

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

Established under s.438U of the *Local Government Act 1993*

INTERIM REPORT: TERM OF REFERENCE 4

COMMISSIONER RICHARD BEASLEY SC

Date of Report: 7 May 2019

(1) Introduction

1. On 27 June 2018, the Hon. Gabrielle Upton MP, the then Minister for Local Government, established a public inquiry into the Blue Mountains City Council (“the Inquiry”). The Inquiry was established under the power given to the Minister in s.438U of the *Local Government Act* 1993 (“LGA”).
2. The Terms of Reference require inquiry into nine separate matters relating to the Council’s management of asbestos, and certain employment, working environment and organisational structure issues within Council. The Terms of Reference form Appendix “A” to this Interim Report. At the completion of public hearings and any further investigation, a report is to be provided to the Minister in relation to the Terms of Reference.
3. The text of s.438U(1) of the LGA makes it clear that the Inquiry is into the conduct of the Council – that is, its senior staff - and its governing body (the elected councillors). The issues are to be inquired into by reference to the guiding principles, roles and obligations on the Council and the governing body set out in various provisions of the LGA referred to later in this Interim Report.
4. This Interim Report, and the public hearings conducted on 8, 9 and 12 April 2019, involve only Term of Reference 4. A brief explanation is required concerning this.
5. Asbestos management issues are raised in Terms of Reference 1, 2, 5, 7 and 9. Since November 2017, several inquiries or investigations have been commenced that relate broadly to asbestos management by the Council. These investigations are being conducted by Safe Work NSW, the Environmental Protection Authority, and, more obliquely, the Office of the NSW Ombudsman. They are ongoing as of the date of writing this Interim Report.
6. While there may be no overlap with the Inquiry’s Terms of Reference and any investigation being conducted by these other agencies and regulators, there is a real risk of such overlap. Accordingly, by letter dated 23 October 2018, I advised the Minister

that I would not be conducting any inquiry, or holding any public hearings, in relation to the asbestos management Terms of Reference until I am advised that these other inquiries have been completed.

7. Terms of Reference 3, 6 and 8 relate broadly to employment and organisational structure issues. Public hearings in relation to these Terms of Reference will occur shortly.
8. Term of Reference 4 is in its own category. It requires an inquiry into whether:

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

9. As can be seen from the text of Term of Reference 4, it requires an inquiry into the processes adopted by the Council in engaging the law firm Clyde & Co (and a partner of that firm, Mr Michael Tooma) to undertake an independent investigation into certain asbestos-related incidents involving the Council, and the processes of engaging the law firm McCullough Robertson (and a partner of that firm, Ms Scarlet Reid) to conduct an independent investigation into “employment issues” within Council. For ease of reference, these are generally referred to respectively as the “asbestos issues” and “recruitment issues” in the balance of this Interim Report.
10. The processes of engagement referred to above are to be considered against the obligations, roles and guiding principles imposed on the Council and its governing body in the provisions of the LGA referred to in Term of Reference 4. While this matter is dealt with in more detail later in this Interim Report, it should be noted from the outset that Term of Reference 4 does not require an inquiry that is directly related to the conduct of Mr Tooma or Ms Reid. Nor is it an inquiry into the findings made by them in reports that they authored following their investigations. Any opinions expressed by them in those reports, or conclusions reached by them, are not relevant to Term of

Reference 4. Further, Term of Reference 4 does not require or allow any inquiry into the recommendations made by Mr Tooma or Ms Reid, although those recommendations are part of the evidence tendered at the public hearings.

(2) Public Hearings

11. Public hearings for Term of Reference 4 were held on 8, 9 and 12 April at the National Dispute Resolution Centre. Further public hearings will be held in the local government area of the Council.
12. Prior to the commencement of the public hearings, the Minister appointed Mr Ross Glover of the New South Wales Bar as Counsel Assisting the Inquiry. Mr Angus Broad, of the Office of Local Government, had previously been appointed as Officer Assisting the Inquiry.
13. At the public hearings, Mr Glover tendered a folder of documents of over 500 pages (Exhibit 1), which contained most of the relevant material. Copies of Exhibit 1 were provided to all interested parties or their legal representatives, and published on the Inquiry's website.
14. Pursuant to various summonses to attend that were issued, Mr Glover called the following persons to give evidence:
 - Councillor Mark Greenhill OAM, the current Mayor of the Council;
 - Dr Rosemary Dillon, the current General Manager;
 - Mr Trevor Cork, a principal in the firm McPhee Kelshaw, a firm of solicitors that have been legal advisors to the Council for many years;
 - Ms Scarlet Reid, a partner in the law firm McCullough Robertson;
 - Mr Michael Tooma, a partner in the law firm Clyde & Co.
15. Consistent with a general practice direction that had been prepared for the public hearings, leave was granted to Mr P Singleton of Counsel to appear for the Council.

Leave was also granted to Mr D Jordon SC and Mr R Ranken of Counsel to appear for Mr Tooma and Clyde & Co.

16. I was greatly assisted by Mr Glover, Mr Broad and all Counsel who appeared at the public hearings in understanding the issues involved in Term of Reference 4 for the purposes of preparing this Interim Report.

(3) Chronology of Events

Media reports on asbestos and recruitment issues in early November 2017

17. During 2017, the Blue Mountains Gazette newspaper began reporting on the Council's management of asbestos, which included a report published on 9 July 2017 in the Gazette that SafeWork NSW had directed the Council to develop an Asbestos Management Plan.¹
18. By early November 2017, the Gazette was reporting on concerns regarding asbestos at the Lawson and Springwood Depots. It was reported that at least 10 staff had lodged grievances against the Council in relation to this issue through their union, the United Services Union².
19. On 9 November 2017, certain allegations were raised by Mr Ray Hadley on his 2GB radio program in which he asserted that Council staff had been exposed to asbestos material at both the Lawson Depot, and at a site in Blackheath, and that the Council had only put in place an Asbestos Management Plan in October 2017. It was alleged that the Council's conduct may have also exposed children at a school near one of the sites to asbestos, and that it may be in breach of the Criminal law. It was further alleged by Mr Hadley that the Council had employed, as a Safety Consultant, a person with no experience in safety. It was asserted that this person was on a \$250,000 a year job with the Council for which he had no experience, and that the position did not go to tender. Allegations were generally made as to a close relationship between this Safety Consultant (Mr Mark Mulligan) and a then senior member of the Council's staff, Mr Liddell.

Steps taken by Council from 9 to 14 November 2017 in response to the asbestos and recruitment issue allegations – engagement of Mr Tooma

20. By no later than 9 November 2017, Councillor Greenhill and Mr Cork had formed the view that the allegation raised by the Gazette and Mr Hadley were serious enough that

¹ Blue Mountains Gazette report 9 July 2017, Exhibit 1, pages 1-3.

² Gazette report November 2017, Exhibit 1, pages 4-7.

an urgent independent investigation was required into them. The view taken was that an investigation was required into both the allegations raised concerning the Council's management of asbestos, and in relation to the engagement and subsequent employment of Mr Mulligan.

