

CONFIDENTIAL ITEMS 2003 – SEPTEMBER 2011

#	Date	Item Title	Confidential Order Details	Item being kept confidential - Agenda/ Attachment/ Minutes	Reason regarding retention or recommend-action to release	Resolution Regarding Action	Last Review Date	Next Review Date	Date Released
46	19 Apr 10	Morphett Street – Soil Contamination	Reason: (b) information the disclosure of which: (i) could reasonably be expected to confer a commercial advantage on a person with whom the council is conducting, or proposing to conduct, business, or to prejudice the commercial position of the council; and (ii) would, on balance be contrary to the public interest.	discussion, reports, attachment and minutes	Revoked under delegation.	Extend Confidential Order to September 2017.  The Chief Executive Officer be delegated the authority to revoke all or part of the order and directed to present a report containing the item for which the confidentiality has been revoked	5 Sept 11	4 Sept 12	28/8/12



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**CONFIDENTIAL REPORTS**

**REPORT TITLE:** **CONFIDENTIAL ITEM: MORPHETT STREET - SOIL CONTAMINATION**  
**DATE OF MEETING:** 19 APRIL 2010  
**AUTHOR:** BRIAN CLANCEY  
**AUTHOR'S TITLE:** GENERAL MANAGER, GOVERNANCE & PROJECTS  
**FILE NUMBER:** 44/070/011  
**DEPARTMENT:** GOVERNANCE & PROJECTS  
**DEPARTMENT MANAGER:** BRIAN CLANCEY

Moved Councillor Zanker that Council:

1. pursuant to Section 90(2) and 90(3) of the Local Government Act 1999 orders that the public be excluded from attendance at the meeting to consider in confidence matters regarding:

(b) information the disclosure of which –  
could reasonably be expected to confer a commercial advantage on a person with whom the council is conducting, or proposing to conduct business, or to prejudice the commercial position of council; and would, on balance, be contrary to the public interest.

And

- (i) information relating to actual litigation, or litigation that the council or council committee believes on reasonable grounds will take place, involving the council or an employee of the council;
2. determine that the Chief Executive Officer, General Manager Governance & Projects, General Manager Vision and Compliance, General Manager Council Services, and the Minute Secretary be permitted to remain in the room.

Seconded Councillor Irvine and CARRIED

Moved Councillor Gamble that Council:

3. note that a response has not been received from or on behalf of Gilbert Motors within the required 60 day deadline (Wednesday 7 April 2010) of the receipt of the letter dated 2 February 2010 issued by Thomson Playford Cutlers on Council's behalf to Gilbert Motors Pty Ltd (through their legal representative) to give notice of an intended claim by Council pursuant to Rule 33 of the Supreme Court Rules of South Australia and including an offer to settle the claim for \$400,280 (exclusive of GST);

4. authorise Council officers to instruct Thomson Playford Cutlers to arrange for further investigatory work to be undertaken regarding the Gilbert Motors site (in conjunction with Council undertaking a comprehensive review of its records) to seek to establish as much history about the site as is possible;
5. note that a further report will be provided to Council as soon as the further investigatory work has been completed at which time it is anticipated that Council will be in a position to make a determination regarding proceeding with formal legal action against Gilbert Motors; and

8.20pm Councillor Kuchel re-entered the Chamber and took his chair.

6. order pursuant to Section 91(7), (8) and (9) of the LG Act 1999 that the discussion, reports, attachments and minutes relating to this item be kept confidential and that the revocation of confidentiality be delegated to the CEO to determine when there is no legal or commercial need for continued confidentiality, and that this order be reviewed every 12 months.

