Supplementary Item

11.11 Legal Advice - The ARC Campbelltown

TRIM Reference: B1210/3 Chief Executive Officer, Paul Di Iulio's Report

Purpose of Report

To seek direction from Council on the legal matter.

Strategic Plan Link

Strategy 1.3.1 Provide leisure services that deliver a wide range of sporting, leisure and recreational opportunities

Recommendation

1. That the item be deferred to the end of the meeting.

2. That under the provisions of Section 90 (2) of the Local Government Act 1999 an order be made that the public except Elected Members and the following Staff ..... be excluded from attendance at the meeting in order to consider in confidence Item 11.11.

3. The Council is satisfied that, pursuant to Section 90(3)(h) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is legal advice regarding a matter before the ERD Court.

4. The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because Council is considering legal advice in a matter before the ERD Court.

5. That having considered Agenda Item 11.11 - Legal Advice - The ARC Campbelltown in confidence under Section 90(2) and (3)(h) of the Local Government Act 1999, the Council, pursuant to Section 91(7) of that Act orders that the report and minutes be retained in confidence until the matter is finalised and that this order be reviewed every 12 months [if the confidentiality period is longer than 12 months in duration].

Confidential Item

Supplementary Confidential Item

For Council meeting to be held on

Tuesday 7 March 2017 at 7.30 pm

Refer Item 11.11

Supplementary Confidential Item

11.11 Legal Advice - The ARC Campbelltown

TRIM Reference: B1210/3 Chief Executive Officer, Paul Di Iulio's Report

Purpose of Report

To seek direction from Council on the legal matter versus Caltex (Caltex Petroleum Pty Ltd).

Strategic Plan Link

Strategy 1.3.1 Provide leisure services that deliver a wide range of sporting, leisure and recreational opportunities

Background

As advised at a previous CEO Briefing Session, a conciliation hearing was held on Friday 11 November 2016 with Judge Cole whereby both parties provided their positions. Council's position was in line with the Calderbank Offer (ie $275,000 inclusive of interest plus costs) where Caltex's initial offer was $100,000 all inclusive of costs. At that hearing Caltex agreed to move their offer to $200,000 all inclusive of costs, however I advised that I was not in a position to accept that offer nor would I be recommending to Council that they should accept that offer as it was significantly lower than the Calderbank Offer.

In discussions I made it clear that I would be prepared to recommend a figure to Council if it was in the order of at least $300,000.

Following further discussion, Judge Cole questioned whether a settlement of $250,000 would be suitable to both parties. Again my response was that I wasn't in a position to either accept or reject that offer, however I would be prepared to seek Council's position provided Caltex agreed that they would increase their offer of settlement to $250,000.

Judge Cole agreed with this approach and provided Caltex with 7 days to confirm their offer and set another hearing date for Thursday 8 December 2016.

Discussion

On 18 November 2016, Mr Griffen, Council's Lawyer, received advice (attached) that Caltex had considered the matter and confirmed that their final offer was $200,000 all inclusive of costs in full and final settlement and subject to a Deed of Settlement.

At the hearing on 8 December 2016 this information was conveyed to Judge Cole along with the advice that it is highly unlikely that Council would accept this offer and that Council was extremely disappointed that Caltex was not prepared to consider increasing their settlement offer. As a result, Judge Cole has set a new hearing date for 16 February 2017.

Members may recall the following advice from Mr Griffin was considered at its meeting on 20 December 2016:

> 'Please find enclosed letter from Durrant requesting that we formally respond to the Offer to settle made by Caltex at the mediation conference.
>
> We have up till now neither accepted or rejected the offer. That was because the decision on the offer was one that would be made by Council after it had regard to your views as to whether the offer was one that should be accepted. Clearly our view is that the offer is inadequate and does not meet the costs that Council has been forced to incur to ensure the integrity of the site and the safety and wellbeing of those that attend the Recreation Centre. Caltex on the other hand is proceeding on the basis that the risk of further pollution of the site and the pool is so minimal that Council should have ignored the advice of the independent engineers and instead just followed the advice of Caltex which was in effect to do nothing.
>
> Our advice remains the same which is that Council is fully entitled to pursue Caltex for all the costs it has incurred as a consequence of dealing with the pollution of the site. Whilst Judge Cole urged the parties to reach a financial settlement not based upon the actual loss suffered but to bring an end to the proceedings the figure that she urged Caltex to put they refuse to do so.
>
> On the basis our advice is that the claim of Council has serious merit and deserves to succeed the offer from Caltex whilst bringing an end to the proceedings does not in our view adequately reflect their exposure to damages in these proceedings. Furthermore it seems to us that Caltex have determined to adopt a hardball strategy with Council expecting them to fold rather than take the matter to trial. Experience tells us that parties will ordinarily increase their offers to settle as the inevitability of a disputed hearing becomes more apparent.
>
> We advise that the offer is inadequate and should be rejected. We do not suggest you make a counter offer but instead stick to the Calderbank Offer which was deliberately tailored to be able to be bettered by Council at trial which creates the adverse cost implications for Caltex.
>
> May we please have your formal instructions to reject the Caltex offer and to advise them that the matter will go to hearing unless they make a more commercial offer of settlement.'

As a result of that advice and subsequent discussion Council unanimously resolved that Council:

1. reject the Offer from Caltex Petroleum Pty Ltd for $200,000 all inclusive of costs in full and final settlement and subject to a Deed of Settlement

2. reaffirm its position that any settlement should be in accordance with the Calderbank Offer.

In the days leading up to the 16 February hearing, Caltex provided a further, without prejudice, offer through the lawyer Mr Michael Durant. Their offer (see attached) has now been increased to $250,000 however is subject to execution of a Deed of Settlement (attached).

As you will note in the correspondence from Mr Griffin there are some concerns associated with the Deed of Settlement in regards to the Confidentiality Clause.

In regards to the new offer from Caltex, Council's Senior Counsel, Mr Michael Roder (see attached) believes Council should accept the offer of $250,000 however he also notes concerns with the Confidentiality Clause. However Mr Griffin (see attached correspondence) is still of the view that Council has a strong case and should at the very least seek compensation in accordance with its Calderbank Offer which was reaffirmed at its meeting on 20 December 2016.

Social Implications

There are no social implications in relation to this report.

Environmental Implications

There are no environmental implications in relation to this report.

Asset Management Implications

There are no asset management implications in relation to this report.

Governance / Risk Management

There is always a risk in any litigation process, however the advice to date indicates that Council's case is very strong against Caltex as there is no doubt that they have contaminated Council's property.

Community Engagement

There are no Community engagement implications in relation to this report.

Regional Implications

There are no regional implications in relation to this report.

Financial Implications

If the Offer from Caltex is accepted it would draw this matter to a close and Council would recover $250,000. However if the offer is not accepted, the process will continue and although Council will continue incurring costs, it is hopeful that with a successful outcome these will be recoverable through the courts in line with the Calderbank Offer which has been previously submitted.

Recommendation

That Council:

1. **reject the Offer from Caltex Petroleum Pty Ltd for $250,000 all inclusive of costs in full and final settlement subject to the Deed of Settlement**

2. **reaffirm its position that any settlement should be in accordance with the Calderbank Offer.**

GRIFFINS
LAWYERS

Our Ref: 84974GMG

6 March 2017

Mr Paul Di Iulio
Chief Executive Officer
Campbelltown City Council
172 Montacute Road
ROSTREVOR SA 5073

By Email: pdiiulio@campbelltown.sa.gov.au

Dear Paul

Caltex

Further to our letter to you dated 14 February 2017 which enclosed the letter from HWL Ebsworth which was annexed to a draft Deed of Settlement and Release on the basis that Caltex increases its offer of settlement from $200,000 to $250,000 all-inclusive of costs subject to the execution of their draft deed which, for the reasons set out in my earlier letter to you, I have reservations as to.