21. Also on 9 November 2017, Mr Cork contacted Mr Michael Tooma of Clyde & Co, who he considered to be a Occupational, Health and Safety legal expert who had the experience and expertise needed to conduct an investigation into the Council's management of asbestos. On that day, Mr Tooma contacted (via email) Mr Stephen Nicholson of McPhee Kelshaw, one of Mr Cork's co-principals, to advise that Clyde & Co had "no conflicts" in respect to any possible engagement to conduct an investigation into the Council's management of asbestos.³

22. By letter dated 9 November 2017 from Clyde & Co to Mr Cork, Mr Tooma confirmed that he had been instructed by McPhee Kelshaw to "*conduct an independent investigation into recent asbestos-related incidents involving the Blue Mountains City Council*"⁴. This letter outlined Mr Tooma's charge-out rate and that of a special counsel to assist him. In the letter, Mr Tooma estimated Clyde & Co's total legal costs as being approximately \$25,000 plus GST. This proved to be a considerable underestimate. However, at the time of drafting the 9 November 2017 letter, Mr Tooma had no adequate instructions from McPhee Kelshaw concerning the scope of the task he was being asked to undertake. He stated in his evidence at the public hearings that at this early stage he thought that he was only to investigate one asbestos-related incident, which might take up to one week's work. Ultimately, he was engaged to undertake a much wider investigation, involving a much greater number of work hours, which included interviews with over 40 staff members, and the preparation of four detailed reports containing Mr Tooma's findings and recommendations.

Council Meeting 14 November 2017

23. On 14 November 2017, an ordinary meeting of the Council was scheduled. A Mayoral Minute had been prepared prior to this meeting concerning the asbestos and recruitment

³ Exhibit 1, page 16

⁴ Exhibit 1, pages 20-23.

allegations. That minute was prepared on the instructions of Councillor Greenhill. It contained a recommendation that Council resolve to instruct Mr Cork of McPhee Kelshaw to engage independent investigators to investigate and report on the allegations made against the Council concerning its management of asbestos, and in relation to the recruitment issues.

24. Prior the Council meeting of 14 November 2017 taking place, Mr Cork presented a briefing to all Councillors of approximately half an hour. The allegations made against the Council in relation to the asbestos and recruitment matters were raised and Mr Cork recommended to the Councillors that his firm be instructed to engage appropriate independent experts to investigate and prepare reports in relation to those allegations.
25. Later that evening at the meeting of the Council, the Councillors unanimously resolved to instruct "*Trevor Cork of McPhee Kelshaw Solicitors to engage an independent investigator to investigate and report on [the allegations in relation to asbestos management and the allegations in relation to recruitment of staff and consultants] and any further related matters that the Council's solicitor and independent investigator deem merit further investigation*"⁵. The Council, amongst other resolutions, including resolutions relating to Terms of Reference for the independent investigators, resolved to notify Mr Tim Hurst, the Chief Executive Officer of the Office of Local Government of these matters. It also resolved to notify the Independent Commission Against Corruption (ICAC) in relation to the recruitment issues.

Engagement of Ms Reid

26. On 15 November 2017, Mr Cork spoke with Ms Scarlet Reid, a partner in the firm McCullough Robertson, an expert in conducting workplace investigations. As with Mr Tooma, Ms Reid was shortly thereafter engaged by McPhee Kelshaw to conduct an investigation and prepare a report in relation to the recruitment issue allegations that had been made against the Council.

⁵ Exhibit 1, pages 59-60.

15 November letter of advice from McPhee Kelshaw

27. On 15 November 2017, McPhee Kelshaw (Mr Cork) sent to the Council (Mr Greenwood, the General Manager) a detailed letter of advice. A summary of the advice was:

- (a) The allegations that had been made in the media recently concerning the Council could give rise to litigation against the Council as well as the issue of penalty notices, prosecutions and other investigations.
- (b) As a result of this, it was recommended that Mr Cork be instructed to engage investigators to initiate two separate investigations – one in relation to the asbestos issues, and another in relation to the recruitment issues. It was noted that the Council had resolved to do this.
- (c) In relation to asbestos issues, it was noted that allegations had been made in relation to the construction of a new carpark adjacent to the Lawson Mechanics Institute and the storage of asbestos at the Council's Depots at Lawson, Blackheath and Katoomba, and also noted that issues concerning asbestos at the Springwood Works Depot had been raised with Council by SafeWork earlier in the year. It was noted that in the on-air discussions between Mr Hadley of 2GB and Mr Donley of the United Services Union, it was suggested that the Council may be guilty of criminal conduct or gross negligence in relation to asbestos management, and that staff and students of a school may have been exposed to asbestos contaminated materials as a result of the Council's activities.
- (d) In relation to recruitment of senior staff, it was noted that Mr Hadley asserted that Mr Mulligan had been appointed as a Safety Consultant even though he did not have the experience or qualifications for this role and that he had some form of personal or professional links to Mr Liddell, a senior member of staff at the Council. One implication from this is that Mr Liddell, or both Mr Liddell and Mr Mulligan, had some form of conflict in relation to the engagement and employment of Mr Mulligan.

- (e) It was recommended that the independent investigators be engaged through McPhee Kelshaw, in order that the Council could claim legal professional privilege in relation to any reports prepared⁶.
28. By another letter of 15 November 2017 to Mr Greenwood, Mr Cork notified the Council that Mr Tooma had been engaged to conduct the investigation and prepare a report in relation to the asbestos issues⁷. A copy of the Terms of Reference was attached to this letter⁸.
29. By another letter of the same date, Mr Cork advised Mr Greenwood that Ms Scarlet Reid of McCullough Robertson had been engaged by his firm to conduct an independent investigation and prepare a report in relation to the recruitment issues⁹. A copy of Ms Reid's Terms of Reference was also attached to that letter¹⁰.

Terms of Reference for Mr Tooma and Ms Reid

30. The engagement of Mr Tooma to investigate and report on the asbestos issues was formalised by a letter from Mr Cork to Mr Tooma of 16 November 2017. His Terms of Reference were attached to that letter¹¹. It can be noted that the Terms of Reference given to Mr Tooma involved a considerably wider investigation than was mentioned to him when he was first contacted on 9 November 2017. In general terms, he was asked to investigate and report on asbestos issues relating to the Lawson Carpark and Lawson Depot, the Blackheath site, the Solitary Restaurant building, and the Council's Asbestos Management Plan.
31. By letter of the same date, Mr Cork also confirmed Scarlet Reid's engagement to investigate the allegations concerning staff recruitment¹². In that letter, Terms of Reference for Ms Reid were also attached. She was asked to look into matters concerning the appointment of Mr Mark Mulligan as a Safety Consultant to the Council in the calendar year 2016, and then his employment as the Acting Director, Service

⁶ Exhibit 1, pages 71-76.

⁷ Exhibit 1, pages 78-80.

⁸ Exhibit 1, pages 81-84,

⁹ Exhibit 1, pages 85-87.

¹⁰ Exhibit 1, pages 88-89.

¹¹ Exhibit 1, pages 100-106.

¹² Exhibit 1, pages 125-129.

Delivery with the Council in November 2017. The matters she was to inquire into were the processes of both engaging Mr Mulligan as a Safety Consultant and then subsequently employing him, and whether he was qualified to undertake those roles, and whether there was any inappropriate influence by any other member of Council in relation to his appointment. She was also asked to investigate the appointment of Mr John Hargraves in an acting position on the Council.

