

CONFIDENTIAL – NOT FOR PUBLICATION

CONFIDENTIAL - LEGAL MATTER

WARD: All

RESPONSIBLE DIRECTOR: Mr Garry Hunt
Office of the CEO

FILE NUMBER: 86601

ALT FILE NUMBER:

ATTACHMENTS: Attachment 1 Letter from Minter Ellison dated 13 April 2010
Attachment 2 Letter from Greenland Legal dated 9 March 2010
Attachment 3 Decision of Council of 23 December 2008 and Report JSC5-12/08

PURPOSE

The purpose of this report is to inform Council of recent correspondence received from Turfmaster's legal representatives concerning an offer of settlement in relation to the proceedings which the City has taken against Turfmaster.

EXECUTIVE SUMMARY

Greenland Legal, Turfmaster's lawyers, has written to Minter Ellison, the City's legal representatives, with an offer to settle the proceedings. The offer effectively amounts to an offer for the City to walk away from the proceedings and for each party to bear its own costs. In justification of its offer, Greenland Legal traverses what it considers to be the evidentiary weaknesses of the City's case against its client.

Minter Ellison has prepared an advice in response to the matters raised in the Greenland letter, explaining the implications of the offer, canvassing the options available to the City and providing a progress report on the further conduct of the litigation.

Under the terms of the offer, the City must provide a response to Greenland Legal by Friday 23 April 2010 if it wishes to accept the offer.

Accordingly, Council is required to determine its response to the offer. Senior lawyers from Minter Ellison who have the conduct of the matter will be in attendance to assist Council in its deliberations.

A copy of the letter from Greenland Legal and the Minter Ellison advice dated 13 April 2010 is attached. Incorporated in the Minter Ellison advice is a table which sets out likely timelines and costs associated with each of the various options. The report to Council and the resolution made by Council at the Special Meeting of 23 December 2008 is also attached.

Version No.	Date	Status	Amendments / Comments	Distributed by:

BACKGROUND

Decision to issue proceedings against Turfmaster

At a Special Council Meeting on 23 December 2008, Council resolved to initiate civil proceedings against Turfmaster for damages incurred by the City as a result of what the City alleges was Turfmaster's breach of contract and negligence in applying herbicide in a number of sumps around the City in 2006 which resulted in the extensive death and decline of trees in the vicinity of the sumps. The decision to issue proceedings was taken against the advice of Minter Ellison and against the officer recommendation contained in the Report to Council. The officer recommendation was to authorise the CEO to seek a meeting with Turfmaster to participate in mediation and seek its agreement to negotiate a reimbursement of the City's costs.

Likely cause of tree deaths

Prior to the tree death incidents, which first became apparent in early 2007, the City had engaged Turfmaster to control weeds in and around sumps for a number of years. From 2004 (and in 2005 and 2006), Turfmaster used a new herbicide, *Hexazinone*, for the sump spraying but it was only after the 2006 application (a severe drought year) that tree deaths on an extensive scale occurred. The City obtained expert scientific advice in May 2007 on the likely cause of these events which indicated that they were caused by the *interaction* of the severe drought and the application of *Hexazinone*. This conclusion raised the issue of causation which together with a number of other evidentiary matters pointed to some difficulties in the path of the City succeeding in a case against Turfmaster. These difficulties were canvassed in legal advice obtained from Minter Ellison in August 2008. These matters are again considered in the recent Minter Ellison advice attached to this report.

Costs incurred by City

The City has performed extensive remediation work at considerable expense since 2007. It has also incurred legal expenses in dealing with the Department of Environment over the issue generally.

Since the decision to issue proceedings was taken in December 2008, the City was engaged throughout 2009 in the early stages of the proceedings involving the discovery of documents, the preparation of its statement of claim, responding to the defence filed by Turfmaster, seeking to further expert evidence and refining the issues central to the claim. This work has incurred substantial cost.

Consultation:

The City has consulted with Minter Ellison, the City's legal representatives.

COMMENT

The difficulties inherent in the City's case and the various options available to Council are considered at length in the Minter Ellison advice. It is not intended to repeat those considerations in this report. However Council's attention is drawn to the cost implications of the offer which are dealt with at paragraphs 6 to 12 of the Minter Ellison advice. Given the limited risk of exposure to an indemnity costs order and that the next stage of the proceedings involves mediation in the Supreme Court which will not incur substantial costs, it is recommended that the City reject the offer, obtain further expert evidence and proceed to mediation. The matter can then be reviewed in light of the expert evidence and the course of the mediation.

VOTING REQUIREMENTS

Simple majority

RECOMMENDATION

That Council **AUTHORISES** the CEO to provide instructions to Minter Ellison as follows:

- 1 ADVISE** Greenland Legal that the City rejects the offer made on behalf of Turfmaster; and
- 2 CONTINUE** with the conduct of the proceedings through to mediation in the Supreme Court as currently ordered.

CONFIDENTIAL

13 April 2010

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BY POST

Mr Garry Hunt
Chief Executive Officer
City of Joondalup
Boas Avenue
JOONDALUP WA 6919

Dear Mr Hunt

City of Joondalup v Turfmaster Pty Ltd

1. We refer to our meeting on 31 March 2010 with you and Mr McLaughlin and confirm your instructions to provide advice on the contents of the letter dated 9 March 2010 from Greenland Legal (**Letter**).
2. The Letter sets out the weaknesses that Turfmaster alleges exist with the City's claims. Taken together, the allegations cast doubt upon the City's claims. In particular the Letter deals with the City's claims by considering factors such as the label specifications for *hexazinone*, the likelihood of the City being able to establish that the spraying of *hexazinone* was a material cause of the death and decline in health of trees and shrubs (**Tree Death and Decline**) and the difficulties that Turfmaster perceives in the City's various claims for damages.
3. There are difficulties with the City's claims. The matters discussed in the Letter are, by and large, not new. Most of them were mentioned in our detailed letter of advice dated 5 August 2008 (**Advice**). In our Advice we pointed to significant difficulties in the causation aspects of the City's case, and that is a significant part of the attack made by Turfmaster. It remains a major area of controversy in the City's claim.
4. After making the various assertions about the City's claim, the Letter makes an offer on a *Calderbank* basis that the action be settled by the City discontinuing its claim and each party bearing its own costs.
5. This letter deals with the following:
 - (a) the meaning and effect of a *Calderbank* offer;
 - (b) aspects of the analysis of the City's claim;
 - (c) aspects of the issues of causation and damages;



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SYDNEY MELBOURNE BRISBANE CANBERRA ADELAIDE PERTH GOLD COAST
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- (d) the process of mediation which the Supreme Court procedure has ordered take place;
- (e) the progress being made with expert evidence and the reasons why it is important; and
- (f) the City's position with respect to its insurance.

We will provide advice on costs and timelines shortly.

Calderbank offer

6. A *Calderbank* offer is so called after the case in which its use was sanctioned by the courts. It has an effect on the costs of an action. If a party (**Recipient**) unreasonably rejects a *Calderbank* offer, and at trial does not receive a judgment in terms more favourable to it than the terms of the *Calderbank* offer, the Court can order that the Recipient pay the costs of the other party on an indemnity basis from the date upon which the offer lapsed.
7. The difference from the usual position is that if a party is successful at trial, it will ordinarily be awarded its costs of the proceedings on a party/party basis, which usually results in a recovery of about 50% of costs incurred. If a Court concludes that the Recipient has unreasonably rejected a *Calderbank* offer, it can order that that the Recipient pay the costs of the other party on an indemnity basis, which usually results in a recovery of about 75% to 90% of costs incurred.
8. We have considered whether the offer is a 'true' *Calderbank* offer. The better view is probably that the offer is a *Calderbank* offer.
9. There is authority for an argument that an offer to a plaintiff to discontinue with no order as to costs is not an offer to compromise, and does not carry with it the consequences of a *Calderbank* offer. Despite that, recent Western Australian Supreme Court Authority has held that an offer for judgment to be entered for the offeree with each party bearing its own costs can properly be described as an offer to compromise, because the offeror is giving something away, the costs to which it would otherwise be entitled: *Globaltech Pty Ltd v Pareek* [2006] WASC 30 (S).
10. However, as outlined above, a *Calderbank* offer will not justify an award of indemnity costs unless its rejection was unreasonable. Turfmaster has the onus of demonstrating that the City's refusal to accept the offer was unreasonable.
11. The City's action is a complex one, involving multiple factual scenarios that are not straightforward. There is an argument that because of this uncertainty the Court will not order that the City pay indemnity costs if it is not successful in the action, but there is a risk that such an order would be made.

12. On our view, the City should consider the future conduct of the action on the basis that there is a risk, which is not fanciful, that if it does not do better at trial than the terms of the offer, it will be ordered to pay indemnity costs.

Issues with label specifications

13. The Letter makes the point that the City's claims are largely based upon *hexazinone* being used contrary to its label specification. It should be noted that the City also makes claims based upon the fact that Turfmaster failed to advise the City adequately or at all about remedial measures when the extent of the problems became apparent, which are not dealt with in the Letter.
14. The City need not prove that *hexazinone* was sprayed in the sumps in 2006. Turfmaster admits that it did so, but says that it was directed to do so by the City, and also pleads that it sprayed *hexazinone* in sumps in 2004 and 2005.
15. Because of the evidence that will be given by Trevor Taylor and Dennis Cluning that they agreed to the use of *hexazinone* after discussions with Turfmaster, the City's claim was amended, on Counsel's advice, to plead a variation of the Contract. The variation pleaded is that Turfmaster recommended that the Contract be varied to allow the application of *hexazinone* and, relying on that recommendation, the City agreed to vary the Contract. (There might need to be a further amendment to the statement of claim to make it clear that in relying on the recommendation, the City relied on Turfmaster's expertise.)
16. It is therefore not possible to argue that Turfmaster breached the Contract because it applied *hexazinone*. The facts are that with the knowledge of the City, through its relevant officers, Turfmaster sprayed *hexazinone* in sumps within the City in 2004 and 2005.
17. The label specification for *hexazinone* permits its use in 'Industrial Weed Control Applications'. The letter contends that the application of *hexazinone* in 'sumps' is equivalent to an Industrial Weed Control Application and that there is therefore doubt about whether the use of *hexazinone* in sumps is an off-label use.
18. There is some doubt about the classification of sumps and consequently whether the application of *hexazinone* in sumps is contrary to the label specification. We incline to the view that it is, but we will need to discuss this matter with an expert.
19. The letter also points to the fact that the Departments of Health and Agriculture in Western Australia (the bodies responsible for prosecuting cases of off-label use of chemicals) (Departments) have not prosecuted Turfmaster because of this uncertainty over the classification of sumps. We do not know whether this is the case. Such decisions by the Departments (if they in fact have been made) is a matter that has an effect on the City's claims, but those decisions (including because of the different standards of proof that apply) are not of themselves determinative of the question whether the application of *hexazinone* in sumps was contrary to label specification.

