



Report of the Queensland Ombudsman



QUEENSLAND
ombudsman

The Daintree River Ferry Report

A review of the Douglas Shire Council's
tender process and related issues for
the 2006 contract to operate the
Daintree River Ferry

December 2006

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5 December 2006

The Honourable Mike Reynolds MP
Speaker of the Legislative Assembly
Parliament House
George Street
BRISBANE QLD 4000

Dear Mr Reynolds

In accordance with s.52 of the *Ombudsman Act 2001*, I hereby provide to you my report, *A review of the Douglas Shire Council's tender process and related issues for the 2006 contract to operate the Daintree River ferry*. This investigation considers the administrative conduct of the Council's councillors and officers.

Yours faithfully

A handwritten signature in black ink, appearing to read "D. Bevan".

David Bevan
Queensland Ombudsman

Enc.

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Foreword

The Queensland Ombudsman has an important role in investigating administrative actions and decisions of public sector agencies. Since the *Ombudsman Act* commenced in 2001, the Ombudsman also has a statutory responsibility to make recommendations to agencies and provide them with other help to improve their administrative practices.

This report presents the findings of a review of the Douglas Shire Council's tender process and related issues for the 2006 contract to operate the Daintree River ferry.

My investigation examined the Council's administrative conduct including the formulation of the tender conditions, the evaluation of the tenders, consideration of the recommendation contained in the evaluation report, and the content and effect of the executed contract to operate the ferry. In addition I examined Council's March 2006 decision to purchase the ferry used by the previous operator.

The report makes recommendations for improvements to the administrative practices of the Council including on the conduct of tender processes and in dealing with potential conflicts of interest by councillors and officers.

Because the issues dealt with in the report are of significant public interest, I have decided to present the report to the Speaker for tabling in the Legislative Assembly as provided for in s.52 of the *Ombudsman Act 2001*.

I place on record my appreciation of the efforts of my investigating officers from the Local Government and Infrastructure Team in my Office and the cooperation and assistance they received from investigating officers of the Crime and Misconduct Commission.



David Bevan
Queensland Ombudsman

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Abbreviations and Dictionary

Andreassen	Mr Colin Andreassen, immediate past ferry contractor, Principal of Daintree Ferry Pty Ltd
Baade	Mr Robert (Bob) Baade, General Manager, Engineering Services, DSC
Berwick	Councillor Mike Berwick, Mayor, DSC
CEO	Mr Terry Melchert, Chief Executive Officer, DSC
Councillors A-F	Councillors of the DSC
CMC	Crime and Misconduct Commission
DSC	Douglas Shire Council
EPA	Environmental Protection Agency
LGA 1993	<i>Local Government Act 1993</i>
LGAQ	Local Government Association of Queensland
McCosker	Mr Brad McCosker, Partner, McCullough Robertson
McCullough Robertson	McCullough Robertson Lawyers, retained by DSC
Moore	Ms Tracey Moore, Special Counsel, McCullough Robertson
My investigating officers	Mr Craig Allen, Assistant Ombudsman Mr David Barakin, Senior Investigating Officer Mr Paul Leo, Assistant Ombudsman
Neely	Mr Jim Neely, Project Manager and Acting CEO, DSC
Norris	Christopher Norris, trading as Norris Earthmoving and Raw Materials and principal and director (together with Charmaine Norris) of Sirron Enterprises Pty Ltd, the contractor for the ferry operations under the 2006 contract
Norris tender	The tender of Christopher and Charmaine Norris for the 2006 contract for ferry operations
Officers A-C	Senior officers of the DSC on the evaluation panel for the assessment of the ferry tenders
Officer D	A senior officer employed in the Engineering Services Division of the DSC

Executive Summary

Investigative context

I have completed my investigation into the tender process and other issues relating to the Douglas Shire Council's (DSC) administrative actions in awarding in 2005 a contract for the operation of the Daintree River ferry to commence on 1 July 2006.

The investigation was initiated following discussions between the Chief Executive Officer and my Deputy Ombudsman in relation to the contractual arrangements for the Daintree ferry, and related matters reported in *The Courier Mail* on 28 February 2006 and *The Australian* on 1 March 2006. I decided to commence an own initiative investigation under s.12(a)(iii) of the *Ombudsman Act 2001* into the administrative conduct of the DSC.

My Deputy Ombudsman made contact with the Crime and Misconduct Commission (CMC), which confirmed that the CEO had written to the CMC on 22 February 2006 referring a number of allegations to it in relation to the ferry contract arising from a DSC meeting on 7 December 2005.

The CEO, as the Chief Executive Officer of DSC, has an obligation under s.38 of the *Crime and Misconduct Act 2001* to report to the CMC any information he suspects involves or may involve official misconduct.

The CMC and my Office agreed that we would jointly investigate the allegations reported by the CEO.

My investigation has been conducted informally under s.24(a) of the *Ombudsman Act 2001*, without the need to invoke my coercive powers under Part 4. The DSC, through its councillors and officers, as well as private individuals, have provided all information requested by my investigators.

Daintree River ferry service

The Douglas Shire is a small rural region on the coastline of Far North Queensland that has a population of over 11,000 people. There has been substantial development in the shire in recent years but its economy is still largely built on tourism (the Great Barrier Reef and the Wet Tropics of Far North Queensland with over 80% of the shire being World Heritage listed) and an established agriculture sector. The shire attracts a million visitors a year and produces a million tonnes of sugar cane, beef cattle and a variety of fruit crops.

The administrative centre of the shire is in Mossman, which is 75 kilometres north of Cairns. The shire is experiencing rapid growth and incorporates Port Douglas and the Daintree National Park. Both these areas are renowned nationally and internationally as tourism destinations.

The Daintree ferry operation provides a service to residents who reside north of the Daintree River as well as to the many tourists who visit the Daintree National Park and the Wet Tropics of Far North Queensland. It follows that the ferry is an important piece of local transport infrastructure.

By virtue of s.930 of the *Local Government Act 1993*, the DSC has an exclusive right to provide a ferry service across the Daintree River and has entered into contracts over time with private entities to operate the ferry on its behalf, the immediate past contractor being Daintree Ferry Pty Ltd, whose principal is Colin Andreassen.

From 1 July 2006, the contractor is Sirron Enterprises Pty Ltd, the Directors of which are Christopher and Charmaine Norris.

Public report

This report summarises my investigation and contains my opinions and recommendations and is provided to the Speaker of the Queensland Legislative Assembly pursuant to s.52 of the Ombudsman Act for tabling in the Assembly. I have taken this step because the events associated with the tender process gave rise to:

- concern within the local community;
- numerous media reports, especially locally, that suggested impropriety in the process; and
- dissension between Council staff.

Furthermore, my investigation identified a number of administrative deficiencies with the Council and I have made recommendations to remedy those deficiencies. I consider that the findings and recommendations in this report will provide guidance to other councils in dealing with complex tender processes and assist councillors and officers deal with potential conflicts of interest.

De-identification

The purpose of this report is to deal with the specific allegations made that are detailed below and to remedy a number of administrative deficiencies that were identified during my investigation. The primary purpose of this report is not to expose any individual DSC councillor or officer. Therefore, I have deleted references to the names of all councillors except for the mayor and all but three of the officers (including their position titles). The officers whose names appear in this report are central to the events relating to the tender process and related issues we investigated.

The circumstances

This investigation has traversed a number of issues stemming from the allegations made both to my Office and initially to the CMC concerning the 2005 tender process undertaken by the DSC and related issues, including DSC's March 2006 decision to purchase the ferry formerly operated by Daintree Ferry Pty Ltd.

The specific allegations surrounding the 2005 tender process included the following:

- Bob Baade, DSC's General Manager of Engineering Services, designed the tender documentation in a way to advantage the Norris tender.
- The preparation and evaluation of the tender documentation was carried out in a way calculated to exclude other tenderers.
- Before the tender process had concluded, Norris undertook excavation work on the property of Berwick's partner at a discounted rate.
- There were delays in calling tenders and finalising the contract documentation designed to alter the tender result.
- There was improper lobbying of councillors by Andreassen during the tender process.

The broad issues for investigation are whether there was any improper administrative action by DSC in relation to the decision to let the contract for ferry operations across the Daintree River, including delay, the scope of the tender documentation (whether it did or could have favoured a potential tenderer), the consideration and acceptance of the tender and its implementation.

As a result of reports in the media, I also investigated the circumstances and terms of DSC's purchase of the ferry from Andreassen, including whether the exercise of a different option at an earlier time could have saved funds of the DSC.

As indicated, the investigation has taken place in tandem with a separate CMC investigation into the allegations reported by the CEO to the CMC in his letter of 22 February 2006.

During the course of this investigation, my officers:

- obtained and examined files, documents and records from DSC;
- conducted recorded interviews with a number of DSC councillors and officers;
- obtained and considered submissions lodged by DSC councillors, officers and non-agency personnel;
- made inquiries with and obtained information from relevant non-agency personnel;
- obtained and considered transcripts of interviews with relevant non-agency personnel that had been conducted by officers from the CMC; and
- undertook a site inspection of the ferry crossing point.

Notices of proposed adverse comment

To meet my obligations to give procedural fairness under s.55 of the Ombudsman Act, certain councillors and officers, as well as one of the tenderers who could be considered to be the subject of adverse comment, were given notices specifying the proposed adverse comment and invited to make submissions. Their submissions have been incorporated into the report at various points.

Maladministration

This investigation did not identify any unlawful or otherwise improper administrative action on the part of the DSC or any councillor or officer. However, I formed the opinion that in some instances DSC's actions or failure to act amounted to unreasonable administrative action within the meaning of s.49(2)(b) of the Ombudsman Act. The investigation also identified a number of other lesser administrative deficiencies and I have made recommendations to assist DSC to address these deficiencies.

Opinions and recommendations

The evidence obtained during the investigation supports the following opinions and recommendations.

Opinion 1

There is no evidence that Baade had any direct influence or involvement in the evaluation process, or that he attempted to exert any such influence.

Opinion 2

The allegation that Baade designed the conditions of tender and the indicative contract in a way to advantage the Norris tender has not been substantiated.

Opinion 3

The allegation that Baade caused the assessment of the tenders to be carried out in such a way as to exclude other possible tenderers has not been substantiated.

Opinion 4

The allegation that Baade delayed the tender process in order to favour the Norris tender has not been substantiated.

Opinion 5

Baade made full and timely disclosure to Neely and Officer A of the potential conflict of interest that arose once his stepdaughter, Charmaine Norris, expressed an intention to tender for the Daintree ferry contract.

Opinion 6

Baade failed to comply with paragraph 4.3 of the DSC's Code of Conduct in that he failed to disclose in writing to the CEO his potential conflict of interest and the nature of the interest.

Opinion 7

Neely, as Acting CEO, failed to comply with paragraph 4.3 of the DSC's Code of Conduct in that, upon being informed by Baade of a potential conflict of interest, he failed to appropriately record the disclosure and the nature of the interest in the DSC records.

Opinion 8

It would have been good administrative practice for Officer A to have made a record of Baade's disclosure in the DSC records.

Opinion 9

DSC failed to provide adequate training to its officers on its Code of Conduct. This failure constituted unreasonable administrative action within the meaning of s.49(2)(b) of the Ombudsman Act.

Recommendation 1

DSC officers undertake training on the provisions of the DSC's Code of Conduct, especially in relation to conflicts of interest.

Recommendation 2

DSC develop a policy to guide officers in the appropriate steps to take when making or receiving a disclosure of a possible conflict of interest.

Opinion 10

From the time of Baade's disclosure to Neely (at the relevant time the Acting CEO) and Officer A, Baade did not take any further part in, or seek to influence, the tender process, including:

- the formulation of the conditions of tender;
- the evaluation of the tenders; and
- the formulation of and negotiations about the conditions of contract after the DSC had resolved at its 7 December 2005 meeting to award the Daintree ferry contract to Norris.

Opinion 11

There is no evidence of favouritism or other maladministration in relation to the decision that the term of the contract executed between the DSC and Norris concerning the Daintree ferry operation would be ten years and not five years, as contained in the indicative contract.

Opinion 12

- (a) Baade had no inappropriate involvement in omitting from the 2006 contract a clause in similar terms to the 'penalty' clause contained in the 2001 contract.
- (b) Part 18 of the 2006 contract (clauses 18.1 to 18.12), which was drafted by DSC's solicitors, deals appropriately with the issues covered by the 'penalty' clause in the 2001 contract, mainly termination, default and payments in the event of termination.

Opinion 13

- (a) Baade did not influence the inclusion of the requirement for a second ferry in either the conditions of tender or the contract executed between the DSC and Sirron Enterprises Pty Ltd.
- (b) The clauses incorporated into the 2006 contract containing the requirement for the contractor to have a second ferry available (clause 3.4 Condition of Contract and clauses 3.2 and 3.4 in Schedule 2) were incorporated because of a similar requirement in clause 6.1 of the 2001 contract.

Opinion 14

There is no evidence that Norris gained any benefit under the 2006 ferry contract, either directly or indirectly, as a result of Baade's ongoing involvement as the DSC's representative under the contract.

Opinion 15

When Baade disclosed his potential conflict of interest, the DSC should have taken steps to instruct its solicitors to replace Baade as the nominated representative under the ferry contract. This failure constituted unreasonable administrative action within the meaning of s.49(2)(b) of the Ombudsman Act.

Opinion 16

- (a) The circumstances of Baade's involvement in the decision allowing Norris to conduct dredging operations from the ferry had the potential to give rise to a perception of bias in favour of Norris.
- (b) However, the evidence does not establish that Baade played any significant part in the decision to allow Norris to conduct dredging operations from the ferry or that his involvement resulted in Norris improperly receiving any favourable treatment.

Recommendation 3

DSC review and, if necessary, obtain legal advice on the terms of the 2006 ferry contract, especially clause 10.1 and Schedule 1, Item 3, with a view to nominating another DSC officer as DSC's representative under that contract and, if necessary, negotiate any necessary amendments to the contract with Sirron Enterprises Pty Ltd.

Opinion 17

Baade was not given responsibility for the preparation of the tender and contract documentation in relation to the Daintree ferry contract until the CEO spoke to him on 14 or 15 July 2005.

Opinion 18

Responsibility for the preparation of the tender and contract documentation in relation to the Daintree ferry contract prior to mid-July did not rest with Engineering Services but with Corporate Services and, in the absence of a Director or General Manager of Corporate Services, with the CEO.

Opinion 19

The CEO was ultimately responsible to Council for ensuring the tender process for the Daintree ferry was conducted in an efficient and timely manner.

Recommendation 4

DSC review its strategic and operational documents and systems to ensure that the CEO and General Managers have a clear understanding of their responsibilities for the efficient conduct of important infrastructure tenders, such as the Daintree ferry tender.

Opinion 20

The members of the evaluation panel undertook the evaluation of the tenders fairly and impartially and used an appropriate tool for recording their individual evaluations, namely, the scoring sheet prepared by McCullough Robertson Lawyers.

Opinion 21

The considerations and weighting details contained in the evaluation scoring sheets were broadly consistent with the principles contained in s.481 of the Local Government Act.

Opinion 22

The evaluation panel members should have settled on a common approach to scoring for each of the specific evaluation criteria prior to separately evaluating the tenders and their failure to do so resulted in their adopting inconsistent approaches to how the scoring guidelines would be applied.

Opinion 23

The members of the evaluation panel failed to make any records of their reasons for the scores they awarded under each of the evaluation criteria.

Opinion 24

Given the need to ensure transparency and accountability in a tender process, good administrative practice in the circumstances would have entailed the panel members recording their reasons for the scores they awarded under each of the evaluation criteria.

Opinion 25

The members of the evaluation panel failed to record on their individual scoring sheets any notations indicating that they had evaluated relevant aspects of the tenders, namely:

- the reasoning behind the actual scores given;
- what priority or internal weighting, if any, was applied within the evaluation criterion *Performance History on Similar Projects* that accounted for 50% of the overall score;
- what their expectations were on price;
- how such expectations were arrived at;
- why none of the evaluation panel members considered that the Andreassen tender met expectations on price;
- why the evaluation panel members considered that the Norris tender met expectations on price; and
- what considerations they applied when determining the scoring of the criterion *Price and Value for Money* that accounted for 30% of the overall score.

Opinion 26

The failure by Officer B and Officer C to make a file or diary note of the telephone discussions with Norris' accountant is not in keeping with the obligations under the *Public Records Act 2002* to make 'complete and accurate records' and exposed those officers and the Council to allegations of bias.

Opinion 27

DSC failed to ensure officers were aware of and followed proper record keeping practices. This failure constituted unreasonable administrative action within the meaning of s.49(2)(b) of the Ombudsman Act.

Recommendation 5

DSC review its existing purchasing and procurement policies to ensure they comply with the requirements of s.492A of the LGA 1993.

Recommendation 6

DSC provide training to relevant officers concerning the statutory requirements and procedures relating to the calling and assessment of tenders.

Recommendation 7

DSC amend its policies and procedures relating to the calling and assessment of tenders to require officers involved in the tender process to advise the CEO or other relevant senior officer of any contact with a tenderer or their representative in relation to their tender and ensure that a written record of the contact is prepared and placed on the relevant file or database.

Recommendation 8

DSC develop and implement procedures for record keeping in relation to the evaluation of tenders to ensure that officers are aware of their obligation to make records and that records are retained in a consistent form.

Recommendation 9

DSC provide training to its officers on proper record keeping procedures.

Opinion 28

Councillors did not engage in any conduct that amounted to inappropriately supporting the Andreassen tender.

Opinion 29

It was reasonable for councillors to seek from the CEO additional information to enable them to consider, on an informed basis, the recommendation that Norris be awarded the ferry tender.

Opinion 30

The evaluation report for the tenders for the Daintree River ferry contract did not contain sufficient information to enable the Council to make an informed decision.

Opinion 31

The evaluation report should have contained:

- the individual scoring of each tender from each of the evaluation panel members;
- how the tenders compared on the critical points set out in the scoring sheets;
- the scoring guidelines, the methodology and reasons supporting the evaluation scores; and
- a detailed analysis of the tenders, including operating cost estimates and, at least in general terms, information addressing the main points made in Councillor E's email dated 2 December 2005.

Opinion 32

A briefing session for councillors, conducted prior to Council's consideration of the recommendation contained in the evaluation report, would have assisted the councillors to make a determination on a more informed basis by enhancing their knowledge of the general and technical aspects of the tenders as well as the terms of the indicative contract.

Recommendation 10

DSC hold discussions with councillors to determine whether on major tenders the current level of information contained in reports submitted to Council is sufficient to allow the Council to efficiently consider such issues.

Recommendation 11

DSC develop and maintain a centralised precedent database to assist officers in the drafting of procurement reports on major tenders.

Recommendation 12

DSC provide training on report writing to its officers, including providing reasons for recommendations and identifying relevant evidence and supporting material.

Recommendation 13

DSC require officers who submit tender evaluation reports for Council decision to specifically address compliance with the procurement principles in the report.

Recommendation 14

DSC continue to conduct briefing sessions on major issues (in accordance with recommendation 2 of the Orion Report of June 2005) separate from its deliberative and decision making functions undertaken at its public meetings.

Opinion 33

Andreassen may have breached clause 29.4 of the Conditions of Tender and been thereby subject to disqualification from the tender process on the grounds that, during the tender process, he contacted Councillor B and Councillor E and was contacted by Councillor D, and made statements to them that may have amounted to canvassing support from the councillors for his tender.

Opinion 34

Andreassen's contact with Councillor C and Councillor F during the tender process, in the circumstances, did not amount to canvassing support within the meaning of clause 29.4 of the Conditions of Tender.

Opinion 35

It was not appropriate for Councillor B, Councillor C, Councillor D, Councillor E and Councillor F to either initiate contact with Andreassen about an aspect of his tender during the tender process or to engage in a discussion initiated by Andreassen about the tender or his competitor's tender. Such conduct had the potential to give rise to perceptions of bias in relation to Council's consideration and determination of the tender.

Opinion 36

The councillors were motivated to discuss with Andreassen aspects of his tender because of the failure of Council officers to provide the Council with sufficient information of their analysis of the comparative strengths and weaknesses of the two tenders.

Opinion 37

DSC failed to provide adequate training to councillors on the Councillors' Code of Conduct. This failure constituted unreasonable administrative action within the meaning of s.49(2)(b) of the Ombudsman Act.

