

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

**Established under Section 438U of the *Local Government Act 1993***

**INTERIM REPORT: TERM OF REFERENCE 3, AND  
TERMS OF REFERENCE 6 AND 8  
(EXCLUDING ASBESTOS ISSUES)**

**COMMISSIONER RICHARD BEASLEY SC**

**Date of Report: 14 JANUARY 2020**

**INTERIM REPORT: TERM OF REFERENCE 3, AND  
TERMS OF REFERENCE 6 AND 8  
(EXCLUDING ASBESTOS ISSUES)**

**INTRODUCTION**

1. The Public Inquiry into the Blue Mountains City Council (“the Inquiry”) has nine Terms of Reference. They require investigation into alleged conflicts of interest, employment and recruitment issues, and asbestos management issues. An Interim Report dated 7 May 2019 concerning Term of Reference 4 was provided to the Minister for Local Government, the Honourable Shelley Hancock MP, on that date, and has subsequently been tabled in Parliament. That Interim Report outlined the circumstances leading to the Inquiry being established.
2. A Supplementary Report into Term of Reference 4 dated 31 July 2019, was also provided to the Minister, and has also been tabled in Parliament.
3. As explained in the Interim Report for Term of Reference 4 dated 7 May 2019, a decision was made not to hold hearings on the asbestos management issues (Terms of Reference 1, 2, 5, 7 and 9) at the time when other government agencies were also investigating those matters.
4. Between 2 and 12 September 2019, public hearings were held into Terms of Reference 3, 6, and 8. This Interim Report contains findings in relation to the issues raised in those Terms. However, it may be that Term of Reference 6 (and possibly 8) will be of relevance to the public hearings in relation to the asbestos management Terms of Reference, which are due to commence on 9 March 2020.

## **PUBLIC HEARINGS**

5. The public hearings for Terms of Reference 3, 6 and 8 took place at the Blue Mountains Cultural Centre in Katoomba. Mr Ross Glover acted as Counsel Assisting the Inquiry. The Officer Assisting the Inquiry was Mr Angus Broad, from the Office of Local Government, and he was supported by Ms Jenny Slater. Since the conclusion of these public hearings, Ms Katrina Annis-Brown has acted in the role of Officer Assisting while Mr Broad has been on leave. I am grateful for the hard work and assistance that they provided, both before and during the hearings.
6. Leave was granted to Mr Peter Singleton of Counsel to represent the Council at the public hearings, instructed by Mr Trevor Cook of McPhee Kelshaw, solicitors. Leave was also granted to Mr James Ryan, solicitor, to represent Councillor Brown in the public hearings.
7. Following the public hearings, Mr Glover lodged written submissions (**CA Submissions**). Subsequent to this, a written submission was received from Mr Singleton on behalf of the Council, which contended for acceptance of the submissions made by Counsel Assisting.
8. On 6 November 2019, a written submission was received from Mr Ryan on behalf of Councillor Brown (**Brown Submissions**). On 13 November 2019, the Inquiry received a second submission from Mr Geoffrey Whatmore (**Whatmore Submissions**). On 5 December 2019, the Inquiry received further submissions from Mr Singleton on behalf of the Council in response to the Brown Submissions (**Council Submissions**). Only Mr Glover's written submissions have been uploaded to the Inquiry website. This is because the Brown Submissions, inadvertently, referred to witnesses who gave evidence in private hearings and in relation to which orders were made preventing publication of those witnesses' names, and transcript of their evidence.
9. Regard has been had to all the written submissions in the preparation of this Interim Report, as well as to all the evidence given by witnesses, and to the documents tendered.

## **Summons to 2GB/Mr Hadley**

10. During the course of the public hearings, a Summons for Production of documents was served by the Inquiry on 2GB Radio Station seeking production of documents relevant to Terms of Reference 3, 6 and 8. As things transpired, all documents sought in the summons had either already been produced by 2GB/Mr Ray Hadley, or were already in the possession of the Inquiry.
11. At the time of service of the summons, 2GB and Mr Hadley were invited to make a submission to the Inquiry, given that Mr Hadley had made a number of statements during radio broadcasts on his morning show relevant to the issues raised in the Terms of Reference. In responding to the summons, the General Counsel of Macquarie Media (the owner of 2GB), Ms Alessandra Steele, indicated that Mr Hadley and 2GB did not propose to make any submission unless there was to be “an adverse finding against them”. It was asserted that if such a finding was made, it “would be outside the scope of the relevant Terms of Reference”. Given that many of the Terms of Reference for this Inquiry have been drafted so as to require investigation into matters asserted by Mr Hadley on various dates during the course of his morning show in late 2017 and early 2018, the latter comment is not correct.
12. On 11 September 2019, I caused a letter to be sent to Ms Steele which, relevantly, contained the following:
  - “5. Findings on Mr Hadley’s on-air broadcast were not beyond the scope of Term of Reference 4, nor are they beyond the scope of Term of Reference 3. Those Terms of Reference are directly related to [his] broadcast, and it is neither possible nor responsible for me to inquire into and report on those Terms of Reference without making some findings as to the broadcasts they relate to.
  6. I have made no findings yet in relation to any part of Term of Reference 3, or those parts of Terms of Reference 6 and 8 that may be related to TOR 3. Public hearings are taking place at the moment concerning those Terms. I advise, however, that I would be assisted if Mr Hadley and 2GB would provide submissions in relation to the following matters:
    1. Allegations made on 9 November 2017 that:

- (a) The Mayor the Council was involved in the “appointment of friends within the energy sector to key positions of the Blue Mountains City Council”.
- (b) That there was a “protection racket being run” by the Council to protect Mark Mulligan.

2. Allegations made on 17 November 2017 that:

- (a) Mr Hadley had “found corruption within the Blue Mountains City Council”.
- (b) That there was a “Boys Club, where it appeared that people who had a connection with the electricity sector seemed to be favoured to gain management positions”.
- (c) That Mr Grant McKay and Mr Stuart Liddell were part of a “Boys Club”.
- (d) That “documents are being doctored on the advice of people within Council”.
- (e) That Mr Hadley or others had “uncover[ed] what appears to be, and is, in [Mr Hadley’s opinion] corruption among senior Council officers that needs to be identified”.
- (f) That Mr Mulligan had been “getting money without a quote being asked for, because of [Mr Mulligan’s] association with Stuart Liddell”.

3. Allegations made on 13 December 2017 that:

- (a) Mr Mark Bruhn, Mr Mulligan and Mr Robert Greenwood were part of the “Boys Club” within Council.
- (b) That some of the men in the Boys Club “didn’t follow required procedures when awarding lucrative contracts to Mark Mulligan”.

13. Any submission from Mr Hadley/2GB was requested to be supplied to the Inquiry by close of business 20 September 2019. As at the date of this Report, no submission has been received. A copy of my letter to Ms Steele dated 11 September 2019 is Appendix 1 to this Report.

## SUMMARY OF KEY FINDINGS

### **FINDINGS: TERM OF REFERENCE 3**

Term of Reference 3 required an Inquiry and Report to the Minister with respect to whether:

In exercising their functions pursuant to Parts 1 and 2 of Chapter 11 of the *Local Government Act*, the Council and its governing body has since 2012 determined to employ and/or engage Mr Mark Mulligan, Mr John Hargreaves and other staff or contractors in accordance with the guiding principles in section 8A(1)(a) and (2)(e) and the role of the governing body in section 223(1)(j) and (l) as well as section 349 of that Act.

### **Allegations concerning engagement of Mr Mulligan as a Safety Consultant in September to December 2016**

**Allegation 1: There was no need to create a position of Project Lead for the Safety Improvement Project, and that position could have been filled by an internal candidate in any event.**

#### ***Findings – Allegation 1***

14. The following findings are made as to Allegation 1:
  - (a) A Safety Improvement Project of the kind developed by the Council was needed by at least 2016, and was an appropriate and responsible step to take.
  - (b) There was a need for the Council to employ or engage a person to lead, develop and assist with the implementation of that Safety Improvement Project.
  - (c) It was reasonable for the Council to first employ a person in the role of Project Lead of the Safety Improvement Project, and subsequently reasonable to engage Mr Mulligan as a consultant to complete Phase 1 of the Safety Improvement Project in late 2016.

15. The Council’s conduct was in accordance with sections 8A(1)(a) and (2)(e) of the LGA. Section 223(1)(j) and (l) are not relevant. To the extent that section 349 of the LGA is relevant, the conduct was in compliance with that section.

**Allegation 2: The Council’s procurement policies were not followed for the engagement of Mr Mulligan.**

***Findings – Allegation 2***

16. The resignation of Mr Shellshear was an “unplanned event” with the meaning of that term in the exclusions to the Council’s Procurement Standards. That term requires the circumstances to involve a need for urgent action, as well as the event being “unplanned”. Mr McKay, Mr Hargreaves and Mr Greenwood considered that a replacement needed to be found, to continue and complete Phase 1 of the Safety Improvement Project so that it did not stall. That view was reasonable, and appropriate. There was an urgent need to fill the role of the Project Lead.
17. Consideration, albeit brief, was given to the exclusion for “unplanned event” in the Procurement Standards. As the exclusion applied, the Procurement Standards were not breached. It would have been preferable for reliance on the exclusion to have been recorded in writing.
18. As there was no breach of the Procurement Standards, it follows that there has been no breach of any relevant provisions of the LGA referred to in Term of Reference 3.

**Allegation 3: Mr Mulligan’s engagement was tainted by a conflict of interest between him and Mr Stuart Liddell, that also involved Mr John Hargreaves.**

***Findings – Allegation 3***

19. My findings on Allegation 3 are:
- (a) Mr Liddell had no conflict of interest in relation to the engagement of Mr Mulligan as a consultant to the Council in October 2016.
  - (b) Mr Liddell and Mr Mulligan were not “very close friends” or “mates”.

- (c) Mr Mulligan was not paid “*without a quotation*”.
- (d) Mr Liddell played no active role in the selection process involving Mr Mulligan.
- (e) Mr Mulligan and Mr Liddell were not business partners.
- (f) There was no proper basis for any allegation of conflict of interest in relation to the engagement of Mr Mulligan as the consultant to the Council in October 2016.
- (g) There is no evidence of “*corruption*” in the engagement by the Council of Mr Mulligan.
- (h) The assertions made by Mr Hadley during his radio broadcasts on 17 and 20 November 2017 and 13 December 2017, summarised above, and set out in more detail at [180] below, are wrong.
- (i) The assertion made by Mr Hadley that Mr Mulligan “*acted reprehensibly on behalf the ratepayers of [the] Blue Mountains*” is rejected. This assertion is unsupported by any credible evidence. The evidence is to the contrary – Mr Mulligan provided a high standard of services to the Council.
- (j) The assertion that Mr Liddell or any other member of the Council’s staff acted in a reprehensible manner in relation to the engagement of Mr Mulligan (or any other matter relevant to Term of Reference 3) is also rejected as having no evidentiary basis.

**Allegation 4: Mr Mulligan was not qualified for the position of Project Lead for the Safety Improvement Project.**

***Findings – Allegation 4***

- 20. Mr Mulligan was well qualified for the position of Project Leader of the Safety Improvement Project. Engaging him for this position involved no breach or failure to comply with the obligations in the LGA.



**Allegation 5: Documents concerning Mr Mulligan’s engagement were “doctored” and “backdated”, which was evidence of or constituted “corruption” within the Council.**

***Findings – Allegation 5***

21. The Council’s records were not backdated or changed in any inappropriate or sinister way. Contrary to the allegations made by Mr Hadley in his broadcast of 20 November 2019, the purchasing co-ordinator of the Council was not asked to do anything “illegal”.
22. Mr Bruhn’s email to Mr Liddell of 7 November 2016 was not an attempt to have any records falsified or backdated. It was merely a suggestion from Mr Bruhn about how to both update and maintain a record, and in particular a record of quotes that had already been obtained by Council. The suggestion that Mr Bruhn’s email is evidence of “corruption” is wrong.

**Allegation 6: Mr Mulligan’s name was simply “drawn from a hat” and he was not selected for the engagement via a proper process.**

***Findings – Allegation 6***

23. Mr Mulligan’s name was not “drawn from a hat”.
24. Whether or not someone may have said Mr Mulligan’s name was “drawn from a hat” flippantly, or as some kind of joke, hardly matters. The process was not random. He was an appropriate person for the position. He had the requisite skills and experience. He was interviewed in order that those matters could be tested and ascertained.

**Appointment of Mr Mulligan to the Position of Director, Service Delivery in October 2017**

***Findings – Mr Hadley’s allegation broadcast on 13 December 2017***

25. My findings in relation to the allegations broadcast by Mr Hadley on 13 December 2017 are:

- (a) Viewed in the context of all of his broadcasts, including the entirety of the 13 December 2017 broadcast, a reasonable person would understand that Mr Hadley used the words “*quietly appoint*” to suggest some impropriety in relation to the appointment of Mr Mulligan to the position of Director, Service Delivery, and that it was not an open process. Mr Mulligan was not “quietly” appointed. He was appointed through a proper recruitment process, managed by a firm with expertise in executive appointments (Hayes Executive). He was one of five candidates identified for the position. He was interviewed three times – once by Hayes, once by three members of the Council’s Executive Leadership Team (including Mr Greenwood and Mr Liddell), and once by the entire Executive Leadership Team of the Council. He was identified as the outstanding candidate for the position. Hayes conducted two referee checks on Mr Mulligan which returned glowing responses concerning his capabilities, and work ethic. He was appointed through a proper and transparent process.
  - (b) Mr Liddell did not appoint Mr Mulligan. He interviewed him. He was interviewed by the entire Executive Leadership Team. Ultimately, the appointment was made by Mr Greenwood, who was still General Manager of the Council at the time.
  - (c) Contrary to the assertions broadcast by Mr Hadley, the proposed restructure of the Council was not about ensuring that either Mr Liddell or Mr Greenwood could “*simply appoint ... Mr Liddell’s mate*”, Mr Mulligan. Mr Liddell and Mr Mulligan were not “*very close friends*” or “*mates*”. The suggestion that a restructure was being proposed by the Council so that Mr Mulligan could be appointed to the position of Director, Service Delivery for 12 months is absurd.
  - (d) Mr Greenwood’s decision regarding the limited 12-month term for Director, Service Delivery in October 2017, was a “judgment call” for him, and the rationale for it was reasonable in the circumstances.
26. The appointment of Mr Mulligan as Director, Service Delivery in October 2017 involved no breach of the provisions of the LGA referred to in Term of Reference 3.

**Appointment of Mr John Hargreaves as Project Lead of the Business Improvement Project: Allegation made – Mr Liddell had a conflict of interest he did not avoid.**

***Findings***

27. Mr Liddell and Mr Hargreaves were friends. They played golf together. They were members of the same golf club.
28. Contrary to the assertion made by Mr Hadley during his radio broadcast on 20 November 2017, Mr Liddell did not appoint his friend or “golfing partner” to any position within Council. Mr Liddell played no role in the appointment of Mr Hargreaves to the position of Project Leader in the Business Improvement Project. He did not interview him. He made no decision as to his employment. Mr Liddell understood he had a conflict of interest he had to avoid, as did other senior members of the Council staff.
29. Mr Liddell managed his conflict of interest by avoiding it. This was consistent with the requirements set out in clause 4.2 of the Council’s Code of Conduct, which advises staff of Councils that they “must avoid or appropriately manage any conflict of interest”: Exhibit 41, page 41.
30. Although of less significance, Mr Hargreaves was not “moved on” by the Council. Nor did the circumstances which caused him to resign his position have anything to do with Mr Mulligan. Mr Hargreaves became unwell. This is why he was unable to complete his 12-month contract: T-130.40 and T-131.16-39 (3/9/2019).
31. Although raised in respect to Term of Reference 6, I respectfully disagree with Ms Reid of McCullough Robertson, who took the view in her Independent Report to Council that Mr Liddell committed a “low” grade breach of the Code of Conduct by not disclosing his conflict of interest in writing: See clause 4.12 of the Code of Conduct. Mr Liddell managed his conflict by playing no role in the employment of Mr Hargreaves. Once a conflict is avoided like this, the Code does not require the details of that conflict to be put in writing. A conflict need only be recorded in writing under clause 4.12 of the Code where a person has a “*non-pecuniary interest that conflicts with*

[a] *public duty*... ”. There was no conflict here, as Mr Liddell was not exercising a public duty – he avoided that exercise instead.

32. No aspect of the employment of Mr Hargreaves involved the Council in any breach of the provisions of the LGA referred to in Term of Reference 3, much less corruption.

**Services supplied by Centium: Allegation - That Centium was improperly favoured, there was a breach of the tendering policy, and s55 of the LGA was breached.**

### *Findings regarding Centium allegations*

33. S.55 of the LGA provides that a Council “must invite tenders” prior to entering into any “contract for the provision of services to the Council”. There are exceptions relating to the amount of that contract.
34. In November 2016, it was only necessary for a Council to invite tenders for a contract for the provision of services if the contract was for an amount more than \$150,000: *Local Government (General) Regulation 2005*(NSW), Reg 163(2).
35. The budget for the External Audit Services was \$80,000, and the services being acquired from Centium was just under this. Section 55 of the LGA, therefore, did not apply, and it was not necessary for the Council to invite tenders. There was no breach of s.55 of the LGA in relation to Centium.
36. As to the allegation of “favouritism”, there is no support for such a finding in the evidence. Centium went through a competitive bid process that involved two other firms. Centium was the successful tendered because it had the capacity to do the external auditing required by the Council, and had submitted the lowest quote.
37. Further, the allegation of “splitting orders” to avoid the requirements of the LGA is not supported by the evidence.
38. There was no breach of the Council’s tendering policy. In 2016, that policy required a tender to be undertaken where “the estimated cost of the purchase exceeds \$120,000”:

Exhibit 33, pages 32-36; and page 42 at [1.1.3]. The estimated cost of the services was \$80,000. The Council's tendering policy therefore did not require a tender.

39. There is no evidence to suggest that there has been a breach of any of the provisions of the LGA, referred to in Terms of Reference 3, in relation to Centium.

### **Appointment of Mr Liddell as Acting General Manager and of Dr Dillon as General Manager of the Council**

#### ***Allegations of Councillor Brown***

40. The Allegations of Councillor Brown are set out in [286] below.

#### ***Findings in relation to these allegations***

41. The evidence does not support a finding that a "ruling bloc" of the Council in some way managed the appointment of Mr Liddell first as Acting General Manager, and subsequently Dr Dillon as General Manager, to ensure those positions were held by people "*sympathetic to the position being developed by BMCC in response to the asbestos crisis*".
42. The evidence does not support a finding that the appointment of Mr Liddell as Acting General Manager, or Dr Dillon as Acting General Manager (or subsequently as General Manager) was "*tightly controlled by the Mayor and his ruling bloc as a means of assuring that an outsider without loyalties or need to justify past actions of the Council was not hired*". I accept that Mr Greenwood recommended Mr Liddell for the position of Acting General Manager, and that Councillor Greenhill (the Mayor) saw no reason to disagree with this recommendation. Dr Dillon was recommended for the position of General Manager, and approved by the governing body to be employed in that role, following a normal and rigorous selection process conducted in accordance with the Office of Local Government Guidelines. That process involved the engagement of an independent external consultant. A person independent of the Council (the General Manager of Penrith Council) was on the final Selection Panel.

43. The assertion that Mr Liddell was Councillor Greenhill's "captain's pick" for Acting General Manager is rejected. There is no evidence to support the view that Mr Liddell was recommended to fill the Acting General Manager's position with a view to ensuring he was ultimately made General Manager, or for increasing his chances of obtaining that position.
44. The evidence does not support a finding that Dr Dillon became Councillor Greenhill's "pick" from the time Mr Liddell stepped down from the Acting General Manager's position on 14 November 2017, if anything improper is meant by this. There is nothing wrong in either Councillor Greenhill, or any other member of the governing body, having confidence that Dr Dillon could fulfil the role of either Acting General Manager, or as General Manager for a year. There would be something very wrong if they appointed her to that position when they lacked confidence in her capabilities for the role. There is nothing wrong in them forming the view that she might ultimately be a person suitable to take the role of General Manager on a permanent basis. She was not appointed until such time as a proper and thorough recruitment process was undertaken, following which she was the preferred candidate of the Selection Panel, and the governing body.
45. In her submission to the Inquiry, Councillor Brown complained about being unexpectedly notified of the Mayoral Minute for the meeting of 24 July 2018, and of not receiving the minute until two minutes after the meeting started. There is no direct evidence concerning this, however, for the purposes of an administrative inquiry like this, I am prepared to accept what Councillor Brown has said. It is preferable (and may on occasions be vital) for mayoral minutes to be provided to councillors so that they have time to read them prior to a meeting commencing – noting also that this was an important meeting concerning the appointment of a general manager. All Councils in New South Wales must have proper regard to the meeting requirements in the Office of Local Government Councillor Handbook, and ensure that matters requiring either the need for research or lengthy consideration are not introduced without notice (barring exceptional circumstances).
46. However, none of the other councillors felt compromised by any late provision of the Mayoral Minute – they could not have done so, given that they clearly felt they were

able to vote on the recommendation concerning Dr Dillon. Given that other councillors did not feel compromised by the late provision of any mayoral minute, it would not be proper to make any finding that the late supply of minutes “*does not allow proper consideration by the members of the governing body*” of the matters dealt with in those minutes.

47. Nothing concerning the appointment of Mr Liddell as Acting General Manager, nor the appointment of Dr Dillon as General Manager, involves any failure by the Council or the governing body to comply with the provisions of the LGA referred to in Term of Reference 3.

**Appointment of Manager, City Presentation, September 2017 to May 2018: Allegations – recruitment policy not followed, and candidate had one negative referee check**

***Finding regarding Allegation***

48. The Council’s policy concerning recruitment and employment (Exhibit 42 from page 181) provides that there must be an “independent panel member” who is to be “positioned outside of the branch where the vacant position is located”: Exhibit 42, page 186.
49. The policy does not require a recruitment panel member to be independent of the Directorate, but rather of the relevant Branch (in this case, City Presentation). The three members of the Recruitment Panel were from the same Directorate, but one was independent of the Branch that they were recruiting for: T-454.6-18 (5/9/19). There was no breach of the policy.
50. A negative reference does not disqualify a person from being appointed to any position. There might be reasons, based on common sense, why a negative reference may not be afforded the same weight for an internal candidate as distinct from an external candidate. This is because the capabilities of an internal candidate for a position, and their suitability for that role, might be far better known for an internal candidate. In this case, they were.

51. Nothing in relation to the appointment of Mr Long as Manager, City Presentation, involved the Council or any of its staff being in breach of any of the provisions of the LGA referred to in Term of Reference 3.

### **HRM Partners Pty Ltd**

#### ***Allegation – Mr Liddell had a conflict***

52. HRM Partners Pty Ltd (**HRM**) provided services to the Council. A witness alleged that Mr Liddell was a former director of HRM, and that he sold this company to Mr McCleary, its owner: T-83.1-4 (10/7/19) (private hearing). The implication was that Mr Liddell had some form of conflict of interest, and any purchase orders involving HRM should be further investigated.

#### ***Findings re the Allegations***

53. The Inquiry obtained a Current and Historical Company Extract for HRM: Exhibit 71, page 464. It was incorporated on 17 September 2004. It is a company limited by one share. That share is held (and always has been) by Mr McCleary. There have been no transfers of that shareholding. On 27 September 2017, two additional directors were appointed. Mr Liddell was not one of them.
54. Mr Liddell has never been a shareholder in HRM. He has never been a director of that company. He did not sell it to Mr McCleary.
55. There is therefore no evidentiary basis to support the allegations made in relation to HRM. They are rejected.
56. Counsel Assisting submitted that given the lack of foundation for these allegations, it would not be a worthwhile use of public resources for the Inquiry to seek to investigate further whether Mr McCleary and Mr Liddell were “friends”. I accept that submission.



57. Based on the above findings, there is no evidence of a breach of any of the provisions of the LGA referred to in Term of Reference 3 concerning HRM.

### **Conclusion regarding Term of Reference 3**

58. The evidence does not support a finding that any of the Council, its senior staff or the governing body breached any of the provisions of the LGA relevant to the Inquiry into Term of Reference 3.

### **FINDINGS: TERM OF REFERENCE 6**

Term of Reference 6 required an inquiry into whether:

In exercising functions pursuant to Parts 1 and 2 of Chapter 11 of the LG Act, the Council and its governing body since 2012 has facilitated, and is facilitating, a consultative and supportive working environment in accordance with the guiding principle in s.8A(1)(i) and the role of the governing body in s.223(1)(i), (j) and (l) of that Act.

### **Findings regarding Springwood Depot Review (see [396] to [401] below for allegations and detailed findings)**

59. There is insufficient evidence to support a finding that the Council behaved in an inappropriate way, or that it was inappropriate to carry out some investigation given that allegations of some level of impropriety (which turned out to be false) had been made. In those circumstances, no finding is made that the Springwood Depot Review involved any breach of s.8A(1)(i) of the LGA.

### **Findings regarding Procurement Review (see [402] to [436] below for allegations and detailed findings)**

60. My findings in relation to the Procurement Review, and the Procurement Review Report are:

- (a) It would have been preferable for Mr Whatmore to have been consulted about the review before the Procurement Report was drafted. At a minimum, he may have been able to assist with procedural and factual matters.
  - (b) It is unlikely that it was intended for Mr Whatmore and Mr Irwin to read the Procurement Report. That, however, is not a complete answer to the manner in which parts of it were drafted. Mr Whatmore and Mr Irwin's response to item 22, and in particular item 24 of the Procurement Report, were genuine, as were Mr Whatmore's concerns regarding what he perceived to be other errors in the report. Their concerns at the implications of item 24 are reasonable, and readily understandable. Their feelings that they had been accused of improper conduct or theft by use of the word "likely" in item 24 is not irrational. In the absence of any evidence of theft, they were entitled to feel aggrieved.
  - (c) At the meeting of 17 October 2016, the best response by the Council to item 24 would have been a concession that it was not worded well, withdrawal of the implication of "likely" theft, and an apology for that. However, Mr Mackay was at pains to make clear that no finding of wrongdoing was made, nor intended. That alone, however, did not address, in a direct way, the use of the term "likely" in item 24.
  - (d) The process of resolving Mr Whatmore and Mr Irwin's grievance with the Procurement Report took too long. In part, that was unavoidable, given some delay with the finalisation of the grievance report (the Weir Report). However, this was a matter that should have taken weeks or at most a few months to resolve finally, not well over a year.
61. In considering the issue of "consultative and supportive working environment", it is relevant to consider that there was no intent to imply misconduct, nor to discover it. The Procurement Review was designed to identify risk, not wrongdoing. A draft of the report was circulated to senior staff, with the intent of identifying "overreach", and errors. None of relevance were.