20. The City also claims that Turfmaster breached its contract because it breached the label warning not to apply *hexazinone* within a distance of two times the height of a tree (**Tree Height Requirement**). Turfmaster says that because the Contract required the application of herbicides from fence line to fence line of the sumps, the City's argument is made difficult. Further the Letter also notes that two chemicals specified for application in the Contract, *simazine* and *sulfometuron*, contain warnings similar to the Tree Height Requirement and that Turfmaster applied these herbicides on behalf of the City for more than a decade (thereby ignoring that warning) without any apparent untoward incident. These latter allegations are not currently part of Turfmaster's defence.
21. Each of the matters identified above do impact upon the strength of the City's claim. While none of them alone is fatal to the City's claim, they are matters that make the City's prospects of success more uncertain.

Causation

22. Turfmaster contends that the applications of *hexazinone* in sumps in 2004 and 2005 without any adverse effects, coupled with the drought in 2006, makes the City's task of establishing that the application of *hexazinone* in 2006 caused the Tree Death and Decline difficult. Its argument is that the drought in 2006 appears to have been an anomaly and that therefore, combined with the 2004 and 2005 sprayings of no ill effect, Turfmaster could not reasonably have foreseen the extreme drought at the time it sprayed the sumps, in 2006.
23. It also points to:
 - (a) deaths of trees in Kings Park and an assessed loss of 20% of trees at Wireless Hill;
 - (b) the sustained high temperatures (over 45 degree Celsius) during late 2006; and
 - (c) the occurrence of dramatic death and decline of desirable trees and shrubs in areas within both the City and the City of Stirling in sumps which had not been sprayed;as evidence suggesting that climate and not *hexazinone* was the cause of the Tree Death and Decline, thus making the City's case more difficult to establish.
24. We note that Messrs Sandral and Banks conclude that there was a statistically significant difference in the Tree Death and Decline observed in sumps that had been sprayed when compared with sumps that had not been sprayed.
25. These problems were discussed in our Advice when we said that there was doubt about the major cause of the Tree Death and Decline, with the City's experts suggesting that the extreme drought in 2006 was a major catalyst of the decline and death of trees and shrubs. The spraying of sumps with *hexazinone* in 2004 and 2005 without any apparent ill effects creates a reasonably

significant risk that the use of *hexazinone* was not a major cause of the deaths and decline.

26. Assuming for the moment that the City will succeed in its arguments that Turfmaster applied *hexazinone* in a manner contrary to the label specification:
 - (a) in its contractual claim, the City must establish that it was reasonably foreseeable that the Tree Death and Decline would result if Turfmaster breached the Contract by applying *hexazinone* contrary to label specifications; and
 - (b) in its negligence claim, the City must establish that if Turfmaster negligently applied *hexazinone*, that was more probable than not the reason for the Tree Death and Decline.
27. There is a real risk that the City will not be able to do that, at least without further expert evidence, a matter to which we refer below.
28. Turfmaster also points to evidential difficulties relating to the proof of the existence of *hexazinone* which will have to be dealt with if the action continues.

Damages

29. If the City establishes liability, it will not recover all that it has spent in relation to the spraying issue.
30. Turfmaster says that Mr Sandral believed that the requirements of the DEC were excessive and that the City ought to have challenged the requirements of the DEC earlier than it did so. It suggests that an earlier meeting between the CEO and the head of the DEC is likely to have reduced costs.
31. We have previously advised that some of the expenses incurred as a result of DEC requirements and work to avoid the classification of sites is recoverable, and we maintain that view, particularly if it can be demonstrated that without such work, more of the sites may have been classified under the *Contaminated Sites Act 2003* which would have lead to significantly increased costs.
32. If the Court concludes that Turfmaster is liable, it will not quickly agree with allegations that the City failed to mitigate loss caused by Turfmaster's fault, and will not use hindsight to conclude that the amounts expended by the City were unreasonable. But it will scrutinise the amounts claimed to ensure that they are reasonable.
33. Turfmaster also says that legal fees incurred in dealing with the DEC, in dealing with Turfmaster's FOI application and in supervising the inspection of the City's documents by Turfmaster's solicitors will not be recovered to any great extent. We believe that the City will recover a proportion of the legal fees it incurred in dealing with DEC and the FOI application – the extent of the recovery is not certain. We do not think that the City will recover anything for the legal costs incurred in supervising the inspection of documents.

Mediation and other matters

34. The Court has ordered that the parties participate in a mediation to take place on a date after 10 June 2010. If the parties cannot otherwise settle the action, the mediation must occur because the Court has made that order.
35. Mediation is part of the normal court process. The Court's experience is that well over 90% of cases settle at mediation.
36. The mediation will be conducted by a Registrar of the Supreme Court who is an accredited mediator. It will be attended by representatives of the parties and their lawyers. The representatives who attend the mediation must have authority to settle the action.
37. A mediation begins with the parties together in a room with the mediator and their respective lawyers. The plaintiff, ordinarily through its lawyers, makes an opening statement to which the defendant responds. What occurs thereafter is generally up to the parties and the mediator. Often the mediator will speak to the parties separately to discuss their views, which the mediator may or may not be permitted to disclose to the other party.
38. Unless the City wishes to accept the current offer, it should participate in the mediation.
39. A failure to accept the current offer will mean that Turfmaster will make the various interlocutory applications set out in the Letter. As to those applications:
 - (a) it may be that the City cannot provide particulars of the number, location and distance from sumps of trees in and trees around sumps, which have either died or declined. If it cannot, the quantum of its claim might be affected, but it should not prevent the mediation from taking place;
 - (b) if Greenland Legal will identify the descriptions of privileged documents that it says are insufficient and the City through us agrees the descriptions are not sufficient, the City should correct those descriptions;
 - (c) the City has not claimed privilege where the only basis for doing so is the involvement of Ms Cheng;
 - (d) if the City has relevant documents in its possession which have not been discovered those documents must be discovered. The Letter refers specifically to diaries from 2004 of Dennis Cluning, Dave Djulbic, the CEO, the Mayor and Ms Cheng. We are instructed that apart from Mr Djulbic who may have taken his diaries with him when he left his employment with the City, no diaries exist;
 - (e) the letter refers to a report from Messrs Sandral and Banks which pre-dates the report we have (**First Report**). Turfmaster alleges that

the First Report, which was a 'final report', concludes that the Tree Death and Decline was due to the drought in 2006. It also alleges that there were 5 copies of the First Report which Trevor Taylor (now employed by Turfmaster) collected from Mr Banks and handed to Dave Djulbic. In his first affidavit of discovery, the CEO disclosed the fact that the First Report had existed, but that it could no longer be found. We have discussed the circumstances surrounding the First Report with Ms Cheng and Messrs Sandral and Banks. None of them have a physical copy. Messrs Sandral and Banks do not have an electronic copy and believe that later versions of the report were saved over the top of the First Report. The City is likely to have to swear a further affidavit concerning the circumstances surrounding the First Report and what happened to the copies of it.

40. Turfmaster has said that if the City does not accept the offer, it will take advice on whether, if the Court finds that Turfmaster is not liable to the City, it has causes of action against the City for damages:
- (a) for defamation against the City or relevant personnel or both by reason of the '*...high profile, high-handed, secretive and deceptive manner in which the city has conducted itself...*' to date. We are not entirely sure what Turfmaster is referring to. If the action were commenced for proper reasons, we doubt that the City could, for commencing and continuing proceedings alone, be taken to have defamed Turfmaster. If the City, councillors or staff have made comments about the action and Turfmaster's performance outside of the Court process, then there may be some risk to the City or its personnel of an action for defamation;
 - (b) for the City's '*...deliberate and targeted exclusion of Turfmaster from the public tendering process involving services to ...*' the City. We have previously provided advice to the City on its ability not to award a contract to Turfmaster where it submitted the only response to a RFT issued by the City. We said then that if the RFT included in the specified selection criteria the ability to consider whether a respondent had a satisfactory record of fulfilling previous contracts with the City, that criterion would be an acceptable basis upon which to refuse to award a contract to Turfmaster. We still believe that advice is valid. In some cases a refusal to deal may be a breach of the *Trade Practices Act 1974 (Act)*. We doubt that this is a relevant issue in this case because the City is unlikely to have the requisite degree of market power to infringe against that Act; and
 - (c) for the City's breach of the arbitration clause in the Contract. The Contract was terminated before action was commenced and arguably the agreement to arbitrate ended when the Contract was terminated. Further, the usual 'remedy' when a party ignores an arbitration clause in a contract is that the other party may apply for a stay of the proceedings and require the matter to proceed by way of

arbitration. Turfmaster chose not to do this, and the Court is unlikely to contemplate an award of damages in this case.

Expert evidence

41. Further expert evidence is essential to the City's case. The City cannot proceed to trial without it.
42. The expert evidence currently available to the City concludes that the drought in 2006 was a major catalyst for the Tree Death and Decline. As noted above in the discussion under causation, the City must establish that the spraying of hexazinone was causative, in a legal sense, of the Tree Death and Decline. The current report by Messrs Sandral and Banks leaves that question open.
43. In any trial, the City will also need to deal with the allegation that the First Report concluded that the drought was the reason for the Tree Death and Decline. The City can expect detailed questioning of Messrs Sandral and Banks on why they changed their conclusions as to the cause of the Tree Death and Decline.
44. Further, neither of the authors of the report are experts in herbicides. Mr Sandral does have experience with herbicides but he is more properly described as a general scientist, rather than as an expert in herbicides. Consequently, his credentials (and therefore ability to make robust, defensible statements about the risks and dangers of *hexazinone*) may be called into question.
45. We have encountered difficulties in obtaining properly qualified independent expert opinions on the use of *hexazinone*. Greenland Legal have also stated that they are now briefing their 3rd expert due to complexities of the matter and the herbicide itself.
46. The report obtained from Mr Peirce was unsatisfactory. We therefore approached scientists from DuPont and Macspred to provide expert evidence, but could not persuade them to do so. We then spoke to Dr Stephen Powles and Dr Terry Piper.
47. Dr Powles confirmed he had already been engaged in part to provide expert evidence for Turfmaster. He said that therefore he would not be able to assist the City.
48. We are now dealing with Dr Terry Piper to provide an expert report, and are waiting for him to return the deed of confidentiality which we have sent him.

