

PUBLIC INQUIRY INTO BLUE MOUNTAINS CITY COUNCIL

COUNSEL ASSISTING'S FURTHER OUTLINE OF SUBMISSIONS IN RELATION TO TOR 4

Introduction

1. This further outline addresses the issues that arise in relation to the re-opened Inquiry into TOR 4.
2. It is not the purpose of this outline to set out an exhaustive summary of all of the matters raised in the submissions received, or evidence given during the hearings, in relation to TOR 4. It should not be assumed that if a particular issue is not expressly referred to in this outline that it has been ignored or disregarded.

Background

3. Term of Reference 4 (**TOR 4**) provides that the Commissioner is to inquire and report to the Minister for Local Government with respect to whether:

“In exercising its functions pursuant to Parts 1 and 2 of Chapter 11 of the LG Act, the Council’s process of engaging Clyde & Co and McCullough Robertson lawyers (through McPhee Kelshaw solicitors and conveyancers), including with respect to the management of any conflicts of interest, to conduct independent investigations into asbestos related incidents and employment issues, respectively, was in accordance with the guiding principles in sections 8A(1)(b), (h), (2)(e) and 8B and the role of the governing body in section 223(1)(c) and (l) of that Act.”

4. On 8, 9, and 12 April 2019, public hearings in relation to TOR 4 were held (**April Hearings**).
5. On 7 May 2019, the Commissioner delivered an interim report in relation to TOR 4 (**Interim Report**). The ultimate conclusion in relation to TOR 4 was expressed as follows¹:

“... The Council’s process of engaging Clyde & Co and McCullough Robertson was, in all the circumstances, prudent and appropriate. Mr Tooma never had a conflict of interest, hence there was no real conflict for the Council to manage. As to the alleged conflict, the Council’s response to those

¹ Interim Report [122].

allegations, and the response of the governing body, was reasonable and appropriate. No aspect of the matters raised in Term of Reference 4 involve 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 Ray Hadley, the host of the *Ray Hadley Morning Show* on 2GB, made a number of allegations concerning the evidence given by certain witnesses, and the information presented by the Blue Mountains City Council (**Council**), during the April Hearings (**16 May Broadcast**).
7. In particular, Mr Hadley alleged that (emphasis added)²:
 - a. *“...the council, and I'll be kind here, has simply misled the Commissioner. I could say that they've told a bald-faced lie, but I'll use the other term and say they've misled the Commissioner.”*
 - b. *“Throughout transcripts... Rosemary Dillon, and others, stated that Mark Mulligan had nothing to do with asbestos management as a consultant in 2016, or as acting service delivery director in 2017.”*
 - c. *“...at one point of the transcripts, the Commissioner even spends time saying surely the acting service delivery director would be involved in asbestos, but then he's assured, that's not the case.”*
 - d. *“Council, at worst, misled the commission, at best showed how incompetent they are. As acting service delivery director in 2017, Mark Mulligan not only wrote the position description for the asbestos response teams, he was the convener of the recruitment panel presided over and made the offers of employment.”*
 - e. *“It's an absolute disgrace that the General Manager of Council and Megan Tebay have 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.”*
8. On 22 May 2019, the Commissioner reopened the Inquiry in relation to TOR 4 to consider any further material or evidence that might exist in relation to the relevant matters raised by Mr Hadley in his 16 May Broadcast.

² Ex 26.

9. On 25 May 2019, the Council published a media release, responding to Mr Hadley's allegations.³ The Council rejected the various assertions made by Mr Hadley in his 16 May Broadcast.
10. Following the re-opening of the Inquiry into TOR 4, submissions were received from four individuals (**Further Submissions**). The Further Submissions referred to aspects of Mr Mulligan's involvement with asbestos-related issues during the period in which he was a consultant to, and later as an employee of, the Council. None referred to any particular finding contained in the Interim Report which was said to have been affected by "*misleading*" evidence or information.
11. In addition, Mr Hadley and Macquarie Media produced material (subject to certain redactions⁴) in answer to summonses issued to them. It would appear that at least some of the comments made by Mr Hadley in his 16 May Broadcast were based on the content of an email sent to 2GB on 15 May 2019. The content of that email was largely repeated by Mr Hadley in his 16 May Broadcast.
12. Further hearings were held on 11, 17, and 26 June 2019 (**June Hearings**). At those hearings, three of the four authors of the Further Submissions referred to in paragraph 10 above gave evidence.⁵ That evidence was heard in private session, and is subject to orders restricting the publication of the identity of certain witnesses, certain exhibits (including the Further Submissions), and the content of the transcripts of their evidence.
13. The material produced by Mr Hadley and Macquarie Media was also tendered during the June Hearings, and is similarly subject to orders preventing its publication.
14. As a consequence of those orders, it is only possible to refer the material that is subject to them in general terms.