62. Mr Whatmore and Mr Irwin's concerns and complaints were taken seriously by the Council. Mr Mackay put in writing the fact that the Procurement Report neither found evidence of wrongdoing, nor did it intend to imply such. This resulted in them being offered an apology, and – although it took too long – a result that Mr Whatmore was ultimately satisfied with. I accept the Council's submissions that:

*“The willingness of the Council to act on the Weir Report's recommendations showed a willingness to close essentially unresolvable issues in a conciliatory way favourable to the employee”:*  
Council Submissions at [47].

63. The Procurement Review was not perfect, and part of the Procurement Report contained an unfortunate implication. It is not a matter, however, that when considered in proper and complete context demonstrates a failure by the Council to provide a consultative or supportive working environment for staff.

64. Care needs to be taken not to make a general finding under s.8A(1)(i) based only on a less than perfect audit or review. In my view, the legislature should not be taken to have intended that adverse findings under s.8A(1)(i) are apt to be made based on isolated incidents where consultation or support could have been better. The preferred construction is that Parliament should be taken to have intended that the provision is to be directed more towards systemic failures to consult and support. While I therefore make no finding of breach of s.8A(1)(i) of the LGA in relation to the Procurement Review, it was a review where consultation should have been broader, and where ultimately the wording of the Report caused understandable concern.

### **Findings on the obligations of the governing body re TOR 6**

65. Section 223(1)(i) of the LGA provides that one of the roles of the governing body is to *“determine the process for appointment of the General Manager by the Council and to monitor the General Manager's performance”*. The process by which Dr Dillon was appointed was clearly consistent with the *“Guidelines for the Appointment and Oversight of General Managers”* published by the Department of Premier and Cabinet: Exhibit 71, pages 310-312.

66. The way the governing body of the Council monitors the performance of the General Manager is consistent with the Guidelines for Oversight published by the Department of Premier and Cabinet: Exhibit 71, pages 317-318.
67. There is no evidence that there has been any failure by the governing body in relation to its obligations under Section 223(1)(j) of the LGA “*to determine the senior staff positions within the organisation and structure of the Council*”, whether on its own or linked to the general principles set out in s.8A(1)(i).
68. There was no evidence given or tendered at the hearings to suggest that the governing body has failed to perform its obligation to ensure that the Council acts honestly, efficiently, and appropriately pursuant to s.223(1)(l) of the LGA, and the evidence was that processes are in place to satisfy this general principle.

#### **FINDINGS: TERM OF REFERENCE 8**

Term of Reference 8 requires inquiry into whether:

In exercising functions pursuant to Parts 1 and 2 of Chapter 11 and Part 2 of Chapter 13 of the LG Act, the governing body and the senior staff of the Council has determined, reviewed and re-determined an appropriate organisational structure and resource allocation in accordance with the guiding principle in s.8A(1)(c), (2)(c) and the role of the governing body in s.223(1)(g), (h) and (l) of that Act.

#### ***Findings on “resource allocation”***

69. During the public hearings, many of the Council’s documents prepared pursuant to the Integrated Planning & Reporting framework and obligations under the LGA were tendered. These included the Council’s Community Strategic Plan (Exhibit 39), its Delivery Program and Operational Plan (Exhibit 65), its State of City End of Council Term Report (Exhibit 66), and various Annual Reports (Exhibit 54). The evidence establishes that the Council has complied with its requirements under Part 2 of Chapter 13 of the LGA. No criticism was made by anyone that the Council’s statutory planning

documents were inadequate. No evidence was adduced to suggest that the Council's resource allocation was in any way inappropriate.

70. In 2015, the NSW State Government introduced its "Fit for the Future Reform Program" for Local Government. All councils were required to present an Improvement Program to the Independent Pricing and Regulatory Tribunal (**IPART**) by 30 June 2015: Exhibit 58, page 2.
71. The objective of the Fit for the Future Reform Program was to encourage councils to create plans to demonstrate how they would be sustainable, and an efficient provider of services to the community in the future. The improvement programs required to be provided to IPART obliged Councils to "*submit a proposal to demonstrate how they are or will become fit for the future in terms of being financially sound, operating efficiently and being in a strong position to guide growth and delivery quality services*": Exhibit 58 page 5. IPART delivered its final report entitled "Assessment of Council Fit for the Future Proposals" to the Government in October 2015: Exhibit 58, page 97. Out of 139 council proposals received, only seven were assessed by IPART as being fit for the future. The Blue Mountains Council was one of those councils: Exhibit 58, pages 97, 107, 108 and 177. IPART found that the Council "*satisfies the financial criteria overall. It satisfies the criteria for sustainability, infrastructure and service management and efficiency*": Exhibit 58, page 177.
72. Councillor Greenhill explained that the Council's planning to prepare for a successful response to IPART in 2015 – that is, an assessment of being "fit" for the future – involved a number of years of work: see generally his evidence at T-642-644 (10/9/19). Mr Blackadder – who provided expert evidence to assist the Inquiry on the topics of the Council's resource allocation and structural reorganisation - said in his evidence that IPART had put all councils "through the hoops" and that:

*"... they had to provide very comprehensive responses to the status of their infrastructure and their projections on expenditure. So, yes, IPART, because of their independent nature, I think you can guarantee that they did a very comprehensive and thorough process, so that those councils that have come out with the status of "fit for the future", have done very well. That's probably qualified by a need for those councils*

*to continue to stay fit and to ensure that they meet those financial sustainability indicators on an ongoing basis”*: T-605.15-26 (9/9/19).

73. The evidence supports a finding that in relation to its “resource allocation” the Council has complied with its obligations under s.8A(1)(c) and (2)(c) of the LGA, as well as under Part 2 of Chapter 13. The evidence also supports a finding that the governing body has complied with its obligations under ss.223(1)(g), (h) and (l) of the LGA.

### ***Findings – organisational structure***

74. In in his expert report (Exhibit 56), Mr Blackadder said this about the Council’s 2018-19 organisational structure review:

*“In my view, the process and methodology adopted by the Council in its review of the organisational structure is comprehensive, sound in its thoroughness and respectful of the roles of councillors and employees in undertaking the review ... From the information provided to me it does appear the Blue Mountains City Council has met all the requirements for delivering a sound result. I make no judgment on the merit or otherwise of the structure adopted. Each organisational structure should quite rightly reflect what is required to deliver the needs and aspirations of the local community as expressed in the community strategic plan. There is no “one size fits all” for organisational structures and in my view any structure can be made to work”*: Exhibit 56, page 26.

75. In his evidence at the Public Hearings, Mr Blackadder described the Council’s 2018-19 organisational structure review as one of the most comprehensive he had seen, and as “best practice”.
76. Beyond the opinion of Mr Blackadder, all the evidence supports a finding that the 2018-2019 improvement strategy and structural review conducted by the Council was comprehensive, thorough and best practice. It was conducted in compliance with all relevant obligations under the LGA referred to in Term of Reference 8.
77. As to previous organisational structure reviews, 2011 was comprehensive, but is outside the timeframe of Term of Reference 8. Given the 2018-19 review, there is insufficient

utility in making findings about the more limited reviews conducted in 2013, 2015 or 2017.

**RECOMMENDATION – TERM OF REFERENCE 8: ORGANISATIONAL  
STRUCTURE GUIDELINES**

78. Mr Blackadder noted that local councils now have the benefit of comprehensive guidance from the State Government and its Office of Local Government in relation to planning: see, for example, the Integrated Planning & Reporting Guidelines and Manual (Exhibits 38 and 76). He did however express the view that it would be useful if guidelines were developed to assist councils with organisational structure reviews, and had this exchange with Counsel Assisting:

Q. But these phases are what you consider to be a best practice approach; is that right?

A. I guess what I'm articulating there is, based upon my experience, the sorts of things that an organisation would do and yes, there are no guidelines. Every council approaches this in a different way. There are some common principles that would follow, but there is no guidebook, as there, for example, with the integrated planning legislation, there is a very comprehensive guideline document which, to the credit of government and local government, they have developed together.

The Commissioner: Q. Is that something that is missing from the assistance that the higher level of government gives to local council in terms of not having a guideline about how councils should, in a general way, go about conducting organisational reviews, structural reviews?

A. Commissioner, it is missing. I suppose the question is, in every aspect of the council's operations, what would be desirable and having some guidelines?

Q. It couldn't be a straitjacket sort of document, I guess that, but could one be created that was of general assistance to all councils that were looking to undertake an organisational structure review?

A. Commissioner, to the credit of the Office of Local Government, they have worked closely with councils to develop numerous guidelines over the years, and I think it is fair to say that there is in local government a real expertise that the government should use, the Office of Local Government should use, and they do that, but here is perhaps an example where it may be useful for some guidelines to be developed using those councils that have been through the process.

Mr Glover: Q. The six phases you identify there, rather than as I have put to you at best practice, provide some operational principles in the approach to a review; is that a better way to describe it?

A. Yes, thank you, yes: T-552.3-42 (9/9/19).



79. The approach adopted by the Council to its 2018-2019 organisational review was one that was not only thorough, but was embraced by the Council staff, no doubt in part because of the comprehensive consultation phases. It was the subject of commendation by Mr Blackadder in his evidence: see [389] below.
80. Given Mr Blackadder's experience in assisting councils with organisational reviews, his suggestion that councils may benefit from a general guideline as to how to approach conducting such reviews (as distinct from a directive as to how a particular organisational structure must look) should not be ignored.
81. Based on evidence given at the public hearings by Mr Blackadder, and the evidence concerning the Council's 2018-19 organisational structure review, I recommend that the Minister ask the Office of Local Government to consider developing a set of general guidelines to assist councils in conducting reviews and redeterminations of their organisational structure. While the OLG will have its own expertise and views in this area, it could be asked to consider the general phases for such an organisational review as outlined by Mr Blackadder in his report, and to also consider the approach adopted by the Council in its 2018-2019 organisation review and redesign – see below at [498] to [510], and Mr Blackadder's Report to the Inquiry: Exhibit 56, especially at pp8-11 and 25-27.

## TERM OF REFERENCE 3

### Relevant Statutory Provisions

82. Term of Reference 3 requires an Inquiry and Report to the Minister with respect to whether:

3. In exercising their functions pursuant to Parts 1 and 2 of Chapter 11 of the *Local Government Act*, the Council and its governing body has since 2012 determined to employ and/or engage Mr Mark Mulligan, Mr John Hargreaves and other staff or contractors in accordance with the guiding principles in section 8A(1)(a) and (2)(e) and the role of the governing body in section 223(1)(j) and (l) as well as section 349 of that Act.

83. Chapter 11 of the *Local Government Act 1993 (LGA)* is headed “How are Councils staffed?” Part 1 deals with the determination, redetermination and review of the organisational structure. Part 2 deals with the appointment and functions of the General Manager, and the employment of senior staff.

84. Section 8A of the LGA was introduced in September 2016. The following subsections are relevant:

Section 8A(1)(a): Council should provide strong and effective representation, leadership, planning and decision-making.

Section 8A(2)(e): Council decision-making should be transparent, and decision-makers are to be accountable for decisions and omissions.

85. Term of Reference 3 requires a consideration of matters in the time period 2012 onwards. As section 8A was not enacted until September 2016, for the period before this I have taken the Term of Reference to be directed to the repealed section 8 of the LGA which, relevantly, provided:

- (1) A Council has the following charter:
  - ...
  - to exercise community leadership;
  - ...

- to have regard to the long term and cumulative effects of its decision;
- ...
- to engage in long term strategic planning on behalf of the local community;
- ...
- to keep the local community and the State Government (and through it, the wider community) informed about its activity;
- ...
- to ensure that, in the exercise of its regulatory functions, it acts consistently and without bias, particularly where an activity of the Council is affected;
- to be a responsible employer.

86. Subsections 223(1)(j) and (l) of the LGA are in the following terms:

**223 Role of the governing body**

- (1) The role of the governing body is as follows:
- ...
  - (j) to determine the senior staff positions within the organisation structure of the council,
  - ...
  - (l) to be responsible for ensuring that the Council acts honestly, efficiently and appropriately.

87. Section 349 of the LGA is in the following terms:

**349 Appointments beyond merit**

- (1) When the decision is being made to appoint a person to a position:
- (a) only a person who has applied for appointment to the position may be selected; and
  - (b) from among the applicants eligible for appointment, the applicant who has the greatest merit is to be selected.
- (2) The merit of the persons eligible for appointment to a position is to be determined according to:
- (a) the nature of the duties of the position; and

(b) the abilities, qualifications, experience and standard of work performance of those persons relevant to those duties.

(3) In determining the merit of a person eligible for appointment to a position, regard is to be had to the objects of Part 4 of this Chapter (see section 344).

88. Section 344 of the LGA is in the following terms:

### **344 Objects**

(1) The objects of this Part are--

(a) to eliminate and ensure the absence of discrimination in employment on the grounds of race, sex, marital or domestic status and disability in councils; and

(b) to promote equal employment opportunities for women, members of racial minorities and persons with disabilities in councils.

(2) In this section “disability” has the same meaning as the *Disability Discrimination Act 1992* of the Commonwealth.

### **Scope of Term of Reference 3 – Matters inquired into**

89. Leaving aside the relevant statutory provisions, the crucial words of Term of Reference 3 are:

*“... the Council and its governing body has since 2012 determined to employ and/or engage Mr Mark Mulligan, Mr John Hargreaves and other staff or contractors ...”*

90. As a matter of text, inquiry had to be made into the employment or engagement by the Council of Mr Mulligan and Mr Hargreaves. “Other staff or contractors” is a large group. Clearly, these words cannot be understood as requiring investigation and report into the employment or engagement of every staff member or contractor to the Council since 2012. The matters that were inquired into were driven by the submissions received by the Inquiry, by matters of public controversy, and by the evidence adduced and tendered at the public hearings.

**Engagement of Mark Mulligan as Safety Consultant to the Council – September 2016 to December 2016**

***Background facts***

91. In July 2015, the Council retained Willis Australia Limited (**Willis**), who “*conducted an independent safety management review of the state of [the Council’s] safety management system*”: Exhibit 28, page 27. Willis produced a report for the Council entitled “Safety Management System Review” dated October 2015 (**Willis Report**): Exhibit 28. The Willis consultant identified what he found to be a “*range of control weaknesses in the current safety management system*” of the Council: Exhibit 28, page 27.
92. Twenty-six recommendations were made to the Council, which Willis indicated needed to be implemented “*in order for [the Council] to be considered as having a fully functional safety management system in accordance with AS/NZS 4804*”. The first control weakness identified by Willis was that “*WHS policies ... do not align with the Work Health and Safety Act 2011*”: Exhibit 28, page 27.
93. Partly as a result of the Willis Report, in early 2016 the Council commenced a Business Improvement Project (**BIP**). As part of the BIP, the Council commenced a Safety Improvement Project (**SIP**).
94. In February 2016, the position of Project Lead for the SIP was created within Council. The person to be employed in this position was to report to the Manager, Governance and Risk of the Council, which at the time was Mr Grant McKay. In summary, the Project Leader of the SIP was required to “*mature and further develop Council’s Safety Management System in accordance with the findings of the*” Willis Report. It was anticipated that the position would run for approximately 12 months “*with the possibility of extending*”: see Exhibit 71, page 5.
95. The key responsibilities for this role were described as follows:

- “1. *Refine Council’s project plan for the maturing of the Safety Management System (“SMS”) ensuring that it addresses the development of an integrated suite of foundational policy and procedures and builds corresponding capability and safety incident reporting, investigation, data analysis, risk management, assurance and training.*
2. *Provide advice on the most appropriate structure for the project, including but not limited to phasing, timeline, milestone, project risk, budget and outcomes.*
3. *Execute this plan as the project lead under the governance of a “program office” for business improvement.*
4. *Work co-operatively and constructively with existing members of the safety team to progressively transition them into the maturing SMS.*
5. *Ensure all aspects of organisational change management are included in the project plan and are adequately addressed in the plan’s execution.*
6. *Identify safety training needs across the organisation and incorporate training programs into the project plan.*
7. *Provide the business improvement program office with regular reports on the status of the project utilising agreed performance metrics with particular attention to the attainment of agreed milestones.*
8. *According to the demands of the plan and the expectation of the program office, develop cross-functional coalitions to ensure that the momentum of the project is maintained.*
9. *Design and execute, either directly or indirectly, regular assurance exercises to confirm system conformance and assess/quantify the developing maturity of the SMS”: Exhibit 71, page 6.*

96. The position was advertised, and several applicants were short-listed and then interviewed. Mr Michael Shellshear was the successful candidate. He commenced employment with the Council on 18 April 2016. Mr Shellshear resigned in August 2016.

97. By at least this time a “Project Management Plan” had been created for the SIP: Exhibit 18. Mr John Hargreaves was the Program Leader for the BIP, and Mr McKay had

project oversight. The Project Director was Mr Stuart Liddell, the Group Manager People and Systems. The Project Sponsor was the then General Manager of the Council, Mr Robert Greenwood.

98. The SIP had three Phases. The overall objective for Phase 1 was “*to be compliant with the WHS Act 2011 and Regulations*”: Exhibit 18, page 7 of 16.
99. In September 2016, Mr Mark Mulligan, through his consulting firm MA & SE Mulligan, was engaged by the Council as a consultant to complete Phase 1 of the SIP. A letter dated 9 September 2016 was sent by the Council (signed by Mr Liddell) to Mr Mulligan, confirming some of the terms of his consultancy. The consultancy was to run from Wednesday, 5 October 2016, through to Friday, 23 December 2016. Mr Mulligan was engaged for three days each week, at a rate of \$1,600 per day. Prior to 5 October 2016, Mr Mulligan had worked a few days for the Council to prepare for his consultancy to complete Phase 1 of the SIP.

### ***Summary of Allegations***

100. The following allegations in relation to the engagement of Mr Mulligan as a consultant to the Council in September to December 2016 were inquired into:

Allegation 1: There was no need to create a position of Project Lead for the SIP, and that position could have been filled by an internal candidate in any event.

Allegation 2: The Council’s procurement policies were not followed for the engagement of Mr Mulligan.

Allegation 3: Mr Mulligan’s engagement was tainted by a conflict of interest between him and Mr Stuart Liddell, that also involved Mr John Hargreaves.

Allegation 4: Mr Mulligan was not qualified for the position of Project Lead for the SIP.

Allegation 5: Documents concerning Mr Mulligan's engagement were "doctored" and "backdated", which was evidence of or constituted "corruption" within the Council.

Allegation 6: Mr Mulligan's name was simply "drawn from a hat" and he was not selected for the engagement via a proper process.

101. Several of the allegations made above – namely 2, 3, 4 and 5 – were made in radio broadcasts by Mr Ray Hadley on his morning show on 2GB: Exhibits 10 and 45.

### *Witnesses*

102. The following persons gave evidence on matters that touched on the issues raised by the engagement of Mr Mark Mulligan as a consultant:

- Mr Geoff Whatmore, the Council's Purchasing Supply Co-ordinator at the relevant time.
- Mr Steve Irwin, the Warehouse Co-ordinator.
- Mr Grant McKay, the Council's Manager, Governance and Risk at the relevant time.
- Mr Trevor Anderson, the Council's Program Leader, Safety.
- Mr Michael Keyes, a member of the Safety Team.
- Mr Mark Mulligan.
- Mr Robert Greenwood, the General Manager of the Council until November 2017.
- Ms Jasmine Cooper, the Executive Officer.
- The witness described as "Witness 1" in private hearings.

103. Mr Mark Bruhn and Mr Stuart Liddell were summonsed to give evidence. Both were excused on medical grounds. Mr Hadley was requested to make a submission to the Inquiry to assist it in relation to various matters alleged by him on his radio program: see Appendix 1. No submission was received by Mr Hadley or 2GB.



### **Allegation 1 – the Position was not necessary, or could have been filled internally**

104. The Willis Report contained a number of recommendations beyond advising the Council to prepare Work Health and Safety Policies to align with the *Work Health and Safety Act 2011 (WH&S Act)*. These recommendations were based on the weaknesses in the current safety Management System that the author of the Willis Report identified. These included the following:

- “• *Inadequate mechanisms regarding hazard identification, risk assessment and review mechanisms.*
- *Lack of documentation of WHS goals and objectives for all levels within the BMCC.*
- *Lack of strategic alignment between local WHS plans and BMCC WHS strategic directions.*
- *Current codes of practice and legislation are not reflected across the organisation.*
- *Lack of identification of and delivery of WHS training across BMCC.*
- *Lack of consultation and consultative processes consistent with WHS legislation.*
- *Lack of formalised WHS communication to ensure consistent messaging across BMCC.*
- *Insufficient WHS safety reporting within BMCC which adequately covers lead and lag indicators, system failures, hazards, risk assessments, preventative and correction action.*
- *Lack of consistent messaging of WHS documentation and document control processes.*
- *Inadequate monitoring processes in relation to safety inspection reporting.*
- *Lack of rigour behind current WHS investigation methodology, incident report in and analysis.*

- *Lack of sufficient safety audit processes*”: Exhibit 28, pages 27-28.

105. Trevor Anderson, the Council’s Program Leader, Safety, and Michael Keyes, who at the relevant time was also a member of the Safety Team with responsibilities for investigations of public health and safety matters, both gave evidence at the public hearings.
106. Mr Anderson did not agree with the findings and recommendations in the Willis Report: T-920.42-47. He considered that it’s author had been influenced by people in Council, particularly Mr McKay and Yasoda Muralitharan to “build a case” that the Council did not have a properly functioning safety system: T-920.45 to T-921.18. He considered that any deficiencies in relation to safety systems within the Council were because the Council had deliberately run the Safety Team down, and had not provided adequate resourcing: T-921.20-27. He considered that people who had been employed by the Council did not have even theoretical knowledge of safety or workers compensation, and that there were no problems until safety became under-resourced: T-922.8-26.
107. Mr Anderson produced his own discussion paper concerning proposed resourcing of the Governance and Risk Branch of the Council. He undertook this task because of his concerns regarding the Willis Report, which he summarised as being a “hatchet job”: T-920.38. It appears to be Mr Anderson’s view that the money spent by the Council on employing Mr Shellshear, and then engaging Mr Mulligan on the SIP, was unnecessary, and that the project could have been managed by him and others within the Council, including Mr Keyes: see generally T-922.
108. Mr Keyes also said in his evidence that he believed he had the skills to undertake the BIP. He said he made this clear to Mr McKay who at first said that the position would be advertised. He said he would wait for it to get advertised, but two weeks later Mr Hargreaves commenced his employment leading the BIP within Council. He said he was told by Mr McKay not to bother applying, because Mr McKay wanted someone from the outside: see T-191.25 to T-192.1.

109. Those more senior to Mr Anderson and Mr Keyes took a different view as to the merit of the Willis Report, and the need to find an appropriate person to take the role of the Project Lead for the SIP. There is no doubt this was considered an extremely important project within the Council. The then General Manager of the Council, Mr Robert Greenwood, said in his evidence that he considered the SIP to be one of Council's "top priorities": T-612.9. He considered it extremely "important to the workforce and to the Council in terms of its risks and its reputation", and because of that it may have been the only project where he became "the sponsor": T-612.17-23 to T-613.7.

110. Mr McKay, who had responsibility for the project, also took the view that the Willis Report identified deficiencies in the Council's Safety Management Systems. He viewed the SIP as being one:

*"... about improving the maturity of the safety in the organisation. The project or piece of work done by Willis found that in some areas of the organisation lacked maturity in terms of its safety management systems. The project had as its terms of reference a requirement to ensure that the organisation had a fit for purpose safety management system and that over a period of time we could mature that system to meet the needs of the organisation."*: T-337.2-9.

111. Mr McKay explained what he meant by his use of the term "maturity" in this way:

*"By "mature" I mean that it had a well-designed framework, in other words a policy and set of competent procedures, and those procedures and policy were well implemented and internalised into organisational practice. Although the organisation had a very strong desire to achieve that, it didn't have it at the time that John [Hargreaves] came on board. So it was going to be a difficult project and required a lot of focus on his part ..."*: (T-343.12-19).

112. Mr McKay said that there was some disagreement as to whether the Council's documents, policies and procedures were compliant with the WH&S Act. He said there was even stronger disagreement, however:

*"... about the nature of a Safety Management System of a type that I had in my head, of the type that I thought the Blue Mountains Council needed in order to be able to manage its safety risks in a proactive manner."*: T-348.16-20.

113. Beyond ensuring that the Council's documents and policies and procedures were compliant with the WH&S Act, Mr McKay said that the Council needed:

*“... a way of being able to track our safety risk, being able to identify proactively our safety risks and being able to manage those. We needed better co-ordination of training in development and safety. All of those are classic documented components of a Safety Management System.”:* T-349.10-15.

114. Mr McKay felt that the Council needed to:

*“... move beyond the idea that a Safety Management System was a folder of documents and get to the understanding that it was a series of behaviours in the field, a particular culture that we needed to build, that would take time and effort to build – in other words, quite a new approach.”:* T-349.32-37.

115. Mr McKay considered that the Council needed to recruit an external person to devise this new approach, and take the lead for the SIP: T-349.39-44. He said he had no recollection of informing Mr Keyes or anyone else that the position of Project Lead had to be filled by someone from outside the Council, and said that if there had been a *“person inside the organisation that had the skills and attributes to be able to do this, they would not have been disqualified”*: T-346.20-22.

116. He did, however, make the observation that in his opinion Mr Keyes and Mr Anderson may have found the concept of a SIP – perhaps because they didn't accept the findings in the Willis Report – to be foreign and “threatening”: T-345.26-36.

117. Mr McKay's views concerning the Willis Report were shared by Mr Mulligan. Mr Mulligan considered that it identified “gaps” in the Council's Safety Management System that he identified as well. He was of the view that the Council's documentation was not compliant with the WH&S Act: T-476.14-35.

118. These views are reflected in the Project Management Plan for the SIP which had been initially prepared by 12 August 2016, and updated by 11 September 2016: Exhibit 18. The fundamental objective of Phase 1 of the SIP was to make the Council compliant with the current version of the WH&S Act, and its Regulations.

