors, that they needed to test and be satisfied as to this, and ensure that their deliberations in this regard, if there were any, were properly and openly and transparently documented.

In fact the loan approved by the resolution passed at the meeting (incidentally, out of the public gaze in Committee of the Whole and closed session), was on terms that it would be for as long as five years. One wonders how the Councillors could be and were satisfied, assuming they even put their minds to the question, that the sewerage moneys would in fact not be needed for those works for a period as long as that. Five years, more than the life of the term of office of those Councillors, is a very long time in local government. After all, once lent out, and failing any obligation on the borrower to repay the moneys before that 5 year period was up, the moneys could not be got at.

This loan represented some 15% (or nearly one sixth) of Council's reported *total* reserves and cash holdings, and 63% of the reserves in its sewerage fund, earmarked for sewerage works to be undertaken for the benefit of its community and ratepayers.

Lending the money out for such a long period has denied the community and ratepayers the use of those funds for that period, and is considered to be a serious example of financial mismanagement and profligacy. It is evidence that this Council, both through its General Manager and its elected Councillors, has failed to discharge its Charter obligations under section 8 of the Act, to bear in mind that it is the custodian and trustee of public assets and that it must effectively account for and manage the assets for which it is responsible.

And while the loan agreement signed between Council and the Association required the Association to pay regular monthly interest payments on the amount of the loan, the evidence is that Council had, until the matter was brought to light by Forsyths, not even bothered to monitor what was paid or payable (no interest payments had been made at all by the time of the visit in September 2004, even though the loan was advanced in March 2004).

Forsyths' concerns prompted the new Upper Hunter Shire Council to pursue the Association over the outstanding interest payments, and a letter was issued on 2 September 2004 formally demanding payment of these outstanding moneys. The Department understands that these moneys have now been paid in full.

The Department is also satisfied that the Upper Hunter Shire Council is taking steps to monitor the situation for the future and also to secure from the Association an agreement to revise the terms of the loan agreement, so that a definite and proper schedule is fixed for repayment of principal, rather than leaving it purely at the discretion of the Association as to whether any of the principal is repaid before 10 March 2009.

It is also noted that at its recent meeting of 27 September 2004 the Upper Hunter Shire Council has taken steps to regularise the failure of the former

Murrurundi Shire Council to comply with the requirements of section 356. Its Management Plan, which had not to date disclosed or provided for the existence of the loan and its continuation, is to be amended, and this is to be placed on public exhibition for 28 days from 29 September 2004, so that the public may be able to make submissions on the matter. While it must be questioned whether the past failure by its predecessor Council to comply with section 356 can legally be remedied ex post facto in this manner, at least for the past, as opposed to the future continuation in existence of the loan, Council's moves to ensure that there is openness and transparency about the loan, and to ensure that its Management Plan correctly provides for and makes mention of it, are to be commended.

There are, however, further aspects of concern regarding the transaction.

As noted, the Council approved the making of the loan at its meeting on 15 April 2003. The approval was for a loan of five years, and in fact on the basis that "repayment to be over a period of five years as monies become available to" the Association. It is reasonable to assume that in April 2003, the Councillors were anticipating and approving a loan that was going to be repaid in full by April 2008, or very soon thereafter.

However, the loan was not advanced until 12 March 2004, and the loan agreement and related mortgage were not signed until 10 March 2004, so that the five year repayment term, stated to run "from the date of this agreement" now became an obligation to repay only on 10 March 2009, nearly one year later than the date apparently envisaged and approved by the Councillors.

Nor did the loan agreement reflect the terms of the Council approval, in a number of respects.

First, as noted, the Council approved a loan that had to be repaid progressively over the 5 year period, as moneys became available to the Association. That is not what clause 3 of the agreement says at all. It merely requires repayment of the outstanding balance on the fifth anniversary of the date of the agreement, but with no commensurate obligation to make any payments of principal in the meantime.

The approval was also for the "loan to be made in increments of \$100,000". Clause 2.2 of the loan agreement did correctly reflect and provide for this. Yet, when the Association wrote to Council on 23 February 2004 it asked for the loan to be made in one hit, for the whole \$500,000. The letter asserted that this was "as per the loan agreement made between us", but this was plainly not so. No one at Council seems to have bothered to query this, and a cheque was apparently drawn without question for the full amount.

Council's approval was for "all costs associated with the loan and security to be borne by" the Association. Yet, clause 5.2 of the agreement does not so provide. It requires the Association to pay only the costs associated with the mortgage and its discharge. To make matters worse, clause 7 actually provides

that “each party shall bear its own legal costs associated with the drafting and execution of this agreement”.

All this may, though there is presently no evidence to support this, well be pursuant to negotiated and agreed amendments to the term of the deal. But the point is that this is not what the Council approved, through the resolution of its Councillors on 15 April 2003. And there is no further resolution of the Councillors in evidence to show that any amendments to the deal and the documents as signed were approved. The General Manager was given no delegated authority either in this regard, so if he purported to give the necessary approval, he had no authority and power to do so.

Why was all this not picked up? It was the responsibility of the General Manager and under him his staff, such as his Manager Finance and Administration, Mr Arbuckle, to do so. It was their responsibility, in dealing with Council’s solicitors, to ensure that the documents they drew up correctly reflected the approval of the Council. So much is clear from section 335 (1) of the Act.