The scope of TOR 4

15. As noted at [9] of the Interim Report, TOR 4 requires an inquiry into the processes adopted by the Council in engaging, first, Clyde & Co (and Mr Tooma) to undertake an independent investigation into certain asbestos-related incidents involving the Council, and secondly, McCullough Robertson (and Ms Reid) to conduct an investigation into "*employment issues*" within Council. TOR 4 does not involve any inquiry into the

³ Ex 15.

⁴ Which masked the identity of the authors of the communications that were sent to 2GB.

⁵ The fourth, although having received a Summons, did not attend to give evidence.

conduct of those investigations, any aspect of Mr Tooma's or Ms Reid's conduct, or the findings made by them.

16. None of the comments made by Mr Hadley in his 16 May Broadcast, the matters contained in the Further Submissions, or any of the evidence given during the June Hearings raised any issue about the findings made in the Interim Report in relation to:
 - a. the engagement of McCullough Robertson and Ms Reid⁶; or
 - b. whether it was appropriate for the Council to appoint Mr Tooma and Clyde & Co, or the process adopted by Council in relation to that appointment⁷.
17. Accordingly, there is no need to revisit any of those matters.
18. Mr Mulligan's involvement in what might generally be described as asbestos management or asbestos issues can only relate (in the context of TOR 4⁸) to the question of whether Mr Tooma had a conflict of interest, in that those matters might tend to suggest Mr Tooma was investigating aspects of Mr Mulligan's conduct.
19. At [97] of the Interim Report, the Commissioner found that Mr Tooma's Amended Terms of Reference "*required no investigation into the services provided by Mr Mulligan at the time he was a consultant to the Council, or in relation to his work while an employee of the Council from November 2017 to February 2018.*" That finding was consistent with Mr Tooma's evidence given during the April Hearings.⁹
20. It is submitted that it was the critical finding in concluding that Mr Tooma had no conflict of interest. If Mr Tooma was not investigating Mr Mulligan's conduct, then the extent of any prior relationship, or the extent of Mr Mulligan's involvement in asbestos related issues during either period he was at the Council, is immaterial for the purposes of TOR 4.
21. Significantly, none of the Further Submissions, and no witness called during the June Hearings, suggested that Mr Tooma's sworn evidence in this respect was "*misleading*". Likewise, Mr Hadley's comments during his 16 May Broadcast¹⁰ do not make any such suggestion.

⁶ Interim Report [102]-[109].

⁷ Interim Report [76]-[89].

⁸ That is not to say that some of those issues may not be relevant to other terms of reference, which are to be considered at a later date.

⁹ See, e.g., T303.5-304.1 (9/4/19). Other witnesses gave evidence to the same effect, see, e.g., T208.41-47, 261.29-262.9 (9/4/19).

¹⁰ Which can only have been based on information supplied to him, rather than first-hand knowledge.

22. It was also significant that, during the June Hearings, each of Witness 2 and Witness 3 agreed, if not entirely, then in all material respects with the analysis of the Mr Tooma's amended terms of reference, as they related to Mr Mulligan, which was attached to Ms TeBay's memorandum dated 21 February 2018.¹¹ That analysis concluded that none of those terms of reference required a consideration of Mr Mulligan's conduct. Mr Mulligan also gave evidence confirming the accuracy of that analysis.
23. For the reasons that follow, is submitted that whatever view one takes about the precise level of involvement that Mr Mulligan may have had in the Council's asbestos management, or asbestos issues, the material set out in Further Submissions, or adduced during the June Hearings, does not support a finding that:
- a. Mr Tooma's Amended Terms of Reference (despite his sworn evidence to the contrary) required him to consider Mr Mulligan's conduct; and
 - b. as a consequence, Mr Tooma had a conflict of interest; and
 - c. the Council was aware of that conflict (or at least the circumstances giving rise to it) at the time, such that it was required to take steps to manage that conflict.