Insurance

49. The City has notified its insurer about the issue and we have, on instruction from the City, kept its insurers advised about progress being made in the action.

50. We are not aware of any express requirement to seek the consent of the City's insurers to either continue with or settle the action. It would however be prudent to do so.
51. We have not been provided with a copy of the City's policy of insurance and cannot, at this stage, advise further on the question of the application or otherwise of the City's policy.

Yours faithfully
MINTER ELLISON



**City of Joondalup v Turfmaster
CIV 1101 of 2009**

Estimated costs and timeline

Option		Costs		Timeline	
	<p>The City could choose to accept Turfmaster's settlement offer that the City discontinue its action and each party bears its own costs.</p>	<p><u>\$3,000</u></p> <p>If the offer were to be accepted immediately, we anticipate the City would incur these costs in preparing and negotiating a deed of settlement with Turfmaster.</p>	<p><u>1 month</u></p> <p>The preparation and negotiation of a deed of settlement could happen quite quickly.</p>		
<p><u>Counter Offer</u></p>	<p>An alternative option would be for the City to make an alternative counter offer. The terms of any counteroffer the City may wish to have are entirely at its discretion. For example, they could include requiring Turfmaster:</p> <ul style="list-style-type: none"> • to pay a proportion of the City's legal fees; • a proportion of fees incurred in 	<p><u>\$6,000 - \$15,000</u></p> <p>We have not raised the possibility of a counter claim with Turfmaster's lawyers. Turfmaster may refuse to entertain a counter offer.</p> <p>The costs will be depend upon whether the City's counter offer is accepted or whether the parties then conduct negotiations to attempt to resolve the claim.</p>	<p><u>2-6 weeks</u></p> <p>The formulation of a counter offer is likely to take 2 weeks.</p> <p>If Turfmaster accepts the counter offer the matter can be completed quickly.</p> <p>If Turfmaster is prepared to negotiate, it is conceivable that the negotiations could continue for a further month, possibly longer.</p>		

Option	Costs	Timeline
<p>dealing with experts and government agencies; and / or</p> <ul style="list-style-type: none"> a written statement to provide that it applied hexazinone contrary to label specification, or something similar, which could be made publicly available. 	<p>\$18,000 - \$30,000</p> <p>The cost estimate includes dealing with the foreshadowed interlocutory applications and preparing for and attending the mediation, including discussions with the City's experts.</p> <p>The range in costs reflects the fact that there may argued applications in Court before mediation (although we recommend that the interlocutory matters be resolved by agreement where that can reasonably be done) and the uncertainties with respect to timing.</p>	<p><u>July - September 2010</u></p> <p>The mediation is listed to occur on a date not before 14 June 2010.</p> <p>We are awaiting Turfmaster's available dates for the mediation. Once they are received, the date for the mediation will be arranged to accommodate the respective availabilities of the Court, the parties and their legal representatives.</p> <p>In our view, the mediation will last for at least one day. If agreement is not reached on the day but the parties wish to continue discussions, or even if agreement is</p>
<p><u>Offer not accepted and action settled at mediation</u></p>	<p>The City rejects Turfmaster's offer and proceeds to mediation where the action is settled on a basis that is acceptable to the parties.</p> <p>The risk is that Turfmaster does not repeat the offer currently made, or any offer.</p>	

Option	Costs	Timeline
	<p>If the City were to accept the current settlement offer at mediation, there is a risk that it may have to pay Turfmaster's legal costs on an indemnity basis from the time that offer lapses (being 23 April 2010) until any agreement is reached. This is because by then, the current settlement offer – made on a <i>Calderbank</i> basis – would have lapsed.</p> <p>We outlined the effect of a <i>Calderbank</i> offer in our letter of advice dated 13 April 2010.</p> <p>Any settlement at mediation should therefore include an express term that the City is not liable for any indemnity costs.</p>	<p>unlikely but further discussions will help narrow issues closer to trial (thereby saving the City time and money), the mediation can be adjourned.</p>
<p>Offer not accepted, <u>action not settled at mediation and proceeds to trial</u></p>	<p><u>\$140,000 - \$160,000</u></p> <p>In our letter of 4 September 2009, we a revised estimate of costs from the date of that letter up to and including trial, in the amount of \$252,000 exclusive of GST and disbursements.</p> <p>The City has incurred a further \$79,340.77 in costs, exclusive of GST and disbursements for work done post 4 September 2010.</p> <p>The estimate in our letter of 4 September 2009 did not include an estimate of costs in relation to the numerous interlocutory applications foreshadowed by Turfmaster in its letter of 9 March 2010.</p> <p>At that time, those applications were not foreseen.</p>	<p><u>Likely to be early 2011, but possibly earlier</u></p> <p>We estimate that the City's trial will take at least 7 days, but it may well be more.</p> <p>If action proceeds to trial, we cannot say with certainty when a trial will occur. We have spoke to the Listings section of the Supreme Court of Western Australia who say that the all trails for 2101 have been programmed already.</p> <p>While cases can, and do, settle thus freeing up space, our best estimate at the moment is that the trial will occur in the first half of 2011.</p> <p>If the action proceeds to trial, the City should apply to move the action to the Commercial and Managed Cases</p>

Option	Costs	Timeline
	<p>If the City defends all of applications foreshadowed by Turfmaster (which we do not recommend), we estimate that the City will incur a further \$30,000 in costs in doing so, exclusive of GST and disbursements.</p> <p>All litigation is generally expensive and the result is uncertain. Our views on the City's case have been set out in our advices to the City.</p> <p>If the City is unsuccessful, the best position for it will be that it has to pay Turfmaster's costs on a party/party basis.</p> <p>AS noted in our advice of 13 April 2010, that the City could be ordered to pay Turfmaster's costs on an indemnity basis.</p>	<p>List (CMC List). Cases on the CMC List are actively managed by a Judge and delays are thought to be minimised. We have not recommended this to the City previously, because of the time it is taking to obtain further expert evidence.</p>

*Costs are those additional to what has already been spent

PERM

9 March 2010

Your Ref: MSF:60-1349719
Our Ref: MLG/GN/bm/10005

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**CONFIRMATION OF
FACSIMILE TRANSMISSION**

Without Prejudice Save as to Costs

**City of Joondalup v Turfmaster Pty Ltd
Supreme Court of Western Australia CIV 1101/2009**

We refer to the above matter and advise that we are instructed to offer on *Calderbank* terms, that our client will bear its own costs if your client agrees to a dismissal of its claim against our client.

The reasons why your client should seriously consider accepting this offer include the following, which is based on our instructions and present understanding of the facts.

Label Indications

1. Your client's causes of action are effectively based upon alleged breaches of the MacSpred product label by our client. Effectively, the label contains two indications and two contra-indications for use. The indications are *Pinus Radiata* forests and industrial type situations ("industrial sites").
2. As you probably know, the APVMA is the body charged with regulating the registration of chemicals, including their concomitant labelling. However, in Western Australia, the bodies charged with prosecuting chemical users for label infringements, are the Department of Agriculture and the Department of Health, who have declined to prosecute Turfmaster, concluding that the issue of whether sumps were industrial sites was a "grey area".
3. The APVMA glossary of labelling terms did not and does not refer to "sumps" and accordingly, *prima facie*, it would appear that the use of ANY herbicide within sumps would *ipso facto* be an off label use of that herbicide. Before and since the 2004/05/06 spraying of Hexazinone in sumps, your client sprayed, and continues to spray, herbicides in sumps, when those chemicals' labels do not indicate that use either, nor does your client have any permit to use those chemicals "off label".
4. We acknowledge that Gaye Weller at the APVMA drafted a letter which concluded that the use of Hexazinone in sumps appeared to be an off label use, however, also note that she is a relatively junior staff member at the APVMA. The APVMA's General Counsel, James Suter, has been quoted as

saying that the labelling code is not an exhaustive list, and is merely a guide to possible uses.

5. Sumps perform an industrial function, namely to filter and drain runoff water, which contains collected contaminants such as heavy metals from vehicle exhausts, road film, oils, domestic fertilisers, domestic herbicides, and miscellaneous debris. Indeed, some sumps periodically require manual removal of these filtered contaminants. Your client's stated objective was to achieve "brown bread" within sumps (ie the total eradication of vegetation) so as to allow them to perform their function efficiently.
6. We can see no relevant difference between a sump, and for instance, a gravel road running along the perimeter of a refinery which abuts natural bushland (which has trees whose roots extend under the road). On your client's view, applying Hexazinone on this road would be a label indicated use, as the refinery is an industrial site. The point is that even sites which are undoubtedly industrial, will often have a perimeter interface with the "desirable environment", yet that does not change the site's function/ character/ classification from industrial. Sumps, too, have such a perimeter interface, but in our view, that fact does not change their function/ character/ classification either.
7. We note that when the DEC asked your client how it classified sumps (in light of the industrial site issue), your client was itself unsure, and eventually retreated to drawing correlations from its own town planning scheme, with which our client is not familiar. It seems that the DEC is also confused about the industrial site issue.
8. In short, it is far from clear that our client's use of Hexazinone was off label as regards use indications.

Label Contra-indications

9. The label's contra-indications relate to avoiding direct or indirect contact with the root zone of desirable trees and shrubs, which is roughly twice the height of the plant.
10. However, the contract required our client to apply the chemical evenly in the sumps from fence line to fence line.
11. The product labels for Simazine and Sulfometuron both contain similar warnings (to that of Hexazinone's) about directly or indirectly applying those chemicals within the root zone of desirable trees and shrubs, yet your client had, by our client, done exactly that for more than a decade without apparent untoward incident.

