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G.J. Ploetz

Consultant

R.E. Hartfiel LL.B.(Hons)

Queensland Legislative Assembly	
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 14 JUN 2018	By Leave <input type="checkbox"/>
MP: <u>MRS MILLER</u>	
Clerk's Signature: 	

**M.A. Kent
& Associates**
SOLICITORS

Your Ref:
Our Ref: GP:KW:170158

21 May 2018

The Honourable
Mrs Jo-Ann Miller
Member for Bundamba
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Dear Mrs Miller

RE: ROBERT AND JACKIE SELLARS AND IPSWICH CITY COUNCIL

We advise that we act for Mr & Mrs Sellars and **enclose** herewith a letter which we have forwarded to the Honourable Mr Hinchliffe, Minister for Local Government, Minister for Racing and Minister for Multicultural Affairs and request that you take this matter up with the Honourable Minister in a timely matter having regard to recent events.

It would appear, and as we've referred to, that any findings by the internal investigation by the Ipswich City Council into its own actions cannot be relied upon and that the Ombudsman's recommendations ought to have been followed.

We take this opportunity to thank you in anticipation of receiving any assistance you can provide to our clients.

We look forward to hearing from you and/or the Honourable Minister in due course.

Yours faithfully

M.A. KENT & ASSOCIATES


Greg Ploetz
Solicitor

Principal

G.J. Ploetz

Consultant

R.E. Hartfiel LL.B.(Hons)

M.A. Kent
& Associates
SOLICITORS

Your Ref:

Our Ref: GP:KW:170158

22 May 2018

The Honourable
Mr Stirling Hinchliffe
Minister for Local Government, Minister for Racing &
Minister for Multicultural Affairs
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Dear Mr Hinchliffe

RE: OUR CLIENT - R & J SELLARS AGAINST IPSWICH CITY COUNCIL

We confirm that we act on behalf of Mr & Mrs Sellars who through their company structure involving Sellars Constructions Pty Ltd and Triple Mouth Pty Ltd had entered into contracts with the Ipswich City Council and had honoured and performed services contracted for without issue for a considerable period of time. The Contracts were without knowledge of our client or notification to our clients, brought to an end by the Ipswich City Council.

An initial complaint was made to the respective Ombudsman who referred the matter to the then Crime and Misconduct Commission which in turn instructed the Ipswich City Council to undertake an internal investigation on their behalf.

The initial complaint also involved dealings which occurred outside of Council by the then CEO Mr Karl Wulff who had engaged our clients to perform work on his personal residence which was then the subject of a dispute regarding payment. This was arranged through the then Ipswich City Council Works Manager.

Subsequently a complaint was made to the Auditor General office whose office carried out an audit and found 11 significant procurement deficiencies (not all involving our clients). This report was tabled in Parliament in May 2015.

There were in fact two investigations one involving Mr Wulff and the other involving our clients contracts being terminated by the Ipswich City Council.

Subsequently a further complaint was made to the respective Ombudsman who then following further investigations prepared a report, a copy of which is **enclosed**, which made certain recommendations to the Ipswich City Council.

Following this report we and our clients met with Council Representatives namely Mr Andrew Roach and Ms L Nicholls (Legal Representative). In those discussions it was stated that the Council would contribute \$15,000 initially towards our client's legal costs. The costs incurred would include costs associated with formulating our clients claim for the losses they, through

the companies referred to, suffered due to the maladministration and breaches of the contract by the Ipswich City Council.

Our clients only became aware of the situation concerning their position in relation to the contracts with Ipswich City Council and the administration of those contracts in December 2012.

Due to the situation our client's annual turnover went from \$2.5 million per year to nil and as a result our clients lost their house and other investments.

The Council was, it appears, prepared to look at our clients claim in light of the Ombudsman's report but when asked to provide further information to allow a properly and detailed claim to be made refused to provide same and did, and continues to, refer to one contract only. The Council has now referred the matter to its insurers and through the lawyers engaged are denying any and all liability and are relying, in their view, on the defence of any claim being statute barred, a claim which we do not agree with.