32. Subsequent to 16 November 2017, and until early February 2018 when further allegations were made by Mr Hadley on his radio show (discussed below), Mr Tooma, Ms Reid and their assistants proceeded with their investigations and to prepare their reports. As discussed in more detail below, Mr Tooma ultimately prepared three Interim Reports, and a Final Report dated March 2018. Ms Reid prepared a Final Report of March 2018. Those reports were not tendered at this Public Inquiry. They were not relevant, as Term of Reference 4 does not require (or allow) an inquiry into the merits or otherwise of the investigations conducted by Mr Tooma and Ms Reid, or their final reports. Further, there is an unresolved claim by the Council of legal professional privilege in relation to those reports. That was not a matter that required a ruling to be made on for the purposes of this Interim Report. It should be noted, however, that in evidence given by witnesses in relation to the reports prepared by Mr Tooma and Ms Reid, the consensus was that they were the result of a detailed and thorough investigation, and that they are in general high quality work.

Amended Terms of Reference for Mr Tooma

33. On 12 December 2017, the Council in a unanimous vote (Councillor Brown was not in the Chamber) resolved to amend Mr Tooma's Terms of Reference. The Amended Terms were sent to Mr Tooma in a letter from McPhee Kelshaw dated 13 December 2017¹³.
34. As indicated by Mr Tooma and Mr Cork in their oral evidence at the Public Hearings, Mr Tooma's Terms of Reference were amended because subsequent to his initial engagement, the Council had received further improvement Notices from SafeWork, and had also been served with Clean-up Notices from the Environmental Protection

¹³ Exhibit 1, pages 151-154.

Authority. The broadened Terms of Reference required Mr Tooma to investigate the Council's response to the Inquiries by SafeWork and these various Notices, and increased the number of properties involved in his investigation.

12 to 19 December 2017 – First Suspension Notice and Council response

35. On the same date (12 December 2017) the Minister issued to the Council a Notice of Intention to Issue a Suspension Order (“the First Suspension Notice”).
36. In the week that followed, the Council worked on preparing a response to the Minister's First Suspension Notice. By this time, Dr Rosemary Dillon had taken over as the Council's General Manager, Mr Greenwood having retired on 17 November 2017.
37. An extraordinary meeting of Council was convened on 19 December 2017 to finalise Council's response to the Minister's First Suspension Notice.
38. At that meeting, the Council resolved to respond to the Minister's First Suspension Notice by offering as an alternative that she issue a Performance Improvement Order to *“improve its management of asbestos and appoint a temporary advisor to the Council with the requisite experience in safety and asbestos management”*.¹⁴
39. By letter dated 20 December 2017, signed by the Mayor Mr Greenhill and the Deputy Mayor Mr Van der Kley, the Council asked the Minister to impose a Performance Improvement Order, rather than suspend it. Enclosed with that letter was a draft terms Performance Improvement Order for the Minister's consideration,¹⁵ and a detailed submission. The submission contained the Council's responses to the allegations made against it, and in relation to Notices served upon the Council by both the EPA and SafeWork, and including the Council's establishment of an asbestos management taskforce structure. Also attached to the submission was a copy of the Council's Asbestos Management Plan.¹⁶

¹⁴ Exhibit 1, page 187

¹⁵ Exhibit 1, pages 191-200

¹⁶ Exhibit 1, pages 201-313

Performance Improvement Order

40. By letter dated 22 December 2017 to Councillor Greenhill, the Minister indicated that she had determined to issue a Performance Improvement Order rather than proceeding with suspension.
41. By 18 January 2018, the Council had indicated to the Minister that it accepted the terms of the proposed Performance Improvement Order, and on 22 January 2018, the Minister issued a Performance Improvement Order under s.438A of the LGA. Amongst other actions required by the Performance Improvement Order, the Council was required to implement all of the recommendations arising from both Mr Tooma's investigation, and Ms Reid's.¹⁷

Allegations of conflict of interest made by Mr Hadley in February 2018

42. On 13, 14 and 15 February 2018, Mr Hadley made further allegations on his radio show, this time in relation to the investigation being conducted by Mr Tooma. An audio tape of Mr Hadley's allegations was tendered by Counsel Assisting at the public hearings.¹⁸ There is no need to detail all the matters alleged by Mr Hadley, but in summary he made the following assertions:
- (a) that Mr Mulligan oversaw asbestos management at the Council;
 - (b) Mr Mulligan was the Council's Chief Safety Officer;
 - (c) Mr Mulligan and Mr Tooma were "best mates";
 - (d) that Mr Tooma was "basically investigating Mr Mulligan";
 - (e) that the performance of Mr Mulligan was the subject of Mr Tooma's investigation;

¹⁷ Exhibit 1, page 330

¹⁸ Exhibit 10

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

43. As will become clear from the findings that follow, except for (h) above, the assertions made by Mr Hadley were not factually accurate. Further, the Minister had done something – she had issued a Performance Improvement Order on 22 January 2018. That was an appropriate decision by the Minister in the circumstances. Further, at least in relation to the matters the subject of Term of Reference 4, the Council’s conduct could not in any way be described as “recalcitrant”.

Council’s initial response to Mr Hadley’s conflict allegations

44. The Council took immediate steps to investigate the allegations made by Mr Hadley, commencing with the allegations made by him on 13 February 2018. First, Mr Cork prepared a letter from his firm to Mr Grant Gleeson, the Director of Legal Services at the Office of Local Government. In that letter, Mr Cork advised Mr Gleeson that Mr Mulligan had been engaged by the Council in the period August 2016 to November 2016 as a safety consultant but had “*not [been] engaged to develop the Council’s asbestos management plan or asbestos management policies*”.¹⁹

45. The letter by Mr Cork to Mr Gleeson also advised that Mr Mulligan had been employed as the Acting Director of Service Delivery on 1 November 2017 but his employment

¹⁹ Exhibit 1, page 334

had ceased on 12 February 2018. Further, the Council had not been advised by anyone, including Mr Tooma, of any prior professional relationship between Mr Mulligan and Mr Tooma. In short, the Council first became aware of it when Mr Hadley made his allegations on 13 February 2018. Mr Cork also asserted in the letter that there was “*no basis for concluding that Mr Tooma’s prior professional involvement with Mr Mark Mulligan disqualified Mr Tooma from conducting the investigation*”.²⁰

46. Enclosed with the letter was a preface to the 2017 edition of Mr Tooma’s Due Diligence book, which makes no reference to Mr Mulligan. Also attached to Mr Cork’s letter was an email from Mr Tooma to Mr Cork dated 13 February 2018.²¹ In it, Mr Tooma detailed his professional and personal relationship with Mr Mulligan. Mr Mulligan had been the Chief Safety Officer of Essential Energy, at a time when the firm Mr Tooma was a partner of was providing legal services to that company. Mr Tooma shared a close professional relationship with Mr Mulligan, and a friendship that was related to that professional relationship. For a short period of time in 2008/2009, they owned shares in the same racehorse together. Mr Tooma had provided a reference for Mr Mulligan for the purposes of him seeking employment with the Council, but did not recall being contacted by the Council in relation to that reference. In his oral evidence, Mr Tooma agreed that he probably had not been called by the Council, as that was something that he was likely to remember.
47. Further, it would appear that from the time Mr Mulligan left Essential Energy in 2013, to nearly 5 years later when Mr Tooma interviewed Mr Mulligan at the Council for the purposes of obtaining background facts, Mr Tooma and Mr Mulligan had no contact with each other except for Mr Mulligan asking Mr Tooma for a reference. Mr Tooma concluded his email by saying that he was “*happy to discuss the content of this email with the Minister’s office, the USU and/or SafeWork NSW if my independence is of concern to them*”.
48. Mr Cork’s letter and Mr Tooma’s email were enclosed with a covering letter from Councillor Greenhill, and Dr Dillon to the Minister dated 13 February 2018. In that