I also refer to my email to you dated 21 February 2017 in which I enclosed a note from Mr Roder SC to me setting out his views on the increased offer of settlement which were essentially that the increased Caltex offer is worthy of consideration by Council. Whilst this increased offer is not put to us in the form of a Calderbank letter, it will no doubt have that effect and impact in the event that the matter were to proceed to trial and a judgment obtained by Council against Caltex did not exceed the offered sum of $250,000. It must of course be borne in mind that whereas one would ordinarily expect in the ERD Court that cases of this nature which essentially involve civil prosecutions by a Local Government Body that costs would follow the event. There is of course a wide discretion within the Court not to order costs but in the ordinary course, one would expect the successful party to apply for and be granted the costs of the hearing.

The issue that now must be addressed by Council is whether the increased offer made by Caltex places the position of Council at such risk so as to cause it to reconsider the position that it took at the 20 December 2016 meeting which was to maintain the position as set out in our letter to HWL Ebsworth Lawyers dated 20 September 2016. The position of Council is that it would accept on a without prejudice and commercial basis the sum of $275,000 inclusive of interest plus costs to be agreed or taxed. We **enclose** a copy of that letter which is framed as a Calderbank letter of course for ease of reference. The disparity between what Caltex have now offered and what we advised Council would accept in the letter of 20 September 2016 is $25,000 plus the costs of the action. In a position paper prepared by us on behalf of Council at the settlement conference convened by Judge Cole of

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the ERD Court we claimed legal expenses of $167,227.34 including Expert Reports and Roder SC which, at that time, did not include fees paid to Mr Roder SC.

When we framed the Calderbank offer we did so to exclude a number of expenses that could properly have been added to the sum claimed against Caltex and did not include interest paid on the monies paid by Council to address to the pollution of the land and the ongoing building process at the Campbelltown Leisure Centre site. We did that deliberately to in effect give Council some fat in the event that at some later time Caltex did increase its offer to try and settle this claim so that we had more comfort in terms of being successfully able to argue for an indemnity costs order on the basis that we could better the position put in the Calderbank offer made by Council. We now know that since the forwarding of the Calderbank offer that Caltex has increased its offer from $200,000 to $250,000 all-inclusive to settle the proceedings.

Quantification of damages in a case like this is not an exact science. Whereas we believe that the report of Mr Kilsby is extremely good and lays the foundation for the claim against Caltex, the position taken by the in-house engineers at Caltex who attended the settlement conference was that the Kilsby report would not be accepted against that of their expert, PB, and as such their risks in this matter were adequately covered by their initial offer of $200,000 all-inclusive of costs and interest.

Courts in cases like this listen to competing opinions and then on the balance of probabilities make a decision as to which party has met the required civil onus that it has proven the claim against the other party. Cleary Caltex have had concerns as to its own position as is evidenced by the increase from its initial offer of $100,000 to the current offer of $250,000. The issue for Council however is not that Caltex may have increased the offer to settle but whether that offer represents a reasonably commercial settlement of the current ERD proceedings brought against it and whether Council should accept that offer.

It is trite to say that all litigation has its risks. In litigation experts that give very strong opinions in their Report can sometimes under cross-examination be found to have made certain fundamental errors that impact upon the foundations of that opinion. When this happens those expert reports that looked so good in writing diminish greatly in value in the eyes of the Court. Just as we believe we will show the PB report to be deficient, Caltex will undoubtedly attack the Kilsby report and will question the advice given by FMG as to the need for the installation of the membrane and the costs that were occasioned as a consequence of Council following that advice. If Caltex could establish that the advice of FMG was simply wrong and that there was never a need to install the membrane then its offer of $250,000 puts it in a very good position to succeed against Council.

These are what are called the risks of litigation. The issue that we now need to address is whether the increased offer changes the risk of litigation to such a degree that commercial sense dictates that the offer should be accepted to enable the proceedings to be resolved. The opinion of Mr Roder SC is that the increased offer does add further risk to the position of Council. That of course goes without saying as if you increase your offer by $50,000 then you have an extra $50,000 worth of fat to play with. In the interim however Council has continued to incur costs to prosecute this action which it would not have been incurred had a sensible offer by Caltex been made at the settlement conference as had been intimated would occur. Furthermore, the offer made by Caltex makes no allowance whatever for the legal costs incurred by Council to prosecute this claim nor the interest on the capital expended by Council to address the issues created by them.

Had Council not prosecuted the claim Caltex would have paid nothing. It sits uneasily with me that having denied liability from the outset and then only made

token offers of settlement that Caltex feels that it should not be obliged to pay the legal fees incurred by Council in bringing this matter to where it is today. It simply does not reflect the commercial reality of enforcement proceedings as are litigated very commonly in the ERD Court whether it be the EPA prosecuting a rogue operator or a Council requiring a resident to only build a home in strict accordance with the planning consent granted. In those scenarios the party at fault is invariably required to meet the reasonable legal costs incurred by council to have the matter brought before the Court in the making of appropriate Orders.

My view is that Caltex should increase the offer it has made to reflect the costs that Council has incurred in bringing this matter before the Court. Caltex may well come back and say that they have factored that cost issue in to the offer of $250,000 as they simply still do not accept that the installation on the membrane was required. That is a predictable response and consistent with how they have dealt with us in the past. The bottom line however is that if we are right on the necessity for the installation on the membrane then the Caltex offer does look in my view deficient.

Against that scenario is of course the need to manage and balance the risks of litigation. It may well be the view of Council that it is better to accept a contribution towards the costs it has incurred as a consequence of the pollution of the land rather than go to trial seeking full restitution. They are commercial decisions that Council makes on a daily basis and is well position to do here. My view is that the offer is still not at the level it should be but against that it does bring finality to the litigation. Were the offer to be $300,000 inclusive of costs and interest I would recommend you carefully consider accepting that offer.

I am of course most happy to elaborate further on any of the matters raised herein should you so require.

Kind regards
GRIFFINS LAWYERS



GREG GRIFFIN
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Enc: Copy letter of 20 September 2016
Schedule of Expenses

GRIFFINS
LAWYERS

Our Ref: 84974gmg

20 September 2016

HWL Ebsworth Lawyers
Level 21, Westpac House
91 King William Street
ADELAIDE SA 5000

Without Prejudice Save as to Costs

Attention: Mr Michael Durrant

By Post & By Email: mdurrant@hwle.com.au

Dear Sir

City of Campbelltown and Caltex Petroleum Pty Ltd
ERD Court Action No 258 of 2015

Further to our previous correspondence we write to advise that whilst our client maintains its strong belief that it will succeed in its claim against your client for repayment of costs and expenses incurred as a result of your client's contravention of the *Environment Protection Act 1993* it is prepared to settle this claim against Caltex for a lesser sum than it is likely to receive by way of an Order from the ERD Court in an attempt to save both parties the costs of running a lengthy trial and to instead agree upon a regime requesting a fair contribution by Caltex to the legal, building and consultant costs it has incurred as a direct consequence of the pollution of the site by your client.

The purpose of this letter is to set out the reasons why our client will succeed in its claim against your client and to make a without prejudice offer of compromise in full and final settlement of that claim. That offer is open for 14 days from the date of this letter and will expire on 5 October 2016.

Background

The Campbelltown Leisure Centre site is located at Botanic Grove Campbelltown SA, and is owned by the City of Campbelltown Council ("Council"). The Leisure Centre has recently undergone a $28,000,000 dollar redevelopment which has included a significant extension and upgrade to the Leisure centre building and installation of a number of in-ground all-weather public swimming pools on the eastern and northern sides of the complex. The redeveloped Leisure Centre is a publically funded key regional facility that is expected to serve the South Australian public for many decades to come.