Recommendation 15

DSC undertake training for councillors on the Councillors' Code of Conduct, particularly in relation to the obligations in paragraph 2.3.2.4(g) of the Code.

Recommendation 16

DSC amend its purchasing policy to incorporate a general prohibition on contact between tenderers and DSC councillors in similar terms to clause 29.4 of the Conditions of Tender and refer expressly to paragraph 2.3.2.4(g) of the Councillors' Code of Conduct.

Recommendation 17

DSC amend its purchasing policy to incorporate a general requirement for councillors and DSC officers to make a written record of any contact they have with a tenderer, or an agent or representative of a tenderer, about any aspect of the tender during the tender process and forward such record to the DSC's CEO.

Recommendation 18

The CEO establish and maintain a register of all such disclosures.

Opinion 38

There is no evidence to support the allegation that Berwick received any discount or other benefit from Norris in relation to the work Norris undertook on the subject property of Berwick's partner in October 2005.

Opinion 39

There is no evidence that the Norris tender was either directly or indirectly advantaged in the tender process as a result of Norris undertaking the work on the subject property of Berwick's partner.

Opinion 40

Berwick did not have a material personal interest in the outcome of the ferry tender process when, at the DSC's meeting of 7 December 2005, he participated in discussions and voted on the tender evaluation panel's recommendation that Council accept the Norris tender.

Opinion 41

Berwick should have disclosed to the Council the fact that Norris was undertaking work on his partner's property as soon as practicable after he was told by Norris that he had submitted a tender for the ferry contract.

Recommendation 19

DSC develop procedures to ensure that, for all major tender processes, councillors are promptly informed of the identities of all tenderers to ensure that potential conflict of interest situations are avoided.

Opinion 42

- (a) There was a significant delay in the DSC considering the options and deciding to go to tender for the ferry contract.
- (b) The delay was caused in part by the DSC's decision to broaden the terms of the review of the ferry service to include a review of the option for a bridge and by the CEO's absence on leave.

Opinion 43

The CEO did not cause the signing of the final contract for the Daintree River ferry to be delayed.

Opinion 44

While the timelines for the tendering process were tight, any delays in the process were not caused by maladministration.

Opinion 45

The DSC did not have proper procedures in place for the effective and timely management of significant projects such as the Daintree ferry tender. This failure constituted unreasonable administrative action within the meaning of s.49(2)(b) of the Ombudsman Act.

Recommendation 20

DSC develop and implement procedures to be incorporated into its Procurement Manual for the planning and procurement of significant purchases of goods and services.

Opinion 46

Council's decision to purchase the ferry rather than to negotiate an extension of the ferry operation with Daintree Ferry Pty Ltd was a reasonable one in that it was based on legal advice and a detailed analysis by its officers of the options open to the DSC to ensure the continuity of the ferry service.

Opinion 47

The decision to purchase the ferry guaranteed the continuation of the ferry operation until the Norris ferry commenced operation.

Opinion 48

Whether that option proves to be a cost effective one will depend substantially on the price DSC obtains for the sale of the ferry.

Opinion 49

Berwick's allegation that Councillor D's discussion with Andreassen during the tender process potentially cost the DSC a substantial amount of money is not substantiated.

Chapter 1: Background

1.1 Introduction

In March 2006 I commenced an own initiative investigation under s.12(a)(iii) of the *Ombudsman Act 2001* into the tender process and other issues relating to the Douglas Shire Council's (DSC) administrative actions in awarding in 2005 a contract for the operation of the Daintree River ferry.

Public concern about the award of the ferry tender were reported in the local media and also in *The Courier Mail* on 28 February 2006 and *The Australian* on 1 March 2006.

The investigation took place in tandem with a separate Crime and Misconduct Commission (CMC) investigation into the allegations reported by the CEO in a letter to the CMC on 22 February 2006.

This report therefore refers to some evidence obtained in interviews conducted by the CMC and provided to my Office in the course of the joint investigation of the allegations set out at 1.3 below.

1.2 Daintree River ferry service

The Daintree ferry operation provides a service to residents who reside north of the Daintree River as well as to the many tourists who visit the Daintree National Park and the Wet Tropics of Far North Queensland. It follows that the ferry is an important piece of local transport infrastructure.

Under a 2001 contract, the ferry service was conducted by Daintree Ferry Pty Ltd. The 2005 tender was awarded to Christopher Norris, trading as Norris Earthmoving and Raw Materials, but the contract was let to Sirron Enterprises Pty Ltd of which he is a director.

1.3 Allegations

In his letter to the CMC dated 22 February 2006, the CEO referred a number of allegations that had been made to him concerning the tender process, namely that:

- *The GM (Engineering Services) Bob Baade – whose stepdaughter, Charmaine Norris, is a principal of the successful tenderer, Norris Earthmoving and Raw Materials – designed the tender documentation in a way to advantage Norris.*
- *The preparation and assessment of the tender documentation were carried out in such a way as to exclude other tenders in that the conditions of the contract stated that the contract would be for a five year term with an option for a further five year term to be awarded at the absolute discretion of the Council. However, the evaluation panel recommended that Norris be awarded a 10 year contract.*
- *The Mayor had work done on his farm [actually the property of Berwick's partner] by Norris, who also has an excavator business, in the period directly before the award of the tender and that some gratuity in terms of the cost of the work was received.*
- *Staff was slow to call tenders and to finalise contract documentation and this was in some way designed to alter the tender result.*

Following communications between my Office and DSC about the investigation, Berwick made a number of allegations in an email to my Office dated 8 March 2006, namely that:

- *There was (improper) lobbying of, and collaboration between, councillors (unspecified) and Colin Andreassen of Daintree River (sic) Ferry Pty Ltd during the tender process;*
- *During the debate on the award of the tender, the length of the debate and the motions that were put and failed indicated 'that some councillors (unspecified) wished to offer the tender to Andreassen because [otherwise] he would remove the ferry on March 22';*
- *Councillor D approached Andreassen during the tender process to 'accommodate the purchase of the ferry by council rather than award a tender to either of the two tenderers'.*

Berwick also referred to a memorandum he wrote to the CEO dated 19 February 2006 that asked him to respond to the following matters:

- That, in early 2006, the CEO had selectively disseminated the final contract (prepared by McCullough Robertson) and related documents to certain councillors;
- That there had been 'apparent deliberate delays to the signing of the [ferry] contract', which was contrary to DSC's interests.

1.4 Issues for investigation

The broad issues for investigation (which incorporate the allegations set out in 1.3 above) are whether there was any improper administrative action in relation to the decision to let the contract for ferry operations across the Daintree River, including delay, the scope of the tender documentation (whether it did or could have favoured a potential tenderer), the consideration and acceptance of the tender and its implementation.

1.5 Conduct of investigation

I am satisfied that DSC is a public agency under the Ombudsman Act and the matters set out at 1.3 and 1.4 constitute 'administrative action' and are therefore within my jurisdiction to investigate.

My investigation included my investigating officers interviewing councillors and officers on site and inspecting and obtaining records of the DSC.

I have complied with ss.25(2)(b) of the Ombudsman Act requiring observance of the rules of natural justice. Furthermore, during the course of the investigation the CEO was given an opportunity as the Principal Officer to comment on the 'subject matter of the investigation', as required by s.26(3) of the Act.

Thirteen notices of proposed adverse comment were provided to councillors and officers of the DSC and one private party in compliance with s.55 of the Ombudsman Act. The responses of each of the parties have been considered and I have included relevant parts of the submissions or commented on the effect of the submissions as appropriate throughout the report. These notices also advised the recipients that I intended to present a report on the investigation to the Speaker for tabling in Parliament.

Chapter 2: Conflict of interest

2.1 Introduction

In my investigation, I considered whether Baade had an actual or perceived conflict of interest, the extent of his involvement in the tender process and the appropriateness of his actions in the circumstances.

Specifically, the allegations in relation to Baade are to the effect that:

- he designed the tender documentation in a way to advantage Norris;
- the preparation and assessment of the tender documentation were carried out in such a way as to exclude other tenders in that the conditions of the contract stated that the contract would be a five year term with an option for a further five year term to be awarded at the absolute discretion of the Council. (The evaluation report dated 6 December 2005 recommended Norris be awarded a ten year contract with a five year option); and
- he delayed the tender process and the finalisation of the contract documentation to alter the tender result in favour of Norris.

While these allegations were repeated by at least two of the councillors interviewed, no particulars or evidence of improper conduct by Baade in relation to the tender process were provided by any of the councillors or DSC Officers.

2.2 Obligation under Local Government Act to disclose material personal interests and other interests

2.2.1 Material personal interests

Sections 6 and 1142 of the LGA 1993 concern the obligations of Council officers to disclose material personal interests. A material personal interest arises where a person has, or should reasonably have, an expectation that they or an associate would stand to gain a benefit or suffer a loss in an issue depending on the outcome.

2.2.2 Other interests

Section 1139 of the LGA 1993 requires the chief executive officer¹ to keep a register of interests of each senior executive officer¹ and a register of interests of the persons who, under a regulation, are related to senior executive officers. Persons under s.74 of the Local Government Regulation who are 'related' include:

- (a) the person's spouse; or
- (b) any person totally or substantially dependent on the relevant employee and -
 - (i) the person is the relevant employee's child; or
 - (ii) the person's affairs are so closely connected with the affairs of the relevant employee that a benefit derived by the person, or a substantial part of it, could pass to the relevant employee.

2.2.3 General obligations on employees

Sections 1138 and 1143 of the LGA 1993 deal with employee integrity and improper conduct. An officer who does not act with integrity or show proper concern for the public interest could face disciplinary action. An employee who engages in improper conduct may be committing an offence.

2.2.4 Disciplinary action

A breach of the above provisions of the LGA 1993 may attract the penalties set out for the sections or subject the employee to disciplinary action under s.1146 of the LGA 1993.

A failure to disclose a relevant conflict of interest also renders an officer liable to disciplinary action under the DSC's Code of Conduct that applies to all DSC officers (see 2.3 below).

¹ Schedule 2 of the LGA defines a senior executive officer as an employee of a local government who reports directly to the Chief Executive Officer and whose position ordinarily would be considered to be a senior position in the local government's corporate structure.

2.3 DSC's Code of Conduct

Part 4 of the DSC's Code of Conduct that deals with conflicts of interest provides in part:

In the course of their duties, employees and delegates have a responsibility to ensure preference is not given to any person, organisation or interest (whether pecuniary, commercial, political, religious or other) as a result of any private association with that person, organisation or interest and be impartial in regard to how they perform both their professional and public duties.

4.3 DISCLOSURE OF INTEREST

Whenever disclosure is required by the law, recommended in this Code or otherwise where it seems appropriate, it should be made promptly, fully and in writing (or in cases of urgency made orally and confirmed in writing) and both the disclosure and nature of the interest should be appropriately recorded.

Such disclosure should automatically be made by employees engaged in regulatory, inspectorial, personnel selection or other discretionary functions when dealing with relatives, close friends or business acquaintances.

The Chief Executive Officer, on receipt of such disclosure, will determine the extent of any conflict of interest and direct the required action to ensure resolution of the issue. Failure to comply with this procedure may make the officer liable to disciplinary action under the Act.

2.4 Evidence

2.4.1 Baade's evidence

In his interview with my investigating officers in relation to the preparation of the tender documentation, Baade said that he had been asked by the CEO on or about 21 July 2005 to assume responsibility for the preparation of the tender documentation. Before that time, his involvement had been limited to working on some engineering issues concerning the ferry ramps, and design work for the construction of a new northbound lane and bus parking areas and related issues concerning the ferry operation.

My investigating officers obtained a copy of a handwritten letter to McCullough Robertson dated 18 July 2005 that gives instructions for the preparation of the tender and contract documents relating to the Daintree ferry operation. The letter appears to have been written and signed by Baade.

The letter dated 18 July 2005 states in part that this was the first time Baade had been given the task of arranging for the preparation of tender and contract documents and that Baade understood that the CEO had already contacted Brad McCosker, Partner Infrastructure, Energy & Government Group with McCullough Robertson, regarding McCullough Robertson being given instructions to prepare the tender and contract documents.

The letter also states that, on 15 July 2005, the CEO had given Baade the existing contract documents (the 2001 contract) together with the Council minutes of 8 May 2005 and details of certain changes that were thought to be required to the 2001 contract documents.

Apart from references to maintaining the appearance of the ferry at an appropriate standard, the other changes to the tender and contract documents referred to were not particularised in that letter.

Baade also told my investigating officers that he had disclosed the potential conflict to DSC officers, namely Neely, the Acting CEO (while the CEO was on leave) and Officer A.

2.4.2 Neely's evidence

In late September 2005, Neely commenced in the role of Acting CEO in the CEO's absence on leave (from 21 September 2005 to 30 January 2006). Neely's evidence in the course of his interview with my investigating officers was to the effect that Baade had made a direct disclosure to him of the potential conflict of interest arising from Charmaine Norris informing Baade of her intention to submit a tender for the operation of the Daintree ferry.

Neely stated that he didn't record that disclosure or keep a note of his discussion with Baade and that he was unable to recall the date on which Baade made the disclosure.

2.4.3 Officer A's evidence

In the course of his interview with my investigating officers, Officer A stated that Baade had informed him of the potential conflict of interest. Officer A did not make a record of the discussion and Officer A was not able to recall the date on which Baade made the disclosure.

Following Baade's disclosure, Officer A stated that he assumed responsibility for the conduct of the tender process, including liaising with McCullough Robertson and selecting the members of the panel of DSC officers to evaluate the tenders received, form a recommendation and then report to Council for decision.

2.4.4 Officer B's evidence

In the course of his interview with my investigating officers, Officer B stated that after the tenders had closed on 24 October 2005, Officer A had requested that he and Officer C sit on the panel to evaluate the tenders, because McCullough Robertson had stressed the importance of having an independent evaluation panel.

2.4.5 Moore's evidence

In the course of my investigator's discussions with Moore, she advised that McCullough Robertson had been informed of Baade's disclosure of the potential conflict of interest. From that time, Officer A had dealt with the conduct and evaluation of the tender and was the primary liaison between the DSC and McCullough Robertson.

My officers obtained a copy of a handwritten filenote by Moore of a telephone discussion between Moore and Officer A, dated 9 November 2005, which relevantly states:

Bob Baade – out of loop – taking care to ensure that he has no involvement.

2.5 Ongoing administration of the ferry contract

2.5.1 Introduction

In the course of my investigation, both Berwick and the CEO raised issues concerning Baade's ongoing association with the ferry contract and the separate contract for sand dredging also held by Norris.

This was relevant to my investigation because the 2006 ferry contract identifies Baade as the DSC's representative to make or agree to variations under the contract.

As well as concerns about the actual conduct of dredging operations, it was apparent from an email from the CEO to my investigating officers dated 28 June 2006, that an issue had arisen regarding the payment of royalties for sand extraction.

2.5.2 Communications about dredging operations

The specific issue about the dredging contract concerned the apparent approval given by Baade and Officer D for Norris to engage in sand dredging by operating his excavator directly from the DSC's ferry rather than the 'dumb barge' that Norris regularly used to perform the dredging work.

I note that DSC's potential liability for damage to the ferry and the cost of repairs (for bowing of beams and decking due to the operation by another contractor of an excavator in sand dredging work) was a relevant issue in the DSC's decision to purchase the ferry from Daintree Ferry Pty Ltd. This issue is dealt with in Part 9 of this report.

This issue apparently came to a head after the CEO gave directions in early June 2006 that the Norris excavator cease conducting dredging operations from the ferry.

Baade's and the CEO's emails dated 5 June 2006

Baade sent an email to the CEO dated 5 June 2006 in which he stated that the approval to dredge from the ferry had been given after the view was formed that:

... we [Baade and Officer D] decided that operating off the ferry was the most effective means of doing the work in the circumstances, we advised Chris Norris accordingly. Obviously you undermined our decision without even advising/consulting with me. You keep emphasising the operation of the ferry is now fully my responsibility.

By email also dated 5 June 2006, the CEO responded to Baade (and also forwarded his response to Officer A and the DSC's other senior managers) stating that he had dealt directly with Officer A on the issue, given Baade's previous disclosure of a possible conflict of interest.

The CEO's email continued:

I am concerned you have in any way intervened in re-engineering the contract to allow what could be seen as a benefit to the contractor and [which does not comply] with the tender submitted and the [reason for] acceptance of the tender by Council.

The CEO's confidential memorandum dated 6 June 2006

By confidential memorandum dated 6 June 2006, the CEO directed Officer A, among other things, to ensure that all dredging works be carried out from the 'dumb barge' and not from the ferry unless expressly agreed by both the CEO and Officer A and only in the event of 'extreme emergency'.

Norris email dated 7 June 2006

Chris Norris, by email to Berwick dated 7 June 2006, raised some concern about the CEO informing him that the ferry could not be used to conduct dredging operations. Norris stated that such use of the ferry was allowable under the DSC's Dredge Management Plan.

2.5.3 Examination of tender, assessment and contract documents relating to the dredging operations

I have undertaken an examination of the tender documents, assessment report and the contract between the DSC and Norris concerning the dredging operations in the Daintree River.

Tender documents

From that examination, it is clear that in Schedule 1 of the Norris tender for the dredging contract, the description of dredging equipment and operations referred, among other points, to:

- (a) excavator mounted on motorised dumb barge; and
- (b) digging material from the river and loading onto dumb barge with excavator.

In other words, there was no provision in the tender documents for operating the excavator from the ferry.

The assessment report that had been signed by the CEO, Officer A and Officer D also described the method of removal of the alluvial material as being by way of 'Excavator mounted on dumb barge'.

Assessment report

The assessment report dated 6 December 2005 recommended that the Norris tender be accepted and stated:

The tender of C & C Norris is the cheapest and has the advantage of having the dredging being carried out from a dumb barge rather than from the ferry.

2.5.4 Baade's ongoing involvement in 2006 DSC – Norris ferry operation contract

A related issue concerns Baade's ongoing involvement as the DSC's representative under the 2006 DSC – Norris ferry operation contract.

I have examined the ferry contract and relevantly Clause 10.1 provides:

10.1 DSC's Representative

DSC's Representative (or such other person as DSC may from time to time nominate by written notice to the Contractor and the Guarantor) may exercise all the powers and functions of DSC under this contract (including the power to make or authorise a Variation).

DSC's Representative may, by written delegation or authorisation, delegate any of his functions or authorise other persons to make or agree to Variations under this Contract and to carry out administrative functions on behalf of DSC's Representative.

Schedule 1, Item 3 of the contract identifies the Director of Engineering Services or delegate or such other person as may be appointed by DSC as its representative from time to time. Baade is expressly identified in Schedule 1, Item 3 as the Director of Engineering Services.

2.5.5 Baade's evidence

In relation to Baade's ongoing involvement as DSC's representative under the 2006 ferry contract, in his interview with my investigating officers, he stated that he was DSC's representative under the ferry contract but that his preference was not to have that responsibility, primarily because of the potential for disputes to arise under the contract.

Baade also indicated that he would discuss the issue of his continued involvement in the ferry contract with the DSC and that he had taken a similar approach with the sand dredging contract in relation to which he stated:

... I had no involvement from the start because I knew there could be interest and ... it gets a bit of a problem when you get relatives involved. It's the first time I've had the experience.

However, this is not entirely consistent with Baade's email to the CEO of 5 June 2006 (referred to above at 2.9.2) in which he stated that:

... we [Baade and Officer D] decided that operating off the ferry was the most effective means of doing the work in the circumstances, we advised Chris Norris accordingly.'

2.5.6 Officer D's evidence

In view of Baade's email, my investigator sought clarification from Officer D on Baade's involvement in the decision to allow Norris to use the ferry for dredging operations. By email dated 31 August 2006, Officer D advised that he had made the decision to allow Norris to use the ferry and that:

Bob Baade was actually visiting us in hospital when Norris rang him. Bob asked me if I would mind talking to him as I had more experience with what was required. I said to Norris that it should be OK as long as he used the same method we had used previously on the ferry but he should check with [another officer] first to ensure it was OK to proceed.

Officer D said that he did not make any record of the phone call, but that the decision was supported by the Dredge Management Plan as Norris was 'unable to access the ferry channel with his barge because of large sand build up around [the] channel'.

2.5.7 Neely's evidence

In relation to Baade's ongoing involvement as DSC's representative under the 2006 ferry contract, in Neely's interview with my investigating officers, he stated that he had made the decision to have Baade become involved again in the ferry contract once Council had made its decision to award the contract to Norris.