²⁰ Exhibit 1, page 336

²¹ Exhibit 1, pages 340-341

letter, Council suggested that if the Minister had any “residual concerns”, further options included:

- “1. *reviewing the status of the Tooma inquiry, assessing whether or not it should be completed by Mr Tooma or someone else as advised; and*
2. *the appointment of a Special Advisor by the OLG to work with the Council given the challenges before us.*”²²

49. At this stage, with the allegations of Mr Hadley freshly made, and without a full appreciation of all of the facts, nor perhaps having the time to fully absorb them, Councillor Greenhill had a discussion with Mr Hurst, the Chief Executive of the Office of Local Government, in which he confessed to having had his confidence “shaken” in Mr Tooma’s investigation. That was an understandable feeling in the immediate aftermath of Mr Hadley’s 13 February broadcast. It may have been that he also said that he and Dr Dillon had lost confidence in the investigation, or that Mr Hurst (understandably) interpreted what he was being told as that.

14 February 2018 – Second Notice of Intention to Suspend

50. By letter to Councillor Greenhill dated 14 February 2018, in response to the Council’s letter of 13 February 2018, the Minister gave notice pursuant to s.438K of the LGA that it was her intention to issue a Suspension Order to suspend the Council for 3 months and appoint an interim administrator under s.438M of the LGA (“Second Notice of Intention to Suspend”).
51. The Minister explained that integral to her decision to issue a Performance Improvement Order in December 2017 (the order was in fact made on 22 January 2018 after the terms were agreed), rather than suspend the Council, was the integrity of the processes that Council had initiated – in particular, the two independent investigations of Mr Tooma and Ms Reid. She then indicated that his had now been:

“...called into question as a result of a pre-existing relationship, apparently both professional and social in nature, between Michael

²² Exhibit 1, page 333

Tooma of Clyde & Co and the Council's [then] Chief Safety Officer Mr Mulligan which I note from Council's letter was not disclosed to it."

52. Pausing there, as will be explained later, Mr Mulligan was not employed as the Council's Chief Safety Officer, nor had he had a professional or social relationship with Mr Mulligan for nearly 5 years.
53. The Minister then went on to explain that she "*remained concerned that the processes adopted by Council did not ensure that prior associations were disclosed to the Council when engaging Mr Tooma*" and that both the Council's General Manager Dr Dillon and Councillor Greenhill had told the Chief Executive Officer of the Office of Local Government that they had "*lost confidence in the investigation*".²³ The Council was invited to provide a submission in response.

Council response to Mr Hadley's allegation and Second Notice of Intention to Suspend

54. By letter dated 16 February 2018 to Dr Dillon and Councillor Greenhill, Mr Cork provided a detailed response to the allegations made by Mr Hadley on 13-15 February 2018. This letter also provided a useful chronology of events.²⁴ The important matters outlined in this letter were as follows:
- (a) On 9 November 2017 Mr Tooma had confirmed to McPhee Kelshaw that he had no conflicts of interest in relation to undertaking an investigation into the Council's asbestos management.
 - (b) Mr Tooma did not disclose to Mr Cork that he had previously worked in association with Mr Mulligan when Mr Mulligan was with Essential Energy, but that Mr Mulligan's employment with that company ended in 2012.
 - (c) Mr Mulligan was engaged as a third-party consultant with the Council in relation to its work, health and safety policies from August 2016 to 23 December 2016, but it did not appear as though he had any "*significant role in assisting the Council develop its policies in relation to asbestos management*".

²³ Exhibit 1, page 343

²⁴ Exhibit 1, pages 358-366

- (d) Mr Mulligan was employed by the Council as temporary Acting Director Service Delivery from 1 November 2017. Mr Tooma was nominated as one of his referees.
- (e) Mr Mulligan was not and never has been the Chief Safety Officer of the Council.
- (f) In the period Mr Mulligan was employed by the Council as Acting Director Service Delivery, his *“responsibilities in that position did not include ... the development and implementation of the Council’s policies in relation to asbestos management”*.
- (g) The Council’s *“Asbestos Management Plan was finalised and adopted in the period May 2017 to November 2017”*, hence, *“Mr Mulligan played no part in that process”*.

More details on Mr Mulligan’s role at Council

- 55. In relation to the above, it is clear that Mr Mulligan was not in fact ever employed as the Chief Safety Officer of the Council. As Dr Dillon explained in her oral evidence, after the time that Mr Mulligan was employed by the Council on 1 November 2017, a person by the name of Allen Harris was engaged (in December 2017) as the Chief Safety Officer for the Council for a 3-month period. He was then employed in that position on a two-year contract early in 2018. A bundle of 94 pages of documents relevant to the appointment of Mr Harris as Chief Safety Officer was tendered at the public hearings and became Exhibit 11.
- 56. Further, with respect to whatever role Mr Mulligan had in relation to workplace health and safety when engaged as a consultant by the Council in the period August 2016 to December 2016, he had no role in relation to asbestos management generally, or preparation of the Council’s Asbestos Management Plan. A bundle of several hundred pages of documents containing Mr Mulligan’s work product for the period in which he was engaged by the Council as consultant was also tendered at the public hearing and marked as Exhibit 12. It establishes that in the time he was engaged as a consultant in 2016, he had no role in advising the Council in relation to specific matters of asbestos

management or in developing its Asbestos Management Plan. As such, he had no role in anything that was germane to Mr Tooma's Terms of Reference for the investigation that he was asked to conduct.

57. At about the same time that Mr Cork was drafting his letter for Councillor Greenhill and Dr Dillon, Dr Dillon was conducting her own investigations in relation to whether Mr Mulligan had anything to do with the Council's asbestos management during the period either that he was a consultant in 2016, or from the time he was employed as Acting Director Service Delivery from 1 November 2017. She asked Ms Megan Te Bay, the Acting Group Manager of People and Systems at the Council, to look into this matter.
58. Dr Dillon confirmed in her oral evidence that Ms Te Bay's analysis concluded that Mr Mulligan had nothing to do with asbestos management or any area that would be the subject of Mr Tooma's investigation during the period that he was a consultant.²⁵ Mr Mulligan's responsibilities as a consultant to the Council centred on the Safety Improvement Program, and to improve safety management systems of the Council.
59. Mr Tooma was also asked during this period by Mr Cork to outline why he had interviewed Mr Mulligan as part of his investigation on 12 January 2018. Mr Tooma sent a letter to Mr Cork dated 19 February 2018 in which he explained why this was so.²⁶ The interview with Mr Mulligan in fact had nothing to do with asbestos management. The Council was divided into several directorates: Director Service Delivery; Director City and Community Outcomes; Director Development and Customer; Group Manager People and Systems; Group Manager Integrated Planning and Finance.²⁷ Mr Tooma simply wanted to ask Mr Mulligan some questions about how those directorates operated so that he had a better understanding of the responsibilities of senior people within each of them.