For that matter, why did Council’s auditors of the time not pick this all up either?

Why did it only come to light after new auditors – Forsyths – were brought in by the two new Councils?

The failings go on.

The loan as approved was for “interest to be calculated on the highest monthly balance”. However, clause 4.2 of the loan agreement merely provides for interest to be “calculated on monthly rests”, which does not mean the same thing.

The General Manager’s report to the 15 April 2003 Council meeting advised “given the offer of interest at investment rates there should be no loss of income to the Council”. The approval also was certainly on terms that the interest rate was to be reviewed annually by reference to the 90 day bank bill rate, and clause 4.4 of the loan agreement correctly reflected that. But, an annual review and correction of the interest rate would mean that if investment interest rates fluctuated (upwards) in the meantime, Council would in fact miss out on and lose money on what it would have otherwise earned by having the moneys out on investment or in a bank account or whatever, which is what the Act required, and at flexible or variable interest rates. On a loan or investment of \$500,000 this could amount to a considerable sum.

The General Manager clearly misrepresented the position to the Councillors and they failed to pick this up or understand it.

The loan agreement was executed under the common seal of the Council in the presence of Mr Kelaher as Mayor and Mr Griffiths as General Manager. The document states that the common seal purported to be affixed “pursuant to a resolution of Council passed on 15 April 2003”.

Clause 48 (4) of the Local Government (Meetings) Regulation 1999 requires expressly that it is unlawful to affix the Council seal to a document “unless the document relates to the business of the Council and the Council has resolved (*by resolution specifically referring to the document*) that the seal be so affixed”. The resolution of 15 April 2003 was not expressed in those terms, and indeed made no mention of any loan agreement at all.

The seal was therefore unlawfully affixed to this document, and it is surprising that the Council solicitors were not astute to this. The prime responsibility, however, clearly rests with the General Manager and Mayor.

Lastly, as was noted above, the resolution of 15 April 2003 was actually passed by the Councillors in Committee of the Whole, or closed session of the meeting, from which the public were excluded. Clause 42 (3) (a) of the Local Government (Meetings) Regulation 1999 required that the exact resolution, as passed in closed session, be reported or made public in open session. The minutes of Council’s meeting of that day record that there was a general and vaguely worded resolution made public, but it was not the exact and detailed resolution as passed in closed session, so what was publicly disclosed was a censored version, and therefore in breach of the Regulation. As noted elsewhere in these submissions, this appears to have been a systemic problem at this Council.

It is submitted that it is hard to imagine how the General Manager and Councillors of the former Murrurundi Shire Council could have made a greater mess of their handling of this transaction.

#### Concerns relating to the performance of the former Manager, Finance and Administration, Mr Ken Arbuckle

There are serious concerns about the performance of Mr Arbuckle as Manager Finance and Administration of the former Murrurundi Shire Council. They link in with various concerns raised by Forsyths in their interim audit letter. It is noted that the employment of Mr Arbuckle with the new Liverpool Plains Shire Council, to whom Mr Arbuckle was transferred after the date of the proclamation, was terminated by Council with effect from 9 September 2004.

The failure of Mr Griffiths, as General Manager of Murrurundi Shire Council, to conduct a required performance appraisal in relation to Mr Arbuckle has already been noted.

Mr Arbuckle’s role as Manager Finance and Administration covered many of the financial management, financial reporting, financial control, records keeping, meeting procedure and general management areas in respect of which concerns have already been raised. However, from a governance viewpoint, the failed performance of Mr Arbuckle is a matter for which the General Manager must take ultimate responsibility.

In addition, the role of Mr Arbuckle in relation to the alleged processing and authorisation of unlawful termination payments to Mr Griffiths has been noted.

Attention is now focussed on the concerns raised by Forsyths relating to fringe benefits tax (FBT) payable to the Australian Taxation Office (ATO) in respect of the payment of fringe benefits to (or salary sacrifice arrangements made for the benefit of) Mr Arbuckle, as well as on goods and services tax (GST) issues and the filing of Business Activity Statements (BAS) with the ATO.

Mr Arbuckle was appointed to Council as Manager Finance and Administration, for a four year term, with effect from 5 July 2002, under a written performance based contract. The contract provided for a total remuneration package of \$68,500. Mr Arbuckle was not a "senior staff" member, in the strict meaning of section 332 of the Act.

The components and exact make-up of the package were, at the outset, left undetermined and vague. This was not appropriate, and the details should have been clearly agreed between Council (via the General Manager) and Mr Arbuckle at the outset. The failure to do so meant that there was a risk that, from a legal perspective, the contract was possibly unenforceable.

The components of the package comprised four parts – salary, employer's contribution to superannuation, a rent subsidy (as to 50% of the rent) on housing, and a Council provided vehicle. The contract is silent as to any other benefits, and contains no provision for any salary sacrifice arrangement.

Mr Arbuckle's CV and job application disclose that he claimed a wide range of skills and attributes, including being "experienced in correct meeting procedure", "strong financial skills", "well versed in the preparation of Council internal and external financial reporting requirements" and that "a team under my direction will deliver a high standard of customer service with positive outcomes for Council". The evidence shows that Mr Arbuckle failed to live up to his hype.