Neely also stated that the CEO had a 'slightly different view' about Baade's continuing involvement with the ferry contract. However, Neely decided to keep Baade involved because, with the decision made to award the ferry contract to Norris, there was, in Neely's view, no longer an apparent conflict of interest issue to be concerned about and the ongoing responsibility for the management of the ferry contract would rest with Engineering Services. Neely stated that if an issue arose concerning the ferry contract, Baade could delegate to or appoint another DSC officer to deal with it.

2.6 Analysis

2.6.1 Provisions of the LGA 1993

The requirements in relation to disclosure under the LGA 1993 are limited in s.1142 to situations where a Council officer has a 'material personal interest' in an issue to be, or being, dealt with by the employee in the course of the employee's duties. In such a situation, the officer must immediately inform the chief executive officer, in writing, of the interest and must not deal with, or further deal with, the issue except under the CEO's written directions.

Under s.6 of the LGA 1993, an officer has a 'material personal interest' in an issue if that person has, or should reasonably have, a realistic expectation that, whether directly or indirectly, the person or an associate stands to gain a benefit or suffer a loss.

Relevant to the circumstances of Baade's situation, with his stepdaughter, Charmaine Norris, being a principal of Norris Earthmoving and Raw Materials and director of Sirron Enterprises Pty Ltd, 'associate' is defined under s.6(2) of the LGA 1993 to include a spouse or other member of the person's household. In effect, the interest of an 'associate' is treated as the interest of the officer.

The effect of s.1142 and s.6 of the LGA 1993 is that an officer's involvement in any decision of Council reasonably likely to provide either a 'benefit' or 'loss' to the officer or associate, may contravene s.1142 of the LGA 1993.

There is no evidence or indeed allegation that Baade stood to gain any direct or indirect financial or other advantage in the event that the Norris tender was successful. Therefore, Baade could only have had a 'material personal interest' in the tender process if an 'associate' would reasonably be expected to gain any direct or indirect financial or other advantage from a successful Norris tender.

In the circumstances of this case, Baade could only have had a 'material personal interest' if his stepdaughter, Charmaine Norris, was his associate in that she was a member of his household under s.6(2)(a) of the LGA 1993. I agree with the proposition stated in the Commentary to the LGA 1993 (LGAQ 13-02) at page 8 which is to the effect that the words 'member of a person's household' connote someone ordinarily residing with the officer as their main domicile and who receives, or is entitled to receive, some level of dependent support, for example a dependent child, parent or other family member.

On the material before me, there is no evidence that Charmaine Norris ordinarily resides with, is financially dependent on and in fact receives or is entitled to receive support from Baade. Therefore, she does not appear to be and 'associate' of Baade, for the purposes of s.6 and s.1142 of the LGA 1993.

It follows that, in the absence of any evidence of Baade receiving or reasonably expecting to receive a personal 'benefit' or 'loss', I do not consider that for the purposes of s.1142 of the LGA 1993, Baade had a 'material personal interest' in the outcome of the tender process.

During the course of the investigation my officers examined the DSC's Register of Interests that revealed a number of entries for Baade, but none indicating a financial association between Baade and Charmaine Norris.

It is clear from an examination of the general obligations on employees that relate to integrity and improper conduct (as set out under ss.1138 and 1143 and under the definition of 'misconduct' in schedule 2 of the LGA 1993) that an employee who contravenes the relevant provisions is liable to disciplinary action.

On the material before me, especially in light of the disclosures contained in the Register of Interests, there is no evidence that Baade has acted in contravention of any of the relevant provisions of the LGA 1993.

2.6.2 DSC's Code of Conduct

The provisions of DSC's Code of Conduct are also relevant to the consideration of the various allegations made about Baade's involvement in a possible conflict of interest.

As noted in paragraph 2.3 above, DSC's Code of Conduct requires an officer to disclose an actual or perceived conflict of interest.

Specifically, the Code provides that whenever disclosure is required by the law or recommended by the Code or in other situations when it seems appropriate, an officer should make the disclosure promptly, fully and in writing (or, in cases of urgency, orally and confirmed in writing) and both the disclosure and nature of the interest should be appropriately recorded.

2.6.3 Actual or perceived conflict in tender process

While the allegations made in relation to Baade having a conflict of interest lack particulars about what specific actions Baade undertook or may have undertaken to benefit the Norris tender in some way, it appears to me, from the material, that the only reasonable possibilities open are:

- the conditions of tender and requirements were formulated in such a way as to provide the Norris tender with some advantage (see 2.10.3.1);
- Baade exerted some influence over the evaluation process, notwithstanding that he was not a member of the assessment panel comprising other DSC officers (see 2.10.3.2); and
- the actual terms of the contract executed between DSC and Norris were favourable to Norris (see 2.10.3.3).

I will deal with each of the above possibilities in turn.

2.6.3.1 Possible influence by Baade on the conditions of tender

The issue of Baade's influence on formulating the conditions of tender said to favour the Norris tender relates to the second allegation reported by the CEO to the CMC. That allegation referred generally to the conditions of tender and evaluation processes and the granting of a ten year contract in circumstances where the tender conditions and the indicative contract expressly stated the term of the contract was five years with a further option of five years.

When interviewed, two councillors repeated that allegation and also contended that the Norris tender had benefited from:

- the requirement in the conditions of tender for the successful tenderer to have a second ferry, or access to a second ferry; and
- the removal from the 2006 contract of the 'penalty' clause contained in the 2001 Daintree ferry contract.

In summary, the allegations against Baade concerning the conditions of tender comprise three main points:

- extension of the term of the Daintree ferry contract from five years to ten years;
- the requirement for a second ferry; and
- the removal of the 'penalty' clause from the 2006 contract.

It is apparent from the conditions of tender and the terms of the indicative contract, supported by my investigating officers' discussions with Moore, that each of those allegations can be readily disposed of.

Term of contract

In relation to the term of the contract, an examination of the conditions of tender and the indicative contract (Annexure A to the conditions of tender) that was provided to prospective tenderers reveals that the published tender notice did not specify the duration of the contract.

Likewise the term of the contract is not referred to expressly in the conditions of tender that had been prepared by McCullough Robertson. The conditions of tender relevantly state that:

'Contract' means the contract to be formed between DSC and the successful Tenderer pursuant to Clause 25 of these Conditions of Tender an indicative form of such Contract being at Annexure A;

Clause 2.1 of the indicative contract is headed 'Term' and defines the term of the contract as follows:

'Term' means in relation to this contract, the period of 5 years from the Contract Commencement Date with an agreed option exercisable at the sole discretion of the DSC to extend the Term for a further period of 5 years on identical terms to those found in this contract (DSC's option)...

Clause 2.1 is prefaced with a note to tenderers in bold as follows:

[Note to Tenderers – both the Term of the Contract and any option periods will be negotiated with the successful Tenderer. Tenderers should indicate in their Tender the maximum Term they are prepared to enter into and the details (number and duration) of any option periods they are prepared to provide.]

Both Norris and Andreassen tendered on the basis of a ten year term, not the five year term contained in the indicative contract. In light of the express note to tenderers that prefaced clause 2.1 of the indicative contract, and the conditions of tender generally, it was open to Norris and Andreassen to submit tenders for a period of ten years. Indeed, the note to tenderers suggests that the DSC was actually seeking to extend the contract term and the number and duration of any options that tenderers were prepared to tender on.

In the circumstances, it is difficult to see how Baade could have advantaged the Norris tender in relation to the term of the contract. As noted above, both the Norris and Andreassen tenders were submitted on the basis of ten year terms, with the Norris tender including an option for a further five years.

Second ferry requirement

In Baade's interview with my investigating officers, he referred to comments that Councillor D made at the DSC meeting on 7 December 2005 to the effect that the requirement for a second ferry was unfair and had deterred at least one local cane farmer from submitting a tender.

In the course of my investigator's discussions with Moore on 13 April 2006, she confirmed that, apart from Baade's initial handwritten letter dated 18 July 2005 that instructed McCullough Robertson to prepare the conditions of tender and contract documents and raised a ferry maintenance issue for inclusion in the documents, the substance of the conditions of tender and the terms of the indicative contract were initiated by McCullough Robertson.

Clause 6.1 of the 2001 contract (made on 12 April 2001) included a requirement on the contractor that if the ferry service was discontinued, save for certain specified reasons (adverse weather, damage to DSC's ancillary equipment, slipping of the ferry as required by law), the contractor must at the contractor's cost provide an alternative ferry service as specified in the contract. Importantly, that requirement was contingent on the alternative ferry service being at all times acceptable to the DSC having regard to the size and condition of the alternative vessel and safety requirements. Under Clause 6.1, the contractor was only able to utilise the alternative ferry service and rely on the subject clause once each calendar year.

Moore confirmed to my investigator that the clauses in the 2006 contract containing the requirement for the contractor to have a second ferry available (clause 3.4 Condition of Contract and clauses 3.2 and 3.4 in Schedule 2) were incorporated because they were substantially to the same effect, albeit in slightly different terms, as Clause 6.1 of the 2001 contract.

The material before me indicates that McCullough Robertson had already included these clauses in the draft 2006 contract of their own initiative when Baade attended their office on 10 or 11 August 2005. The purpose of the meeting appears to have been to explain to Baade the proposed changes to the 2001 contract and to confirm they were in accordance with the DSC's expectations, rather than Baade providing direct input into the conditions of tender, evaluation documents or the terms of the indicative contract.

Removal of 'penalty' clause

In Baade's interview with my investigating officers, he stated that at a Council meeting earlier in 2006 he was criticised by a number of councillors about the removal from the 2006 contract of what was described as the 'penalty' clause contained in the 2001 contract.

In the course of my investigator's discussions with Moore, she confirmed that the review of the tender documents relevant to the 2000 tender and related 2001 ferry contract led to McCullough Robertson redrafting a substantial number of those provisions for inclusion in the conditions of tender and contract documents for the new tender process. One such provision in the 2001 contract (clause 16) related to liquidated damages.

While it seems that clause 16 from the 2001 contract was not directly incorporated into the 2006 contract, Part 18 of the 2006 contract (clauses 18.1 to 18.12) deals extensively with the issues of termination, default and payments in the event of termination.

Therefore, in my view, the 2006 contract deals more comprehensively with the issues of termination, default and payments in the event of termination, than the 2001 contract.

2.6.3.2 Possible influence on tender evaluation

Baade's evidence

Baade's evidence was that he had taken no further part in the tender process, including the evaluation process, after he disclosed the potential conflict to Neely and Officer A before tenders closed on 24 October 2005.

Officer A's evidence

Officer A stated that, following Baade's disclosure, he assumed responsibility for the conduct of the tender process and Baade played no further role, including in the evaluation of the two tenders.

Officer B's evidence

In the course of his interview with my investigating officers, Officer B stated that after the tenders closed on 24 October 2005, Officer A had requested that he and Officer C sit on the panel to evaluate the tenders, because McCullough Robertson had stressed the importance of having an independent evaluation panel.

Also, in relation to the process that the evaluation panel applied to the evaluation of the tenders, Officer B stated that McCullough Robertson had prepared an evaluation template that rated the various features of the tenders. Officer B stated that the members of the panel evaluated the tenders individually.

Officer C's evidence

Officer C's evidence in relation to the tender evaluation process is consistent with the evidence of Officer A and Officer B.

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There is no evidence that Baade had any direct influence or involvement in the evaluation process, or that he attempted to exert any such influence.

2.6.3.3 Possible influence on terms of contract executed

While no specific allegation has been made in relation to this aspect of the process, as it appears to be the only remaining avenue by which Baade could have sought to exercise some influence in favour of Norris, it is a point worth dealing with.

In the course of this investigation, my officers have undertaken an extensive review of the relevant documentation and the communications between the DSC and McCullough Robertson. The review revealed no evidence of Baade having had any involvement in the formulation of the specific terms of contract, after the Norris tender was evaluated as being the first ranked tender.

It is also clear from that material that Officer A was the main DSC contact with McCullough Robertson about the terms of contract.

For example, McCullough Robertson's email dated 9 November 2005, which included advice about the status of the two tenders and dealt in part with Baade's disclosed potential conflict of interest, was addressed to Officer A. Similarly, subsequent communications between the DSC and McCullough Robertson relating to the terms of contract are all addressed to, or were sent by, Officer A as the primary DSC liaison.

Also, the evidence provided by Moore confirms, from the perspective of McCullough Robertson, that Baade had no further involvement in the matter after the disclosure of his potential conflict of interest.

Therefore, the material my investigating officers gathered does not suggest that Baade had any opportunity to influence the formulation of the terms of contract in favour of Norris.

2.6.4 Ongoing administration of ferry contract

Baade's disclosure of a potential conflict of interest raises the question of the appropriateness of his ongoing involvement in both the ferry contract and the separate contract for sand dredging.

There was clearly the potential for Baade, in managing the two contracts, to encounter situations in which he had a conflict of interest.

The CEO raised this possibility in his email of 5 June 2006 in which he expressed concern about Baade's apparent involvement in the management of DSC's interests in the dredging contract, given his disclosure of a potential conflict of interest in relation to the ferry tender. In particular, he referred to the possibility of:

... re-engineering the contract to allow what could be seen as a benefit to the contractor and (which does not comply) with the tender submitted and the (reason for) acceptance of the tender by Council.

I note the other points made by the CEO in his email of 5 June 2006 about why the Norris tender for the dredging contract was preferred and the terms of that contract. One of the key points made in that email was the risk of damage to DSC's ferry by conducting the dredging operations from the ferry rather than the dumb barge.

In the CEO's email to my investigating officers of 28 June 2006, he raised a second situation in which Baade had a potential conflict of interest. This related to an apparent contractual dispute regarding the payment of royalties for sand extraction.

Baade's awareness of potential conflict issues

From Baade's interview with my investigating officers, it is apparent that he was aware of the potential for a conflict of interest to arise in relation to his ongoing involvement as DSC's representative under the 2006 ferry contract.

Baade stated that his preference was not to be the DSC's representative under the contract. In fact, he specifically identified the potential for disputes to arise under the contract as a primary reason for his preference not to be involved. Baade indicated that he had taken a similar approach with the sand dredging contract.

I note that Baade also told my investigators that he would discuss the issue of his continued involvement in the ferry contract with the DSC but I am unaware if these discussions have taken place.

Baade's involvement in administration of ferry contract

Schedule 1, Item 3, of the 2006 ferry contract identifies as DSC's representative the Director of Engineering Services or delegate or such other person as may be appointed by DSC as its representative from time to time. Baade is expressly identified as the Director of Engineering Services.

Clause 10.1 of the 2006 ferry contract gives the DSC's representative broad power to make or agree to variations under the contract and to carry out administrative functions on behalf of the DSC.

Dredging contract

In relation to the dredging contract, I note that, under Clause 1, the term 'Tender Documents' is defined as including the DSC's tender document and the contractor's tender.

Clause 7.1 of the contract provides in effect that the contractor must carry out the Contractor Services, subject to Clause 7.2 (which deals with the contractor performing the work as required by the DSC), in accordance with the terms and conditions contained in the tender documents and the relevant legislation.

The combined effect of this is that under the 2004 dredging contract, the dredging operations were to be conducted from Norris' dumb barge rather than from the vehicular ferry. This issue, which is the subject of the exchange of emails between the CEO, Baade and Officer A in early June 2006, is dealt with immediately below.

Potential for conflicts of interest

While the specific legal rights and obligations of the DSC and Norris under both the ferry contract and the dredging contract are outside the scope of my investigation, they provide relevant examples of how commercial disputes can easily give rise to potential conflicts of interest.

One such example is contained in Norris' email to Berwick of 7 June 2006 in which Norris explains the circumstances in which he obtained approval to use the DSC's ferry to conduct his dredging operations.

Specifically, Norris explains in the email that the authorisation to dredge from the ferry was obtained from Officer D after Charmaine Norris, having telephoned her mother, spoke to Baade who asked how the dredging was proceeding. Charmaine Norris put Chris Norris on the phone who informed Baade that the sand build up was so great that, to keep the ferry operational, it would be quicker to use the main ferry to conduct the dredging operations. Norris stated that Baade advised him to call back and he believes that Baade then discussed the issue with Officer D, who was in charge of the dredging contract. Norris went on to state that Officer D then approved the request to use the DSC's ferry.

Baade's email to the CEO of 5 June 2006 suggests that Baade was more actively involved in the decision to approve the use of the DSC's ferry for dredging purposes and did not simply act as an intermediary. Baade claims in the email that the CEO had 'emphasised' that the operation of the ferry was Baade's responsibility. I further note that the CEO responded to Baade's email on the same day directing Baade to 'take no further part in administering the dredging or the new ferry contract' and that on 6 June 2006, the CEO directed Officer A not to allow DSC's ferry to continue to be used for the dredging operations, except in emergency situations.

The problem is compounded by the fact that Baade, as Director of Engineering Services, supervises Officer D in his position. However, Officer D is adamant that he alone made the decision, albeit, in Baade's presence. Therefore, as Norris was not present when the decision was made, Baade's email is ambiguous. I do not think there is sufficient evidence to establish Baade took part in making, or influencing, the decision to allow Norris to use the ferry for dredging operations.

As mentioned, Baade said his primary reason for not wanting to be involved in managing the contract was the potential for disputes to arise under the contract.

In my view, Baade's concerns, as well as those of the CEO, were well founded. For example, if the ferry had been damaged while being used by Norris for dredging operations, Baade would have had the responsibility under the 2006 ferry contract to negotiate a settlement or recommend to Council a course of action, including possible legal action. In view of his relationship with Chris and Charmaine Norris, this would have placed him in an untenable position.

2.7 Opinions and recommendations

The evidence obtained during the investigation supports the following opinions and recommendations.

Opinion 2

The allegation that Baade designed the conditions of tender and the indicative contract in a way to advantage the Norris tender has not been substantiated.

Opinion 3

The allegation that Baade caused the assessment of the tenders to be carried out in such a way as to exclude other possible tenderers has not been substantiated.

Opinion 4

The allegation that Baade delayed the tender process in order to favour the Norris tender has not been substantiated.

Opinion 5

Baade made full and timely disclosure to Neely and Officer A of the potential conflict of interest that arose once his stepdaughter, Charmaine Norris, expressed an intention to tender for the Daintree ferry contract.

Opinion 6

Baade failed to comply with paragraph 4.3 of the DSC's Code of Conduct in that he failed to disclose in writing to the CEO his potential conflict of interest and the nature of the interest.

In his submission dated 23 October 2006 in response to my s.55 (Ombudsman Act) notice, Baade stated:

I was not aware of the requirement of disclosure in writing to the CEO after providing oral advice on issues which could be perceived as (a) conflict of interest. I note Para 4.3 [DSC's Code of Conduct] Disclosure of Interest of the Code states: 'The Chief Executive Officer should be consulted for direction if at any time an employee is unsure whether a conflict exists with official duties.' As you are aware I consulted with the CEO and Acting CEO, however neither of them provided direction by stating any perceived conflict of interest should be stated in writing.

Melchert has commented on a number of occasions that staff and councillors need training about their responsibilities in relation to material/personal interests. Unfortunately no such training has occurred to date.

I have been employed by Douglas Shire Council for almost 30 years and until receipt of your letter I was not aware that DSC has a Code of Conduct. I now understand that since the new staff induction procedures were introduced some 10 years ago (approx est) that new employees have been issued with a copy of the code.

Even accepting that the DSC had not sufficiently publicised its Code of Conduct among officers, I am of the opinion that Baade, as an experienced senior officer in the DSC, should have known that disclosing his conflict of interest in writing was simply good administrative practice.

Baade's submission on this issue reinforces the need for training for DSC officers on its Code of Conduct (see Recommendation 1).

Opinion 7

Neely, as Acting CEO, failed to comply with paragraph 4.3 of the DSC's Code of Conduct in that, upon being informed by Baade of a potential conflict of interest, he failed to appropriately record the disclosure and the nature of the interest in the DSC records.

In his submission dated 20 October 2006 in response to my s.55 notice, Neely stated:

I am very familiar and well understand the principles embodied in Conflict of Interest legislation.

...

Your 'Proposed opinion 7' states that I failed to comply with DSC's Code of Conduct in that I did not record [Baade's] disclosure in Council's records. My response simply is that I have never been made aware of the fact that DSC has a Staff Code of Conduct.