Seconded Councillor Irvine and CARRIED

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MEETING DECLARED CLOSED AT 8.27PM

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MAYOR

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DATE

**17. CONFIDENTIAL REPORTS**

**17. REPORT TITLE: CONFIDENTIAL ITEM: MORPHETT STREET  
- SOIL CONTAMINATION**

**DATE OF MEETING: 19 APRIL 2010**

**AUTHOR: BRIAN CLANCEY**

**AUTHOR'S TITLE: GENERAL MANAGER, GOVERNANCE &  
PROJECTS**

**REPRESENTORS: N/A**

**FILE NUMBER: 44/070/011**

**ATTACHMENTS: ADVICE FROM BARRISTER**

**DEPARTMENT: GOVERNANCE & PROJECTS**

**DEPARTMENT  
MANAGER: BRIAN CLANCEY**

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**PURPOSE**

To provide an update on this matter including information regarding legal options and obtain authority to arrange for further investigatory work to be undertaken regarding the Gilbert Motors site.

**RECOMMENDATION**

That Council:

1. pursuant to Section 90(2) and 90(3) of the Local Government Act 1999 orders that the public be excluded from attendance at the meeting to consider in confidence matters regarding:

- (b) information the disclosure of which –  
could reasonably be expected to confer a commercial advantage on a person with whom the council is conducting, or proposing to conduct business, or to prejudice the commercial position of council; and would, on balance, be contrary to the public interest.

And

- (i) information relating to actual litigation, or litigation that the council or council committee believes on reasonable grounds will take place, involving the council or an employee of the council;
  - 2. determine that the Chief Executive Officer, General Manager Governance & Projects, General Manager Vision and Compliance, General Manager Services, Manager Governance and Business Processes; and the Minute Secretary be permitted to remain in the room.
  - 3. note that a response has not been received from or on behalf of Gilbert Motors within the required 60 day deadline (Wednesday 7 April 2010) of the receipt of the letter dated 2 February 2010 issued by Thomson Playford Cutlers on Council's behalf to Gilbert Motors Pty Ltd (through their legal representative) to give notice of an intended claim by Council pursuant to Rule 33 of the Supreme Court Rules of South Australia and including an offer to settle the claim for \$400,280 (exclusive of GST);
  - 4. authorise Council officers to instruct Thomson Playford Cutlers to arrange for further investigatory work to be undertaken regarding the Gilbert Motors site (in conjunction with Council undertaking a comprehensive review of its records) to seek to establish as much history about the site as is possible;
  - 5. note that a further report will be provided to Council as soon as the further investigatory work has been completed at which time it is anticipated that Council will be in a position to make a determination regarding proceeding with formal legal action against Gilbert Motors; and
  - 6. order pursuant to Section 91(7), (8) and (9) of the LG Act 1999 that the discussion, reports, attachments and minutes relating to this item be kept confidential and that the revocation of confidentiality be delegated to the CEO to determine when there is no legal or commercial need for continued confidentiality, and that this order be reviewed every 12 months.
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### **BACKGROUND**

At its meeting on 1 February 2010 Council resolved as follows:

*That Council:*

1. *pursuant to Section 90(2) and 90(3) of the Local Government Act 1999 orders that the public be excluded from attendance at the meeting to consider in confidence matters regarding:*

- *(b) information the disclosure of which – could reasonably be expected to confer a commercial advantage on a person with whom the council is conducting, or proposing to conduct business, or to prejudice the commercial position of council; and would, on balance, be contrary to the public interest.*

*And*

- *(i) information relating to actual litigation, or litigation that the council or council committee believes on reasonable grounds will take place, involving the council or an employee of the council;*
2. *determine that the Chief Executive Officer, General Manager Governance & Projects, General Manager Vision and Compliance, General Manager Services, Manager Projects; and the Minute Secretary be permitted to remain in the room.*
  3. *note the response received from Botten Levinson on behalf of Gilbert Motors Pty Ltd.*
  4. *authorise the Chief Executive Officer or nominee to instruct Thomson Playford Cutlers to issue on Council's behalf a letter to Gilbert Motors Pty Ltd (through their legal representative) to give notice of an intended claim by Council pursuant to Rule 33 of the Supreme Court Rules of South Australia and including an offer to settle the claim for \$400,280 (exclusive of GST).*
  5. *note the update regarding the dispute between Council and Tonkin Consulting.*
  6. *note that a further report will be provided to Council to enable consideration of possible further actions in relation to both Gilbert Motors Pty Ltd and Tonkin Consulting including the option of the commencement of formal legal action.*
  7. *Orders pursuant to Section 91(7),(8) and (9) of the LG Act 1999 that the discussion, reports, attachments and minutes relating to this item be kept confidential and that the revocation of confidentiality be delegated to the CEO to*

*determine when there is no legal or commercial need for continued confidentiality, and that this order be reviewed every 12 months.*

#### Gilbert Motors Communication

Subsequently the following has occurred in relation to Gilbert Motors.