At the time of his application for the job at Murrurundi Shire Council Mr Arbuckle apparently held two concurrent positions. One was as an employee (the Manager – Budget) with the Western Australian Main Roads Department, and the other was as a "consultant" with a firm described as "TM Consulting". He had briefly held a position at the Walgett Shire Council as Director of Corporate Services between April and September 1999, leaving apparently for family reasons. Other than this stint, he appears to have had no experience in local government in NSW. He had previously worked at one time in local government in Western Australia. Local government laws differ in some cases quite markedly from State to State, and interstate experience can in practice sometimes prove more of a hindrance than a help, particularly to those who are not prepared to acquaint themselves with the particular details and sometimes different approach of the NSW Act.

Section 449 (1) of the Act required that Mr Arbuckle lodge with the General Manager, within 3 months of becoming a designated person, a return of his interests. This return is often called a "primary return", and is intended to be the

first, or an initial return, providing, on a prospective/future basis, a disclosure of the potential sources for pecuniary interests that might arise in the future. Later returns are lodged on a retrospective basis, that is to say they disclose interests actually held, after the event, in the previous year to 30 June.

As already noted, Mr Arbuckle did lodge with Council the required primary return, on 12 August 2002, or at least that is the date it was apparently dated. This return disclosed that Mr Arbuckle was expected to have a potential pecuniary interest through his derivation of income from and through his being a shareholder and director of "Traverse Management Consultants Pty Ltd". It is assumed, in the absence of contrary evidence from, say, Mr Arbuckle, that TM Consulting and that company are one and the same. On the other hand, it is noted that a recent letterhead of that company uses a logo comprising the initials "TMC", and the letter sighted was signed by or on behalf of the company by a person whose role was described as "TMC Administration".

Mr Arbuckle's next return (ordinary return) covered the period 5 July 2002, his start date at Council, to 30 June 2003. It was apparently lodged on 12 September 2003, or at least that is the date the form was apparently dated. This return disclosed that, in addition to his job at Murrurundi Shire Council, he derived income in that period from being a "Director" of "Traverse Management Consultants Pty Ltd". No mention was made of being a shareholder, and in the absence of evidence to the contrary it is assumed that Mr Arbuckle must have disposed of his shares during the year.

These disclosures raise the question of whether or not section 353 of the Act (rules regarding secondary employment) was complied with in respect of Mr Arbuckle. It is also noted that clause 5.1 (g) of Mr Arbuckle's contract also provided that he was not to "engage in other remunerated work without the written consent of the General Manager".

In an email of 26 June 2002 from Mr Arbuckle at TM Consultants, in which he accepted the job at Murrurundi Shire Council, he told Mr Griffiths:

TMC will continue in existence. What is Councils policy. I would like to get permission. This would be on the basis of no conflict of interest.

Mr Arbuckle's file contains no evidence of any reply to that email. The inference is that Mr Griffiths failed to give the required written consent, and therefore any work done by Mr Arbuckle for TMC was in breach of both the Act and his contract.

Notwithstanding that Mr Arbuckle's main employment contract did not provide for any salary sacrifice arrangement, the evidence is that he did in fact sign a separate Salary Sacrifice Agreement with Council on 5 July 2002, the same day as his contract. The agreement indicates that it was made pursuant to clause 8 of the Local Government (State) Award 2001. On its face the agreement ran indefinitely.

The evidence is that some three payments, totalling approximately \$25,132, were paid by Council over a period between 24 December 2003 and 25 June 2004 and that are in question. It is not known whether there were other payments made between 5 July 2002 and 24 December 2003, and whether or not, in respect of those payments, all legal and other taxation requirements and laws were complied with.

Clause 3.1 of the agreement provided that the amount of salary that could be sacrificed in the first year was \$14,142. The first year started on "the beginning of the first pay period to commence on or after 5 July 2002" (clause 4.1). Let us assume, for present purposes, that each year was a year commencing 5 July. Clearly, therefore, payments totalling \$25,132 in a seven month period ending at the end of June 2004 exceeded the amount referred to in clause 3.1.

Clause 14.1 of the agreement, however, did allow "variations" to the agreement, but required that these be "in writing and shall be appended to this Agreement". Forsyths were concerned about the lack of documentation to underpin the increase to \$25,132. However, an examination of the files and records of the former Murrurundi Shire Council has brought to light a letter sent by Mr Arbuckle to the General Manager of the Council on 2 October 2003. That letter reads:

Under the terms of the salary sacrifice arrangement I request a change to the amount to be sacrificed.

The amount to be sacrificed during this current 12 months is \$12,142.00. I would appreciate if we can make the final balance reconciliation for the year ended 4 July 2003 in the near future.

This wording is far from clear as to its intent and effect. Yet, the copy found of the letter found on the file bears a handwritten endorsement, signed by Mr Griffiths on 9 October 2003, saying "Approved".

This, accordingly, may, though it is not clear, amount to the required written variation for the purposes of clause 14.1, though the letter appeared not to be "appended" to the agreement.

However, given the unclear wording, what was "approved"? A benevolent interpretation is that it was a change of the amount to be sacrificed to \$12,142 for the 12 months commencing 5 July 2003 and ending 4 July 2004. That interpretation *appears* to give some meaning and sense to the final sentence of the letter.