My induction to DSC comprised an introduction to all members of staff and nothing more. In my view the Code should be one of the fundamental documents provided to new employees (this has since been rectified and new employees now receive a copy of the Code.) I only recently became aware of the Staff Code of Conduct by accident when the Code of Conduct for Councillors was introduced.

In summary, once I became aware of Baade's potential conflict of interest I ensured he took no further part in the tender assessment and decision making process in regard to the Ferry Service Contract. I therefore think it is unfair and unreasonable to suggest that I failed to comply with a Code that clearly was not brought to my attention during the induction process.

In my opinion, Neely, as Acting CEO, should have been aware of the existence of DSC's Code of Conduct and, in any event, should have known that making a record of Baade's disclosure was good administrative practice.

Neely's submission on this issue further reinforces the need for training for DSC officers on its Code of Conduct (see Recommendation 1).

Opinion 8

It would have been good administrative practice for Officer A to have made a record of Baade's disclosure in the DSC records.

Officer A, in his submission dated 9 October 2006, in response to my s.55 notice, stated:

'... With regards to Opinion 8, the first time I was aware that Baade may have involvement in a possible conflict of interest was when Norris had obtained Tender documents for the Daintree Ferry Contract. From this point on I was aware that I may have to be the responsible officer to take control of the tender evaluation process and report to Council. It should also be noted that I was never officially notified of Baade's possible conflict of interest until Council's Solicitors, McCullough Robertson, notified me by letter dated 9th November, 2005, which was some time after opening of Tenders which occurred on 24th October, 2005.

I have noted your opinion 8 but given the circumstances I believe I have acted responsibly to the Douglas Shire Council's Code of Conduct. ...'

I accept that Officer A's failure to record Baade's disclosure does not amount to a breach of DSC's Code of Conduct.

Opinion 9

DSC failed to provide adequate training to its officers on its Code of Conduct. This failure constituted unreasonable administrative action within the meaning of s.49(2)(b) of the Ombudsman Act.

Recommendation 1

DSC officers undertake training on the provisions of the DSC's Code of Conduct, especially in relation to conflicts of interest.

Recommendation 2

DSC develop a policy to guide officers in the appropriate steps to take when making or receiving a disclosure of a possible conflict of interest.

Opinion 10

From the time of Baade's disclosure to Neely (at the relevant time the Acting CEO) and Officer A, Baade did not take any further part in, or seek to influence, the tender process, including:

- the formulation of the conditions of tender;
- the evaluation of the tenders; and
- the formulation of and negotiations about the conditions of contract after the DSC had resolved at its 7 December 2005 meeting to award the Daintree ferry contract to Norris.

Opinion 11

There is no evidence of favouritism or other maladministration in relation to the decision that the term of the contract executed between the DSC and Norris concerning the Daintree ferry operation would be ten years and not five years, as contained in the indicative contract.

Opinion 12

- (a) Baade had no inappropriate involvement in omitting from the 2006 contract a clause in similar terms to the 'penalty' clause contained in the 2001 contract.
- (b) Part 18 of the 2006 contract (clauses 18.1 to 18.12), which was drafted by DSC's solicitors, deals appropriately with the issues covered by the 'penalty' clause in the 2001 contract, namely, termination, default and payments in the event of termination.

Opinion 13

- (a) Baade did not influence the inclusion of the requirement for a second ferry in either the conditions of tender or the contract executed between the DSC and Sirron Enterprises Pty Ltd.
- (b) The clauses incorporated into the 2006 contract containing the requirement for the contractor to have a second ferry available (clause 3.4 Condition of Contract and clauses 3.2 and 3.4 in Schedule 2) were incorporated because of a similar requirement in clause 6.1 of the 2001 contract.

Opinion 14

There is no evidence that Norris gained any benefit under the 2006 ferry contract, either directly or indirectly, as a result of Baade's ongoing involvement as the DSC's representative under the contract.

Opinion 15

When Baade disclosed his potential conflict of interest, the DSC should have taken steps to instruct its solicitors to replace Baade as the nominated representative under the ferry contract. This failure constituted unreasonable administrative action within the meaning of s.49(2)(b) of the Ombudsman Act.

Opinion 16

- (a) The circumstances of Baade's involvement in the decision allowing Norris to conduct dredging operations from the ferry had the potential to give rise to a perception of bias in favour of Norris.
- (b) However, the evidence does not establish that Baade played any significant part in the decision to allow Norris to conduct dredging operations from the ferry or that his involvement resulted in Norris improperly receiving any favourable treatment.

Recommendation 3

DSC review and, if necessary, obtain legal advice on the terms of the 2006 ferry contract, especially clause 10.1 and Schedule 1, Item 3, with a view to nominating another DSC officer as DSC's representative under that contract and, if necessary, negotiate any necessary amendments to the contract with Sirron Enterprises Pty Ltd.

In DSC's submission in response to my proposed report that I forwarded pursuant to s.26(3) of the Ombudsman Act, the CEO stated in relation to the issue of 'conflicts of interest':

I have also, up until recent times, been able to prevent 'conflicts of interest' and therefore CMC reportable matters by being very thorough, including significant legal advice and document checking on important and high risk projects and, in my view, by fulfilling the oversight role of the Chief Executive Officer.

I have found in the past, as reflected by our previously very, very low involvement with the CMC, that the best way to deal with probity issues is to prevent them from happening, not by allowing them [to] happen and then having to report them in an environment of reporting placed on the Chief Executive Officer which has a very low threshold.

I am sure your recommendations will assist in the restoration of this position for the organisation.

Chapter 3: Responsibility for conduct of tender

3.1 Introduction

During the course of the investigation, we sought to ascertain who had responsibility for the conduct of the ferry tender.

Our examination of the minutes of DSC meetings for 2004 and the first half of 2005 revealed a number of references to the ferry operation generally and the tender process for the new contract.

While the minutes of 4 May 2005 recorded instructions to the General Manager of Engineering Services to undertake some technical design work concerning the ferry and Council's adoption of the recommendation that Council consider immediately proceeding with preparation of tender documentation for the new ferry contract, the minutes do not record that the General Manager of Engineering Services had responsibility for preparing the tender documentation.

3.2 Evidence

3.2.1 The CEO's evidence

When my investigating officers interviewed the CEO, they asked him what section of DSC had primary responsibility for the preparation of tenders and major contracts. The CEO replied that the Director of Engineering Services had this responsibility.

In relation to the general awarding of contracts, the CEO stated:

Well, most of the contracts are let through Engineering Services because they are the biggest consumer of product if you like whether it's water treatment plants or whatever, but generally it would be the general managers in each program and they would draft up contractual [documentation] and often if it's a big one it would be outsourced.

The CEO was also asked at what point primary responsibility for the preparation of the tender and contract documentation had been given to Baade, and replied:

In this particular case though as I say I did hand it [primary responsibility for the preparation of the tender and contract documentation] on to the Director Engineering Services, that's documented by diary notes, I cannot find any diary note earlier than 15th of July and that's consistent with the briefing session of 4th July, which is where you will see a document where I've taken back to them [Council].

And further:

... there's a follow up diary note on the 15th and the 19th and you will see that in July ... all further communications are directly between the General Manager Engineering Services and McCullough Robertson; you will see there's no further ... interaction with me.

At another point in the interview, the CEO said that this discussion with Baade took place on 14 July 2005:

... my first indication of a follow up is the 14th of July and then subsequently a week later and then you will see him [Baade] actually getting motivated and doing so, that's what I'm relying on ...

My investigating officers sighted the diary note that confirmed that the CEO's discussion with Baade occurred on 14 July 2005. However, the CEO refers to this discussion as a 'follow-up', implying that there had been some earlier discussion with Baade about responsibility for the tender process. This is not supported by Baade or any other witness or by any document.

Unfilled position of Director of Corporate Services

In the course of his interview, the CEO stated that the position of Director of Corporate Services had remained unfilled from the resignation of the former Director in late 2004 until November 2005. The CEO explained that the decision not to appoint a person to the position of Director of Corporate Services was influenced by the fact that an organisational review and restructuring of Council's administrative operations had been contemplated at that time.

My investigating officers asked the CEO whether he considered that the absence of a Director of Corporate Services had negatively impacted on the ferry tender process. In response, the CEO stated:

No, I don't because by the time that tender was going through we had, we had Jim Neely here as a project officer and so we would have, we would have had capacity to deal with it. I think it's always been an engineering function ...

When asked by my investigating officers whether Corporate Services had primary responsibility for the preparation of tender and contract documentation for major contracts such as the Daintree ferry, the CEO stated:

No, it was, things were often allocated to whom had the time.

...

Well, as I say, most of them go through Engineering Services. The ferry one was probably an unusual one because it should have gone probably to Engineering sooner but I think if you go back to the previous tenders called they would have their water and sewerage plants which were major projects, just to take the pressure off them, they [primary responsibility for the preparation of the 1995 and 2000 ferry tender and contract documentation] were done by Corporate Services.

The CEO acknowledged that even if responsibility for a project had been delegated to or rested with one of the General Managers, as CEO, he was still accountable for general oversight of the projects.

The CEO stated that in about 2003-04 the DSC's management group realised it was under-resourced having regard to the increased workload being placed on its administration.

3.2.2 Baade's evidence

As noted above in 2.4, in relation to the preparation of the tender documentation, Baade's evidence was to the effect that prior to being asked by the CEO on 21 July 2005 to assume responsibility for the preparation of the tender documentation, his involvement had been limited to working on some engineering issues concerning the ferry ramps, and design work for the construction of a new northbound lane and bus parking areas and related engineering issues concerning the ferry operation.

Baade said that the preparation of tender and contract documentation for major projects including the previous two ferry contracts (1995 and 2000) was primarily the responsibility of Corporate Services. Baade stated that until mid-July 2005, he had assumed that Corporate Services, under the supervision of the CEO, given the absence of a Director of Corporate Services, was dealing with the preparation of the tender and contract documentation for the ferry tender process.

The general thrust of Baade's evidence was that primary responsibility for the preparation of the tender and contract documentation in relation to the Daintree ferry contract did not pass to him until 21 July 2005.

3.2.3 Officer C's evidence

Officer C commenced employment with the Council on 7 November 2005. During his interview with my investigating officers, Officer C indicated that while it was appropriate for the operational divisions to manage relevant contracts once they were entered into, he considered that oversight of tender processes and contract completion were matters within the responsibility of Corporate Services.

3.2.4 Neely's evidence

Neely, in his interview, suggested there was some confusion between the CEO and Baade as to who had primary responsibility for the preparation of the tender and contract documentation.

3.3 Other material considered

3.3.1 Douglas Shire Council minutes

The minutes of the adjourned Council and Corporate Services General Meeting (incorporating Engineering & Parks Services and Building Town & Environmental Planning Services) held on 4 May 2005 record under item B (pages 18-19 of the minutes) that Baade, in his capacity as General Manager of Engineering Services, was specifically instructed to:

- (a) design new ramps of a 'lesser' slope to allow more convenient and time effective loading. This work could include 'extending' the approach on the southern side to the extent of the existing barrage thereby reducing the travel distance and the area to be dredged.*
- (b) Proceed with design and approvals for the construction of a new northbound lane on the northern side of the river including new priority lanes for southbound traffic, bus parking, tour boat loading facility and small toilet facility and a pedestrian lane. (Generally in accord with the thrust of the Traffic Engineer's Report.)*
- (c) To develop in accord with (a) and (b) a new signage regime.*
- (d) Be prepared to drive new pylons to secure the ferry as and when required. The designs to be referred to Council, prior to construction.*

The minutes of 4 May 2005 also deal with the preparation of the tender documentation including some options to be considered for the tender.

It is relevant to note that while the minutes of 4 May 2005 record DSC's instruction that Baade undertake the infrastructure design work relating to the ferry operation, the responsibility for considering proceeding with the preparation of tender documents and the ferry options was left with the Council. Importantly, according to the minutes, neither Baade nor any other officer was instructed to undertake any action at that time in relation to the preparation of tender documentation and the ferry options canvassed in the minutes.

However, this was a matter of such significance to the DSC that the CEO should have ensured appropriate action was being taken to progress the tender.

3.4 Analysis

There is a dispute between the CEO and Baade as to who had responsibility for preparation of the tender documentation prior to mid-July. The CEO's diary note is evidence that he directed Baade on 14 July 2005 to prepare the documentation.

Even though the diary note describes this meeting as a 'follow-up', there is no evidence to support the view that Baade had been given this responsibility at some earlier time.

The CEO was unable to provide details of any earlier discussion with Baade on the issue.

In support of his view, the CEO stated that responsibility for a tender of this kind would ordinarily have gone to Engineering Services given its responsibility for roads and the ferry being part of the road network.

On the other hand, Baade maintains that, until the CEO spoke to him in July 2005², he had assumed that Corporate Services, under the supervision of the CEO (because of the vacancy in the Director of Corporate Services position), was preparing the ferry tender documentation. Baade said that his assumption was based on the fact that in 1995 and 2000 Corporate Services had been responsible for preparing the tender documentation for the two earlier ferry contracts.

I note that the CEO agreed Corporate Services had prepared the tender documentation for the earlier ferry contracts but maintained this was to 'take the pressure off' Engineering Services.

Who had primary responsibility for the Daintree ferry tender prior to mid-July 2005?

Until Baade was given primary responsibility for the preparation of the tender and contract documentation in mid-July 2005, the CEO had at least oversight responsibility for the administrative processes relating to renewal of the Daintree ferry contract.

Under s.1131 of the LGA 1993 it is apparent that the CEO has the primary executive role within Council.

Also relevant is that s.1132 of the LGA 1993 confers on the CEO a broad power of delegation to other officers.

The view that the CEO had at least oversight responsibility of the ferry tender process is also supported by the content of Council's minutes of 4 May 2005, which record that, while Baade was specifically instructed to undertake the infrastructure design work related in the ferry operation as detailed above, the responsibility for considering the preparation of tender documents and the ferry options (c) and (d) was left with the Council.

On the material provided, it is apparent that the preparation of the tender and contract documentation for the previous ferry contracts in 1995 and 2000 had not been managed through the Council's Engineering Services Division.

² Baade said he thought the CEO gave him the direction on 21 July 2005 but Baade's handwritten letter to McCullough Robertson that gives instructions for the preparation of the tender and contract documents relating to the Daintree ferry operation is dated 18 July 2005. The letter also states that on 15 July 2005 the CEO had given Baade the existing contract documents (the 2001 contract) together with the Council minutes of 8 May 2005 and certain other changes that were thought to be required to the provisions in the 2001 contract documents.

3.5 Opinions and recommendations

The evidence obtained during the investigation supports the following opinions and recommendations.

Opinion 17

Baade was not given responsibility for the preparation of the tender and contract documentation in relation to the Daintree ferry contract until the CEO spoke to him on 14 or 15 July 2005.

Opinion 18

Responsibility for the preparation of the tender and contract documentation in relation to the Daintree ferry contract prior to mid-July did not rest with Engineering Services but with Corporate Services and, in the absence of a Director or General Manager of Corporate Services, with the CEO.

Opinion 19

The CEO was ultimately responsible to Council for ensuring the tender process for the Daintree ferry was conducted in an efficient and timely manner.

Recommendation 4

DSC review its strategic and operational documents and systems to ensure that the CEO and General Managers have a clear understanding of their responsibilities for the efficient conduct of important infrastructure tenders, such as the Daintree ferry tender.

Chapter 4: Evaluation of the tenders

4.1 Legislative and policy framework

At the time tenders were advertised on 10 September 2005, the contract and tendering provisions were in accordance with Reprint 9K of the LGA 1993, 18 August 2005. The *Local Government and Other Legislation Amendment Act 2005*, which commenced on 18 November 2005, inserted new provisions in the LGA 1993 for contracts and tenders. Therefore, at the time the decision was made on awarding the contract on 7 December 2005, ss. 481, 484, 488, 490 and 492A of the LGA 1993 were in force.

While s.492A of the LGA 1993 requires a local government to prepare procurement and disposal manuals, at the relevant time during the tender process for the ferry, the DSC had a purchasing procedure manual in place (dated 31 July 2001), as was required under the *Local Government Finance Standards* made pursuant to the former s.416 of the LGA 1993, that deals with the application of the five principles set out under the present s.481 of the LGA 1993 (the former s.395).

4.2 Introduction

The evaluation of the tenders received from Daintree River Ferry Pty Ltd (Andreassen) and Norris Earthmoving and Raw Materials was undertaken by a panel of three senior DSC officers.

The evaluation process undertaken involved the members of the evaluation panel each completing their individual evaluations on a scoring sheet that had been prepared by McCullough Robertson.

Both the tenders considered by the evaluation panel provided for the construction of new ferries each with capacity of 27 cars. Both tenders proposed ten year terms. The Norris tender also included an option for a further five year term.

While the actual tender amounts remain commercial in confidence, there was a substantial disparity between the tenders, with the Andreassen tender more costly than the Norris tender.

The DSC received a summary of the tenders from McCullough Robertson by email dated 9 November 2005. In summary, McCullough Robertson considered the Norris tender to conform to the Conditions of Tender while Andreassen's was not considered to conform due to the failure to:

- submit the \$5,000 tender deposit;
- confirm that there were no departures, additions or variations to the Conditions of Tender; and
- provide the hourly rate for additional persons.

Notwithstanding that apparent non-compliance with the Conditions of Tender, McCullough Robertson suggested that the Andreassen tender be admitted to the evaluation process.

The email from McCullough Robertson dated 9 November 2005 also provided the DSC with recommended scoring criteria and weightings as well as scoring guidelines. It is apparent from an examination of the tender evaluation sheets that each member of the evaluation panel scored the Norris tender as being first placed.

4.3 Evidence

4.3.1 Officer A's evidence

Initial Interview

Officer A stated that, following Baade's disclosure of a potential conflict of interest, he assumed responsibility for the conduct of the tender process and Baade played no further role, including in the evaluation of the two tenders.

In relation to the tender assessment process, Officer A stated that each member of the evaluation panel completed an evaluation on a scoring sheet that had been prepared by McCullough Robertson. Officer A stated that each member scored the Norris tender as being first placed and that he prepared the evaluation report dated 6 December 2005 after Officer B and Officer C had reviewed and agreed with the report and its recommendation to award the contract to Norris. The report went to Council's 7 December 2005 meeting.

Supplementary Interview 1

In a second interview, Officer A told my investigating officers that Officer B had phoned 'Norris' accountant to make sure there wasn't a mistake in their tender'.

Supplementary Interview 2

In a third interview with my investigating officers, Officer A stated that, prior to scoring the tenders, the members of the evaluation panel did not discuss the scoring guidelines or how the various scoring criteria were to be applied. Officer A also said that aside from the score sheets he had no other notes or records to explain why particular scores in the tender evaluation process were awarded.

4.3.2 Officer B's evidence

Initial Interview

In the course of his interview with my investigating officers, Officer B stated that after the tenders had closed on 24 October 2005, Officer A had requested that he and Officer C sit on the panel to evaluate the tenders, because McCullough Robertson had stressed the importance of having an independent evaluation panel.

Also, in relation to the process that the panel applied to the evaluation of the tenders, Officer B stated that McCullough Robertson had prepared an evaluation template that rated the various features of the tenders. Officer B stated that the members of the panel evaluated the tenders individually. He said he had also undertaken his own separate informal evaluation and had only shared the content of that with Officer A and Officer C after each of them had separately scored the Norris tender as the first placed tender. Officer B described the separate informal evaluation as a 'comfort' measure to reassure him that the Norris tender, which was substantially less expensive than the Andreassen tender, was financially sustainable.

Officer B said that, in the course of conducting his informal evaluation, he contacted Norris' accountant before the panel formally scored the tenders, to inquire about rate of return calculations and that the accountant, while declining to provide specific information, stated that he, and presumably Norris, were 'comfortable' with the financial soundness of the tender.

Officer B stated he made no file or diary note of the discussion with Norris' accountant.

Supplementary Interview

In a supplementary interview with my investigating officers, Officer B stated that the members of the evaluation panel did discuss the scoring guidelines in general terms and that he undertook the evaluation by comparing both the Daintree Ferry Pty Ltd and Norris tenders without considering the then existing ferry contract.

Officer B also stated that after the individual scoring was done, the panel members met to discuss generally how the tenders were scored and that, except for the score sheets, he had no other notes or records to explain why particular scores in the tender evaluation process were awarded.

Officer B stated that an additional reason for undertaking his own separate assessment of the tenders was that he had not been comfortable with the scoring mechanism provided by the scoring guidelines and sheets.

