

BLUE MOUNTAINS CITY COUNCIL PUBLIC INQUIRY

OPENING STATEMENT OF COMMISSIONER RICHARD BEASLEY SC ON THE RE-OPENING OF TERM OF REFERENCE 4

1. On 7 May 2019, I provided an Interim Report of that date in relation to Term of Reference 4 (Interim Report) to the Minister for Local Government. This followed public hearings on that Term of Reference held on 8, 9 and 12 April 2019.

2. Term of Reference 4 requires an inquiry into whether:

“[i]n exercising its functions pursuant to ss.23 and 24 of the Local Government Act, the Council’s process of engaging Clyde & Co and McCullough Robertson Lawyers (through McPhee Kelshaw Solicitors & Conveyancers), including with respect to management of any conflicts of interests, to conduct independent investigations into asbestos-related incidents and employment issues, respectively, was in accordance with the guiding principles in ss.8A(1)(b), (h), (2)(e) and 8B and the role of the governing body in s.223(1)(c) and (l) of that Act.”

3. In the Interim Report I made a number of findings of fact, not all of which are relevant to set out now.

4. The genesis for Term of Reference 4 appears to have been allegations made by Mr Ray Hadley on his radio show, made on 13, 14 and 15 February 2018. In summary, during broadcasts on those days, Mr Hadley made the following allegations:

- (a) that a Mr Mark Mulligan oversaw asbestos management at the Council;
- (b) that Mr Mulligan was the Council’s Chief Safety Officer;
- (c) that Mr Mulligan and a Mr Michael Tooma (a partner in the firm Clyde & Co who had been engaged through the Council’s solicitors, McPhee Kelshaw, to

conduct an independent investigation into the Council's management of asbestos in December 2017) were "best mates";

- (d) that Mr Tooma was "basically investigating Mr Mulligan";
- (e) that the performance of Mr Mulligan was the subject of Mr Tooma's investigation;
- (f) that Mr Mark Mulligan's mate (Mr Tooma) was investigating Mr Mulligan;
- (g) that Mr Mulligan had been the contractor responsible for the Council's Asbestos Management Plan;
- (h) that in the Foreword to the 2012 edition of his book "Due Diligence: Duty of Officers", Mr Tooma had thanked Mr Mulligan for his feedback and had described him as his "good friend";
- (i) that Mr Tooma had a conflict and should terminate his investigation;
- (j) that the Minister should get off "her backside" and do something about this "recalcitrant Council".

5. In my Interim Report, based on the oral evidence given and documents tendered during the public hearings, I found all but one of these allegations to be factually inaccurate. The exception was the reference to the 2012 edition of Mr Tooma's book. Further, I made a finding that Mr Tooma at no stage had a conflict of interest in relation to the investigation he was engaged to conduct, bearing in mind his specific Terms of Reference – see page 153 of Exhibit 1. Further, I found that the Council managed the allegation that Mr Tooma had a conflict of interest in an appropriate way and, finally, I found that no aspect of the matters raised in Term of Reference 4 involved conduct or action that was not in accordance with the obligations and duties imposed on the Council and the governing body under the relevant provisions of the *Local Government Act*.

6. On 16 May 2019, Mr Hadley raised the topic of my Interim Report on his radio show. In that broadcast he asserted that I had been “misled” by Council. Mr Hadley went on to assert that:

“...as Acting Service Delivery Director in 2017, Mark Mulligan not only wrote the position description for the Asbestos Response Teams, he was the convenor of the recruitment panel who presided over and made the offers of employment”.

7. Pausing there, it should be noted that at [66] of my Interim Report of 7 May 2019 I noted that Council had tendered evidence at the Public Hearings in April that Mr Mulligan did have the responsibility of assisting.

8. Mr Hadley went on to allege that:

“The team employed by Mark Mulligan went on in 2018 to make errors work [sic] at Katoomba Depot that resulted in 13 staff being exposed to friable asbestos from poorly controlled works”.

Whether or not that allegation is factually accurate or not, there is an issue as to whether such a matter could fall within Mr Tooma’s terms of reference, which were finalised in December 2017, noting also for the moment that his Final Report is dated March 2018. Mr Hadley went on to state the following:

“It’s an absolute disgrace that the General Manager of Council and Megan Tebay [a Council employee] misled the Commissioner, in my opinion. Because his findings seem to rely on the fact that Mulligan had nothing to do with asbestos, which is just a lie.”

9. Mr Hadley went on to assert that he had “proof” in relation to these matters.
10. Had the Interim Report merely been criticised in some way, it would be inappropriate for me to even comment, let alone re-open the hearings into Terms of Reference 4. However, an allegation that I have made erroneous findings because I have been “misled” or lied to in evidence given under oath is not something that can be ignored. I therefore determined to re-open Public Hearings in relation to Term of Reference 4.
11. Accordingly, I notified the Minister of this and took steps to have a summons to produce documents served on Mr Hadley and 2GB and certain other persons.

12. Section 438U of the *Local Government Act 1993*, which contains the power for the Minister to establish this Inquiry, uses the term “Public Hearings”. Ordinarily then, it would be expected that all hearings in relation to an Inquiry such as this should be held in public. However, with the exception of one part of one Division of the *Royal Commissions Act* that Act applies to enquiries established under s.438U of the *Local Government Act*. That empowers me to direct, in proper circumstances, that some hearings be held in private and that non-publication orders can be made in relation to certain evidence.

13. On the basis of certain medical evidence which will remain confidential and subject to a non-publication order, I have determined that it is appropriate to hear from at least some witnesses in this re-opened hearings in relation to Term of Reference 4 in private. While they will be held in private, the following persons will be entitled to be present at and participate in those hearings:
 - (a) The Council’s legal representatives.
 - (b) Mr Tooma and any of his legal representatives.
 - (c) Dr Rosemary Dillon, Ms Kirrally Twomey, and Ms Grace Edmunds.
 - (d) Any members of the Council’s governing body.
 - (e) All persons assisting the Inquiry.
 - (f) Any other person who can satisfy me they have a proper and sufficient interest in Term of Reference 4.

14. To ensure the anonymity of certain of the witnesses, for the reasons I have previously mentioned, I have already made non-publication orders in relation to certain witnesses’ names and addresses, and I either have or will be making a non-publication order in relation to the transcript of their evidence. It is likely, however, that that evidence will form a confidential annexure to any Supplementary Interim Report in relation to Term of Reference 4.

15. The Inquiry will now proceed by way of Private Hearing.

7 June 2019