It would seem that, having regard to more recent events that, there can be, with respect, no reliance placed on any internal investigations carried out by the Ipswich City Council and its representatives as the Ombudsman's report clearly evidences through its recommendations.

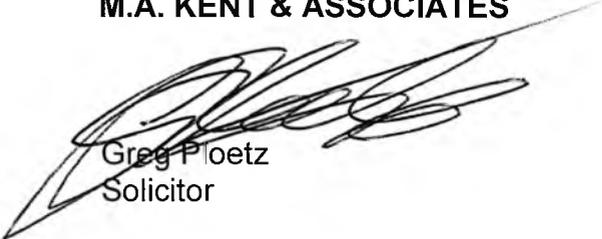
Our clients have previously referred this matter to the Member for Bundamba, the Honourable Jo-Ann Miller to whom a copy of this letter has also been provided.

Our clients seeks your intervention in this matter as due to nothing our clients have done or not done they have lost the benefits of the contracts that were breached by Ipswich City Council having regard to the situation where the Council were prepared to come to a resolution of our clients claim until such time as the insurers became involved.

Given the current uncertainty regarding the tenure of the current Ipswich City Council, we ask for your assistance in bringing this matter to a prompt resolution.

Yours faithfully

M.A. KENT & ASSOCIATES



Greg Ploetz
Solicitor



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Our ref: 2015/04472

17 February 2017

Confidential

Mr Robert and Mrs Jackie Sellars
92 William Street West
COALFALLS QLD 4305

Sent by email: Jackie.4@bigpond.com

Dear Mr and Mrs Sellars

I refer to your complaint against the Ipswich City Council (council) regarding the administration of a building trade services contract following a request for tender 08-09-046 (RFT), referred to as 'contract 046'.

The investigation into your complaint has now been completed, and I have provided council with a final report. The purpose of this letter is to inform you of the result of the investigation.

My final report contains opinions about the administrative actions of the council and recommendations for the council to consider.

I have **attached** relevant parts of my report to this letter, namely Chapters 1-3, and an extract of Chapter 7 (Attachment).

Background, Jurisdiction and Investigation

The background to the investigation, my jurisdiction and the investigation steps are contained in the Attachment as Chapters 1-3.

Contract 046

Contract 046 established 21 categories of trade services.

The tenderers were ranked as 'primary' or 'secondary' suppliers for each category depending on the evaluation by council. According to the RFT, it was intended that the suppliers would be approached as the need arose to provide quotes for the required trade services. Primary suppliers were to take precedence over secondary suppliers as stated in clause 1.3 (specific conditions of tender) of the RFT (Clause 1.3 Objective):

Primary pre-qualified suppliers will be provided with the first opportunity to quote for a project. While Secondary pre-qualified suppliers will be provided with a secondary opportunity for a project should all primary suppliers forego their opportunity or fail to meet the requirements of a project.

Though it was not documented formally, council's officers intended that the primary suppliers in the building category would be in the 'prime position' to quote for all work across all the trade categories under contract 046 (Prime Position Objective). However, this objective was not contained in the contract materials.

In the investigation it was identified that the total work value in the building category over the life of contract 046 was \$12,234,343.30. The total work value in the concreting category over the life of contract 046 was \$2,518,171.12.

Opinions

The investigation considered council's actions around the establishment and objectives of contract 046.

A number of issues were identified relating to the evaluation and appointment of suppliers to the panel, including compliance by council with the RFT in calling for quotations, confusion around the Prime Position Objective, incomplete evaluation of the Sellars Construction tender submission, and the decision not to include Sellars Construction in the concreting category.

The council's response to the proposed report indicated that council accepts there were some administrative errors made by council. However, the response did not accept any of the matters of concern which were identified relating to the establishment and objectives of contract 046.

I am nevertheless of the opinion that the critical issues between council and Sellars Construction, including the licensing issue (see below), can be linked to poor probity and evaluation practices in relation to Tender 08-09-046.