12. Also, in the relevant year, namely 2006, the 2004/2005 Hexazinone applications were regarded by both parties to have fully achieved their objectives without any problems. Neither party thus had any reason to expect any untoward result from repeating the 2005 Hexazinone application in 2006, notwithstanding the label contra-indications. Obviously, neither party could foresee that 2006 would be the driest year ever recorded in Perth.
13. Your client, by Dennis Cluning, knew of the potential of Hexazinone to damage trees whose roots extended into sumps, due to experience in the late 1980s when he instructed Kim Evans that the sumps were to be "brown bread" and that if any trees died, then so be it. Dennis Cluning subsequently informed Kim Evans that he had "taken some flak" from some members of your client, or its predecessor, about some trees which died, but that from an engineering department perspective, Cluning preferred to take the flak rather than have the trees within sumps. Notwithstanding this experience, your client's tender document required the even application of the contractually specified chemicals from fence line to fence line, subsequently verbally varied by Trevor Taylor to substitute Hexazinone for Sulfometuron, Simazine, and Glyphosate.
14. Given your client's abandonment of its allegation that our client applied Hexazinone around sumps, there is no apparent reason to think that surface flow of water washed Hexazinone into areas where the roots of desirable trees or shrubs extended. This is because sumps, by design, are lower than surrounding areas.

Causation

15. In our view, the successful applications of Hexazinone in sumps in 2004/2005, coupled with 2006 being the driest year in Perth's recorded history, pose significant difficulties for your client, which bears the onus of proof.
16. We understand that your client's expert, Mr Sandral, initially wrote a "final" report which attributed the flora loss to the drought rather than the spraying. We note that your client has failed to provide us with this report and that your client's CEO has sworn that he cannot obtain a copy. He can expect to be cross examined on that statement, in detail.
17. Given that the 2006 year appears to have been an anomaly, we doubt whether that climatic event could be considered foreseeable by our client, and accordingly, we doubt that a court would find that our client ought to have factored in an extremely remote 1:100 year event into its decision to suggest the use of Hexazinone to achieve your client's objectives.
18. The drought was unprecedented, and we note that there were widespread reports of death and decline of trees and shrubs around the State, in areas which could not be said to have been impacted upon by Hexazinone. Some

examples of this include the assessed 20% loss of trees at Wireless Hill, and the trees at Kings Park.

19. As you are probably aware, trees are able to withstand relatively high temperatures, but become exceedingly stressed at temperatures over 45 degrees Centigrade. Apart from the drought, we understand that in late 2006 there were successive days where the temperature exceeded 45 degrees Centigrade, and that this killed many desirable trees and shrubs even in areas which could not be said to have been impacted upon by Hexazinone. Indeed, we understand that presently, the trees in your client's parks and reserves show a 20 to 50% incidence of death and decline as a result of the recent high temperatures. We presume that your client will not seek to attribute those losses to our client's spraying of Hexazinone in 2004, 2005 and 2006.
20. We also note that your client has some evidential issues related to causation, including the following:
 - (a) Both in the City of Stirling and the City of Joondalup, there was sometimes dramatic death and decline of desirable trees and shrubs in sumps which had NOT been sprayed, and apparently no damage in several sumps which had been sprayed;
 - (b) WA Chemistry Centre does not appear to have been certified to test for Hexazinone;
 - (c) The Eastern States laboratories that tested samples for Hexazinone had to develop new tests to do so, which obviously raises doubts about the reliability and accuracy of the groundbreaking results obtained;
21. There appears to be considerable disagreement between DEC, Sandral, and Environ/ GHD regarding causation.
22. Sandral expressed reservations about whether the methodologies employed by your client when surveying the sumps in 2007, 2008 and 2009 would withstand scrutiny;
23. From our inspection of your client's documents, we note that there were many instances of death and decline of desirable trees and shrubs unrelated to herbicides, drought, and high temperatures, including that attributable to:
 - (i) natural attrition;
 - (ii) disease;
 - (iii) insects;
 - (iv) the unexplained, but well documented, phenomenon of Tuarts dying in Western Australia,

- (v) pathogens such as honey fungus and the root rotting fungus, cinnamon fungus.
24. The alleged *up gradient* migration of Hexazinone from sumps is not, in our view, adequately explained by Sandra's hypothesis that preferential water channels account for this phenomenon.
25. Regarding leaf tissue testing for Hexazinone residue taken from trees adjacent to sprayed drainage sumps, we note that the tree selection procedures seem skewed towards proving that Hexazinone entered ground water, as opposed to being taken up from the sumps by the roots of drought affected trees (which would have absorbed any other herbicide applied directly in the sumps). In particular, the (negative result) control samples are located further than 100m, in some cases 170m, upstream from the relevant sump, whereas (positive result) samples are taken 15 - 69m downstream from sumps, with the majority of positive result trees being well within their root zone from the relevant sump.

What Would Have Occurred if Turfmaster had Continued to Apply the Contractually Specified Chemicals?

26. We have already mentioned above that the contractually specified chemicals' labels contained similar warnings to those on Hexazinone's label ("label equivalency point").
27. However, more important is factual causative equivalency in the then prevailing conditions. Our client will establish at trial that to the extent that any death or decline was caused or contributed to by the use of Hexazinone, the same damage would have occurred if our client had adhered to the contractually specified chemicals, for the following reasons:
- (a) The City's specified application rate of Sulfometuron methyl translates to 450 grams of active ingredient per hectare, which is 7.5 to 20 times the rate used in eucalyptus plantations to eradicate competing weeds.
- (b) The contractually specified application rate of Simazine for sumps in the City translates to 9kg active ingredient per hectare, which is at least twice the rate generally used to eradicate competing weeds in plantations.
- (c) The preceding decade's use of Sulfometuron would have pruned the fine hairs on tree roots which penetrated the sumps. This would limit the uptake of moisture and nutrients from the soil, thereby stressing the trees to begin with, even in normal years.
- (d) The extreme drought in 2006, coupled with successive days of extremely high temperatures, further stressed the trees, severely.

- (e) If Sulfometuron and Simazine had been applied at the rates contractually required (which an expert we consulted characterized as "*ridiculously high*") in those conditions, those chemicals would have remained active in the soil for much longer, and at more potent concentrations, than usual, and whenever some rain fell, they would be reactivated. This meant that the chemical effect would have lingered, whereas with normal rainfall, the effect would have been of much shorter duration, as the chemicals were diluted and leached away into the soil.
- (f) In the high heat conditions which prevailed, eucalypts in particular transpire much more than usual (unlike some species which shut down in high temperatures) which dramatically increases the amount of herbicide absorbed.
- (g) This explains why in normal years, the contractually specified chemicals did not result in noticeable death or decline of desirable trees and plants.
- (h) To the extent that your client alleges that Hexazinone's increased mobility over Simazine in soil contributed to the problem, remember that Sulfometuron is just as mobile as Hexazinone, but far more toxic to humans, hence the Health Department's circular PSC88, which endorsed Hexazinone.
- (i) We also note that as a result of this incident, your client banned outright the use of Simazine in its jurisdiction, and intended to petition the federal government to do likewise.

Arbitration

- 28. Your client has chosen to litigate, in breach of its own Tender document which required that such disputes be arbitrated.

Quantum

- 29. In our view, your client faces significant hurdles in proving the amount of its claim, including:
- 30. Sandral opined that DEC's requirements of your client were excessive, and we would argue that to the extent that your client's claim relates to complying with directives issued by DEC, these ought to have been challenged much earlier than they were. Many of the DEC's requirements were novel, and an earlier meeting between the respective heads of the City and DEC (as subsequently occurred), would probably have served to dramatically reduce quantum.

31. To the extent that your client's claim relates to costs involved in removing and replacing trees on private properties, we doubt that it had any legal standing or obligation to do so. If Turfmaster's spraying of Hexazinone caused any damage to private property, the City would ordinarily not be liable for the acts of an ostensibly competent contractor, except of course to the extent of any contributory negligence in not apprising itself of the chemical properties of Hexazinone before agreeing to its use.
32. We also point out that with regard to issues of reliance on Turfmaster, your client was not the proverbial "babe in the woods", but previously had, and now has, an in-house spraying program, which included a library of material safety data sheets and labels relating to herbicides.
33. If your client is successful at trial, it will recover on taxation a fraction of its legal fees expended to date. With respect, we submit that some of the City's legal fees were unnecessarily incurred, especially any related to dealing with the DEC, and attempting to thwart our client's Freedom of Information attempts to obtain information from the City and DEC.
34. Given the manner in which the City of Stirling dealt with the same problem, although possibly on a smaller scale, your client's high profile, apparently politically motivated decision to pursue our client, is something which would need to be scrutinised at some length to determine reasonableness.
35. In addition, to the extent that your client's legal fees relate to costs involved in effectively standing guard over us whilst we inspected your client's documents at your offices, we would argue that those costs were unnecessarily incurred too, especially considering that we were able to inadvertently uplift and upload some of your client's privileged documents under the direct supervision of your staff.
36. We would resist any claim that relates to attempting to recover the costs of the Glutathione tree injections, given that your client's first mitigation attempts occurred 14 months after damage manifested (unlike the City of Stirling, which lopped off affected branches and thereby saved many of its trees). In addition, the Glutathione appears to have been untried ("a world first"), in circumstances where your client's Chief Executive Officer was the Chairman of Murdoch Link Pty Ltd, whom we understand proposed the Glutathione.
37. Your client will find it difficult to quantify any claim for damaged trees, since they recover, and it is not clear to us that any value can be ascribed to damage which does not require replacement of the tree.

