

**PUBLIC INQUIRY INTO THE BLUE MOUNTAINS CITY
COUNCIL**

Established under section 438U of the Local Government Act 1993

**SUPPLEMENTARY INTERIM REPORT: TERM OF
REFERENCE 4**

Date of Report: 31 July 2019

A. Introduction

1. On 8, 9 and 12 April 2019, public hearings were conducted in relation to Term of Reference 4 (**the April Hearings**) for the Blue Mountains City Council Public Inquiry (**the Inquiry**). Term of Reference 4 required an inquiry into whether:

“In 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 interest, 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.”

2. On 7 May 2019, a report was provided to the Hon. Shelley Hancock MP, the Minister for Local Government, titled “Interim Report: Term of Reference 4” (**First Interim Report**). It was shortly thereafter tabled in Parliament.
3. The genesis for Term of Reference 4 appears to have been allegations made by Mr Ray Hadley on his radio show on 13, 14 and 15 February 2018. In summary, Mr Hadley alleged that:
 - (a) Mr Mark Mulligan oversaw asbestos management at the Council, and had been the contractor responsible for the Council’s Asbestos Management Plan;
 - (b) that Mr Michael Tooma, a lawyer who had been engaged to conduct an independent investigation into the Council’s management of asbestos in 2017, was “best mates” with Mr Mulligan;
 - (c) that Mr Tooma was “investigating Mr Mulligan”, that the performance of his “mate” Mr Mulligan was the subject of his investigation, and that consequently Mr Tooma had a conflict of interest and should terminate his investigation.

4. In the First Interim Report, a finding was made that the above allegations, and some others, were factually inaccurate: First Interim Report at [43]. One statement made by Mr Hadley - 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" - was correct. However, based on evidence given at the April Hearings, a finding was made that Mr Tooma and Mr Mulligan had ceased any professional or social relationship in about 2012. Their only interaction was a request by Mr Mulligan for a reference from Mr Tooma in 2017.
5. A finding was also made in the First Interim Report 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 Terms of Reference, which did not relate to any services provided, work done, or decisions made by Mr Mulligan as either a consultant to or employee of the Council: see [122] of the First Interim report, and page 153 of Exhibit 1. A finding was made however that the Council managed the (factually incorrect) *allegation* that Mr Tooma had a conflict of interest in an appropriate way.
6. An ultimate finding was made 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 LGA: First Interim Report at [122].
7. On 16 May 2019, Mr Hadley referred to the First Interim Report on his radio show. In his broadcast, he asserted that I had been "misled" by Council during the April Hearings. 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 that presided over and made the offers of employment."
8. Pausing at this assertion, it should be noted that at [66] of the First Interim Report, reference is made to the fact that Council tendered evidence at the April Hearings that Mr Mulligan had a role in relation to the recruitment of persons for the Asbestos Response Team. As will be seen later, that role was of short duration. Mr Mulligan

was not the “convenor” of the recruitment panel, nor did he make any “offers of employment”: see [66]- [67] below.

9. Mr Hadley then alleged in his broadcast that:

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

10. First, as stated above, no team was employed by Mr Mulligan. Secondly, whether the other allegations are factually accurate or not, there is an obvious issue as to whether such matters could fall within Mr Tooma’s Terms of Reference, which were finalised in December 2017 – and noting that his final report to the Council is dated March 2018. Mr Hadley then went on to state the following:

“It’s an absolute disgrace that the General Manager of Council [Dr Rosemary Dillon] 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.”

11. Mr Hadley asserted that he had “proof” in relation to these matters. He offered to provide the Inquiry with that proof: see Exhibit 26. He stated that he would be “*happy to give all the information I have, which backs up the statements I made*”: Exhibit 26. Mr Hadley added that he had a “*mob of whistle-blowers*” in relation to the matter: Exhibit 26.
12. Pausing again for a moment, it is not accurate that the findings in the First Interim Report were based on Mr Mulligan having “nothing to do with asbestos management” (emphasis added). There is no finding to that effect.
13. Had the First Interim Report merely been criticised in some way, it would generally be inappropriate for me to comment about that criticism. However, a public allegation was made that the First Interim Report contains erroneous findings because I had been “misled” or lied to in evidence given under oath. That is not a matter that can responsibly be ignored. At best, this is an allegation that Council witnesses misinformed me as to relevant facts, and provided the Inquiry with misleading documents. At its

highest, it may be an allegation of perjury. Accordingly, I decided to reopen public hearings in relation to Term of Reference 4, and notified the Minister of this decision. Hearings were conducted on 11, 17 and 26 June 2019 (“the June Hearings”).