4.3.3 Officer C's evidence

Initial Interview

Officer C stated in the course of his interview with my investigating officers that he had only commenced with the DSC (on 7 November 2005) a couple of days before he was asked by Officer A to join the tender evaluation team. Officer C stated that he had no prior knowledge of either tenderer or indeed any specific knowledge about the Daintree River ferry operation.

He stated that the next day, he and Officer A met with Chris and Charmaine Norris to discuss the viability of their tender and obtained their approval to confirm certain details with their accountant.

Officer C stated that Officer B then contacted Norris' accountant who provided enough information to satisfy Officer C that Norris sufficiently understood the costs involved in operating the ferry.

Officer C said he did not make any record of the discussion with Chris and Charmaine Norris as it was just a short discussion in which he and Officer A sought permission to speak with Norris' accountant.

My officers asked Officer C if he had had an opportunity to review the evaluation report prior to it being submitted to Council on 7 December 2005. Officer C stated that he did not think so.

My investigating officers asked Officer C if he considered that the evaluation report contained sufficient information about the reasons for the evaluation panel's recommendation to enable the Council to make a properly informed decision. He said he considered the evaluation report contained sufficient information but he recalled that the Council wanted more detailed information about the specifics of the tenders, including issues such as technical details about the construction of the ferries.

Supplementary Interview

In his supplementary interview with my investigating officers, Officer C stated that he had no recollection of the evaluation panel members discussing the scoring guidelines before the tenders were separately evaluated.

4.5 Analysis

4.5.1 Evaluation process

An examination of the documents relating to the evaluation of the tenders reveals that the evaluation process was undertaken with the members of the evaluation panel each completing individual evaluations on a scoring sheet prepared by McCullough Robertson. McCullough Robertson's email to Officer A dated 9 November 2005 was primarily concerned with the results of their review of the Norris and Andreassen tenders in terms of whether they conformed to the conditions of tender and considerations such as term and price of the tenders as well as the evaluation process. Attached to that email was a summary of the Norris and Andreassen tenders together with scoring sheets recommended for use in DSC's evaluation of the tenders.

The scoring guidelines set out a range of descriptions and scores for criteria ranging from ten out of ten (exceeds expectations for that criterion) down to zero (does not meet criterion).

4.5.2 Procurement principles

Section 481 of the LGA 1993 sets out five principles that a local government must consider when entering into contracts, namely:

- open and effective competition;
- value for money;
- encouragement of the development of competitive local business and industry;
- environmental protection; and
- ethical behaviour and fair dealing.

These five principles are not mutually exclusive in their operation, nor are they listed in any order of ranking, and I am satisfied that the criteria and weightings recommended by McCullough Robertson were consistent with that section.

4.5.3 Efficacy of evaluation process

It is apparent from an examination of the tender evaluation sheets that each member of the evaluation panel ranked the Norris tender first.

Having regard to the evidence of each of the panel members as well as my investigating officers' examination of the tender documents, the tender evaluation process appears to have been conducted properly and in accordance with the process developed by McCullough Robertson. Nonetheless, there were some aspects of the evaluation process that could have been improved.

The first is the failure of the panel members to discuss the scoring guidelines at the outset of the evaluation process. This is good administrative practice to ensure members take a consistent approach in assessing the tenders against the evaluation criteria.

The second is the failure of the panel members to make any notes of their reasons for awarding scores against the evaluation criteria.

It is important to ensure that decisions made under a tender process are both transparent and accountable, and the absence of notes or comments that provide the reasoning behind the scoring of the tenders under particular criteria makes it extremely difficult to review the evaluation process beyond examining whether an appropriate evaluation methodology was followed and the evaluation process on its face was fair, independent and unbiased.

A further consequence of the absence of notes or comments supporting the numerical scores awarded is that there is no record that might act as a memory aid if a panel member is later required to justify their scores. This was a problem for panel members in this case, who had difficulty recalling the specific reasoning behind their scores when interviewed by my investigating officers.

The third aspect is that, while it is clear from the evidence that all evaluation panel members agreed with the recommendation to award the ferry contract to Norris, there is some inconsistency about whether, and to what extent, Officer B and Officer C had the opportunity to review the evaluation report prior to it being submitted to Council's meeting on 7 December 2005. Clearly, it is important that all tender evaluation panel members have, and take, the opportunity to satisfy themselves that the evaluation report, including the recommendation, accurately records the panel's deliberations.

4.5.4 Failure to make record of discussions

A further issue arising from the evaluation process relates to the panel members' contact with Christopher and Charmaine Norris and their accountant and failing to make a file or diary note to record the content of the discussions. I accept that tender processes can frequently require making contact with tenderers or their professional advisers in order to clarify aspects of a tender. However, it is important to ensure that a full record of such conversations is made to support the transparency and accountability of the tender process.

There is no suggestion from the evidence that, in making inquiries of Christopher Norris and Norris' accountant, any of the panel members acted unethically or unprofessionally.

However, the failure to make a file or diary note of these discussions left the panel and the DSC open to the allegation that the tender evaluation process had not been conducted impartially.

Allegations of bias are more frequently based on perceptions rather than on evidence of actual partisan conduct. In such a situation, the question is whether a fair-minded observer could reasonably apprehend that the decision-maker might not bring an impartial mind to the decision.

In this case, if the unsuccessful tenderer had learnt of the panel members' unrecorded discussions with Norris or Norris' accountant, he may well have believed the evaluation process had not been conducted impartially.

While the *State Purchasing Policy* does not directly apply to the Daintree ferry tender process, it provides useful guidance in relation to the general principles that should be applied to ensure that purchasing decisions are made ethically, honestly and with fairness to all participants in a tender process.

4.5.5 Record keeping (Information Standard 40)

Public authorities (including by definition, local governments) are required to make 'complete and accurate records' in accordance with the *Public Records Act 2002* (PRA).

The primary purpose of Information Standard 40 (IS40) is to help public authorities meet their record keeping obligations under the PRA. IS40 is managed and administered by Queensland State Archives. A secondary purpose of IS40 is to foster record keeping best practice in State and local government agencies so that appropriate record keeping systems become an essential part of the business activities of all public authorities thereby ensuring that records are identified, captured and retained in an accessible and useable format that preserves their evidential integrity for as long as they are required.

In IS40 the term 'business activities' includes all forms of government, organisational and community activity undertaken by public authorities.

Effectively managed public records and record keeping systems facilitate and support:

- delivery of government services;
- business continuity;
- accountability; and
- enrichment of Queensland's cultural resources.

Public authorities must comply with legal, administrative, cultural and business record keeping requirements through reliable record keeping systems that ensure that full and accurate records of government business are adequately made, preserved and made accessible.

4.6 Opinions and recommendations

The evidence obtained during the investigation supports the following opinions and recommendations:

Opinion 20

The members of the evaluation panel undertook the evaluation of the tenders fairly and impartially and used an appropriate tool for recording their individual evaluations, namely, the scoring sheet prepared by McCullough Robertson.

Opinion 21

The considerations and weighting details contained in the evaluation scoring sheets were broadly consistent with the principles contained in s.481 of the LGA 1993.

Opinion 22

The evaluation panel members should have settled on a common approach to scoring for each of the specific evaluation criteria prior to separately evaluating the tenders and their failure to do so resulted in their adopting inconsistent approaches to how the scoring guidelines would be applied.

Officer B, in his submission dated 25 October 2006 in response to my s.55 notice, stated:

It was agreed by the panel not to discuss the process beforehand on the basis that we did not want to get involved in discussions that could lead to being influenced beforehand. As [Officer C] and myself were not involved in any aspect of this tender up until the point of being requested to participate on the panel we were both in an unbiased position.

The evaluation method and criteria being used for the assessment is quite common and all panel members have had experience with these methods before. I have used and been involved in many of these over a number of years therefore didn't require a discussion on the principles beforehand. Also from experience it is quite common when using award scoring methods that panel members will return different scores however invariably the final result will be the same.

In my view, there is a clear distinction to be drawn between a discussion to determine a common approach to how the individual evaluations would be undertaken and one that directly discussed the merits of the separate tenders. Therefore, I consider opinion 21 to be well founded.

Opinion 23

The members of the evaluation panel failed to make any records of their reasons for the scores they awarded under each of the evaluation criteria.

Opinion 24

Given the need to ensure transparency and accountability in a tender process, good administrative practice in the circumstances would have entailed the panel members recording their reasons for the scores they awarded under each of the evaluation criteria.

Opinion 25

The members of the evaluation panel failed to record on their individual scoring sheets any notations indicating that they had evaluated relevant aspects of the tenders, namely:

- the reasoning behind the actual scores given;
- what priority or internal weighting, if any, was applied within the evaluation criterion *Performance History on Similar Projects* that accounted for 50% of the overall score;
- what their expectations were on price;
- how such expectations were arrived at;
- why none of the evaluation panel members considered that the Andreassen tender met expectations on price;
- why the evaluation panel members considered that the Norris tender met expectations on price;
- and
- what considerations they applied when determining the scoring of the criterion *Price and Value for Money* that accounted for 30% of the overall score.

Opinion 26

The failure by Officer B and Officer C to make a file or diary note of the telephone discussions with Norris' accountant is not in keeping with the obligations under the *Public Records Act 2002* to make 'complete and accurate records' and exposed those officers and the Council to allegations of bias.

Opinion 27

DSC failed to ensure officers were aware of and followed proper record keeping practices. This failure constituted unreasonable administrative action within the meaning of s.49(2)(b) of the Ombudsman Act.

Officer B, in his submission dated 25 October 2006, in response to my s.55 notice stated:

Whilst I did not record the content of the discussions I did record the date and time of the conversation and held this for record purposes. The reason there were no transcripts/content recorded of the conversation was the discussion was purely for verifying that Norris had included all aspects of operating items and they were comfortable with (the) rate of return for their tender price. At no time did I or did the accountant request or provide any calculations or costings relative to the tender.

While I acknowledge the points made in Officer B's submission, good administrative practice required compliance with the relevant obligations under the *Public Records Act 2002* to make and retain a record of his discussions with Norris' accountant.

Recommendation 5

DSC review its existing purchasing and procurement policies to ensure they comply with the requirements of s.492A of the LGA 1993.

Recommendation 6

DSC provide training to relevant officers concerning the statutory requirements and procedures relating to the calling and assessment of tenders.

Recommendation 7

DSC amend its policies and procedures relating to the calling and assessment of tenders to require officers involved in the tender process to advise the CEO or other relevant senior officer of any contact with a tenderer or their representative in relation to their tender and ensure that a written record of the contact is prepared and placed on the relevant file or database.

Recommendation 8

DSC develop and implement procedures for record keeping in relation to the evaluation of tenders to ensure that officers are aware of their obligation to make records and that records are retained in a consistent form.

Recommendation 9

DSC provide training to its officers on proper record keeping procedures.

Chapter 5: Council's deliberations on 7 December 2005

5.1 Introduction

The DSC's deliberations concerning awarding the Daintree River ferry contract centred on the recommendation to accept the Norris tender that was contained in the Evaluation Report dated 6 December 2005, prepared by Officer A. The Council meeting at which the tender was discussed lasted approximately four hours. The evidence indicates that the councillors were not unanimous in supporting the Norris tender and believed additional information should have been provided to support the panel's recommendation.

On the material before me, it is apparent that both tenderers were present, at least for substantial parts of the meeting, which was open to the public. The evidence also indicates that the tenderers were present when allegations were made by Berwick to the effect that Andreassen had improperly lobbied councillors during the tender process and allegations were made by Councillor F that Norris had undertaken work on Berwick's property during the tender process.

5.2 Allegation

In relation to Council's deliberations on 7 December 2005, in his email to my Office dated 8 March 2006, Berwick alleged that:

During the debate on the award of the tender the length of the debate and the motions that were put and failed indicated 'that some councillors (unspecified) wished to offer the tender to Andreassen because [otherwise] he would remove the ferry on March 22'.

5.3 Minutes of meeting

While the minutes do not record the nature of the discussion that took place or the points of argument made by each councillor, they appear to chronologically record the various motions and amendments considered by the Council.

Berwick's disclosure of a perceived conflict of interest (which is recorded in the minutes as having been made immediately after the meeting resumed at 1.15pm) is consistent with the account of events given by Charmaine Norris in her interview with CMC officers.

The minutes also indicate that Berwick's disclosure was made subsequent to the motion he moved, seconded by Councillor B (before the lunch adjournment), that the Council accept the tender submitted by Norris for the Daintree River ferry contract.

The minutes also show that Councillor F changed his vote after the lunch adjournment and voted in favour of the motion to adopt the recommendation. That vote, along with the votes of the three councillors (including the Mayor) who had previously supported a motion to that effect, resulted in the motion being carried.

5.4 Evaluation report

Officer A prepared the Evaluation Report dated 6 December 2005. From the evidence of the evaluation panel members, it is not clear if and to what extent Officer B and Officer C were given the opportunity to peruse the report before it went to Council and whether they considered the report and attachments to contain sufficient information to allow councillors to properly make their decision.

The report contained a recommendation to accept the Norris tender in the following terms:

It is recommended that Council accept the tender submitted by Norris Earthmoving and Raw Materials for the above contract at the submitted prices for a term of 10 years and an option in Council's favour to extend the contract for a further 5 years.

The report outlined some general information concerning both the Norris and Andreassen tenders and attached a number of additional documents including a summary of tender prices and the letter from McCullough Robertson dated 9 November 2005 that, among other things, contained an analysis of both tenders in terms of whether they were conforming, prices, term of the proposed contract and a general outline of the recommended evaluation process, score sheets and score guidelines.

However, the report provides no information concerning the actual scoring of the tenders (either total scores of each tender or the individual scoring of each tender from individual panel members), how the tenders compared on the critical points set out in the scoring sheets and the scoring guidelines or indeed the methodology and reasons supporting the evaluation scores given by the members.

In relation to whether the Evaluation Report included sufficient information to enable councillors to properly consider the awarding of the Daintree River ferry contract, the views of the evaluation panel members that it did, differ from those of a number of the councillors.

There is a common theme in the evidence given by the councillors in their interviews with the investigating officers from the CMC that they were not given sufficient information prior to the 7 December 2005 meeting about the Conditions of Tender and the specifics of the tenders received.

A number of councillors made more specific comments in this regard in the course of those interviews and in their interviews with my investigating officers.

5.5 Evidence

5.5.1 Berwick's evidence

In relation to the usefulness of the evaluation report dated 6 December 2005, in his interview with my investigating officers, Berwick stated that prior to the changes resulting from the Organisational Review Report into the DSC that had been prepared by Orion Consulting Network in June 2005, the trend had been for brief reports to be made to Council, with attachments containing a great deal of background and supporting information with the result that councillors were effectively required to carry out their own analysis of the particular issues.

In response to a question from my investigating officers as to whether he considered the report provided to councillors at the meeting on 7 December 2005 lacked sufficient information on which to make their decision, Berwick replied in the affirmative and described it as 'a poor report'.

Berwick also stated that while he accepted the evaluation report's recommendation, he considered the analysis of the issues and the comparison between the tenders to have been minimal and that:

In terms of answering councillors' questions I think it [the evaluation report] was poor.

5.5.2 Councillor A's evidence

On the issue of the adequacy of the information and analysis contained in the evaluation report, in his interview with my investigating officers, Councillor A stated that the report lacked sufficient detail and analysis explaining the reasons for the recommendation to accept the Norris tender and that councillors at the meeting were seeking more information upon which to base their consideration of the issue.

Councillor A stated that there were several adverse effects on the course of the 7 December 2005 meeting, directly or indirectly resulting from councillors not having seen the tender documents before that meeting. One problem was that the councillors lacked specific knowledge about the effect of the Conditions of Tender and the terms and content of the indicative contract that had been provided to prospective tenderers.

According to Councillor A, this resulted in:

- the relatively strained dynamic of the 7 December 2005 meeting, which both tenderers attended; and
- difficulty explaining the decision to, and answering questions by, members of the public about the decision to award the Daintree River ferry contract to Norris.

The evidence given by Councillor A to the investigating officers from the CMC was consistent with that given to my investigating officers.

5.5.3 Councillor E's evidence

In his interview with the investigating officers from the CMC, Councillor E made a number of points relevant to the adequacy of the evaluation report, including that a full briefing and more specific information were required prior to the meeting on 7 December 2005. Councillor E stated that because of the lack of information at the meeting, there was uncertainty among councillors, himself included, concerning the content of the indicative contract in relation to the requirement for a second ferry to be available at certain times.

In the course of our investigation, my officers obtained a copy of an email from Councillor E dated 2 December 2005 that was sent to Neely while he was the DSC's Acting CEO.

Councillor E's email set out a number of specific concerns, including what he considered to be over-reliance on the assessment of the tenders that was provided by McCullough Robertson by way of their letter dated 9 November 2005. A copy of that letter was later attached to the evaluation report prepared for Council.

More specifically, Councillor E expressed concern about the paucity of the information provided to councillors, including the absence of a direct engineering comparison between the Norris and Andreassen tenders.

Councillor E's email went on to list 14 specific points of concern. The main points were:

- whether the specifications tendered for the ferries have the same deck bearing capacity;
- the design quality and engineering standards applying to each tender;
- the suitability and the absence of a comparison of the back up ferries available to the tenderers;
- whether the receipt of two tenders was sufficient for the DSC; and
- build times and the commencement of the ferry operation under the 2006 contract.

5.5.4 Councillor F's evidence

The minutes of the DSC's meeting of 7 December 2005 show that Councillor F first voted against the evaluation panel's recommendation but changed his mind subsequently.

In the course of his interview with my investigating officers, Councillor F stated that he considered the amount of information contained in the evaluation report was sufficient to allow him to properly consider the recommendation in the evaluation report to award the ferry contract to Norris.

5.5.6 Neely's evidence

In relation to the evaluation report, Neely told my investigating officers that, while he was aware of the content of the evaluation report prior to the meeting on 7 December 2005, he had only 'skimmed it' and, as that meeting was the last scheduled for the year, it was important to have the tender process finalised by Council. Neely's evidence indicates that, although he was the Acting CEO at the time, he had no input into the draft evaluation report and did not review the evaluation report before it was submitted to Council.

Neely also stated that, had there been more time, he would have suggested that councillors attend a briefing session to better understand the details of the tenders and the technical issues about two weeks before having to consider and vote on the evaluation report recommendation, but that the DSC, in the circumstances, didn't have that time.

The general tenor of Neely's evidence is that a more detailed evaluation report, coupled with a briefing session, would probably have led to an easier and less strained Council meeting, with councillors better informed on the relevant issues, including the content of the conditions of tender and the terms of the indicative contract.

5.5.7 Officer A's evidence

In his interview with my investigating officers, Officer A stated that he attended the Council meeting on 7 December 2005 and answered a number of questions from councillors about the recommendation contained in the evaluation report to accept the Norris tender.

In relation to the preparation of the evaluation report, Officer A stated that the report was compiled directly from the scoring sheets that each member of the evaluation panel had separately completed. Officer A also described that in accordance with usual DSC practice, copies of the separate scoring sheets were not attached to the final report.

Also, Officer A stated that, at both the closed session and the session open to the public at which the tenderers attended, the questions asked by councillors largely focused on the technical and engineering issues concerning the tenders. Despite these questions, he said he did not believe it would have assisted councillors to have been briefed on the evaluation of the tenders.

Officer A stated that he did not take the content of the email from Councillor E into account when drafting the evaluation report dated 6 December 2005. He also stated that while the primary reason for that was the lack of time, he also agreed with the content of Neely's email response to Councillor E to the effect that the technical and engineering questions were really matters for DSC officers to be concerned with, not councillors.

5.6 Analysis

The DSC's deliberations at its meeting on 7 December 2005 concerning awarding the Daintree River ferry contract were founded on the Evaluation Report dated 6 December 2005, which recommended that the Norris tender be accepted. The motion to accept the Norris tender was moved by Berwick and seconded by Councillor B at the commencement of DSC's consideration of the issue.

The evidence of Berwick, Councillor A and Councillor E outlined above shows that councillors wanted more information about:

- why the recommendation to accept the Norris tender was made;
- details about the meaning of the Conditions of Tender and the clauses of the indicative contract; and
- certain technical and engineering issues related to the tenders.

For example, Councillor E's email of 2 December 2005 to Neely (while he was the DSC's Acting CEO), apart from raising a number of general points, also sought information about some specific technical and engineering related issues, including the absence of a direct engineering comparison between the Norris and Andreassen tenders.