Investigations conducted at the Leisure Centre site since 2011 have concluded that hydrocarbon contamination is present in the soil and groundwater at the site. The contamination is associated with the migration of a plume of hydrocarbon

contaminated groundwater (the "plume") from the Caltex Service Station (the "Caltex site") located approximately 100m south-east and up-gradient of the Leisure Centre site. The source of the contamination has been identified as being the leakage of underground petroleum storage systems (UPSS) at the Caltex site.

Elevated concentrations of the following contaminants of concern have been detected in the plume:

- Total Petroleum Hydrocarbons (TPH);
- Benzene, Toulene, Ethylbenze and Xylene (BTEX)

The presence of Benzene in elevated levels at the Leisure Centre site is of particular concern. Benzene is known to be carcinogenic to humans. Human exposure pathways to benzene include inhalation of benzene vapour and ingestion or contact with benzene impacted water.

Environmentally sensitive receptors located in the area of the Leisure Centre include Fourth Creek, approximately 200m south-west of the site and the river Torrens, approximately 870m west of the site. Groundwater at the Leisure Centre site has been inferred to flow in a west-north-westerly direction and is expected to discharge into Fourth Creek or the Torrens River, which are both fresh-water ecosystems.

Risks of environmental harm

At the time of design and commission of the Leisure Centre, there remained significant uncertainties as to the risk posed by the hydrocarbon contamination present at the site. The relevant uncertainties are outlined below.

Status of the plume

The groundwater plume extends from the Caltex site through to the Eastern portion of the Leisure Centre site underlies the extended Leisure Centre building complex, including areas where in-ground pools have now been constructed. Some of the highest concentrations of TPH and BTEX reported for the plume have been detected in the area of the pools.

In 2011, Caltex engaged Parsons Brinkerhoff ("**PB**") to conduct environmental site assessments at the Caltex site.

Groundwater and soil vapour monitoring events conducted by PB have been ongoing since that time for the purpose of delineating the plume and to assess its stability. Despite this, it remains the case that the size, shape and temporal properties of the plume have not yet been confidently defined. As of the latest reported groundwater monitoring event in 2015, PB concluded that further testing is still required to confirm whether the hydrocarbon plume is stable or decreasing in size and/or concentration.[1]

The previous groundwater assessment report, dated 23 January 2015,[2] had concluded that the nature of the dissolved hydrocarbon plume remained unstable and that the contaminant load emanating from the site exceeded the capacity of the aquifer to naturally attenuate hydrocarbons within the area of investigation. It further concluded that the presence of Light Non Aqueous Phase Liquid (LNAPL) in onsite wells and increased dissolved hydrocarbon concentrations observed in offsite wells during recent groundwater monitoring event may have represented a shift in the risk profile of sensitive offsite receptors and that further assessment works were warranted.

[1] PB, *Groundwater Assessment Report for Caltex Campbelltown Service Station* (25 May 2015).

[2] PB, *Groundwater Assessment Report for Caltex Service Station* (23 January 2015).

Status of the contamination Source

The source of the contamination has been identified as being the leakage of UPSS infrastructure at the Caltex site.[3] The PB *Phase 1 and 2 Environmental Site Assessment Report* ("ESA") dated 10 November 2011, lists details of four operational and four redundant UPSS tanks known to have existed at the Caltex site at the time of the report.[4] It is not stated to be a complete list.

Documentation disclosed to date regarding integrity testing conducted by Leighton O'Brien on UPSS infrastructure at the site relates only to 7 UPSS tanks, leaving one tank on the ESA list unaccounted for. Further, only 5 UPSS tanks are accounted for in integrity documentation from after 2011. A detailed site history listing the timing of installation, use types, replacement, decommissioning, removal, or remediation of UPSS infrastructure has not been provided.

The need for a detailed history of on-site UPSS infrastructure in order to properly characterise the contamination source is an issue which has been raised by Steve Kirsanovs, the auditor engaged by Caltex for the service station site. In his Review of Detailed Risk Assessment letter report dated 5 October 2012, the auditor noted:

> *"There are 2 items from previous comments that still remain to be resolved and should be noted for future reporting: -*
>
> - *UPSS information. Previous reports have noted the known underground infrastructure at the site includes 4 operational USTs and 4 redundant USTs (some of which are understood to have been removed). As per previous comments, consideration should be given to undertaking further enquiry or investigation to confirm whether or not there is any other remaining underground infrastructure that has not yet been identified.*
> - *Characterisation of On-Site Source/s. Residual fuel related impacts in soils under the Caltex site are not well characterized and will need to be upgraded to improve the understanding of the source area/s."*

The need to properly characterise the contamination source (including the existence of any as yet unidentified USTs) is highlighted by the following conclusion of the PB Groundwater Assessment Report dated 14 March 2014 (emphasis added):

> *"The detection of LNAPL in MW1 and MW3 and the increase in dissolved hydrocarbon concentrations in the well located immediately down the hydraulic gradient during recent GMEs [groundwater monitoring events],* ***suggests that a recent release may have occurred at the service station****. As there is no correlation between the increase in dissolved hydrocarbon concentrations in this well and groundwater fluctuations, it is considered unlikely that this observed increase is a result of seasonal variation in groundwater elevations."*

It is known that redundant UPSS infrastructure remains in place at the Caltex site. Best practice for UPSS source removal is to remove all the infrastructure associated with the leak, including highly impacted soils surrounding the leak areas that could contribute to ongoing groundwater impacts. This has not occurred at the Caltex site.

It is thus clear that there remains significant uncertainty regarding the status of the source of the groundwater contamination present at the Caltex and Leisure Centre sites.

Status of Audit outcome

[3] PB, *Phase 1 and 2 Environmental Site Assessment (ESA)* (10 November 2011).
[4] ESA at pg 8.

In 2012, Caltex engaged Steven Kirsanovs of Kirsa Environmental as the EPA-accredited Site Contamination Auditor for the Caltex site. As the EPA-accredited site auditor, Mr Kirsanovs is required to complete a Site Contamination Audit Report, and associated audit statement, with copies provided to the client (Caltex), EPA and local planning authority (City of Campbelltown). This has yet to occur and it can be inferred by the failure to do so that the auditor's work is still ongoing.

Until a site contamination audit report is issued, uncertainty remains about the outcome of that audit with respect to the current and future risks associated with the groundwater contamination, the magnitude of those risks and the additional measures required to mitigate them.

Context of the risk

An assessment of the risk presented by the groundwater contamination must take into account the particular circumstances of the Leisure Centre redevelopment. In particular:

- the extent of the public funds involved in the investment;
- the beneficial purposes of the redevelopment as a public facility; and
- the intended 50 year life span of the facility.

Uncertainties about the level of risk presented by the contamination raise the following special considerations in this context:

- the potential for loss of public confidence in the facility, undercutting both its commercial viability and the social benefits it was intended to provide; and
- the significantly greater difficulty and expense of retrofitting mitigation measures later in the life-cycle of the facility, as opposed to during the original construction phase.

Council's options

For reasons set out above, the risks posed by the hydrocarbon plume present at the Leisure Centre remained unacceptably uncertain at the time of design and commissioning of the Leisure Centre redevelopment. In particular, the nature, extent, fate and transport of the contaminated groundwater plume had not been confidently defined. Faced with such uncertainty regarding the current and future risks associated with the plume in relation to the construction and use of the Leisure Centre, our client realistically had two options:

1. commission further testing and monitoring by a suitably qualified and experienced environmental engineering consultant in the hope of adequately resolving the uncertainties; or

2. take a precautionary approach to design and management to confidently and prudently manage the uncertainties.