1. Thomson Playford Cutlers issued on Council's behalf a letter dated 2 February 2010 to Gilbert Motors Pty Ltd (through their legal representative) to give notice of an intended claim by Council pursuant to Rule 33 of the Supreme Court Rules of South Australia and including an offer to settle the claim for \$400,280 (exclusive of GST).
2. Subsequent communication occurred between Mr Grant Gilbert and Mr Andrew Stuart regarding a meeting to discuss the matter.
3. Mr Grant Gilbert and Mr Andrew Stuart met on 17 March 2010. The meeting was cordial but concluded by Mr Gilbert in less than 10 minutes.
4. Post this meeting there has not been any further communication from or to Gilbert Motors.
5. A response has not been received from or on behalf of Gilbert Motors within the required 60 day deadline (Wednesday 7 April 2010) of the receipt of the notice issued by Thomson Playford Cutlers.

#### Preliminary Legal Opinion

Council has received via Thomson Playford Cutlers a preliminary opinion from Mr Graham Dart, Barrister (attachment 1).

Council officers have subsequently sought clarification on a number of points from Thomson Playford Cutlers.

Three key points arising from this preliminary opinion from Mr Dart are:

1. There are sufficient grounds for Council to initiate proceedings against Gilbert Motors at common law;
2. Further investigatory work is required to clearly establish the merit of Council also initiating statutory proceedings for a civil remedy against Gilbert Motors pursuant to the Environmental Protection Act;



3. The advice is predicated on some key assumptions and acknowledges that the evidence in some areas is not yet complete and hence there is an associated risk.

### **DISCUSSION**

Given the experience to date, it is not at all likely that a satisfactory resolution to this matter will be achieved without Council taking the next step of commencing legal proceedings against Gilbert Motors.

Taking this step does not preclude the option of the matter being resolved through negotiation and indeed it may act as a catalyst for Gilbert Motors to make an offer to Council.

The Barrister (Mr Dart) has recommended that "... A nuisance claim be pursued in the District Court if Council determines to litigate in this matter. It would be possible to plead both nuisance and negligence in the same proceedings."

Thomson Playford Cutlers has advised that "at present there is sufficient evidence to pursue a claim against Gilbert under the EPA Act, however further details about what has happened on the property from the date of Gilbert's purchase will also, in our view, provide supplementary arguments. Strategically, we believe that Council should fully explore the potential arguments available to it under the EP Act before initiating any proceedings. The benefit of this approach is that it will compel the EPA to weigh into the mix and provide a larger stick with which to encourage Gilbert to settle."

There are a number of considerations. These include:

#### **Likelihood of success**

Thomson Playford Cutlers consider the prospects of success are good based on the existence of the contamination, the impact on Council's land and works and our expert's opinion that the contamination has originated from the Gilbert Motors site.

If the matter was to proceed to trial and Council was successful the reasonable expectation (as advised by Thomson Playford Cutlers) would be that the financial result for Council would be the amount of Council's claim (as specified in its offer) and 60% of legal costs of the action.

The current evidence is that Gilbert Motors installed the new tanks, from this it has always been assumed (quite reasonably) that the old tanks were still in use at that point.

If evidence did come to light that Gilbert Motors did not own the land when the tanks were decommissioned from service Council

prospects of success would be significantly diminished. Refer below to risks.

Based on the information currently available, the common law remedy is considered by Thomson Playford Cutlers to have greater prospect of success.