B. Executive Summary of Findings

14. The assertions made by Mr Hadley during his 13, 14, and 15 February 2018 broadcasts were factually inaccurate, save for the reference to Mr Tooma’s book. The findings made in [43] of the First Interim Report are confirmed.
15. The finding made in [122] of the First Interim Report that Mr Tooma did not at any stage have a relevant conflict of interest is confirmed.
16. The finding made in [122] of the First Interim Report that the Council’s response to the false assertion that Mr Tooma had a conflict of interest was reasonable and appropriate, is confirmed.
17. Also in [122] of the First Interim Report, a finding was made that no aspect of any 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*”. That finding is confirmed.
18. In relation to the reopening of Term of Reference 4, the following further findings are made:

Contrary to the assertions made by Mr Hadley in his broadcast of 16 May 2019:

- (a) I was not misled by any evidence given by any witness in the April Hearings.
- (b) I was not misled by any document prepared by Council that was provided to the Inquiry. In particular, the document prepared by Ms TeBay which is Appendix A to this Supplementary Interim Report, is factually accurate and reliable.

- (c) I was not lied to by any witness in the April Hearings. In particular, I was not lied to by Dr Dillon, the Council's General-Manager.

C. Steps taken prior to June Hearings.

19. Prior to the June Hearings commencing, summonses for production of documents were served on the owner of radio station 2GB, and Mr Hadley. Those summonses were complied with, with two exceptions. First, there was some minor redacting on the documents to seek to preserve the identity of the person or persons who had supplied the documents to 2GB/Mr Hadley. That should not have occurred, but is not a matter that I wish to take up further. Secondly, one document has not been produced, as the Inquiry has been told by a representative of 2GB that it would reveal the identity of its author. While that is also unsatisfactory, Counsel Assisting (Mr Ross Glover) was informed that the document was already one in the Inquiry's possession. Given this, no further steps were deemed necessary.
20. Following the publication of the First Interim Report, four persons also provided the Inquiry with submissions or further submissions concerning matters relevant to Term of Reference 4, and the findings made in the First Interim Report (**Further Submissions**). Each of those persons was summonsed to appear at the June Hearings, and to provide relevant documentation.
21. Mr Mark Mulligan was also served with a Summons to attend the hearings, and to produce relevant documents. The General Manager of the Council, Dr Rosemary Dillon, was requested by Council Assisting to also answer further questions at a public hearing. Mr Michael Tooma, through his legal representatives, was informed leave would be given to him to give further evidence or make further submissions, if he deemed it necessary.

D. Public and Private Hearings

22. Section 438U of the LGA, which contains the power for the Minister to establish this Inquiry, uses the term "public hearings". Ordinarily then, it would be expected that hearings in relation to an inquiry such as this should be held in public. However, except

for one part of one division of the *Royal Commissions Act 1923 (RCA)*, that Act applies to inquiries established under s.438U of the *Local Government Act 1993 (LGA)*. 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: s12B(1) and (2) RCA.

23. Dr Dillon and Mr Mulligan gave their evidence at public hearings. Of the four other witnesses summonsed to attend, three complied with their summonses and gave evidence at the Inquiry (a witness, described as Witness 4, failed to answer their summons to attend. I have, however, considered their written submission). All three witnesses requested that their evidence be given in private hearings. Requests were also initially made that their evidence be given in the absence of any persons other than those immediately assisting the Inquiry, such as Counsel Assisting and the Officer Assisting (Mr A Broad).
24. Based on confidential medical evidence provided to the Inquiry, I determined that the witnesses described below as Witnesses 1 and 2 should give their evidence in private hearings. I also made orders under s.12B(1) of the RCA that the names and addresses of these witnesses not be published, and made non-publication orders in respect to their submissions, the transcript of their evidence, and in relation to any documents they provided to the Inquiry if those documents were not already part of the documentary material available to the Inquiry. On application, and partly for consistency, I made the same orders in relation to Witness 3.
25. As was explained to each of Witness 1, 2 and 3 (**the Witnesses**), I was not prepared to make an order excluding all persons from the private hearings other than those assisting the Commission. Certain senior staff of Council, its governing body, Mr Tooma and Mr Mulligan, all have a real interest in Term of Reference 4. To have excluded any of them from the private hearings would almost certainly have been an unlawful denial of procedural fairness if I were to rely on any of the evidence given by the Witnesses for the purposes of fact-finding in relation to Term of Reference 4, or any other Term of Reference. Accordingly, I made directions under s.12B(3) of the RCA that there would be a limitation on who could be present at the private hearings, but that the following persons were entitled to be present and participate at the hearings:

- (a) the Council's legal representatives;
- (b) Mr Tooma and any of his legal representatives;
- (c) Dr Rosemary Dillon (the Council's General-Manager), Ms Kirrilly Twomey, Ms Grace Edmonds and Mr Alan Harris (all Council employees) for the purposes of instructing the Council's legal advisors;
- (d) any members of the Council's governing body;
- (e) all persons assisting the Inquiry;
- (f) any other person who could satisfy me that they had a proper and sufficient interest in Term of Reference 4.

E. General findings in relation to credibility and reliability of witnesses

- 26. My specific findings on factual matters set out below are, at least in part, informed by my findings in relation to the credibility and reliability of the evidence given by witnesses at the April and June Hearings.
- 27. I find that both Dr Dillon and Mr Mulligan gave truthful and reliable evidence. In large measure, their oral evidence was in any event supported by the Council's documentary evidence.
- 28. The evidence given by Witnesses 2 and 3, in my view, was also honest, and when unsupported by documents, their evidence represented their best recollection. No submission was made by Mr Glover to the contrary, nor by Mr Singleton who appeared on behalf of the Council.
- 29. A submission was made by the Council that Witness 1 gave evidence that was both "reckless" and "false and misleading".