I formed the following opinion:

Opinion 1

The critical issues between council and Sellars Construction identified in this report can be linked to poor probity and evaluation practices in relation to Tender 08-09-046. This amounts to unreasonable administrative action under s.49(2)(b) of the Ombudsman Act.

The investigation considered council's actions in relation to a licensing issue with Sellars Construction. The licensing issue was identified in my report as referring to the Building Services Authority (BSA) licensing requirements for builders under the RFT for Sellars Construction.

On 24 July 2009, council became aware that Sellars Construction did not hold a building licence.

On 12 August 2009, council issued a generic letter to Sellars Construction, and several other suppliers, about BSA licensing requirements. The letter does not state directly that Sellars Construction did not have a builder's licence.

Following council's letter to Sellars Construction dated 12 August 2009, council officers met with Mr Sellars and began providing advice on restructuring the businesses. Mr Sellars responded by letter dated 25 August 2009.

I consider council's letter of 12 August 2009 did not address Sellars Constructions' non-compliance issue and may have caused confusion as to what was required to achieve compliance.

Unfortunately, council did not take further action after it received Mr Sellars' letter dated 25 August 2009 to contest what was provided and could not explain the reasons for its inaction.

On 14 September 2009, council was advised by Mr Sellars that the public liability insurance had been altered so that Triplemouth was included on the same policy as Sellars Construction and that the BSA was advised the registration details of Sellars Construction to include on the Triplemouth licence. Again, there is no evidence that council took any action after receiving this advice to contest what was provided, or follow up the steps taken by you with the BSA on the licensing issue.

I consider that in not contesting advice provided by Sellars Construction's letter in August and advice in September 2009 may have caused you to believe that the council's instructions had been successfully executed.

Council's failure to respond was unreasonable and wrong in the circumstances.

The council obtained legal advice in relation to the licensing issue in December 2009 and again in February 2010, which changed its view in regard to the licensing issue.

In my view, it was unreasonable of council not to have formally communicated its changed position to Sellars Construction. Council also failed to deal with Sellars Construction under the terms of contract 046 to resolve the licensing issue.

I considered that council had numerous opportunities to resolve the licensing issue, but did not.

In the circumstances, it would have been appropriate for council to utilise the contractual dispute resolution processes under contract 046.

In its response to the proposed report, the council did not agree with that position.

I formed the following opinion:

Opinion 2

Council's failure to formally communicate its position on the licensing issue to Sellars Construction following Sellars Construction's advices to council in August and September 2009 and after receiving legal advice on 19 February 2010 amounts to unreasonable administrative action under s.49(2)(b) of the Ombudsman Act.

In the investigation I noted the significance of the BTS spreadsheet to how contract 046 operated. You advised that a supplier's ability to receive any work opportunities was entirely dependent on the information contained on the BTS spreadsheet.

I am satisfied that on or about 15 June 2010, council removed Sellars Construction from the BTS spreadsheet but did not notify you of its decision, or its reasons.

In my view, the BTS spreadsheet was the key reference point for council officers to identify suppliers for the 046 contract. Removing Sellars Construction from the BTS spreadsheet was akin to terminating Sellars Construction from contract 046 without notice, contrary to due process under the contract materials.

In its response to the proposed report, the council did not agree with that position.

I formed the following opinion:

Opinion 3

Council's removal of Sellars Construction from the BTS spreadsheet from 15 June 2010 was akin to terminating its contract and was done without complying with the 'Breach, Termination and Dispute Resolution' provisions under contract 046 when the circumstances indicated they should have been utilised. This amounts to unreasonable administrative action under s.49(2)(b) of the Ombudsman Act.

I then considered the impact on Sellars Construction in the period July 2010 to December 2011.

On the balance of probabilities, I gave weight to your submission that you were assured on numerous occasions that 'work would come'. That is entirely consistent with council officers trying to assist, ineffectively as it turns out.