However the civil law remedy would draw in the EPA which may help to encourage Gilbert Motors to make an offer.

### Risks

The civil law remedy is dependent upon obtaining and assessing further information. This would need to be undertaken by:

1. Council in the form of a comprehensive review of its records to identify as much history about the site as is possible, and in particular anything which relates to the underground tanks and/or the contamination or pollution of Gilbert's land; and
2. Thomson Playford Cutlers reviewing some historical legislation concerning Gilbert's obligations for the management and removal of underground tanks.

A major risk is that Gilbert Motors did not own the land when the old tanks were decommissioned from service. It is preferable to undertake further research prior to determining to proceed to initiate legal proceedings.

Similarly evidence is desired as to the current status of the old tanks i.e. were they removed or do they remain in-situ.

### Timing

It would be preferable to seek to resolve the matter as soon as practicable given the resources it continues to consume, both staff time and financial. It would also be preferable to reach a conclusion prior to the caretaker period for council decision making which commences in September 2010 pre the general election in November 2010.

Thomson Playford Cutlers advise that if Council were to initiate legal proceedings within the next month, Council can expect to be in trial by mid-next year. The actual length of proceedings will depend on the tactics employed by Gilbert Motors. Based on the actions to date of Gilbert Motors, it can be expected that delay will continue to be a tactic employed by Gilbert Motors.

As indicated above, the initiation of formal legal proceedings may help to prompt an offer from Gilbert Motors.

### Costs

Civil claim would involve further cost in obtaining additional information regarding site management post acquisition by Gilbert Motors.

Thomson Playford Cutlers has estimated that:

1. the cost of running these proceedings to the end of trial will likely be in the range of \$180,000 to \$210,000 inclusive of Counsel and expert's fees.
2. these costs may be greater or less depending on the actual work involved.
3. initiation of a claim for civil remedies under the Environment Protection Act will not result in Council incurring any costs greater than those for the common law proceedings.
4. it is our preliminary view that the costs to pursue the civil remedy (on its own) would in fact be less by virtue of the statutory presumptions which are available to the benefit of Council.

### Next Steps

With the benefit of the most recent legal advice it is now proposed to arrange for some further investigatory work to be undertaken regarding the Gilbert Motors site to seek to establish as much history about the site as is possible.

Once this information is to hand a further report will be provided to Council. It is expected that this will be in May 2010. At this time it is anticipated that Council will be in a position to make a determination regarding proceeding with formal legal action against Gilbert Motors.

It is proposed to have representatives of Thomson Playford Cutlers in attendance at this Council meeting to be available to answer any questions that Council Members may have.

### Fundamentals

It is important that Council acknowledges:

1. that the objective remains the pursuit of the "polluter pays" principle so the broader community is not burdened with the cost to Council of the soil contamination associated with the Morphett Street stormwater infrastructure upgrading;
2. that if the pursuit of the objective requires Council taking formal legal proceedings this can be expected to be a lengthy

process unless an agreed settlement is negotiated at some point;

3. the estimated cost range of running the proceedings to completion of a trial;
4. that with any formal legal proceedings the outcome is not certain; and
5. the need to maintain confidentiality so as not to compromise the process.

#### **POLICY IMPLICATIONS**

1. **Financial/budget**

See body of the report.

2. **Legal**

Refer body of report and attached.

3. **Staffing/Work Plans**

The matter continues to have a significant time impact on three senior council officers.

4. **Environmental**

The site management and removal works undertaken in association with the stormwater infrastructure upgrading on Morphett Street were actioned in accordance with EPA requirements.

5. **Social**

Principle of polluter pays, not the broader community.

6. **Strategic Plans**

Not applicable.

7. **Risk Assessment**

Refer body of the report.

8. **Asset Management**

Not applicable.

**COMMUNITY CONSULTATION****1. Customer Needs Analysis**

Not applicable.

**2. Promotion/Communications**

It is recommended that the matter remain confidential at this time as it may assist in achieving an earlier and better outcome for the community and would prevent the position of Council from being compromised.