30. I do not accept that Witness 1 gave evidence that was either deliberately false or misleading on any issue central to Term of Reference 4. The Witnesses all have a deep interest in matters relating to the Council's management of asbestos, and in relation to the Inquiry's Terms of Reference relating to management of asbestos. There is nothing unreasonable in that. However, all three witnesses either have or at some stage had an imperfect understanding of Mr Tooma's Terms of Reference and whether Mr Mulligan's role within Council had any direct relationship to those Terms of Reference. I also find that the Witnesses considered Mr Mulligan had a bigger role in relation to management of asbestos than was the case, largely because they at times mischaracterised the services he provided as a consultant that were related to safety in a general sense as being related to asbestos management specifically. Equally, they mischaracterised to a degree his responsibilities as Acting Director, Service Delivery, as being specifically related to asbestos management, when they were not: see below at [40] to [56].
31. It may be also that the Witnesses have an imperfect appreciation of what is a conflict of interest, and perhaps also an imperfect understanding (or knowledge) of the relationship between Mr Tooma and Mr Mulligan. For Mr Tooma to have had a "conflict of interest" as a lawyer engaged to conduct an independent investigation into various matters concerning the Council's management of asbestos, he would have had to have been in a position where his interests, or those of Mr Mulligan (if there was a relevant relationship between them), conflicted with the interests Mr Tooma owed to the Council. Mr Mulligan and Mr Tooma were not "best mates". Whatever professional and social relationship they had ended in 2012, save for the provision of a reference in 2017: see the findings in the First Interim Report in this regard. Further, Mr Tooma's Terms of Reference did not in any event require him to investigate the services provided by Mr Mulligan to the Council as a consultant, or the work he performed as an employee. Not only does the relevant evidence establish this, it was a matter that both Witnesses 2 and 3 frankly acknowledged in their evidence, and a matter confirmed by Mr Mulligan: see [70] to [72] below.

F. Findings

(i) Introduction

32. The reopening of Term of Reference 4 caused unexpected cost. Some of that cost will be borne by the ratepayers of the Blue Mountains in not only legal fees, but in the time that senior staff have been taken away from their normal duties to attend the Inquiry. It also comes at a cost to taxpayers of New South Wales. Partly for that reason, I do not intend to deal with every matter raised in evidence in this Supplementary Interim Report, nor do I intend to refer to every document that was tendered. I will refer expressly to only those documents that are most material to my findings. It should be noted also that given the non-publication orders I have made in relation to the transcript of the private hearings, it will be necessary for me to refer to that evidence in a general way so to not identify any of the Witnesses.
33. Nevertheless, I have had regard to all the evidence tendered at the public and private hearings, to the submissions received, and to all the oral evidence given at hearings in making findings.
34. Further, one preliminary matter should be clarified. As Mr Glover noted in his Outline of Submissions prepared following the June Hearings, none of the comments made by Mr Hadley in his 16 May broadcast, or the matters contained in the Further Submissions, nor any of the evidence given in the June hearings, raise any issues about the findings made in the First Interim Report in relation to:
- (a) the engagement of McCullough Robertson and Ms Reid; or
 - (b) whether it was appropriate for the Council to appoint Mr Tooma and Clyde & Co, or the processes adopted by Council in relation to that appointment.
35. Accordingly, there is no need to revisit any of those matters, and the findings made in the First Interim Report regarding them at [102]-[109] and [76]-[89] respectively stand.
36. Another misunderstanding set out in the Further Submissions, and seemingly held by the Witnesses, was that the Council had made a submission or given evidence in the

April hearings that Mr Mulligan had “nothing” to do with asbestos management either at the time he was a consultant, or when he was an employee. One witness explained that they thought they had read this on the Inquiry’s web page. Another thought the statements were based on a mixture of a media release published by the Council (presumably Exhibit 15), and an article in the Blue Mountains Gazette.

37. It also appears that some of the comments made by Mr Hadley during his 16 May broadcast were based, at least in part, on an email he received on 15 May that is the subject of a non-publication order. That email contains several factual inaccuracies relating to Mr Mulligan: see generally [4] to [56] and [66]-[67] below.
38. The Council’s position during the April Hearings was that the entirety of the organisation had some responsibility to ensure that the Council’s asbestos policy was applied, and adhered to. This no doubt applied to Mr Mulligan during the time he was an employee. As noted in Counsel Assisting’s submissions, this position was advanced in Councillor Greenhill’s evidence, the submissions made by the Council, and in the documents created by Ms TeBay which stated, “all parts of an organisation have accountability of adhering to an asbestos management plan”: Exhibit 1, page 445.
39. The real issue in any event relevant to Term of Reference 4 is not whether Mr Mulligan had absolutely no involvement in asbestos management. The key issues are what was the extent of that role, and did it create a conflict of interest for Mr Tooma (and, if so, how was that managed by Council).