Officer A told my investigators that, in response to the technical and engineering related questions that councillors had asked, his position was that, regardless of which tender was accepted, the ferry that was to operate would require certification to ensure it was designed and built according to the relevant standards.

However, this response does not sufficiently address the points made in Councillor E's email of 2 December 2005.

The report outlines some general information concerning both the Norris and Andreassen tenders and attached a number of additional documents, including a summary of tender prices and the letter from McCullough Robertson dated 9 November 2005 that, among other things, contained an analysis of both tenders in terms of whether they were conforming, prices, term of the proposed contract and a general outline of the recommended evaluation process, score sheets and score guidelines.

However, as I noted above in section 5.4, the report provides no information concerning the actual scoring of the tenders (either total scores for each tender or the individual scoring of each tender by the evaluation panel members), how the tenders compared on the critical points set out in the scoring sheets and the scoring guidelines or indeed the methodology and reasons supporting the evaluation scores.

The evaluation scoring sheets completed by each member of the evaluation panel also lack any comments or notations that reveal how particular aspects of the tenders were evaluated, including:

- the reasoning for the actual scores;
- what priority or internal weighting, if any, was applied within the evaluation criterion *Performance History on Similar Projects* that accounted for 50% of the overall score;
- what the expectations on price were;
- how such expectations were arrived at;
- why none of the evaluation panel members considered that the Andreassen tender met expectations on price;
- why all evaluation panel members considered that the Norris tender met expectations on price; and
- what considerations were applied when determining the scoring of the criterion *Price and Value for Money* that accounted for 30% of the overall score.

It is also apparent that none of the technical and engineering related points raised in Councillor E's email dated 2 December 2005 was dealt with in any detail in the report.

As I have said, I am satisfied that the tender evaluation process was conducted properly and in accordance with the process that had been developed by McCullough Robertson. Nonetheless, I consider that Councillor E's email dated 2 December 2005 raised some relevant issues for the DSC's consideration. Therefore, it may have been beneficial to have included information about those issues and their relevance to the recommendation in the evaluation report, in terms that councillors, who were not engineers, could have understood.

I note that the DSC was also not provided with details of Officer B's separate informal evaluation, which he undertook as a 'comfort' measure to reassure him that the Norris tender, which was substantially less expensive than the Andreassen tender, was financially sustainable.

Officer B's informal summary of the tenders sets out an estimate of the yearly costs of operating the ferry and details of the inquiries he made that led to his estimate of costs and which he used to determine his scoring under the criterion of *Price and Value for Money*.

I also note from the evidence of Officer B, that his conclusion that the Andreassen tender was above his expectation on the tender price and did not represent value for money was based on his own inquiries about the costs associated with running the ferry operation and his evaluation of tenders.

Officer B stated also that, on the same basis that he had evaluated the Andreassen tender, he considered the Norris tender to represent better value for money.

This informal evaluation would no doubt have assisted the DSC in comparing the respective tenders.

In the circumstances, Officer B's summary of his informal assessment of tenders should have been incorporated into the evaluation report dated 6 December 2005.

However, in expressing this opinion, I am mindful that the evaluation report was completed within a tight timeframe for presentation at the meeting on 7 December 2005, which was DSC's last scheduled meeting for the year.

No briefing session

I note from Officer A's evidence that he did not consider that a briefing session for councillors conducted prior to Council's 7 December 2005 meeting would have assisted them.

Neely, in his evidence, expressed the view that a more detailed evaluation report, coupled with a pre-meeting briefing session, would have assisted Council's consideration of the ferry tender.

Neely's view is supported by the councillors' views, particularly Berwick, Councillor A and Councillor E, concerning the insufficiency of the information and analysis contained in the evaluation report.

If such a pre-meeting briefing session had been conducted, it is likely that much of the apparent difficulty at, or stemming from, the 7 December 2005 meeting (discussed in Part 9 of this report) might have been avoided.

In support of that view is the fact that during the course of the interviews with councillors conducted by my investigating officers and the officers of the CMC, the councillors often exhibited a mistaken understanding of the actual conditions of tender and the terms of the indicative contract.

The advantages associated with conducting pre-meeting briefing sessions, at least in relation to substantial contracts or other issues coming before Council for consideration and decision, are that councillors have the opportunity to properly consider the information provided and to ask questions about the information away from the distractions of a public meeting of the Council.

In this regard, I note the content of the Organisational Review Report into the DSC that had been prepared by Orion Consulting Network in June 2005.

Under the heading Governance Issues, the report included the following recommendation that briefing sessions be conducted:

That Briefing Sessions be conducted on major issues at least a week before the relevant Council meeting. No recommendations are to be presented in officer reports to these briefing sessions. These sessions are to be closed to the public and strictly confidential.

I have also considered the analysis contained in the Orion report underpinning the above recommendation. The Orion analysis appears to be consistent with my assessment of the desirability of separating Council's information gathering activities from its deliberations and decision making (meetings at which the latter takes place should generally be open to the public).

Page 9 of the Orion report relevantly states:

A major problem of the current Council meetings is that they have multiple purposes. Some matters are for information purposes, some are for reviewing recommendations, while some are for complex political and policy debate. The multiple purposes do not engender meeting efficiency.

This problem has not been assisted by the quality of management reports, which often do not contain all the information required by councillors to make informed decisions.

...

Other Councils in similar circumstances ... get around this problem by having in-house briefing sessions for all councillors on major issues and forthcoming Council reports. This allows each councillor to become fully informed on each issue, and to allow time for reflection and discussion between the councillors, away from the pressure-cooker environment of Council meetings. It is essential that Council continues to have transparent decision making processes.

I understand that the DSC has implemented this recommendation.

Course of deliberations

The allegation made by Berwick in his 8 March 2006 email to my Office was to the effect that the course of debate and the voting pattern of some councillors at the Council's 7 December 2005 meeting indicated that those councillors wished to award the ferry contract to Andreassen.

From my examination of the minutes for the 7 December 2005 meeting, it is immediately apparent that at no time was a motion put to accept the Andreassen tender.

Apart from what seems to have been the consistent support by Berwick, Councillor B and Councillor E for the motion to accept the recommendation to award the ferry contract to Norris, I am unable to identify any other consistent voting pattern by any group of councillors.

I note the motion proposed by Councillor D and Councillor F to the effect that Council defer making a decision until the Council received clarification 'in relation to legal issues and the option of purchasing the old ferry'. That motion was lost.

5.7 Opinions and recommendations

The evidence obtained during the investigation supports the following opinions and recommendations.

Opinion 28

Councillors did not engage in any conduct that amounted to inappropriately supporting the Andreassen tender.

Opinion 29

It was reasonable for councillors to seek from the CEO additional information to enable them to consider, on an informed basis, the recommendation that Norris be awarded the ferry tender.

Opinion 30

The evaluation report for the tenders for the Daintree River ferry contract did not contain sufficient information to enable the Council to make an informed decision.

Opinion 31

The evaluation report should have contained:

- the individual scoring of each tender from each of the evaluation panel members;
- how the tenders compared on the critical points set out in the scoring sheets;
- the scoring guidelines, the methodology and reasons supporting the evaluation scores; and
- a detailed analysis of the tenders, including operating cost estimates and, at least in general terms, information addressing the main points made in Councillor E's email dated 2 December 2005.

Officer A, in his submission dated 9 October 2006 in response to my s.55 notice, stated:

Reports submitted to Council for consideration never include individual scoring records. These records are kept by the individual panel members.

With regard to [Councillor E's] email dated 2nd December 2005, it would appear that [Councillor E] had received the report before this date and it would not have been possible to respond to his points in the report and it would not have been appropriate to prepare a supplementary report as [Councillor E] may have been influenced by outside sources.

While I acknowledge Officer A's view that it was not the practice for individual scoring sheets to be annexed to the evaluation report and acknowledge the time constraints confronting Officer A in preparing the report, I remain of the opinion that councillors' decision making would have been assisted if the information detailed in Opinion 31 had been provided in, or annexed to, the evaluation report.

Opinion 32

A briefing session for councillors, conducted prior to Council's consideration of the recommendation contained in the evaluation report, would have assisted the councillors to make a determination on a more informed basis by enhancing their knowledge of the general and technical aspects of the tenders as well as the terms of the indicative contract.

Recommendation 10

DSC hold discussions with councillors to determine whether on major tenders the current level of information contained in reports submitted to Council is sufficient to allow the Council to efficiently consider such issues.

Recommendation 11

DSC develop and maintain a centralised precedent database to assist officers in the drafting of procurement reports on major tenders.

Recommendation 12

DSC provide training on report writing to its officers, including providing reasons for recommendations and identifying relevant evidence and supporting material.

Recommendation 13

DSC require officers who submit tender evaluation reports for Council decision to specifically address compliance with the procurement principles in the report.

Recommendation 14

DSC continue to conduct briefing sessions on major issues (in accordance with recommendation 2 of the Orion Report of June 2005) separate from its deliberative and decision making functions undertaken at its public meetings.

In the DSC's submission in response to my proposed report that I forwarded pursuant to s.26(3) of the Ombudsman Act, the CEO stated:

In particular I support you[r] suggestion of keeping Council better informed on major issues through briefing sessions rather than marginalising the councillors as seems to have happened in the Daintree Ferry case.

Chapter 6: Improper lobbying of councillors by Andreassen

6.1 Nature of allegations

In Berwick's email to my Office dated 8 March 2006, he alleged that:

There was (improper) lobbying of, and collaboration between, councillors (unspecified) and Colin Andreassen of Daintree River Ferry Pty Ltd during the tender process.

...

Councillor D approached Andreassen during the tender process to 'accommodate the purchase of the ferry by council rather than award a tender to either of the two tenderers'.

6.2 Relevant condition of tender

Clause 29.4 of the Conditions of Tender stated:

29.4 Any Tenderer who directly or indirectly canvasses support from an elected member, employee or agent of DSC will be disqualified and any Tender submitted will not be considered.

6.3 DSC Councillors' Code of Conduct

The first Councillors' Code of Conduct for DSC came into effect on 1 March 2006. Paragraph 2.3.2.4(g) provides:

g) Councillors must ensure, where the Council's adopted purchasing and tendering policies restrict or regulate Councillor communications with tenderers, that they comply with such policies.

Councillors should not meet with tenderers or potential tenderers to discuss the tender or potential tender unless such meetings are sanctioned by the Council in advance, have a Council officer in attendance and a record kept and made available to the Council through the Chief Executive Officer. In addition, a Councillor should refrain from attending such a meeting if the Councillor has a conflict of interest or material personal interest.

6.4 Evidence

6.4.1 Berwick's evidence

In the course of his evidence given during two interviews conducted by my investigating officers and by CMC officers, Berwick stated that during the DSC meeting of 7 December 2005 at which the recommendation to award the ferry contract to Norris was considered, a number of councillors revealed that Andreassen had contacted them during the tender process.

Berwick claimed that Councillor A, Councillor B, Councillor D and Councillor E had either been contacted by, or initiated contact with, Andreassen during the tender process.

Berwick also said that it was well known among councillors that once a tender process had commenced there ought to be no contact between tenderers and councillors in relation to the tender. Berwick confirmed that the LGAQ had conducted training for the new councillors following the last local government election (in 2004) that covered, among other things, the need for councillors to have no contact with tenderers during a tender process.

Four councillors, namely Councillor B, Councillor E, Councillor C and Councillor D were first elected at the last Council election.

In the course of his interview with officers of the CMC, Berwick stated that Andreassen had not contacted him during the tender process.

6.4.2 Andreassen's evidence

During his interview with officers of the CMC, Andreassen confirmed that he had spoken to most of the DSC councillors about his tender. Andreassen stated that Councillor D had called him to discuss some general issues concerning the ferry operation, such as the wage costs, but not the specifics of his tender. Similarly, he said he discussed the tender to varying extents with Councillor E, Councillor B, Councillor C and Councillor F and, to the best of his recollection, the discussions focused on a comparison of the two tenders. Andreassen said he had not discussed the tender process with Councillor A.

Andreassen denied that he had tried to influence the tender process. He explained that his contact with the various councillors was merely an attempt to highlight the advantages of his tender, in particular, the availability of a second ferry (the existing ferry) with a 21 car capacity as well as his company's experience in operating the Daintree ferry service since 1995.

6.4.3 Councillor A's evidence

In the course of his interview with my investigating officers, Councillor A stated that he played lawn bowls at the same club as Andreassen, but denied having had any discussion about the tender process with him while the tender process was ongoing.

Similarly, in his interview with officers of the CMC, Councillor A stated that he had had a number of discussions with Andreassen at the relevant time, but had no recollection of Andreassen raising the issue of the tender with him.

6.4.4 Councillor B's evidence

Councillor B, when interviewed by officers from the CMC, stated that Andreassen had made contact by telephone and asked for a meeting to discuss aspects of the tender process and subsequently had a discussion at Councillor B's home. While uncertain of the date, Councillor B recalls that Andreassen had expressed concern about the late commencement of the tender process and raised the prospect of extending the existing ferry contract. Councillor B also stated that Andreassen raised an issue about the type of ferry that Norris proposed to operate.

However, Councillor B stated that at no time did Andreassen seek information about the Norris tender or ask Councillor B to vote at Council in favour of his tender.

6.4.5 Councillor C's evidence

In his interview with officers from the CMC, Councillor C stated that he was aware of the allegations of improper lobbying by Andreassen, but that the only contact made by Andreassen with him concerned the insurance on the then existing ferry contract which was due to expire at the end of March 2006.

Councillor C told the CMC officers that he listened to Andreassen about the insurance issue, and that Andreassen did not attempt to influence him to support his tender. Councillor C also said that Andreassen's contact with him could not be considered as lobbying.

Councillor C stated that the content and effect of Clause 29.4 of the Conditions of Tender, which precluded contact by tenderers with councillors or DSC officers during the tender process, were only brought to the attention of councillors at the DSC meeting on 7 December 2005.

6.4.6 Councillor D's evidence

In Councillor D's interview with my investigating officers, he stated that, on the Saturday (3 December 2005) prior to the 7 December 2005 meeting, he contacted Andreassen to obtain some information about the ongoing fuel and labour costs of the ferry operation. Councillor D explained that he had contacted Andreassen because of the lack of information provided to councillors about the tenders prior to the DSC meeting of 7 December 2005.

Councillor D stated that at no time did Andreassen contact him to lobby for Councillor D's support in favour of his tender.

In his interview with officers of the CMC, Councillor D gave an account that was consistent with that given to my investigating officers.

6.4.7 Councillor E's evidence

When interviewed by CMC officers on 22 March 2006, Councillor E stated that Andreassen had telephoned and left a message for Councillor E to call him about the tender process. Councillor E stated that he telephoned Andreassen back and during that discussion Andreassen sought to have him compare the technical aspects of the tenders (such as the engine and hydraulic back ups). He could not recall the date of the discussion but the subject matter indicated that it was during the tender process.

Councillor E stated that he did not regard Andreassen's contact as an attempt to lobby him. Rather, Andreassen was seeking to have him make a comparison between the tenders and at no time did Andreassen directly ask Councillor E to support his tender.

6.4.8 Councillor F's evidence

In Councillor F's interview with officers of the CMC, he stated that Andreassen had contacted him by telephone on one occasion during the tender process to discuss the timing of the decision so he could consider issues surrounding the possible extension of the ferry operation by Daintree Ferry Pty Ltd beyond 21 March 2006.

Councillor F also stated that he had spoken to Andreassen about the ferry tender. However, Councillor F made no reference, either in his two interviews with my investigating officers or in his interview with officers of the CMC, to Andreassen having sought his support in Council's vote on the ferry contract.

6.5 Analysis

I note the evidence of Berwick to the effect that councillors knew, or ought to have known, that they should not have any contact with tenderers.

In his evidence Berwick expressly referred to the fact that the LGAQ had conducted training for the new councillors following the last local government election that covered, among other things, the need for councillors to have no contact with tenderers during a tender process.

I also note that in Andreassen's interview with officers of the CMC, he confirmed that he had spoken to most of the DSC councillors about his tender. More specifically, Andreassen stated that Councillor D had called him to discuss some general issues concerning the ferry operation, such as the wage costs (but not the specifics of his tender) and that he had had discussions to varying extents with Councillor E, Councillor B, Councillor C and Councillor F.

Andreassen denied having discussed his tender with Councillor A.

Andreassen denied trying to influence the tender process. However, he admitted that the purpose of his contacting the various councillors was to highlight the advantages of his tender, namely, the availability of a second ferry (the existing ferry) with a 21 car capacity as well as his company's experience in operating the Daintree ferry since 1995.

While Councillor E, Councillor B, Councillor C, Councillor D and Councillor F all acknowledge that they had been involved in discussions of one kind or another with Andreassen about the tender process or the ferry operation, none of them considered that during those discussions, Andreassen had tried to lobby them to vote in favour of his tender.

However, Councillor B said that Andreassen raised an issue about the type of ferry Norris proposed to operate and Councillor E said that Andreassen sought to have him compare the technical aspects of the two tenders.

In relation to Councillor D, I note that he initiated the contact with Andreassen to obtain details about ongoing fuel and labour costs associated with the ferry operation because of what Councillor D described as the lack of information that had been provided to councillors.

My view is that Clause 29.4 of the Conditions of Tender, which refers to a direct or indirect approach to canvass support from a councillor or DSC agent or employee, is broad enough to capture the kind of approaches made by Andreassen to Councillor B and Councillor E.

In my view, the ordinary meaning of the words 'canvasses support' connotes conduct whereby a tenderer solicits support for their tender from a councillor, employee or agent of a council or tries to influence a decision to be made by such a person in relation to a tender. It does not matter whether the tenderer's conduct tends to promote an aspect of their own tender or to highlight a deficiency in a tender of a competitor.

Even though Councillor D approached Andreassen, Andreassen could still be in breach of Clause 29.4 depending on their discussion. At this time, there is insufficient evidence to conclude that this discussion constituted a breach of the clause.

The nature and extent of contact between Andreassen and Councillor C, and Andreassen and Councillor F, during the tender process would not, on the available evidence, have breached Clause 29.4 of the Conditions of Tender.

However, regardless of whether any of the councillors' contact with Andreassen came within the scope of Clause 29.4, they should have been aware that it was not appropriate to have any contact with a tenderer about an aspect of a tender or a related matter, during the course of the tender process.

Despite Berwick's assertion that at the relevant time, councillors were well aware of the principle that they ought to have no contact with tenderers during the tender process, I note Councillor C claims the issue was only brought to councillors' attention at the meeting on 7 December 2005.

As noted earlier, the Councillors' Code of Conduct did not commence until 1 March 2006. My examination of DSC's relevant purchasing policy revealed no prohibition on or work instructions for councillors or DSC officers in relation to communicating with tenderers during tender processes.

However, the rule that councillors refrain from contacting tenderers during the tender process (except in prescribed circumstances) is simply good administrative practice:

- to prevent perceptions of bias arising; and
- to maintain an appropriate distinction between the role of councillor and the role of Council officers.

6.6 Opinions and recommendations

The evidence obtained during the investigation supports the following opinions and recommendations:

Opinion 33

Andreassen may have breached Clause 29.4 of the Conditions of Tender and been thereby subject to disqualification from the tender process on the grounds that, during the tender process, he contacted Councillor B and Councillor E and was contacted by Councillor D, and made statements to them that may have amounted to canvassing support from the councillors for his tender.

Andreassen, in his submission dated 26 October 2006 in response to my s.55 notice, stated:

The existence of Clause 29.4 escaped my notice when I read the tender document and I freely admit that I did have discussions with Councillors whilst oblivious to its existence and therefore in all truth may have been fairly disqualified. It is simply not true that I deliberately set to influence Councillors to vote in my favour as suggested by Chairman [sic] Berwick.

...

Most of my discussions with Councillors and Council staff related to deficiencies in the original document, particularly in relation to the configuration of the new vessel. There was no provision in the original document for a toilet on the vessel and no shelter area for pedestrians using the vessel. The tender document was subsequently amended to remedy these deficiencies only after I met with Council officers. The tender document was amended again to correct another error in the original issue.

...

There was never any attempt on my part to disadvantage the other tenderer nor influence the Councillors or Council officers in my favour.

I note that Andreassen's submission is consistent with the evidence he gave during his interview with officers of the CMC and with the accounts of the councillors with whom he had discussions during the tender process.