Interlocutory Applications

38. Notwithstanding Registrar Boyle's indication that any applications would be viewed in light of the question "*How does this advance the mediation?*", if the

matter does proceed to trial, we foreshadow interlocutory applications as follows:

- (a) Obtaining the further and better particulars related to the number, location and distance from sumps (where relevant) of trees in and trees around sumps, which we expect will be very onerous and costly to your client, assuming it is possible at all. Further, your client will need to distinguish damaged trees from killed trees. This is obviously highly relevant to quantum and causation.
- (b) Applications related to the description of documents in your client's formal list, both privileged and non-privileged. For example, many of your client's non-privileged documents are expressed to be "*email from A to B with attachment*". There is often no attachment, and secondly, where the attachment is the substantive document, it ought to be described properly so as to enable our client to navigate with reasonable ease and expedition to any particular document in your client's extremely large list.
- (c) In addition, in order for our client to properly assess your client's 900-odd claims for privilege, those documents will need to be properly described so as to enable us to determine the basis of the claim for privilege.
- (d) We also foreshadow an application challenging any privilege claimed in respect of Julie Cheng's status as (ostensibly) in-house Counsel, but in fact Principal Legal and Compliance Officer (and who has now left the City's employ).
- (e) We also intend to challenge several of the claims for privilege, starting with those that predate by one and a half years the first reports of tree damage post the 2006 Hexazinone application.
- (f) There is also a multitude of documents missing from your client's discovery list, most notably the diaries from 2004 onwards of Trevor Taylor's line management, including Dennis Cluning, Dave Djulbic, the Chief Executive Officer, the Mayor, and Julie Cheng.
- (g) We also foreshadow requiring an affidavit from your client's Chief Executive Officer explaining the circumstances in which the five copies of Sandral and Banks' first report (which largely served to exonerate our client, and which were personally collected by Trevor Taylor from John Banks, handed to Dave Djulbic, and later reviewed in a meeting between *inter alia* your client's CEO and Trevor Taylor) inexplicably went missing and are no longer within the City's custody, control or power.

- (h) We are considering an application on behalf of Mr Taylor to compel the production to him of his signed statement, which you have declined to give him.

Defamation

39. Our client instructs that if the matter proceeds to trial, and our client is found not liable to your client, in addition to the usual costs consequences which follow such an event, (especially considering this *Calderbank* offer), Kim Evans intends to seek McCusker QC's opinion on:
- (a) the merits of pursuing a defamation action against your client and/or its relevant personnel, given the high profile, high handed, secretive, and deceptive manner in which your client has conducted itself in this matter to date; and
 - (b) whether Turfmaster Pty Ltd has any cause of action against your client, based on your client's deliberate and targeted exclusion of Turfmaster from the public tendering process involving services to your local authority client.
40. However, if your client agrees to a dismissal of its claim against our client, and undertakes to evaluate future conforming tenders from Turfmaster on their merits, then our client will undertake not to pursue the causes of action contemplated in 39(a) and (b) above, or any cause of action based on your client's breach of the arbitration clause in its contract with Turfmaster.

Conclusion

41. The above represents merely some of the reasons why your client should consider accepting our client's offer. The offer is open for 30 days from the date of this letter.

GREENLAND LEGAL PTY LTD

Per:


MARK GREENLAND

Email: greenland@greenbro.com.au
northmore@greenbro.com.au

cc: WFI
Att: Heather Kerr
Ref: 2831175 by email

MOTION TO GO BEHIND CLOSED DOORS - [02154] [29610]

MOVED Mayor Pickard, **SECONDED** Cr Young that in accordance with section 5.23 of the Local Government Act 1995 and clause 67 of the City of Joondalup's Standing Orders Local Law 2005, this Meeting of the Council sit behind closed doors to consider Item JCS5-12/08 – Confidential Report – Legal matter relating to a past contract as legal advice has been obtained which relates to the matter under discussion, with the following employees and persons being in attendance:

- Chief Executive Officer - Mr Garry Hunt
- Director Governance & Strategy - Mr Ian Cowie
- Director Infrastructure Services - Mr Martyn Glover
- Principal Legal and Compliance Advisor - Ms Julie Cheng
- Administrative Secretary - Mrs Lesley Taylor
- Mr Michael Ferguson, Partner – Minter Ellison
- Mrs Cheryl Edwardes, Special Counsel – Minter Ellison
- Ms Margie Tannock, Senior Associate - Minter Ellison

The Motion was Put and

CARRIED (11/0)

In favour of the Motion: Mayor Pickard, Crs Amphlett, Corr, Fishwick, Hart, Hollywood, John, Macdonald, McLean, Norman and Young.

The member of the public present left the Chamber at this point, the time being 1842 hrs.

JSC5-12/08 CONFIDENTIAL REPORT – LEGAL MATTER

WARD: All

RESPONSIBLE DIRECTOR: Mr Garry Hunt
Chief Executive Officer

This Item is Confidential – Not for Publication

A full report was provided to Elected Members under separate cover.

MOVED Mayor Pickard, **SECONDED** Cr Amphlett that Council:

- 1 AUTHORISES** the Chief Executive Officer to commence legal proceedings in the Supreme Court of Western Australia against Turfmaster Pty Ltd for breach of contract;
- 2 In taking the legal action, seek a determination from the Supreme Court of Western Australia that Turfmaster Pty Ltd should replace significant native trees on a 'like for like' basis.**

Mayor Pickard provided the following reasons for his departure from the Officer's Recommendation:

- It is incumbent on the City to seek restitution from the contractor in a public forum which allows the inappropriate behaviour to be exposed.
- The significant damage caused to the City's property and native flora.
- The potential damage to the reputation of the City of Joondalup.

Discussion ensued.

The Motion was Put and

CARRIED (6/5)

In favour of the Motion: Mayor Pickard, Crs Amphlett, Hollywood, John, Macdonald and Norman
Against the Motion: Crs Corr, Fishwick, Hart, McLean and Young

MOTION TO GO TO OPEN DOORS - [02154] [29610]

MOVED Mayor Pickard, SECONDED Cr Young that in accordance with clause 67 of the City of Joondalup's Standing Orders Local Law 2005, the Meeting of Council be held with open doors, the time being 2045 hrs.

The Motion was Put and

CARRIED (11/0)

In favour of the Motion: Mayor Pickard, Crs Amphlett, Corr, Fishwick, Hart, Hollywood, John, Macdonald, McLean, Norman and Young.

No member of the public was present in the Chamber at this time.

In accordance with the City's Standing Orders Local Law 2005, Mayor Pickard read aloud the motion in relation to JSC5-12/08 – Confidential Report – Legal Matter.

CLOSURE

There being no further business, the Mayor declared the Meeting closed at 2049 hrs; the following Elected Members being present at that time:

MAYOR T PICKARD
Cr KERRY HOLLYWOOD
Cr TOM MCLEAN
Cr TRONA YOUNG
Cr MARIE MACDONALD
Cr GEOFF AMPHLETT
Cr MICHELE JOHN
Cr MIKE NORMAN
Cr SUE HART
Cr BRIAN CORR
Cr RUSS FISHWICK

MEETING DATE: 23 December 2008

**JSC5-12/08 CITY'S CLAIM AGAINST TURFMASTER PTY LTD -
TREE DEATHS AND DECLINE IN AND AROUND
DRAINAGE SUMPS**

86601

WARD: All

RESPONSIBLE Garry Hunt
DIRECTOR: Office of the Chief Executive Officer

PURPOSE

To advise Council of the City's legal position with respect to the contractual dispute with Turfmaster Pty Ltd (**Turfmaster**). The report identifies various options for proceeding. There is no right or wrong way to proceed. However, this report recommends the option which is most likely to minimise both financial and reputational risk to the City.

EXECUTIVE SUMMARY

The City has been engaged in dealing with issues involving tree deaths in and around drainage sumps which the City alleges has been caused by Turfmaster's application of a residual herbicide. The City has reached the point where it wants to decide whether to issue a claim against Turfmaster and Council is required to consider advice from the City's solicitors in respect to the City's legal position.

In May 2006, the City engaged Turfmaster to spray drainage sumps for weeds. From September 2006, the problem of tree deaths in and around drainage sumps started to emerge. By early 2007, it was clear there was a large scale problem and that the City of Stirling, who had engaged the same contractor to spray drainage sumps, was experiencing the same issue. The City responded by commissioning experts to investigate the cause of the problem and ceasing all contractor and in-house spraying until protocols could be reviewed.

The expert report found that the herbicide used by Turfmaster, *hexazinone*, was the primary cause of ill health and death of trees and shrubs throughout the City. Survey results estimated that approximately 2000 were dead and 3000 were adversely affected.

In May 2007, the Department of Environment and Conservation (**DEC**) announced it was investigating the tree deaths in the Cities of Joondalup and Stirling. The actions of both Cities and the contractor have been and continue to be the subject of investigation by DEC in terms of potential breaches of the *Environmental Protection Act 1986* and the *Contaminated Sites Act 2003*.

The City engaged Minter Ellison Lawyers to advise on two issues:

- environmental management and dealings with the DEC; and
- the contract with Turfmaster, specifically whether there were grounds to terminate the contract.

Version No.	Date	Status	Amendments / Comments	Distributed by:

In terms of Turfmaster's liability, hexazinone was not an expressly agreed chemical for use in the City and was not an agreed variation to the contract. In August 2007, the contract with Turfmaster was terminated. The City terminated the contract with Turfmaster because:

- Turfmaster failed to carry out its responsibilities under the contract with due diligence to the reasonable satisfaction of the City; and
- Turfmaster failed to apply herbicides in accordance with label specifications, resulting in significant vegetation loss and substantial remediation costs.

Limited response has been received from Turfmaster or its solicitors, other than to deny breach of contract.

Private property owners living adjacent to drainage sumps had plants affected or die as a result of the spraying. The City has been fully committed to assisting these residents with the removal and replacement of plants by designating officers to respond to inquiries and setting up a register of affected residents. The City has responded to approximately 40 requests from private property owners.

At the request of the DEC, the City engaged a contaminated sites consultant and auditor to conduct a ground water monitoring program to determine what impact hexazinone was having on health and the environment. The ground water monitoring program was one of several significant measures the City undertook to assess, investigate, manage and replace trees and associated vegetation affected by the misapplication of herbicide.

Costs have been extensively documented in order to claim these in any potential action with Turfmaster. The City has been diligent in ensuring it mitigates its losses in this regard.

The Council now needs to decide how it wishes to proceed in regard to Turfmaster and its activities. Elected Members will recall the recent updates by way of confidential briefing sessions and memorandums they have received from the City's solicitors and the Chief Executive Officer. These updates were necessarily focused on the regulatory side of this matter as the City has a paramount obligation to discharge its environmental and public health statutory duties.

The City's solicitors and key staff recently met with the DEC. The outcome of that meeting, in conjunction with the pro-active, strategic approach taken by the City to date, indicates a conclusion to this aspect within the near future. It is anticipated that the next few months or so will not result in any significant accrual of additional costs to the City in terms of complying with DEC requests and ensuring regulatory compliance. The DEC also indicated it was undertaking an investigation into the activities of Turfmaster, regarding potential breaching of the *Environmental Protection Act 2003* or the *Contaminated Sites Act 2003*. We understand that progress on this investigation is likely to be lengthy and some time away from resolution.