(ii) Mr Mulligan’s consultancy – October to December 2016

40. During the period 5 October 2016 to 23 December 2016 (plus a few days in August and September of 2016 for preparatory work), Mr Mulligan was engaged as a consultant to the Council, on a three-day week: Exhibit 1 p 449.
41. His specific task was to “...review the Safety Improvement Project Plan, progress against the Plan Objectives and to develop policy, procedures and training materials which would assist [the Council] to deliver against the objectives of the project”.

42. The objectives of the project for Mr Mulligan as a consultant were:

- to ensure officers of the Council as described under the provisions of the *Work, Health & Safety Act 2011* (WHS Act) fulfil their due diligence obligations;
- to be fully compliant with WHS Act and WHS Regulations 2011;
- to commit to continuous improvement in work, health and safety, and strive for compliance with AS/NZS 4801: Occupational Health and Safety Management Systems,

amongst other tasks: see generally Exhibit 18, which is the “Project Management Plan – Safety Improvement”, and Exhibit 1 p 450. Mr Mulligan’s brief was to update the Council’s safety policy documentation, by bringing it up to date with changes to the WHS Act: T105 L43 to T106 L19. It can be noted that as a safety professional, Mr Mulligan refers to such policies as “Tier 1” documents. He explained that procedural documents are Tier 2, and instructional documents (such as an Asbestos Management Plan) are Tier 3: T108 L9-30. A shorter way of saying this may be that Mr Mulligan was required to develop “general” safety policies, rather than ones dealing with specific hazards: T111 L28-30.

43. Amongst the material developed by Mr Mulligan for the Council during the period of his consultancy was the following:

- (a) the incident reporting and investigation procedure and associated templates;
- (b) reviewing and reviving the WHS consultation procedure;
- (c) risk management procedure;
- (d) the remote and isolated worker’s procedure;
- (e) the measuring and evaluating performance procedure;

(f) the workplace and worksite inspection procedure;

(g) the first WHS document register for the Council.

See generally Exhibit 18.

44. As an aside, it seems to be unanimously agreed by all witnesses who expressed an opinion that Mr Mulligan's work was of high quality.
45. What seems to be the view of the Witnesses, however, was that because Mr Mulligan was involved in the Council's "Safety Improvement Project", he was necessarily involved in the preparation of that Policy as it relates to asbestos.
46. Other matters raised by the Witnesses were that:
- (a) Mr Mulligan had prepared incident reporting and investigation procedures which because they apply to all safety issues, apply to asbestos. As a matter of logic, that is correct, but it hardly makes Mr Mulligan responsible for asbestos management at the Council.
 - (b) It was also suggested that Mr Mulligan had prepared incident reporting forms. True enough, one of these forms could be used in relation to an asbestos-related incident, just as it could be used in relation to incidents unrelated to asbestos. That again does not make Mr Mulligan, as a consultant, responsible for asbestos management at the Council. The same point can be made about Mr Mulligan preparing other procedures or manuals that mention asbestos or hazardous materials, or the fact that some of his work was ultimately incorporated (at a time he was not at the Council) into the Council's Asbestos Management Plan.
47. None of the matters referred to above place Mr Mulligan, as a consultant to the Council, anywhere near in charge of asbestos management at the Council. Further, as was found in the First Interim Report, Mr Mulligan:

(a) did not draft the Asbestos Management Plan;

(b) did not approve the Asbestos Management Plan;

(c) was never a member of any relevant Council asbestos group, team or taskforce: see also [56 (a) to (e)] below.

48. Witness 1 referred to the fact that the reporting procedure and forms developed by Mr Mulligan (which he praised) were the subject of a discussion with Mr Tooma during an interview. That may be so, however:

- there was no discussion that Mr Mulligan was the author of these documents.
- Mr Tooma was not investigating the adequacy of these forms, or Mr Mulligan's work.

49. Witness 1 also suggested that Mr Mulligan had some obligation to develop the Council's Asbestos Management Plan at the time he was a consultant. I reject that assertion. As a consultant, Mr Mulligan was given specific tasks to do, which he did. Others were given the responsibility for drafting and finalising the Asbestos Management Plan.

(iii) Employment of Mr Mulligan's November 2017 to February 2018

50. Mr Mulligan was employed as the Acting Director, Service Delivery, and commenced work at the Council on 1 November 2017. A "Position Summary" and list of "Key Responsibilities" is set out in Exhibit 1 page 451. There is no specific responsibility for asbestos management in this document, nor any mention of "asbestos". His employment ceased on 13 February 2018, a period of about 14 weeks (Mr Mulligan is now employed as Associate Director, Work Environment, at the Australian National University). The fact that he was an employee for such a short period requires a "reality-check" to be taken to any allegation Mr Mulligan had a significant role in asbestos management at the Council, or that anything that he did as an employee could

have been relevant to Mr Tooma's Terms of Reference, who was engaged as an independent expert to investigate asbestos matters within only a few days of Mr Mulligan commencing his employment.

