

**ADELAIDE HILLS COUNCIL
ORDINARY COUNCIL MEETING
Tuesday 27 February 2018
CONFIDENTIAL AGENDA BUSINESS ITEM**

Item: 19.2

Originating Officer: Nick Taarnby, Project Coordinator

Responsible Director: Terry Crackett, Director Corporate Services

Subject: Adelaide Hills Swimming Centre, Woodside - Shade Sail

For: Decision

1. Adelaide Hills Swimming Centre, Woodside – Shade Sail – Exclusion of the Public

Pursuant to section 90(2) of the *Local Government Act 1999* the Council orders that all members of the public, except:

- CEO, Andrew Aitken
- Director Engineering & Assets, Peter Bice
- Director Strategy & Development, Marc Salver
- Director Corporate Services, Terry Crackett
- Director Community & Customer Service, David Waters
- Executive Manager Governance & Performance, Lachlan Miller
- Manager Property Services, Natalie Westover
- Minute Secretary, Pam Williams

be excluded from attendance at the meeting for Agenda Item 19.2: (Adelaide Hills Swimming Centre, Woodside – Shade Sail) in confidence.

The Council is satisfied that it is necessary that the public, with the exception of Council staff in attendance as specified above, be excluded to enable Council to consider the report at the meeting on the following grounds:

Section 90(3) (i) of the *Local Government Act 1999*, the information to be received, discussed or considered in relation to this Agenda Item is 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, the disclosure of which could reasonably be expected to prejudice the commercial position of person/agency/business involved with any litigation that may be undertaken.

Accordingly, on this basis the principle that meetings of the Council should be conducted in a place open to the public has been outweighed by the need to keep the information and discussion confidential.

2. Adelaide Hills Swimming Centre, Woodside - Shade Sail – Confidential Item

SUMMARY

The purpose of this report is to provide the Council with information in relation to the failure of the shade sail structure at the Adelaide Hills Swimming Centre at Woodside in September 2016 and to seek a resolution to take reasonable action, including initiate legal proceedings against Shade Form Australia Pty Ltd (Shade Form) for an alleged breach of contract.

Shade Form installed a shade sail structure at the Woodside Swimming Centre in 2012 at a cost of approximately \$66,000. In September 2016, a large steel post sheared off at the base resulting in significant damage to the structure and to the swimming pool surround. Engineering studies undertaken as part of the proposed remedial action indicated there was likely a design issue and manufacturing fault. As a result of these investigations, the LGA Mutual Fund advised that they would not accept a claim and we should direct the claim for repairs to the supplier of the structure.

After exhaustive investigations and attempts to seek an acceptable resolution from Shade Form and their insurer, we are now at a stage where Council's Solicitors, Norman Waterhouse Lawyers, have advised that legal proceedings will need to be commenced if this loss is to be recovered.

RECOMMENDATION

Council resolves:

- 1. That the report be received and noted**
- 2. That Council does all reasonable things, including initiating legal proceedings to recover losses associated with an alleged breach of contract by Shade Form Australia due to a substantial structural failure of the Shade Sail they supplied and installed at the Adelaide Hills Swimming Centre at Woodside.**
- 3. That the Chief Executive Officer be delegated to undertake all necessary actions to effect this resolution.**

1. GOVERNANCE

➤ Strategic Management Plan/Council Policy

Goal	Organisational Sustainability
Strategy	Risk and Responsibility – legal compliance & asset sustainability

➤ Legal Implications

It is proposed that Council would initiate legal proceedings against Shade Form to recover losses and costs incurred by Adelaide Hills Council as a result of an alleged breach of contract by Shade Form Australia.

The alleged breach of contract is due to Shade Form providing certain representations and warranties about the structure that they installed in 2012 and the subsequent failure of that structure.

Action will be undertaken through the appropriate Court.

➤ **Risk Management Implications**

The recommendation in this report will assist in mitigating the risk of:

Financial Loss sustained by Council as a result of the existing shade sail being deemed unsafe for repairs.

Inherent Risk	Residual Risk	Target Risk
Extreme (4B)	Moderate (3C)	Low (2D)

It is intended that by initiating legal action, losses incurred or likely to be incurred will be recovered. Legal costs, which are likely to be around \$20,000, are not certain to be recovered. Given this, it is important to control any proceedings so as to ensure that this action is effective and further risk of cost, out weighing benefit, is controlled. A mitigation action to review the current costs against likely outcome at regular intervals is to be included as part of any approved action.

➤ **Financial and Resource Implications**

There are no budgeted funds allocated for initiating legal action against Shade Form. The total cost of initiating this action and getting to a hearing would be approximately \$20,000. Although legally it will be hard to recover our legal costs, it is intended that any settlement would include these costs and the initial position would be on the basis that Shade Form cover all of Council's out of pocket costs to date, including legal cost. At the time of this report Council has incurred \$6,188 in legal cost which are not certain to be recovered in any settlement/ judgement.

Further the cost of removing the existing structure and replacing it with a new, more suitable structure is estimated to be approximately \$222,966. This sum is comprised as follows.