119. For reasons that do not require any finding to be made, Mr Shellshear, who was employed in the position as Project Lead for the SIP commencing in April 2016, resigned in August 2016, with Phase 1 of the SIP substantially incomplete.
120. Upon Mr Shellshear's departure, both Mr McKay and the General Manager, Mr Greenwood, took the view that it was important to quickly find a replacement for him to progress and complete Phase 1 of the SIP. During a conversation with Mr Liddell, who shared the view that the SIP needed to maintain momentum, Mr Liddell gave Mr McKay Mr Mulligan's name as a person who might be worth discussing a possible consultancy with. Mr Liddell however told Mr McKay he did not want to be involved if Mr Mulligan was contacted, as he and Mr Mulligan used to work together: T350.38 to 351.12 (5/9/19). Mr Greenwood's evidence was that as the SIP had been commenced, he felt it was "*important that there was ... continuity. We didn't want to lose traction*": T-613.41-43. Because of the urgency, he felt that it was appropriate to engage a contractor at the time, rather than readvertise and seek an appropriate person on a longer-term recruitment basis: T-614.6-12.
121. Mr McKay's view was that the Council needed to "*maintain the momentum of the project*" and quickly find someone who "*had a force of personality who was very credible and would, in a very short time, be able to push through barriers and get*" the SIP to where the Council needed to: T-350.8-19. Mr McKay too was content to engage a suitable person on a consultancy basis, particularly as the traditional recruitment process which resulted in Mr Shellshear being employed had resulted in only one suitable candidate being interviewed: T-351.47 to T-352.6. Obtaining someone on a consultancy basis meant that it was likely, in Mr McKay's view, that person could be engaged to carry the project forward in "*weeks as opposed to a matter of months*": T-352.5-6. Ultimately, he became satisfied that Mr Mulligan had the skillset and personality that the Council required to lead at least Phase 1 of the SIP.
122. In his evidence, Mr Hargreaves went perhaps even further in terms of explaining the urgency that the Council felt in replacing Mr Shellshear, describing it as something close to a state of "panic" to fill the role: T-140.28-46 and T-141.42-47.

### *Findings: Allegation 1*

123. Based on the evidence presented to the Inquiry, the Willis Report identified weaknesses in the Council's Safety Management Systems. It is understandable that some people within the Council's organisation with responsibility for safety at the time might have a different view, but I am comfortably satisfied that the Willis Report identified a real need for reform and updating of the Council's Safety Management Systems.
124. Even if there is room to debate some of the findings or recommendations in the Willis Report, it is not a report that any Council could responsibly ignore. The Willis Report, whatever else it did, identified critical weaknesses in the Council's Safety Management Systems as they stood towards the end of 2015. It made recommendations that a responsible Council would have to implement, and implement quickly. This is what the Council did.
125. The Council ultimately developed a SIP blueprint (Exhibit 18) that had certain critical matters as "deliverables" across its three Phases. The most critical one initially (and part of Phase 1) was to bring the Council into compliance with the WH&S Act. This was a fundamental matter that the Council had to achieve. Someone had to fulfil the role of ensuring the Council became compliant with the WH&S Act. I am comfortably satisfied there was a need for a Project Lead of the SIP.
126. As to whether that leadership role could have been filled internally, that is a matter upon which different people could reach different views. Mr Anderson and Mr Keyes clearly had their own views.
127. Mr McKay had a different view. It was his responsibility to make that decision. He ultimately decided to bring someone in from outside the Council organisation with an appropriate skill base to be the Project Leader of the SIP. The evidence does not establish this was an unreasonable decision to make. Following a recruitment process a candidate was selected who, for reasons that are not relevant, resigned only a few months after he commenced employment.

128. Upon Mr Shellshear's resignation, both Mr McKay and Mr Greenwood were of the view that a replacement person needed to be found as a matter of urgency. Given the importance of Phase 1 of the SIP, that was a reasonable view to take. It was important that the SIP not stall. Mr Mulligan was identified as a candidate to lead the Council in completing Phase 1 of the SIP in circumstances outlined below. There is no credible evidence before the Inquiry, nor has any suggestion been made, that Mr Mulligan was not an appropriate person to lead Phase 1 of the SIP. The evidence is that he was. Whether or not Mr Anderson or Mr Keyes could have filled that role, the persons with responsibility at the Council for ensuring that position was filled were entitled to prefer an external candidate, and it was reasonable for them to do so. The Willis Report alone, and the need for the Council to urgently make itself compliant with the WH&S Act and Regulations, are reason enough for those within the Council with the responsibility of deciding to prefer an external person to come in and undertake this role. Having identified an appropriate and competent person, they were entitled to engage Mr Mulligan in the role, rather than using someone already in the Council's employ.
129. In summary, the following findings are made as to Allegation 1:
- (d) A Safety Improvement Project of the kind developed by the Council was needed by at least 2016, and was an appropriate and responsible step to take.
  - (e) There was a need for the Council to employ or engage a person to lead, develop and assist with the implementation of that Safety Improvement Project.
  - (f) It was reasonable for the Council to first employ a person in the role of Project Lead of the Safety Improvement Project, and subsequently reasonable to engage Mr Mulligan as a consultant to complete Phase 1 of the Safety Improvement Project in late 2016.
130. The Council's conduct here was in accordance with sections 8A(1)(a) and (2)(e) of the LGA. Section 223(1)(j) and (l) are not relevant. To the extent that section 349 of the LGA is relevant, the conduct was in compliance with that section.

**Allegation 2 – The Council’s Procurement Policies were not followed in the engagement of Mr Mulligan**

131. This allegation has its genesis in a requisition for payment to Mr Mulligan’s firm for part of his consultancy services in the period October to December 2016.
132. Mr Geoff Whatmore was at all relevant times the Council’s Purchasing Supply Co-ordinator. Part of his duties involved converting requisitions for goods purchased and services acquired by the Council into purchase orders within the procurement system, known as the On-line Requisition and Purchasing System (ORPS).
133. Evidence given to the Inquiry during the hearings established that in general terms the Council’s requisition process worked in this manner:
  - (a) A requisition for goods and services is raised.
  - (b) That requisition required approval by a manager with the relevant authority level, which varied depending on the value of the goods or services acquired.
  - (c) The requisition was forwarded to the Purchasing Team, who would raise the purchase order.
134. On 4 November 2016, Mr Whatmore became concerned regarding two requisitions that had been sent to him. One related to services supplied by Centium. That matter is addressed later. The other related to the services provided by Mr Mulligan for Phase 1 of the SIP, through his consulting firm, M A & S E Mulligan. Mr Whatmore’s concern was such that on that date, he sent an email to Mr Mark Bruhn, who was then the Council’s Director, Service Delivery: Exhibit 34 (Mr Whatmore’s first submission to the Inquiry) page 7. The email was copied to five other people, including Ms Jasmine Cooper (the Council’s Executive Officer), and Mr Steve Irwin who worked in the warehouse and who, from time to time, assisted in raising purchase orders.
135. The requisition for Mr Mulligan’s consultancy services had been sent by Mr Hargreaves. In his 4 November 2016 email, Mr Whatmore said this about it:



*“Mark,*

*I would like to request your approval to raise two orders from the following requisitions:*

*...*

*Secondly, Req 132145 from John Hargreaves. This is for consulting services on MA and SE Mulligan to a value of \$65,000, once again no reference to quotations received. The tender/quote reference is quoted as N/A. Not applicable? This is the second order raised this year on this supplier with possibly no quotes received which once again raises the possibility of supplier favouritism.*

*Your advice and approval on this matter would be appreciated, as normal procedure would be to refer these questions to the internal auditor”: Exhibit 71, page 71.*

136. Mr Whatmore’s reference to “N/A” can be explained through Exhibit 36. This is a computer screenshot for what is said to be requisition 132145. Next to the box “Description” are the words “Consulting Services – SIP”. The vendor is identified as MA and S E Mulligan. Next to the box “Reference” is the entry “N/A”. It was Mr Whatmore’s evidence that the proper procedure is that this reference box should have contained either a quote number or a TRIM file number (TRIM is a reference to “Total Records and Information Management”, the electronic document management system used by the Council).
137. Shortly after receiving Mr Whatmore’s email, Mr Bruhn forwarded it to the General Manager, Mr Greenwood, with the message *“Can you please call on my mobile to discuss this?”*: Exhibit H, page 66.
138. On the same day Mr Greenwood then sent the email chain to Mr Liddell, the Group Manager of People and Systems with the message: *“FYI. Mark will raise with you. I told him not to respond until he spoke to you. I assume we went through due process for engagement”*: Exhibit H, page 65.
139. On 7 November 2016, Mr McKay sent an email to Mr Liddell concerning both the Centium and Mulligan requisitions. That email, relevantly, read as follows:

*“Stuart, the internal order requisition arose from a selective quotation. Three quotations/submissions were sought in writing and a properly selection process took place. Full documentation is in TRIM and can be obtained from Yas.*

*Regarding safety, as you will recall two submissions were sought. They responded in writing and were interviewed by John and I. Mark was chosen without a view at the time how long he was to be engaged for. The full extent of the PO may ultimately not be drawn down upon.*

*John can provide full details on the “Mark” process and Yas can provide full details of the Centium process”: Exhibit H, page 65.*

140. It seems clear enough that the reference to “PO” is to “purchasing order”: see Exhibit H, page 65.
141. Later on 7 November 2016, Mr Bruhn emailed Mr Whatmore concerning both requisitions. Relevantly, in relation to the Mulligan requisition he asked: *“To clarify, what you require is a TRIM reference or quotation reference on the purchase requisition?”* Exhibit 34, page 10.
142. Shortly thereafter, Mr Whatmore emailed Mr Bruhn back, relevantly stating as follows: *“As for the TRIM reference, that is a requirement of the Standard and the Procurement Policy to ensure best practice etc”*: Exhibit 34, page 9.
143. Mr Bruhn responded on the same day with: *“I’ll make sure this is correct, ask the staff to amend requisition with reference when it’s done, then let you know I am no longer putting hold on it”*: Exhibit 34, page 9.
144. Shortly after on the same day, Mr Bruhn emailed Mr Liddell, relevantly saying as follows:

*“... here is the email trail from Geoff. The way forward from my perspective is:*

- 1. Written quotation guidelines is as follows ...*
- 2. Normal practice is for quote numbers or TRIM records to be referred in the text of the requisition (not in/a for example).*

3. *I suggest Grant produces a document for each purchase “analysis and acceptance of written quotations report” (as per page 6 of the document I have sent you) for you to approve accept). This will enable the background an rationale for each process to be recorded (if this doesn’t already exist).*
4. *Once you are satisfied with that please have the requisitions updated with quote reference and TRIM file reference, and let me know so I can move the “hold””: Exhibit H, page 71.*

145. Mr Whatmore made contact with his Union, the United Services Union, who on 15 November 2016 wrote to the General Manager concerning Mr Whatmore’s original email of 4 November 2016 in which the assertion was made that there had been “no response” to Mr Whatmore: Exhibit 34, pages 13-14. This was not accurate, as Mr Whatmore had been responded to, although clearly not in terms that he considered to be satisfactory.

146. On 16 November 2016, Mr Bruhn emailed Mr Whatmore stating as follows:

*“Apologies for taking so long to get back, I am back to back with meetings and wanted to review the files as well.*

*I am satisfied that written quotations for both contracts had been received so please process requisitions 132104 and 132145.*

*My understanding the persons making the requisitions cannot make changes as they have been approved by the Group Manager, so can you please add the following notes to each requisition:*

*Centium TRIM F10028 – quotes received and contract awarded for a period of 12 months until 30 June 2016.*

*MA & SE Mulligan TRIM F10099 – received.*

*Thanks for raising this with me”*: Exhibit 34, page 9.

147. Mr Whatmore told the Inquiry in his evidence that he attempted to access the TRIM files identified by Mr Bruhn in his email, but he was unable to. He became concerned that the quotes were being hidden: T-167.32-42 (11/7/19).

148. Partly prompted by his inability to access the TRIM files and partly because of other concerns, Mr Whatmore sent a lengthy email to Mr Bruhn, again on 18 November 2016, in the following terms:

*“Thanks for the reply Mark. I note your direction to process the requisitions; however, I have some genuine concerns about whether the required processes have been followed in these instances.*

*There are three key principles in the procurement process, especially in relation to the spending of public moneys, as stated by the New South Wales Department of Premier and Cabinet. When considering expenditure, they must ensure that they:*

*are open, transparent and accountable in their dealings,  
ensure that their dealings promote fairness and competition, and  
obtain best value.*

*In regard to the two requisitions under discussions, I have yet to see how they follow these principles, and therefore how they comply with Council’s requirements.*

...

*On investigation it was found that both those TRIM files were locked and access was denied. How is this open and transparent? How many quotations were received? The written quotations procurement standard is very clear on the requirements of quotations where the expenditure is greater than \$50,000, advertising on Council’s internet page, for example. All of the requirements, as follows, need to be included in the appropriate TRIM file also.*

*Approval to procure by written quotation.*

*Check list for preparation of written quotations request.*

*Quotation documents.*

*Evaluation criteria.*

*Independent assessor’s analysis and sign off.*

*Comparative analysis.*

*Approval to engage supplier.*

*Summary of written quotations.*

*The apparent reluctance in this instance to provide access to this information appears to indicate that the above requirements were not carried out. If this is the case, we need to ask, are there any conflicts of interest, how is this process transparent, how are we promoting fairness and competition, are we obtaining value for money? The Standard is also very specific in regards to the sanctions for non-compliance.*

...

*Your further advice on how to proceed would be appreciated. External advice will also be sought*”: Exhibit 34, page 8.

149. On 23 November 2016 Mr Bruhn responded to Mr Whatmore by email as follows:

*“Further to my previous instruction, and your subsequent email, on the basis of preliminary advice received from the Acting Executive Officer, please proceed with processing the orders.*

*I will take full responsibility for your approving of these.*

*This needs to be completed by close of business Thursday, 24/11/16 please*”: Exhibit 34, page 15.

150. The following day Mr Whatmore sent an email to Mr Bruhn, copied to, amongst others, Mr Greenwood the General Manager, the Acting Executive Officer, Melanie Trezise, and Mr Irwin. He stated as follows:

*“I have to say that I am raising these orders under protest. I have sought advice and it is possible that disciplinary procedures may be taken out against me if I refuse your directive. I originally questioned these requisitions on the 4<sup>th</sup> November. At no time since have I been given a suitable answer to my concerns. Risk and Governance are the section that should be questioning these requisitions. As they are the requestors, there is no-one else in the organisation able to question them, apart from myself. There are no independents within Council in this matter to seek advice from.*

*The orders will be raised today but further questions will be asked from external sources*”: Exhibit 34, page 15.

151. The orders were raised on 24 November 2016, although ultimately by Mr Irwin (nothing turns on this), because Mr Whatmore was at a Leadership Training Course.
152. As a result of the concerns raised by Mr Whatmore in his first email of 4 November 2016, and his 18 November 2016 emails, a preliminary Code of Conduct investigation was commenced by the Council’s Acting Executive Officer, Ms Melanie Trezise, in December 2016.

153. Shortly after, the Council’s Executive Officer, Ms Jasmine Cooper, returned from leave and took over conduct of the investigation. This matter is discussed in further detail below at [341] to [349].
154. With respect to the main allegation under consideration here – that the engagement of Mr Mulligan failed to comply with the Council Procurement Standards – there was a threshold question as to whether the Standard applied or not.
155. Ordinarily, for the procurement of goods and services to a value over \$10,000 but under \$120,000, written quotations are required, and the protocols set out in the “Written Quotations Procurement Standards” (**Procurement Standards**) of the Council apply: Exhibit 71, page 113.
156. The Procurement Standards set out relevant matters and procedures that are to be followed in relation to a procurement for services of an amount of \$65,000, such as that involving Mr Mulligan’s engagement.
157. Apart from the assertion that the Procurement Standards applied, there were several specific sub-allegations made as follows:
  - (a) Mr Mulligan might have been engaged “without event talking about cost”: T-29.28-30 (10/7/19) by Witness 1.
  - (b) There was a failure to record a quote number or TRIM file number in the “Reference” field, within the ORPS System, with the information recorded in the box as being “N/A”, in breach of the Procurement Standards: T-28.46 to T-29.7 (10/7/19).
  - (c) Material in the relevant TRIM file was updated after the completion of the Procurement Process: T-25.6-34 (10/7/19).
  - (d) Three quotes were required pursuant to the Procurement Standard, but only two were obtained.

158. The suggestion that Mr Mulligan was engaged without talking about “cost” is contrary to the evidence. On 18 August 2016, Mr Mulligan emailed Mr McKay and Mr Hargreaves, setting out the days upon which he was available to work in the periods August through to December 2016, and discussing the fact that his usual daily rate was \$1,800 but given that more than 30 days were involved, he would reduce his rate to \$1,600: Exhibit 33, pages 7-8.
159. Ultimately, the Council sent a letter to Mr Mulligan dated 9 September 2016 titled “Contract Confirmation” confirming both the number of days he would work, and that his daily rate was to be \$1,600.00: Exhibit 33, page 12.
160. Even if the Procurement Standards applied, the allegation that three quotes were required, not two, is not accurate. The Procurement Standards do not require that. Further, they do not require that a quote reference or TRIM file number be included in the Council’s On-line Purchasing System. The records, instead, must be saved into the TRIM system, and relevantly in relation to Mr Mulligan, they were.
161. The Procurement Standards, if they applied, require certain other steps to be taken in relation to a contract of the sum involving Mr Mulligan, which were not undertaken here. The issue is, did they have to be?
162. The Procurement Standards provide for several “specific exclusions” to the written quotation process. One of these exclusions was in the following terms:
- “Where goods/materials/services are required for an emergency or unplanned event and authorised in writing by a Director/Group Manager”*: Exhibit 33, page 114. (Emphasis added)
163. The issue arises as to whether the engagement of Mr Mulligan in the circumstances that existed in August 2016 was an “emergency or unplanned event”?
164. In my view, it falls within the description “unplanned event”. In reaching that view, I do not consider that every unplanned event would fall within that term. “Unplanned event”, within the meaning of the exclusion in the Procurement Standards, should be read in context with the word “emergency”. In my view, there must be some urgency

to the unplanned event, or something unexpected, that causes the need for swift action, and thereby gives rise to the exclusion.

165. Following the resignation of Mr Shellshear, Mr McKay, Mr Greenwood and Mr Hargreaves viewed the appointment of someone to lead the SIP was a matter of urgency. Indeed, the employment of Mr Shellshear before that had been a matter of some urgency, given that the Council's Safety Policies were not in compliance with the WH&S Act. The sense of urgency to find a replacement for Mr Shellshear was appropriate.
166. The relatively sudden resignation of Mr Shellshear, creating an urgent need for his replacement to move forward with Phase 1 of the SIP, was the sort of "unplanned event" contemplated by the exclusions to the Procurement Standards.
167. Contrary to the evidence of Mr McKay, who said that the exclusion was discussed immediately in the period following the resignation of Mr Shellshear and the identification of Mr Mulligan as a suitable candidate to replace him, Mr Ryan, on behalf of Councillor Brown, has submitted that it is much more likely that an emergency (and I assume an urgent unplanned event) was not discussed at the time: Brown Submissions at [8].
168. In support of this submission, Mr Ryan notes that in a letter to ICAC of 18 May 2017, Mr Greenwood acknowledged that the standard procurement process was not followed: Exhibit 71, page 75. He has also noted that in relation to the various email exchanges concerning Mr Whatmore's concerns, at no stage was Mr Whatmore told that an emergency or unplanned event meant that the Procurement Standards were excluded. Mr Ryan notes that there is no record of the Council relying on the emergency or unplanned event exclusion in any of the documentary evidence tendered at the Inquiry: see generally Brown Submissions at [9]-[17].
169. There is some force in Mr Ryan's submission. Mr Mackay's evidence was that there was a discussion concerning the exclusion to the Procurement Standards: T-353.42 to 354.13 (4/9/19). As noted by Counsel Assisting, this evidence was not challenged at the public hearing. I also accept the Council's submissions that Mr Mackay's credit



was not impeached on any other issue: Council Submissions [13(1)]. I therefore find that there was a discussion about the exclusion to the Procurement Standards, but I consider that this discussion was likely to have been brief. Further, it would have been preferable had that discussion been documented, as well as the determination that the exclusion applied.

170. However, in my view, even if (contrary to my finding) there was no consideration to the exclusion, the exclusion still applied. The resignation of Mr Shellshear and the need to engage someone with the skills and experience of Mr Mulligan to take over Phase 1 of the SIP did constitute an “unplanned event” which required an urgent response. Councillor Brown suggests in her submission that to say that the Council complied with its Procurement Standards is only true in a “retrospective technical sense”, and that the policy was still “circumvented”, and that the Council had a “disregard to adherence” to the Procurement Standards: Brown Submissions at [14], [15] and [27]. I do not agree that the policy was circumvented, if what is implied by that is some calculated and deliberate attempt to bypass the Procurement Standards. I accept that greater regard could have been had to the Procurement Standards, and to the issue of whether the “unplanned event” exclusion applied. While in my view it did, as indicated above, that matter should have been documented.
171. Councillor Brown also submits that the engagement of Mr Mulligan is best described as “*rushed and panicked*”: Brown Submissions at [17]. Mr Hargreaves did use the word “*panic*”. Mr Mackay and Mr Greenwood described the situation as urgent. This in my view is a more apt description. Mr Mulligan was not engaged in circumstances where there was no regard to whether he could undertake the task he was engaged to do. Further, I reject the submission that Mr Mulligan’s appointment was the result of an “*extremely dysfunctional and non-supportive working environment which existed at*” the Council: Brown Submissions at [17]. That expression is hyperbolic, and not supported by the weight of evidence.
172. It is true that Mr Mackay wanted a person with a sufficiently robust personality who could deliver the reforms needed by Council. That was because he understood that there was likely to be some resistance to change, or a reluctance to embrace it, or that members of staff might take the view that they could themselves perform the task Mr

Mulligan was engaged to do. That a candidate for the task of delivering Phase 1 of the SIP required the resilience to see it through is not evidence of the Council providing a dysfunctional and non-supportive work environment, at least in this regard. It is no more than a recognition that this was a substantial and important task, which would require change and reform, and such things can pose challenges to almost every organisation.

173. It may also have been a recognition that Mr Mulligan (or any person engaged to undertake the same task he was) was likely to encounter some antagonism. He did from at least one member of the Council staff who was antagonistic enough towards Mr Mulligan to have supplied Mr Hadley with a series of inaccuracies and falsehoods about Mr Mulligan himself, and his engagement, and subsequent employment with the Council.
174. I also do not accept Councillor Brown’s submissions that the engagement of Mr Mulligan was an indication that the Council:
- (a) was “*in deep trouble*”; or
  - (b) was a “*highly antagonistic workplace*”; or
  - (c) showed “*a disregard for applying policy*”; or
  - (d) had a “*panicked management team*”: Brown Submissions at [29].
175. As to (c), I have already found that the exclusion to the Procurement Standards applied given the circumstances the Council faced with Mr Shellshear’s departure. As to (b), while some staff felt that they could do what Mr Mulligan was engaged to do, more senior management did not. Their view had a rational basis: the Willis Report as to need, and Mr Mulligan’s skillset, qualifications and experience as to his capabilities. As to (d), the situation was urgent, but I do not accept management panicked, if this is an attempt to imply that reason and logical thinking was not applied to the appointment of Mr Mulligan. As to (a), while I do not accept that the phrase “*deep trouble*” is appropriate, I do agree – although it is not part of Term of Reference 3 – that there is

some evidence to suggest that the Council should have engaged someone like Mr Mulligan before 2016, given that one of his main tasks was to bring the Council into compliance with the WH&S legislation which had been enacted some years before. This issue is likely to be the subject of further inquiry in the remaining Terms of Reference.

176. Further, Mr McKay, Mr Greenwood and Mr Hargreaves did reasonably and appropriately view the situation – Mr Shellshear’s departure - as an unplanned event which created the need for an urgent response. They proceeded on that basis. It would have been preferable if reference to the specific exclusion concerning the engagement of Mr Mulligan had been documented. It may also have been preferable that Mr Whatmore was informed of this, although there was no obligation to do so.

***Findings: Allegation 2***

177. The resignation of Mr Shellshear was an “unplanned event” with the meaning of that term in the exclusions to the Procurement Standards. Mr McKay, Mr Hargreaves and Mr Greenwood considered that a replacement needed to be found, to continue and complete Phase 1 of the SIP so that it did not stall. That view was not only reasonable, but appropriate. There was an urgent need to fill the role of the Project Lead.
178. Consideration, albeit brief, was given to the exclusion for “unplanned event” in the Procurement Standards. As the exclusion applied, the Procurement Standards were not breached. Preferably, reliance on the exclusion should have been recorded in writing.
179. As there was no breach of the Procurement Standards, it follows that there has been no breach of any relevant provisions of the LGA referred to in Term of Reference 3.

**Allegation 3: Mr Mulligan’s engagement was tainted by a conflict of interest between himself and Mr Stuart Liddell, that also involved Mr John Hargreaves**

180. The assertion that the engagement of Mr Mulligan as a consultant to the Council in October 2016 was tainted by a conflict of interest involving Mr Liddell, and possibly

Mr Hargreaves, was itself based on a number of other allegations. These were as follows:

- (a) It was alleged that Mr Mulligan and Mr Liddell were “*very close friends*”, “*mates*” and part of a “*Boys Club*” within Council. On his morning show on 17 November 2017, Mr Hadley, in the course of referring to Mr Mulligan as “*Markie the Sparkie*”, referred to Mr Liddell as his “*old mate from the Boys Club*”. He went on to conclude this part of his broadcast by saying:

*“And all you’re doing, “Markie the Sparkie”, is making me angrier, and we’ll get you and we’ll get your mate Stuart, and we’ll get the others, because they have acted reprehensively on behalf of the ratepayers of Blue Mountains”*: Exhibit 45 (17/11/17), pages 12-13.

In his broadcast of 20 November 2017, Mr Hadley said this:

*“On Friday, I revealed emails between some of the men which confirm they didn’t follow required procedures when awarding lucrative contracts to Mark Mulligan, known as “Markie the Sparkie”. Mark Mulligan previously worked with Stuart Liddell at Essential Energy, and I am told they are very close friends”*: Exhibit 45 (20/11/17), page 2, lines 20-25.

In his broadcast of 13 December 2017, Mr Hadley made a reference to “*Mark Mulligan, a mate of Liddell’s, appointed by Liddell, known as Markie the Sparkie*”: Exhibit 45 (13/12/17), page 3, lines 44-47.

In the same broadcast, Mr Hadley said this:

*“This change enabled retiring General Manager, Robert Greenwood, and soon to be Acting General Manager, Stuart Liddell, to quietly appoint Liddell’s mate, Mulligan, to the role”*: Exhibit 45 (13/12/17) page 4, T-25-28.

- (b) It is alleged that Mr Mulligan and Mr Liddell were involved in some kind of business together. Mr Whatmore said in his evidence that:

*“Then it came out that, yeah, that was Stuart’s former colleague. I think they were partners in a business at one point. There were connections:” T-186.14-16.*

- (c) It was alleged that Mr Mulligan had been paid for his work as a consultant, without providing a quote, because of his alleged friendship with Mr Liddell. In his 17 November 2017 broadcast on his morning show, Mr Hadley said this:

*“But Mark Bruhn said in his email to Stuart Liddell about the fact that you got a \$65,000 stipend without a quotation or a tender process”:* Exhibit 45 (17/11/2017) page 12.41-43.

- (d) It was alleged that a conflict arose because of an association between Mr Liddell and Mr Mulligan from their previous time working together. Again, in his 17 November 2017 broadcast, Mr Hadley said:

*“... but this proves that this Council is corrupt; that they give jobs to their mates, to their golfing partners, to their former colleagues from Country Energy or Endeavour Energy, and it’s been going on for quite some time”:* Exhibit 45 page 5.25-29.