That being so, then the only properly authorised salary sacrifice payments to be made in the period ended 4 July 2004 were payments totalling no more than \$12,142. As noted, in fact payments were made in that period of more than double this amount. They were therefore made in breach of the agreement, and the first question that comes to mind in that regard is whether or not the payments were properly authorised by or on behalf of Council.

By letter of 11 August 2004, the Acting General Manager of the Upper Hunter Shire Council, Mr Dutton, sought clarification from Mr Griffiths on a number of questions relating to Mr Arbuckle and his terms of employment. Mr Griffiths replied by letter of 28 August 2004. He stated that his reply was not based on a perusal of documentary records, but on his own “memory of events”. Much of what Mr Griffiths said in his letter does not appear to tally with the documentary evidence. He was also very vague as to amounts and details. He asserted that:

It is also recalled that the payment for the year ended 30 June 2003 [probably, at least according to the documentary evidence, this should be 4 July 2003] may have been made in the following financial year.

For this to have occurred, if it did, seems out of order. It is noted that the ATO ruling on salary sacrifice arrangements that would have been in force at the time was ruling number TR 2001/10. That ruling, at paras 19-22, states that payments made pursuant to arrangements entered into after the relevant income had been earned, that is to say after the event, amount to “ineffective salary sacrifice arrangements”, and attract tax that was not otherwise payable if the arrangement was effective.

In a letter, marked “Without Prejudice”, and dated 18 August 2004, from Mr Arbuckle to Mr Robert Hunt, then Acting General Manager of the Liverpool Plains Shire Council, Mr Arbuckle “agree[d] that it is an ineffective salary sacrifice”. He said he would now deal direct with the ATO about the matter.

Clause 2.1 of the agreement provided that the benefits that were salary sacrificed under the agreement were to be forwarded, or paid, by Council “to the Remuneration Consultant named by the employee”.

In their interim audit report letter of 12 August 2004 Forsyths state:

Local government councils may enter into contractual arrangements with third party providers to manage and administer staff salary sacrifice arrangements on their behalf. Such contractual arrangements do not relieve councils of the responsibility of lodging fringe benefits tax returns and payment of the associated tax liability. This information [presumably the details and information needed to be able to complete the tax returns] is normally provided by the provider, in a timely manner, to allow Council to complete and lodge fringe benefits tax returns.

We have been unable to locate any evidence of Council contracting with TMC to administer salary sacrifice arrangements. Nor have we sighted any correspondence from TMC which details how the funds, received by them, were disbursed and the fringe benefit components of such payments.

The visit to Murrurundi and the inspection of Council files by the Departmental Officers has brought to light one letter, undated, and unsigned, purporting to have emanated from TMC, simply advising that Council had a FBT liability as at 31 March 2004 of a particular amount. That letter was not addressed to Council, but to Mr Arbuckle, and it is not clear when and if that letter was referred to the appropriate person to deal with at Council.

Mr Dutton sought clarification from TMC about the letter, and generally about the salary sacrifice arrangements. However, other than acknowledging that the aforementioned letter emanated from their office and confirming that funds totalling \$25,132.24 had been received from Council, TMC declined to provide any other information, including about whether any form of agreement had been signed between itself and Council regarding the administration of the salary sacrifice arrangements, without Mr Arbuckle's permission.

The visit and enquiries made by the Departmental Officers failed to bring to light any such required contract between Council and TMC. The salary sacrifice arrangements would therefore appear to raise serious questions in terms of possible breaches of taxation laws and/or the State Award. They equally raise serious questions of probity, given the lack of required documentation.

In the same vein, serious questions arise, it is submitted, as to the choice and use of TMC as the salary sacrifice payment vehicle, or "Remuneration Consultant", in the wording of clause 2.1 of the agreement between Mr Arbuckle and Council. That term is not defined in the agreement, and the expression seems curious. While the agreement appears to be based on a precedent obtained from someone, enquiries with the LGSA by the Department suggest that the precedent agreement was not one of theirs.

One of the key concerns is that TMC, a company in which Mr Arbuckle was, at least at the outset, not only a director but also a shareholder, was allowed to be used as the vehicle to receive the funds from Council and to administer the salary sacrifice arrangements. According to Forsyths, on the basis of a company search conducted by them, Mr Arbuckle resigned as a director on 23 April 2004, but as this date is post the proclamation, when Murrurundi Shire Council ceased to exist, this factor is considered to be irrelevant for present purposes.

If, as Forsyths maintained, Council remained responsible for the lodgement of FBT returns and the payment of the related tax to the ATO, it is submitted that it was incumbent on Council to ensure that it was making arrangements with a responsible third party that it was appropriate to make, and to ensure that the whole deal satisfied probity and openness and transparency requirements. There is no evidence that Mr Griffiths, or anyone else at Council, made any such due diligence or other checks. The primary responsibility was that of Mr Griffiths as General Manager, and as the person to whom Mr Arbuckle reported, however. Any such checks should, if made, clearly have been documented and the documentation securely filed in an appropriate file.

Another facet to this relates to the fact that the Council did not know what the payments related to – for example, were they permissible and proper payments, recognised as appropriate, lawful and tax effective salary sacrifice payments, such as for superannuation, the provision of a motor vehicle, or the payment of child care costs, and so on – see, for example ATO tax ruling TR 2001/10 at para 20, and note clause 8 (ii) of the Award – that would have known (and legitimate) tax outcomes and responsibilities for Council, or were they going to be distributed or paid for other unauthorised or non-legitimate purposes?

