

AUBURN COUNCIL

May 20, 2009
To the Ordinary Meeting of Council

General Manager's Report

187/09 LATE ITEM - Austin Australia Pty Ltd (In Liquidation) V Auburn Council

C-32-04/18 JB:HK

SUMMARY

Progress report on negotiated settlement with the Liquidators of Austin Australia Pty Ltd.

RECOMMENDATION

- 1. That Council agree to the terms of settlement negotiated with and accepted by the Liquidators of Austin Australia Pty Ltd of \$3 million in full and final settlement of all costs of litigation and arbitration.**
- 2. That the General Manager be authorised to sign all documents associated with the final payment.**

REPORT

A number of reports have been submitted to Council concerning the litigation and arbitration proceedings between Austin Australia Pty Ltd and Auburn Council.

The General Manager has been negotiating with the parties in accordance with Council's Resolution at its meeting of October 3, 2007 -

"RESOLVED unanimously that the Council authorise the General Manager to undertake negotiations with a number of parties associated with the construction of the Auburn Civic Buildings and that a further report be provided to the Council on the matter."

At its meeting of February 4, 2009 Council was advised that the Arbitrator made the final award on January 7, 2009 as follows -

- "1. Auburn is to pay Austin's costs of the proceedings up to 11 April 2003 assessed as between party and party.*
- 2. Auburn is to pay Austin's costs of the proceedings after 11 April 2003 assessed as between solicitor and client.*
- 3. Auburn is to pay the costs of the reference to arbitration"*

The initial costs claim from Colin Biggers Paisley on behalf of Austin was \$3,788,346.98 made up as follows –

Period	Total amount invoiced	Interest	Total with interest
Prior to 11 April 2003	\$609,265.11	\$364,361.01	\$973,626.12
Post 11 April 2003	\$2,108,223.06	\$706,497.80	\$2,814,720.86
Total	\$2,717,488.17	\$1,070,858.82	\$3,788,346.98

They further advised in the interest of settling the matter an offer of \$3,409,512.28 was made to be accepted by Council by April 17, 2009.

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An extension of time was sought by Council. That extension was granted. Matthews Folbigg examined the claimed costs from Colin Biggers and Paisley.

In assessing the claimed costs the following issues were considered -

1. Taxing the claims by Colin Biggers and Paisley. Council would be responsible for all costs associated with "*taxing*" of the claim. Possible cost \$150,000 to \$200,000 due to the size of the total bill.
2. Any "*taxing*" at best would result in a reduction of between 20 – 30% of legal costs.
3. The potential that further action could be taken as a separate action in the Supreme Court to obtain a verdict from interest on costs. If Council was unsuccessful all costs would be borne by Council, estimate \$100,000 with a payout of the full interest costs of \$1,070,858.82. If Austin were unsuccessful Council would be unlikely to recover any funds unless a cost undertaking was granted.
4. The interest component of \$1,070,858.82 if left to be contested would escalate and further penalise Council.

In discussions with the Mayor and Matthews Folbigg Council made a counter offer of \$3M in full settlement. This offer was subject to a counter offer of \$3.2M from Colin Biggers Paisley who advised the Liquidator would recommend acceptance of the \$3.2M to a meeting of creditors.

Council maintained its position and the offer of \$3M as a full and final settlement of all costs was accepted on May 13, 2009 subject to payment being made by May 27, 2009.

All negotiations were undertaken on the basis that any settlement was subject to approval by Council at its May 20, 2009 meeting.

Payment of the negotiated amount is subject to legal agreements and undertakings that no further claims will be made against the Council by Austin in any court.

The December revised budget included a total budget of \$6,173,000 for awards and cost associated with both MDA and Austin legal actions. Based on awards and cost finalised to date, and the terms of settlement agreed to be Austin, the total cost of new actions are now estimated \$7,100,000 resulting in a budget shortfall of \$927,000. Potential funding sources for the shortfall will be reported as part of the June 2009 quarter review.