51. Mr Tooma's original Terms of Reference were also finalised within days of Mr Mulligan commencing his employment with the Council. His ultimate Terms of Reference were settled about six weeks after Mr Mulligan commenced his employment. As a matter of obviousness, this chronology provides a strong indication that Mr Tooma was retained to investigate matters, incidents and issues that took place and arose before (and sometimes long before) Mr Mulligan's employment commenced.
52. In evidence they gave during the June Hearings, and in their further submissions, the Witnesses made various assertions and drew various conclusions based on the Council's structure that in the short period Mr Mulligan was an employee of the Council he had a wide role in asbestos management. In general terms, the matters raised were as follows:
 - (a) It was suggested that the whole organisation – and hence Mr Mulligan as Acting Director, Service Delivery – had responsibility to ensure that the Asbestos Management Plan was adhered to. That is accepted, but it falls well short of giving Mr Mulligan a significant role in asbestos management. In truth, it gives him no different role to anyone else in the organisation at a senior level in relation to the Asbestos Management Plan.
 - (b) Further, Mr Mulligan had no responsibility for the drafting, preparation or implementation of the Asbestos Management Plan. The Asbestos Management Plan makes it clear that these are the responsibility of the Manager, Governance and Risk at the Council (Exhibit 30, page 110), and were not the responsibility of Mr Mulligan as Acting Director Service Delivery.
 - (c) It was suggested that because Mr Mulligan was a member of the Executive Leadership Team (ELT) and Peak Safety Steering Group (PSSG), he had some further responsibility or duty in relation to the Asbestos Management Plan and asbestos management generally. The minutes of the meetings of the ELT and

PSSG, however, during the period that Mr Mulligan was a member of them, show that no issue was raised that was within the scope of Mr Tooma's Terms of Reference.

- (d) Further, Mr Mulligan, apart from having no responsibility for the drafting or implementation of the Asbestos Management Plan, played no role in the endorsement of the Asbestos Management Plan. The Plan was endorsed before Mr Mulligan became a Council employee. Some suggestion was also made that the Asbestos Management Plan requires constant review and updating, and Mr Mulligan had a responsibility for this. That is not consistent with the Asbestos Management Plan, which assigns responsibility for ongoing review to the Manager, Governance and Risk, and not the Director, Service Delivery.
- (e) It was also pointed out by the Witnesses that the Asbestos Management Plan gave the Manager, City Presentation, the task of developing and implementing an annual program of inspections. It was then suggested that as the Manager, City Presentation, sits within the Service Delivery directorate, Mr Mulligan therefore had overall managerial responsibility. This, however, ignores the corporate structure that was adopted in relation to asbestos management by the Council in December 2017, referred to below at [53] to [56].

(iv) Asbestos Management Taskforce

- 53. In a memorandum to the ELT dated 20 November 2017, Mr Mulligan and Mr Grant McKay recommended the creation of an "Asbestos Response Group" to manage asbestos finds and remediation work: Exhibit 19. This was said to be consistent with the Asbestos Management Plan. The Group (also referred to as a "Team" in the memo) was to report to the Manager, Parks and Support Services.
- 54. Following this, by an email dated 11 December 2017, Dr Dillon advised the Council's governing body of certain changes that had been made by senior staff in relation to the management of asbestos. The first matter of significance was the engagement of a Chief Safety Officer, Mr Alan Harris, for a three-month period (which has subsequently been

extended). It was Mr Harris who would have prime responsibility for the management of asbestos.

55. Attached to Dr Dillon's email was a document "Facts Sheet – Asbestos Management Taskforce". This management hierarchy, Dr Dillon said in her evidence, was put in place by senior staff with the assistance of Safe Work NSW, who was providing the Council with advice. At the top of the hierarchy is the General Manager. It then shows the **Asbestos Management Taskforce**, led by the Chief Safety Officer Mr Harris, as having responsibility for the **Asbestos Response Team**. Equally, the Director of City and Community Outcomes would have responsibility to the **Asbestos Project Team** which would work in coordination with the Asbestos Response Team. There was also a **Safety Team** that would refer asbestos-related incidents to the Asbestos Response Team. A further document attached to this provided Q&A information concerning this restructure, noting that the Asbestos Project Team commenced on 1 December 2017 (about four weeks after Mr Mulligan began employment at the Council): see Exhibit 11, pages 21-24.
56. For the sake of completeness, the following should also be noted in relation to the assertion that Mr Mulligan played any significant role in asbestos management at the Council:
- (a) An **Asbestos Working Group** was established in early 2017. It included six persons headed by the Manager, Governance and Risk. Mr Mulligan was never a member.
 - (b) An **Asbestos Management Project Team** was established on 8 June 2017. It comprised six people, and was headed by the Manager, Governance and Risk. Mr Mulligan was never a member.
 - (c) As noted above, an **Asbestos Response Team** was created, led by the Chief Safety Officer. Mr Mulligan was never a member.
 - (d) The Asbestos Projects Team reported to the **Project Control Group**. Mr Mulligan was never a member of this Group.

(e) The above groups and teams did not report to Mr Mulligan.