²⁵ Exhibit 1, pages 367-378

²⁶ Exhibit 1, page 379

²⁷ Exhibit 1, page 499

Maddock's Report

60. Dr Dillon at this stage had also engaged Maddocks Lawyers to conduct an inquiry and provide their legal response to the following two questions:

- (1) whether processes implemented by Council's solicitor, Mr Cork, in engaging Mr Tooma as an independent advisor were adequate and robust enough in the circumstances; and
- (2) whether Mr Cork was able to reasonably rely upon the answers given by Mr Tooma.

61. The conclusion reached by Maddocks was that:

*"It is our opinion that Mr Cork followed a reasonable process in his engagement of Mr Tooma. Further, it is our opinion that it was reasonable in the circumstances for Mr Cork to rely on Mr Tooma's representations that he was free from conflict."*²⁸

Council extraordinary meeting 20 February 2018

62. The Council held an extraordinary meeting on 20 February 2018. Councillor Greenhill had a Mayoral Minute drafted for the purposes of this meeting. The most important matters arising from that Mayoral Minute are the following:

- (a) Mr Mark Mulligan never worked for the Council as Chief Safety Officer.²⁹
- (b) *"Mr Mulligan was never responsible for controlling the investigation of asbestos management or for developing the Council's Asbestos Management Plan."*³⁰
- (c) The project scope for Mr Mulligan's consultancy was in fact *"to review and approve the Safety Management System (SMS) at the Blue Mountains City*

²⁸ Exhibit 1, page 384

²⁹ Exhibit 1, page 399

³⁰ Exhibit 1, page 400

(BMC) in response to the findings of the Willis review completed in October 2015". The key recommendation of the Willis review was that the Council introduce a robust safety management system.³¹

(d) The project description for Mr Mulligan to provide services to the Council when contracted as a consultant (described as phase 1) involved 10 areas, none of which directly related to asbestos management.³²

(e) *"Mr Mulligan was not at any time during his 2016 consultancy a member of any asbestos working group within the Council."*³³ This statement is supported by numerous other documents which confirm that Mr Mulligan was never a member of any relevant asbestos working group with the Council either as a consultant or as an employee.

(f) Mr Mulligan left his employment with Essential Energy in 2012. His professional and personal relationship with Mr Tooma essentially ended at that time.³⁴

63. The Mayor also noted in the course of the Mayoral Minute that when he first spoke to the Office of Local Government after Mr Hadley's allegations were first aired on 13 February 2018, he did advise the Chief Executive that his confidence had been "shaken by the allegations".³⁵ He now took the view, it would appear, that no conflict existed. He confirmed to the other councillors that as an employee of the Council, Mr Mulligan had no responsibility for development of the Asbestos Management Plan or for the Council's response to asbestos management issues.³⁶

64. In the Mayoral Minute, Councillor Greenhill suggested that the Council make a submission to the Minister in response to her Second Notice of Intention to Suspend, offering three ways of going forward. One involved Mr Tooma completing his

³¹ Exhibit 1, page 400

³² Exhibit 1, page 401

³³ Exhibit 1, page 402

³⁴ Exhibit 1, page 402

³⁵ Exhibit 1, page 406

³⁶ Exhibit 1, page 407

investigation. The other involved that investigation being completed by another partner of Mr Tooma's, Ms Alena Titterton. The third option was to appoint a new investigator, although the Mayoral Minute notes that "*the organisational impact of this step may be very significant*". In her oral evidence at the public hearings, Dr Dillon confirmed that more was being referred to here than the extra cost burden this would have placed on Council. The asbestos management investigation, but in particular the allegations that had been made by Mr Hadley in both November 2017 and February 2018, had a detrimental effect on the morale of staff generally in the Council, and had also had a negative impact on certain staff. This was a matter of concern to her. She was worried that the appointment of a new investigator, leaving aside the issue of costs, would delay and extend out what was already proving to be a somewhat traumatic process for Council staff.

65. At the extraordinary meeting of Council of 20 February 2018, by a majority of Councillors (Councillors Christie, Brown and Schreiber against), the Council resolved to make a submission to the Minister generally in accordance with the Mayoral Minute, and noting that Mr Tooma by this stage had delivered his first interim report.³⁷ It should be noted however that the Councillors who voted against this resolution had previously proposed their own set of resolutions, which included a resolution to respond to the Minister in accordance with the Mayor Minute.

Memorandum on Mr Mulligan's responsibilities

66. The following day Dr Dillon received a memorandum from Ms Te Bay outlining in further detail Mr Mulligan's responsibilities both as a consultant and employee.³⁸ In that memorandum Ms Te Bay advised Dr Dillon that during the time of his consultancy in 2016 "*the responsibility of the Asbestos Management Plan was undertaken by another directorate and was not assigned to Mr Mulligan*". In relation to his employment, Ms Te Bay noted that 6 months prior to Mr Mulligan being employed by the Council, in June 2017, a project team had been established for the development of the Asbestos Management Plan. In December 2017, a taskforce was developed for further development and management of the Asbestos Management Plan. An asbestos

³⁷ Exhibit 1, pages 441-442

³⁸ Exhibit 1, pages 444-446

response team was also established in December 2017. Mr Mulligan was at no time a member of any of these teams. His only responsibility was “to assist the Chief Safety Officer in interviewing and selecting appropriate staff of the asbestos response team in December 2017”.³⁹ However, “the oversight and responsibility of managing the Asbestos Management Plan was not that of Mr Mulligan’s directorate”.

Council submission to the Minister on Second Notice of Intention to Suspend

67. Under cover of an email dated 22 February 2018, the Council provided its submission to the Minister in relation to her Second Notice of Intention to Suspend. That submission outlined several the factual matters referred to above.⁴⁰ In particular, the Minister was advised that:

*“Mr Mulligan was not responsible for development of the Council’s Asbestos Management Plan and his work did not specifically focus on the Council’s overall asbestos response. Mr Tooma was not required to assess, evaluate or judge Mr Mulligan or his performance. Therefore, Mr Tooma did not have a conflict of interest.”*⁴¹

68. Councillor Greenhill and the Deputy Mayor Councillor Van de Kley advised the Minister also in this letter that “the Mayor, in common with other elected councillors, considers that Mr Tooma’s investigation should continue and he has confidence in Mr Tooma”.⁴² When asked about this statement in oral evidence, Councillor Greenhill confirmed that, in his view, at least a majority of the governing body now had confidence in Mr Tooma given that they had been advised of all of the facts, and wanted his investigation to continue.
69. Certain court matters intervened after this. Also on 22 February 2018, the Council sought to injunct the Minister from suspending it. A single judge of the Supreme Court granted that injunction. In June, however, the Court of Appeal allowed the Minister’s appeal in relation to that order, and set aside the injunction: *Minister for Local Government v Blue Mountains City Council* [2018] NSWCA 133. No further action has been taken to suspend the Council.

³⁹ Exhibit 1, page 445

⁴⁰ Exhibit 1, pages 551-561

⁴¹ Exhibit 1, pages 555-556

⁴² Exhibit 1, page 557

(4) Relevant Statutory Context

70. Term of Reference 4 requires a consideration as to whether the Council’s process of engaging Clyde & Co and McCullough Robertson to conduct the independent investigations by Mr Tooma and Ms Reid was in accordance with the guiding principles set out in ss.8A(1)(b), (h), (2)(e) and 8B of the LGA, and in respect to the governing body in ss.223(1)(c) and (l) of the LGA. Those statutory provisions are relevantly as follows:

“8A Guiding principles for councils

Exercise of functions generally

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

...