- (e) It was also alleged that Mr Mulligan’s engagement as a consultant was tarnished by a conflict of interest involving Mr Hargreaves in this manner – Mr Hargreaves and Mr Liddell were friends and golfing buddies. Mr Hargreaves may have been influenced by Mr Liddell, it was alleged, to the extent that he played a role in the engagement of Mr Mulligan for the Council: Witness 1, T-40.45 to 41.2 (10 July 2019).

181. It goes without saying that it is important that consultants are not engaged by a council in circumstances where a conflict of interest is involved. Amongst other things, this would be a breach of the Council’s Code of Conduct.

182. “Conflict of interest” is defined in the Council’s Code of Conduct, and contains various clauses instructing to staff how they should manage conflicts of interest. The Code was relevantly in the following terms at the time Mr Mulligan was engaged in 2016:

***“Part 4 Conflicts of Interest***

4.1 *A conflict of interest exists where a reasonable and informed person would perceive that you could be influenced by a private interest when carrying out your public duty.*

4.2 *You must avoid or appropriately manage any conflict of interest. The onus is on you to identify a conflict of interest and take the appropriate action to manage the conflict in favour of your public duty.*

...

4.12 *Where you have a non-pecuniary interest that conflicts with your public duty, you must disclose the interest fully and in writing, even if the conflict is not significant. You must do this as soon as practicable”: Exhibit 40, pages 41-42.*

183. In addition to being a breach of the Code of Conduct, if Council staff were to exercise their public duties in circumstances where a conflict of interest was involved, they would almost certainly be in breach of section 8A(1)(a) of the LGA that is referred to in Term of Reference 3.

184. Specifically, in relation to the allegations made concerning Mr Mulligan, sub-section 349(1)(b) of the LGA, referred to in Term of Reference 3 could also be relevant. It provides that in circumstances where an appointment to a position within Council is to be made, the person to be appointed is “*the Applicant who has the greatest merit*”.

### ***Findings: Allegation 3***

185. There is no substance to any of the allegations described above in [180]. Mr Liddell did not have a conflict of interest in relation to the engagement of Mr Mulligan as a consultant to the Council. Even if he did, it would have made no difference: he may have signed Mr Mulligan’s letter of appointment as head of the relevant directorate, but he played no active role in the engagement of Mr Mulligan.

186. In other words, even if he had a conflict of interest, by not playing any role in the engagement of Mr Mulligan, I would have found that he managed that conduct appropriately and in accordance with the Code of Conduct. In any event, he had no conflict to manage.

187. Set out in the paragraphs immediately below are the facts that support that a finding that no conflict of interest existed.
188. Mr Liddell and Mr Mulligan were not “*mates*” or “*very close friends*”:
- (a) There is no evidence that Mr Mulligan and Mr Liddell were “*very close friends*” or “*mates*”. Whoever informed Mr Hadley of this was either misinformed themselves, or was lying.
  - (b) Mr Mulligan, in his evidence, explained the extent of his relationship with Mr Liddell. They had worked for the same company at one stage. However, “*in the 17-odd years*” he was at Essential Energy, he only “*worked directly to Mr Liddell for that period between February 2003 and September 2004*”: T-469.23-24.
  - (c) After Mr Liddell left Essential Energy, Mr Mulligan’s interactions with Mr Liddell were limited to a few phone calls that might have, usually, involved referee checks.
  - (d) Further, Mr Mulligan said: “*I didn’t have any contact with him for several years*”: T-469.45.
  - (e) Outside of possibly sharing a drink with Mr Liddell, with other workers, during the time they were at Essential Energy, Mr Mulligan had Mr Liddell and his wife to his house on one occasion for dinner. Mr Mulligan “*never went to a function or had dinner at his place*”: T-470.25.
189. There is no contrary evidence to this. I accept Mr Mulligan’s evidence. I regard Mr Mulligan as a witness of the truth, and I also consider him to be a reliable, as well as a credible witness. To the extent he needs corroboration, it is telling that when Mr Mulligan was identified as a potential candidate to complete Phase 1 of the SIP, Mr Liddell had to ask his PA to obtain Mr Mulligan’s contact details, as he had not seen him for several years: Exhibit 71, page 49.

190. None of this is the stuff of “very close friends” or “mates”. Mr Mulligan and Mr Liddell, for several years, worked for the same company. For about 18-months, Mr Mulligan reported to Mr Liddell. That was approximately 12 years before Mr Mulligan was engaged as a consultant by the Council. In that intervening 12 years, Mr Mulligan and Mr Liddell had rarely had contact with each other. It is nonsense to suggest that in those circumstances Mr Liddell had any form of conflict of interest.
191. Mr Mulligan and Mr Liddell were not in a business together, as one witness speculated.
192. As previously found, Mr Mulligan’s engagement involved no breach of the Procurement Standards, because an exclusion applied. To the extent it is suggested that he did not have to supply a quote “*because of his association with Mr Liddell*”, that is wrong. As outlined above, working days at a daily rate were agreed, in writing, between the Council and Mr Mulligan.
193. There is no evidence to suggest Mr Hargreaves was in some way influenced by Mr Liddell to engage Mr Mulligan. It is true Mr Hargreaves and Mr Liddell were friends and played golf together. It is true Mr Hargreaves thought Mr Mulligan was an outstanding candidate for the position of Project Lead for the SIP, and that he also did an outstanding job. So what?
194. Counsel Assisting asked Mr Hargreaves, during his evidence, whether Mr Liddell lobbied him or pressured him to engage Mr Mulligan. Mr Hargreaves’ response was: “*No. If he had done that, I would have told him to go jump, and I would have resigned*”: T-185.13-14. I accept that evidence.
195. Mr Hargreaves’ evidence was that Mr Liddell “*wasn’t involved at all*” in the selection process that resulted in Mr Mulligan being engaged by the Council: T-185.1. This evidence is accepted. It is consistent with the documentary evidence, and there is no evidence of any substance to the contrary.
196. One final matter should be addressed. It was alleged that Mr Liddell was a director of a company or a firm called “Skillswest” at a time when Mr Mulligan’s wife was an



employee: T-84.25-40 (10/7/2019). It is not clear whether this was in some way suggested as meaning this created a conflict of interest for Mr Liddell.

197. In any event, Mr Mulligan confirmed in his evidence that for a period his wife worked for Skillswest, at a time when Mr Liddell was a director. The following exchange then took place between Counsel Assisting and Mr Mulligan:

*“Q. From that do I take it that, to your knowledge, your wife never worked with Mr Liddell during the time she was at the company?”*

*A. No. In fact, I believe that she never even talked to him during that time. The Board were quite separate from the leadership and executive team of the organisation”: T-471.2-7.*

198. If it is being alleged that there was a conflict for Mr Liddell because of anything to do with Skillset, that allegation is rejected.

### ***Summary of Findings on Allegation 3***

199. In summary, my findings on Allegation 3 are:

- (a) Mr Liddell had no conflict of interest in relation to the engagement of Mr Mulligan as a consultant to the Council in October 2016.
- (b) He and Mr Mulligan were not “*very close friends*” or “*mates*”.
- (c) Mr Mulligan was not paid “*without a quotation*”.
- (d) Mr Liddell played no active role in the selection process involving Mr Mulligan.
- (e) Mr Mulligan and Mr Liddell were not business partners.
- (f) There was no proper basis for any allegation of conflict of interest in relation to the engagement of Mr Mulligan as the consultant to the Council in October 2016.

- (g) There is no evidence of “corruption” in the engagement by the Council of Mr Mulligan.
- (h) The assertions made by Mr Hadley during his radio broadcasts on 17 and 20 November 2017, and 13 December 2017 (set out at [180] above) are wrong. While no findings have yet been made in relation to the asbestos management terms of reference, the assertion that Mr Mulligan “*acted reprehensibly on behalf the ratepayers of [the] Blue Mountains*” is rejected. It is unsupported by any credible evidence. The evidence is to the contrary – Mr Mulligan provided a high standard of services to the Council.
- (i) Further, the assertion that Mr Liddell or any other member of the Council’s staff acted in a reprehensible manner in relation to the engagement of Mr Mulligan (or any other matter relevant to Term of Reference 3) is also rejected as having no evidentiary basis.

**Allegation 4: Mr Mulligan was not qualified for the position of Project Lead for the SIP**

200. During a broadcast on his morning show on 9 November 2017, Mr Hadley asserted that Mr Mulligan had “no known history in that type of work” when raising his engagement as Project Lead for the SIP: Exhibit 10, 9 November 2017 broadcast. This assertion is also wrong.
201. For almost his entire working life, Mr Mulligan has been involved in Work, Health and Safety Matters. He is now an expert in that field. After working in the area of Work Health and Safety for Endeavour Energy, he ran his own consultancy business in this area for approximately 6 years. All witnesses at the Inquiry who were able to comment praised the standard of Mr Mulligan’s work for the Council when he was engaged to complete Phase 1 of the SIP.

***Findings: Allegation 4***

202. Mr Mulligan was well qualified for the position of Project Leader of the SIP.

**Allegation 5: Documents concerning Mr Mulligan’s engagement were “doctored” and “backdated”, which was evidence of or constituted “corruption” within the Council**

203. This allegation seems to have emanated from Mr Bruhn’s email to Mr Liddell sent on 7 November 2016, that is set out in full in [144] above: Exhibit H, page 71.
204. Witness 1 was of the view that this email constituted a form of “instruction” from Mr Bruhn to Mr Liddell as to how to back-date the process for the engagement of Mr Mulligan in an inappropriate way that was in breach of the Council’s Procurement Standards.
205. In his 17 November 2017 broadcast, Mr Hadley suggested that he had uncovered “*corruption among senior council officers*”: Exhibit 45, 17 November 2017 broadcast, page 10.21-23.
206. In a broadcast on 20 November 2017, Mr Hadley made specific reference to Mr Bruhn’s email to Mr Liddell and read from it. He then said this about the email:

*“That was after this bloke’s already been employed. So they are asking someone, the purchasing co-ordinator to do something that’s quite illegal – to raise documents that should have been done before this bloke’s company was contracted to the Council”*: Exhibit 45, 20 November 2017 Broadcast pages 12-35.

***Findings: Allegation 5***

207. No request was made by anyone at Council to get the purchasing co-ordinator (it is assumed that this is a reference to Mr Whatmore, who held this position) to do anything “*illegal*”. The Council’s Procurement Standards are not legislative instruments.
208. Properly construed, Mr Bruhn’s email to Mr Liddell of 7 November 2016 is not some instruction as to how to inappropriately or improperly backdate documents in relation to the engagement of Mr Mulligan.
209. What Witness 1 and Mr Hadley seem to be driving at is the suggestion that no quotes had been received from Mr Mulligan, and Mr Bruhn’s email was attempting to get

around this. This seems clear enough from what Mr Hadley said shortly before referring to Mr Bruhn's email during his broadcast, which was as follows:

*"I've got in front of me an email from a purchasing co-ordinator, leaked to me by someone who's no longer employed by Council. It talks about consulting services for MA and SE Mulligan to the value of \$65,000. This was when he was not full-time, but a contractor. Once again, no reference to quotations received, the tender quote referred to "N/A", not applicable. This is the second order raised this year, on this supply, with possibly no quotes received, which once again raises the possibility of supplier favouritism": Exhibit 45, 20 November 2017 Broadcast, page 3.1-10.*

210. It would take a deeply suspicious mind to read anything sinister into Mr Bruhn's email to Mr Liddell. The context in which it needs to be considered includes these matters:
- (a) A written quote had been obtained from Mr Mulligan. The days he was going to work had been agreed, as had his daily rate.
  - (b) Neither Mr Liddell nor Mr Bruhn were involved in the engagement of Mr Mulligan. There was no need for them to cover up any alleged oversight or failure to comply with the Procurement Standards.
  - (c) The circumstances involving Mr Mulligan's engagement meant that the Council's Procurement Standards did not apply in any event, because it was an "unplanned event", within the meaning of that exception – see [170] above.
211. Mr Bruhn's email to Mr Liddell of 7 November 2016 is simply a suggested procedure to ensure that what had already been done was recorded more fully, and a record maintained. There was nothing improper or sinister about it. It is not evidence of corruption.
212. The Council's records were not backdated or changed in any inappropriate or sinister way. Contrary to the allegations made by Mr Hadley in his broadcast of 20 November 2019, the purchasing co-ordinator of the Council was not asked to do anything "illegal".

213. Mr Bruhn’s email to Mr Liddell of 7 November 2016 was not an attempt to have any records falsified or backdated. It was merely a suggestion from Mr Bruhn about how to both update and maintain a record, and record of quotes that had already been obtained by Council. The suggestion that Mr Bruhn’s email is evidence of “corruption” is wrong.

**Allegation 6: Mr Mulligan’s name was simply “drawn from a hat” and he was not selected for the engagement via a proper process**

214. Some witnesses suggested that they either heard from other employees of Council that they had been told that Mr Mulligan’s name had been “drawn from a hat”. Some said they had attended a meeting with Mr McKay, Mr Liddell and possibly Mr Hargreaves when one of those persons had said Mr Mulligan’s name was “drawn from a hat”: see, e.g. T-197.34-40 (11/7/2019); T-198.13-38 (3/9/2019). The suggestion made was that the process of selecting Mr Mulligan was “random”.

***Findings: Allegation 6***

215. Mr Mulligan’s name was not “drawn from a hat”.

216. Whether or not someone may have said Mr Mulligan’s name was “drawn from a hat” flippantly, or as some kind of joke hardly matters. The process was not random. He was an appropriate person for the position. He had the requisite skills and experience. He was interviewed in order that those matters could be tested and ascertained.

**Appointment of Mr Mulligan to the Position of Director, Service Delivery, October 2017**

***(a) Background***

217. On 5 September 2016, Mr Mark Bruhn was appointed to the position of Director, Service Delivery, a senior staff position within Council. He became a member of the Council’s Executive Leadership Team. The Director, Service Delivery is “*accountable for providing leadership and direction to a large workforce (about 750 people) in the delivery of high-quality front-line services*”: Exhibit 71, page 119.

218. Mr Bruhn resigned from this position a year later, in August 2017.
219. The Council then engaged the recruitment firm Hayes Executive to find a replacement. A decision was made, however, that whoever the successful candidate was, initially they would be offered only a 12-month contract.
220. Mr Greenwood, who was due to retire as General Manager on 17 November 2017, explained the rationale for a contract limited to 12 months to the governing body in a Business Paper for a meeting of the Council held on 22 August 2017. The Business Paper concerned a review of the organisational structure of the Council.
221. In relation to the position of Director, Service Delivery, Mr Greenwood said this in the Business Paper:

***“Director Service Delivery***

*The recently vacated Director Service Delivery position provides an opportunity to recruit a Director on an interim basis. As such, it has been determined to engage an interim director for a 12-month fixed term period.*

*The rationale for this decision is twofold. Firstly, it provides an incoming General Manager the ability to determine the incumbent for this position. Secondly, an interim director will be able to have a stronger focus in delivering against specific outcomes, including strengthening organisational alignments; driving business performance and improvement; and strengthening service delivery”: Exhibit 71, page 155.*

222. In his evidence to the Inquiry, Mr Greenwood explained that as General Manager of the Council his preference was to choose the Senior Directors that he would have to work with. Given that he was due to retire from the Council in the middle of November 2017, he felt he should afford the same opportunity to whoever became the next General Manager of the Council. Mr Greenwood’s “philosophy” seemed to be that it would be hoped that whoever was appointed to the position for 12 months would “*turn that directorate around*” and if they were suitable, continue beyond that. He wanted,

however, to leave any extended period “*up to the next General Manager*”: T-624.16-43 (9/9/2019).

223. The recruitment process was commenced by Hayes in late August 2017. Mr Greenwood said that he provided Mr Mulligan’s name to Hayes. He did so because:

*“I was very impressed with him, the way he conducted the safety review, and I got to know him and his skills. He was certainly someone that operated at a level that I felt would be suitable for our organisation and for local government. ... Traditionally it is an area that is difficult – I found difficult to fill. The further you move away from the Sydney CBD, the harder it gets. So having seen his skills, and another person who I recommended – I’m trying to think of his name, but there were two people I recommended to Hayes, not just him”*: T-625.27-39.

224. Mr Mulligan was initially interviewed by a person from Hayes. He was told in that interview why the position was only being offered initially for 12 months: T-481.32-43.

225. Following his interview with Hayes, Mr Mulligan was then interviewed by three members of the Council’s Executive Leadership Team: Mr Greenwood, Mr Luke Nicholls, the Director of City and Community Outcomes; and Mr Liddell, the Group Manager, People and Systems. It can be noted, to the extent that it is relevant, that Mr Greenwood was aware that Mr Liddell and Mr Mulligan had worked at the same company some years before: T-615.33-34.

226. Each of Mr Greenwood, Mr Nicholls and Mr Liddell completed Interview Assessment sheets regarding their interview with Mr Mulligan. Mr Mulligan was noted as a “highly suitable candidate” by Mr Greenwood: Exhibit 71, page 177. Positive notes and comments were also made by Mr Nicholls and Mr Liddell in their Interview Assessment sheets: Exhibit 71, pages 180-185.

227. After this interview, Mr Mulligan was then interviewed by the Council’s entire Executive Leadership Team.

228. The conclusion reached by those that conducted the interview process was that the other candidates for the position – Hayes had identified five – were either not suitable for the role, or not available on a full-time basis.
229. During this process, in October 2017, Hayes conducted two referee checks on Mr Mulligan: Exhibit 71, pages 213-219. These were detailed checks in which the referee was asked many questions to identify Mr Mulligan’s strengths and weaknesses, as well as his expertise and experience. The referee check documents showed that strongly positive comments were made by the referees concerning Mr Mulligan’s skills, capabilities, and work ethic. Both indicated that Mr Mulligan was highly suited to the role, and that his previous employers would not hesitate to re-employ him if he was available for a position.
230. On 27 October 2017, Mr Greenwood sent an email to all staff at the Council indicating that Mr Mulligan had been appointed as Director, Service Delivery, for a period of 12 months: Exhibit 71, page 220.
231. In a letter subsequently sent to the United Services Union in response to some queries by it, Mr Greenwood confirmed that he was ultimately responsible for the appointment of Mr Mulligan for a 12-month period: Exhibit 71, page 223.

**(b) *Allegations concerning Mr Mulligan’s appointment as Director, Service Delivery for 12 months***

232. On his morning show of 13 December 2017, Ray Hadley made certain allegations concerning the appointment of Mr Mulligan to the position of Director, Service Delivery for 12 months. It would appear that, prior to this, he had been provided with a copy of the Council Business Paper for its confidential meeting of 22 August 2017 referred to above. Mr Hadley said this in the course of his broadcast:

*“I can now reveal I am in possession of a Mayoral Minute from a confidential Council meeting in August where a restructure of the organisation was approved. This restructure included an important change to the Director of Service Delivery role, which was given to “Markie the Sparkie” – Mark Mulligan.*



*The Mayoral Minute says:*

*The new Director of Service Delivery will be recruited on an interim basis, which provides the incoming General Manager --*

*That's Stuart Liddell, who's suspended at the moment --*

*The ability to determine the incumbent for that position.*

*This change enabled retiring general manager, Robert Greenwood, and soon to be Acting General Manager, Stuart Liddell, to quietly appoint Liddell's mate, Mulligan, to the role": Exhibit 45, 13 December 2017 Broadcast, page 4.7-28.*

233. Later in the broadcast, during a period where Mr Hadley was interviewing Councillor Brown, he said this:

*"Now, if I can get to a second issue, Councillor Brown, I'm in possession of the Mayoral Minute from a confidential Council meeting back in August, where a restructure of the organisation was approved, but it appears to me that this – they've tried to – it is many, many pages of it, but I – thanks to Zoe and help from others, I've determined the restructure was simply all about making sure that either the former general manager or the incoming general manager, being Mr Liddell, who's no longer there at the moment, had an opportunity to simply appoint to the Director of Service Delivery role their mate, or Liddell's mate more particularly, Mark Mulligan": Exhibit 45, 13 December 2017 Broadcast, page 7.12-24.*

234. Later, the following exchange took place between Mr Hadley and Councillor Brown:

*Councillor Brown: And, I mean, at the time I had no idea why that would be the case, but then you're looking at it and thinking, "Why are they doing that?" But I rescinded – I put up the rescission motion because I thought (a) we were going to be spending more money, it was going to cost us more because there were all these other upgrades of people's positions, and it didn't make any sense. The General Manager's leaving, there's no way we should be restructuring right – he should not be proposing a restructure as he goes out the door.*

*Ray Hadley: Sure. Sure.*

*Councillor Brown: So, that's it. And the only thing that we really needed to approve that couldn't have been done anyway was that change to that one role, so, you are correct in that. You're correct.*

Ray Hadley: *Well, it appeared, like, “Oh, we’re looking at a whole range of different things” – and you’ve pinpointed it – but it was all about providing an opportunity for Mr Liddell, as the incoming General Manager, to appoint Mark Mulligan to this role, and that’s the start and finish of it. It doesn’t go anywhere else”*: Exhibit 45, 13 December 2017 Broadcast, page 7.43 to 8.19.

***Findings in relation to allegations concerning appointment of Mr Mulligan as Director, Service Delivery***

235. My findings in relation to the allegations broadcast by Mr Hadley on 13 December 2017 are:

- (a) Viewed in the context of all of his broadcasts, and the entirety of the 13 December 2017 broadcast, a reasonable person would consider that Mr Hadley used the words “*quietly appoint*” to suggest some inappropriateness or impropriety in relation to the appointment of Mr Mulligan to the position of Director, Service Delivery. Mr Mulligan was not “quietly” appointed. He was appointed through a proper recruitment process, managed by a firm with expertise in executive appointments. He was one of five candidates identified for the position. He was interviewed three times – once by Hayes, once by three members of the Council’s Executive Leadership Team (including Mr Greenwood and Mr Liddell), and once by the entire Executive Leadership Team of the Council. He was identified as the outstanding candidate for the position. Hayes conducted two referee checks on Mr Mulligan which returned glowing responses concerning his capabilities and work ethic. He was an appropriate candidate for the position, appointed through a proper and transparent process.
- (b) Mr Mulligan was not “Liddell’s mate” as alleged by Mr Hadley.
- (c) Mr Liddell did not appoint Mr Mulligan. He interviewed him. He was interviewed by the entire Executive Leadership Team. Ultimately, the appointment was made by Mr Greenwood, who was still General Manager of the Council at the time.

(d) The proposed restructure of the Council was not about ensuring that either Mr Liddell or Mr Greenwood could “*simply appoint ... Mr Liddell’s mate*”, Mr Mulligan. As I have already found, Mr Liddell and Mr Mulligan were not “*very close friends*” or “*mates*”. The suggestion that a restructure was being proposed by the Council so that Mr Mulligan could be appointed to the position of Director, Service Delivery for 12 months is absurd.

236. To provide expert guidance concerning organisational structure and resource allocation issues to the Inquiry (Term of Reference 8), the Inquiry had the benefit of an expert report prepared for it by Mr Stephen Blackadder of Blackadder Associates: Exhibit 56 (**Blackadder Report**). Mr Blackadder is a person with extensive experience in Local Government. An outline of Mr Blackadder’s experience can be found below at [474], and in the Blackadder Report.

237. Although Mr Blackadder was primarily asked to assist the Inquiry with matters pertaining to the Council’s organisational structure and resource allocation, Council Assisting asked him for his views concerning Mr Greenwood’s decision that, given his imminent retirement, the position of Director, Service Delivery should be offered for a closed 12 month period when it needed to be filled in October 2017 following Mr Bruhn’s resignation in August 2017. He gave this evidence in an exchange with Counsel Assisting:

Mr Glover: Q. So under this heading there is a vacant director position and a determination to engage a director for 12 months in the first paragraph. Then the rationale is set out, and the first is that it provides an incoming General Manager the ability to determine the incumbent for this position. Now, in a context where the then General Manager was to retire and a new one was yet to be appointed, do you have a view about whether appointing a Director level position on that interim basis in an appropriate course?

A. Yes, I do. I suppose I would have a couple of views, depending on the circumstances. Firstly, as a matter of principle, provide a new General Manager with the opportunity to recruit an executive team member for up to 5 years is probably the most desirable outcome. The decision taken to appoint on an interim basis for 12 months was probably, based upon what I’m seeing here generally, was probably a good decision but on the other side ... I would say, on the other side, that it’s horses for courses. It could be that to bring stability to the organisation a longer-term appointment might have been highly

desirable. There could have been a person internally ... so there is an in-principle decision, yes, it would probably be best if the new General Manager had the discretion to appoint their Director, but at the same time, the current General Manager may have had a very good reason to put someone in the place that would deliver more effectively the objectives of the Council. So, again, horses for courses.

Mr Glover: Q. That's a judgment call?

A. Completely a judgment call.

Q. And there is nothing, to your mind, wrong with the judgment that was exercised here; is that fair?

A. No, I think that's a sound judgment: T-554.24 to 555.29 (9/9/2019).

238. On the basis of all the evidence presented to the Inquiry, I find that Mr Greenwood's decision regarding the limited 12 month term for Director, Service Delivery in October 2017 was a judgment call for him, and that the rationale for it was reasonable in the circumstances.
239. In light of the above findings, the appointment of Mr Mulligan as Director, Service Delivery in October 2017 involved no breach of the provisions of the LGA referred to in Term of Reference 3. He had the skills, experience and capabilities for the position. He was appointed through a proper process. Mr Liddell was not his "mate", nor did Mr Liddell appoint Mr Mulligan. The appointment for the 12 month term had nothing to do with Mr Liddell and concerned only Mr Greenwood's reasonable judgment that given his imminent retirement, a senior member of staff overseeing a directorate should not be appointed for more than 12 months, for the time being.

### **Appointment of Mr John Hargreaves**

#### ***(a) Background facts***

240. As mentioned above in [93], in February 2016 the Council created the Business Improvement Project (**BIP**). The Safety Improvement Project (**SIP**) was a part of the BIP. The position of Program Leader for the BIP was created at the same time. The key responsibilities for this role included:

*“Deliver and oversee Business Improvement Projects in areas such as (but not limited to) safety, procurement, contract management, compliance management, asset management, systems integration and process improvement accounting for the needs of the business, Council’s strategic objectives and the goal of enhanced productivity/efficiency”:*  
Exhibit 71, page 227.