CONFIDENTIAL

RECORDED 24/5/10

**GRAHAM DART***Barrister**Telephone: 61 8 8231 6033**Facsimile : 61 8 8231 7607***Kingston Chambers***47 Wright Street**Adelaide, S.A. 5000**DX 109 Adelaide**Mobile : 0414 362832**E-mail: gdart@kingstonchambers.com.au*

22 March 2010

Confidential Attachment to Item 17.1

Thomson Playford Cutlers  
Solicitors  
19 Gouger Street  
ADELAIDE SA 5000

Attention: Mr Fraser Bell

Dear Sir

Re: **DISTRICT COUNCIL OF MOUNT BARKER /**  
**GILBERT MOTORS PTY LTD**

I refer to our previous discussions in this matter.

You have recently provided a brief in this matter seeking advice in relation to a possible claim against Gilbert Motors Pty Ltd by the District Council of Mt Barker ("Council").

In this letter I set out the options available to Council.

**BACKGROUND**

The Council is the registered proprietor of certain land at Mt Barker, being the land comprising Morphett Street, Mt Barker. The Council determined to upgrade the storm water infrastructure along Morphett Street and in 2008 engaged a contractor for that purpose. The contractor commenced work in April 2008.

The contractor commenced trenching but soon became aware that the soil which was being removed from the trench was contaminated. Testing was carried out on the soil and it was established that the source of the contamination was hydrocarbons in the soil.

On the corner of Morphett Street and Adelaide Road is a BP service station. There has been a service station on the site for many years. The site has been owned and operated by Gilbert Motors Pty Ltd, the prospective defendant, since 1986. The service station is the obvious source of the contamination.

In or about 1992 a new underground petroleum storage system ("UPSS") was installed on the site. Recent testing has confirmed this system does not leak, the

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inference being that the leakage which caused the contamination must have occurred prior to 1992.

As a result of the discovery of the contamination the storm water project was delayed for a considerable period of time. Substantial additional expense was incurred in testing and subsequently removing the contaminated soil to a safe storage facility. In the result the Council has incurred a significant cost in excess of that budgeted for with respect to the project and would like, if possible, to recover that expense from Gilbert Motors.

### ASSUMPTIONS

For the purpose of this advice I am asked to assume that:

- 1 The UPSS installed in 1992 does not leak and is not the source of the contamination.
- 2 The UPSS which were present on the land at the time Gilbert Motors became the proprietor leaked, and continued to leak, until replaced.
- 3 That the source of the hydrocarbon contamination detected in, on and under Morphet Street is a petroleum product which leaked from the old UPSS after Gilbert Motors became the registered proprietors of the relevant land.

### POSSIBLE CAUSES OF ACTION

#### *Environmental Protection Act*

In the *Environmental Protection Act* there is a general environmental duty which provides that a person must not undertake an activity that pollutes, or might pollute, the environment unless the person takes reasonable practical measures to prevent or minimise any resulting environmental harm.<sup>1</sup>

It is a defence to a claim that the general environmental duty has been breached if:

- maximum pollution levels were fixed, or
- conditions of environmental authorisation were being complied with.<sup>2</sup>

I assume that the defences are not relevant on the facts known to me.

It is an offence to cause an environmental nuisance by polluting the environment intentionally or recklessly and with the knowledge that an environmental nuisance will or might result.<sup>3</sup>

<sup>1</sup> *Environmental Protection Act 1993* Section 25(1)

<sup>2</sup> *Environmental Protection Act* Section 25(3)

<sup>3</sup> *Environmental Protection Act* Section 82

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The *Environmental Protection Act* provides that application may be made to the Environment, Resources and Development Court for orders in the nature of civil remedies.<sup>4</sup>

Of particular relevance is:

*Section 104(1)(e). If a person has suffered injury or loss or damage to property as a result of a contravention of this Act, or incurred costs and expenses in taking action to prevent or mitigate such injury, loss or damage an order against the person who committed the contravention for the payment of compensation for the injury loss or damage, or payment of the reasonable costs and expenses incurred in taking that action.*

A persons whose interests are affected by the subject matter of an application under the civil remedy provisions, i.e. in relation to injury or damage to property, has standing to bring an action. The Council, as the registered proprietor of the land, has standing.