(b) Councils should carry out functions in a way that provides the best possible value for residents and ratepayers;

...

(h) Councils should act fairly, ethically and without bias in the interests of the local community;

...

Decision-making

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

...

(e) Council decision-making should be transparent and decision-makers are to be accountable for decisions and omissions.”

71. The only part of s.8B which appears to be relevant is the following:

“8B Principles of sound financial management

The following principles of sound financial management apply to councils:

(a) Council spending should be responsible and sustainable, aligning general revenue and expenses.”

72. Section 223(1)(c) and (l) are relevantly in the following terms:

“223 Role of governing body

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

...

(c) to ensure as far as possible the financial sustainability of the council,

...

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

(5) Findings

73. As is clear from the relevant statutory provisions, Term of Reference 4 requires the consideration of the Council's process of engaging Clyde & Co and McCullough Robertson Lawyers to conduct the independent investigations they did against what can be described as the following obligations:
- (a) the obligation to carry out functions in a way that provides the best value for residents and ratepayers;
 - (b) the obligation to act fairly and ethically in the interests of the local community;
 - (c) the obligation that decisions be transparent and that decision-makers be accountable for those decisions;
 - (d) aligned to (a) above, the obligation that the Council spend money responsibly;
 - (e) aligned to (a) and (d), the obligation that the governing body ensure the financial stability of the Council, and ensure that it acts honestly, efficiently and appropriately.
74. In his written submissions provided at the conclusion of the public hearings, Counsel Assisting submitted that Term of Reference 4 in its proper statutory context required a determination of the following issues:

Engagement of Clyde & Co for the Tooma investigation

Issue 1: Was the decision to appoint Mr Tooma reasonable?

Issue 2: Was Mr Tooma an appropriate person to conduct the investigation?

Issue 3: Was it appropriate for Mr Tooma to be engaged through McPhee Kelshaw?

Issue 4: Did the costs of the investigation raise any matters of concern regarding the statutory roles and functions of the Council and governing body?

Issue 5: Did the Council manage the issue of the alleged conflict of interest (if there was one) appropriately and in accordance with the relevant provisions of the LGA? (It should be noted that this issue requires a determination as to whether there was in fact a conflict of interest).

75. The issues of relevance as submitted by Counsel Assisting are accepted. For the reasons that follow, I have also accepted the substance of Counsel Assisting's submissions on each issue.

Issue 1: Was the decision to appoint Mr Tooma reasonable?

76. The issues concerning asbestos management raised in the Gazette and by Mr Hadley on his radio show in November 2017 were matters that the Council was required to take seriously. Beyond that, the concerns that the United Services Union had in relation to the Council's management of asbestos were also matters that the Council was required to respond to urgently. This Term of Reference does not require any investigation or finding as to whether there was any mismanagement by the Council in relation to the asbestos issues. Clearly, though, there were serious issues to be investigated in relation to the management of asbestos at various Council owned sites. These issues had resulted in the involvement of both the Environmental Protection Authority and SafeWork NSW.
77. It was reasonable in those circumstances for the Council to decide that an investigation was required into these matters. Given that the issues of alleged criminality and risk to public health had also been raised on Mr Hadley's radio program, it was also appropriate that any investigation be conducted by someone independent of Council. It may in fact, in all of the circumstances, have been inappropriate conduct by the Council and its governing body not to appoint an independent investigator to inquire into these issues. There is nothing unusual or uncommon about corporate entities or government departments or agencies appointing experts to provide advice in relation to work, health and safety issues. Mr Tooma has been involved in many such investigations himself.

78. The decision then by the Council to decide to engage an independent person to conduct an investigation into the Council's handling of asbestos generally was reasonable, and in accordance with the relevant provisions of the LGA referred to in Term of Reference 4.
79. It should also be noted that the Council's decision to appoint an independent investigator in relation to its management of asbestos was expressly endorsed by the Minister subsequent to that decision being taken. The Performance Improvement Order made by the Minister on 22 January 2018 required the Council to adopt the recommendations made in Mr Tooma's reports (and also Ms Reid's in relation to the recruitment issues).

Issue 2: Was Mr Tooma an appropriate person to conduct the investigation?

80. Mr Tooma is an experienced legal practitioner who has a high level of expertise in relation to work, health and safety. He has conducted many investigations, and his appointment to conduct an investigation into the handling of asbestos by the Council was welcomed by the Union. He is clearly a leader in his field of expertise. It could not seriously be argued that he was not a qualified and appropriate person to conduct the investigation he was engaged to conduct.

Issue 3: Was it appropriate for Mr Tooma to be engaged through McPhee Kelshaw?

81. McPhee Kelshaw are one of the Council's panel solicitors. They have a long history of providing advice to the Council. Mr Cork is a highly-experienced practitioner. The Council undoubtedly has confidence in both the firm and in Mr Cork.
82. It was natural for the Council to turn to Mr Cork at the time that the asbestos issues were first publicised. It was equally prudent of the Council to accept his advice and guidance as to who would be an appropriate person to conduct any independent investigation. It was prudent of the Council to accept Mr Cork's advice that an independent investigator be appointed, and that the independent investigator should be engaged by his firm on behalf of the Council.

83. One of the reasons given for Mr Cork's firm being the entity that engaged Mr Tooma was so that the Council would have the opportunity to claim legal professional privilege in relation to any reports prepared by Mr Tooma. Whether or not there is privilege in relation to those reports, or whether or not it has been waived, does not need to be decided for this Term of Reference. However, it was perfectly appropriate for Mr Cork to give this advice, and appropriate for the governing body to give consideration to its ability to claim privilege over any reports prepared by Mr Tooma. Doing so was to act in accordance with the relevant provisions of the LGA. Not giving consideration to this may have been to have breached one or more of those provisions, given the potential for this issue to expose the Council to at least the risk of some form of legal claim being made against it.
84. There was therefore nothing unusual or inappropriate for Clyde & Co to be engaged for the Council by McPhee Kelshaw. This was a prudent step. In addition to anything else, it enabled an experienced legal practitioner (Mr Cork) to manage the process on the Council's behalf rather than a senior person at Council such as the General Manager having to manage Clyde & Co and Mr Tooma's investigation directly. Given the complexities involved, this was appropriate, and added another layer of independence.

Issue 4: Did the costs of the investigation raise any matters of concern regarding the statutory roles and functions of the Council and governing body?

85. In round terms, Clyde & Co billed the Council about \$600,000 for the work performed by Mr Tooma, including the preparation of his four reports. On any view, this was an expensive exercise for the Council.
86. However, given the complexity of the task, the seriousness of the matters being investigated and the breadth of Mr Tooma's Terms of Reference (which were clearly all matters that by November 2017 required investigation), it was always going to be a costly exercise for Council. It could have been costlier. In his oral evidence, Mr Tooma explained that his firm wrote off about \$600,000 in work in progress, largely it would seem because of the uncertainty (and perhaps more) created by the allegations made by

Mr Hadley on 13-15 February 2018 which resulted in the Minister issuing the Second Notice of Intention to Suspend.