The City continues to implement the Sump Reinstatement Program, which involves the re-vegetation and reinstatement of sumps and private properties. This program will continue to at least Winter 2009 which will necessarily mean the City will incur further costs. However, advice from the City's legal advisors is that costs likely to be incurred in the future will not prevent the City pursuing costs recovery now.

Accordingly, it is timely now for the Council to consider the approach to be taken in regard to pursuing a claim against Turfmaster. Attached is a Briefing Note to guide Council's decision-making in this matter. Elected Members are again reminded of the importance of maintaining confidentiality. Confidentiality is critical to retaining the best case for the City when it issues a claim against the contractor. If Turfmaster is aware of the City's case or if it has copies of

confidential material which could be used against the City, this will be detrimental to the City's best prospects of success. **All advice provided by the City's solicitors continues to be the subject of legal professional privilege, including this report and its attachments.**

This report outlines the strengths and weaknesses of the City's case against Turfmaster initially. As the assessment of strengths and weaknesses show, the City's claim is not clear cut and is open to challenge on several fronts. The paper then identifies six objectives or priorities the Council may have which will also influence the course of action chosen. Finally, the report presents three distinct courses of action: one with two sub-options.

The essential elements of Minter Ellison's recommendation as documented in the Briefing Note is that the City first negotiate with Turfmaster to attempt to resolve the dispute by meeting and mediation before contemplating commencing legal action. On the basis of the legal advice, it is recommended that Council authorises the Chief Executive Officer to initially seek a meeting with Turfmaster's Managing Director with a view to obtaining agreement to refer the dispute to mediation. It is envisaged that mediation will allow the City to secure a confidential reimbursement of the City's reasonable costs.

Representatives from Minter Ellison Lawyers will be present at the Special Council Meeting to discuss with Elected Members the matters articulated in the attached Briefing Note, including outlining an estimate of the costs the City has incurred to date as well as potential cost implications for the options identified.

BACKGROUND

HISTORY OF THE SUMP SPRAYING MATTER

Simply put, the "sump spraying issue" involves widespread tree deaths in and around drainage sumps allegedly caused by a chemical that was used by the City's contractor in May 2006. The City has evidence that supports the conclusion that the tree deaths were caused by the misapplication of the herbicide *hexazinone*. Hexazinone was applied by Turfmaster to most of the City's drainage sumps in May 2006 (and may have been applied by Turfmaster in previous years).

The City had for many years relied on the experience and expertise of the its contractor to apply an appropriate herbicide to control noxious and unwanted weed. Turfmaster applied hexazinone outside the label specifications. Allegedly, as a result, trees and shrubs died on a large scale. The City did not expressly approve the unauthorised use of hexazinone and only became aware of its unauthorised use after noticing the widespread tree deaths.

The key events in 2007

- Expert report by John Banks & Associates commissioned by the City on the cause of tree deaths in and around drainage sumps – February 2007
- The Department of Environment and Conservation (DEC) advises the City it is investigating tree deaths in and around drainage sumps within the Cities of Joondalup and Stirling – 22 May 2007. The DEC is responsible for investigating:
 - the impact of hexazinone on the environment and human health; and
 - whether there have been any breaches of the *Environmental Protection Act 1986*
- The Departments of Health and Water also become involved in investigating the matter – May 2007
- Banks and Sandral's expert report finalised 25 May 2007;

- Minter Ellison Lawyers engaged by the City 29 May 2007 to investigate potential contractual breach and advise on DEC investigation and other regulatory issues;
- Elected Members are briefed by John Banks & Associates and Minter Ellison at a confidential forum on 5 June 2007;
- Contract with Turfmaster Pty Ltd for the supply and application of pesticides terminated on 9 August 2007;
- Turfmaster's solicitors write to Minter Ellison denying breach of contract on 23 August 2007; there have been no further communications from Turfmaster or its solicitors since this time
- On 27 August 2007, DEC classifies the sump site at 29 Ellison Drive, Padbury as "possibly contaminated, investigation required";
- On 27 August 2007, the Department of Health advises it will not be proceeding with prosecution of Turfmaster
- At the request of DEC, City conducts tests on wood tissue and public bores to determine the presence of hexazinone;
- City challenges DEC's contention that all sump sites affected by hexazinone need to be reported as suspected contaminated sites on 6 September 2007; DEC confirms the City is not required to report all sump sites unless contamination is suspected;
- Departments of Health and Water advise the City in writing that they do not consider the issue of hexazinone related tree deaths a risk to public health – September 2007
- City engages contaminated sites consultant, GHD Pty Ltd, and accredited auditor, Environ, to conduct ground water monitoring program in September 2007
- DEC approves protocols for the removal and replacement of trees and shrubs – September 2007
- Ground water monitoring involving drilling of 4 sump sites and sampling of 40 private bores commences in October 2007
- Minter Ellison challenges the DEC's decision to classify the sump site at 29 Ellison Drive, Padbury on 8 April 2008 because the City did not agree that the site was contaminated within the meaning of the *Contaminated Sites Act 2003*;
- John Banks & Graeme Sandral submit report on the likely impact of hexazinone residue in private bores on domestic gardens
- By the end of 2007, the City had assisted over 40 private property residents who had plants die allegedly as a result of herbicide spraying

The key events in 2008

- In January 2008, the City engages John Banks & Associates to inject glutathione into 75 significant trees affected by hexazinone, in an attempt to rejuvenate their health
- GHD Reports on private bore sampling and sump drilling are submitted to DEC in March and April 2008, respectively; GHD Reports conclude that the source of hexazinone is in fact the spraying by Turfmaster; City agrees to implement all recommendations in the reports
- On 29 April 2008 at the Strategy Session, Elected Members are briefed by the Chief Executive Officer and Minter Ellison on the Sump Remediation Program, regulatory/compliance issues and status of the contractual dispute against Turfmaster
- City representatives and Minter Ellison meet with DEC on 31 July 2008 to discuss a way forward with respect to City's environmental obligations; An 'in principle' agreement is reached about the City committing to a monitoring and reporting protocol with respect to the affected sump sites
- City conducts leaf tissue analysis at two high profile sump sites – Craigie Leisure Centre and Hepburn Avenue/Mitchell Freeway; the report by John Banks & Associates is provided to the DEC on 20 October 2008

- Report to Council at Ordinary Council Meeting 25 November 2008 – City's claim against Turfmaster
- By the end of 2008, the first phase of the Sump Remediation Program will be complete, which has involved removal of dead vegetation at all affected sump sites, sensitive area pruning and replanting at 45 high profile sites
- A further 31 residents whom the City offered assistance will have had their dead plants removed and replacements planted by February 2009

DEC

- A key factor which has delayed resolution of this issue has been the inconsistent and dilatory approach of the DEC
- It has been crucial to manage the DEC and limit its imposts on the City
- Minter Ellison and the City have worked closely to ensure the DEC does not place unnecessary and unreasonable demands on the City without any legal basis or any other public interest justification
- The fact that the City has not been required to report each and every affected sump site to the Contaminated Sites branch and to investigate each site represents an enormous cost saving (both in financial and human resource terms). The investigation of each individual sump could have cost approximately \$50,000 per sump
- The City is confident that it has discharged its environmental and public health statutory duties in the best interests of the community
- The City contacted DEC on 12 December 2008 about the status of its investigation, which was commenced in May 2007. DEC advised that it had yet to conduct a number of interviews and that the investigation had slowed down due to a number of other priorities.

No ongoing impact

- The scientific evidence gathered by the City indicates that the tree deaths were caused by an isolated event and there is no evidence of ongoing or residual effects on human health or the environment.
- The City will continue its ongoing monitoring and reporting program over the next 12 months, which involves resampling private bores that originally tested positive for hexazinone, resampling the bores drilled into the 4 sump sites and visual inspections.

Insurer

- The City has kept its insurer informed about developments in this matter, particularly with respect to private properties affected by hexazinone spraying.

COSTS

- The City has carefully recorded and substantiated all costs incurred in relation to the sump spraying issue

Legal expenditure

- As at the end of November 2008, the City had incurred \$277,531 in legal fees
- Some concerns were expressed at the Ordinary Council Meeting of 25 November 2008 at the level of legal expenditure that the City had incurred

- The following information has been provided to assist Elected Members understand areas where the majority of legal fees have been spent
- The breakdown of legal fees according to time spent on DEC / regulatory issues and secondly, the contractual dispute with Turfmaster is as follows:
 - 70% of total fees have been incurred in respect of DEC / regulatory issues = \$194,272
 - 30% of total fees have been incurred in respect of the contractual dispute with Turfmaster = \$83,259.

This amount includes work done as a matter of urgency (when Minter Ellison was first instructed) in obtaining detailed statements from four former City employees prior to their departure and in providing advice to the City before, at and immediately after Turfmaster's contract was terminated by the City. It also includes the consideration of a significant volume of technical and other information and the preparation of a detailed advice to the City on its potential claim against Turfmaster in August 2008.
- The legal fees and other associated costs which would have been incurred if the City had failed to challenge DEC's demands are estimated as follows:

As an example, if any of the affected sump sites were classified under the *Contaminated Sites Act 2003*, the City could have been required to pay around \$50,000 for environmental investigations, reporting and monitoring per site. The City received a quote to conduct a contaminated sites investigation at the classified sump site in Padbury totalling \$50,000. Even if only 10 sites were classified (as has happened in the City of Stirling), the City could have incurred additional costs in the sum of \$500,000.
- The City has saved considerable costs in managing all aspects of this matter by devoting an in-house Principal Legal and Compliance Officer to the task on an almost full time basis.