It is clear that from July 2010 Sellars Construction ceased receiving building work. This coincided with Sellars Construction's removal from the BTS spreadsheet. Meanwhile, Triplemouth was engaged and paid for work under the concreting category, before that ceased in September 2010.

The interaction between you and council's officers over the period, the reported impact in cessation of work, the removal of Sellars Construction from the BTS spreadsheet and the financial records relating to work for Sellars Construction ending in June 2010 and later in September 2010 for Triplemouth are all in general alignment.

I am satisfied that council's actions contributed to you losing opportunity for work under contract 046, or, had council been clear and transparent about the licensing issue, to choose to seek work elsewhere.

In the Attachment, Chapter 7 identifies the key aspects of council's maladministration.

I considered the deficient administration of the tender and the contract, taken in its constituent parts and in its entirety, did cause Sellars Construction loss of work opportunity under contract 046.

In its response to the proposed report, the council did not agree with that position.

I formed the following opinion:

Opinion 4

Council's mismanagement of contract 046, taken in its constituent parts and as a whole, caused Sellars Construction to lose work opportunity which, in turn, contributed to financial detriment. The totality of council's actions amounts to unreasonable administrative action under s.49(2)(b) of the Ombudsman Act.

Recommendations

In the Attachment, Chapter 7 identifies my recommendations.

In its response to the proposed report, the council did not agree with my recommendations.

The recommendations I made to the council are:

Recommendation 1

Council provide a written apology to the complainants for the impact on them of its administration of contract 046.

Recommendation 2

Within six months of my report, council negotiate a settlement with the complainants, in good faith, which acknowledges their loss of work opportunities under contract 046.

Recommendation 3

Council pay the complainants' reasonable legal or other professional fees in negotiating a settlement.

Recommendation 4

Where requested, council provide the complainants and their professional advisers with information about contract 046 in a timely way and restrict the information only as may be required by law.

Process going forward

As previously advised to you, council may or may not accept the recommendations made.

I have requested that council provide notification to me by Friday 17 March 2017 of:

- the steps taken or proposed to be taken by council to give effect to the recommendations; or
- if council does not intend to give effect to a recommendation, the reasons for its decision.

There is a possibility that council may contact you before this time to progress the matter. You are free to enter discussions with council as you consider appropriate.

The information contained in this letter should be treated as confidential with the exception of disclosure to a legal or other person for the purposes of obtaining professional advice.

Please contact Assistant Ombudsman Craig Allen on (07) 3005 7040 or toll free on 1800 068 908 if you wish to discuss this letter.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Phil Clarke', with a long horizontal flourish extending to the right.

Phil Clarke
Queensland Ombudsman

Encls.

Chapter 1: Introduction

1.1 Background

Jackie and Robert Sellars (the complainants) were in the concrete construction business since 1994, trading as Sellars Construction Pty Ltd (Sellars Construction) and later Triplemuth Pty Ltd (Triplemuth).

Since 2006, Sellars Construction was essentially Ipswich City Council's (council) main supplier of concreting works under an 'Annual Construction of Concrete Works' contract, reference 06-07-018 (contract 018).

In 2008, council changed the way in which it engaged suppliers for its trade based services. At that time council was 'using multiple suppliers of single, trade based services'.¹ Moving forwards, council's intention was to take a consolidated approach to undertaking construction, installation and maintenance work on many types of public buildings. To facilitate the approach, council sought to establish a panel of *pre-qualified* suppliers for its trade services – which included concreting works.² The new approach resulted in the 'Building Trade Services Preferred Supplier Arrangement' contract, reference Tender 08-09-046 (contract 046).

The officers mainly involved in establishing and administering contract 046 were:

- council's Principal Procurement Officer (PPO) who coordinated the scoring of the tenders for contract 046, at the time engaged as council's parks and recreation officer
- a four person panel which evaluated the scores against the assessment criteria and ranked each tenderer
- council's Senior Contracts Officer (SCO) who managed the suppliers engaged under contract 046
- council's Strategic Supply Manager (SSM) who oversaw the tender evaluation process and supervised the SCO.