Under the first option, our client would have incurred the costs of additional testing, assessment and modelling work in addition to the costs of a dedicated Auditor specifically for the site. Furthermore, there was the real possibility such assessment work would create significant project delays, during which the community would be deprived of a valuable public facility, not to mention costs associated with the delay and serious reputational damage to the project. Of course, these costs would be on top of any measures ultimately recommended to mitigate the risks so defined.
Under the second option, which was ultimately selected, our client accepted it was obliged to incur and indeed did incur, the costs of preparing an emergency response

plan, a four-day extension of time claim, the installation of the vapour-proof membrane and monitoring costs.
Faced with those options, there can be no doubt that Council acted reasonably in taking a precautionary approach to design and management of the Leisure Centre.

Council's claim

The expenses our client seeks to claim are set out in the Schedule of Expenses **enclosed** with this letter. The basis for each item of expense is set out briefly below.

1. Membrane

Groundwater levels in the vicinity of the main pool (SGW01) have been observed to be as high as 1.3m below ground level in sampling undertaken by S&G at the site in 2010.[5] The depth of the main pool is 1.8m below ground level, 0.5m deeper than the groundwater level observed by S&G in 2010.

In its report prepared for these proceedings, dated 27 January 2015, PB provides a '*provisional opinion*' that rainfall sufficient to bring the groundwater level at SGW01 above the base of the main pool may be expected to occur every 2-6 wet seasons. The Leisure Centre pool is an indoor pool open all year round. Therefore, according to PB's provisional opinion, interaction between the groundwater and the main pool may be expected to occur up to 25 times over the 50 year life span of the pool. It can also be noted that of the 10 observed groundwater measurements at SGW01, half were at levels above the base of the main pool.

Based on the observed groundwater levels at the Leisure Centre site, FMG specified an external waterproofing membrane for the pool shell construction. This was the original Preprufe membrane. The purpose of the external membrane is to prevent the possible intrusion of contaminated groundwater in both its liquid and vapour form from entering the concrete shell and passing through into the pool interior.

The *Preprufe* external waterproofing membrane was specified as part of the initial "box and pour" pool design. During the tender review period, a commercial pool contractor introduced the option of a cheaper pool construction by the adoption of a shotcrete construction technique. The original Preprufe waterproofing membrane was not suitable for shotcrete construction.

The *Voltex DS* membrane, which was suitable for shotcrete construction, and also had the added benefit of being flexible and able to accommodate movement without fracturing, was substituted for the unsuitable Preprufe membrane. The cost of the *Voltex DS* membrane represented a cost saving of $60,500 from the amount provisionally budgeted for the membrane under the building contract for the Leisure Centre redevelopment.

The engineering advice provided by John Goldfinch of FMG is that under normal circumstances absent contaminated ground water, neither the Voltex DS membrane nor the original Preprufe membrane would have been specified.[6]

The cost of the membrane is contained in the Variation Order dated 4 June 2015 from Sarah (**enclosed**).

2. Extension of Time Claim

[5] ESA Phase II, Soil and Groundwater Consulting (S&G), 13 September 2011. Well SGW01.
[6] Report John Goldfinch dated 28 August 2015.

On 7 May 2015, Brett Coshell wrote to Caltex explaining that the contractor was concerned that excavation works at the site could accelerate or aggravate migration of the plume towards Fourth Creek and requesting confirmation that it was safe to being civil works. The response from Ben Annan of Caltex dated 7 May 2015 provided:

> *"Dewatering activities, by their nature, will temporarily alter the local hydrogeology. This then has the potential to impact plume stability/migration. The assessment program we are undertaking now will not assess this. Post-completion of the community centre, PB/Caltex may be required to reinstall a monitoring well network to assess the latest plume characteristics."*

The contractor was not satisfied that Caltex was addressing the issue. On 14 May 2015, Council received a Notification of Impacts to Groundwater from the EPA advising that the contamination plume had spread and implied changes in the stability of the plume. The notification advised Council to contact Caltex in relation to potential risks and expressly warned that precautions may be necessary in relation to works undertaken at the site.

Excavation works were due to commence on 18 May 2015. The EPA notification was the final trigger that caused Council to conclude that going ahead with the excavation was too risky without written confirmation from Caltex that it was safe to do so.

Council wrote to Caltex on 15 May 2015 raising the urgent need to address the ramifications of the notification upon the construction works due to commence 18 May 2015. The letter also expressly raises the possibility that excavation works would be delayed as a result of the EPA notification.

On 15 May 2015, Sarah were instructed to suspend excavation works on site until further notice, pursuant to Architect's Instruction 08. It was not until 21 May 2015 that written confirmation was provided by email from Ben Annan of Caltex to Paul Di Iulio and Brett Coshell that it was safe for excavation works to proceed. Council gave instructions to Sarah to recommence works later that day. The duration of the delay ran from 18 May 2015 to 21 May 2015. The cost of the delay is contained in Variation Order Costing #08 dated 29 May 2015 **(enclosed).**

3. Dust and air monitoring

Dust and air monitoring was carried out on the basis that it was required by the CEMP for the safe management of hydrocarbon contamination present at the site, and that it was prudent to do so. The dusts were analysed for targeted potential contaminants of concern as indicated by the previous environmental investigations at the site. The dust and air monitoring would not have been carried out in the absence of groundwater contamination at the site. The relevant Architect's Instruction 10 (**enclosed**) issued to Sarah dated 18 May 2015 provides as follows:

> ***Re: Dust & Air Monitors for CEMP Compliance***
>
> *"The CEMP Rev 3 dated May 2015 includes a requirement for dust monitors to be established on site (refer pg 14 item 5.2.2). It states 'dust control measures will be implemented during redevelopment works in particular where excavation activities involve management of contaminated soil.' It goes further to request that continuous dust monitors be implemented and placed strategically on site. The dust monitoring is a variation to contract. Any airborne dust and organic solids generated from soils on site has potential to be contaminated and as you are aware, management of contaminants is excluded from our contract sum.*

Proceed with the dust monitoring as a variation to the works on the proviso that it is only required as a result of the groundwater contamination on the site."

The costs of the monitoring is contained in Variation Order 10 issued by Sarah on 30 April 2016 (**enclosed**).

As part of the implementation of the dust and air monitoring, and in accordance with the CEMP, an occupation hygienist was hired to provide Sarah workers with training in monitoring the occupational risks from potential vapours released from the groundwater plume during excavation works. The costs of the hygienist are contained in Variation Order 58 issued by Sarah on 18 March 2016 (**enclosed**).

4. & 5. Plume monitoring & emergency response plan

The plume monitoring program and emergency response plan arose as a result of concerns held by the contractor about the destabilising impact of excavations and dewatering activities on the plume, and in particular, that those works could accelerate or aggravate migration of the plume towards Fourth Creek, located approximately 200m to the south of the Leisure Centre site. The catastrophic consequences of contamination reaching Fourth Creek necessitated having a defence strategy in place to protect the creek in the event migration of the plume was exacerbated by excavation works.

The contractor's opinion (as set out above) was that Caltex had not addressed this issue in its risk assessments for the site. In particular, the contractor felt that a sampling program should be in place to monitor migration of the plume during construction activities and which would trigger an emergency response should accelerated migration toward Fourth Creek be detected.

The monitoring program was needed in order to assess whether the emergency response strategy to protect the creek should be triggered. The results of the plume monitoring program were presented in FMG's Groundwater Assessment Report dated 27 July 2015. The results indicated that, as at the time of the investigation, the plume had not crossed the site boundary. The report concluded that plume monitoring should continue to allow any indication of migration of the plume toward Fourth Creek to be picked up and if necessary acted upon via the emergency response plan.

The costs of the plume monitoring and emergency response plan are contained in the FMG invoices dated 1 & 31 August 2015 (**enclosed**).

6. DesignInc

The additional DesignInc fees contained in Item 6 of the Schedule are wholly referable to additional work done by DesignInc in engaging directly with Caltex regarding the contamination issues at the site. The fees include DesignInc's conversations with Caltex, correspondence in relation to the issue, and specific meetings to address contamination concerns, including with Caltex and are fully accountable within DesignInc office records.