The scope of Mr Tooma's Amended Terms of Reference

24. Having regard to the relevance of the issues raised in Mr Hadley's 16 May Broadcast and the Further Submissions to TOR 4, it is useful to again note the scope of the Amended Terms of Reference for Mr Tooma's investigation.
25. Those Amended Terms of Reference (supplied to Mr Tooma on 13 December 2017) were in the following terms¹²:

- “1. *The conduct of the works at the Lawson car park and the Lawson Mechanics Institute, including the removal of any soil, rock and other materials from the worksite and the relocation of any such materials to other sites.*
2. *The use of the Lawson depot to receive any materials referred to in paragraph 1 and the other storage and subsequent removal of those materials from the Lawson depot to any other work sites within the City.*
3. *The work undertaken by the Council in the period 2012 to date to compile the Council's Asbestos Register (AR) and to prepare the*

¹¹ Ex 1, pp 444-447, 547-550.

¹² Ex 1, pp 151-154.

Council's Asbestos Management Plan (AMP), including any factors which delayed or contributed to the delay in the completion of that work.

4. *Whether the presence of asbestos based building materials, or asbestos contaminated soil, within any building or on any properties owned by the Council, in the period 2016 to date, was not appropriately documented, recognised or managed at that time.*
5. *The identification of asbestos contaminated materials (including fill) within the former Blackheath tip site, including the access allowed to that site (by staff and members of the public) once the presence of asbestos base materials was known.*
6. *The actions taken by the Council in the period May 2017 to date, in response to any enquiries undertaken by SafeWork NSW (SW) or any notices given by SW to the Council, in relation to the management of asbestos based materials in Council owned properties, the repair of properties containing such materials and the advice given to Council staff in relation to the presence of those materials.*
7. *Investigations undertaken by the Council in the period 2012 to date to identify asbestos based materials in any building or on any site identified by SW in the period May 2017 to date, and the steps taken by the Council, both before and after May 2017, to record, remediate or render safe asbestos in any such buildings.*
8. *Whether any disciplinary action was taken or threatened against members of the Council staff arising from information brought forward by those staff members in relation to the Council's management of asbestos issues.*
9. *The procedures and plans that have been adopted by the Council in the period 2012 the date, and the work practices that have been in implemented by the Council over that period, to manage risks associated with asbestos based materials, present within Council owned buildings or on Council owned land.*
10. *The Council's policies and practices adopted and implemented in the period 2012 to date to ensure that Council staff were informed from time to time of the presence of asbestos based materials in Council owned*

buildings and on Council owned sites, including information made available to Council staff before work was undertaken at any such building or site.

11. *The establishment, role and operation of the Council's Work, Health and Safety Committee.*
12. *Such other matters as the investigator brings to the Council's attention and recommends as a matter that should be investigated (subject to that recommendation being endorsed by the Council's solicitor)."*

26. It is clear from the Clyde & Co reports that were produced in response to those Amended Terms of Reference¹³ that to the extent that a term of reference identified the subject time period as including a range "to date", Mr Tooma treated the period to include up to 13 December 2017 only.
27. It follows that any matter post-dating 13 December 2017 was not the subject of Mr Tooma's investigation.

The issues raised by the Further Submissions

28. As noted above, the Further Submissions addressed aspects of what was said to be Mr Mulligan's responsibility for, or involvement in, asbestos issues during the period in which he was a consultant in 2016 and as an employee between November 2017 and February 2018.