A memorandum dated 8 January 2009 from the SSM to the Chief Financial Officer recommended the establishment of contracts for various trade services, including contract 046. On 20 January 2009, the City Management and Finance Committee considered and approved the arrangements. Contract 046 was set up to run for two years with extensions possible.

In February 2009, the SCO wrote to Sellars Construction to advise that it was successful for contract 046 as a 'primary supplier for the building category' and to indicate that contract documents would be forwarded within a short period of time, which were later executed and returned to council. The contract materials comprised a number of documents (contract materials), including some key dispute resolution processes identified in Appendix A.

This report describes the events relating to the development of contract 046 in 2008, the appointment of Sellars Construction in early 2009 and subsequent events through to the end of 2011.

Ultimately, Sellars Construction was removed from the council's suppliers list, the Building Trade Services spreadsheet (BTS spreadsheet – see Appendix B, 'B1'), in June 2010. From that point onwards, opportunities to quote for work stopped. This led to interactions between the complainants and council staff. In the final stages, the complainants say they were advised by council officers to prepare for a 2012 tender - Contract reference 011-12-005 (contract 005). However, they were unsuccessful in this tender.

After not being successful in contract 005, Sellars Construction went into liquidation in February 2012.

¹ Item 1.1, Attachment 1 of the Request for tender document for contract 046.

² Under s.487 of the (repealed) *Local Government Act 1993* relating to a panel of suitable providers.

The complainants made complaints to a number of external bodies. In January 2012, the then Crime and Misconduct Commission (CMC) considered allegations, made by the complainants, about official misconduct by council's then CEO. The complaint allegations were sent to council for investigation, subject to review by the CMC. Council's Internal Auditor (IA) investigated the allegations of official misconduct and found that there was no evidence to substantiate the complainants' allegations. The IA's report was finalised in November 2012. The complainants received a copy of that report under the right to information access scheme (RTI).

The complainants then raised further allegations against the SSM and SCO, which were again referred by the CMC to council for investigation. The IA's subsequent investigation report was completed on 26 April 2013 (the 2013 report). The report found that there was no evidence to support official misconduct by any officer. Furthermore, the IA concluded that 'no issues were identified in relation to the responsibilities of management', and 'no systemic issues were identified during the course of this investigation'.

In 2014, the Crime and Corruption Commission (CCC) finalised its review of the IA's investigation. The complainants applied for and received further information through RTI.

In 2015, the complainants complained to the Queensland Audit Office (QAO). The QAO Audit Report 16 2014-15, tabled in May 2015, included a section on procurement practices at council. The report identified eleven major issues which were reported to council.³

In mid-2015, the complainants approached this Office alleging maladministration by council. This investigation commenced in November 2015.

1.2 The complaint

The complainants stated in their complaint to this Office that:

... Ipswich City Council's systemic and administrative actions failed causing extensive detriment to our companies and our personal wellbeing.

...

It was not until after receiving Right to Information Council internal emails, correspondence etc, Investigation Reports and Crime and Misconduct Commission's internal documents from the end of 2012 until July 2014, that we finally were aware of the actions of Ipswich City Council.

...

Sellars Construction had been a Primary Preferred Supplier for Concreting Works on an Annual basis since 1994. Over this 16 year period, our business thrived on efficiency and effectiveness with annual turnover of approximately \$2.5 million, with growth potential each year. Sellars worked under 65 Council construction leaders over this period, without a breach.

...

On 15th June 2010, (the) SCO removed Sellars Construction from the spreadsheet of the Preferred Supply List on council's database. The 'spreadsheet' IS the Preferred Supply List and the ONLY opportunity to obtain requests for quotations from various construction leaders within Ipswich City Council.

We are of the opinion that (SSM) and (SCO) misguidance, mis-instructions and improper duty of care and procedure to a longstanding contractor led to the dissolution of company, loss of all savings and investments achieved over the 16 years of dedicated hard work we had shown Council. Throughout the last half of 2010, and during 2011, (the) (SSM) and (SCO) deceived us to the extent that we invested all we had to sustain our business.