7. Removal & Disposal of contaminated soil

Hydrocarbon contamination present in soil excavated at the Leisure Centre site was found to be at levels requiring off-site disposal of the soil. The costs of the disposal are as provided in the Variation Order dated 29 June 2015 from Sarah (**enclosed**).

8. Legal fees

Our client claims the costs of the non-litigious legal advice provided by Griffins in relation to the contamination present at the Leisure Centre site. Council sought this legal advice for the purpose of managing its preventative and mitigative response to the contamination present at the site. In particular, Council sought advice as to its rights and obligations both under the *Environment Protection Act 1993* and the general law, and how the contamination might be managed in accordance with those rights and obligations.

The costs of the legal advice are contained in the Griffins Invoices dated 4 May, 31 May and 1 July 2015 (**enclosed**). The provisions of these Invoices is on a without prejudice basis and does not constitute a waiver of our client's legal professional privilege other than to confirm to your client the quantum of the legal costs it has incurred and paid to date.

Principal Issue in Dispute

The law is clear that our client is entitled to an order for payment of the reasonable costs and expenses incurred in taking action to prevent or mitigate injury, loss or damage to property as a result of Caltex's groundwater contamination.

The issue in dispute between the parties is whether the costs and expenses claimed by Council

(i) were incurred for the purpose of taking action to prevent or mitigate loss or damage suffered as a result of your client's groundwater contamination; and
(ii) were incurred reasonably.

It is clear from the basis of the claim set out above that each cost and expense claimed by Council was directed to the prevention or mitigation of groundwater contamination at the site.

It is equally clear that each cost and expense was incurred reasonably. This is because (as set out in detail above):

a) the risks posed by the hydrocarbon plume present at the Leisure Centre remained unacceptably uncertain at the time of design and commissioning of the Leisure Centre redevelopment;
b) the Leisure centre redevelopment was a major publically funded investment intended to serve the community for many decades to come; and
c) the circumstances dictated that it was reasonable and prudent for Council to take a precautionary approach to design and management of the Leisure Centre to confidently manage the uncertainties.

Without prejudice settlement offer

Notwithstanding the merits of our client's position, we are instructed that, on a without prejudice basis, our client is prepared to make the following offer to resolve the claim against your client on the basis that:

1. Your client pay to the Council on a without prejudice and commercial basis the sum of $275,000.00 inclusive of interest plus costs to be agreed or taxed;

2. the Proceedings against your client be discontinued;

3. the parties enter into a Deed of Settlement reflecting these terms.

This offer is made in good faith, purely on a commercial basis and with no concession as to the merits of your client's position.

Our client's offer is made in accordance with the principles applied in *Calderbank v Calderbank* [1975] All ER 333, *Cutts v Head* [1983] EWCA Civ 8 and *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1998) 81 ALR 397 (at 400-1). We put you on notice that if:

1. your client does not accept the offer; and

2. this matter proceeds to a final hearing; and

3. our client achieves a similar or better outcome than the terms of this offer,

our client will seek an order that your clients pay costs on an indemnity basis from the date of this letter. This offer remains open for 14 days and will expire close of business, on 5 October 2016. Please obtain your client's instructions and respond to us within that time.

We look forward to hearing from you.

This letter is written without prejudice, save as to costs.

Yours faithfully

GRIFFINS LAWYERS



GREG GRIFFIN
Direct email: ggriffin@griffins.com.au
Direct line: (08) 8113 5112

Encl: As listed above

Schedule of Expenses

No.	Item	Cost (ex GST)
1.	Supply and installation of Voltex DS Bentonite geotextile waterproofing system to manufacturer's installation recommendations. See **attached** Variation Order Costings dated 4 June 2015 from Sarah.	$139,500.00
2.	Extension of Time Claim arising from four day suspension of works (18/05/15 – 21/05/15). See **attached** Variation Order (Variation 8) dated 28 May 2015 from Sarah.	$11,200.00
3	3.1 Variation Order Costing from Sarah Constructions for Dust & Air Monitors for CEMP Compliance. See **attached** Variation Order 10 from Sarah dated 30 April 2016. 3.2 Occupational Hygienist re Dust & Air monitoring. See **attached** Variation Order dated 18 March 2016 from Sarah. Consumables not claimed.	$106,419.85 $11,468.38
4.	Plume Monitoring as per Emergency Response Plan. See **attached** Invoice dated 28 July 2015 from FMG.	$9,700.00
5.	Preparation of Emergency Response Plan and Monitoring strategy by FMG. See **attached** Invoices dated 29 June, 31 August 2015 from FMG.	$6,000.00
6.	DesignInc fees in relation to additional work undertaken by DesignInc at the request of council to engage directly with Caltex regarding the contamination issue. Including: conversations with Caltex, correspondence in relation to that issue, and specific meetings to address those concerns, including with Caltex, and a meeting at Griffins Lawyers. See **attached** DesignInc timesheets.	$10,368.75
7.	Removal & disposal of contaminated soil by Integrated Waste Services. See **attached** Variation Order dated 29 June 2015 from Sarah.	$7,983.50
8.	Legal expenses (Griffins Lawyers) See **attached** Griffins Invoices dated 4 May, 31 May and 1 July 2015.	$23,185.41
	Sub-total, claim	**$325,825.89**

Schedule – Costs in the cause

No.	Item	Cost (ex GST)
1.	John Goldfinch consultancy fees, FMG Engineering. See **attached** invoices dated 30 November 2015; 29 January 2016; 31 March 2016 and email chain from Louise Wheatley of FMG dated 6-7 April 2016.	$13,048.00
2.	Adam Kilsby consultancy fees, Katalyse Pty Ltd. See **attached** invoice dated 19 August 2016	$16,415.00
3.	Legal expenses (Griffins Lawyers) (Excl. Michael Roder SC) connected to the proceedings	$116,902.84
4.	Counsel fees (Michael Roder SC) See **attached** invoice 22 August 2016	$20,861.50
	Sub-total, costs in the cause	**$167,227.34**

MICHAEL RODER SC
BARRISTER

20 February 2017

Griffins Lawyers
49 Flinders Street
ADELAIDE SA 5000

Attention: Greg Griffin

Dear Greg

City of Campbelltown – Leisure Centre Claim

Thank you for your recent correspondence advising of the progress of the Court hearing and the recent offer that has been made by Caltex.

I note that Caltex has now increased its offer to $250,000.

Whilst I understand the offer is not as high as the Council would like, as discussed at the mediation, in my view such a proposal merits acceptance having regard to:

1. The risks attendant in the litigation.

2. The costs which would be incurred in preparing this matter for hearing in relation to the anticipated returns were the action successful.

Whilst I accept that the Council has responsibilities as a statutory authority, my view is that it would be prudent to resolve this matter having regard to those commercial risks. I am happy to advise in more detail should you wish.

You have also asked me to consider the question of confidentiality. In my view this might be best addressed by simply pointing out to Caltex, that there are statutory impediments contained in section 90 of the *Local Government Act* to maintaining confidentiality in relation to Council decisions.

If the outcome were otherwise acceptable, it may be that the Council could agree to maintain confidentiality to the extent that it is permitted to do so consistently with the Local Government Act.

All Correspondence to: GPO Box 1570, ADELAIDE SA 5001
12/211 Victoria Square, ADELAIDE SA 5000 | Phone: (08) 8211 7677 | mroder@hzc.com.au

Liability limited by a scheme approved under Professional Standards Legislation

I look forward to hearing from you.

Yours faithfully

Michael Roder SC

GRIFFINS
LAWYERS

Our Ref: 84974GMG

16 February 2017

Mr Paul Di Iulio
Chief Executive Officer
Campbelltown City Council
172 Montacute Road
ROSTREVOR SA 5073

By Email: pdiiulio@campbelltown.sa.gov.au

Dear Paul

Caltex

Further to our telephone discussion yesterday I advise that I attended before Judge Cole in the ERD Court this morning at which time she asked what progress had been made with respect to this matter. I advised the Court that there had been a further offer put by Caltex and that is a matter that required consideration by Council at its next meeting.