Other costs

- As at the end of November 2008, the total costs the City has incurred is:
 - \$853,248
- The estimated costs the City will incur in the future are:
 - For 2008/09 = \$114,900
 - For 2009/10 = \$479,000 (this amount is solely for the Sump Remediation Program)
- The major areas in which the City has incurred costs are:
 - Sump Remediation Program = 39.3%
 - Legal expenditure = 32.5%
 - Consultancies = 23.9%

DETAILS

STRENGTHS AND WEAKNESSES OF CITY'S CASE

Strengths

1. Turfmaster misapplied hexazinone in contravention of label specifications
2. Turfmaster did not carry out its duties in a proper and workmanlike manner

3. Turfmaster caused damage to the City's property and native flora
4. The expert report says that tree deaths were caused by the presence of hexazinone
5. Turfmaster held itself out as expert in its field

Additionally:

- Hexazinone was not a herbicide that was specified in the contract between the City and Turfmaster
- The contract is in writing with an indemnity clause
- The City has obtained expert reports and received results of scientific testing, which, if accepted by a Court would tend to establish that the herbicide caused the tree deaths
- The City has statements from the Australian Pesticides and Veterinary Medicines Authority and the Department of Health that the application of the herbicide in sump areas is an off-label use
- Turfmaster was or ought to have been aware from previous events that hexazinone was likely to cause tree deaths
- Turfmaster ought to have been aware of the risks of using hexazinone due to the damage caused by the spraying of that chemical in Kununurra in 2003

Weaknesses

- The degree to which low rainfall in winter 2006 (beyond the control of Turfmaster) caused or contributed to the loss of trees. The City's expert report says that a major catalyst for the tree deaths was the 'extreme drought of 2006'. The City of Stirling's expert report also concludes that the loss of trees and shrubs is due to interaction between the application of hexazinone and the drought conditions in 2006. The City needs clear and unequivocal evidence that Turfmaster's application of hexazinone caused the death of trees for it to succeed in any action against Turfmaster
- The terms of the contract are not clearly drafted particularly in specifying the detail of the contractor's responsibilities and liabilities
- The fact that the key witness for the City in any proceedings, Trevor Taylor, now works for Turfmaster. There is a possibility that Mr Taylor may now be reluctant to give evidence and may attempt give evidence in a manner that tends to favour Turfmaster rather than the City and may even hamper the City's claim.
- Supervisory issues – there is evidence that the City did not discharge its supervisory obligations under the contract
- This is a novel claim that has not been tested in the courts before so predicting any outcome is difficult
- A lack of legal authority on the issue of 'like for like' replacement of trees. It is not known whether a Court will assess damages on the replacement of trees on a 'like for like' basis, or whether it will only award damages assessed by reference to the costs of replanting sapling trees.
- That the City may have tacitly approved the use of hexazinone.

TURFMASTER'S LIKELY ARGUMENTS IN DEFENCE

1. The major cause of the deaths of trees was climate / drought. Hexazinone had been used for three consecutive years prior to 2006 and there were no adverse environmental impacts. Turfmaster will argue that but for the extreme drought, the damage would not have occurred.

2. The City tacitly authorised the use of hexazinone because it knowingly allowed it to be applied
3. The City did not carry out its supervisory obligations under the Contract
4. DEC and Department of Health have investigated the actions of Turfmaster and are not proceeding with prosecution
5. The City's consultants may not be qualified to reach the stated conclusions in their reports

ESTABLISH COUNCIL'S OBJECTIVES AND PRIORITIES

Objectives	Dispute Forum	Resolution
1. Openness and transparency - "the community have the right to know"	Court	
2. Bring Turfmaster to account publicly	Court	
3. Recover the City's costs - maximise financial restitution so that ratepayers do not have to carry the burden	Mediation /	potentially successful court action
4. Protect the City's interests and reputation - poor practices and deficiencies in City's processes may be exposed resulting in criticism	Mediation	
5. Inflict financial detriment on Turfmaster - punish Turfmaster financially	Mediation /	successful court action
6. Protect the City's financial standing - ensure the City's reserves are spent wisely	Mediation	

Questions for Council in determining its objectives and priorities:

- Is it more important for Council to expose Turfmaster's failings publicly or to maximise financial restitution?
- Is it more important for Council to let the community know about actions it has taken or to maximise financial restitution?

Issues and options considered:

1. **Take no action** with the exception of replacing the trees on public and private property

Advantages	Disadvantages
Following full implementation of the Sump Remediation Program, there would be no further costs involved	This option would not meet community expectations
There is no potential for the City to 'lose' as would be the case in an open and transparent course of action	City funds all remediation costs on public and private property, estimated to be \$850,000
No ongoing substantial legal costs nor the administrative 'expense' of having the City's staff involved in litigation	There is no potential for the City to 'win' and recover costs or bring Turfmaster to account
	City is likely to be publicly criticised

2. Meditation

What is mediation?

- Mediation is a well recognised and accepted confidential process for resolving disputes
- Mediation involves a qualified mediator acting as an impartial third party to assist the parties to resolve their differences.
- The mediator does not impose solutions upon the parties.
- Through facilitation and technical skills, the mediator is able to assist the parties to explore the issues in depth and reach the best possible joint decisions that the circumstances allow
- The parties can ultimately come up with their own solutions to settle the dispute and those solutions can go well beyond the orders that a Court can make.
- Even if all of the aspects of a dispute are not settled, mediation can assist parties to agree on some issues and narrow down the issues they do not agree upon which will limit the issues that may subsequently go to Court.

Is Turfmaster willing to mediate?

- Unknown. The first stage of this option would be for the CEO to ask the Managing Director of Turfmaster whether he is prepared to enter into good faith negotiations

Benefits of mediation

- The greatest benefits of mediation are that the parties have control over the process and that it is a relatively informal, quick, more flexible and less expensive process than litigation
- The savings in legal costs and time is achieved because:
 - Parties can dispense with the preliminary steps required for a court hearing;
 - Parties can identify the issues quickly and concisely.
- In terms of convenience, a mediation process can occur at relatively short notice and at a time convenient to the parties
- Mediation is appropriate where a dispute involves complex issues
- Mediation can be implemented prior to, or in conjunction with, other forms of dispute resolution such as arbitration or court proceedings
- While the parties must agree to participate in a mediation, that can be achieved by way of a separate agreement
- It is also noted that the contract with Turfmaster contains a dispute resolution clause which provided for the referral of disputes to mediation
- It is open to Council to take a proactive and leading role in any mediation with Turfmaster, for example, approval of the mediation agreement
- If successful, mediation may well achieve a higher amount of compensation for the City's costs

Cost of mediation

- It is difficult to estimate in advance the duration and cost of the mediation due to the complexity of the matter and the fact that a mediator has yet to be appointed
- However, there is no doubt that a mediated outcome is more expedient and cost-effective than a litigated outcome

- The question of what level of involvement lawyers for both parties will have in the mediation will depend on the outcome of the meeting between the Chief Executive Officer and the Managing Director of Turfmaster. For example, it may be agreed at the meeting that legal representation is not required during the actual negotiations but may be engaged to formalise any agreement that is reached at the conclusion of the mediation.
- estimated cost of ½ day mediation = \$15,000 - \$20,000
- estimated timeline for outcome = 6 to 10 weeks from obtaining agreement to mediate and appointing mediator
- there are two sub-options:

(a) Mediation with a public outcome

- The discussions between parties during mediation are and remain confidential. This is the case whether the mediation is privately organised or 'imposed' by the Court.
- Usually, one or other of the parties requires the outcome of mediation to also remain confidential, but this is not inevitable. If a party has particular reasons for wanting to make a public announcement about the outcome, this itself can be a matter that is the subject of mediation.

Advantages	Disadvantages
Mediation with a public outcome would support the objectives of openness and transparency and bringing Turfmaster to account publicly	Mediation with a public outcome has more potential to damage the reputation of the other party; therefore, Turfmaster may be less willing to mediate on these terms
	Requiring a public outcome eliminates a 'bargaining chip' which could be used in the mediation process

(b) Mediation with a confidential outcome

Advantages	Disadvantages
Neither the reason for a dispute nor the basis upon which it is resolved need be made public. Where privacy and confidentiality are important, mediation enables parties to preserve these rights without public disclosure. This often leads to more satisfactory outcomes for both parties.	The City may not meet its objective of transparency and accountability to the public
Confidentiality and flexibility are the most significant advantages to parties using Alternative Dispute Resolution	Even if some form of mediation is used, judicial recourse may still be necessary

3. Litigation

- If Council wished to make Turfmaster publicly account for its breach, it could commence legal action
- In considering whether to commence proceedings, the Council should consider:
 - the strength of its claim against Turfmaster;
 - the likely amount that the City might recover in proceedings if it is successful compared with the total cost of proceedings; and
 - whether Turfmaster is financially able to meet any amount that might be awarded to the City.

Advantages	Disadvantages
After the trial and any appeals, a result will be known	In any action, there is a risk of losing at trial, and in this case there are uncertainties that mean the City is (in common with all litigants) not guaranteed of success
If legal action was successful, it is likely that the City would be able to recover: <ul style="list-style-type: none"> ▪ damages to the value of between 50% and 75% of its costs ▪ between half to two-thirds of its legal and expert witness expenses 	Costly - A conservative estimate of the fees payable to Minter Ellison for bringing proceedings against Turfmaster would be at least \$350,000. This amount does not include the costs of counsel (estimated to be around \$150,000) and expert witness fees (estimated to be between \$80,000 to \$120,000). Even if the City wins its case, it may still be out of pocket If legal action failed, the City would be expected to pay between half to two-thirds of Turfmaster's expenses (likely to be the same as the City's fees)
The hearing is public and can be reported	Time-consuming – the amount of executive and staff time ('corporate energy') involved will be enormous
Judges and courtrooms are provided free to the litigants	Delay – court waiting lists are lengthy and it could take up to 24 months and perhaps more to have the trial and receive a decision. Appeals from the first instance decision could enlarge the time taken to obtain a final decision
Courts base decisions on fact and law, not compromise	Lack of confidentiality
Parties are bound by the decision of the court, which can be enforced	Formal and drawn out process – litigation is governed by procedural rules - certain steps must be taken and the rules of evidence apply
Court decisions are appealable and errors can be corrected, reviewed or reversed by the appellate courts	At the end of the day, there may be no 'winners'. For the most part, the courts can only make orders requiring one party to pay another. Furthermore, the Court may make a decision that is not acceptable to either party
	There is no way of assessing Turfmaster's

	current financial capacity to pay the City damages and legal costs because it is not required to lodge financial statements
	The City would require further expert evidence about the major cause of the deaths if it proposes to commence action. The estimated cost of additional expert evidence will need to be considered

4. Legal advice

A Briefing Note summarising the advice from the City's solicitors is attached. The City has a claim against Turfmaster. However, it is the recommendation of Minter Ellison that the most favourable outcome for the City would be achieved by a confidential, negotiated settlement with Turfmaster, for the restitution of the City's reasonable costs.