87. There is no issue as to whether either Mr Tooma's charge-out rate or that of Clyde & Co was anything other than the market rate for a practitioner of his experience and expertise, nor was there any suggestion that the charge-out rates of any other persons from Clyde & Co that offered Mr Tooma assistance were not market rates.
88. Part of Mr Tooma's reporting process involved him making many recommendations to the Council. Without a detailed investigation such as that conducted by Mr Tooma, it is unlikely that he would have been able to have made the recommendations that have now been accepted by the Council. In the context of the circumstances facing the Council in November 2017, it cannot then be said that the cost of engaging Mr Tooma was not a necessary spend by the Council. In finding that, it should be noted that it is not part of this Term of Reference to determine whether, in all the circumstances, the Council should have allowed the position to be reached where an investigation of the kind conducted by Mr Tooma was necessary. No finding one way or the other is made in relation to that issue now.
89. The issue of cost in relation to Mr Tooma is premised upon the fact that in the circumstances facing the Council by November 2017, it was appropriate and necessary to engage someone like Mr Tooma to conduct the investigation that he did, and to prepare the reports that he did. Looked at in that context (and that context alone), it cannot be said that the cost involved in engaging Mr Tooma was not in accordance with any of the relevant provisions of the LGA.

Issue 5: Did the Council manage the issue of the alleged conflict of interest (if there was one) appropriately and in accordance with the relevant provisions of the LGA?

90. Mr Tooma told Mr Cork on 9 November 2017 that Clyde & Co did not have a conflict of interest. Mr Cork and the Council were entitled to rely on that advice.

91. This means that no issue arises in relation to any conflict of interest at least up until 13 February 2018, when Mr Hadley began making the allegations made by him that are referred to in [42] above.
92. The Council's response in relation to the allegations made by Mr Hadley on 13-15 February 2018 was to ascertain what the true facts were.
93. Unfortunately, in the initial aftermath after Mr Hadley's allegations that were aired on 13 February 2018, Councillor Greenhill did have at least his confidence in Mr Tooma's investigation shaken, and said this or words to that effect to the Chief Executive of the Office of Local Government. That in part set the ball rolling to the Minister issuing the Second Notice of Intention to Suspend the Council.
94. It is equally unfortunate that of the significant allegations made by Mr Hadley from 13-15 February 2018, none were factually accurate.
95. Mr Tooma and Mr Mark Mulligan were not in the period August 2016 to December 2016 (when Mr Mulligan was a consultant to the Council), nor in the period November 2017 to February 2018 (when Mr Mulligan was an employee of the Council) "best mates". They had no doubt enjoyed a close working relationship in the period 2008-2012 at the time when Mr Mulligan was employed by Essential Energy, and Mr Tooma was providing legal services to that company.
96. It is true that in the foreword to his 2012 Due Dilligence book, Mr Tooma referred to Mr Mulligan as his "good friend". However, their professional and personal relationship ended in about 2012, and with the exception of Mr Mulligan asking Mr Tooma for a reference at some time during 2017, had not been resumed. However, in the circumstances outlined below, it would not matter if in fact Mr Tooma and Mr Mulligan could be described as "best mates".
97. Mr Tooma was engaged by McPhee Kelshaw to conduct an investigation into the Council's handling of asbestos issues according to defined Terms of Reference. Those Terms of Reference, and the Amended Terms of Reference, are Appendix B and C to this Interim Report. They required no investigation into the services provided by Mr

Mulligan during the time he was consultant to the Council, or in relation to his work while an employee of Council from November 2017 to February 2018.

98. Mr Mulligan was not involved in asbestos safety issues for the Council when he acted as a consultant to it, nor was he involved in the preparation of the Council's Asbestos Management Plan. When he was employed in November 2017 as the Acting Director of Service Delivery, he was not a member of any asbestos management taskforce or group. He was again not involved in the preparation of, or implementation of, the Council's Asbestos Management Plan. To the extent that Mr Hadley asserted that Mr Mulligan was the Chief Safety Officer of the Council with any form of responsibility in relation to the preparation or implementation of the Asbestos Management Plan for the Council, Mr Hadley was wrong.
99. To the extent that Mr Hadley also asserted that Mr Tooma was investigating Mr Mulligan, this was also inaccurate. No part of Mr Tooma's investigation required him to investigate any conduct, actions or advice by Mr Mulligan. In those circumstances, it would not have mattered whether Mr Mulligan and Mr Tooma were in fact "best mates", or indeed relatives. It would not have created a conflict of interest.
100. In short then, for the reasons outlined above, Mr Tooma had no conflict of interest. As such, there was no conflict of interest to be managed by the Council. Although not strictly part of Term of Reference 4, however, it should be noted that the Council's actions and conduct after it was asserted that Mr Tooma had a conflict of interest were at all times appropriate. Despite the initial shock, the Council ascertained the true facts. It relayed those facts to the governing body (through the Mayoral Minute and other documents), and in turn informed the Minister of the position. It correctly submitted to the Minister that Mr Tooma did not have a conflict of interest, and that he should continue with his investigation. As an alternative, it was suggested that Ms Titterton of Clyde & Co could finalise the investigation and presumably the balance of any reports.
101. Not only was the Council's action appropriate here, and in accordance with the relevant provisions of the LGA, had the Council determined that Mr Tooma had a conflict of interest, it would have been wrong. Had the Council decided to instruct Mr Cork to

terminate Mr Tooma's engagement, that would have been an inappropriate step, and possibly in breach of at least some of the relevant provisions of the LGA. On the basis of the real facts, it was appropriate that Mr Tooma's engagement continue, and that he be allowed to finalise his investigation and prepare the reports that he did subsequent to the allegations being made by Mr Hadley on 13-15 February 2018. Any other course would have involved undoubtedly a greater cost to ratepayers, a potential compromise of the investigation, and a likely delay in its conclusion (especially if a person from outside of Clyde & Co was engaged), which would not have been in ratepayers' interests, or in the interests of Council staff.

(6) Issues concerning the engagement of McCullough Robertson

102. Counsel Assisting suggested that the following issues should be determined in relation to Ms Reid’s investigation, which I accept:

Issue 1: Was the Council’s decision to appoint an independent investigator in relation to the “recruitment issues” reasonable?

Issue 2: Was Ms Reid an appropriate person to conduct the investigation?

Issue 3: Was it appropriate for McCullough Robertson to be engaged through McPhee Kelshaw?

Issue 4: Cost.

Issue 5: Management of any conflicts of interest.

Issue 1: Was the Council’s decision to appoint an independent investigator in relation to the “recruitment issues” reasonable?

103. The allegations made by Mr Hadley in November 2017 concerning the engagement of Mr Mulligan as a consultant, and his subsequent employment, were serious. In essence, it was alleged that someone had been engaged and employed by the Council for a particular role who had no expertise in that area. While this allegation is more directly relevant to other Terms of Reference, as a matter of obviousness it was an allegation that the Council had to take seriously. In part, this was because it was alleged that there was some form of inappropriate relationship between Mr Mulligan and a senior member of the Council’s staff that was behind either his engagement as a consultant or his employment. This raised issues of potential corruption, which the Council deemed serious enough to refer to ICAC. ICAC chose not to conduct its own investigation, at least in part because the Council had taken the step of engaging Ms Reid of McCullough Robertson to investigate these issues.

104. In all the circumstances, it was prudent and appropriate for the Council to engage an independent person to conduct an investigation into the issues raised by Mr Hadley.

Issue 2: Was Ms Reid an appropriate person to conduct the investigation?

105. Ms Reid is a highly experienced legal practitioner with a high level of expertise in relation to workplace employment and safety issues. Her experience includes conducting a number of investigations in relation to workplace issues for government, including Councils. No sensible suggestion could be made that she was not an appropriate person to be engaged to conduct the investigation she was asked to.