That being so Judge Cole adjourned the Directions Hearing until 9.25am on 16 March 2017. After Court I spoke with Mr Durrant as to aspects of the Deed that may be problematic. I told him that the non-disparagement clauses did not cause concern but it is very difficult for a public body such as Council to agree to a confidentiality clause particularly when proceedings have been issued and if the question is asked by a rate payer than they are entitled to an answer not inhibited by confidentiality requirements.

I did not discuss the money aspect with Mr Durrant as that is something for us to consider. I have spoken with Mr Roder SC. Mr Roder is very much of the view that the increase in the offer, as I suggested would be his opinion, makes it much more attractive and one that you should give serious consideration to. I assured him that Council were taking his views into account and would consider all aspects when the matter is next before them.

Kind regards
GRIFFINS LAWYERS

GREG GRIFFIN
Direct email: ggriffin@griffins.com.au
Direct line: (08) 8113 5112

From: Michelle Linkson [mailto:MLinkson@griffins.com.au] **On Behalf Of** Greg Griffin
Sent: Tuesday, 14 February 2017 11:54 AM
To: Paul Di Iulio
Cc: Katherine Beazley
Subject: City of Campbelltown v Caltex Petroleum Pty Ltd

Dear Paul,

Please see email below and **attached** letter with enclosures.

Regards,

Greg Griffin
Griffins Lawyers

49 Flinders Street, Adelaide, SA 5000 • GPO Box 2077, Adelaide SA 5001
T: 08 8410 2020 • **DL:** 08 8113 5112 • **F:** 08 8410 1920 • **W:** www.griffins.com.au

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From: Michael Durrant [mailto:mdurrant@hwle.com.au]
Sent: Sunday, 12 February 2017 2:28 PM
To: Greg Griffin <GGriffin@griffins.com.au>
Subject: RE: City of Campbelltown v Caltex Petroleum Pty Ltd [HWLE-Matter.C038973.568270]

Dear Mr Griffin

WITHOUT PREJUDICE SAVE AS TO COSTS

We are instructed that our client offers to settle this matter on the terms set out in and subject to execution of the Deed of Settlement attached.

We look forward to hearing from you.

Regards

Michael Durrant
Partner

HWL EBSWORTH LAWYERS

Level 21 Westpac House 91 King William Street | Adelaide SA 5000
Phone +61 8 8205 0828 | Mobile 0412 563 758
Fax 1300 464 135 (Australia) | Fax +61 2 8507 6582 (International)
mdurrant@hwle.com.au | www.hwlebsworth.com.au

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GRIFFINS
LAWYERS

Our Ref: 84974GMG

14 February 2017

Mr Paul Di Iulio
Chief Executive Officer
Campbelltown City Council
172 Montacute Road
ROSTREVOR SA 5073

By Email: pdiiulio@campbelltown.sa.gov.au

Dear Paul,

Caltex

Please find **enclosed** letter from Mr. Durrant together with a proposed Deed of Settlement which they say needs to be executed by the parties if you accept their latest increased offer to settle the proceedings.

The offer has increased from $200,000 Inclusive of costs and interest to $250,000 Inclusive of costs and interest. Our Calderbank Offer stands at $275,000 plus costs. Having regard to the 2 expert Reports provided by FMG and Adam Kilsby the combined cost of which is circa $29,000 plus the legal fees you have incurred there is still daylight between what we are demanding and what they are prepared to pay. I **enclose** herewith 2 Schedules showing the hard costs we say were incurred in the construction process due to the contamination and the costs that have been incurred in being obliged to pursue enforcement proceedings against Caltex.

It will ultimately of course be up to the Judge to assess and determine which of those costs were reasonably and properly incurred. Caltex has consistently maintained the position that there was no need for Council to have incurred any costs other than ongoing monitoring fees which has been their position from the outset of the dispute. Notwithstanding the somewhat unyielding opinions of their in house engineers they have since December increased their offer to settle from $100,000 to the current offer of $250,000. The mere fact that they have substantially increased their offers does not mean that the offer is sufficient for Council to accept.

We have them now at the figure we had hoped they would put to us post the settlement conference conducted by Judge Cole. Our joint view was to thereafter go back to squeeze further monies to get between $280,000 and $300,000. Tactically we now need to decide whether we continue that strategy. We have a sound basis for you to engage Caltex direct in further settlement discussions. You are able to say that since the last offer made by Caltex this has been the subject of a full review by Council. As a consequence of Council undertaking that process the position has hardened which makes settlement a more difficult thing to achieve.

49 Flinders Street Adelaide SA 5000 GPO Box 2077 Adelaide SA 5001 telephone + 61 8 8410 2020 facsimile + 61 8 8410 1920 email@griffins.com.au
GMG Legal Services Pty Ltd an Incorporated Legal Practice ABN 19 074 972 231
www.griffins.com.au

Using that as the door opener you may well be able to convince them that it is easier and more cost productive for them to meet your minimum figure than you try to convince Council to accept a lesser sum that its lawyers and you have told Full Council it stands to receive. That is a tactical matter for you to consider. I am pretty confident Senior Counsel would embrace that approach. In fact he would most likely advise Council to take what is on offer as a matter of risk management to protect Council from a possible adverse costs order in the event the Court assesses the damages payable at less or about the offered sum.

When we calculated your Calderbank Offer we did so excluding interest on monies paid and reducing the quantum to make it an achievable figure. That was prudent. Arguably the expert report costs are only payable if we beat their offer and secure an Order for costs. That $29,000.00 whilst having been paid may never come into play in determining the potential adverse costs Orders if we fail to reach the new threshold.

The new offer clearly adds a new layer of risk. We are in Court on Thursday. My view would be to adjourn the matter for a further period to enable you and Council to give careful consideration to it which may require it coming back to Council for approval. I could not see Judge Cole having any problem with that. She would endorse such action.

The Deed

As to the Deed which forms part of the new offer I am very uncomfortable as to the inclusion of a Confidentiality Clause. Whilst the non-disparagement Clause is probably acceptable I am concerned that Council cannot if it so chooses ever be able to disclose the settlement of these proceedings to the ratepayers. All you need is a journalist to discover the enforcement proceedings have been discontinued and you have a story. Any lack of ability to disclose the settlement sum may cause Council embarrassment. Whilst no one wants this issue in the public domain the inability to appear transparent may well provide an impediment to Council to agree to the inclusion of such a Clause.

That is a matter that you are best to make the call upon but this is an issue that Council needs to make a decision upon. I am of course available to discuss any of the matters raised herein at your convenience which should be before Thursday.

Kind regards
GRIFFINS LAWYERS

GREG GRIFFIN
Direct email: ggriffin@griffins.com.au
Direct line: (08) 8113 5112

Encl:
1. Email from Michael Durrant encl proposed Deed of Settlement
2. Schedules

HWL EBSWORTH
LAWYERS

DEED OF SETTLEMENT AND RELEASE

CITY OF CAMPBELLTOWN

and

CALTEX PETROLEUM PTY LTD
ACN 000 007 876

Ref 568270

Doc ID 396880193/v3

Level 21, Westpac House, 91 King William Street, Adelaide SA 5000 Australia

GPO Box 286, Adelaide SA 5001 Australia

Telephone +61 8 8205 0800

Facsimile 1300 464 135 (Australia) +61 3 9034 3257 (International)

hwlebsworth.com.au

HWL EBSWORTH
LAWYERS

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DEED OF SETTLEMENT

Date

Parties

CITY OF CAMPBELLTOWN of c/- Griffins Lawyers, 49 Flinders Street, Adelaide SA 5000

(**the Council**)

CALTEX PETROLEUM PTY LTD (ACN 000 007 876) of c/- HWL Ebsworth, Level 21, 91 King William Street, Adelaide SA 5000

(**Caltex**)

Recitals

A. The Council, a body corporate pursuant to the provisions of the Local Government Act, is the registered proprietor of property at Botanic Grove, Campbelltown, South Australia being the land comprised in Certificate of Title Volume 5444 Folio 575 (**the Site**) upon which it operates a Leisure Centre (**the Leisure Centre**) including two swimming pools (**the Swimming Pools**).