The premise contained in the Further Submissions

29. Two of the Further Submissions suggested that the Council had told the Inquiry that Mr Mulligan had "*nothing to do*" with asbestos management, or asbestos generally, during the time he was a consultant or an employee.
30. One witness explained that statements made to that effect were a summary of what that witness had read on the Inquiry's webpage. The other said that such statements were based on a mixture of a media release published by the Council¹⁴, and an article in the *Blue Mountains Gazette*.
31. Another submission referred to a finding said to have been made that Mr Mulligan had "*no connection*" to asbestos, and asserted that the inquiry had been given "*misguided information*". That witness was unable to identify any particular finding made in the

¹³ Which are before the Inquiry as a confidential exhibit, and for a limited purpose only.

¹⁴ Presumably Ex 15.

Interim Report to that effect, or any aspect of the evidence that was said to be “*misguided*” (neither of which the witness had read). That witness also identified the basis for the submission as being the Council’s media release¹⁵ and an article (or perhaps articles) from the *Blue Mountains Gazette*.

32. As noted above it would also appear that some of the comments made by Mr Hadley during his 16 May Broadcast were based (at least in part) on an email received by 2GB on 15 May 2019. That email also asserted that the Council had stated to the Inquiry that Mr Mulligan had “*nothing to do with asbestos management*”.
33. It is submitted that the underlying premise that it was the Council’s position (or that the evidence of any particular witness called) during the April Hearings that Mr Mulligan had “*nothing to do with*”, or was “*not connected with*”, the issue of asbestos (including asbestos management) is not supported by the evidence given, or submissions made, during the April Hearings.
34. When that material is considered as a whole, it can be seen there was a distinction drawn between what might be described as the strategic responsibility of writing and developing specific asbestos policy, on the one hand, and the responsibility to ensure that in the performance of the Council’s day to day operations that policy was adhered to, on the other.¹⁶
35. Properly understood, it was the Council’s position during the April Hearings that the whole of the organisation (including the Service Delivery Directorate and thus Mr Mulligan) was responsible to ensure that the Council’s asbestos policy was applied and adhered to. That position was advanced in Cr Greenhill’s evidence¹⁷, submissions by Counsel for the Council¹⁸, and Ms TeBay’s memorandum, which stated (*inter alia*) “*all parts of an organisation have accountability of adhering to an Asbestos Management Plan*”¹⁹.
36. Accordingly, the premise that the Council (or any particular witness) told the Inquiry that Mr Mulligan had “*nothing to do with*” asbestos or asbestos management is not supported by the evidence. It is in that context that the particular issues raised in the

¹⁵ Ex 15.

¹⁶ See, e.g., T69.22-44 (26/6/19)

¹⁷ T124-125 (8/4/19).

¹⁸ T321-322 (12/4/19)

¹⁹ Ex 1, p 445. The qualification that Ms TeBay placed on that general statement related to the responsibility for the policy document itself. That plainly sat within People & Systems, as stated in the AMP itself.

Further Submissions, and in the evidence given during the June Hearings, falls to be considered.

The period of Mr Mulligan's consultancy

37. Mr Mulligan was formally engaged as a consultant to the Council with effect from 5 October 2016.²⁰ Consistent with the findings at [56] and [95] of the Interim Report, he also undertook some preparatory in about August and September 2016.²¹
38. It was suggested that because Mr Mulligan was involved in the Council's Safety Improvement Project, he was, necessarily, involved in the preparation of policy that related to asbestos. In particular²², it was suggested that:
- a. Mr Mulligan had prepared an Incident Reporting and Investigation Procedure, which applied to all safety issues, including those involving or related to asbestos.
 - b. Mr Mulligan had prepared incident reporting forms, which were used in reporting of all safety incidents, including those involving or related to asbestos.
 - c. Mr Mulligan had prepared other procedures, or manuals, that mentioned asbestos or hazardous materials.
 - d. Some of Mr Mulligan's work during his consultancy was later incorporated into, or referred to in, the Council's Asbestos Management Plan that was published in October 2017 (**AMP**).
39. Even if all of those matters are accepted, they do not make Mr Mulligan responsible for the preparation of the Council's AMP, or the Council's overall asbestos management policy.
40. There can be no doubt that the AMP, and other policy that was related to it (such as the Council's asbestos SOPs) were prepared, finalised, and approved during a time when Mr Mulligan was not at the Council. No witness suggested that Mr Mulligan played any role in the preparation or approval of that material. Any suggestion that because Mr Mulligan's work as a consultant was incorporated the AMP, or any other asbestos policy document, at a later time makes him responsible for the development of Council's overall asbestos management policy should be rejected.
41. A witness suggested that the use of the reporting procedure and forms developed by Mr Mulligan was the subject of discussion during his interview with Mr Tooma. A review

²⁰ Ex 2.