57. Given the above, it is clear why Mr Mulligan was not a person of interest in terms of Mr Tooma's investigation.

(v) Some other aspects of Mr Hadley's 16 May broadcast

58. Before turning to Mr Tooma's Terms of Reference, certain matters from Mr Hadley's broadcast require clarification. Referring to [56] of the First 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 to 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."

59. The finding made at [56] of the First Interim Report is supported by all the evidence. Mr Mulligan had no role in the preparation of the Council's Asbestos Management Plan. His work as a consultant required him to prepare high level policy plans and forms, but was never directed specifically to asbestos. The fact that he was dealing with the topic of safety generally neither puts Mr Mulligan in charge of asbestos management at the Council, nor does it give him any specific role in relation to that. To suggest that Mr Mulligan had a specific or significant role in relation to the management of asbestos is, in any event, a ridiculous proposition given that he had no role in the preparation of the Asbestos Management Plan, and in light of the matters referred to at [40] to [56] above, including the absence of Mr Mulligan from any group or team that did have specific asbestos-related responsibilities.

60. Mr Hadley also said the following:

"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. In [59] of the First Interim Report, I noted that the interview between Mr Tooma and Mr Mulligan "had nothing to do with asbestos management". That is an observation

as to the interview, it is not a finding that Mr Mulligan had “nothing to do with asbestos”.

62. In [62] of the First Interim Report, I have extracted an observation from the Mayoral Minute dated 20 February 2018 which stated that:

“Mr Mulligan was never responsible for controlling the investigation of asbestos management or for developing the Council’s asbestos management plan.”

63. This is not a finding, but rather a quote from the Mayoral Minute. Nevertheless, the factual accuracy of the Mayoral Minute is borne out by the evidence. However, it is not an assertion that Mr Mulligan had “nothing” to do with asbestos. A similar point applies to [63] of the First Interim Report. [67] of the First Interim Report merely describes a submission from the Council. It should be noted, however, that Council did not make a submission that Mr Mulligan had “nothing to do with asbestos”. In fact, they told the Inquiry he had a role at least in relation to interviewing people for an asbestos taskforce: see Exhibit 1 p 445, and [66]-[67] below.

64. Paragraph [98] of the Interim Report states as follows:

“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.”

65. Those findings are based on the evidence given and tendered at the April Hearing, and are confirmed by the further evidence at the June Hearings.

(vi) Mr Mulligan not convenor of interview panel for Asbestos Response Team

66. Another matter raised by the Witnesses, and broadcast by Mr Hadley on 16 May 2019, was that Mr Mulligan was the “convenor” of an interview panel for positions on the Asbestos Response Team, and that he wrote the position descriptions. This is not accurate.

67. Mr Mulligan had been a co-author of the memorandum referred to in [53] above that recommended the creation of what became the Asbestos Response Team. Mr Mulligan explained in his evidence that given the number of reports coming in to Council of potential asbestos contamination or finds, additional staff were needed: see T120 L21-39. What happened thereafter was:

(a) It was decided, pending the appointment of Mr Harris as Chief Safety Officer, to at least get the recruitment process going for the Asbestos Response Team. Advertisements were placed naming Mr Mulligan as the Council contact: T123 L7-16.

(b) Mr Harris commenced work on 8 December 2017. He “took the lead on the recruitment” process for the Asbestos Response Team from then on: T123 L18. This makes sense, given the team was to report to him.

(c) It was Mr Harris who made the offers of employment for the Asbestos Response Team, not Mr Mulligan: T125 L12-24.

(d) It appears that one of the witnesses was directed to Mr Mulligan in relation to their own application to be part of this team. This was coincidental, and can no doubt be explained by Mr Harris’ recent employment. It did not make Mr Mulligan the “convenor” of the interview panel. The responsibility for making offers of employment was Mr Harris’s. A witness may have been mistakenly told that Mr Mulligan was the “convenor” of the interview panel, or perhaps they honestly, but mistakenly, assumed this. It does not matter. Mr Mulligan was not the convenor.

68. While on the topic of mistaken assumptions, various documents were tendered at the June hearings that show that Mr Mulligan was from time to time informed, as the recipient of an email (usually a group email) of matters to do with asbestos management. Receiving such emails, or being copied into them, did not put Mr Mulligan front and centre on asbestos management at the Council. He rather received these emails because he was Acting Director, Service Delivery. While an asbestos issue might require input of some kind from a person employed in that position, it was not

one with overall (or even significant) responsibility for asbestos management at the Council, and particularly not after 1 December 2017 when the new asbestos “framework” was put in place. Being copied in on those matters in no way detracts from the core facts set out in [40] to [56] above. No doubt during his time as an employee of the Council Mr Mulligan received numerous emails concerning matters unrelated to his core duties and responsibilities as Acting Director, Service Delivery.

69. Further, there were times when Mr Mulligan passed on asbestos information to those responsible for managing it, such as when there was a report of potential contamination at the South Street Depot: T 114 L37 – T 115 L22. It would appear also that at some stage Mr Mulligan requested that a “stockpile audit” should be performed. Some suggestion was made by a witness that this was because Mr Mulligan had a forewarning of Mr Tooma’s recommendations. Mr Mulligan denied this, and I accept his denial. That assertion was baseless.