B. Caltex is the registered proprietor of property at 542 Lower North East Road, Campbelltown, South Australia being the land comprised in Certificate of Title Volume 5806 Folio 602 upon which it operates a service station (**the Service Station Site**).

C. The Site and the Leisure Centre are located downhill and to the west of the Service Station Site and concentrations of hydrocarbons beneath the Site have been detected.

D. By Summons issued in the Environment, Resources and Development Court of South Australia Action No. 258 of 2015 and dated 27 October 2015 (**the Proceedings**) the Council sought orders that Caltex be required to pay compensation, in an amount to be assessed by the Court, for the reasonable costs and expenses allegedly incurred by the Council in taking action to prevent or mitigate alleged loss or damage to the Site, the Leisure Centre and the Swimming Pools as a result of Caltex's alleged breach of the Environmental Protection Act 1993 (**the EP Act**).

E. Further, in the Proceedings the Council sought a declaration establishing the liability of the Respondent to pay compensation for such reasonable costs and expenses to be incurred in the future by the Council in taking action to prevent or mitigate the

loss or damage to its property as a result of Caltex's alleged breach of the EP Act.

F. The parties have agreed to settle and resolve the Proceedings on the following terms of settlement (**the Deed**).

This Deed witnesses that in consideration of, among other things, the mutual promises contained in this Deed the parties agree as follows:

1. Definitions and interpretation clauses

1.1 Definitions

In this Deed:

Business Day	means a day on which banks are open for business in South Australia excluding a Saturday, Sunday or public holiday in that State.
Claim	means any action, claim, proceeding or demand whatsoever, whether presently existing or arising at any time in the future and whether referable to events or circumstances which have already occurred or which may occur in the future.
Court	means the Environment, Resources and Development Court of South Australia.
Designated Locations	means the proposed well sites marked on the Map attached to this Deed.
Effective Date	means the date on which this Deed is signed by the last of the signatories to it.
EP Act	means the Environmental Protection Act 1993 (SA).
Environmental Protection Authority	means the South Australian Environmental Protection Authority.

Groundwater Management Plan	means the Parsons Brinckerhoff Groundwater Management Plan of 2 July 2014 for the Service Station Site.
Permitted Activities	means the installation, monitoring and decommissioning of wells at Designated Locations on the Site to test groundwater. The works which are to be conducted by Caltex on the Site pursuant to its obligations under the EP Act and the Groundwater Management Plan.
Service Station Site	means the land comprised in Certificate of Title Volume 5806 Folio 602 upon which Caltex operates a service station.
Site	means the land comprised in Certificate of Title Volume 5444 Folio 575 upon which the Council operates a Leisure Centre.

1.2 **Interpretation**

In this Deed unless a contrary intention is expressed:

(a) headings and italicised, highlighted or bold type do not affect the interpretation of this Deed;

(b) the singular includes the plural and the plural includes the singular;

(c) a gender includes all other genders;

(d) other parts of speech and grammatical forms of a word or phrase defined in this Deed have a corresponding meaning;

(e) a reference to a 'person' includes any individual, firm, company, partnership, joint venture, an unincorporated body or association, trust, corporation or other body corporate and any Government Agency (whether or not having a separate legal personality);

(f) a reference to any thing (including any right) includes a part of that thing, but nothing in this clause 1.2(f) implies that performance of part of an obligation constitutes performance of the obligation;

(g) a reference to a clause, party, annexure, exhibit or schedule is a reference to a clause of, and a party, annexure, exhibit and schedule to, this Deed and a reference to this Deed includes any clause, annexure, exhibit and schedule;

(h) a reference to a document (including this Deed) includes all amendments or supplements to, substitutions or replacements or novations of, that document;

(i) a reference to a party to any document includes that party's successors and permitted assigns;

(j) a reference to an agreement other than this Deed includes an undertaking, deed, agreement or legally enforceable arrangement or understanding whether or not in writing;

(k) a reference to a document includes any agreement or contract in writing, or any certificate, notice, deed, instrument or other document of any kind;

(l) a promise, agreement, representation or warranty by two or more persons binds them jointly and severally;

(m) a provision of this Deed may not be construed adversely to a party solely on the ground that the party was responsible for the preparation of this Deed or the preparation or proposal of that provision;

(n) a reference to a body, other than a party to this Deed (including an institute, association or authority), whether statutory or not, which ceases to exist or whose powers or functions are transferred to another body, is a reference to the body which replaces it or which substantially succeeds to its powers or functions;

(o) the words 'include', 'including', 'for example', 'such as' or any form of those words or similar expressions in this Deed do not limit what else is included and must be construed as if they are followed by the words 'without limitation', unless there is express wording to the contrary;

(p) a reference to a day is to the period of time commencing at midnight and ending 24 hours later;

(q) if a period of time is specified and dates from a day or the day of an act, event or circumstance, that period is to be determined exclusive of that day;

(r) if an act or event must occur or be performed on or by a specified day and occurs or is performed after 5:00 pm on that day, it is taken to have occurred or been done on the next day; and

(s) a reference to '$', 'A$', 'AUD', 'dollars' or 'Dollars' is a reference to the lawful currency of the Commonwealth of Australia.

1.3 Business Day

If anything under this Deed is required to be done by or on a day that is not a Business Day that thing must be done by or on the next Business Day.

2. Settlement sum

2.1 Settlement amount

Caltex will pay to the Council and the Council shall accept payment from Caltex of the sum of $250,000.00 (**Settlement Sum**) in the manner and at the times provided for in clauses 2.2 to 2.3 hereof.

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2.2 Payment

Caltex will pay the Settlement Sum within 21 days of HWL Ebsworth receiving a counterpart of this Deed executed by the Council by bank transfer into the following bank account:

Account name: Griffins Lawyers Trust Account

Bank:

BSB:

Account number:

Reference:

2.3 Time of the essence

Time is of the essence in relation to the obligations prescribed by this clause.

3. Discontinuance

Within 7 days after the receipt of the Settlement Sum the Council will file a notice of discontinuance in the Proceedings on the basis that the Proceedings be discontinued as against Caltex with no order as to costs, and Caltex consents to the Proceedings being discontinued on that basis.

4. Release

Effective upon receipt of the Settlement Sum the Council frees, releases and discharges Caltex and each of its related bodies corporate as defined in the *Corporations Act 2001* (Cth) and each of the directors, servants and agents of each of them from all actions, proceedings, claims, demands, costs and charges arising, whether known or unknown, out of or in relation to the Proceedings, the Site, the Leisure Centre and the Swimming Pool.

5. Independent Advice

Each party warrants that:

(a) it has been advised to obtain, and has had time to obtain, independent legal advice prior to execution of this Deed;

(b) it has obtained that independent legal advice prior to execution of this Deed; and

(c) it understands the terms of this Deed and the nature of its obligations under this Deed.

6. Bar to proceedings

The parties agree that, subject to an action for the non-performance of obligations under this Deed, this Deed shall operate and may be pleaded in any court as a bar to any claim commenced or maintained by any party before or after the date of this Deed which is inconsistent with or contrary to this Deed.

7. Site Access

7.1 **Access**

The Council agrees to provide Caltex or any contractor, employee or agent of Caltex access to the Site to conduct the Permitted Activities.

7.2 **Notice**

Caltex agrees to provide the Council with 7 days notice in writing to the CEO of the Council prior to accessing the Site for the purposes of conducting the Permitted Activities.