Opinion 34

Andreassen's contact with Councillor C and Councillor F during the tender process, in the circumstances, did not amount to canvassing support within the meaning of Clause 29.4 of the Conditions of Tender.

Opinion 35

It was not appropriate for Councillor E, Councillor B, Councillor C, Councillor D and Councillor F to either initiate contact with Andreassen about an aspect of his tender during the tender process or to engage in a discussion initiated by Andreassen about the tender or his competitor's tender. Such conduct had the potential to give rise to perceptions of bias in relation to Council's consideration and determination of the tender.

The extracts from Andreassen's submission quoted under Opinion 31 are also relevant to this opinion. He also said:

...

I will be extremely disappointed if there are adverse comments in your report about my part in the tender process. My actions were more of those of a concerned citizen who wanted the job done properly. I know from long experience that an inadequate ferry service across the Daintree river would severely impact upon those residing north of the river and also on the many businesses involved in the tourism industry. I am independently wealthy and not reliant on operating the ferry service as a source of income.

There was never any attempt on my part to disadvantage the other tenderer nor to influence the Councillors or Council officers in my favour. The whole job was very poorly handled and delayed from the very beginning by Council staff and this should be the focal point of your report. You might ask why tenders were called at such a late stage despite plenty of warning and why was the original tender document so deficient in content.

Again, Andreassen's submission is consistent with his evidence given in the course of his interview with officers of the CMC.

While Andreassen may not have been aware of the existence of Clause 29.4, I remain of the opinion that his discussions with councillors had the potential to give rise to a perception of bias concerning Council's consideration and determination of the tender.

Opinion 36

The councillors were motivated to discuss with Andreassen aspects of his tender because of the failure of Council officers to provide the Council with sufficient information of their analysis of the comparative strengths and weaknesses of the two tenders.

Opinion 37

DSC failed to provide adequate training to councillors on the Councillors' Code of Conduct. This failure constituted unreasonable administrative action within the meaning of s.49(2)(b) of the Ombudsman Act.

Recommendation 15

DSC undertake training for councillors on the Councillors' Code of Conduct, particularly in relation to the obligations in paragraph 2.3.2.4(g) of the Code.

Recommendation 16

DSC amend its purchasing policy to incorporate a general prohibition on contact between tenderers and DSC councillors in similar terms to Clause 29.4 of the Conditions of Tender and refer expressly to Paragraph 2.3.2.4(g) of the Councillors' Code of Conduct.

Recommendation 17

DSC amend its purchasing policy to incorporate a general requirement for councillors and DSC officers to make a written record of any contact they have with a tenderer, or an agent or representative of a tenderer, about any aspect of the tender during the tender process and forward such record to the DSC's CEO.

Recommendation 18

The CEO establish and maintain a register of all such disclosures.

Chapter 7: Work undertaken by Norris on the property of Berwick's partner

7.1 Introduction

The allegation reported to the CMC by the CEO in his letter dated 22 February 2006 stated:

The Mayor had work done on his farm [actually the property of Berwick's partner] by Norris, who also has an excavator business, in the period directly before the award of the tender and that some gratuity in terms of cost was received.

The issue of Norris undertaking work on the property of Berwick's partner after the tender period had closed, but before the DSC had made a decision, was first raised by Councillor F during Council's 7 December 2005 meeting.

7.2 Norris' evidence

In the interview conducted with Chris and Charmaine Norris by officers of the CMC, they confirmed that they had undertaken work on the subject property on three days, namely, from 29 to 31 October 2005.

Charmaine Norris stated that the work was actually performed by Chris Norris and one of their employees with an excavator and a tandem tip truck and that all hours worked were charged at the appropriate rate for private work, being higher than the rate Norris charged the DSC under existing contractual arrangements.

In response to a question from the CMC investigators about whether any discount was given, Charmaine Norris stated:

No discount given. He's actually charged at a higher rate than in our rates we have in the contract with the actual Douglas Shire Council, so he's just charged like any other type of private work.

Chris Norris confirmed that they had not provided a quote to Berwick in relation to the subject work.

In response to a question from the CMC investigators about how many other earthmoving businesses operate in the area, Chris Norris responded that there were three or possibly four such businesses, including his, that could have undertaken the work on the property of Berwick's partner, but that two of the other operators had larger excavators.

Chris Norris stated that they got the work because their excavator was smaller than those of the other operators and therefore, given the nature of the work and access issues involved in getting a larger excavator onto the property, the smaller excavator was more suited to the job.

Chris Norris said that he had not had any discussion about the ferry tender with Berwick while undertaking the subject work. Chris Norris went on to refer to the Conditions of Tender (Clause 29.4) prohibiting contact between tenderers and councillors or DSC officers.

Charmaine Norris stated that, at Council's meeting on 7 December 2005, Councillor F had told the meeting that Norris had undertaken work on the subject property before the tender process had concluded. I note that Councillor F confirmed this when interviewed by the CMC investigators.

7.3 Evidence

7.3.1 Berwick's evidence

In the interview conducted by my investigating officers, Berwick stated that he had hired Norris to undertake the work on the subject property because he thought that Norris had the most suitable excavator for the work involved as it was smaller than the 25 tonne excavator of another contractor. The Norris excavator was also better able to obtain access to the property and was therefore a cheaper option than a larger excavator.

Berwick stated that the work included soil conservation measures and fixing a culvert across a creek, moving some soil for one of the fish farming ponds as well as work associated with re-aligning about 40 metres of gravel road.

Berwick also stated that Norris had previously undertaken work on the property some three or four years before. The work undertaken between 29 and 31 October 2005 had been arranged some considerable time before the work was actually carried out.

In relation to the tender for the contract to operate the Daintree River ferry, Berwick stated that the only discussion he had with Norris was while the work was in progress when Norris told Berwick that he had submitted a tender for the ferry contract.

On the issue of when he first became aware that Norris had submitted a tender for the operation of the ferry, Berwick stated that, while he didn't have a clear recollection:

I think most likely it was when he [Norris] was out at our place but I am fuzzy on that.

Berwick stated that he considered it appropriate for Norris to continue undertaking the work even after he became aware that Norris had tendered for the ferry contract.

Berwick's evidence given during his interview with officers of the CMC is consistent with that given in the course of his interview with my investigating officers.

7.4 Douglas Shire Council minutes of 7 December 2005

The minutes for the Council meeting of 7 December 2005 confirm that Berwick disclosed the fact that Norris was undertaking work on his property at the relevant time in the following terms:

Cr Berwick stated that there may be a perceived conflict of interest because Mr Norris had previously been contracted to carry out some work on Cr Berwick's partner's property. Cr Berwick advised he would remain in the meeting to participate in all discussions and vote.

7.5 Analysis

7.5.1 Meeting of 7 December 2005

Councillor F told the CMC investigators that, in Council's meeting on 7 December 2005, he advised that Norris had undertaken work on the property of Berwick's partner. This appears to have led to Berwick's disclosure of that fact at the meeting, which the minutes record as having been made following the lunch adjournment.

7.5.2 Payment for work undertaken

Berwick provided my Office with a copy of the invoice submitted to him by Norris for the subject work (invoice number 0565 dated 1 November 2005 for a total inclusive of GST of \$2900.70) and a copy of an invoice from another firm submitted to Norris for the hire of a float to transport the Norris excavator (invoice number 01455056 for \$450 plus GST).

Based on the invoice submitted by Norris, the excavator was charged at a rate of \$90 per hour.

My investigating officers made inquiries with the DSC about the rate it is charged by Norris for work undertaken by the excavator. The relevant documents provided by the DSC include minutes of Council meetings for 1 June 2004 and 7 June 2005 together with a Summary of Yearly Tenders for various classes of equipment that the DSC would engage for work on a contract basis.

The summaries for 2004-05 and 2005-06 record that the charge rate for Norris' Kobelco SK 120-5LC (12.5 tonne) excavator were, in both years, below the hourly rate charged to Berwick.

From an examination of the invoices and Berwick's banking records, it is clear that the invoice amount of \$2900.70 was paid in full (Berwick's cheque number 001392) on 29 December 2005 and cleared with his bank on 9 January 2006.

The terms of payment under the invoice required payment within 14 days after the date of invoice. However, neither Berwick nor Norris is able to say when the invoice was actually received or sent. Berwick says his partner did not pay the invoice until approximately six weeks after the subject work had been undertaken. This meant that, at the time Berwick moved the motion in the DSC's meeting of 7 December that Norris' tender be accepted and later voted in support of a similar motion moved by Councillor F, he still owed a considerable amount of money to Norris.

My investigator made inquiries with Charmaine Norris and Berwick in relation to the fact that Berwick's partner had not paid the invoice until 29 December 2005. Charmaine Norris advised that it is normal practice for their customers to pay invoices by the end of the month following the month in which the invoice is sent out. Charmaine Norris stated that, in this instance, she had no recollection or record of when the invoice was actually posted to Berwick. Charmaine Norris also stated that she did not consider it unusual that the invoice was not paid until the end of December.

Berwick's partner responded on his behalf and advised that she had written out the cheque for the invoice when she paid all the bills on 29 December 2005. She said that because it was Christmas, she may not have posted the cheque until after the new year.

7.5.3 Material personal interest

Section 244 of the LGA 1993 establishes the requirement for councillors to disclose material personal interests.

The requirements in relation to disclosure under the LGA 1993 are limited in s.244 of the LGA 1993 to situations where a councillor has a 'material personal interest' in an issue to be, or being, dealt with by the council or a committee of the council. In such a situation, the councillor must disclose the interest to the meeting and must not be present at or take part in the meeting while the issue is being considered or voted on.

Under s.6 of the LGA 1993, a councillor has a 'material personal interest' in an issue if that person has, or should reasonably have, a realistic expectation that, whether directly or indirectly, that person or an associate stands to gain a benefit or suffer a loss.

Berwick, in his submission dated 23 October 2006, in response to my s.55 notice, stated:

The comment about us continuing with the Norris engagement after becoming aware they had tendered for the ferry should not be construed as being negative which is how it sounds at the moment. By that stage:

- *Evidently the tender box had already been opened – I was not aware of this;*
- *Norris was already on site;*
- *It would have been difficult to find another operator;*
- *We would probably miss the dry weather and have to wait till the following dry season;*
- *I did not discuss it with him any further.*

... I totally reject the inference and suggest that even if it were overdue and I was aware of it, there would still be no material interest unless I were corrupt and accepting a bribe. If this were the case I suspect the offence of bribery would be much worse than failing to declare a material interest. ...

There is no evidence that Berwick received or expected to receive any favourable treatment in relation to the amount he was charged for the work on his partner's property or the time allowed to settle the invoice.

7.5.4 Other ethical considerations

The DSC's Councillors' Code of Conduct came into effect on 1 March 2006 and therefore does not apply to action that occurred before that date. In my view though, the principles enunciated in the Code reflect the general ethical obligation on all public officials, including councillors, to act with integrity and in the public interest.

Paragraph 2.3.2.4 (a) of the Code provides:

- a) *Councillors must conduct themselves in a manner, which will maintain and strengthen the public's trust and confidence in the integrity of the Council, ensuring that their actions do not detract from the integrity of the Council and avoiding any action, which may diminish its standing, authority or dignity.*

The allegations the CEO reported to the CMC in accordance with his duty under the *Crime and Misconduct Act 2001* had been matters of public speculation for some time in the Douglas Shire community. The CEO was also motivated to report the matters because they had been raised in council, including at the council meeting on 7 December 2005.

Even though I consider that Berwick did not have a material personal interest in the ferry tender, in view of the high level of community and local media interest in the matter, he should have disclosed to the Council that Norris was doing, or had done, work on his property as soon as practicable after Norris told him that he had submitted a tender.

In expressing that view, I note Berwick's evidence concerning:

- his reasons for choosing Norris to carry out the work, namely, the nature of the work, the limited number of suitable contractors in the area and access problems; and
- the timing of his engaging Norris to do the work, which was influenced by Norris' availability to carry it out before the onset of the wet season.

7.5.5 Communication of tenders received

I note from Berwick's evidence that he said he did not have a clear recollection of when he first became aware that Norris had submitted a tender, but thought that it was, most likely, when Norris was undertaking the work on his partner's property (29 to 31 October 2005).

I am not aware of any other evidence that contradicts Berwick's account of events. During the course of this investigation, my investigating officers contacted Neely (at the relevant time Acting CEO) and Officer A about whether the identity of the tenderers was communicated to councillors and other senior DSC officers.

In a telephone discussion with my investigator, Officer A stated that he attended the opening of the tender box on 24 October 2005 and that he did not have any contact with any councillors about the identity of the tenderers.

Similarly, Neely stated that he did not recall discussing the ferry tender with any councillor in the week or so following the closing of tenders. Neely stated that he had no diary note of such a discussion with any councillors. Neely also stated that there was no formal procedure in place to inform councillors of the names of tenderers.

Given the importance of the ferry operation to the DSC, it may seem surprising that no councillor inquired about the number of tenderers or their identities in the week or so following the closing of tenders. However, there is no evidence from any of the councillors in their interviews with either my investigating officers or the officers from the CMC that such discussions took place.

7.6 Opinions and recommendations

The evidence obtained during the investigation supports the following opinions and recommendations.

Opinion 38

There is no evidence to support the allegation that Berwick received any discount or other benefit from Norris in relation to the work Norris undertook on the subject property of Berwick's partner in October 2005.

Opinion 39

There is no evidence that the Norris tender was either directly or indirectly advantaged in the tender process as a result of Norris undertaking the work on the subject property of Berwick's partner.

Opinion 40

Berwick did not have a material personal interest in the outcome of the ferry tender process when, at the DSC's meeting of 7 December 2005, he participated in discussions and voted on the tender evaluation panel's recommendation that Council accept the Norris tender.

Opinion 41

Berwick should have disclosed to the Council the fact that Norris was undertaking work on his partner's property as soon as practicable after he was told by Norris that he had submitted a tender for the ferry contract.

I had some initial concerns that Berwick had not disclosed the fact that Norris had undertaken work on the property of Berwick's partner and had voted on the motion that the council accept the Norris tender when he had not paid for the work. However, these concerns have been allayed after considering the result of my investigating officer's additional inquiries and the content of Berwick's submission.

Recommendation 19

DSC develop procedures to ensure that, for all major tender processes, councillors are promptly informed of the identities of all tenderers to ensure that potential conflict of interest situations are avoided.

Chapter 8: Timeliness of ferry tender and contract execution

8.1 Allegation

In Berwick's memorandum to the CEO dated 19 February 2006, he asked the CEO to respond to two matters, namely:

- that, in early 2006, the CEO had selectively disseminated the final contract (prepared by McCullough Robertson) and related documents to certain councillors; and
- that there had been 'apparent deliberate delays to the signing of the [ferry] contract', which was contrary to DSC's interests.

The implication in the memorandum is that the CEO was responsible for delaying the contract.

8.2 Summary of timelines

The five year term of the 2001 contract for the ferry operation, which had been awarded to Daintree Ferry Pty Ltd, expired on 21 March 2006.

The chronology set out in Appendix A relating to the tender process for the 2006 contract shows that, at least by early November 2005, the DSC had considered the implications of the contract with Daintree Ferry Pty Ltd ceasing on 21 March 2006. With that in mind, the DSC sought an extension of the existing contract to 30 June 2006.

There followed a series of communications between the DSC and Daintree Ferry Pty Ltd, as a result of which, on 23 November 2005, DSC believed that Daintree Ferry Pty Ltd had offered to extend operations until 30 June 2006. By letter dated 1 December 2005, DSC wrote to Daintree Ferry Pty Ltd accepting the extension offer to 30 June 2006. On 5 December 2005, Daintree Ferry Pty Ltd withdrew the offer of extension to 30 June 2006.

Shortly after that, the DSC commenced negotiations with Daintree Ferry Pty Ltd for the purchase of the ferry. The issues surrounding DSC's decision to purchase the ferry are dealt with in Part 9 of this report.

8.3 Analysis

8.3.1 General observations

It is a general and repeated theme in the evidence of the majority of DSC officers interviewed that the tender process was commenced later than was preferable, given the likely lead times required for the construction of a ferry should that be necessary. The general thrust of the views expressed was that the tender process ought to have been well underway 12 months prior to the expiration of the existing ferry operation contract.

However, while the timelines might be considered to have been 'tight', the fact is that Norris was notified by letter dated 9 December 2005 that their tender had been accepted with the contract between the DSC and Sirron Enterprises Pty Ltd being executed on or about 21 February 2006.

Similarly, while negotiations between the DSC and Daintree Ferry Pty Ltd had failed to result in an extension of the existing contract to 30 June 2006, the DSC was successful in negotiating the purchase of the ferry from Daintree Ferry Pty Ltd prior to the expiration of the existing contract period.

The effect of the DSC successfully negotiating the purchase of the ferry was to guarantee the continuation of the ferry operation until the successful tenderer was able to commence ferry operations.

8.3.2 Progress of ferry tender and contract

My investigation revealed that, rather than there being any specific cause, the following sequence of events contributed to the delay in finalising the tender for the ferry:

- On 4 March 2004, Rainforest CRC was commissioned to investigate and advise DCS on ferry options.
- On 8 March 2004, the CEO first gave consideration to the need to prepare tender documents for the new ferry contract.
- On 9 June 2004, DSC minutes of special meeting resolved to broaden scope of review by Rainforest CRC to include bridge option.
- On 6 July 2004, CEO sent fax to Rainforest CRC confirming DSC's decision to broaden review.
- Rainforest CRC did not finalise its report and provide it to DSC until December 2004.
- From 17 December 2004 to 7 March 2005, the CEO was on leave. It appears that little was done to progress DSC's consideration of the options except that Rainforest CRC gave a presentation to councillors in January 2005.
- When the CEO returned to work in March 2005, he prepared a report for Council analysing the options in the CRC report. The CEO's report is dated 28 April 2005.
- On 4 May 2005, the Council considered the CEO's report and approved that a tender be let for a new ferry contract.
- Therefore, it took 14 months for DSC to determine that it would proceed with the ferry option.
- At Council's meeting on 4 May 2005, it does not appear to have allocated clear responsibility for the preparation of the tender documents.
- Therefore, little happened to progress the tender until mid-July 2005 when the CEO directed Baade to take responsibility for the tender process.
- Confusion about responsibility for preparation of the tender documents during the period 4 May 2005 to mid-July 2005 was exacerbated by the absence of a Director of Corporate Services and by the fact that Corporate Services had taken responsibility for the preparation of tender documents for the two previous tenders for the ferry.
- The CEO was again absent from the Council for the period 21 September 2005 to 30 January 2006 during which time Neely was Acting CEO.

Once Baade was given responsibility for the preparation of the tender and contract documents, the matter appears to have proceeded without any undue delay.

The principal steps taken were as follows:

- On 18 July 2005, Baade wrote to McCullough Robertson giving instructions for the preparation of the tender and contract documents. McCullough Robertson confirmed those instructions by email dated 26 July 2005, and set out a proposed timeframe for the completion of the tender process.
- In early August 2005, Baade had discussions with McCullough Robertson in Brisbane about the tender process and the review of the existing documentation and proposed conditions of tender that would apply.
- The tender was advertised on 10 September 2005 and tenders closed on 24 October 2005, after a two week extension was granted.
- By 9 November 2005, McCullough Robertson had undertaken a review of the tenders received and forwarded to the DSC a summary of the tenders as well as the tender evaluation guidelines and score sheets.
- The evaluation took place in November 2005 and the evaluation report dated 6 December 2005 was submitted to the Council meeting on 7 December 2005 where it resolved to award the contract for the Daintree ferry operation to Norris.
- By letter dated 9 December 2005, the DSC informed Norris that he was the successful tenderer. After that date negotiations as to the specific conditions of contract were entered into, with McCullough Robertson again playing a central role in the review of the conditions of contract. Finally, the contract between the DSC and Sirron Enterprises Pty Ltd was executed on 21 February 2006. Therefore, it took approximately ten weeks to finalise the contract from the time the DSC awarded the contract to Norris. However, this coincides with the Christmas period and with the CEO's absence from the Council.

8.3.3 Douglas Shire Council procedures

I note that the DSC has a Quality System Manual that includes a procedure relating to Purchasing (Including Control of Customer Supplied Product) dated 31 July 2001, but this procedure was described by Baade and the members of the evaluation panel as applying to more routine or recurrent purchases. For significant purchases such as the Daintree ferry contract (reference was also made to contracts relating to the construction of the Douglas Shire's sewerage treatment plant), DSC's practice was to seek external advice about the conditions and process.