Given the impact that Turfmaster's conduct has had on the City and its environment, it is understandable that some Elected Members and some sections of the community may wish to commence litigation proceedings against Turfmaster immediately as a form of publicly bringing into account the contractor. This has not been recommended by the City's legal advisors as litigation should be considered a last resort when other options of dispute resolution have been exhausted. This should not be perceived as the City taking a soft approach to its dealings with Turfmaster. On the contrary: the City has already terminated Turfmaster's herbicide spraying contract (which was of significant value to Turfmaster).

Link to Strategic Plan:

1.3 To lead and manage the City effectively – the City should strive to enforce its legal rights.

2.1 To ensure that the City's natural environmental assets are preserved, rehabilitated and maintained. A successful negotiated outcome would assist the City in funding the Sump Reinstatement Program.

Legislation – Statutory Provisions:

Not applicable

Risk Management considerations:

The City would suffer financial and reputational risk if it failed to use its best endeavours to negotiate a good outcome with the contractor. The community expects the City to take action to recover costs.

To date, the City's insurer has been kept informed of developments in this matter. Should Council endorse the recommendation, it is proposed that the City's insurer be notified accordingly.

Due to the imminent issuing of the claim against Turfmaster, it is vital that all Elected Members are aware of the importance of retaining confidentiality. If Turfmaster is aware of the City's case, if it has copies of confidential material which could be used against the City, this will be detrimental to the City's best prospects of success.

Financial/Budget Implications:

It is proposed that the cost of mediation be funded from the legal expenditure budget. Ultimately the fees are up to the individual mediator to appraise and the parties to set. In most instances the fee is related to the complexity of the case and the quantum in dispute.

Policy implications:

4-3 Financial Planning – Strategic Matters – the prudent management of financial risks relating to the costs the City has incurred in this matter necessitates the City using its best endeavours to recover those costs in an efficient manner. The Strategic Financial Plan also requires Council to consider the financial effects of Council decisions on future generations.

Regional Significance:

The City of Stirling continues to engage Turfmaster for the supply and application of pesticides, despite confronting a similar problem involving tree deaths around drainage sumps. The situation within the City of Stirling has no foreseeable impact on the actions the City of Joondalup will take in respect to the recovery of costs.

Sustainability implications:

The City will be discharging its social and environmental responsibilities should a successful settlement be reached as this would preserve financial access for future generations.

Consultation:

The City has sought extensive legal advice from Minter Ellison Lawyers on this matter.

COMMENT

To date, the City's actions have focused on protecting the City's corporate interest and reputation, in the pursuit of maximising financial restitution against Turfmaster.

There are no right or wrong answers in terms of the way forward. This report notes the possible options and the objectives and priorities that will lead individuals to choosing a particular option. From an officer perspective, it is important that the City's financial position be maximised and the risk of damage to reputation be minimised. As a result, the City recommends that mediation be kept confidential and that Turfmaster work for the City again (outside of herbicide spraying) to enhance the City's bargaining power and maximise the potential outcomes for the City.

Recognising that this latter point may be controversial, it is important to recognise that firstly, in commercial negotiations, the aim is for each party to walk away satisfied with what the final agreed terms are. If one party gets it all and the other party gets far too little, or nothing, to their satisfaction then, sooner or later, the deal may fall over or be dishonoured or end up in the courts when the 'dissatisfied' party breaks the agreement. Secondly, Turfmaster may be willing to pay the City a higher amount of compensation if the City re-engages the company for other (non-chemical related) work. Finally, it is generally recognised in the horticultural industry that Turfmaster are experts and provide a quality service in turf installation and fertiliser application.

ATTACHMENTS

Briefing Note to Elected Members – Minter Ellison Lawyers

VOTING REQUIREMENTS

Simple Majority

RECOMMENDATION

That Council:

1. **AUTHORISES** the Chief Executive Officer to seek a meeting with the Managing Director of Turfmaster Pty Ltd ('Turfmaster') to undertake the following actions:
 - a) outline the City's basis for a claim against Turfmaster;
 - b) seek Turfmaster's agreement to a negotiated, confidential reimbursement of the City's costs; and
 - c) seek Turfmaster's agreement to mediation of the dispute with the cost of mediation being shared equally by the parties.
2. In the event an agreement as outlined in paragraph 1 is reached at the meeting, **AUTHORISES** the Chief Executive Officer to approach the Institute of Arbitrators and Mediators Australia with a view to appointing an accredited mediator to mediate the dispute between the City and Turfmaster;
3. At the mediation, **AUTHORISES** the Chief Executive Officer to negotiate a confidential outcome affirming the actions to be taken by the parties to the mediation and restitution of the City's costs;
4. **AUTHORISES** the Chief Executive Officer to undertake all measures necessary to effect any outcome agreed upon at the mediation.
5. **AUTHORISES** the Chief Executive Officer, in the course of the negotiations with Turfmaster, consider the future engagement of Turfmaster for non-herbicide related contracts, including the supply and application of fertiliser or turf maintenance;
6. **REQUESTS** the Chief Executive Officer to prepare a report on the outcome of any negotiations or mediation with Turfmaster.

Signature of Originating Manager

Signature of Originating Director

CITY OF JOONDALUP

Claim against Turfmaster Briefing Note to Elected Members

We set out below our advice on:

- (a) the strength of the City of Joondalup's (City) claim against Turfmaster Pty Ltd (**Turfmaster**) for damages generally; and
- (b) whether particular expenditure incurred by the City can be recovered from Turfmaster.

1. Consideration of Evidence

1.1 This advice is based only on:

- our review to date of the City's files;
- a consideration of the expert evidence the City has obtained to date;
- proofs of evidence of a number of the City's potential witnesses;
- we have not had the benefit of reviewing any documents or other evidence in Turfmaster's possession, nor do we know what evidence Turfmaster has in relation to the tree deaths; and
- our advice is therefore necessarily preliminary in nature.

1.2 We note that the evidence remains confidential and certainly subject to legal professional privilege. None of the relevant documents relate to current contractual matters before the Council. Because of the commercially sensitive nature of present advice, and that the documents may well be subject to the processes of discovery in the event the matter proceeds to court, we have determined it is not appropriate to release the material to Elected Members at present.

2. Review of Claim

2.1 The City has an arguable claim against Turfmaster for damages for a breach of the contract between them because:

- (a) Turfmaster applied the herbicide Macspred Hexmac (active ingredient hexazinone) (**Herbicide**) in circumstances that probably amounted to off-label use;

- (b) Turfmaster did not carry its duties in a proper and workmanlike manner; and
 - (c) Turfmaster breached the contract between Turfmaster and the City (**Contract**) in that carrying out its obligation under the contract, it caused damage to the City's property and native flora.
- 2.2 There is some doubt that the misapplication of *hexazinone* was the sole cause of the deaths of trees and shrubs. Turfmaster had apparently applied *hexazinone* in previous years without adverse effect. An expert report suggests that the extreme drought that occurred in 2006 may also have been a catalyst. The City will need further evidence about the major cause of the deaths if it proposes to commence action in court.
- 2.3 If the City were successful in establishing that Turfmaster's breaches caused the deaths of trees and shrubs the City may be able to recover varying percentages of the different classes of costs it has incurred.
- 2.4 We recommend that the City first negotiate with Turfmaster to attempt to resolve its dispute before it contemplates commencing action, by meeting and mediation.
- 2.5 If negotiations fail, the City must obtain further evidence, particularly of the impact of misapplication of *hexazinone*, as opposed to the impact of climate change and should also seek pre-action discovery from Turfmaster before the City decides whether to commence action.
- 3. The City's chances of success**
- 3.1 In our view, the City has an arguable claim against Turfmaster that it breached the Contract. That is not to say that the City will definitely succeed in any action it might commence.
- 3.2 In considering whether to commence proceedings, the City should consider:
- (a) the strength of its claim against Turfmaster;
 - (b) the likely amount that the City might recover in proceedings if it is successful compared with the total cost of proceedings; and
 - (c) whether Turfmaster is financially able to meet any amount that might be awarded to the City.
- 3.3 The issue of the City's supervisory obligations will be raised in any action. The City might argue Turfmaster was an independent contractor with significant expertise and experience and that it had previously discharged its contractual duties without these obligations necessarily being strictly complied with. A lack of supervision (if established) may, however, have the effect of reducing the amount of any damages awarded to the City.
- 3.4 The City has evidence that suggests that the loss of vegetation was caused by Turfmaster's application of the Herbicide. Investigations carried out by DEC and GHD (the City's contaminated sites consultant) each refer to the presence of hexazinone in groundwater, soil and leaf samples.

- 3.5 The year 2006 was the driest year ever recorded for the Perth Metropolitan area.
- 3.6 It is clear that the climatic event played a significant role and cannot be dismissed as a consideration in any proceedings the City might bring against Turfmaster. It is almost certain that Turfmaster will argue that the interaction between the unusual climatic event and the application of the Herbicide means that the application of the Herbicide was not a breach of Contract, or if it were a breach, it should not be liable for any damages because the climatic event was the major cause of tree and shrub deaths.

4. The recoverability of expenses as loss and damage

We have itemised these expenses under a number of separate headings. We have given consideration to each separate category, in terms of how much might be recovered by the City for each expense. Because of the different types of expenses, different percentages of recovery can be expected to apply.

- 4.1 Removal of trees in and around drainage sumps;
- 4.2 Removal and replacement of dead trees on private property;
- 4.3 Replanting and rehabilitation of sumps;
- 4.4 Replanting semi-mature or mature trees;
- 4.5 Consultant's report on tree and shrub decline;
- 4.6 Laboratory analysis;
- 4.7 Legal fees;
- 4.8 Costs associated with the requirements of DEC in connection with the investigation of the sites.

We look forward to the opportunity to discuss with you more fully our considerations of the individual and total expenses which might be recovered as loss and damage. This recoverability will also depend on the type of resolution achieved by the City. For example, the City may be better placed to argue a higher percentage with Turfmaster in mediation, rather than pursuing a global total in a litigious situation.

Minter Ellison Solicitors