²¹ T105.8-22 (17/6/19).

²² Again, this is not an exhaustive itemisation of all issues raised.

of the transcript of that interview reveals that to the extent that those matters were discussed, the fact that Mr Mulligan was the author of those documents was not. In any event, it is clear from a review of the Clyde & Co reports that Mr Tooma was not investigating or being asked to comment upon the adequacy of that procedure or the forms that accompanied it.

42. It was also suggested by a witness that because the deliverable of phase 1 of the Safety Improvement Project was described as being “*To be complaint with the WHS Act 2011 and regulations*”²³, Mr Mulligan was obliged to ensure that Council had an asbestos management plan.²⁴ That suggestion should be rejected. The overwhelming weight of the evidence was that Mr Mulligan was engaged to assist the Council in putting in place an overall structure for a safety management system. His task was to develop the high level policy and framework, and did not extend to preparing a specific policy relating to asbestos (which was to occur once that work was complete)²⁵. Consistent with that evidence, the task of preparing a specific policy directed to the issue of asbestos was allocated to someone else, and work on that policy had not commenced by the time Mr Mulligan’s consultancy ended on 23 December 2016.²⁶
43. It is submitted that the material contained in the Further Submissions, and the evidence given during the June Hearings, does not support a conclusion that any of the evidence adduced during the April hearings insofar as it related to the extent of Mr Mulligan’s responsibilities in the period in which he was a consultant was “*misleading*” or led the Commissioner into error.

November 2017 to February 2018

44. Mr Mulligan commenced his employment as Acting Director, Service Delivery on 1 November 2017. His employment ceased on about 13 February 2018. Accordingly, he occupied that role for about 11 weeks.
45. Various assertions were made in the Further Submissions, and in evidence given during the June Hearings, as to the level of involvement that Mr Mulligan had in relation to asbestos management and issues in that period. Those assertions included that Mr Mulligan had involvement in, or responsibility for:

²³ See Ex 18, p 7.

²⁴ It is not necessary to resolve (in the context of TOR 4) the precise content of the legal obligation imposed on the Council by the relevant legislation and regulations. Again, they are issues that may be relevant to other terms of reference.

²⁵ T217.24-218.18 (9/4/19).

²⁶ See, e.g., T104.34-111.30 (17/6/19); Ex 12.

- a. the AMP (including by reason of his membership of the PSSG and the ELT);
 - b. the Council's asbestos management generally (including by reason of his membership of the PSSG and the ELT);
 - c. certain functions given to the Service Delivery Directorate by the AMP, and other policy directed to the issue of asbestos;
 - d. any activity undertaken within the Service Delivery Directorate that resulted in coming into contact with, or dealing with, asbestos;
 - e. the recruitment of the positions in the counsel's asbestos response team (**ART**);
 - f. specific asbestos issues that arose during that period.
46. As to the issues referred to in sub-paragraphs (a)-(d) above:
- a. first, to the extent that it was suggested that the whole organisation (including Mr Mulligan and Service Delivery) was responsible to ensure that the AMP and any other safety policy (including that specific to asbestos) was adhered to, that may be accepted. Ms TeBay's memorandum made that clear.²⁷ No witness during the April Hearings suggested otherwise.
 - b. secondly, as noted above, an important distinction was drawn between a general responsibility to ensure that the AMP (or any other policy relating to asbestos) was adhered to in the day to day operations of the Council, and the responsibility for the drafting, preparation, and implementation of the AMP itself. The AMP makes clear the latter is the responsibility of the Manager, Governance & Risk.²⁸ Once that important distinction is acknowledged, it can be seen that position adopted by the Council during the April Hearings (including in Ms TeBay's memorandum) was consistent with the manner in which the responsibilities for the development, implementation and maintenance of the AMP are set in the plan itself.²⁹
 - c. thirdly, to the extent that it was suggested that Mr Mulligan's membership of the ELT and PSSG gave him some additional responsibility for the AMP and asbestos issues generally, the ELT and PSSG Minutes for the period during 1 November 2017 to 28 February 2018 reveal that the issue of response to asbestos issues, and resourcing, was discussed. That is unexceptional given the

²⁷ Ex 1, p 445.