7.3 **Access Interference**

The Council must ensure that it does not and must ensure that any contractor, employee or agent of the Council does not unreasonably interfere or cause unreasonable interference with the performance of the Permitted Activities.

7.4 **Indemnity**

Caltex agrees to indemnify the Council against loss or damage arising from the performance of the Permitted Activities.

8. Goods and Services Tax (GST)

8.1 **No GST payable on Settlement Sum**

The parties understand that the Settlement Sum is being paid to the Council in accordance with GST Ruling GSTR 2001/4, and that amount is not consideration for a supply and is therefore not subject to GST.

8.2 **If GST is payable**

(a) Regardless of clause 8.1, if the Australian Taxation Office (**ATO**) determines that any Supply made under or in connection with this Deed by one party (**Supplier**) to another party (**Acquirer**) is subject to GST, the payment for that supply will be exclusive of GST and the Supplier is entitled to recover any additional amount on account of GST from the Acquirer.

(b) The Acquirer will not be obligated to make any payment for either the supply referred to in paragraph 8.2(a) or on account of the GST referred to in paragraph 8.2(a) until the Supplier has issued a tax invoice to the Acquirer for the supply to which the payment relates.

8.3 If a payment made by one party to the other party is a reimbursement or indemnification of a cost, expense, loss or liability incurred by that other party, the reimbursement or indemnification sum will first be reduced to a net sum by deducting the amount, if any, for which that other party is entitled to an input tax credit, and then increasing that net sum by the amount of GST payable by that other party.

8.4 **Defined terms**

8.5 Words or expressions used in this clause, which are defined in *A New Tax System (Goods and Services Tax) Act 1999* have the same meaning here.

9. Non-disparagement

(a) The Council undertakes and agrees that it will not, and will use its best endeavours to ensure that its directors, officers, employees and agents do not, disparage, adversely comment on or call into disrepute, by words or conduct, Caltex, its directors, officers, employees, agents or any person or entity related to Caltex.

(b) Caltex undertakes and agrees to not disparage, adversely comment on or call into disrepute, by words or conduct, the Council, its directors, officers, employees, agents or any person or entity related to the Council.

10. Confidentiality

10.1 Obligation

The parties acknowledge that the terms of this Deed are confidential. Save to say that the Proceedings have resolved, no party shall, without prior written consent of the other party, disclose or permit to be disclosed the terms of this Deed (in whole or in part) or the negotiations leading to the execution of this Deed to any other person except:

(a) to enforce this Deed;

(a) as is necessary to obtain legal or financial advice in respect of this Deed but subject to the advisor being obliged to keep the information confidential;

(b) to disclose sufficient details as are necessary to fulfil any legal obligation of disclosure (and then only to persons legally empowered to demand details); and

(c) as such parties may be compelled to disclose according to law including, without limitation, in compliance with any regulatory requirement.

10.2 Exclusions

The obligations of confidence under this document do not apply to any information that:

(a) is in the public domain (other than through any breach of this document); or

(b) a party is required by law to disclose.

10.3 Survival of Obligations

The obligations of confidentiality under this document survive the expiration or termination of this document.

11. General

11.1 Costs

The parties must pay their own costs and expenses in relation to the negotiation, preparation and execution of this document and the acts and transactions contemplated by it.

11.2 Amendment

This document may only be amended in writing signed by all the parties and may not be amended in any other manner.

11.3 **Entire Agreement**

This document contains the entire agreement between the parties about its subject matter. Any previous understanding, agreement, representation or warranty relating to that subject matter is replaced by this document and has no further effect.

11.4 **Waiver**

No waiver by a party of any breach or default by any other party is effective unless reduced to writing and signed by the party making such waiver, and any such waiver does not constitute a waiver of any other continuing breach or default under this document.

11.5 **Severance**

If any provision of this document is prohibited, invalid or unenforceable in any jurisdiction, that provision will, as to that jurisdiction, be ineffective to the extent of the prohibition, invalidity or unenforceability without invalidating the remaining provisions of this document or affecting the validity or enforceability of that provision in any other jurisdiction.

11.6 **Governing Law**

This document is governed by the law in force in South Australia. The parties submit to the non-exclusive jurisdiction of the courts of that State and the South Australian Registry of the Federal Court of Australia in respect of all proceedings arising in connection with this document.

11.7 **Assignment**

A party may not assign or transfer any of its rights or obligations under this document without the prior written consent of the other parties. A party may withhold its consent in its absolute discretion.

11.8 **Remedies cumulative**

Except as provided in this Deed and permitted by law, the rights, powers and remedies provided in this Deed are cumulative with and not exclusive of the rights, powers or remedies provided by law independently of this Deed.

11.9 **Further Assurances**

Each party will promptly do all things required by law or reasonably requested by any other party to give effect to this document.

11.10 **Counterparts and Multiple Originals**

This document may be executed in any number of counterparts and all of those counterparts taken together will be deemed to constitute the same document.

Signing page

Executed as a deed

Executed for and on behalf of **City of Campbelltown** by its representative in the presence of:

Signature of witness	Signature of representative
Full name of witness (print)	Full name of representative (print)
Address of witness (print)	

Executed for and on behalf of **Caltex Petroleum Pty Ltd (ACN 000 007 876)** by its representative in the presence of:

Signature of witness	Signature of representative
Full name of witness (print)	Full name of representative (print)
Address of witness (print)	

GRIFFINS
LAWYERS

Our Ref: 84974GMG

6 January 2017

Mr Paul Di Iulio
Chief Executive Officer
Campbelltown City Council
172 Montacute Road
ROSTREVOR SA 5073

By Email: pdiiulio@campbelltown.sa.gov.au

Dear Paul

Caltex Dispute

Thank you for your letter dated 21 December 2016 which was received on 5 January 2017.

Please find **enclosed** a copy of our letter which sets out your position as to the rejection of the offer of $200,000 all inclusive of costs and interest in full and final settlement of the claim against Caltex and the offer to engage in further discussions with Caltex based upon them accepting the position as articulated in our letter of 20 September 2016 being the Calderbank offer referred to in your earlier correspondence.

Unless we receive a positive response to this letter we suggest that we ask Judge Cole to hear and determine our applications for further and better disclosure which have been put on hold pending these settlement discussions.

Should you have any queries please do not hesitate to contact me.

Kind regards
GRIFFINS LAWYERS

GREG GRIFFIN
Direct email: ggriffin@griffins.com.au
Direct line: (08) 8113 5112

GRIFFINS
LAWYERS

Our Ref: 84974GMG

6 January 2017

Mr Michael Durrant
Partner
HWL Ebsworth Lawyers
Level 21, Westpac House
91 King William Street
ADELAIDE SA 5000

By Post & By Email: mdurrant@hwle.com.au

Dear Sir

City of Campbelltown v Caltex Petroleum Pty Ltd
ERD Court Action No 258 of 2015

Further to our recent attendance in the ERD Court before Judge Cole we advise that we have now obtained instructions from Council as to the offer made by it to settle the dispute by the payment of $200,000 by it, all inclusive of costs, in full and final settlement of the claim our client has against it.

We advise that our client has instructed us to reject that offer. Our client remains however willing to engage in settlement discussions with your client in accordance with the previous offer made by letter dated 20 September 2016 which is as you appreciate a Calderbank offer upon which our client will seek to rely in the event that it is forced to go to judgment in this matter and obtains a sum in excess of the offer that it had previously agreed to accept.

Failing the resolution of the matter prior to the next Directions Hearing on 16 February 2017 our instructions are to request that the Court hear and determine the outstanding applications for further and better disclosure as against your client.

We await your response.

Yours faithfully
GRIFFINS LAWYERS

GREG GRIFFIN
Direct email: ggriffin@griffins.com.au
Direct line: (08) 8113 5112