241. The Project Leader for the BIP was a position within the People and Systems Group, and the relevant branch was Governance and Risk.
242. In his evidence to the Inquiry, Mr McKay clarified that the person that occupied this position did not need to have expertise in every area, as it was an umbrella role devoted to project management, essentially to manage people with specialist expertise in the layer of management underneath: T-337.33-42 (5/9/2019).
243. Mr Hargreaves applied for the position of Project Leader for the BIP, and on 21 February 2016 emailed his resume to the Council: Exhibit 71, pages 235-240.
244. Six people in total applied for the position, and five were interviewed, including Mr Hargreaves. The interview panel comprised Mr McKay, Mr Bruhn and Dr Dillon.
245. One of the five candidates interviewed was ranked as “exceeds requirements for the position”. This candidate, however, withdrew.
246. Mr Hargreaves and another candidate were ranked as “meets requirements for the position”.
247. On 18 March 2016, Mr McKay emailed Stuart Liddell (the Group Manager, People and Systems) and relevantly stated the following:

*“Stuart, just a quick update. Candidate for the position of Program Leader Business Improvement ... emailed me overnight to formally withdraw her application. This leaves John Hargreaves and ... as the only remaining competitive candidates for the role. In my judgment we probably need a second-round process to further explore the strength and weaknesses of these candidates and unambiguously separate them out. ... I’m not sure what this second round process would look like. It’s something I need to discuss with you when you are well. As we have*

*previously discussed ... this is a crucial role and time spent in selecting the right person is time well spent”*: Exhibit 71, page 249.

248. On the same date, Mr Liddell responded to Mr McKay by email, relevantly, in the following terms:

*“Thanks for the update. Agree and agree a second-round interview process anyway – whether one or two.*

*Although if two, **I will have to exclude myself from the panel.** While unusual, maybe GM and you?”*: T-71.249. (Emphasis added)

249. The reason Mr Liddell indicated he would have to exclude himself from the interview process was not a secret. Mr Liddell and Mr Hargreaves were friends. In his evidence, Mr Hargreaves described Mr Liddell and himself as “good friends”, and explained that they were members of the same Golf Club: T-124.30-35 (3/9/2019). They had known each other since about 2006 or 2007: T-125.14 (3/9/2019).
250. At about the time that Mr Hargreaves was considering applying for the position of Project Leader for the BIP, Mr Liddell had explained to him that he had a conflict of interest, and would not be able to be involved in any decision: T-126.19-26 (3/9/2019).
251. Mr McKay also said in his evidence that “*Mr Liddell could not be involved and did not wish to be involved for well-documented and well-known reasons*”: T-339.30-32 (5/9/2019). This was because “*Mr Liddell knew John Hargreaves privately*”: T-340.8 (5/9/2019).
252. Mr Anderson was also aware that Mr Hargreaves and Mr Liddell knew each other, and confirmed that he also understood that “*Stuart Liddell had withdrawn himself because he obviously had a conflict*” in relation to Mr Hargreaves’ candidacy for the Project Leader position of the BIP: T-916.43-46 (12/9/2019).
253. Mr Hargreaves’ second interview was conducted by Mr McKay and Mr Greenwood: Exhibit 71, page 253. He was identified as the most suitable candidate.

254. Prior to offering Mr Hargreaves the job, Mr Greenwood asked Mr McKay to meet informally with Mr Hargreaves, to ensure that he was suitable for the position. In his evidence, Mr McKay explained this:

*“Robert had some reservations about John. He thought that he was technically competent but I think, from recollection, he was concerned about his personal resilience, and he wanted that clarified”*: T-341.33-36 (5/9/2019).

255. Mr McKay met with Mr Hargreaves for a coffee on about 15 April 2016. Following that meeting, Mr McKay sent an email to Mr Greenwood, which was relevantly in the following terms:

*“Following up from our last conversation ... I met informally with John Hargreaves, one of the Applicants you and I interviewed. I had a full and frank conversation with John about the role and my concerns. I came away confident that he has the personal resilience, strength and tactfulness and drive to do the job in the manner in which it needs to be done. In addition, I completed one reference check who confirms his professionalism and his strong ability to get things done. The other reference check is pending availability.*

*However based on the concerns you expressed, I suggest we bring John into the role on a 12-month contract. That gives us the option of going back to the market in 12 months with nothing lost ... I believe there is a need to get the Safety and Procurement Improvement Project started a.s.a.p. A Safety Improvement Project Lead starts on Monday on a 12 month temporary contract. The faster we get the BI Program Leader in place to lead this person and provide momentum to the project the better the outcome will be. Therefore, I am recommending we commence John on a 12 month contract with the option to make permanent upon review. I have also discussed this strategy with Stuart who agrees in principle”*: Exhibit 71, page 252.

256. On 19 April 2016, Mr Greenwood sent an email to Mr McKay indicating that he was prepared to go with Mr McKay’s judgment, and indicating he agreed with the 12-month contract: Exhibit 71, page 251.

257. There was some suggestion in the evidence that Mr Greenwood had expressed the view that he didn’t want Mr Hargreaves *“near the place”*: T-190.28 to 191.34 (3/9/2019); T-916.43 to 917.16 (12/9/2019).

258. In his evidence, Mr Greenwood denied saying anything of the kind, and indicated that Mr Hargreaves would not have been employed if he held that view. Mr McKay could not remember Mr Greenwood saying words to that effect, but acknowledged that Mr Greenwood had “significant reservations” about employing Mr Hargreaves in the role: T-343.37-46 (5/9/2019).
259. To the extent it may be relevant, I think it unlikely that Mr Greenwood said that he didn’t want Mr Hargreaves “near the place”, or words to that effect. They are not consistent with Mr Hargreaves being the successful applicant for the position. I think it more likely that he had reservations about Mr Hargreaves’ resilience as expressed to Mr McKay, and for that reason wanted Mr McKay to have a follow-up informal meeting with Mr Hargreaves in order to seek further reassurance.
260. On 6 May 2016, Mr McKay sent an email to certain staff confirming Mr Hargreaves appointment as Project Leader for the BIP: Exhibit 71, page 255. Mr Hargreaves ultimately did not see out the full 12 months of his contract, and resigned before this.

**(b) Allegations**

261. On his morning show on 17 November 2017, Mr Hadley said:

*“We started looking at this Council because of asbestos. We now find corruption. The Minister should intervene immediately and stand down the Council, based on this and this alone. Forget about the asbestos ... but this proves this Council is corrupt; that they give their jobs to their mates, to their golfing partners, to their former colleagues from Country Energy or Endeavour Energy, and it’s been going on for quite some time”*: Exhibit 45, 17 November 2017 Broadcast, page 5.19-29.

262. The reference to “mates” and “golfing partners” is clearly a reference to Mr Liddell and Mr Hargreaves: see [180], [232], and [233] above. The reference to “former colleagues from Country Energy or Endeavour Energy” is a reference to Mr Liddell and Mr Mulligan.
263. In his broadcast on 20 November 2017, Mr Hadley said this:



*“I also have been reporting a ‘Boys Club’ with senior ranks of Council who have used bullying tactics to prevent staff from speaking out. This group consists, allegedly, of Stuart Liddell, who has now stood down as Acting General Manager; Grant McKay; John Hargreaves, a golfing partner of Mr Liddell’s; Robert Greenwood, the outgoing General Manager; and Mark Bruhn”*: Exhibit 45, 20 November 2017 Broadcast, page 2.12-18.

264. It was also alleged by Witness 1, that Mr Hargreaves was “moved on” rather than resigned and that there was some connection between this and the engagement of Mr Mulligan as a consultant to the Council: T-51.36-43, Private hearing 10/7/2019.

**(c) Findings regarding allegations**

265. Mr Liddell and Mr Hargreaves were friends, and they played golf together. They were members of the same golf club. Neither this, nor the other evidence adduced at the public hearings, provides a rational basis for alleging that the Council is “*corrupt*”.

266. Mr Liddell played no role in the appointment of Mr Hargreaves to the position of Project Leader in the BIP. He did not interview him. He made no decision as to his employment. Mr Liddell understood he had a conflict of interest, as did other senior members of the Council staff.

267. Mr Liddell managed that conflict of interest by avoiding it. This was consistent with the requirements of clause 4.2 of the Council’s Code of Conduct, which advises staff of Councils that they “must avoid or appropriately manage any conflict of interest”: Exhibit 41, page 41.

268. Contrary to the assertion made by Mr Hadley during his radio broadcast on 20 November 2017, Mr Liddell did not appoint his “golfing partner” to any position within Council.

269. Although of less significance, Mr Hargreaves was not “moved on” by the Council. Nor did the circumstances which caused him to resign his position have anything to do with Mr Mulligan, or anyone else. Mr Hargreaves became unwell. This is why he was unable to complete his 12-month contract: T-130.40 and T-131.16-39 (3/9/2019).

270. No aspect of the employment of Mr Hargreaves involved the Council in any breach of the provisions of the LGA referred to in Term of Reference 3.
271. The allegation that it involved “corruption” is wrong, and unsupported by any evidence obtained by the Inquiry.

## **Centium**

### ***Background and Allegations***

272. Centium is a company that provides internal auditing services. They supplied such services to the Council.
273. By at least 2015-16, the Council had adopted what Mr McKay described in his evidence as a “co-source” model for auditing: T-394.12 (5/9/2019). That is, as was demonstrated in Exhibit 53 (the Council’s 2015-16 “Internal Audit Program Status Report”), some parts of the Council’s operations were audited internally, and some externally.
274. In 2016-17, the Council’s budget for external auditing was \$80,000: Exhibit 71, page 50. Quotes were sought from three providers. Deloitte withdrew from the process. Of the two other providers, Centium was the lowest quote: Annexure 1 to CA’s submissions, pages 69 and 110.
275. In his previously mentioned 4 November 2016 email to Mr Bruhn, in which he had raised the issue concerning the requisitions for Mr Mulligan’s consulting fees, Mr Whatmore relevantly stated this:

*“Firstly Req 132104, from Yasoda in Governance and Risk, that I have a few concerns over. Given the current ongoing situation in relation to the procurement review, I am concerned about how to proceed. I understand how this query may be perceived, however, in my role as Purchasing Co-ordinator I would be remiss in not raising these concerns, as it is a test of Council’s Procurement Processes.*”

*The requisition is for internal auditing to a value of \$80,000. There are no references to quotations received on the requisition, as is required by Council's written quotation protocol.*

*Additionally, this is the second order this year on Centium for internal auditing, the previous order with a value of \$59,690. This year the expenditure is over \$140,000, well in excess of Council's tender limit. It also raises the issues, as spelt out in the abovementioned procurement review, of potential order splitting (finding 14) and multiple orders on the same supplier (finding 15)": Exhibit 34, page 7.*

276. Some further emails were exchanged between Mr Bruhn and Mr Whatmore, regarding both the Mulligan requisition and the Centium requisition. It is unnecessary to set these emails out in full, save to say that Mr Bruhn informed Mr Whatmore that, from his perspective, his understanding was that the expenditure for Centium was "*market tested this financial year, so effectively would be a new engagement*"; and that quotations had been received: Exhibit 34, pages 9 and 10.
277. At the public hearings, Mr Whatmore confirmed that his concerns regarding Centium were really these:
- (a) The Council may not have complied with s.55 of the LGA because the cost of the services being provided was such that a tender was required: T-158.33-39 (11/7/2019); T-168.26 – T-170.43 (11/7/2019).
  - (b) The orders in relation to Centium may have been split, to get around the requirements of s.55 of the LGA; and as such he was concerned about possible supplier "favouritism": T-163.1-47 (11/7/2019).
  - (c) The Council had not complied with its tendering policy.

### ***Findings re Centium Allegations***

278. When Mr Whatmore first raised his concerns with Mr Bruhn in November 2016, s.55 of the LGA provided that a Council "must invite tenders" prior to entering into any "contract for the provision of services to the Council". There were exceptions, however, relating to the amount of that contract.

279. At that time, it was only necessary for a Council to invite tenders for a contract for the provision of services if the contract was for an amount more than \$150,000: *Local Government (General) Regulation 2005*(NSW), Reg 163(2).
280. The budget for the External Audit Services was \$80,000, and the services being acquired from Centium was just under this. Section 55 of the LGA, therefore, did not apply, and it was not necessary for the Council to invite tenders. There was no breach of s.55 of the LGA in relation to Centium.
281. As to the allegation of “favouritism”, there is no support for such a finding in the evidence. Centium went through a form of competitive bid process, with other firms. They were selected because they had the capacity to do the external auditing required by the Council, and had submitted the lowest quote. That is not an indication of favouritism.
282. Further, the allegation of splitting orders to avoid the requirements of the LGA is not supported by the evidence. The sum of approximately \$60,000 referred to by Mr Whatmore was for a previous engagement period, and a previous appointment. There was no splitting of orders for the same services.
283. There was also no breach of the Council’s tendering policy. In 2016, that policy required a tender to be undertaken where “the estimated cost of the purchase exceeds \$120,000”: Exhibit 33, pages 32-36; and page 42 at [1.1.3]. The estimated cost of the services was \$80,000. The Council’s tendering policy therefore did not require a tender.
284. There is no evidence to suggest that there has been a breach of any of the provisions of the LGA, referred to in Terms of Reference 3, in relation to Centium.

**Appointment of Mr Liddell as Acting General Manager, and of Dr Dillon as General Manager of the Council**

*Allegations of Councillor Brown*

285. Councillor Brown provided a detailed submission to the Inquiry, prior to any public hearings being conducted (First Brown Submission).

286. Relevantly, in relation to the position of the General Manager, Councillor Brown made these submissions:

*“17. It is my opinion that the ruling bloc of Council has tightly managed the appointment of Mr Liddell and his successor as Acting GM and her subsequent appointment as General Manager, to ensure a person sympathetic to the position being developed by BMCC in response to the asbestos crises was maintained at the top of the organisation. As a member of the governing body, I am concerned that the cessation of the GM’s recruitment process and the subsequent restarting of the process, without apparently notifying the previous applicants, has left unanswered questions. ...*

*137. From the announced retirement of Robert Greenwood in May 2017 and of Stuart Liddell as Acting General Manager to the appointment of Rosemary Dillon as Acting GM in November 2017 and then substantive General Manager in July 2018, I believe the appointment have been tightly controlled by the Mayor and his ruling bloc as a means of ensuring that an outsider without loyalties or need to justify past actions of Council was not hired. This is not a reflection on the capability of Dr Dillon or Mr Liddell but of the inappropriate selection process and criteria.*

*138. When Mr Greenwood announced his retirement in November, there was no need to appoint an Acting GM; as there was 6 months to find a permanent replacement.*

*139. The Mayor was adamant that Stuart Liddell was his “Captain’s Pick” for Acting GM from November.*

*140. Mr Liddell was not the most senior member of the Executive Leadership Team, as he was a Group Manager, not a Director; this suggests that his appointment as A/GM was to improve his chances as the incumbent to be appointed to the permanent position.*

141. *When the GM Recruitment Panel of 6 was appointed on 25 July 2017, they were all from the ruling bloc; they vigorously opposed an amendment that all councillors should meet the final three candidates and have access to all applications; Councillor Hollywood suggested this would be a breach of confidentiality.*
142. *When Mr Liddell stepped down and the BMCC was in crisis, Dr Dillon became the Mayor's "pick" and on 14 November from the limited internal field now available.*
143. *A Mayoral Minute halted the recruitment process at the Mayor's discretion and another extended Dr Dillon's Acting GM role for up to a year, until November 2019 [this should be a reference to 2017].*
144. *On 24 July, Councillors were unexpectedly notified of a Mayoral Minute for the meeting that night, to appoint the GM; the confidential Mayoral Minute, with the recommendation arrived at my Chamber Desk at 7:32 pm, 2 mins after the meeting started.*
145. *My procedural motion that the matter could not be considered because of lack of adequate time was defeated; a deferral motion of one month was also defeated.*
146. *In the Confidential Session, Councillor Hollywood advised there were no candidates who had experience as Council GMs, unlike Dr Dillon, who had now been in the job for 9 months. This seemed strange, given the recent amalgamations.*
- ...
148. *A week later, I heard from two different sources that an applicant in the first round, who had 15 years' experience as Kangaroo Island GM and was raised in the Blue Mountains, had applied. She was not recontacted, as promised, when the process of recruitment was restarted. I acknowledge there may be good reason for this, but it seems strange in light of Councillor Hollywood's comment."*

287. In the submissions provided to the Inquiry on behalf of Councillor Brown dated 12 November 2019, some of these matters were expanded upon, and some were walked back.

288. The allegation that Mr Liddell was the Mayor's "captain's pick" has been modified, and it is accepted that the evidence falls short of establishing any improper motive:

Brown Submissions at [37]. It has been suggested, however, that “*the Inquiry should not be blind to the common organisational tactic of acting appointments leading to permanent positions*”: Brown Submissions at [37]. The submission was then made that:

“... *the Inquiry should be alert to perceptions that such appointments may create and consider how a council could avoid those perceptions. Common practice in councils in NSW is to rotate the Acting General Manager’s position in times of vacancy. In that way a single director is not seen as receiving favourable treatment ahead of an open selection process for the permanent position. Further it is a practice which allows all directors to obtain experience acting in a more senior position and encourages collegiality*”: Brown Submissions at [37].

289. As to the second limb of the submission, although there was no evidence tendered at the Inquiry that this commonly happens, I will accept that it does happen from time to time. It may be appropriate, in some circumstances, for the position of Acting General Manager to be rotated amongst Directors of councils in times of vacancy. I doubt, however, that this practice is appropriate in every circumstance. It may, first, depend on the length of the vacancy. It may also depend upon the circumstances that created the vacancy. In his Reply Submissions, Mr Glover has suggested that the Council may have been well served by the stability of having only one Acting General Manager. There is perhaps much to be said for that view in the circumstances, although it is not necessary for me to make any finding.

290. Reference was also made to the alleged “*last minute supply of a Mayoral Minute*” raised by Councillor Brown in [144] of her submission to the Inquiry prior to public hearings: see [38]-[44] of Councillor Brown’s submission.

291. The supply of this (and other) Mayoral Minutes was raised in the context of the caution in the Office of Local Government Councillor Handbook, which states that:

“*Mayoral Minutes should not be used to introduce, without notice, matters that need research or a lot of consideration by Councillors before coming to a decision.*”

292. A submission has been made on behalf of Councillor Brown that the late supply of various Mayoral Minutes concerning the appointment process for the General Manager

and ultimately Dr Dillon in that position “*does not allow proper consideration by the Members of the Governing Body*”, and is in breach of the Code of Meeting Practice and contrary to the provisions of the LGA that require Councillors to make well-informed decisions: Brown Submissions at [55].

### ***Background Factual Matters***

293. In May 2017, the Council’s General Manager, Mr Greenwood, provided the Council with notice of his intention to retire. His last day as General Manager was to be 17 November 2017.
294. A Mayoral Minute dated 25 July 2017 contained recommendations adopted by the Governing Body concerning the appointment of a “Recruitment and Selection Panel” for the General Manager position. It was comprised of 5 Councillors: the Mayor, the Deputy Mayor, the Alternate Deputy Mayor, and two other Councillors: Exhibit 71, page 350.
295. In addition to the Mayor and Deputy Mayor, Councillors Myles, Foenander and Fell were appointed representatives of the Recruitment and Selection Panel for the General Manager: Exhibit 71, page 353. Only Councillors Brown and Schreiber voted against the Motion proposing their appointment to the Selection Panel.
296. Mr Matthew McArthur from “McArthur Executive” was engaged to assist the Council with the selection of candidates to interview. The position of General Manager was advertised.
297. At the ordinary meeting of the Council held on 17 October 2017, the Mayor (Councillor Greenhill) proposed a recommendation that “The Council appoint Stuart Liddell as the Acting General Manager”: Exhibit 71, page 376.
298. In this Mayoral Minute, Councillor Greenhill explained that the General Manager’s last day would be 17 November 2017, and the Council was unlikely to have completed its recruitment process for a new General Manager by that date. Pursuant to s.334 of the LGA, the Council would then have to appoint an acting GM.



299. The motion to appoint Mr Liddell as Acting General Manager was carried in a unanimous vote at the Council meeting of 17 October 2017.
300. Councillor Greenhill's evidence was that Mr Greenwood suggested to him that Mr Liddell should be appointed to the position of Acting General Manager. He agreed with Mr Greenwood's recommendation. He did so because he respected the judgment of Mr Greenwood, and because Mr Liddell had previously acted as Acting General Manager during the period that Mr Greenhill had been Mayor, and he was "*comfortable with the way he had conducted himself in the role*": T-714.14-15 (10/9/19). Councillor Greenhill denied that Mr Liddell was his "captain's pick": T-714.23-33 (10/9/19). He said that he did not hold any "*particular torch for Mr Liddell*", and that Mr Liddell was not chosen for the Acting General Manager's position to increase his chances of being appointed to the role of General Manager on a permanent basis: T-714.35-46 (10/9/19).
301. At the meeting of the Council held on 14 November 2017, Councillor Greenhill provided an update on the recruitment process for the General Manager by way of another Mayoral Minute. He advised the Councillors that with the assistance of Mr Matthew McArthur, the selection panel had decided 13 candidates should be interviewed by Mr McArthur following the closing date for applications of 17 October 2017. The final shortlist of five candidates was recommended by Mr McArthur for interviews.
302. First round interviews with the five selected candidates were scheduled to commence on Sunday, 12 November 2017. However, as a result of media coverage adverse to the Council and some senior staff, on Friday, 10 November 2017 the Mayor determined to delay further interviews: Exhibit 71, page 379. This decision was subsequently endorsed by all members of the governing body save for Councillor Brown.
303. At the Council meeting of 14 November 2017, the Mayor recommended that:
- "The Council appoints Rosemary Dillon as the Acting General Manager, with this appointment being effective from Friday 17 November 2017 until the appointment of the General Manager"*: Exhibit 71, page 384.

304. This recommendation was made after Mr Liddell requested to be stood down as Acting General Manager, apparently as a result of allegations made in the media regarding the Council's management of asbestos, and concerning the recruitment of staff and consultants (giving rise to TOR 3): Exhibit 71, page 384. It was unanimously agreed to by the governing body: Exhibit 1, page 57. Councillor Brown states that she received the Mayoral Minute for this meeting only moments before the meeting commenced, and was given only a 30-minute period to consider it: Brown Submissions at [54].

305. At the Council's meeting of 12 December 2017, the Mayor in his Mayoral Minute recommended that:

*"The Council to appoint Ms Rosemary Dillon as General Manager for a fixed period of up to one year, effective from Friday 17 November 2017 to Sunday 18 November 2018, with the view of formally appointing a General Manager with a commencement date of Monday 19 November 2018": Exhibit 71, page 389.*

306. In that Mayoral Minute, Councillor Greenhill again expressed the view that the allegations that had been made publicly had made it such that it was not in the interests of the Council to proceed with the recruitment process for a new General Manager for the time being. Further, he considered for reasons of stability it was best to appoint Dr Dillon as General Manager for a period of a year rather than her maintaining the position of Acting General Manager. It was proposed for the Council to restart a fresh recruitment process within six or seven months. Councillor Greenhill explained that he had:

*"... sought guidance from the Office of Local Government (OLG) on the Council's current position and this proposed course of action. Furthermore, I have consulted with the Deputy Mayor in this approach. In both cases, the approach is strongly supported": Exhibit 71, page 391.*

307. The appointment of Dr Dillon for a one-year period as General Manager was approved by a majority of the governing body, with Councillors Brown and Schreiber voting against the recommendation: Exhibit 1, pages 143-144.

308. For the Council's meeting of 1 May 2018, Councillor Greenhill provided a Mayoral Minute in which he proposed re-establishing a recruitment panel for the General Manager to fill that role by November 2018 at the latest. The proposal also included engaging "independent recruitment expertise" to assist in the recruitment process. His minute referred to the Office of Local Government's "Guidelines for the Appointment and Oversight of General Managers", and outlined some of the necessary features for an appointment process of a general manager: Exhibit 71, page 394. These recommendations were approved by a majority of the governing body by resolution, with Councillors Christie, Brown, Hoare and Schreiber voting against.
309. The position for General Manager of the Council was again advertised, with a closing date for applications of 18 June 2018: Exhibit 71, page 443. McArthur Executive were again engaged to provide independent assistance to the Council in the recruitment process.
310. In his Mayoral Minute for the Council's meeting of 24 July 2018, Councillor Greenhill updated the governing body on the recruitment process. Councillors were advised that there had been 37 applications for the position. Seven of those applicants were shortlisted for interview by Mr McArthur, with three then proceeding to interview with the Council Selection Panel which comprised Mayor Greenhill, Deputy Mayor Van der Kley, Councillor Hollywood and Mr Alan Stoneham, the General Manager of Penrith City Council. The Selection Panel recommended that Dr Dillon be appointed General Manager. Her appointment to the position as General Manager was approved by the Council with only Councillor Christie voting against: Exhibit 71, page 457.
311. In his evidence to the Inquiry, Councillor Greenhill denied that Dr Dillon was his personal *pick* or *captain's pick* for the role in these terms:

Counsel Assisting: *Q. Again, the Inquiry has received a submission that Dr Dillon was your "pick" for the role. That's the extent of the submission, but what do you say in response to that suggestion?*

*A. That submission imports for me a fickleness that I don't have. I had no favourite. Dr Dillon was not my pick. I had no particular pick. I simply would have been – I mean, the process we had set out involved an independent external recruitment expert, who guided us through a recruitment process, and that would've informed my view. So, you*

*know, it's not a case of me having preferred candidates and shifting loyalties. I had no preferred candidate": T-716.26-38 (10/9/19).*

### ***Findings in relation to Allegations***

312. The evidence does not support a finding that a “ruling bloc” of the Council in some way “managed” the appointment of Mr Liddell first as Acting General Manager, and subsequently Dr Dillon as General Manager, to ensure those positions were held by people “*sympathetic to the position being developed by BMCC in response to the asbestos crisis*”. That allegation is rejected.
313. The evidence does not support a finding that the appointment of Mr Liddell as Acting General Manager, or Dr Dillon as Acting General Manager (and subsequently General Manager), was “*tightly controlled by the Mayor and his ruling bloc as a means of assuring that an outsider without loyalties or need to justify past actions of the Council was not hired*”. That allegation is rejected. I accept that Mr Greenwood recommended Mr Liddell for the position of Acting General Manager, and that Councillor Greenhill saw no reason to disagree with this recommendation. As for Dr Dillon, the evidence establishes that she was recommended for the position of General Manager, and approved by the governing body to be employed in that role, following a normal and thorough selection process conducted in accordance with the Office of Local Government Guidelines. That process involved the engagement of an independent external consultant. A person independent of the Council (the General Manager of Penrith Council) was on the final Selection Panel. For completeness, it can be noted that Dr Dillon’s appointment was approved by all but one of the governing body.
314. The assertion that Mr Liddell was Councillor Greenhill’s “captain’s pick” for Acting General Manager is rejected. There is no evidence to support the view that Mr Liddell was recommended to fill the Acting General Manager’s position with a view to ensuring he was ultimately made General Manager, or for increasing his chances of obtaining that position. Someone from the senior staff had to be appointed as Acting General Manager. The outgoing General Manager recommended Mr Liddell. There is nothing unusual in the fact that this recommendation was accepted.