Council was in effect writing a blank cheque here and getting itself into a situation over which it might have no control. That was not appropriate.

Council should have had some sort of assurance, in advance, as to what the moneys were going to be disbursed on. It is submitted that this assurance should have been bedded down and included in the salary sacrifice agreement itself. It was not. Clause 8 (ii) of the Award limits the benefits that may be salary sacrificed under the Award. And paragraph (iv) provides that “the benefits to be salary sacrificed and their value shall be in writing and signed by both council and the employee”. The agreement entered into in this case did not satisfy this condition, in that the benefits to be salary sacrificed were not identified in the agreement. Despite the fact that clause 2.0 of the agreement was headed “Benefits to be Salary Sacrificed”, the clause under that heading dealt only with the payment of the amount in question to the Remuneration Consultant.

There is also another aspect in which the agreement signed between Mr Arbuckle and Council did not comply with the Award. Clause 8 (viii) makes it quite clear that the “Council will ensure that the salary sacrifice arrangement complies with taxation and other relevant laws”. Clause 9 of the agreement provided that it was not Council that was going to administer the scheme and clauses 10 and 13 (indemnity to Council) appear to be set up on the basis that it is the employee who takes on responsibility for compliance matters. Clearly this was not consistent with the Award, and as Forysths correctly noted, the responsibility remained at all times with Council.

Council, through its General Manager, Mr Griffiths, failed to discharge its responsibilities both under the Award and under the relevant taxation laws. The General Manager equally had responsibilities under clause 13 of the Local Government (Financial Management) Regulation 1999 that he failed to discharge. That clause makes it quite clear that a General Manager “must ensure that ... the provisions of the Act, the regulations and any other written law relating to Council’s financial obligations or the keeping of accounts by councils are complied with”. Mr Griffiths appears to have been content to leave the matter with Mr Arbuckle. This was quite inappropriate.

These various views are put regardless of whether or not payment by Council of these amounts to a third party associated with the Council’s employee, and in the circumstances noted, was permissible under the taxation laws or any rulings and so on of the ATO. Likewise, this position is put regardless of any such situation under the Award. Similarly, the fact that under the agreement there were clauses providing for Council being kept indemnified from “additional or unexpected FBT liability” makes no difference, it is submitted.

In his letter of 28 August 2004 to Mr Dutton, Mr Griffiths told him “I am not aware of any evidence of disbursement being provided by TMC”. He went on, in what was possibly a hopeful tone, to add “although they would have been recorded as incoming correspondence and placed on file if received”. The point is that there was nothing placed on the file in the way of the required letter or advice from TMC as to how the moneys paid to them had been disbursed.

This compounds the failings. It is submitted that it was Mr Griffiths' responsibility, as General Manager and as Mr Arbuckle's direct report, to satisfy himself that all that needed to be done and all that needed to be received had been. After all, this was a very small Council, with few employees, and delegating such matters to some junior payroll clerk, or such like, and not undertaking any follow up, was, it is submitted, and assuming that this is what he did, not good enough. There is no evidence that he took any such steps.

Forsyths' concerns and conclusions, as set out in their letter, continued:

We note that Council's fringe benefits tax return for the year ended 31 March 2003 and 2004 (prepared by [Mr Arbuckle]) makes no disclosure of the above payments and accordingly no fringe benefits tax has been paid on the above payments. We also note that the above amounts were not included in [Mr Arbuckle's] 2003 and 2004 PAYG Withholding Statements and no PAYGW tax has been remitted to the ATO. [emphasis added]

In his letter of 28 August 2004 to Mr Dutton, Mr Griffiths said:

Discussion was held with Mr Arbuckle about conflict of interest in respect of certifying of expenses, payments and the like. Such payments were not to be signed by the individual and I am not aware of any deviation from this, although it is possible that it occurred in my absence.

This equivocal answer provides little comfort.

Given the obvious conflict of interest that Mr Arbuckle had in respect of the completion of FBT returns that needed to include information about payments to him or on his behalf, for Mr Griffiths to have failed to personally check and sign off on the returns, or at the very least to have personally satisfied himself that all appropriate procedures were in fact being followed at all times, and that his alleged instructions were being carried out, accordingly amounts, it is submitted, to a very serious breach of probity and financial management on his part. Mr Griffiths does not make it clear in his letter whether these alleged instructions were issued direct to Mr Arbuckle, or to some other Council officer. But the point is that it was not sufficient for Mr Griffiths to issue instructions and then just sit back and assume they were being carried out.

The evidence is that it was Mr Arbuckle who issued instructions to Council's Expenditure Officer about "the amount of Fringe Benefits to be included on the Payment Summary (Group Certificate) for the year ended 30 June 2004" for a number of named persons – memo of 12 May 2004. One of those persons was Mr Arbuckle himself. If Mr Griffiths did issue the instructions he says he did, this was in contravention of them. As already indicated, it is submitted that for Arbuckle at least Mr Griffiths should have been personally getting involved and signing off on the relevant instructions, so as to avoid creating circumstances that might be conducive to fraud or other wrong doing.