²⁸ Ex 30, p 110.

²⁹ See, for example, T321.28-322.29 (12/4/09).

issues facing the Council at the time. However, none of the issues that were before the ELT or PSSG during the period in which Mr Mulligan was a member of them were within the scope of Mr Tooma's amended terms of reference.

- d. fourthly, to the extent that it was suggested that the role of the PSSG and ELT were to “endorse” the AMP³⁰, that process had been undertaken prior to its approval on 20 October 2017, and therefore could not have involved Mr Mulligan.
- e. fifthly, to the extent that it was suggested that the AMP was a document that required constant review, the AMP itself notes that the responsibility for the ongoing review and (if necessary) revision of the AMP is the responsibility of the Manager, Governance & Risk.³¹ The evidence does not support a conclusion that any relevant review of the AMP was considered by the PSSG or ELT during the period in which Mr Mulligan was a member, or that any action taken by those bodies in relation to the AMP (or asbestos policy more generally) was within the scope of Mr Tooma's amended terms of reference.
- f. sixthly, as to the suggestion that the AMP gave particular responsibilities to the Service Delivery directorate³², the AMP gave the Manager, City Presentation, the task of developing and implementing an annual program of inspections.³³ Whether or not that task was one that ought to be considered to be within the overall responsibility of the Service Delivery Directorate (notwithstanding position within the corporate structure of that role³⁴) need not be resolved for the purposes of TOR 4. That Mr Mulligan had overall managerial responsibility to ensure that the staff within Service Delivery performed their duties (including any given to them by the AMP) is unexceptional. There is nothing inconsistent about that proposition with the evidence given or the position adopted by the Council during the April Hearings.
- g. seventhly, as to the suggestion that Mr Mulligan had overall managerial responsibility for any work performed within Service Delivery, or any facility within Service Delivery, that came into contact with asbestos, again that is unexceptional. It is entirely consistent with the point being advanced by Ms

³⁰ Ex 30, p 110.

³¹ Ex 30, p 137.

³² E.g.

³³ Ex 30, p 116.

³⁴ In particular, given that it was to be done in consultation with and subject to the approval of the Manager, City and Community Outcomes: see, T 74.34-75.27 (26/6/19).

TeBay when she referred in her memorandum to the whole organisation being responsible to ensure that the AMP was adhered to.

47. As to Mr Mulligan's involvement in the recruitment of positions on the ART, that was a matter acknowledged in Ms TeBay's memorandum.
48. It was suggested that Mr Mulligan's involvement went further than what was described in Ms TeBay's memorandum in that Mr Mulligan wrote the position descriptions, was the convenor of the interview panel, and made the offers of employment. There was also evidence to the effect that such suggestions were inaccurate.³⁵ However, it is not necessary for present purposes to resolve that issue. If the underlying premise that the Inquiry was told that Mr Mulligan had "*nothing to do with asbestos*" falls away, so does the significance of this issue. Further, even if Mr Mulligan's role might be considered to be greater than described by Ms TeBay, that does not make her memorandum "*misleading*", particularly in a circumstance where there is conflicting evidence on the particular extent of that involvement. It also does not advance any relevant issue in relation to TOR 4 as Mr Mulligan's involvement in the recruitment of positions for the ART was not a matter within the scope of Mr Tooma's amended terms of reference.
49. However, Dr Dillon gave detailed evidence concerning the creation of a new structure within the Council, which she intended would "*shift asbestos responsibility*" toward a single point of accountability. That included the appointment of a Chief Safety Officer, and the creation of the Asbestos Management Task Force (which included the ART). Dr Dillon's intention was to create a stand alone part of the Council (reporting to the General Manager) and which had responsibility for asbestos matters.³⁶ Her evidence was that almost immediately after her appointment as Acting General Manager she she drove that process, working largely with Mr McKay, and engaged with SafeWork about it.³⁷ The evidence does not support a conclusion that Mr Mulligan was the architect, or heavily involved in the creation, of that structure.
50. Related to that issue, it was also suggested that the positions in the ART reported through the Service Delivery directorate, and thus through Mr Mulligan. The evidence is clear that whatever might have been proposed, that did not, in fact, occur.³⁸