Cost of supply and installation of the existing structure in 2012	\$66,350
Cost to date undertaking Engineering Studies	\$ 6,616
Estimated cost for removing existing structure	\$40,000
Installation of a new and more suitable structure	\$110,000
Total estimated cost to remove and replace structure	\$222,966

The total Cost that Council will be looking to recover from Shade Form will be as follows:

Cost of supply and installation of the existing structure in 2012	\$66,350
Cost to date undertaking Engineering Studies	\$ 6,616
Estimated cost for removing existing structure	\$40,000
Legal expenses (currently \$6,188)	\$20,000
Estimated Total Claim from Shade Form	\$ 132,966

If the claim against Shade Form is successful the net cost Council for removing and replacing the Shade Sail will be approximately \$90,000. Ideally, Council would try to recover cost and settle the matter with Shade Form before making a firm commitment around reinstallation of this structure.

➤ **Customer Service and Community/Cultural Implications**

Patrons of the Woodside Swimming pool will benefit from the provision and reinstallation of the shade structure, which provides some sun protection to the pool. Council has not allocated budget, nor do the pool operators have funding, to finance a replacement structure until we are able to resolve and settle this matter with Shade Form.

➤ **Environmental Implications**

Not Applicable

➤ **Engagement/Consultation conducted with Council Committee, Regional Subsidiary, Advisory Group, the Administration and Community**

Council Committees: Not Applicable

Advisory Groups: Not Applicable

Administration: Not Applicable

Community: Council Officers have continued to provide updates to the pool committee via Nick Segar (Pool Committee contact person) during the course of this process. However, no formal consultation has been undertaken with the Pool committee or members of the public at this time.

2. **BACKGROUND**

Shade Form installed a shade sail structure at the Woodside Swimming Centre in 2012 at a cost of approximately \$66,000.

In September 2016, a large steel post sheared off at the base resulting in significant damage to the structure and to the swimming pool surround.

Engineering studies undertaken as part of the proposed remedial action indicated there was likely a design issue and manufacturing fault. As a result of these investigations, the LGA Mutual Liability Fund advised that they would not accept a claim and we should direct the claim for repairs to the supplier of the structure.

Immediately following the failure of the shade structure in September 2016, Shade Form advised their insurer. Shade Form and their insurer were initially open to discussions but would not undertake any investigations or repairs and requested that Council provide some evidence that the failure was a result of an engineering error or manufacturing defect. Council staff undertook these studies as part of the due diligence process involved with assessing the damage and developing a scope of work for the repairs that would be required to make this structure safe. Council staff provided this information to Shade Form and their Insurer. On several occasions during this process Council staff have sought to resolve this matter and take instructions from Shade Form and their insurers about how the repairs can be undertaken, but to date Shade Form and their insurer have remained silent in this matter.

Shade Form has not responded to requests for them to undertake repairs and reimburse Council for the costs of the engineering studies undertaken.

Council approached third party contractors to provide quotes to undertake repairs. The fee proposal received noted that they would not warranty any of the work or repairs due to the nature of the repairs to involving infrastructure that may be faulty or defective. Engaging repairs on this basis leaves Council and the Adelaide Hills Swimming Centre with an unacceptable level of risk for future failures from the existing infrastructure.

Council staff engaged Norman Waterhouse Lawyers to provide advice in this matter.

3. ANALYSIS

After exhaustive investigations and attempts to seek an acceptable resolution from Shade Form and their insurer, we are now at a stage where Council's Solicitors, Norman Waterhouse Lawyers, have advised that legal proceedings will need to be commenced if this loss is to be recovered.

The costs to ensure the structure is safe and suitable for this site, the approximate total cost excluding legal costs would be in the vicinity of \$222,966. This is made up of the following:

Cost of supply and installation of the existing structure in 2012	\$66,350
Cost to date undertaking Engineering Studies	\$ 6,616
Estimated cost for removing existing structure	\$40,000
Installation of a new and more suitable structure	\$110,000

Any legal action to recover cost/losses would be on the basis of restoring Council to the position they were in before the breach occurred. So legal action would likely cover the initial cost of the structure, cost to remove the structure less the 4 years use of the structure that has been enjoyed from its prospective life. On the basis that the life of the structure is 30 years, then a deduction of 13-15% would apply to any settlement.

A controlled and appropriately calculated legal action is likely to be the only way a settlement can be reached with Shade Form. This is not without risk or cost and must be carefully monitored and assessed to ensure that the final cost does not outweigh the benefit.

4. OPTIONS

Council has the following options:

- I. That Council does all reasonable things, including initiating legal proceedings, to recover losses associated with an alleged breach of contract by Shade Form Australia due to a substantial structural failure of the Shade Sail they supplied and installed at the Adelaide Hills Swimming Centre at Woodside **(Recommended)**
- II. Council not take any further action against Shade Form in this matter, remove the existing shade structure and not install a new structure.
(Not recommended)
- III. Council not take any further action against Shade Form in this matter and replace the existing (failed) structure at their cost. The estimated total cost of this will be approximately \$242,966. **(Not Recommended)**

5. APPENDIX

Nil

3. Adelaide Hills Swimming Centre, Woodside – Shade Sail – Period of Confidentiality

Subject to the CEO, or his delegate, disclosing information or any document (in whole or in part) for the purpose of implementing Council's decision(s) in this matter in the performance of the duties and responsibilities of office, Council, having considered Agenda Item 19.2 in confidence under sections 90(2) and 90(3) (i) of the *Local Government Act 1999*, resolves that an order be made under the provisions of sections 91(7) and (9) of the *Local Government Act 1999* that the report and the minutes of Council and the discussion and considerations of the subject matter be retained in confidence until the matter is determined but not longer than 12 months.

Pursuant to section 91(9)(c) of the *Local Government Act 1999*, Council delegates the power to revoke the confidentiality order either partially or in full to the Chief Executive Officer.