Clearly, tax was being avoided. The beneficiary was Mr Arbuckle. A serious question of possible tax avoidance, and maybe even fraud, on the part of

Mr Arbuckle arises. Mr Griffiths would appear to be potentially implicated in that fraud, and certainly may be responsible for setting up, or allowing to be set up, whether knowingly or negligently, circumstances in which such fraud might easily be perpetrated.

The ATO is now aware of the matter, having been advised by letter of 19 August 2004, on behalf of the former Council, and by way of formal voluntary disclosure, about the failure to withhold tax from payments made to Mr Arbuckle. Therefore, it is a matter, it is submitted, for the ATO to take any necessary action in respect of the matter.

Fortunately, perhaps both for Council and for Mr Arbuckle, because of the early voluntary disclosure made to the ATO, before they got onto the trail of the breaches, the ATO, in accordance with its published guidelines on these matters, determined to “remi[t] any failure to withhold penalty relating to the failure to withhold ... to nil” (letter of 2 September 2004). Mr Arbuckle will, of course, still have to pay the tax that was not paid to the ATO.

That, however, does not excuse the failures of governance and probity on the part of Mr Griffiths and Mr Arbuckle.

Mr Dutton’s letter of 28 July 2004 to the Independent Commission Against Corruption referred to that body only concerns over Mr Griffiths’ termination payments. No referral has been made regarding Mr Arbuckle and his salary sacrifice arrangements. A question may arise as to the utility or appropriateness of this, given (a) the fact that the ATO would appear to be the more appropriate body to deal with the matter and (b) the Commission’s advice in respect of the referral about Mr Griffiths that it proposed to take no action.

There is more, however.

Forsyths also raised concerns in relation to GST. They said:

It is a requirement of the audit that the Auditor each year provide to the Minister a GST Independent Review Report, which confirms that the GST Management Systems are sufficiently adequate to enable compliance with the GST Legislation and the requirements of the Director General of the Department of Local Government. The report must also state that “nothing has come to our notice with respect to any correspondence between the Council and the Australian Taxation Office (ATO) regarding outstanding taxation debts that are attributable to a Business Activity Statement (BAS)”.

For the year ended 30 June 2003 the former auditor of Council issued an unqualified Review Report which indicated that Council was complying and that no correspondence from the ATO had been noted.

Council’s records clearly indicate that there was significant correspondence from the ATO in both the 2003 and 2004 financial years dealing with overdue Business Activity Statements, including reminders, final reminders, overdue account balances and penalty notices. It has been estimated by staff that penalties and interest on outstanding Business Activity Statements approximate \$8,000.

It is apparent from our review and discussions with Council's current staff that there has been a significant breakdown in control procedures in relation to preparation, reconciliation and lodgement of Business Activity Statements. It has been necessary for staff to reconstruct all Activity Statements for the last five quarters in order to determine the correct GST and withholding tax liability. ...

Mr Arbuckle was the Council officer directly responsible for ensuring that the necessary Business Activity Statements were correctly lodged, and on time. It was in turn, from a governance perspective, the responsibility of Mr Griffiths as General Manager to also be satisfied that this was being done. What the General Manager really should have been doing was getting some sort of annual certificate from his report to so assure him. There is no evidence that this was done. It represents a serious failing in governance, once more on the part of both Mr Griffiths and Mr Arbuckle.

Correspondence to Council of the nature referred to from the ATO (or for that matter any other regulatory authority) is the sort of correspondence that a well organised and efficient General Manager would ensure gets personally across his or her desk and seen by him. This seems not to have happened at this Council.

Mr Griffiths in his 28 August 2004 letter said that to his knowledge all the required tax returns had been lodged. He went on:

I am not aware of any penalty notices from the Australian Taxation Office and therefore unaware of the notices or penalties being drawn to the attention of the Council or Council's auditors. I was aware of some problems in mid 2002, however I believed the problem to be fixed and did not have concern until May 2004 during planning of the final financial reports. Again that was, to my understanding, rectified in June 2004.

Having, by his own admission, been aware of problems in mid 2002, it was incumbent on Mr Griffiths to be far more hands on about the matter, and to be exercising a closer watch, than appears to have been the case. The inference is that he was too trusting of Mr Arbuckle, even in the face of past known problems. As is noted elsewhere in these submissions, Mr Griffiths failed to undertake any required regular performance appraisal of Mr Arbuckle's performance. There seems to have been a Rafferty's Rules and "she'll be right mate" attitude at this Council. Even for a small Council this was clearly not good enough.

The implication from what Mr Griffiths is saying, if it is correct, is that Mr Arbuckle was knowingly suppressing the existence of the correspondence and notices from the General Manager, and everyone else apparently. If true that is a very serious situation.

It has not been established whether the former auditor should have discovered the existence of this correspondence and so on by more stringent audit procedures.

Mr Hunt sought a written explanation of matters from Mr Arbuckle. He had to be chased because his replies were clearly inadequate and evasive. This is what Mr Arbuckle first replied, in a letter of 25 August 2004:

In response to your interim audit letter.

Issues raised on the operations at the time can be answered by a bit of history. The situation on arrival was outlined by the GM. After some discussion a set of mutually agreed priorities were established. These were carried out per the General Managers instructions. The General Manager was fully apprised of the progress of the various works within the constraints of operations. Put simply it was a medium term plan that was still in progress at the date of the proclamation.