Issue 3: Was it appropriate for McCullough Robertson to be engaged through McPhee Kelshaw?

106. For the reasons set out in relation to this issue involving Mr Tooma's investigation, it was reasonable and prudent for McCullough Robertson to be engaged through McPhee Kelshaw.

Issue 4: Cost

107. In round terms, Ms Reid's investigation and the preparation of her report cost the Council about \$120,000.

108. While this a high cost to the Council, no suggestion was made that it did not reflect a reasonable cost given the scope of the investigation that Ms Reid was required to do, and the report she ultimately prepared. Her recommendations have been made public, and have been accepted and adopted by the Council. The evidence was that her report was of high quality. For similar reasons as expressed in relation to this issue in relation to Mr Tooma, there is no basis for finding that any costs associated with the engagement of McCullough Robertson was not in accordance with any of the relevant provisions of the LGA.

Issue 5: Management of any conflicts of interest

109. Ms Reid did not have any conflict of interest, nor does it seem that anyone has alleged that she did.

(7) Submissions of Councillor Brown

110. In a written submission dated 1 April 2019 (“1 April submission”) seeking permission to speak at the public hearings, Councillor Brown raised several matters that she was allowed to expand upon in oral submissions at the public hearings. Shortly prior to this Interim Report being finalised, Councillor Brown sent to the Inquiry a document containing 74 paragraphs of her “Final Submissions” in relation to TOR 4 (“final submissions”).
111. Many of the matters raised by Councillor Brown are addressed in the findings set out above. The following matters raised by Councillor Brown are, however, addressed briefly.
112. In her final submissions, Councillor Brown claims that the urgency in which the Council acted in early November 2017 was “confected”.
113. At the heart of Councillor Brown’s assertion is the fact that asbestos had been an ongoing issue for the Council since prior to November 2017. I accept that. However, those matters, and the submissions Councillor Brown makes in relation to them, are arguably matters for consideration in relation to the other asbestos Terms of Reference. They do not arise in respect to TOR 4 (and not all of the procedural matters raised by Councillor Brown are relevant to any of the Terms of Reference). In relation to Term of Reference 4 however, I do not accept that the urgency that the Council acted with was in any way confected. Serious allegations were made in the media against the Council in November 2017. They raised concerns over public health, the health and safety of Council employees, and the integrity of its engagement of consultants and staff. Those allegations, understandably, prompted action from the Minister, as outlined above. These were very serious matters that had to be addressed immediately, and required urgent action. I do not consider that any person – that is Councillor Greenhill, Dr Dillon, Mr Greenwood, Mr Cork, or the entire governing body of the Council – acted in any manner that was not driven by a genuine and proper recognition that decisions and action had to be taken swiftly.

114. In her final submission, Councillor Brown asserts that the Council was “panicked” into passing the resolutions that it did on 14 November 2017, when it did not have sufficient details of the allegations. In submitting this, Councillor Brown cannot speak for the whole governing body. Further, as at 14 November 2017, it is unlikely any person had a full understanding of the details of all the allegations made. That was the whole point of appointing Mr Tooma and Ms Reid to conduct the investigations that they did. In any event, the unanimous resolutions passed by the Council on 14 November 2017 are best construed as the considered and reasonable response to the asbestos and recruitment issues that had been raised in the media. It was a response that had to be undertaken swiftly.
115. In her 1 April submission, Councillor Brown contends that the governing body should have been provided with costs estimates by Mr Tooma and Ms Reid for the 14 November meeting of Council. Estimates of costs were provided by both Clyde & Co and McCullough Robertson. Accepting that they may not have been provided to the governing body at the time of the Council meeting of 14 November 2017 (Ms Reid was not retained until 15 November in any event) when it was unanimously resolved to engage independent investigators, it would, in particular for Mr Tooma, have been impossible at that stage for him to provide an accurate estimate of his likely fees. However, no councillor could have been in doubt that experienced practitioners of great expertise had been retained, and that given the breadth of what they were asked to investigate and report on, a relatively high cost would be involved.
116. Councillor Brown has also submitted that a tender process should have been put in place for the Tooma and Reid investigations. This submission is rejected. A tender process would not have been in any way practical. The Council had to act swiftly. Further, as at 14 November 2017, the Council would not have been in a position to provide sufficient information to relevant law firms for them to be able to tender with sufficient certainty with respect to the likely cost of any such investigation.
117. Councillor Brown also raised the issue as to whether McPhee Kelshaw should have been instructed as it was to engage Mr Tooma or Ms Reid – which is said to have added a further layer of unquoted cost and complexity – or whether some “other model” should have been costed and compared with it prior to approval by the governing body.

118. The only alternative model would have been for the Council to engage Clyde & Co and McCullough Robertson directly. For the reasons outlined in [82]-[84] above, it was appropriate and prudent for Mr Tooma and Ms Reid to be engaged through McPhee Kelshaw.
119. In her 1 April 2019 submission, Councillor Brown raised the issue as to whether the governing body were provided with timely advice concerning the need to appoint independent investigators and whether the briefing provided by Mr Cork prior to the Council meeting of 14 November 2017 was adequate.
120. As stated above, Mr Cork, Councillor Greenhill and senior members of the Council staff were under considerable pressure in the period after 9 November 2017 as a result of the allegations made in relation to the Council's handling of asbestos, and in relation to the recruitment issues. Sufficient information by way of the 14 November Mayoral Minute was provided to the governing body, and there is no proper basis to form a view that Mr Cork's briefing was not adequate. There is no evidence from other members of the governing body that they felt they did not have an adequate basis for passing the unanimous resolutions they did. Sometimes – such as in the circumstances here – decision makers have to make decisions quickly. The standard that is appropriate for the provision of information and advice to a Council in those circumstances should be judged in the context of the urgency of the situation, and the seriousness and complexity of what is being dealt with. No doubt other matters may be relevant. The standard however cannot be one of perfection. At a minimum, what was done here was both reasonable and adequate.
121. Councillor Brown has also raised the issue of whether the Mayoral Minutes for the two investigations should have been provided to the councillors sooner than they were. As indicated above, senior members of the Council staff, the Mayor, and Mr Cork, were under a great deal of pressure from early November 2017 onwards. The Mayoral Minute that was drafted for the purposes of the 14 November 2017 meeting contained perfectly adequate and sufficiently thorough content to explain to the governing body why it was recommended that they make a resolution to appoint independent investigators. It was provided to the governing body at a time that still enabled the

Councillors to feel sufficiently informed, and confident in the advice given, that they unanimously passed resolutions for independent experts to inquire into very serious issues – a matter found above to be a reasonable and appropriate response to those issues.

(8) Ultimate Conclusion - Term of Reference 4

122. In light of the above, the Council's process of engaging Clyde & Co and McCullough Robertson was, in all the circumstances, prudent and appropriate. Mr Tooma never had a conflict of interest, hence there was no real conflict for the Council to manage. As to the alleged conflict, the Council's response to those allegations, and the response of the governing body, was reasonable and appropriate. No aspect of the matters raised in Term of Reference 4 involved conduct or action that was not in accordance with the obligations and duties imposed on the Council and the governing body under the relevant provisions of the *Local Government Act*.

Richard Beasley SC, Commissioner Blue Mountains Public Inquiry

7 May 2019.