³⁵ See, e.g., T 123.32-124.9, 125.8-24 (17/6/19); T91.31-93.6 (26/6/19)

³⁶ T67.9-69.20; 84.1-85.38 (26/6/19); Ex 11, pp 23.

³⁷ T67.18-25; 81.3-21 (26/6/19).

³⁸ See, e.g., Ex 11, pp 1-2, 21-24; T125.26-127.34 (17/6/19).

51. Finally, as to the suggestion that Mr Mulligan was involved specific asbestos issues, that were then discussed by that witness with Mr Tooma, the two examples given related to the:
- a. Katoomba Tip, which was said to have arisen before Mr Milligan commenced on 1 November 2017, but was then handed to him to manage thereafter; and
 - b. Springwood Depot, said to have arisen in December 2017.
52. Neither of those matters were within Mr Tooma's Amended Terms of Reference, and neither were the subject of findings made in his reports. Accordingly, even if one were to accept that witnesses account of the circumstances of those incidents and that they were the subject of discussion with Mr Tooma during an interview³⁹, they are not matters which are capable of giving rise to a conflict of interest.

Specific Findings

53. In his 16 May Broadcast, Mr Hadley identified a number of paragraphs of the Interim Report in the context of his various allegations.
54. In relation [56] of the Interim Report Mr Hadley said:
- “The Commissioner’s report says, further to respect of whatever role Mr Mulligan had in relation to workplace health and safety, when [engaged as a] consultant by the council in the period August 2016-December 2016, he had no role in relation to asbestos management generally or preparation of the council’s asbestos management plan”.*
55. There is nothing incorrect about that finding. There is no evidence to support a conclusion that whilst a consultant Mr Mulligan had any role in the preparation of the Council's AMP. Secondly, the overwhelming weight of the evidence was that his work as a consultant required him to prepare the high level policy framework, and not the specific policy that was directed to asbestos. That such framework itself would apply to the issue of safety (of which asbestos was a part), does not make him responsible for the Council's asbestos management generally.
56. Mr Hadley continued:
- “in point 57, Rosemary Dillon asked the group managing [director] of people [and] systems at council, Megan TeBay, to look into whether Mulligan had*

³⁹ The accuracy of which may be relevant in relation to other terms of reference, but does not need to be resolved in TOR 4.

anything to do with asbestos during the time period or after, when Mulligan was the acting service delivery director.”

57. Pausing there, [57] of the Interim Report states that Dr Dillon asked Ms TeBay to look into whether Mr Mulligan had *“anything to do with the Council’s asbestos management”*. It was not confined to the issue of “asbestos” generally.

58. Mr Hadley then referred to paragraph 58 of the report stating:

“it says that Dillon confirmed in her oral evidence that Mrs TeBay, or Miss TeBay’s analysis concluded that Mr Mulligan had nothing to do with asbestos management or any area that would be the subject of Mr Tooma’s investigation during the period that he was a consultant”.

59. Again, the evidence does not suggest that Ms TeBay’s conclusion in this respect was incorrect. As noted above, the evidence does not support a finding that any aspect of Mr Mulligan’s conduct was the subject of Mr Tooma’s investigation.

60. Mr Hadley continued:

“This assertion that Mulligan had nothing to do with asbestos is repeated in point 59, point 62 b, point 63, 67 and point 98”

61. Paragraph 59 of the Interim Report refers to an interview between Mr Tooma and Mr Mulligan, and states that *“The interview...had nothing to do with asbestos management.”* That is not an “assertion”, or finding, that Mr Mulligan had *“nothing to do with asbestos”*. Further, a review of the transcript of that interview reveals (consistent with the finding made at [59] of the Interim Report) that it was not related to any aspect of Mr Mulligan’s involvement in asbestos management.