315. The evidence does not support a finding that Dr Dillon became Councillor Greenhill's "pick" from the time Mr Liddell stepped down from the Acting General Manager's position on 14 November 2017, if anything improper is meant by this. There is nothing wrong in either Councillor Greenhill, or any other member of the governing body, having confidence that Dr Dillon could fulfil the role of either Acting General Manager, or indeed General Manager for a year. There would be something very wrong if they appointed her to that position when they lacked confidence in her capabilities for the role. There is nothing wrong in them forming the view that she might ultimately be a person suitable to be appointed to the role of General Manager on a permanent basis. The fact remains, however, that she was not appointed until such time as a proper and thorough recruitment process was undertaken, following which she was the preferred candidate of the Selection Panel, and all but one of the governing body.
316. Councillor Brown has complained of inadequate notice concerning the Council meeting of 24 July 2018, at which the recommendation for Dr Dillon to become the General Manager was approved by Council.
317. In her submission to the Inquiry, Councillor Brown complained about being unexpectedly notified of the Mayoral Minute for the meeting of 24 July 2018, and of not receiving the minute until two minutes after the meeting started. There is no direct evidence concerning this. However, I am prepared to accept what Councillor Brown has said. It is preferable (and may on occasions be vital) for mayoral minutes to be provided to councillors so that they have time to read them prior to a meeting commencing – noting also that this was an important meeting concerning the appointment of a general manager. It is noted, however, that none of the other councillors felt compromised by any late provision of the Mayoral Minute – they could not have done so, given that they clearly felt they are able to vote on the recommendation concerning Dr Dillon. Given that other councillors did not feel compromised by the late provision of any mayoral minute, it would not be proper to make any finding that the late supply of minutes "*does not allow proper consideration by the members of the governing body*" of the matters dealt with in those minutes, as contended for in Councillor Brown's second submission.

318. Nevertheless, although no finding is made that this does not occur, the Council is reminded to have proper regard to the meeting requirements in the Office of Local Government Councillor Handbook, and to ensure as far as possible that matters requiring either the need for research or lengthy consideration are not introduced without notice.
319. Given the above findings, nothing concerning the appointment of Mr Liddell as Acting General Manager, nor the appointment of Dr Dillon as General Manager, involves any failure by the Council or the governing body to comply with the provisions of the LGA referred to in Term of Reference 3.

### **Manager, City Presentation – Appointment Process September 2017 to May 2018**

320. On 29 September 2017, the Council commenced a recruitment process for the position “Manager, City Presentation”: Exhibit 71, pages 266-269. The authority to recruit for this position was approved by Mr Liddell, the then Group Manager People and Systems.
321. Three candidates applied for the position. They included Daniel Long, who had worked for the Council since 2009, and at the time of his application in October 2017 held the position of Acting Manager, Parks and Support Services: Exhibit 71, page 277.
322. Candidates were interviewed by Mr Mulligan, who by this time had started in the position of Director, Service Delivery (the Manager, City Presentations is within the Service Delivery group), Mr Craig Wilson, and Ms Kirrily Twomey: Exhibit 71, page 272. The interviews were conducted on 1 December 2017.
323. Mr Long was the Selection Panel’s preferred candidate.
324. However, following the interview process, one of Mr Long’s referees gave him an unfavourable reference. This was an internal referee. Mr Scott Buchanan, the Council’s Program Leader for HR Services, explained to the Inquiry in his evidence that this caused the appointment process for Mr Long to stall, a matter noted in an email from Ms Twomey to Luke Nicholls, the Council’s then Director City and Community Outcome, dated 8 May 2018: Exhibit 71, page 298.

325. Mr Buchanan explained that his understanding was that given the negative reference (it should be noted that Mr Long had performed well at interview and his other reference checks were positive), Mr Mulligan decided to hold off appointing him permanently to the role, and appointed him as Acting Manager City Presentation “*to see what Dan was capable of doing*”: T-404.21-23 (5/9/19).
326. Mr Mulligan ceased employment with the Council in February 2018, and it was not until May 2018 that Mr Nicholls sought to have the recruitment process for Manager City Presentation finalised.

### ***Allegations concerning Manager City Presentation***

327. In his evidence to the Inquiry, Witness 1 made two core allegations concerning the appointment of Mr Long. They were that:
- (a) the Recruitment Panel was not properly constituted as all its members were from the same directorate, and “*so there was no independent as per the policy*”: T-93.14-16 (10/7/19) (private hearing); and
  - (b) Mr Long was appointed to the position despite a poor referee check: see generally T-93 to 96 (10/7/19).

### ***Findings regarding allegations***

328. Exhibit 42 contains within it the Council’s policy concerning recruitment and employment (from page 181). In the general procedures relevant to all vacancies, there is a policy that there must be an “independent panel member” who is to be “positioned outside of the branch where the vacant position is located”: Exhibit 42, page 186. In his evidence to the Inquiry, Mr Buchanan explained that the purpose of this is to ensure that the independent panel member is not potentially unduly influenced by the other panel members: T-399.28-38 (5/9/19).

329. The allegation made by Witness 1 is incorrect. The policy did not require a recruitment panel member to be independent of the Directorate, but rather of the relevant Branch (in this case, City Presentation). Ms Twomey explained in her evidence that while the three members of the Recruitment Panel were from the same Directorate, she was independent of the Branch that they were recruiting for: T-454.6-18 (5/9/19).
330. In relation to the allegation concerning the negative reference, it can first be noted that reference checks are not required under the Council's relevant recruitment and employment policy for internal applicants such as Mr Long. It is up to the discretion of the Recruitment Team Leader, which in this case was Mr Mulligan: Exhibit 42, page 189.
331. Further, a negative reference by no means automatically disqualifies a person from being appointed to any particular position. Mr Buchanan confirmed this in his evidence, and it reflects common sense: T-402.32-44 (5/9/19). No doubt, a negative reference is one matter that a recruitment panel will bear in mind before ultimately deciding whether or not to offer a particular job to an applicant. There might also be reasons, again based on common sense, why a negative reference may not be afforded the same weight for an internal candidate as distinct from an external candidate. The capabilities of an internal candidate for a particular position, and their suitability for that role, might be far better known for an internal candidate than an external candidate.
332. In any event, the negative reference check for Mr Long was not a disqualifying factor for him for the position of Manager, City Presentation.
333. Accordingly, nothing in relation to the appointment of Mr Long as Manager, City Presentation, involved the Council or any of its staff being in breach of any of the provisions of the LGA referred to in Term of Reference 3.



## HRM Partners Pty Ltd

### *Allegations and factual findings*

334. During questioning on his confidential submission, Witness 1 gave evidence that a company called HRM Partners (HRM) provided services to the Council. He did not identify what services these were with precision, but they were “*in the human resources area*”, seemingly to do with “*profiling staff and that type of training*”: T-82.24-27 (10/7/19) (private hearing). The services they provided apparently related to small amounts of money: T-104.5-15 (10/7/19) (private hearing).
335. Witness 1 alleged that Mr Liddell came across as “*very friendly*” with someone called Peter McCleary, who he subsequently found out was the owner of HRM. It was suggested that Mr Liddell was a former director of HRM, and that an ABN search showed that he had sold this company to Mr McCleary: T-83.1-4 (10/7/19) (private hearing). The implication was that Mr Liddell had some form of conflict of interest, and any purchase orders involving HRM should be further investigated.
336. The Inquiry obtained a Current and Historical Company Extract for HRM: Exhibit 71, page 464. The company was incorporated on 17 September 2004. It has always had a principal place of business and registered address in Queensland. It is a company limited by one share. That share is held (and always has been) by Mr Peter McCleary. There have been no transfers of that shareholding. Mr McCleary has been a shareholder of the company since its incorporation. On 27 September 2017, two additional directors were appointed. Mr Liddell was not one of them.
337. Mr Liddell has never been a shareholder in HRM. He has never been a director of that company. He did not sell it to Mr McCleary.
338. There is therefore no evidentiary basis to support the allegations made in relation to HRM. They are rejected.
339. Counsel Assisting made the submission that given the lack of foundation for these allegations, it would not be a worthwhile use of public resources for the Inquiry to seek

to investigate further whether Mr McCleary and Mr Liddell were “friends”. I accept that submission.

340. Based on the above findings, there is no evidence of a breach of any of the provisions of the LGA referred to in Term of Reference 3 concerning HRM Partners.

**Transparent decision-making – s.8A(2)(e) LGA**

341. As mentioned above at [153], on 20 December 2016, the Council’s Executive Office Ms Jasmine Cooper commenced a preliminary inquiry into Mr Whatmore’s concerns regarding the requisitions relating to the services provided by Mr Mulligan and Centium. She summarised the issues raised as follows:

- “• *Internal audit services to a value of \$60,000 in 2015/16 and \$80,000 in 2016/17, equates to \$140,000, in excess of Council’s Tender Limit of \$120,000, constituting a breach of Council Policy. [This relates to Centium].*
- *Consulting services from vendor MA and SE Mulligan to a value of \$65,000 in 2016/17 constituting a breach of Council Policy.*
- *Consulting services from vendor MA and SE Mulligan, selected as a result of an existing relationship with the decision-making officer, constituting a breach of the Code of Conduct”: Exhibit 71, page 44.*

342. Ms Cooper concluded that the allegations warranted further investigation. On 20 December 2016 she made the following recommendations which were endorsed by Mr Greenwood, the General Manager:

***“Recommendation***

*In relation to the requirements of clause 6.27 of Par 2 of the Council’s Code of Conduct, I consider:*

- *the allegations may be serious and as such require that the subject officers of the complaint are provided procedural fairness to respond to the allegations, in particular where desktop review of records has not concluded the matter.*

*Process matters for further investigation:*

- *the process undertaken to engage Centium for internal audit services;*
- *the process undertaken to engage Mark Mulligan of vendor MA and SE Mulligan for consulting services; and*
- *the requirement for and reporting of conflict of interest”: Exhibit 71, page 46.*

343. By 7 February 2017, Ms Cooper had completed a report into the issues raised by Mr Whatmore: “Code of Conduct – Final Report – Review 16/09” (**Cooper Report**): Exhibit 71 from page 55. In that report, Ms Cooper concluded that the claims made in relation to the requisitions were “*unsubstantiated*” and “*unfounded*”: Exhibit 71 p65-66.

344. Mr Whatmore requested a copy of the quotations relating to both Centium and Mr Mulligan. They were not supplied to him. Some consideration was given to s.8A(2)(e) of the LGA regarding this, which provides that “Council decision making should be transparent”.

345. I am not convinced that any aspect of s8A(2)(e) applies here. That Council decision making should be generally transparent can be accepted, but there are exceptions to this general rule, and limits. The Council may make decisions, for example, that are protected by a form of privilege. For example, if a decision is made based on legal advice, at least that advice may be privileged. Further, transparency cannot be so broad that every request for information or documents that is denied would breach the section. The quotations did not have to be provided to Mr Whatmore. Perhaps in hindsight a simpler solution may have been to show Mr Whatmore the relevant documents. Perhaps in hindsight it might have been better, rather than engaging in a string of email messages, for a member of staff to have met with Mr Whatmore at an early stage to discuss the engagement of Mr Mulligan and Centium to allay his concerns. Regardless of this, no finding of breach of s.8A(2)(e) is made.

346. On 8 April 2017, Mr Whatmore also sought a copy of the Cooper Report: Exhibit 34 p 24-25. Ms Cooper considered he was entitled to a copy of the report, and told him this,

although she indicated she could not tell him when he would receive the report, as it was being considered by Mr Greenwood: Exhibit 34 p24.

347. On 8 August and 13 October 2017, Mr Whatmore again requested a copy of the Cooper Report. The United Services Union requested a copy on his behalf by letter to the Council dated 23 October 2017: Exhibit 34 p29, 34 and 39.

348. Also on 23 October 2017, Mr Greenwood wrote to Mr Whatmore, and explained that he would not be given a copy of the Cooper Report: Exhibit 34 p40-41. Mr Greenwood had taken the view that the Cooper Report had been requested by him, and was not a Code of Conduct Report – which would have entitled Mr Whatmore to a copy. Mr Greenwood explained in his evidence that he had received legal advice in relation to this.

349. It would have been preferable for Ms Cooper to have not initially informed Mr Whatmore that he was entitled to a copy of the Cooper report. That is not a criticism of her, however. Her view at the time was understandable. It was also understandable why Mr Greenwood might review that decision. Transparency in Council decision making is important, but does not mean that every internal council report must be made public, nor does it mean that it is wise to always circulate every such report. It may sometimes be damaging to circulate such reports. It might inhibit the advice contained within them. These decisions will depend on many and varied circumstances. In any event, Mr Greenwood obtained legal advice that the Cooper Report did not have to be provided to Mr Whatmore. There was no serious challenge to that advice at the Public Hearings.

### **Conclusion regarding Term of Reference 3**

350. The evidence does not support a finding that any of the Council, its senior staff or the governing body breached any of the provisions of the LGA relevant to the inquiry into Term of Reference 3.

## TERM OF REFERENCE 6

### Relevant statutory provisions, and scope of Term of Reference 6

351. Term of Reference 6 requires an inquiry into whether:

In exercising functions pursuant to Parts 1 and 2 of Chapter 11 of the LG Act, the Council and its governing body since 2012 has facilitated, and is facilitating, a consultative and supportive working environment in accordance with the guiding principle in s.8A(1)(i) and the role of the governing body in s.223(1)(i), (j) and (l) of that Act.

352. Section 8A(1)(i) of the LGA provides that “*Councils should be responsible employers and provide a consultative and supporting working environment for staff*”. This provision has been in place since September 2016. For relevant matters prior to the enactment of s.8A, the Inquiry has considered the concept outlined in the Charter set out in the previous s.8 described above at [85].

353. Section 223 of the LGA deals with the role of the governing body. The relevant provisions for the purposes of the role of the governing body:

**“223 role of the governing body**

(1) *The role of the governing body is as follows:*

...

(i) *to determine the process for appointment of the general manager by the council and to monitor the general manager’s performance,*

(j) *to determine the senior staff positions within the organisation structure of the council,*

...

(l) *to be responsible for ensuring that the council acts honestly, efficiently and appropriately.”*

354. As with all terms of reference, Term of Reference 6 must be given a sensible construction. Placing some limits on the scope of the Inquiry is a necessary part of that.

355. Term of Reference 6 must be construed in the context of the other terms. Those terms require investigation into three issues: first, those relating to the Council's management of asbestos. Secondly, those relating to employment and engagement of staff, and thirdly, the Council's organisational structure and resource allocation.
356. As was discussed in the public hearings conducted in September 2019, the Council's management of asbestos (expressly referred to in Terms of Reference 1, 2, 5, 7 and 9) may also be relevant to Term of Reference 6. This was made clear in Counsel Assisting's opening statement at the September 2019 public hearings.
357. For the purposes of this Interim Report, Term of Reference 6 is not considered in the context of any asbestos management issues that will be the subject of evidence at hearings to be conducted in March-April 2020. No findings made in this Interim Report concerning Term of Reference 6 should be treated as meaning that the issues for inquiry in that Term of Reference are not open for further consideration and findings if relevant evidence is adduced at the hearings in March-April 2020 involving asbestos management issues. However, for the purposes of this Interim Report concerning Term of Reference 6, inquiry has been had into whether as a general matter the Council is "*facilitating a consultative and supporting working environment*", and this has been considered in the context of any other matters that have been the subject of inquiry that are not related to asbestos management issues (e.g. the matters investigated as part of Term of Reference 3).
358. Pausing here, in the Brown Submissions, the Inquiry has been accused of using an "inconsistent methodology" between the approach taken to Term of Reference 3, and that taken to Terms of Reference 6 and 8. The allegation seems to be that the Inquiry has taken only a "high level assessment" of what is raised through Terms of Reference 6 and 8.
359. The approach taken both at the public hearings, and as explained above, does not support this assertion. First, Term of Reference 3 makes involves specific matters: the employment and engagement of Mr Mulligan and Mr Hargreaves, and other staff and contractors. Terms of Reference 6 and 8 are more generally expressed. Term of

Reference 6 has been (and is in this Interim Report) considered in the context of the matters such as those raised by Term of Reference 3. It will also be considered – if the evidence compels this – in the context of the asbestos management issues raised in Terms of Reference 1, 2, 5, 7 and 9.

360. Term of Reference 8 (see from [468] below) demands a “high level” approach. “Organisational structure” and “resource allocation” are big picture issues. That is not to say, however, that the evidence before this Inquiry in relation to either of these issues is short on detail.

**“Consultative and supportive workplace” and “responsible employer”: s.8A(1)(i) LGA**

361. The Council employs about 750 people, including about 550 on a full-time basis. It is perhaps inevitable, as Counsel Assisting submitted, that on occasions some members of staff may feel as though they were inadequately consulted on a particular matter, or that they were not properly supported by the Council in relation to a particular issue or incident. Even if individual instances of such failures can be identified through evidence, common sense suggests that such instances do not necessarily form a proper foundation for a finding that the Council as a whole fails to provide a “consultative and supportive working environment for staff”, or that it is not a “responsible employer”. An Inquiry such as the one required by Term of Reference 6 is more concerned about identifying possible systemic failure.
362. Further, Mr Glover suggested that primarily Term of Reference 6 requires an investigation into the Council’s systems, processes and policies in order to determine whether they are consistent with those that would be put in place and implemented by an organisation seeking to provide a consultative and supportive workplace. While I agree, I accept that all Terms of Reference, including Term of Reference 6, must be construed contextually. That is why some individual matters relevant to other Terms of Reference (such as Term of Reference 3), and the issues related to asbestos management, may also be relevant to findings in respect of Term of Reference 6.
363. Further, Term of Reference 6 has its own context. Although perhaps not expressed as elegantly as it could be, it also requires consideration as to whether those matters the

subject of LGA s.223(1)(i), (j) and (l) have been dealt with by the governing body in a way that shows it is facilitating a “consultative and supporting work environment for staff”.

### **Council’s Policies and Processes**

364. A great deal of evidence was given and tendered at the public hearings concerning the measures taken and policies adopted by the Council to consult and engage with its workforce, and to provide a supportive workplace. These are outlined in the following paragraphs.

### ***Staff Consultative Committee***

365. All local councils must have a Staff Consultative Committee (**SCC**) pursuant to the *Local Government (State) Award 2017 (the Award)*. The Committee comprises representatives of management, staff and unions. The aims of a staff consultative committee are to “*provide a forum for consultation between the employer and its employees that encourages a free and open exchange of views*” and to “*positively cooperate in workplace reform to enhance the efficiency and productivity of the employer and to provide employees with access to career opportunities and more fulfilling, varied and better paid work*”: clause 32A(i) and (ii) of the Award. The functions of the committee are also outlined in the Award, and include such matters as training, consultation about organisational structure, job redesign, salary systems, communication and education mechanisms, performance management systems, working hour arrangements and health, and wellbeing programs.

366. A witness who lodged a confidential submission, and who did not wish to give evidence in public – Witness 6 – explained broadly how the SCC operates: T-261-262. Mr Buchanan (the Council’s Program Leader for Human Resources) did likewise: T-413.



### ***Team Brief***

367. “Team Brief” is a system for communication between management and staff established by Mr Greenwood when he was General Manager: T-631.36 (9/9/19). A document explaining its operations was tendered (Exhibit 67), and relevantly states:

*“Team Brief is a systematic way of communicating between leaders and their team which is interactive by the use of a feedback form. It involves a monthly half hour meeting in which leaders at each level inform their team of important current issues within the organisations. The meetings begin with a leadership and cascade throughout the organisation within a pre-determined time frame, usually no longer than three working days. The system follows a specific format, allowing ideas, questions and information to be fed back to the leadership team. Briefings are scheduled, with times, dates and places fixed at least six months in advance.”*

368. The benefits of Team Brief are said to be in “*reducing misunderstandings, promoting commitment and efficiency, and improving consultation*”: Exhibit 67, page 1.

369. In his evidence, Mr Buchanan gave a brief outline of how Team Brief works from his perspective (T-415.42-416.22 (5/9/19)), as did Mr Greenwood, who stated that one of the design features for Team Brief was that it would ensure that in relation to a particular issue there was one clear message from the Executive Leadership Team: T-680.14-15 (10/9/19).

370. Team Brief is, however, only one means of facilitating communication between the leadership team and other members of staff. Dr Dillon explained in her evidence that most of the directorates of the Council meet quarterly or six-monthly, but generally quarterly, and branches tend to meet on a fortnightly basis: T-866.5-17 (11/9/19).

### ***Staff Surveys***

371. From at least 2002 the Council has regularly conducted staff surveys. The last survey was conducted in 2016. Dr Dillon explained in her evidence that staff surveys have not been conducted in the last couple of years, mainly because the Council has been occupied by several independent investigations, and also this Inquiry. It is her intention

to have another staff survey undertaken in 2020: T-866.22 (3/9/19). Exhibit 37 contains the results of various staff surveys up to 2016. The surveys are detailed, and employees are invited to answer questions in relation to all relevant aspects of the Council's operations and workplace issues. Response rates to surveys from 2002 through to 2016 were generally in the low 60% region, and staff satisfaction (in more recent surveys) in the 75 to 77% range: Exhibit 37, page 107.

372. Mr Blackadder considered a staff satisfaction rating of 75% or thereabouts to be “pretty good”, noting that Council staff “can be very discerning about their working conditions and leadership”. He considered that a pass mark for staff satisfaction in a survey would be approximately 70%: T-580-581 (9/9/19). He did indicate however that he would like to see a much higher participation rate.
373. Staff surveys are important. Amongst other things, they provide a voice to staff who might not feel comfortable raising some issues at meetings – whether group meetings, or face to face. They can provide vital feedback to management and senior council staff. However, some caution should be exercised in drawing definitive conclusions based on them alone – including conclusions about participation rates. The nature and complexity of the survey, the circumstances that exist at the time it is conducted, the demographics of the employees, and no doubt many other factors may require careful analysis before views on either the survey results, or its participation rate, are formed.
374. In any event, there is no doubt that staff surveys were taken seriously by the Council, and considered to be a useful tool.

### ***Engagement with staff during organisational review***

375. The Inquiry was provided with documents from the Council concerning organisational reviews undertaken in 2011, 2013, 2015, 2017, and during 2018-2019: Exhibit 57. The 2011, and 2018-19 reviews, were of far greater scope than the others.
376. As one example of engagement, the General Manager's report for the ordinary meeting of Council on 26 March 2018 outlined the consultation and engagement process for the 2019 review: Exhibit 57, tab “2019”, pages 15-17. This demonstrated that several days

and meetings throughout the review from April 2018 to March 2019 were dedicated to staff information and consultation. Similar consultation and information days were set aside for the Senior Leadership Team, the Executive Leadership Team and the governing body. These were usually in the form of workshops. Reports concerning each of the four stages of consultation were prepared, and those reports were sent to all staff, and to the United Services Union for their feedback.

### ***Support Strategy***

377. Following certain media reports in late 2017 and 2018, particularly Mr Hadley’s broadcasts which have been dealt with in this and previous Interim Reports, the Council engaged independent legal experts to conduct investigations into the asbestos management, and the employment and recruitment issues. Those investigations took place in late 2017, through to about March 2018. Employees of Council were also required to give evidence in relation to investigations conducted by both SafeWork, and the Environmental Protection Authority. No doubt they also were involved in internal discussions and investigations. Since the establishment of this Inquiry in mid-2018, several staff have been engaged in both assisting the Inquiry in terms of documents, and in giving evidence.
378. As a result of these multiple investigations, the Council prepared a “Staff and Councillor Support Strategy”: Exhibit 72. This strategy was developed with the aim of ensuring staff and members of the governing body felt supported in relation to their involvement in any investigation, and to ensure that any risks to health were monitored. Psychological and counselling services were made available.

### **Other examples of support and engagement**

379. In the course of their evidence, Mr Greenwood, Dr Dillon and Mr Buchanan informed the Inquiry of various other policies of the Council or measures undertaken by it that relate to the issues of staff consultation and support. These included staff engagement and support systems, employee assistance programs, newsletters, meetings and engagement by the Executive Leadership Team with staff at various Council worksites, and excellence awards.

380. All of the matters outlined in [365] to [379] above are evidence of the Council adopting and implementing policies and processes to ensure compliance with its statutory obligations under s.8A(1)(i) of the LGA to provide a “consultative and supportive working environment for staff” and to be a “responsible employer”.
381. In his evidence, Mr Blackadder described this raft of programs and policies as “*a fairly comprehensive series of opportunities for staff to input into decisions by management, by leadership*”: T-577.11-26 (9/9/19).

### **Relevant issues raised by witnesses**

#### ***Witness 6***

382. Witness 6 gave evidence relevant to Term of Reference 6 at a private hearing. An order was made prohibiting the publication of the evidence given by this witness. A similar order was made in relation to the written submission provided to the Inquiry by Witness 6, including documents attached to that submission that had not already been made public: Confidential Exhibit J.
383. Orders were also made permitting certain staff on the Council and its legal advisors to be present, and to participate. Councillor Brown and Mr Ryan were also present and participated. An opportunity was given to any other persons who considered that they might have a sufficient interest to make application to be present and participate in this private hearing.
384. Because of the non-publication orders made, in some instances it is necessary to refer to Witness 6’s evidence in a general way only, but this does not pose any problem in terms of making findings.
385. Witness 6 raised certain matters in relation to various Council work programs, and concerning a meeting of Council, where the witness considered they and their team were treated unfairly and inappropriately by another member of council staff. Witness 6 raised a grievance, and contacted the union about these issues. The witness also

sought the involvement of Mr Buchanan, the Council's Human Resources Manager, to facilitate a resolution of one of the matters of concern. In relation to another issue, Witness 6 sought a response from senior management. Some of the issues resulted in email exchanges between staff of the Council that were in direct, although not in rude or offensive language.

386. What ultimately is revealed is a breakdown of the working relationship between Witness 6 and another senior member of the council staff. That is unfortunate. However, the issues are not of the kind where it would be appropriate to make a finding that the Council is in breach of its obligations under s.8A(1)(i) of the LGA, either systemically, or in relation to these specific matters.
387. Witness 6 also expressed the opinion that the Council had inadequately consulted with staff during various organisational reviews and restructures. As noted at [91] of the Brown Submissions, Witness 6 made observations critical of the previous General Manager in relation to consultation issues. Witness 6 did clarify, however, that it was perhaps no longer appropriate to describe the Council's consultation with staff across the board as "inadequate". The situation, in Witness 6's view, is "improving".
388. A fair summary of Witness 6's evidence in this regard is perhaps that their chief concerns were with consultation regarding organisational reviews and restructures prior to the most recent one in 2018-19. The suggestion was made that past senior management did not welcome staff feedback. A concern was also expressed that staff were provided with a proposed restructure model, and their comments were then sought, whereas Witness 6 felt the best practice involved significant and meaningful consultation prior to a draft proposed restructure document being formulated and circulated.
389. Mr Blackadder expressed very positive views concerning the Council's 2018-19 major organisational review. He had the opportunity to consider documentation prepared by the Council in relation to it. He said the following in this exchange with Counsel Assisting:

*“Q. Having been referred to that section of this report, what is your view about the purpose and focus of this review?”*

*A. Purpose – I think the purpose was to conduct a very comprehensive review of the organisation, with the end result being to adopt a new structure. The process, as I have indicated before, is probably one of the most comprehensive I have seen. ... The new structure has been developed and has some very clear accountabilities and responsibilities ... I think the Council has very comprehensively stepped through a process which I would regard as generally best practice”*: T-562.45 to 563.16 (9/9/19).