An application for a civil remedy will, in the first instance, be referred to a conference under Section 16 of the *Environmental, Resources and Development Court Act* and will otherwise be determined under the normal provisions of that Act.

To succeed in the application for a civil remedy it must be established that Gilbert Motors contravened the *Environmental Protection Act*. In practical terms that means obtaining a finding that Gilbert Motors contravened the general environmental duty or committed an environmental nuisance.

The activity undertaken is the operator of a service station. The general environmental duty is breached unless the person takes all reasonable practical measures to prevent or minimise the resulting environmental harm.

It is clear that Gilbert Motors undertook activity from 1986 to 1992 which caused the contamination. It would be for Gilbert Motors to establish that they took all reasonable practical measures to prevent the tanks leaking between 1986 and 1992, and assuming that they would not be able to establish that, then they would have contravened their general environmental duty.

There are technical difficulties with seeking remedies under the *Environmental Protection Act*. The first is that the pollution complained of appears to have arisen by reason of activities undertaken prior to the commencement of the Act which was passed in 1993 but did not commence operation until May 1995.

The entitlement to claim a civil remedy will therefore only be available if Gilbert Motors are presently still contravening their general environmental duty, or creating an environmental nuisance by reason of the continuing escape of the contaminants

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<sup>4</sup> *Environmental Protection Act* Section 104



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from its site. I assume, but have no evidence, that the petrol which leaked from the UPSS prior to 1992 is still on the Gilbert Motors site and continuing to migrate off that site. If that is the case there is arguably a continuing breach of the general environmental duty and as well as seeking orders for the costs incurred to date, orders could be sought requiring Gilbert Motors to take appropriate action to prevent or mitigate any further environmental harm. Further consideration will need to be given to this issue.

#### PRIVATE NUISANCE

The tort of nuisance is a separate and distinct cause of action. In essence private nuisance ("nuisance") exists to provide a remedy in circumstances where there has been interference with the enjoyment of land. The tort of negligence and nuisance often overlap on the same factual basis, but as mentioned above, they are separate and distinct causes of action.

The causing of physical injury to land will found a claim in nuisance. All that the Council would need to establish here is that material damage to the land in Morphett Street resulted from the flow of hydrocarbons from the Gilbert Motors property to the road.

It is not necessary for the Council to allege or prove that there was any breach of duty by Gilbert Motors, nor any unreasonable use of the land, it is simply necessary to establish the material fact of damage to the land caused by the escape from Gilbert Motors' land of the hydrocarbon. It does not matter that whether or not the damage was foreseeable, nor the conduct of Gilbert Motors was reasonable.<sup>5</sup> There is no need to establish any negligence on behalf of Gilbert Motors. A deliberate act, an act done in good faith or in a genuine belief that it was justified may still lead to a cause of action in nuisance.<sup>6</sup>

It seems probable that when Gilbert Motors took over the conduct of the service station the UPSS was already leaking. It can be assumed that that continued between 1986 and 1992. In that sense Gilbert Motors took over the nuisance when it acquired the property. Gilbert Motors will be liable if the nuisance was such that with ordinary care and the management of its property it should have realised the risk of its existence.<sup>7</sup>

The usual remedy in a nuisance case is an injunction to prevent the nuisance from continuing. That is not what is sought by the Council in this matter. It seeks damages.

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<sup>5</sup> See generally as to the cause of action *Kraemers v Attorney-General for the State of Tasmania* (1966) TSR 113 @ 118-121.

<sup>6</sup> *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 @ 904.

<sup>7</sup> *Sedleigh-Denfield* Supra @ 905.