...

³ Page 37.

The impact on our wellbeing has been affected immeasurably and then further increased by Council's ignorance of our complaint and ... gross maladministration and negligence ...

1.3 Events as a whole

There were three identifiable stages in the interactions between council and the complainants.

This report describes and analyses the actions in each of the three stages (see Chapters 4 to 6) but, importantly, also views the actions by council in their entirety (see Chapter 7).

Chapter 2: Jurisdiction and legislation

The Ombudsman is an officer of the Parliament empowered to deal with complaints about the administrative actions of Queensland government departments, public authorities and local governments. As Ipswich City Council is an 'agency' for the purposes of the *Ombudsman Act 2001* (Ombudsman Act), it follows that I may investigate its administrative actions.

Under the Ombudsman Act, I have authority to:

- investigate the administrative actions of agencies on complaint or on my own initiative (without a specific complaint)
- make recommendations to an agency being investigated about ways of rectifying the effects of its maladministration and improving its practices and procedures
- consider the administrative practices of agencies generally and make recommendations, or provide information or other assistance to improve practices and procedures.

The Ombudsman Act outlines the matters about which the Ombudsman may form an opinion before making a recommendation to the principal officer of an agency. These include whether the administrative actions investigated are contrary to law, unreasonable, unjust or otherwise wrong.

Although the Ombudsman is not bound by the rules of evidence, the question of the sufficiency of information to support an opinion of the Ombudsman requires some assessment of weight and reliability. The standard of proof applicable in civil proceedings is proof on the balance of probabilities. This essentially means that, to prove an allegation, the evidence must establish that it is more probable than not that the allegation is true. Although the civil standard of proof does not strictly apply in administrative decision-making (including the forming of opinions by the Ombudsman), it provides useful guidance.

'Unreasonableness' in the context of an Ombudsman investigation

In expressing an opinion under the Ombudsman Act that an agency's administrative actions or decisions are 'unreasonable', I am applying its popular, or dictionary, meaning. I am not applying the doctrine of legal unreasonableness applied by the Courts when judicially reviewing administrative action.

Chapter 3: Investigation

3.1 Initiation of the investigation

On 16 November 2015, the CEO was advised of my decision to investigate the complaint under s.24(a) of the Ombudsman Act, that is, the investigation would be conducted informally (without recourse to part 4 powers).

Having considered the steps taken by the complainants initially through this Office, the CCC and the QAO, a decision was made under s.20(3)(c) of the Ombudsman Act to investigate the complaint even though the complaint was apparently 'out of time'. The allegation of maladministration had, over the period of time, not been fully ventilated through external review processes and it was appropriate to do so.

The investigation focused on the events that transpired between council and the complainants from September 2008 to December 2011.

3.2 Investigation issue

The issue for investigation is whether council's administrative actions surrounding the administration of contract 046, specifically related to the complainants' businesses, Sellars Construction and Triplemouth, were reasonable.

Contract 046 ran in parallel with contract 018. Contract 018 ended on 31 December 2009. The result of the overlapping contracts undoubtedly created a complex environment for both council and the complainants. However, the investigation did not consider the administration of contract 018.

The investigation did not consider the complainants' concerns about contract 005 because the preceding events under contract 046 underpin the complainants' concerns about maladministration.

3.3 Investigation steps

An information request was made to the CEO outlining the available evidence relevant to three identifiable stages:

- council's evaluation of tenders for contract 046
- council's awareness of anomalies with its tender process
- council's decision to remove Sellars Construction from the BTS spreadsheet.

In response to the information request, the CEO provided a submission to this Office on 16 December 2015 (CEO's submission). Following consideration of the CEO's submission, further documents were requested and provided by council.

On 7 March 2016, investigators from this Office (investigators) conducted a recorded interview with the PPO.