62. Paragraph 62(b) of the Interim Report extracts matters included in a Mayoral Minute dated 20 February 2018. It refers to a statement in that minute that *“Mr Mulligan was never responsible for controlling the investigation of asbestos management or for developing the Council’s Asbestos Management Plan”*. It is not a finding made by the Commissioner. Further, it does not go as far as to say that Mr Mulligan had *“nothing to do with asbestos”*. In any event, for all of the reasons outlined above, the evidence is consistent with the content of the extracted portion of that minute.

63. Paragraph 63 of the Interim Report again refers to information contained in the Mayoral Minute of 20 February 2018. When the context in which the extracted comment was made is considered, it can be seen that it was directed to responsibility for areas that

fell within the scope of Mr Tooma's investigation. In that respect, those observations are supported by the evidence. Again, [63] of the Interim Report it is not an "assertion" or finding by the Commissioner, that Mr Mulligan had "*nothing to do with asbestos*".

64. Paragraph 67 of the Interim Report refers to a submission from the Council to the Minister. Nothing in the extracted portion amounts to an assertion by the Council (let alone a finding by the Commissioner) that Mr Mulligan had "*nothing to do with asbestos*".

65. Paragraph 98 of the Interim Report contains a finding that:

"Mr Mulligan was not involved in asbestos safety issues for the Council when he acted as a consultant to it, nor was he involved in the preparation of the Council's Asbestos Management Plan. When he was employed in November 2017 as the Acting Director of Service Delivery, he was not a member of any asbestos management taskforce or group. He was again not involved in the preparation of, or implementation of, the Council's Asbestos Management Plan."

66. Again, that is not a finding that Mr Mulligan had "*nothing to do with asbestos*". The finding was limited to specific issues and responsibilities. For example, it did not amount to a finding that Mr Mulligan had no responsibility for ensuring that the AMP was adhered to by staff in the Service Delivery Directorate, or that the work of that directorate that involved asbestos was performed in a proper and compliant manner.

67. Later Mr Hadley suggested that the findings in the interim report (and in particular those identified by him) "*seem to rely on the fact that Mulligan had nothing to do with asbestos, which is a lie.*"

68. It is submitted that the findings in the Interim Report were not based on any suggestion that Mr Mulligan had "*nothing to do with asbestos*". Rather, they were directed to his specific involvement in particular asbestos issues and policy in the context of matters that fell within Mr Tooma's Amended Terms of Reference.

Conclusion

69. At a general level, that:

- a. some of the general policy work undertaken by Mr Mulligan as a consultant would apply to the issue of asbestos; and

b. Mr Mulligan had involvement in asbestos issues whilst engaged as Acting Director, Service Delivery,

can be accepted.

70. Different views might be taken about the extent of those responsibilities, or the words used to describe them. It is not necessary to make detailed findings about those matters in the context of TOR 4. They might arise in other terms of reference.
71. However, it is submitted that when regard is had to the whole of the evidence given during the April Hearings, the Commissioner would be satisfied that it was not the position advanced by the Council (including through the evidence of Cr Greenhill, Dr Dillon, Ms TeBay's memorandum or by its Counsel) that Mr Mulligan had "*no involvement*" or "*nothing to do with*" in asbestos or asbestos management.
72. Further, it is submitted that properly understood, the findings in the Interim Report were not based on any such suggestion. The findings were directed to specific issues in the context of Mr Tooma's Amended Terms of Reference. In this respect, none of the matters raised in the Further Submissions as they were explored during the oral evidence in the June Hearings, cast doubt upon the critical finding that Mr Tooma was not investigating Mr Mulligan's conduct and therefore there was no actual conflict of interest for the Council to manage.
73. It is submitted that the evidence adduced during the June Hearings does not support a conclusion that: any witness knowingly "*misled*" the Inquiry; that any document that was placed before the Inquiry contained knowingly "*misleading*" information; or that any finding made in the Interim Report was based upon any such evidence or material.
74. In those circumstances, the ultimate conclusion reached at [122] of the Interim Report should be confirmed.

3 July 2019

Ross D Glover

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