...

I thank the author for highlighting these issues the feedback is welcome and will assist me in my future Local Government career.

Quite understandably, Mr Hunt immediately told Mr Arbuckle that his reply was inadequate and followed this up with a sternly worded letter of 31 August 2004. He told him that “the issues identified ... are serious and require your immediate attention and explanation”. He continued:

Council has certainly not raised these issues with you as “feedback”, as you have put it, these are issues relating to core financial management processes and accountabilities at the former Murrurundi Shire Council and as noted, raise doubts as to whether that Council has complied with its statutory obligations in some areas.

Mr Arbuckle’s reply was dated 8 September 2004. He asserted that he was taking “the matters raised in your letter ... very seriously” and that he was not intending “to be dismissive of those concerns”. He went on to acknowledge awareness of the Department’s intervention, and assumed there would be an “investigation into me or the former Murrurundi Shire ... I therefore reserve my right not to answer at present until there is clarification of an ongoing investigation”.

This was an entirely unsatisfactory response.

### Planning and development management

The former Murrurundi Shire Council was a Council that due to small staff numbers and limited resources did not have the capacity, in-house, to deal with planning and development matters. Instead this was contracted to and performed by the neighbouring then Scone Shire Council, apparently for some 30 years. It is understood that this generally involved an officer travelling to Murrurundi one or at most two days a week.

In its letter of 26 August 2003 to the Minister (replying to his call for submissions on local government reform by 31 August 2003) Council’s General Manager boasted that “it should be noted that an unprecedented number of development applications are currently being processed”. On the other hand, it is noted from the Department of Local Government’s *Comparative Information on NSW Local Government Councils 2002-2003*, therefore covering the period to 30 June

2003, information is given, at page 200, information that is compiled by the Department from information provided to the Department by each relevant Council, that for Murrurundi Shire Council there was in fact a considerable *reduction* in the number of DAs determined in the 2002-2003 year, when compared with the previous financial year. The reduction was by a margin of nearly 20%.

And from figures provided to the Departmental Officers during the visit to Council in September 2004, there was no obvious surge in applications lodged over the first two months of the 2003-2004, such as would justify what Mr Griffiths was telling the Minister.

As to Council's performance in processing of DAs, in terms of timeliness, the *Comparative Information* shows that for 2002-2003 Council performed worse than the group average for the Group of Councils of which it is a part, namely Group 9. The group average was 23.19 calendar days, whereas Council's was 30.4. So, it is clear that this Council was not, despite the help from Scone, performing as well as might otherwise have been expected.

The performance of Scone Shire Council itself was equally not as good as the average for its Group (group 10), with a figure of 40 days, compared with the group average of 32.74 days.

A review of the information provided to the Departmental Officers shows that there would appear to be some questions as to why certain DAs took as long as they did to assess and be approved. For example, there are, in the period since 1 January 2001, a number of examples where DAs for carports or garages took two months to determine. Similarly, an application in 2001 for a "relocated dwelling" took some 4 months to determine. In 2002 another application for a "pool and extensions" took over 6 months. In 2003 an application for a "house and garage" took nearly 5 months. In the same year an application for "2 multi-purpose courts" took over 6 months, and so on.

None of these sorts of applications are, on their face, ones that might ordinarily be expected to be complicated and take longer to assess and determine, and no doubt figures such as these do nothing for the average. On the other hand, it must be noted that the Departmental Officers did not inspect the particular files to assess whether or not there were legitimate reasons, in these particular cases, why the process took longer, for example, because of some defect or deficiency in the original application, or because of the receipt of a large number of objections from neighbours.

#### Financial control procedures and performance of the new Liverpool Plains Shire Council

This matter is reported on in the attached separate submissions from Mr Wallace, at Tab B.

## Financial control procedures and performance of the new Upper Hunter Shire Council

This matter is reported on in the attached separate submissions from Mr Wallace, at Tab B.

### **Other information obtained**

#### Staff numbers

An opportunity was taken during the visit to obtain information as to staff numbers at the former Murrurundi Shire Council and at each of the two new Councils (post amalgamation and after transfer to them of relevant staff from the former Murrurundi Shire Council and other constituent Councils, including the former Central Northern County Council), including a break down between indoor and outdoor staff.

The information gathered (in terms of full time equivalent staff) is as follows:

Council	Indoor	Outdoor	Total
Murrurundi Shire Council	12	23	35
Upper Hunter Shire Council	68	113	181
Liverpool Plains Shire Council	30.74	75.95	106.69

### **General conclusions**

The preliminary conclusions reached on the basis of the evidence and information available to the Department at this time show that there was serious financial and general mismanagement on a wide front or range of matters at the former Murrurundi Shire Council.

It would appear that many of the problems occurred only during and after 2002, and possibly principally in 2003-2004, a time when much of the focus of the General Manager and Council's governing body, in particular led by its Mayor, Mr Earl Kelaher, was on the "Bugger Off Bob" campaign opposing local government reform and feared amalgamations. They took their eyes off the main game, at the cost and expense of the ratepayers and Council's community.