On 30 March 2016, investigators met with council's IA to discuss financial data requested from council, which helped inform the investigation. Relevant material is contained in Appendix B, particularly B2 and B3.

The Ombudsman Act provides that, if at any time during the course of an investigation it appears to me that there may be grounds for making a report that may affect or concern an agency, the principal officer of that agency must be given an opportunity to comment on the subject matter of the investigation before the final report is made.⁴ On 24 October 2016, the CEO was provided

⁴ Section 26(3) of the Ombudsman Act.

with a proposed report. The Chief Financial Officer responded by letter dated 18 November 2016. In this report, I refer to the officer's response as 'council's response to the proposed report.'

In short, council's response indicated that while much of the detail in the proposed report is factually accurate, council did not consider the conclusions provided a fair representation of its administration of contract 046. I have, accordingly, given careful consideration to those views. Throughout the report I have included relevant extracts from council's response to the proposed report and my comments in response.

The investigation of the complaint has been completed. In reaching a final view in relation to the complaint, the material provided by the complainants and council's written and officers' oral submissions have been taken into account.

3.4 De-identification

The purpose of this report is to provide the outcome of the investigation of the complaint to this Office about council's actions. As council's administrative actions are the focus, I do not consider it is necessary to include the names of council officers and suppliers under contract 046. I have therefore de-identified the information.

Chapter 7: Conclusion - Events viewed as a whole

7.1 Viewing this matter

in viewing this matter, I consider it is not only necessary to consider the individual events but to also consider the events as a whole in terms of their impact on the complainants. I also consider it necessary to consider what might have happened had council acted differently.

7.2 Impact from the complainants' perspective

The complainants continue to speculate as to the reason behind council's actions throughout contract 046.

The complainants have persisted with their endeavours to understand what occurred through various RTI applications and complaints to oversight bodies. Based on what they have received to date, the complainants suspect significant maladministration in relation to their contract, improper conduct and corruption by officers and negligence by council in general.

They have advised of the difficulties they have faced in terms of financial and emotional detriment. It is their belief that council's actions have caused detriment.

The situation has and continues to cause the complainants considerable stress.

7.3 Extent of maladministration

In viewing this matter as a whole, I note the following key problems with council's administration of contract 046:

- The conceptual framework for the contract and how the contract worked in practice for inviting and awarding building trade services jobs did not align, nor was the Prime Position Objective in the building category reflected in the way council administered the contract, or in the contract materials.
- Council's officers did not strictly administer the contract in accordance with the RFT and contract materials. It did not provide the primary suppliers with the first opportunity to quote for jobs before inviting quotations from secondary suppliers and, in fact, provided opportunities to suppliers which did not tender for particular trade categories. As a general proposition, all suppliers should have been entitled to presume that the contract would be administered in accordance with its conditions, which it was not.
- Council did not, in its assessment and evaluation of the tenders, identify and deal with critically important issues such as insurances and BSA licensing requirements relating to Sellars Construction. The critical issues that followed can be linked to poor evaluation and probity practices.
- Based on the scoring of the Sellars Construction tender and evaluated effectiveness rating and their history of providing concrete services it is not clear why Sellars Construction was not included in the list of primary suppliers for concreting. Had that occurred, Sellars Construction could have carried on supplying concreting services to council for the duration of contract 046, where the builders in the prime position had first been given the opportunity to quote on the work and refused. The complications it experienced later with council over the licensing issue would not have affected its ability to submit for concreting work.
- Council had numerous opportunities to effectively deal with the licensing issue, including when it substantively became known in July 2009 and later under the contract materials when legal advice was obtained of the implications of engaging Sellars Construction on jobs involving building work components.