390. For previous reviews and restructures, the Council’s approach was to have a proposed structure presented for consultation, rather than undertaking consultation first before any proposed structure was developed partly through that consultation process. Mr Greenwood, who was the General Manager of the Council in the period of the 2011-2017 reviews and restructures, explained the process of consultation between the governing body and the Executive Leadership Team, and with each of the directorates, and with staff feedback then being taken into account. There was a presentation of the new proposed structure to a staff consultative committee before it was presented to the staff as a whole: T-639.12 to 642.8 (10/9/19); Exhibit 42, pages 124-125; T-419.12 to 422.25 (5/9/19).
391. Although this was a different approach to that taken in 2018/19, Mr Blackadder did not criticise the approach, and did not consider that it was inadequate: T-572-576 (9/9/19).
392. What emerges from this, and Witness 6’s concerns about what they felt were aspects of inadequate consultation in the past, is that the Council has clearly both refined and altered its approach to organisational reviews. That is a good sign. A council operating properly no doubt learns things from each restructure and review, and carries that institutional learning and knowledge forward such that improvement is continually made. This is not necessarily evidence of inadequacy in the past, but more likely the result of improvements being made over time based on experience, new thinking, new ideas, and the like.
393. Witness 6 no doubt identified matters from previous reviews and restructures where things – in particular consultation – either were not done perfectly, or could have been

improved. That is normal, and not an indication in itself of a failure to fulfil the obligations under s.8A(1)(i) of the LGA.

394. What is clear is that with the most recent restructure – and hence the most relevant to this Inquiry – the standards and scope of consultation was at a “best practice” level.

### **Internal Audits**

395. The circumstances of two internal audits were the subject of evidence at the Inquiry, for the purposes of considering them within the context of s.8A(1)(i). One related to the operation of the Council’s Springwood Depot Recycling Facility (**Springwood Depot**). The second was an “oversight review” into procurement and tendering processes (**Procurement Review**), which resulted in a report entitled “Procurement and Tendering Process – Oversight Review Summary Report” (**Procurement Report**): Exhibit 44.

### ***Springwood Depot Review***

396. In Confidential Exhibit J, Witness 6 made mention of the Springwood Depot Review, indicating it was a review conducted after allegations were made to the Executive Officer of the Council about improper conduct concerning the operation of the Springwood Depot. This was said to have led to an external investigation at the Council’s cost that was “extremely stressful” for the staff involved and ultimately found no basis for any allegations that were made.
397. In evidence given at a private hearing, Witness 6 explained that the Springwood Depot was a recycling centre where residents “*could bring in materials that would be sorted and either recycled or moved on, so things like scrap metal was dropped there ... construction waste, concrete, bricks, rubble*”: T-215.5-10 (private hearing 4/9/19).
398. Witness 6 did not know a great deal about the detail of the allegations but their “*broad understanding*” was that they were to do with “*the potential of misuse or non-reporting of items, things like that*”: T-215.40-41 (private hearing 4/9/19).

399. Witness 6 explained that their understanding was that the allegations were made following a Council audit. The allegations having been made, the Executive Officer decided they needed to be investigated further. Witness 6 did not suggest there was anything wrong with this process. However, staff were “*very surprised about the allegations made*”, “*shocked*”, “*aggrieved about being the subject of those allegations*”, and generally found the investigation to be “*unjustified*”, and “*unexpected*”: At T-216.4-217.44 (private hearing 4/9/19).
400. At [132]-[136] of the Brown Submissions, it is asserted that the Springwood Depot Review is evidence of the Council failing to provide a “supportive working environment”. It is alleged it conducted an investigation without sufficient basis for doing so. This is not consistent with Witness 6’s evidence. Witness 6 conceded that given the nature of the allegations that were made, it was appropriate that they be investigated: T-216.21-28 and T-217.38-44 private hearing 4/9/19.
401. There ultimately was insufficient evidence to support a finding that the Council behaved in an inappropriate way, or that it was not obliged to carry out some investigation given the allegations had been made. In those circumstances, no finding is made that the Springwood Depot Review involved any breach of s.8A(1)(i) of the LGA.

### ***Procurement Review***

402. The Procurement Review was conducted by the Council’s Governance and Risk Branch. The authors of the Procurement Report – the “Audit Team” – were Ms Yasoda Muralitharan (Program Leader, Risk and Assurance), and Mr Grant Mackay, the Manager, Governance and Risk and Chief Audit Executive: Exhibit 44, page 1.
403. Terms of Reference for the Procurement Review were finalised by 18 December 2015: Exhibit 51, page 1. The objective of the review was to “assess the oversight arrangements/processes currently in place around the delivery Tendering and Procurement” of the Council: Exhibit 51, page 3.



404. In his evidence, Mr Mackay explained that the Procurement Review was an audit that had come from his view that the Council “*needed to reform ... its internal audit function*” which he thought was “*immature and relatively impotent*”: T-358.18-19 (5/9/19). A decision was made that the Council needed a better understanding of “*the level of control that the organisation had over procurement*”: T-359.1-2 (5/9/19). In short, the idea was to gain a proper understanding of how the Council managed any risks associated with procurement.
405. The Procurement Review was intended only to identify risks. It was not an investigation into loss or theft. It was about the Council determining whether it had “*the correct level of control over procurement*” and was not set up to discover wrongdoing: T-359.20-33 (5/9/19).
406. A draft of the Procurement Report was provided to senior members of staff in April 2016. The report was sent to the General Manager, heads of the directorates, and the various senior staff at manager level: Exhibit 51, pages 7-9.
407. The draft was provided to the senior staff under cover of an email from Mr Mackay dated 14 April 2016. He indicated that the purpose of providing the draft was to seek “feedback”. His email stated the following:

*“... It is important we make all reasonable efforts to eliminate:*

- 1. Possible errors of fact.*
- 2. Unsound arguments or overreach.*
- 3. Findings or commentary that is out of scope.*
- 4. Incorrect assignment of responsibility for the setting of management actions”*: Exhibit 51, page 7.

408. Mr Mackay expanded on the reasons as to why a draft Procurement Report was provided before that report was finalised in this way:

*“Because this is the part of the process that gives the business, those who have a stake in the outcome of the audit, an opportunity to agree or disagree with the information that’s in the audit report, the findings that*

*are in the report and the actions that are in the report. This is the opportunity that the business has to be able to give directions and to assure that they're not being misrepresented in any way. It is a vital part of the audit process because it is the part that maintains credibility and integrity": T-361.6-15 (5/9/19).*

409. The expectation was that managers would seek input from relevant people within their teams for the purpose of giving feedback on the draft report: T-361.21-46 (5/9/19).
410. Although still dated February 2016, the final Procurement Report was circulated by Mr Mackay to senior staff on 6 May 2016: Exhibit 51, page 64.

*Mr Whatmore and Mr Irwin's concern*

411. A copy of the Procurement Report found its way to Mr Whatmore and Mr Irwin. It was unlikely that it was intended to be read by them, but nevertheless was, and they had several concerns with it. Of general concern was their view that the member of the Audit Team that did most of the "field work" (Ms Muralitharan) did not have a complete understanding of procurement processes or the operating system. Mr Whatmore and Mr Irwin also had several specific concerns about the Procurement Report. They considered it contained, first, several factual inaccuracies. Mr Whatmore detailed these in a document he prepared that is attached to the Whatmore Submissions: "Response to Procurement and Tendering Process – Oversight Review" (**Whatmore Response**). While Mr Whatmore felt the report was deficient in several areas, it is most relevant to highlight two: items 22 and 24: Exhibit 51, pages 92 and 94.
412. In item 22, a finding was made that "*store staff were able to add new items to the store's inventory without managerial approval*". This was allocated a risk rating of "significant", with a consequent likelihood of "possible". Mr Whatmore's evidence was that this finding was incorrect. He said the Purchasing and Supply Co-ordinator adds new items, not "staff". He also pointed to the "Request for Stocking of New Products" form on the Council's intranet, requiring the signature of a Branch Manager: Whatmore Response, page 16.

413. At item 24, a “finding” was made in this part of the Procurement Report that there was “no document process to write off stock in stores”. This was said to create a “significant” risk, which, while it would be a minor consequence, was “likely” to eventuate. Of further concern to Mr Whatmore and Mr Irwin were these comments:

*“There is no documented process for stock control in stores, including how regular stocktakes are undertaken and how stock is written off ...*

*Potential cause*

*Process/system design; specifically, the absence of effective oversight and control;*

*Implications*

*It is possible that store staff could deliberately write off stock that has already been converted to their own use. It is also possible that store staff could use unaccountable stock write offs to disguise “leakage” resulting from inefficiency and poorly controlled practices”: Exhibit 51, page 94.*

414. Mr Whatmore was also concerned that he was not consulted about the Procurement Review, and was not able to provide any input into it. He felt that he had been accused of misconduct. In his evidence at the public inquiry he said that the Procurement Report:

*...was full of errors and it made implications that we were actually stealing, basically, that we were using stock write offs to hide stock that we had already converted to our own use: T-184.41-44 (11/7/19).*

415. Mr Irwin also considered that the Procurement Report, in particular item 24, was an accusation “*of stealing and all sorts of nasty stuff*”: T-57.39-40 (2/9/19).

416. Mr Whatmore and Mr Irwin both informed the Inquiry that they had some sensitivity regarding the content of, in particular, item 24 of the Procurement Report, as some years previously an employee of the Council had been accused of stealing items from the Council. This led to search warrants being issued, but ultimately did not result, apparently, in a conviction of the staff member of any crime.

417. On 8 August 2017, Mr Whatmore and Mr Irwin lodged a grievance through their union, the United Services Union, concerning the Procurement Report: Exhibit 51, page 130. Meetings were held which failed to resolve Mr Whatmore and Mr Irwin's concerns. A transcript of a meeting held between Mr Whatmore, Mr Irwin, their Union representative (Mr Daniel Papps), Mr Mackay, Mr Bruhn and Mr Buchanan, is also attached to the Whatmore Submissions. It is clear from reading that transcript that both Mr Whatmore and Mr Irwin had at least these concerns with the Procurement Review and the Procurement Report:

- They should have been consulted by the authors of the Report, but were not.
- The Report contained a number of errors.
- They considered that anyone reading item 24 would take the view that they were being accused of theft.

418. For his part, Mr Mackay stated that no findings of wrongdoing were made or intended.

419. Mr Mackay sent a letter in January 2017 to Mr Whatmore and Mr Irwin explaining the objects of the Procurement Review, and stating that:

*“The Review did not identify any evidence of wrongdoing by any BMCC employee nor was the Review’s final report written to imply such a thing.”* (Exhibit 51, page 119)

420. Mr Whatmore and Mr Irwin were still unsatisfied with the response to their concerns from the Council. On 3 November 2017, Weir Consulting was appointed to conduct a grievance dispute resolution process. That resulted in a report dated August 2018: Exhibit 51, page 135 (**Weir Report**).

421. In the Weir Report, findings were made that there were errors contained within the Procurement Review Report. In relation to the way that item 24 was framed, recommendations were made that the Council apologise to Mr Whatmore and Mr Irwin: Exhibit 51, page 155.

422. On 21 December 2018, Dr Dillon (by now the General Manager of the Council) sent an email to various staff concerning the Procurement Review which included the following:

*“One of the key concerns raised that led to the external investigation, was that commentary in a number of the findings was worded in a way that spoke about the potential for people to act inappropriately rather than commenting on the system. Audits evaluate the effectiveness of system controls and apply risk grading for each finding based on what could occur, not what has occurred.*

*With the permission of Geoff Whatmore and Steve Irwin, the team who investigated this investigation, I would like to advise that the investigator found that there was no evidence of wrongdoing by any staff member.*

*It is acknowledged that team members have felt aggrieved about statements in this report and Council has committed to improve its processes. On behalf of the Council I have apologised to Geoff and Steve for any inference of wrongdoing in the review.*

*The external review did not identify any evidence of wrongdoing by any Blue Mountains City Council employee nor was it the intent of the final report to imply such a thing”: Exhibit 51, page 162. (Emphasis added)*

423. Mr Whatmore’s evidence to the Inquiry was that ultimately his grievance had been resolved satisfactorily: T-184.45 to 185.5 (11/7/19). Mr Irwin’s evidence was that while “requisition” was a “poisoned chalice” which has seen a high turnover of staff, and that the three years from the time Mr Whatmore and he first raised a grievance concerning the Procurement Review had been the worst of his life, the Council had returned now to being a “fantastic” place to work: T-89.9-11.

### ***Findings on Procurement Review and report***

424. It is accepted that a review such as the Procurement Review was needed. The fact that some staff are unhappy that an audit or review may be occurring is not a reason for them not to be conducted. As a matter of obviousness, they are no doubt important processes that all councils must perform from time to time.

425. It is accepted in relation to the Procurement Review that, as is recorded in the documents referred to above, and through the evidence of Mr Mackay, the intent was to identify “risk”, and not “wrongdoing”. It was not an investigation into alleged theft. It was a review to identify risks with a means of improving the Council processes.
426. Having said that, both Mr Whatmore and Mr Irwin’s reaction to in particular item 24 of the Procurement Report is both genuine, and understandable. While the report may not have been intended to have been read by them, this does not establish that the wording of item 24 in particular could not have been better expressed.
427. It is accepted that item 24 did not intend to suggest that any member of staff had involved themselves in deliberate write-offs, or had stolen Council goods. It does not say that. Because of the wording “likelihood – likely”, however, it does raise the implication that it is “likely” such things could occur. It is understandable then that staff members involved would be offended by this having seen the document.
428. It was appropriate for any procurement review to identify a risk if processes are not in place whereby that risk could eventuate. While it was no doubt not intended to suggest there was a likelihood of improper conduct (in the absence of evidence that this has occurred), it was not the best drafting. That, however, is not a matter solely the responsibility of its authors. It was circulated to other senior staff in an attempt to eliminate “errors of fact” as well as “overreach”: see [407] above. Clearly, no other senior member of staff was sufficiently concerned or troubled by the language or factual accuracy of the draft Procurement Report to raise them with the authors.
429. Given that the Procurement Review was not intended to uncover wrongdoing, it seems odd that Mr Whatmore was not consulted about the matters that were relevant to his job. That might have ensured greater clarity in the Report.
430. In summary, my findings in relation to the Procurement Review, and the Procurement Report are:

- (a) It would have been preferable for Mr Whatmore to have been consulted about the review before the Report was drafted. He could have assisted with procedural and factual matters.
  - (b) Mr Whatmore and Mr Irwin's response to item 22, and in particular item 24 of the Procurement Report, were genuine. Their concerns at the implications of item 24 are reasonable, and understandable. Their feelings that it had been implied that they were "likely" to engage in improper conduct or theft were not irrational. In the absence of any evidence of theft, they were entitled to feel aggrieved.
  - (c) At the meeting of 17 October 2016, the best response by the Council to item 24 would have been a concession that it was not worded well, withdrawal of the implication of likely theft, and an apology for that. In fairness, Mr Mackay was at pains to make clear that no finding of wrongdoing was made, nor intended. That alone, however, did not address, in a direct way, the use of the term "likely" in item 24.
  - (d) The process of resolving Mr Whatmore and Mr Irwin's grievance with the Procurement Report took too long to resolve. In part, that was unavoidable, but this was a matter that should have taken weeks or at most a few months to resolve finally, not well over a year.
431. Do these findings mean that the Council has breached its obligations in s.8A(1)(i) of the LGA to provide a "consultative and supportive working environment" for staff? In my view, no, for the reasons that follow.
432. The Procurement Report, in particular items 22 and 24, could have been worded differently. As I have found, the offence taken by Mr Whatmore and Mr Irwin was genuine, and reasonable. However, it is relevant (although not decisive) to consider that there was no intent to offend them, nor any intent to imply misconduct.
433. It is also relevant that Mr Whatmore and Mr Irwin's concerns and complaints were taken seriously. Mr Mackay put in writing the fact that the Report neither found

evidence of wrongdoing, nor did it intend to imply such. Following a review by an external consultant, and the preparation of the Weir Report, an apology was made to Mr Whatmore and Mr Irwin. Mr Whatmore was ultimately satisfied with the outcome. I accept the Council's submissions that:

*“The willingness of the Council to act on the Weir Report's recommendations showed a willingness to close essentially unresolvable issues in a conciliatory way favourable to the employee”:*  
Council Submissions at [47].

434. In summary then, the Procurement Review and Report should be considered for the purposes of s.8A(1)(i) of the LGA in the context of:

- (a) the intent of the Review;
- (b) the intent of the Report, and
- (c) the steps that were taken following the relevant staff members' complaint – which included various meetings, correspondence outlining that it was not the intent to make any allegations against them, and ultimately an apology following a recommendation in an independent report.

435. Although it was not intended to imply wrongdoing, the indication that wrongdoing was “likely” in item 24 carried with it an obvious implication. No doubt, the risks associated with the warehouse and its processes could be identified in a manner that does not so directly imply this, particularly in the absence of any evidence of wrongdoing. Indeed, in the absence of such evidence, a finding that a risk was “likely” to eventuate seems to lack a strong evidentiary foundation. Parts of the Procurement Report were less than perfect, and part of it contained an unfortunate implication. It is not a matter, however, that in the context of all the circumstance relevant to it demonstrates a failure by the Council to provide a consultative or supportive working environment for staff.

436. Care needs to be taken not to make a general finding under s.8A(1)(i) based only on a less than perfect audit. In my view, the legislature should not be taken to have intended that adverse findings under s.8A(1)(i) are in general (there may be exceptions) apt to



be made on the basis of isolated incidents where consultation or support may have been lacking. The preferred construction is that Parliament should be taken to have intended that the provision is to be directed more towards systemic failures to consult and support. While I therefore make no finding of breach of s.8A(1)(i) of the LGA in relation to the Procurement Review, it was a review where consultation should have been broader, and where ultimately the wording of the Report caused understandable concern.

### **Obligations of the Governing Body**

437. Term of Reference 6 requires inquiry also into the obligations of the governing body set out in subsections 223(1)(i), (j) and (l) of the LGA in the context of the general principle provided for in s.8A(1)(i) of the LGA that *“Councils should be responsible employers and provide a consultative and supporting working environment for staff”*.
438. Section 223(1)(i) of the LGA provides that one of the roles of the governing body is to *“determine the process for appointment of the General Manager by the Council and to monitor the General Manager’s performance”*. The process by which Dr Dillon was appointed is described above at [305] to [310]. This was consistent with the *“Guidelines for the Appointment and Oversight of General Managers”* published by the Department of Premier and Cabinet: Exhibit 71, pages 310-312.
439. Further, Councillor Greenhill gave evidence as to how the General Manager’s performance is monitored by the governing body. This includes the monitoring of their performance by a “Performance Panel” made up of members of the governing body. In response to Counsel Assisting’s question as to how the governing body specifically performs the function of monitoring the General Manager’s performance, Councillor Greenhill said this:

*“There is a performance review that occurs that involves a process of surveying the Councillors on their views of the GM’s performance against the performance targets set out and agreed by the governing body and appended to the General Manager’s Contract of Employment. The Councillors are surveyed and then the General Manager is – you know, the material from the survey is taken into account. Then the panel, the Performance Panel, measures the performance of the General Manager*

*against the criteria set out in the performance criteria that I just mentioned, and then a report goes to Council, and in confidential session of the Council, the governing body, then deliberates, discusses, debates the performance review and a decision is made by vote”:* T-720.10-26 (10/9/19).

440. Councillor Greenhill also explained his role as Mayor of monitoring the performance of Dr Dillon, his regular meetings and discussions with her, and his role as a conduit between the General Manager and the governing body: T-720.32-722.21 (10/9/19).
441. The way the governing body of the Council monitors the performance of the General Manager is consistent with the Guidelines for Oversight published by the Department of Premier and Cabinet: Exhibit 71, pages 317-318.
442. Section 223(1)(j) of the LGA provides that the governing body is *“to determine the senior staff positions within the organisation and structure of the Council”*. There is no evidence that there has been any failure by the governing body in relation to this obligation, whether on its own or linked to the general principles set out in s.8A(1)(i).
443. Section 223(1)(l) of the LGA provides that the governing body is *“to be responsible for ensuring that the Council acts honestly, efficiently and appropriately”*. Mr Blackadder’s evidence was that the obligations on the Councillors to be “active and contributing members of the governing body” and to “make considered and well-informed decisions” provided for in subsections 232(1)(a) and (b) should be seen as linked to the overarching obligation on Council and to be responsible for ensuring the Council acts “honestly, efficiently and appropriately”: Exhibit 56, pages 23-24.
444. As to how the governing body can take practical steps to ensure the Council acts “honestly, efficiently and appropriately”, Councillor Greenhill explained some of the processes that can take place if there are complaints made that the Council is not acting in this way. He said such complaints:

*“... can either be raised directly with me as Mayor and I can refer them as appropriate to the proper process, or they can be raised directly with the Executive Officer of the Council, or indeed they can be raised directly with the Office of Local Government, ICAC, the Ombudsman, whoever is appropriate. ... It is incumbent on Councillors, whether they’re the Mayor*

*or not, to ask questions, interrogate propositions that come before them, to deliberate appropriately, to read and consider the material that's put before them and at the briefing sessions that we're provided with, to ask the necessary questions that they feel they need to ask in order to ensure that proper processes are being followed in every instance. The briefing sessions give Councillors a chance to interrogate matters that are coming before us outside of the Council meeting: T-722.37-723.19 (10/9/19).*

445. Ultimately, there was no evidence given or tendered at the hearings to suggest that the governing body has failed to perform its obligation to ensure that the Council acts honestly, efficiently, and appropriately. The evidence was that processes are in place to achieve this general principle.

### ***Brown Submission***

446. Contrary to the findings above, Councillor Brown has submitted that findings should be made that the Council failed to provide a “consultative and supporting working environment”. She submits that the evidence supports findings that:

- A culture of bullying existed (at least in the period up to November 2017) from the top of the organisation down.
- An atmosphere of hostility existed at BMCC that caused managers to suffer depression and work programs to be hindered.
- BMCC management created extensive resentment and distrust in the procurement/stores section by instituting a poorly executed and poorly informed review.

...

- BMCC management had created extensive resentment and distrust via an unwarranted audit of the Springwood Depot.

...

- A large number of senior staff have left the organisation creating confusion, suspicion and a lack of certainty.

...

- The lack of consultation regarding safety and the lack of a supportive workplace resulted in a hostile us and them relationship.

...

- There as a body of 50 to 60 staff who were hostile to the ... Safety Improvement Program: Brown Submissions at [64].

447. Several factual matters were submitted by Councillor Brown as supporting these findings. These included the matters addressed in the paragraphs that follow.

448. Councillor Brown asserts at [82] of her submission that a workplace not complying with WH&S laws “cannot by definition be regarded as a supportive workplace”. No findings have been yet as to what laws, if any, the Council was not complying with, but it is sufficiently clear from the Willis Report, and the engagement of Mr Mulligan, that the Council had fallen behind to a degree in keeping its policies and procedures in compliance with the WH&S Act. This is an important issue raised by Councillor Brown. By 2015, however, the Council recognised that there was some urgency to attend to this, and created the BIP and SIP accordingly. The Council sought to fix the problem, and by 2015-16 to fix it as a matter of priority and urgency. That this had to be done is not determinative that the Council failed to provide a consultative and supportive workplace.

449. At [89]-[92] of her submission, Councillor Brown refers to some evidence that she says is indicative of “bullying” and “a culture of bullying and secrecy”. One of the matters referred to related to what would appear in the main to be a personality clash between Witness 6 and a more senior member of the Council staff. There was also reference to some evidence from Witness 6 regarding his views of the previous General Manager of the Council, and a view expressed by Mr Whatmore that, at least for a time at the Council, the view of at least some members of staff was that if “*you raise a problem, you are the problem*”.

450. Some of the matters referred to in these paragraphs of the Brown Submissions are the opinions of people. They may be genuinely held, but they are personal views. Other matters are assertions of fact, but relate to isolated incidents. They fall short of being

evidence that would justify the serious finding that the Council had or has a “culture of bullying”. They do not establish a systemic culture of bullying.

451. At [101]-[108] of her submission, Councillor Brown seeks to make much of the fact that Mr Greenwood and Mr McKay thought that any person appointed to lead the BIP and SIP would need considerable “resilience”. It is a stretch, in my view, to suggest that these views indicate that the Council provided a hostile workplace. These views were expressed more in the context of these programs being significant undertakings of reform, to which there might be some staff resistance.
452. At [111]-[126], Councillor Brown focuses on what she submits is the resentment and distrust created by what she alleges is the unfair treatment of Mr Whatmore. She makes the submission that it is “*hard to imagine an employee being treated with as much contempt as Mr Whatmore has been*”: Brown Submission at [112]. This is an overstatement. It goes beyond Mr Whatmore’s own submissions to the Inquiry.
453. First, as to the concerns raised by Mr Whatmore about the Mulligan and Centium requisitions, the emails between Mr Bruhn and Mr Whatmore do not provide a proper basis for an allegation of “*bullying*”. A way forward was attempted to be found, before Mr Bruhn took “full responsibility”. Nothing in the emails, in my view, is evidence of something that could properly be described as a “*hostile and intransigent attitude towards Mr Whatmore*”: Brown Submissions at [124].
454. Secondly, concerning the Procurement Review, as found above there was an unfortunate and unwarranted implication in at least item 24 of the Procurement Report. I have made findings that it is understandable Mr Whatmore and Mr Irwin felt aggrieved by this. However, as I have also found, it is important to consider this matter in proper context. Ultimately, following a lengthy process, the new General Manager apologised to them, and that has been recorded in writing. I reject the submission that this demonstrates any sustained conduct by the Council that demonstrates that Mr Whatmore’s concerns were not taken “seriously”: Brown Submissions at [118].

455. Submissions are made by Councillor Brown at [137]-[139] concerning various staff leaving their roles within the Council or resigning. It is submitted that these matters are “symptomatic of a workplace which is not supportive”.

456. It can readily be accepted that staff can become unsettled in any organisation by resignations and departures of other staff, including senior staff, when this occurs abruptly or repetitively, and in a short course of time. However, as the Council has submitted at [61] and [62] of its submission, there is a proper context for these matters too.