G. Mr Tooma’s Terms of Reference

70. Appendix A to this Supplementary Interim Report is a document headed “Comparison Table – Independent Investigation into Asbestos Issues” (**Comparison Table**). It comes from pages 547-550 of Exhibit 1. This document was prepared by Ms TeBay of the Council for the purposes of the Inquiry. In it she lists Mr Tooma’s 12 Terms of Reference in one column, and in the other column outlines the Council’s position on whether Mr Mulligan had any relevant role whilst either a consultant to or employee of the Council in relation to the matter for investigation by Mr Tooma in each term of reference.
71. Without more, it is clear from the evidence given at this Inquiry that nothing Mr Mulligan did in the time he was either a consultant to or employee of the Council had any relevance to any of Mr Tooma’s Terms of Reference. It only requires a careful and sensible reading of those Terms of Reference to reach that view. However, it can be noted that Witness 2 agreed that the Comparison Table was accurate in entirety. Witness 3 substantially agreed with the accuracy of the document save for a couple of minor quibbles that are immaterial. Mr Mulligan – whose evidence I accept – also confirmed the accuracy of the Appendix A document when questioned on it by Mr

Singleton: T136 – T140. Witnesses 2 and 3 therefore agreed at the June Hearings that Mr Mulligan’s role as either a consultant or employee to the Council was not a matter of relevance to any of Mr Tooma’s Terms of Reference. This is the central matter for Term of Reference 4 for this Inquiry. Further, nothing in the documents provided by 2GB, any of the witnesses, or in any of the evidence of Witness 1 throws any doubt on the irresistible finding that Mr Mulligan not only had no substantial role in relation to asbestos at the Council, but, more importantly, was not involved in performing services as a consultant, or work as an employee, that was of relevance to Mr Tooma’s Terms of Reference.

72. Given that state of affairs, as a matter of obviousness, Mr Tooma could never have had a conflict of interest in relation to Mr Mulligan even if they did have a close personal or professional relationship (which they did not from 2012 onwards in any event).

H. Conclusions

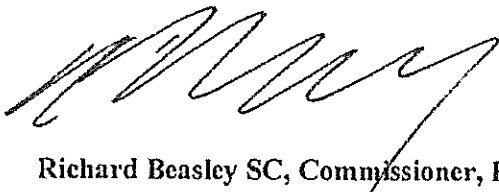
73. The assertions made by Mr Hadley during his 13, 14, and 15 February 2018 broadcasts were factually inaccurate, save for the reference to Mr Tooma’s book. The findings made in [43] of the First Interim Report are confirmed.
74. The finding made in [122] of the First Interim Report that Mr Tooma did not at any stage have a relevant conflict of interest is confirmed.
75. The finding made in [122] of the First Interim Report that the Council’s response to the false assertion that Mr Tooma had a conflict of interest was reasonable and appropriate, is confirmed.
76. Also in [122] of the First Interim Report, a finding was made that no aspect of any 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*”. That finding is confirmed.

77. In relation to the reopening of Term of Reference 4, I make the following further findings:

Contrary to the matters asserted by Mr Hadley in his 16 May 2019 broadcast:

- (d) I was not misled by any evidence given by any witness in the April Hearings.
 - (e) I was not misled by any document prepared by Council that was provided to the Inquiry. In particular, the document prepared by Ms TeBay which is Appendix A to this Supplementary Interim Report, is factually accurate.
 - (f) I was not lied to by any witness in the April Hearings. I was not lied to by Dr Dillon.
78. In its written submissions, in a confidential section, the Council has asked me to make findings as to who may have supplied certain documents or sent certain emails to 2GB/Mr Hadley. Mr Hadley has possibly been misled by at least one of those emails. No part of Term of Reference 4 requires me to investigate who has supplied documents or sent information to 2GB, or to make a finding about this. The evidence in the transcript of course speaks for itself.

Dated: 31 July 2019



Richard Beasley SC, Commissioner, Blue Mountains City Council Public Inquiry.