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In a case of this type tortious damages are available if the cause of action is established. The Council is entitled to damages for whatever losses resulted to it as a natural and foreseeable consequence of the wrongful act of Gilbert Motors. The damages in nuisance are the same as for tort generally. In practise that means whether a claim is brought in nuisance or negligence, should the claim succeed, the damages would be the same.

The details of costings in the schedule in the brief dated 2 November 2009 all appear appropriate and would appear to fall within the definition of natural and foreseeable consequences of the wrongdoing of Gilbert Motors. The legal costs are the costs which might provide the most debate but I expect most would be claimable if arising directly as a result of the disruption to the project and the consequences of that.

There is a separate issue of course about an ongoing escape of hydrocarbons from the site, but that is not a matter on which advice is sought at this time. It should be borne in mind however that there is likely to be an ongoing issue with respect to that.

#### NEGLIGENCE

The other tortious remedy potentially available to the Council is a claim in negligence. The usual elements of negligence would need to be established, that is, Gilbert Motors owed a duty of care to the Council, the duty was breached and damages flow from that breach of duty.

It can be accepted that a duty of care would be established in this matter. The standard of the duty is that of a reasonable person. The law tries to balance the utility of an activity against the threat of harm caused by that activity.

To succeed in negligence, therefore, the Council would need to establish that Gilbert Motors, in maintaining and operating the service station, fell short of the standard of care that a reasonable service station operator would have applied to the conduct of the business and that the breach of duty was causative of the loss suffered by Council.

In order to determine what a reasonable person would do a Court needs to consider the magnitude of the risk, the degree of the probability of its occurrence along with the expensive, difficulty and inconvenience of taking alleviating action<sup>8</sup>.

The difficulty at the moment is we have no information about the conduct of the business by Gilbert Motors. In negligence it is not going to be enough simply to establish that damage has been suffered by reason of the escape of fuel from Gilbert Motors' site to the Council's land. It will be necessary to establish that the cause of the escape was the negligence of Gilbert Motors during the relevant period, which will be between 1986 and 1992, assuming the fuel in the ground leaked during that

<sup>8</sup> *Wyong Shire Council v Shirt* (1980) 146 CLR 40 @ 47.

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period. Until relatively recently special rules applied to the escape of dangerous substances from the property of one person to that of another. The situation is now subject to the normal rules of negligence.<sup>9</sup>

It might be that a breach of duty can be inferred from the simple fact that the UPSS leaked. For that argument to succeed it would need to be established that a reasonable service station operator would have maintained its tanks in a way to prevent leaking. Evidence would be required as to the standard of a reasonable service station operator which we do not have at this time.

### TIME ISSUES

The fuel leak which has caused the damage is assumed to have occurred no later than 1992. That is a considerable period of time ago and causes difficulties. The law imposes various limitations on the time within which actions must be commenced.

In relation to a tort such as negligence or nuisance the limitation period is six years after the cause of action accrued<sup>10</sup>. In relation to the *Environmental Protection Act* an application for a civil remedy must be made within three years after the date of the alleged contravention, although the Attorney-General may authorise proceedings after the time has expired<sup>11</sup>.

The Council, quite reasonably, was entirely unaware of the pollution on its land until the excavations commenced in 2008. Notwithstanding the fact, the law with respect to time limits can be unforgiving. If six years has passed since the cause of action accrued then the time limit has expired.<sup>12</sup> That is the case even if, as here, Council could not have been aware of the pollution at the time it occurred.

However, the question of time limits is not straight forward in this matter. No doubt Gilbert Motors would, if proceedings are issued, insist that the cause of action accrued, or the contravention of the *Environmental Protection Act* occurred, by no later than 1992. In that case the common law and statutory remedies would all be statute barred.

In relation to the tortious claims both negligence and nuisance are known as actions on the case. In relation to such torts damages are part of the cause of action, unlike a direct tort such as trespass, and therefore the cause of action does not accrue until the damage has been suffered. The Council's argument here could be that damage was suffered when the excavation works were carried out, that is 2008. It would follow that the six year time limit runs from that time and has not yet expired.