Serious concerns exist over probity and transparency in respect of Council's operations. This is so particularly in relation to salary sacrifice arrangements entered into for the benefit of Council's Manager Finance and Administration, and in respect of the re-negotiation, at the height of the reform processes, of the General Manager's contract purporting to give him an extended term of office and considerably increased benefits.

Council's community was seriously and actively misled by the General Manager and the Mayor and Councillors as to Council's true situation, particularly the

state of its finances, and a number of the worst excesses were carried on behind closed doors.

If the Murrurundi Shire Council had continued to be in existence, there is no doubt that, if these preliminary findings and conclusions were affirmed in a formal investigation, and in particular in a public Inquiry under section 740 of the Act, a recommendation for the dismissal from civic office of the Councillors would be warranted.

### **Options on any future action**

However, given that the Murrurundi Shire Council is no more, this is a unique situation. It would appear that the options for future action are not straightforward.

Moving to a formal investigation under section 430 of the Act in respect of a former Council has, to my knowledge, not occurred previously. It may appear to have little utility and may or may not serve the public interest. Likewise, a formal public inquiry under section 740.

The question, therefore, is what, if any, further action should be taken.

It is submitted that many of the findings and concerns noted in these submissions may be an object lesson for other Councils, in particular other small and under-resourced Councils, such as was Murrurundi Shire Council. At the very least, it is submitted that the two successor Councils, the Liverpool Plains Shire Council and the Upper Hunter Shire Council, may benefit from information being provided to them to enable them to ensure that their own processes are in order. It also should not be overlooked that both Councils requested the assistance and advice of the Department in this matter.

Given the publicity surrounding the public release of the findings of Forsyths, and the ongoing public interest they have attracted, there may also appear to be some justification for a wider public release of the Department's preliminary observations.

The question for further consideration and debate will be how all this might be achieved.

### **Preliminary Recommendations**

In the meantime, the following preliminary recommendations are offered for consideration. The following list is not offered in any particular order or priority, and may require further review, including the addition of other possible or alternate recommendations.

1. The Department provide to each of the two successor Councils an edited version of these submissions, and be requested to table them publicly at the next meeting of Council.

2. Consideration be given to changes being made to the Act and/or relevant Regulation, with a view to seeking to avoid the ability to create circumstances that might replicate in future some of the worst excesses noted at Murrurundi Shire Council.
3. Specifically, Council Annual Reports should be required to include a full and appropriate disclosure on failures re taxation matters, the receipt of advices as to concerns from taxation and other regulatory authorities, such as the EPA and ATO, the imposition of fines and penalty notices and the amounts of such fines and penalties imposed by taxation and other regulatory authorities, such as the EPA and ATO.
4. Annual Reports should be required to include a disclosure on staff numbers, including a breakdown into numbers of indoor versus outdoor staff.
5. Consideration be given to moving towards a greater regulation of the terms and conditions of contracts of Council General Managers.
6. This might, if considered appropriate, entail going so far as to regulate for Standard terms and conditions for General Managers' contracts.
7. At the very least, there should be a requirement that it is unlawful to seek to renew a General Manager's contract any earlier than six months before the existing contract is due to expire. And, then, the new contract and any such amended terms and conditions should not be allowed to take effect until the existing contract expires. On the other hand, this may need to be tempered against a need to allow some freedom for Councils and their General Managers, in accordance with what most contracts already provide, to make minor ad hoc amendments to a contract in the meantime. Perhaps such amendments might be allowed if they do not entail an additional cost or expense to Council that results in the cost of the present contract increasing by more than, say, 10%. This would allow, for example, yearly remuneration increases and reviews in accordance with the going rate of inflation and/or reasonable market conditions.
8. **It is strongly recommended and considered that it would not be appropriate for the Upper Hunter Shire Council to adopt and affirm the employment contract dated 29 September 2003 signed between the Murrurundi Shire Council and its General Manager.**
9. The Upper Hunter Shire Council should take immediate steps to recover the unlawful long service leave payments made to the former Murrurundi Shire Council General Manager, and to recover the balance owing of the unlawful redundancy payment made to him, after giving credit for that part of that payment that is currently held in the trust account of the Liverpool Plains Shire Council.

10. The Upper Hunter Shire Council should move to renegotiate the terms of the agreement with the Murrurundi Retirement Homes Inc, so that it includes appropriate provisions for regular repayment of principal, and not leave it to the discretion of that body as to when and if payments are made before the balance is outstanding on the fifth anniversary of the loan, as is currently the case.
11. The Department leave the question of possible fraud and evasion of tax by Mr Arbuckle for the ATO to pursue, if it considers fit.
12. Further consideration be given by the Department and the Minister as to any particular implications for the Coonamble Shire Council given the questions that arise having regard to the findings in these submissions.
13. Consideration be given by the Department and the Minister as to whether and how the findings and conclusions of the Department in respect of the former Murrurundi Shire Council should be made more widely known, for the benefit of local government generally in the State. This could be undertaken as part of the Government's ongoing and declared local government reform policy and program, given that the findings would appear to underpin the key rationale and intent of that policy.
14. The Department not otherwise take any further action in the matter.

A handwritten signature in blue ink, appearing to be 'R Bulford', with a long horizontal flourish extending to the right.

13 OCT 2004

**Robert Bulford**  
**Executive Officer (Reform Program)**  
**Ext 4052**

1. Director General
2. Robert Bulford