COMPARISON TABLE
INDEPENDENT INVESTIGATION INTO ASBESTOS ISSUES

TERMS OF REFERENCE (TOR)	INVOLVEMENT OF MARK MULLIGAN
<p>1. The conduct of the works at the Lawson car park and at the Lawson Mechanics Institute, including the removal of any soil, rock and other materials from the work site and the relocation of any such materials to other sites.</p>	<p>The works of the Lawson car park construction were undertaken by the Service Delivery (SD) Directorate. The works at the Lawson Mechanics Institute were contracted to an external building company. Mr Mulligan was not engaged by the Council in any operational capacity at the time that these works were undertaken. Mr Mulligan had no involvement in the works and no responsibility for them.</p>
<p>2. The use of the Lawson depot to receive any materials referred to in paragraph 1 and the storage and subsequent removal of those materials from the Lawson depot to any other work sites within the City.</p>	<p>The Lawson depot was controlled by the SD Directorate at the time that works were undertaken on the Lawson carpark and Mechanics Institute. The Council's City & Community Outcomes (C&CO) Directorate was permitted to store material taken from the car park site within the depot. Mr Mulligan was not involved in any decisions relating to these matters. He had no operational or other responsibilities whatsoever in relation to the Lawson works. At the time Mr Mulligan commenced working at Council the Lawson site was closed.</p>
<p>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 Council's Asbestos Management Plan (AMP), including any factors which delayed or contributed to the delay in the completion of that work.</p>	<p>Mr Mulligan was never engaged by the Council to compile the Council's Asbestos Register (AR) or to prepare the Council's Asbestos Management Plan (AMP). Mr Mulligan was engaged as the consultant, working part time in the period October 2016 to December 2016 to advance the Council's Safety Management Systems (SMS) project. Mr Mulligan had no involvement in asbestos working groups during his engagement as a consultant. Mr Mulligan had no involvement in the asbestos working group following his appointment as Acting Director, Service Delivery with effect from 1 November 2017 until his departure from the Council on 12 February 2018.</p>
<p>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</p>	<p>Mr Mulligan had no responsibility for the documentation, identification and management of asbestos based building materials or asbestos contaminated soil within any Council buildings or on any Council owned properties. Mr Mulligan's directorate were responsive for building maintenance but staff from SD were seconded to the Asbestos Response Team, reporting to a different directorate. Mr Mulligan was director of the area including</p>

time.	waste Management, including the Katoomba tip.
<p>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 based materials was known.</p>	<p>Mr Mulligan had initial responsibilities as asset manager in waste area for the Blackheath Tip, and initial response to securing the site, this responsibility for the management of the former Blackheath tip site, was then transferred to the Asbestos Project Team. Mr Mulligan had no responsibility for determining who would have or may have access to that site.</p>
<p>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.</p>	<p>Mr Mulligan was not working for the Council in the period May 2017 to 31 October 2017. In the period from 1 November 2017 and onwards he had no responsibility in relation to any enquires undertaken by Safework NSW (SW) or in relation to the Council's responses to any notices given by SafeWork NSW (SW) to the Council in 2016 or 2017/2018. However, he did have management of the Katoomba Waste facility and response at this site to Safework, with assistance from the Asbestos Response Team – who did not report to him.</p>
<p>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.</p>	<p>Mr Mulligan had no involvement in or responsibility for any of the investigations described in TOR 7 over the period from 2012 to date, to identify asbestos based materials in any building or in any site identified by SW in the period from May 2017 to date. Note Mr Mulligan had responsibility for building maintenance, but Asbestos response team, who did not report to Mr Mulligan, undertook the initial response to any asbestos matters.</p>
<p>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</p>	<p>Mr Mulligan was not working for the Council as an employee until 1 November 2017. No such allegations have been made for period 1 November 2017 to date. As a consultant in the period October to December 2016 he had no involvement in or responsibility for disciplinary action</p>

<p>relation to the Council's management of asbestos issues.</p>	<p>against members of Council staff.</p>
<p>9. The procedures and plans that have been adopted by the Council in the period 2012 to date, and the work practices that have been 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.</p>	<p>Mr Mulligan's involvement in relation to the Council Safety Management System (SMS) policies was limited to the period October 2016 to December 2016 and his involvement in the Council's SMS project. Mr Mulligan had no role in the implementation of Council's procedures and plans until his appointment as Acting Director, Service Delivery on 1 November 2017. For the 11 week period Mr Mulligan worked as Director he had no role in the adoption by the Council of procedures and plans in relation to work practices to manage risks associated with asbestos based materials present within Council owned buildings or on Council owned land. Work on developing asbestos management plan was being undertaken by a different Directorate.</p>
<p>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.</p>	<p>Mr Mulligan had no role as consultant in October 2016 to December 2016 in informing staff, or ensuring that Council staff were informed from time to time, of the presence of asbestos based materials in Council owned buildings or on Council owned sites. At this time Mr Mulligan was involved in the Council's SMS project. For his appointment for the 11 weeks as Acting Director, Service Delivery, he had no role in informing staff about the presence or possible presence of asbestos based materials in Council owned buildings. By 1 November 2017, when Mr Mulligan commenced working as Director, the issue of asbestos, including the unknown presence of asbestos in Council owned buildings, was a matter of major public controversy. By that date, the USU was involved in ongoing and detailed correspondence with the Council and its members about asbestos issues, including allegations that staff had been permitted to work on sites without being aware of the presence of asbestos.</p>
<p>11. The establishment, role and operation of the Council's Work, Health and Safety Committee.</p>	<p>Mr Mulligan had no role in establishing the Council's Work, Health and Safety Committee nor was he ever a member of that Committee. Mr Mulligan played a role as Consultant October 2016 to December 2016 in reviewing of WHS consultation procedures, including the reestablishment of Work Health and Safety Committees.</p> <p>During the 11 week period from October 2016 to November 2016, working as a consultant, Mr Mulligan supported the General Manager to establish the Peak Safety Steering Group in response the outcomes of the Willis report.</p>
<p>12. Such other matters as the</p>	<p>No additional matters have been recommended by the</p>

<p>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).</p>	<p>investigator for further investigation.</p>
--	--