- Council's officers failed to formally notify Sellars Construction that they maintained concerns about the licensing issue even after Sellars Construction had responded in writing in August and September 2009 about its business arrangements, and after receiving legal advice, which likely led the complainants to believe the licensing issue was resolved. Although prepared in draft form, no later written notification by council served to controvert the likely held belief by Sellars Construction that the licensing issue was resolved.
- Council's officers engaged in informal approaches with the complainants about how the licensing issue might be resolved which was not effective. Officers made suggestions about alterations to the complainants' businesses, which was inappropriate. Although it is appropriate for council to use informal approaches to resolve contractual issues, the contract conditions contained dispute resolution processes to resolve difficulties such as the licensing issue, which were not utilised when the circumstances indicate they should have been.
- Sellars Construction was removed from the BTS spreadsheet in the belief that the action did not amount to terminating it from contract 046, when clearly the effect of doing so was akin to termination and caused detriment to Sellars Construction through lost work opportunity. It was an ineffective response to then engage Triplemouth under standalone arrangements, which did not result in significant or ongoing work for the duration of contract 046. The effect of the removal of Sellars Construction from the BTS spreadsheet, the cessation of work and the financial records are in general alignment.
- Council's officers led the complainants to believe, even after removal from the BTS spreadsheet, that work was coming under contract 046, which did not eventuate.

As a result, I consider the deficient administration of the tender and the contract, taken in its constituent parts and in its entirety, did cause detriment to the complainants through loss of work opportunity under contract 046.

I form the following opinion:

Opinion 4

Council's mismanagement of contract 046, taken in its constituent parts and as a whole, caused Sellars Construction to lose work opportunity which, in turn, contributed to financial detriment. The totality of council's actions amounts to unreasonable administrative action under s.49(2)(b) of the Ombudsman Act.

7.4 Recommendations

I have carefully considered both the direct impact on the complainants of council's maladministration and the systemic issues relating to procurement.

On the systemic issues, there is, in my view, no need to make any recommendations about improvements to council's procurement system on the basis that:

- the CEO's submission indicated that council has since revised its tender processes; and
- council has implemented checks and balances since the audit conducted by the QAO into council's procurement practices.

I note the CEO's submission indicates that council's administrative errors cannot be the primary reason for the liquidation of the complainants' businesses. However, as opinion 4 indicates, the totality of council's maladministration did, in my view, contribute to financial and other detriment to the complainants.

It follows that council should take steps to redress the impact of the maladministration in a timely way. I consider council should, among other things, issue an apology and negotiate a settlement with the complainants based on loss of opportunity for work under contract 046.

There are likely many ways in which the impact might be viewed in terms of lost opportunity, and on which a settlement might be based. I note that there is a wide gap between the lost opportunity as it might be assessed based on, for example, Sellars Construction being in the prime position in the building category for all work under contract 046 and consideration of it as a primary supplier for concreting work based on not being included in that category.

Importantly, in my view, the appropriate forum to balance any aggravating and mitigating factors is during good faith negotiations between council and the complainants about an appropriate settlement, having regard to the loss of work opportunities under contract 046.

In my view, the discussions should be open to consideration of a range of options. I do not seek to limit the possibilities.

I make the following recommendations:

Recommendation 1

Council provide a written apology to the complainants for the impact on them of its administration of contract 046.

I note that pursuant to s.72D of the *Civil Liability Act 2003*, an apology does not constitute admission of fault or liability and is not relevant to a determination of fault or liability.

Recommendation 2

Within six months of my report, council negotiate a settlement with the complainants, in good faith, which acknowledges their loss of work opportunities under contract 046.

In relation to recommendation 2, it is noted that the complainants may or may not wish to enter into an agreement with council on the basis of the recommendation. It is a matter for the complainants to consider their options once they obtain legal or other professional advice.

It is expected that council would pay the reasonable fees the complainants incur for obtaining legal or other professional advice whether or not the complainants then proceed with negotiations.

Recommendation 3

Council pay the complainants' reasonable legal or other professional fees in negotiating a settlement.

To assist the complainants to meaningfully enter into discussions with council, I also consider council should, upon request, make information available about contract 046 to the complainants and their professional advisers in a timely way and restrict release only as may be required by law.

Recommendation 4

Where requested, council provide the complainants and their professional advisers with information about contract 046 in a timely way and restrict the information only as may be required by law.