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<sup>9</sup> *Burnie Port Authority v General Jones Pty Ltd* (1994) 174 CLR 520.

<sup>10</sup> *Limitations of Actions Act* section 35

<sup>11</sup> *Environmental Protection Act* section 104(20)

<sup>12</sup> *Cartledge v E Jopling & Sons Ltd* [1963] AC 758

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Gilbert Motors would argue that the damage was suffered when the land was injured by the contaminants, the date of which is probably uncertain but certainly more than six years ago. The fact that the damage to the land was not ascertained until 2008 is not a relevant consideration if the cause of action accrued at an earlier time. In my opinion a Court would find that the cause of action arose when the land was damaged by the hydrocarbons.

However there is a further argument in the Council's favour on the time point, which is most applicable to a claim in nuisance, and is that there is a continuing cause of action. If it can be established that fuel is continuing to escape from the Gilbert Motors' site to Morphett Street then the cause of action is continuing, and in effect a new cause of action arises every day.<sup>13</sup> In those circumstances the six year limit has not yet expired and the Council would be entitled to recover all damage suffered in the six years prior to the institution of proceedings, which would include the 2008 expenses.

Whilst the *Limitation of Actions Act* limits a claim in tort to six years, the Act also provides that the Court may extend the limitation period in certain circumstances.<sup>14</sup> An additional way in which the Council could avoid any difficulties with limitation periods is if it discovers a new material fact.

In practise what that would mean is for the Council to obtain a further report from an appropriately qualified environmental consultant that the pollutants are continuing to escape from Gilbert Motors land and that further damage is being suffered by the Council. The procurement of such a new material fact by the Council would allow the Council a further twelve months to commence action from the date of receipt of that information. It would also allow the seeking of injunctive relief to prevent the further damage to the land as well as a recoupment of the expenses incurred by Council in 2008.

If there is a continuing escape from the land then the general environmental duty provided for in the *Environmental Protection Act* is also being breached and therefore the three year limitation in that Act would not yet have expired.

In any proceedings Gilbert Motors will attempt to take all the time points. For the reasons set out above however it is unlikely that time points will result in the Council being unable to pursue an action to judgment.

#### CONSIDERATION OF THE CAUSES OF ACTION

As set out above there are three possibilities for recovering of the Council's expenses incurred in this matter. In my view the most straight forward cause of action to pursue would be that of nuisance. It is an old cause of action and not often litigated any more because of the proliferation of statutory remedies. However in this case it

<sup>13</sup> *Earl of Harrington v Corporation of Derby* [1905] 1 Ch 205

<sup>14</sup> *Limitation of Actions Act* (1936) Section 48

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seems to provide the simplest way home for Council. It does not require the establishment of a breach of any duty or negligence. It simply requires establishment of the fact that by reason of an escape from the site of Gilbert Motors physical damage has been suffered to the Council's land.

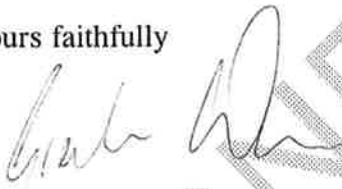
In relation to the action under the *Environmental Protection Act* and the tort of negligence a breach of duty needs to be established over and above the fact of the injury to the Council's land. It would add to the cost and complexity of any litigation, because Gilbert Motors will say that whilst the damage was suffered by reason of an escape from its site, that did not occur as a consequence of any breach of duty and therefore no remedy is available to Council.

A remedy sought pursuant to the *Environmental Protection Act* must be in the Environment Resources & Development Court. That Court does not have an accrued jurisdiction and therefore it could not adjudicate on a nuisance claim if that was brought in conjunction with a claim under the legislation. The Council will therefore be forced to choose between remedies.

I would recommend that a nuisance claim be pursued in the District Court if Council determines to litigate in this matter. It would be possible to plead both nuisance and negligence in the same proceedings.

I would be pleased to discuss the matter further to determine the most appropriate way for Council to recover its expenses in this matter.

Yours faithfully



GRAHAM DART