457. Councillor Brown’s submission should be considered against the background of the totality of circumstances facing the Council from 2016 to now. These circumstances include:

- adverse publicity concerning asbestos management issues (in relation to which no findings have yet been made);
- adverse publicity concerning employment and recruitment issues (the Inquiry has made various findings in Interim Reports regarding these matters, including that many of the broadcasts of Mr Hadley contained significant factual errors and unjustifiable assertions about the Council and some of its staff);
- SafeWork and EPA investigations;
- the McCullough Robertson investigation conducted by Ms Reid;
- the investigation conducted by Mr Tooma of Clyde & Co;
- this Inquiry;
- a comprehensive organisational review and restructure in 2018-19.

458. This confluence of events and circumstances has undoubtedly put strain on the organisation – to some degree on all staff, and certainly no doubt on management and the governing body.
459. It remains to be seen what findings should be made (if any) in relation to Term of Reference 6 as a result of the inquiry into the asbestos management issues outlined in the Terms of Reference relevant to it. However, it is not appropriate in my view, and would be very unwise in light of the circumstances outlined above, to make a finding that resignation or departures of staff are indicative of a non-supportive work environment. What needs to be kept in mind is that a finding that a Council does not provide a consultative and supportive work environment is a serious finding. It should only be made if the finder of fact is comfortably satisfied it should be. It should only be made in circumstances where there is a body of evidence that substantiates such a finding. The evidence in this Inquiry to date – leaving aside any evidence to come on the asbestos management issues – does not justify such a finding. There is also considerable evidence to the contrary, as outlined above.
460. At [140]-[143] of the Brown Submissions, reference is made to a media release issued by the Council (from the Mayor) following the Council receiving Ms Reid’s report in March 2018. That media release contained an error. That fact alone is not evidence that would justify a finding that the Council fails to provide a consultative and supporting working environment. Equally, it does not warrant any loss of trust by the Council staff. As this issue has been raised, I make these findings about it:
- (a) The Council published a media release in March 2018 stating that in her report to Council, Ms Reid had identified no breaches of Council’s Code of Conduct.
  - (b) This was inaccurate – one breach was found, although its objective seriousness was found by Ms Reid to be “low”.
  - (c) The error made by the Council was not deliberate. Councillor Greenhill has taken responsibility for it. I accept that a person within the Council erroneously, but innocently, drafted the media release inaccurately in one regard. The context for that error is important – no adverse findings were otherwise made

against the Council by Ms Reid, nor was this finding recorded in a summary of her findings. I accept the error is best described as an innocent “slip”: Council Submissions at [64].

- (d) Further, although not strictly relevant to the Council’s media release, as indicated above at [31], I respectfully disagree with Ms Reid’s findings that Mr Liddell was in breach of the Code of Conduct. She found that Mr Liddell had identified and disclosed that he had a conflict of interest in relation to Mr Hargreaves’ application for a position with Council, but had breached the Code by failing to put that disclosure in writing. There is some evidence that he did, at least in an email (see [248] above), but in my view, he did not have to. This is because he had already avoided the conflict – he played no role in relation to Mr Hargreaves’ application, or in the decision to employ him. My reading of the Code of Conduct is that he would only have needed to put anything in writing if he intended to participate in the process through which Mr Hargreaves was employed. He did not.
- (e) In any event, regardless of whether or not Ms Reid’s view on the Code is correct, the press release contained a minor, and unintended, inaccuracy. This is not evidence of an unsupportive working environment. It is evidence of human error.

***Cr Brown Submission to defer findings on Term of Reference 6***

- 461. Some comment should also be made in response to the Brown Submissions that I should defer making any findings on Term of Reference 6 until the asbestos management issues have been inquired into.
- 462. That would not be appropriate, for two main reasons. First, the issues concerning Term of Reference 6 in the September hearings are discrete from the issues that will be heard in March-April 2020 concerning asbestos. Secondly, it would not be fair. Those people interested in the factual matters inquired into in the September hearings, as well as the Council, have an expectation that findings will be made about those issues within a reasonable timeframe. They should not have to wait until sometime after April 2020.



463. For completeness, I reject the view that this might cause some people to be “confused”. In my opinion people interested in this Inquiry are capable of understanding that the asbestos management issues have not yet been the subject of hearings and findings, and that, as I have stated before, Term of Reference 6 (and 8) might be of some relevance to those issues.
464. One final matter needs to be clarified from the Whatmore Submissions. Mr Whatmore has expressed a concern from reading the transcripts of the public hearings that he was considered to be a “hostile” witness, and that his concerns have not been “treated seriously”. It may be that Mr Whatmore is of the opinion that the Council, or at least certain witnesses, view him and his views in this manner. Mr Whatmore was not considered by the Inquiry to be a “hostile” witness, nor was he examined by Council Assisting in that manner. To ensure that there is no doubt about it, no finding has been made that he is a “troublemaker”, and the Inquiry has taken his concerns seriously. The fact that Counsel Assisting called Mr Whatmore to give evidence, and took him through his first set of submissions, should be sufficient to dispel that concern.

### **Conclusions on Term of Reference 6**

465. Based on the evidence before the Inquiry, I am comfortably satisfied that the Council and its governing body has facilitated a “consultative and supportive work environment” in accordance with the general principle outlined in s.8A(1)(i) of the LGA, and that the governing body has acted in accordance with subsections 223(1)(i), (j) and (l) of the LGA.
466. The Procurement Report contained some errors of fact, and, at least in one instance, an unfortunate and unwarranted implication that staff might engage in theft or other wrongdoing. Broader consultation during the process of drafting the report may have prevented this, and was advisable in any event. However, no finding of wrongdoing was made, and the implication was unintended. A grievance was investigated internally, and then by an external consultant. An apology was then made to Mr Whatmore and Mr Irwin. For these reasons, the Procurement Review failings are not a proper basis for

making a finding that the Council has failed to facilitate a “consultative and supportive work environment”.

467. These findings in relation to Term of Reference 6 are based only on the evidence that has been given and tendered to date, including in relation to matters relevant to Term of Reference 3. These conclusions are not based on any aspect of Terms of Reference 1, 2, 5, 7 and 9 (relating to asbestos management issues), which have not yet been the subject of any public hearings.

## **TERM OF REFERENCE 8**

### **Scope and statutory provisions**

468. Term of Reference 8 requires inquiry into whether:

In exercising functions pursuant to Parts 1 and 2 of Chapter 11 and Part 2 of Chapter 13 of the LG Act, the governing body and the senior staff of the Council has determined, reviewed and re-determined an appropriate organisational structure and resource allocation in accordance with the guiding principle in s.8A(1)(c), (2)(c) and the role of the governing body in s.223(1)(g), (h) and (l) of that Act.

469. Parts 1 and 2 of Chapter 11 of the LGA contain provisions regarding the organisational structure of a council and the appointment and functions of the General Manager and senior staff. Specific statutory provisions are referred to below.

470. Chapter 13 of the LGA is headed “How are councils made accountable for their actions?”, and Part 2 contains provisions regarding “Strategic Planning”. Specific provisions in this part of the LGA are referred to below.

471. Section 8A of the LGA relevantly provides as follows:

#### **8A Guiding principles for Councils**

Exercise of functions generally

(1) The following general principles apply to the exercise of functions by councils--

...

(c) Councils should plan strategically, using the integrated planning and reporting framework, for the provision of effective and efficient services and regulation to meet the diverse needs of the local community.

...

(2) Decision-making The following principles apply to decision-making by councils (subject to any other applicable law)--

...

- (c) Councils should consider the long term and cumulative effects of actions on future generations.

472. These general principles set out in s.8A referred to above are given a more specific form in Part 2 of Chapter 13 (see [475] below).

473. Section 223 of the LGA relevantly provides as follows:

### **223 Role of governing body**

(1) The role of the governing body is as follows--

...

- (g) to keep under review the performance of the council, including service delivery,
- (h) to make decisions necessary for the proper exercise of the council's regulatory functions,

...

- (l) to be responsible for ensuring that the council acts honestly, efficiently and appropriately.

## **Resource Allocation**

### ***Blackadder Report***

474. To provide expert assistance and opinion in relation to the "resource allocation" and "organisational structure" issues raised in Term of Refence 8, the Inquiry engaged Mr Stephen Blackadder of Blackadder & Associates to, amongst other things, examine the Council's relevant documents and processes, and provide an expert report – The Blackadder Report, Exhibit 56. Mr Blackadder also gave evidence at the Public Hearings. Mr Blackadder was the General Manager (CEO) at Rockdale and Warringah Councils between 1988-2007, and in 2010 was the Acting General Manager of Burwood Council after the Council had dismissed its General Manager. In 2007, he established Blackadder Associates to provide expert advice to Councils concerning, amongst other matters, organisation reviews.

### ***Relevant statutory provisions***

475. Part 2 of Chapter 13 of the LGA imposes a variety of planning obligations on local councils. The following provisions are of relevance:

#### **402 Community strategic plan**

(1) Each local government area must have a community strategic plan that has been developed and endorsed by the council. A community strategic plan is a plan that identifies the main priorities and aspirations for the future of the local government area covering a period of at least 10 years from when the plan is endorsed.

(2) A community strategic plan is to establish strategic objectives together with strategies for achieving those objectives.

(3) The council must ensure that the community strategic plan--

(a) addresses civic leadership, social, environmental and economic issues in an integrated manner, and

(b) is based on social justice principles of equity, access, participation and rights, and

(c) is adequately informed by relevant information relating to civic leadership, social, environmental and economic issues, and

(d) is developed having due regard to the State government's State Plan and other relevant State and regional plans of the State government.

(4) The council must establish and implement a strategy (its "**community engagement strategy**"), based on social justice principles, for engagement with the local community when developing the community strategic plan.

...

#### **403 Resourcing strategy**

(1) A council must have a long-term strategy (called its "**resourcing strategy**") for the provision of the resources required to implement the strategies established by the community strategic plan that the council is responsible for.

(2) The resourcing strategy is to include long-term financial planning, workforce management planning and asset management planning.

#### **404 Delivery program**

(1) A council must have a program (its "**delivery program**") detailing the principal activities to be undertaken by the council to implement the strategies established by the community strategic plan within the resources available under the resourcing strategy.

(2) The delivery program must include a method of assessment to determine the effectiveness of each principal activity detailed in the delivery program in implementing the strategies and achieving the strategic objectives at which the principal activity is directed.

...

#### **405 Operational plan**

(1) A council must have a plan (its "**operational plan**") that is adopted before the beginning of each year and details the activities to be engaged in by the council during the year as part of the delivery program covering that year.

(2) An operational plan must include a statement of the council's revenue policy for the year covered by the operational plan. The statement of revenue policy must include the statements and particulars required by the regulations.

476. In March 2013, the NSW Government (Division of Local Government, Department of Premier and Cabinet) prepared and published guidelines to assist councils in the preparation of their various plans: Integrated Planning and Reporting Guidelines for Local Government in New South Wales (**IP&R Guidelines**): Exhibit 38.
477. The IP&R Guidelines contained information about the integrated planning and reporting framework, the purposes of the various plans required by ss.402 to 405 of the LGA, and the essential elements of each plan.
478. The IP&R Guidelines described the community strategic plan as "*the highest level plan that a council will prepare*", with its main purpose being "*to identify the community's main priorities and aspirations for the future and to plan strategies for achieving these goals*": Exhibit 38, page 7.
479. The resourcing strategy is described as consisting of three components:

- “• *long-term financial planning*
- *workforce management planning*
- *asset management planning.”*

And:

*“... is the point where the council assists the community by sorting out who is responsible for what, in terms of the issues identified in the community strategic plan ... The resourcing strategy focuses in detail on matters that are the responsibility of the Council and looks generally at matters that are the responsibility of others”*: Exhibit 38, page 11.

480. The delivery program and operational plan is described as:

*“The point where the community strategic goals are systematically translated into actions. These are the principal activities to be undertaken by the Council to implement the strategies established by the community strategic plan within the resources available under the resourcing strategy. The delivery program is a statement of commitment to the community from each newly elected council ... All plans, projects, activities and funding allocations must be directly linked to this program. Supporting the delivery program is an annual operation plan. It spells out the details of the program – the individual projects and activities that will be undertaken each year to achieve the commitments made in the delivery program”*: Exhibit 38, page 15.

481. The IP&R Guidelines also make reference to the requirement for local councils to prepare an annual report, which is a “report to the community” rather than to the OLG, which “focuses on the council’s implementation of the delivery program and operational plan”: Exhibit 38, page 21.

482. Also in 2013, the NSW Government produced a comprehensive manual to assist local councils in the preparation of their various plans: **Integrated Planning and Reporting Manual (IP&R Manual)**: Exhibit 76.

483. The IP&R Manual provides detailed information to local councils as to both the essential content of its community strategic plan, its resourcing strategy, its delivery program and its operational plan, and guidance on how to develop such plans, including in relation to time frames.

484. During the public hearings, many of the Council's documents prepared pursuant to the IP&R framework and obligations under the LGA were tendered. These included the Council's Community Strategic Plan (Exhibit 39), its Delivery Program and Operational Plan (Exhibit 65), its State of City End of Council Term Report (Exhibit 66), and various Annual Reports (Exhibit 54).
485. The evidence establishes that the Council has complied with its requirements under Part 2 of Chapter 13 of the LGA. No suggestion was made by anyone that the Council's statutory planning documents were inadequate.
486. Further, no evidence was adduced to suggest that the Council's resource allocation was in any way inappropriate.
487. In 2015, the NSW State Government introduced its "Fit for the Future Reform Program" for Local Government. All councils were required to present an Improvement Program to the Independent Pricing and Regulatory Tribunal (**IPART**) by 30 June 2015: Exhibit 58, page 2.
488. The objective of the Fit for the Future Reform Program was to encourage councils to create plans to demonstrate how they would be sustainable, and an efficient provider of services to the community in the future. The improvement programs required to be provided to IPART obliged Councils to "*submit a proposal to demonstrate how they are or will become fit for the future in terms of being financially sound, operating efficiently and being in a strong position to guide growth and delivery quality services*": Exhibit 58 page 5. IPART delivered its final report entitled "Assessment of Council Fit for the Future Proposals" to the Government in October 2015: Exhibit 58, page 97. Out of 139 council proposals received, only seven were assessed by IPART as being fit for the future. The Blue Mountains Council was one of those councils: Exhibit 58, pages 97, 107, 108 and 177. IPART found that the Council "*satisfies the financial criteria overall. It satisfies the criteria for sustainability, infrastructure and service management and efficiency*": Exhibit 58, page 177.



489. The Council’s financial performance as at the date of the IPART Assessment in October 2015 was considered to be “*poor*”, but its “*predicted financial performance shows significant improvement*”, largely due to the decision to increase rates over the coming years: Exhibit 58, page 108.
490. In his evidence, Councillor Greenhill explained that the Council’s planning to go into a successful response to IPART in 2015 – that is, an assessment of being “fit” for the future – had involved a number of years of work: see generally his evidence at T-642-644 (10/9/19). Mr Blackadder also said in his evidence that IPART had put all councils “through the hoops” and that:

*“... they had to provide very comprehensive responses to the status of their infrastructure and their projections on expenditure. So, yes, IPART, because of their independent nature, I think you can guarantee that they did a very comprehensive and thorough process, so that those councils that have come out with the status of “fit for the future”, have done very well. That’s probably qualified by a need for those councils to continue to stay fit and to ensure that they meet those financial sustainability indicators on an ongoing basis”*: T-605.15-26 (9/9/19).

491. The evidence is consistent then with a finding that in relation to its “resource allocation” the Council has complied with its obligations under s.8A(1)(c) and (2)(c) of the LGA, that the governing body has complied with its obligations under ss.223(1)(g), (h) and (l), and that the Council has complied with its obligations under Part 2 of Chapter 13 of the LGA.

### **Review and determination of the Council’s organisation structure**

492. Part 1 of Chapter 11 of the LGA provides for the organisation structure of councils. Sections 332 and 333 of the LGA are relevantly in the following terms:

#### **332 Determination of structure**

- (1) A council must, after consulting the general manager, determine the following--
- (a) the senior staff positions within the organisation structure of the council,

- (b) the roles and reporting lines (for other senior staff) of holders of senior staff positions,
- (c) the resources to be allocated towards the employment of staff.

(1A) The general manager must, after consulting the council, determine the positions (other than the senior staff positions) within the organisation structure of the council.

(1B) The positions within the organisation structure of the council are to be determined so as to give effect to the priorities set out in the strategic plans (including the community strategic plan) and delivery program of the council.

...

### **333 Re-determination and review of structure**

The organisation structure may be re-determined under this Part from time to time. The council must review, and may re-determine, the organisation structure within 12 months after any ordinary election of the council.

- 493. Section 334 provides for the appointment of the General Manager of Council by the Council. Section 335 sets out all the functions of the General Manager.
- 494. The appointment of Dr Dillon as the Council's current General Manager was dealt with above from [305]. Nothing further need be said.
- 495. In 2011, and 2018-19, the Council conducted significant reviews of its structure. Reviews were conducted in 2013, 2015 and 2017 of a more confined nature.
- 496. The restructure that occurred in 2018-2019 took place following a comprehensive and detailed "organisational performance review" which, as noted above, Mr Blackadder considered to be "*the most comprehensive [he had] ever seen*" and one that, in his view, met "*best practice*": T-562.13 to 563.16 (9/9/19).
- 497. In her submission, Councillor Brown issues a caution in relation to what I assume is the weight that should be afforded to Mr Blackadder's report and his evidence. It is suggested that he is "*well known in local government circles as a consultant who provides recruitment and management services to local councils*": Brown Submission

at [158]. This may be correct, but it has no bearing on the reliability of Mr Blackadder's views. He was asked by the Inquiry to provide it with an expert assessment on certain matters. Experts regularly give evidence before courts and tribunals in circumstances where they earn their living through being engaged by persons, firms and companies who are involved in enterprises relevant to that expert's field of expertise. That the expert is giving evidence in relation to a field that they have expertise in is not a disqualifying factor. It does not create a conflict. Mr Blackadder was retained by the Inquiry to assist it, and he was not retained by the Council or any other interested person.

### ***Mr Blackadder's evidence***

498. In his expert report dated September 2019 (Exhibit 56), Mr Blackadder indicated that in his experience there should generally be six key phases in conducting an organisational review as follows:

*“Phase 1: Project initiation – a resolution of the Council to do so and establishment of clear terms of reference.*

*Phase 2: Establishment of design principles, criteria and assumptions.*

*Phase 3: Detailed review of directorates and functions.*

*Phase 4: Development and refinement of preferred structure option.*

*Phase 5: Presentation of recommended structure for consideration of the Council.*

*Phase 6: Adoption of preferred structure for the purposes of award consultation with staff affected: Exhibit 56, page 8”.*

499. Mr Blackadder also suggested that at the commencement of an organisational structure review, a council might ask a number of questions, as such:

“• *Does the current organisational structure position the Council to achieve its strategic objectives?*

• *How can the structure be organised to better serve customers?*

- *How can enterprise-wide costs be reduced whilst still delivering core services?*
- *Is the Council using alternative service delivery methods to suit its needs – such as shared services with other councillors or organisations, contracting out, or outsourcing, or other delivery methods?*
- *Are decision-making accountabilities in the right place and well defined to support strategy and service delivery?*
- *Is the span of control effective for the leadership needed, and does the organisation have the right capacity and capability in its staff group?": Exhibit 56, page 8.*

500. On the issue of vertical design, Mr Blackadder's advice was that a council should not have more organisational layers than are necessary. Generally, for councils, five layers of decision-making and leadership roles are advisable:

- strategic leadership, being the highest level of strategic leadership and decision-making, which defines and sets the overall organisational strategy and targets;
- divisional leadership, which is also high-level strategic decision-making, and which translates the organisation strategy into the delivery of services, systems and outcomes;
- functional leadership, which involves both strategic and tactical decision-making (tactical in the sense of being the actions that are based on the strategic plans), and which helps design, build, manage and improve services in the systems to optimise performance;
- team leadership, focusing on service delivery and quality as well as tactical decision-making;
- the team members: Exhibit 56, page 9.

501. Mr Blackadder was requested to provide his opinion in relation to the Council's 2018/2019 organisation performance review. He was provided with several relevant

documents, including the report titled “BMCC Improvement Strategy and Action Plan 2019-2021 Including Proposed Organisational Design”, that was presented to the Council meeting on 26 March 2018: Exhibit 57 behind tab marked “2019”, pages 1-18.

502. Mr Blackadder noted that the Council selected a four-stage methodology. The first was: *Stage 1 ... Where are we now as an organisation?* The Council stated that its intent was to identify “*key performance issues, areas needing improvement, areas working well and the current state of the organisation*”: Exhibit 57, 2019 tab, page 2. Mr Blackadder’s view was that this involved a comprehensive analysis of information, and extensive consultation with staff through workshops, open day events, interviews and anonymous submission forms.
503. Stage 2 addressed the question “*Where do we want to be as an organisation?*” This was described by the Council as a “*strategizing stage confirming desired outcomes in relation to identified areas needing improvement*”: Exhibit 57, 2019 tab, page 3. Mr Blackadder stated that this stage “*involved consultation with councillors, the senior leadership team (executive and managers), staff reference group (representing staff from all levels of the organisation, and employees who attended open days and made submissions*”: Exhibit 56, page 25.
504. Stage 3 focused on the question “*How will we get to where we want to be as an organisation?*” This was said by Council to include “*development of high-level action plans to address identified improvement areas*”: Exhibit 57, 2019 tab, page 3.
505. Stage 4 posed the question “*How will we know we are there?*” Mr Blackadder’s view was that this involved “*further comprehensive consultation with councillors and staff*” and “*identified key measures which would be used to track progress and measure success*”: Exhibit 56, page 25.
506. As noted previously, the Council’s review also contained a comprehensive four stage consultation plan, which included consultation with the governing body: Exhibit 57, 2019 tab, pages 15-17. Consultation and communication are hugely important, in Mr Blackadder’s view, for successful organisation reviews. His advice to councils undergoing organisational review is that:

*“The very first thing I do with the general manager is to develop a communication strategy ... it’s the general manager’s task to let the staff know, firstly, what a great opportunity this is; and, secondly, to give some reassurance that the results will be acted upon”*: T-572.10-17 (9/9/19).

507. Mr Blackadder’s opinion in relation to the Council’s review of its organisational structure is as follows:

*“In my view, the process and methodology adopted by the Council in its review of the organisational structure is comprehensive, sound in its thoroughness and respectful of the roles of councillors and employees in undertaking the review ... From the information provided to me it does appear the Blue Mountains City Council has met all the requirements for delivering a sound result. I make no judgment on the merit or otherwise of the structure adopted. Each organisational structure should quite rightly reflect what is required to deliver the needs and aspirations of the local community as expressed in the community strategic plan. There is no “one size fits all” for organisational structures and in my view any structure can be made to work”*: Exhibit 56, page 26.

508. Based on the evidence adduced at the public hearings, the 2018-2019 improvement strategy and structural review by the Council was comprehensive, thorough, and best practice. It clearly was conducted in compliance with all relevant obligations under the LGA referred to in Term of Reference 8.
509. At [172] of her submissions, Councillor Brown has submitted that some councillors *“receive more information than others from the Mayor and that this was primarily determined along political lines”*. She *“suggests”* the distribution of information by the General Manager in this way is not in accordance with the LGA. There is insufficient evidence for any finding to be made in support of these suggestions. Of course, Councillor Brown is not precluded from attempting to make good these assertions at the March-April 2020 hearings.
510. One final matter should be noted about Term of Reference 8. Evidence concerning *“resource allocation”* may be relevant to the asbestos management Terms of Reference.

If so, Term of Reference 8 will also be considered in the context of these terms at the March to April 2020 hearings.

### **RECOMMENDATION – TERM OF REFERENCE 8**

511. Mr Blackadder noted that local councils now had the benefit of comprehensive guidance from the State Government and its Office of Local Government in relation to their planning. The IP&R Guidelines and Manual (Exhibits 38 and 76) are examples of where councils have been provided with significant assistance by the State Government in preparation of their important planning and resource allocation documents.
512. While having noted in his report and in his evidence that there is no “one size fits all” structure that constitutes an appropriate organisation structure for any particular council, Mr Blackadder suggested in his evidence that it would be useful if State Government – probably the OLG – developed guidelines to assist councils in undertaking organisational reviews in a comprehensive, thorough and appropriate manner. In the context of answering a question from Counsel Assisting concerning the Council’s organisational review of 2018/19, Mr Blackadder’s evidence was this:

Q. But these phases are what you consider to be a best practice approach; is that right?

A. I guess what I’m articulating there is, based upon my experience, the sorts of things that an organisation would do and yes, there are no guidelines. Every council approaches this in a different way. There are some common principles that would follow, but there is no guidebook, as there, for example, with the integrated planning legislation, there is a very comprehensive guideline document which, to the credit of government and local government, they have developed together.

The Commissioner: Q. Is that something that is missing from the assistance that the higher level of government gives to local council in terms of not having a guideline about how councils should, in a general way, go about conducting organisational reviews, structural reviews?

A. Commissioner, it is missing. I suppose the question is, in every aspect of the council’s operations, what would be desirable and having some guidelines?

Q. It couldn't be a straitjacket sort of document, I guess that, but could one be created that was of general assistance to all councils that were looking to undertake an organisational structure review?

A. Commissioner, to the credit of the Office of Local Government, they have worked closely with councils to develop numerous guidelines over the years, and I think it is fair to say that there is in local government a real expertise that the government should use, the Office of Local Government should use, and they do that, but here is perhaps an example where it may be useful for some guidelines to be developed using those councils that have been through the process.

Mr Glover: Q. The six phases you identify there, rather than as I have put to you at best practice, provide some operational principles in the approach to a review; is that a better way to describe it?

A. Yes, thank you, yes: T-552.3-42 (9/9/19).

513. The approach adopted by the Council to its 2018-2019 organisational review was one that was not only thorough, but was embraced by the Council staff, no doubt in part because of the comprehensive consultation phases. It was the subject of commendation by Mr Blackadder in his evidence: see [389] above.
514. Given Mr Blackadder's experience in assisting councils with organisational reviews, his suggestion that councils may benefit from a general guideline as to how to approach conducting such reviews (as distinct from a directive as to how a particular organisation structure must look) should not be ignored.
515. As such, I recommend that the Minister ask the Office of Local Government to consider developing a set of general guidelines to assist councils in conducting reviews and redeterminations of their organisational structure. While the OLG will have its own expertise in this area, it could be asked to consider the general phases for such an organisational review as outlined by Mr Blackadder in his report, and to also consider the approach adopted by the Council in its 2018/2019 organisation review and redesign – see above at [498] to [510], and Exhibit 56, especially at pp8-11 and 25-27.

**RICHARD BEASLEY SC**