Our inquiries with the DSC indicated that it does not have any specific procedure in place for the procurement of significant purchases of goods or services.

The *State Purchasing Policy* (and related guides on *Corporate Procurement Planning and Planning for Significant Purchases*) provides useful guidance on the types of considerations that should be central to planning for significant procurement decisions, including:

- establishing the objectives to be achieved from the purchase;
- evaluating potential purchasing strategies and identifying the preferred strategy to be adopted;
- specifying appropriate contract management arrangements; and
- specifying how the achievement of the purchasing objective will be measured.

8.4 Opinions and recommendations

The evidence obtained during the investigation supports the following opinions and recommendations.

Opinion 42

- (a) There was a significant delay in the DSC considering the options and deciding to go to tender for the ferry contract.
- (b) The delay was caused in part by the DSC's decision to broaden the terms of the review of the ferry service to include a review of the option for a bridge and by the CEO's absence on leave.

In the CEO's submission on behalf of the DSC, dated 26 October 2006, and in his submission in response to my s.55 notice, also dated 26 October 2006, he stated that Opinion 42 (which had earlier referred to his absence on sick leave) was:

... not correct as I was absent on sick leave after the finalisation of a decision of Council to call tenders for a new ferry. Having said this some delay would have been caused by the absence of the General Manager Engineering (Baade) over the period May-June 2005 on sick leave.

I note that in his submission in response to my s.55 notice the CEO stated in relation to this opinion that in his view 'the process was delayed because of the Council being confronted with various transport options including a bridge and by significant inaction' by the DSC while the CEO was on extended leave between December 2004 to March 2005.

Opinion 42 is directed to the point that from 17 December 2004 to 7 March 2005, while the CEO was on leave, little appears to have been done to progress DSC's consideration of the options except that Rainforest CRC gave a presentation to councillors in January 2005. My opinion is in no way critical of the CEO for being on leave.

Opinion 43

The CEO did not cause the signing of the final contract for the Daintree River ferry to be delayed.

Opinion 44

While the timelines for the tendering process were tight, any delays in the process were not caused by maladministration.

Opinion 45

The DSC did not have proper procedures in place for the effective and timely management of significant projects such as the Daintree ferry tender. This failure constituted unreasonable administrative action within the meaning of s.49(2)(b) of the Ombudsman Act.

Recommendation 20

DSC develop and implement procedures to be incorporated into its Procurement Manual for the planning and procurement of significant purchases of goods and services.

Chapter 9: Acquisition of the ferry

9.1 Introduction

One of the issues for investigation concerned the circumstances and terms of DSC's purchase of the ferry from Andreassen, including whether the exercise of a different option at an earlier time could have saved funds of the DSC.

In relation to this issue, one of the allegations made by Berwick in his email to my Office dated 8 March 2006 related to improper lobbying of councillors by Andreassen:

Councillor D approached Andreassen during the tender process to 'accommodate the purchase of the ferry by council rather than award a tender to either of the two tenderers'.

The issue of Andreassen's lobbying of councillors and the contact made with him by councillors during the tender process was raised by Berwick during Council's meeting on 7 December 2005 and is dealt with under Part 6 of this report.

In the course of Berwick's interview with my investigating officers, he expanded on the allegation set out above. He suggested that Councillor D's actions in contacting Andreassen during the tender process had potentially cost the DSC a substantial amount of money. Berwick's evidence in support of his allegation is set out in more detail below at section 9.4.

9.2 Options considered by Douglas Shire Council

At Council's meeting on 28 February 2006, which had been called in relation to the negotiations for the extension of the ferry operation from 21 March 2006 to 30 June 2006, the Council considered a number of options, namely:

- a) Council purchase the ferry from Daintree Ferry Pty Ltd and operate the ferry itself,
- b) Council purchase the ferry and find another party to operate the ferry,
- c) Daintree Ferry Pty Ltd operate the ferry,
- d) Council litigate the matter [on the basis that] a binding contract with Daintree Ferry Pty Ltd exists,
- e) Council source another ferry to provide the service.

The following minutes of that Council meeting relate to a recommendation that was based on the recommendation and analysis contained in a confidential report dated 28 February 2006, prepared by Neely in his then capacity as Acting CEO:

Recommendation:

That Council offer to purchase the ferry from Daintree Ferry Pty Ltd in accordance with option (a) in the report and Council operate the ferry from 22 March 2006 to 30 June 2006.

The DSC resolved to accept the recommendation.

9.3 Timing

The contract between the DSC and Daintree Ferry Pty Ltd for the purchase of the ferry that Andreassen had operated was executed on or about 16 March 2006 after what was a somewhat protracted period of negotiation that began in about early November 2005 when Daintree Ferry Pty Ltd offered to extend ferry operations beyond the contract period for the period of 21 March 2006 to 30 June 2006.

By letter dated 1 December 2005, DSC wrote to Daintree Ferry Pty Ltd accepting the extension offer to 30 June 2006. On 5 December 2005, Daintree Ferry Pty Ltd withdrew the offer of extension to 30 June 2006.

Following the withdrawal of the offer, negotiations relating to the possible purchase of Daintree Ferry Pty Ltd's ferry intensified. Ultimately, the DSC was successful in negotiating the purchase of the ferry prior to the expiration of the existing contract period.

As noted above, the effect of that purchase was to guarantee the continuation of the ferry operation.

9.4 Evidence

9.4.1 Berwick's evidence

In Berwick's interview with my investigating officers, he stated that Councillor D's actions in contacting Andreassen during the tender process had potentially cost the DSC a substantial amount of money. Berwick provides an estimate of \$200,000 and possibly more, being the difference between the cost to the DSC had Andreassen agreed to operate the ferry beyond 21 March 2006 until 30 June 2006 and the cost associated with DSC's purchase of the ferry.

In a subsequent interview with my investigating officers, Berwick referred to the rumours circulating in the local community and various public comments made in the local media about the ferry tender. Berwick also referred to a letter that he had submitted to the *Port Douglas and Mossman Gazette* (in which he suggested that Andreassen's tender ought to have been disqualified because of Andreassen's lobbying of councillors during the tender process) and to Andreassen's request for a public apology from Berwick.

9.4.2 Andreassen's evidence

Andreassen stated that he had sent DSC his letter of 5 December 2005 withdrawing the offer to extend the 2001 contract, because the offer to extend (made by letter dated 23 November 2005) had been signed without his authority by his accountant.

In Andreassen's interview with the investigating officers from the CMC, he stated that he attended the Council meeting on 7 December 2005 at which the decision on awarding the contract to operate the ferry was made. It was in the course of that meeting that Berwick raised the allegation of Andreassen lobbying councillors while the tender process was still to be decided.

Andreassen also stated that as late as early February 2006 negotiations were still being conducted in relation to the options of Daintree Ferry Pty Ltd continuing to operate the ferry beyond the existing contract date of 21 March 2006 until 30 June 2006 or DSC purchasing the ferry.

Andreassen stated that following DSC's decision to award the ferry contract to Norris, the negotiations progressed to the stage where he was prepared to extend the operation of the ferry until 30 June 2006 for \$3,300 plus GST per day, but that Berwick made certain comments about him in the local media that resulted in his suspending negotiations.

Andreassen explained that he was concerned by Berwick's comments, including his comments to the effect that Andreassen was seeking to extract a premium price for extending the ferry operation to 30 June 2006 because his tender had been unsuccessful. Andreassen also stated that Berwick had suggested in the media that the delay, between the expiration of the 2001 contract on 21 March 2006 and the scheduled commencement on 1 July 2006 of the Norris operation (that relied on the construction of a new ferry), raised the potential of no ferry service operating unless an agreement was struck with Andreassen.

In his evidence, Andreassen also referred to the valuation of the ferry undertaken by a consulting marine engineers and ship surveyors firm in April 2005 that had valued the ferry at \$700,000.

9.4.3 Neely's evidence

In relation to the DSC's decision to purchase the ferry from Daintree Ferry Pty Ltd, Neely told my investigating officers that the cost of having Andreassen continue to operate the ferry beyond 21 March 2006 until 30 June 2006 (at \$3,300 per day), when coupled with the cost of repairs to the ferry (caused by bowing of beams and decking from the operation of an excavator engaged in sand dredging work) that the DSC was potentially liable for, appeared greater than the cost of actually purchasing the ferry from Daintree Ferry Pty Ltd.

Neely also provided my investigating officers with a copy of his diary notes relating to the negotiation meetings that occurred with Andreassen and a copy of the valuation obtained that valued the ferry at \$700,000 in April 2005.

Meeting on 10 February 2006

Neely's note of the meeting held on 10 February 2006 to negotiate the extension of the ferry operation or the purchase of the ferry by the DSC records that Andreassen, Councillor A and Baade also attended.

In summary, Neely's diary note records that he informed Andreassen that having Daintree Ferry Pty Ltd continue to operate the ferry beyond 21 March 2006 was 'too expensive with many unknown costs'.

The diary note also records that Neely suggested:

DSC pursue the option of purchasing the ferry and operate it from 22 March 2006. This would result in a clearer option in that the exact cost would be known and Council could sell the ferry when Norris commenced operations.

The added advantage would be that should the Norris ferry not be completed by 30/6/06 then the existing ferry could continue to operate.

Neely's diary note records that Andreassen stated he was already proposing to sell the ferry to another potential purchaser, but that he could nonetheless sell it to the DSC.

The note also records that Neely responded that Andreassen could:

... sell the ferry to the DSC without doing any repairs and probably at a price higher than anyone else would be prepared to pay.

Neely's diary notes also record summaries of:

- a discussion with McCullough Robertson about the options available to DSC;
- a further negotiation meeting with Andreassen on 17 February 2006; and
- telephone discussions with Andreassen on 23 February 2006 that dealt with Andreassen's reaction to media statements made by Berwick concerning the ferry contract and Berwick's subsequent telephone call to Andreassen in which Berwick sought to explain his comments and expressed his wish for negotiations to continue.

9.4.5 Councillor A's evidence

Councillor A told my investigating officers that, from around Christmas 2005, he was DSC's main representative in the negotiations with Andreassen for the purchase of the ferry.

Councillor A also stated that, later in 2005 and into 2006, negotiations with Andreassen continued and, following Berwick's public statements and letter in the local media about Andreassen, he (Councillor A) encouraged Berwick to make the public apology that had been requested by Andreassen.

9.4.6 Baade's evidence

In relation to the prospects of the DSC successfully selling the ferry once the Norris ferry commenced operations, Baade told my investigating officers that he had been in contact with a number of potential purchasers for the ferry and considered that the anticipated sale price would at least cover the costs incurred by DSC in purchasing the ferry.

Baade identified a number of these potential purchasers. This information remains commercial in confidence.

9.4.7 Councillor D's evidence

Councillor D told my investigating officers that at the DSC's meeting on 7 December 2005, he had a brief discussion with Andreassen during the lunch break about the DSC purchasing the ferry. Councillor D said that he asked Andreassen about the price he would be prepared to sell the ferry for to the DSC and then suggested that Andreassen submit a proposal to the DSC. He said that Andreassen did not respond to his suggestion.

9.5 Analysis

The question raised by the DSC's decision to purchase the ferry from Daintree Ferry Pty Ltd and the terms on which it was purchased is whether the decision and the terms were reasonably cost effective.

9.5.1 DSC negotiations with Andreassen

Following Andreassen's withdrawal on 5 December 2005 of the offer to extend ferry operations beyond 21 March 2006, negotiations relating to the possible purchase of Daintree Ferry Pty Ltd's ferry assumed greater importance and urgency.

The DSC was, in the end, successful in negotiating the purchase of the ferry prior to the expiration of the existing contract period.

I note that Andreassen said his reason for withdrawing the offer was that it had been signed without authority by his accountant. Regardless of Andreassen's motivation and the relevance (if any) to his decision of Berwick's comments in the Council meeting on 7 December 2005 and subsequently in the local media, it is apparent that Andreassen continued to negotiate with the DSC in relation to Daintree Ferry Pty Ltd continuing to operate the ferry beyond the existing contract date of 21 March 2006 and in relation to the purchase of the ferry by the DSC.

9.5.2 DSC's decision to purchase ferry

The minutes of Council's meeting on 28 February 2006 (that had been called in relation to the negotiations for the extension of the ferry operation) record that Council, after considering a number of options, resolved to purchase the ferry from Daintree Ferry Pty Ltd and operate the ferry itself.

The resolution was founded on the recommendation and analysis contained in a confidential report dated 28 February 2006, prepared by Neely in his then capacity as Acting CEO. That report contained a comparative analysis of various options. Option (a) was that DSC purchase and operate the ferry and Option (c) was that Daintree Ferry Pty Ltd extend its operation of the ferry until 30 June 2006.

The financial analysis of both options appears to have been based on reasonable assumptions and supported the decision for the DSC to purchase the ferry.

Neely's report also highlighted one important consideration weighing in favour of the DSC purchasing the ferry – namely that this would guarantee the continuation of the ferry operation until the Norris ferry was able to commence operation even if Norris failed to meet the scheduled commencement date of 1 July 2006.

An examination of Neely's report shows that it was based on McCullough Robertson's email of 24 February 2006, which set out four options, namely:

- (a) the Council purchasing and operating the ferry,*
- (b) the Council purchasing the ferry and contracting Norris or another party to operate the ferry,*
- (c) Daintree Ferry Pty Ltd continuing to operate the ferry, and*
- (d) the Council litigating its claim that Daintree Ferry Pty Ltd had entered into a binding agreement with the Council to extend the operation of the ferry beyond 21 March 2006.*

Relevant considerations applying to each of those options were outlined in that email and incorporated by Neely into his confidential report, which also contained his analysis of the advantages and disadvantages.

I note that Neely's evidence concerning the basis of his recommendation that DSC purchase the ferry was that the cost of having Andreassen continue to operate the ferry until 30 June 2006 (at \$3,300 per day), when coupled with the cost of repairs to the ferry (or damages claimed by Andreassen) for which the DSC was potentially liable, appeared greater than the cost of actually purchasing the ferry.

That assessment is also broadly consistent with the legal advice from McCullough Robertson dated 24 February 2006 and is consistent with Neely's account of the 10 February 2006 meeting that Neely, Andreassen, Councillor A and Baade attended.

None of the persons interviewed has suggested a more cost effective option for the DSC. I have earlier expressed the opinion that it was inappropriate for Councillor D to contact Andreassen during the tender process and ask him about costs associated with the ferry's operation (Part 6 of this report).

However, Berwick alleges that this contact potentially cost DSC a substantial amount of money. This allegation implies that Andreassen withdrew his offer to extend the ferry's operation because of his discussion with Councillor D. The evidence does not support this implication. Andreassen says that he withdrew the offer because it had been made by his accountant without his consent. Furthermore, he continued to negotiate with DSC on the option of extending the ferry's operations after his discussion with Councillor D on 3 December 2005.

9.5.3 Berwick's comments in Council's 7 December 2005 meeting and in the media

It is clear from Andreassen's evidence that he was concerned about some of the comments made by Berwick in the Council meeting on 7 December 2005 and subsequently in the media, including comments that Andreassen was in effect seeking to extract a premium price for the ferry from the DSC and that his tender ought not to have been considered given what was described by Berwick as Andreassen's improper lobbying of councillors during the tender process.

Neely's diary notes also record the content of telephone discussions with Andreassen on 23 February 2006 that dealt with Andreassen's reaction to media statements made by Berwick concerning the ferry contract and Berwick's subsequent telephone call to Andreassen in which Berwick sought to explain his comments and stated that he wanted the negotiations to continue.

An examination of Council's minutes for the meeting on 7 March 2006 record that Berwick made a public apology to Andreassen and invited him to address the Council. I note that on or about 16 March 2006 the contract between the DSC and Daintree Ferry Pty Ltd for the sale of the ferry was executed.

9.5.4 Resale of ferry by DSC

As mentioned, Baade considered that the prospect of the DSC successfully selling the ferry once the Norris ferry commenced operations was reasonably high.

In an email received from the CEO on 5 July 2006, I was informed that the tenders for the sale of the ferry by the DSC closed in the last week of June.

I note that on 4 July 2006, Council rejected the tender received and authorised the engagement of marine brokers to sell the ferry on the market. In a subsequent telephone discussion with my investigating officers, the CEO advised that the DSC had already received a number of inquiries from possible buyers. The ferry has now been placed with a marine broker to facilitate its sale.

9.6 Opinions

The evidence obtained during the investigation supports the following opinions.

Opinion 46

Council's decision to purchase the ferry rather than to negotiate an extension of the ferry operation with Daintree Ferry Pty Ltd was a reasonable one in that it was based on legal advice and a detailed analysis by its officers of the options open to the DSC to ensure the continuity of the ferry service.

Opinion 47

The decision to purchase the ferry guaranteed the continuation of the ferry operation until the Norris ferry commenced operation.

Opinion 48

Whether that option proves to be a cost effective one will depend substantially on the price DSC obtains for the sale of the ferry.

Opinion 49

Berwick's allegation that Councillor D's discussion with Andreassen during the tender process potentially cost the DSC a substantial amount of money is not substantiated.

Appendix A: Chronology

<i>4 March 2004</i>	<i>Rainforest CRC commissioned to investigate and advise on ferry options</i>
<i>8 March 2004</i>	<i>CEO consideration of going to tender</i>
<i>8 June 2004</i>	<i>DSC minutes: Ferry contract given to councillors</i>
<i>9 June 2004</i>	<i>DSC minutes of special meeting resolved to broaden scope of review by Rainforest CRC to include bridge option</i>
<i>December 2004</i>	<i>Rainforest CRC Options Paper delivered to Council</i>
<i>17 December 2004 – 7 March 2005</i>	<i>The CEO on leave. Neely Acting CEO</i>
<i>28 April 2005</i>	<i>The CEO's memo to Mayor & councillors: Analysis of Rainforest CRC Options Paper</i>
<i>4 May 2005</i>	<i>Baade withdraws from meeting</i>
<i>4 May 2005</i>	<i>Council accepts ferry option</i>
<i>July 2005</i>	<i>McCullough Robertson retained to advise on tender process</i>
<i>mid-July 2005</i>	<i>Baade given carriage of tender project by the CEO</i>
<i>26 July 2005</i>	<i>McCullough Robertson confirm instructions by email</i>
<i>15 August – 16 September 2005</i>	<i>Baade on leave</i>
<i>22 August 2005</i>	<i>Draft tender conditions/document received by DSC from McCullough Robertson</i>
<i>10 September 2005</i>	<i>Tender advertised</i>
<i>21 September 2005 – 30 January 2006</i>	<i>The CEO on leave. Neely Acting CEO</i>
<i>10 October 2005</i>	<i>Advertised closing date for tenders</i>
<i>24 October 2005</i>	<i>Extended closing date for tenders</i>
<i>9 November 2005</i>	<i>McCullough Robertson provide advice about evaluation of tenders</i>
<i>23 November 2005</i>	<i>Daintree Ferry Pty Ltd offers to extend operations until 30 June 2006</i>
<i>30 November 2005</i>	<i>McCullough Robertson draft acceptance to Daintree Ferry Pty Ltd re extension to 30 June 2006</i>
<i>1 December 2005</i>	<i>DSC letter to Daintree Ferry Pty Ltd: acceptance of extension offer to 30 June 2006</i>
<i>5 December 2005</i>	<i>Daintree Ferry Pty Ltd withdraws offer of extension to 30 June 2006</i>
<i>7 December 2005</i>	<i>Council general meeting accepts tender from Norris Earthmoving and Raw Materials</i>
<i>7 December 2005</i>	<i>Baade discloses possible conflict of interest (included in Council minutes)</i>
<i>9 December 2005</i>	<i>Letter of acceptance to Norris Earthmoving and Raw Materials</i>
<i>21 February 2006</i>	<i>2006 ferry contract executed with Sirron Enterprises Pty Ltd</i>
<i>22 February 2006</i>	<i>CEO letter to CMC containing allegations arising from 7 December meeting</i>
<i>16 March 2006</i>	<i>DSC executes contract to acquire ferry from Daintree Ferry Pty Ltd</i>
<i>26 June 2006</i>	<i>Tenders for disposal of ferry close</i>
<i>1 July 2006</i>	<i>Contract start date for new ferry operated by Norris' company Sirron Enterprises Pty Ltd</i>

