

Wingecarribee Shire Council Public Inquiry

Submissions of Counsel Assisting

9 May 2022

A.	Introduction	1
B.	Summary of Submissions	2
C.	Definitions	6
D.	The Hearings	7
E.	Background to the Governing Body 2016 to 2020	8
F.	Legislative Framework for the Suspension and Public Inquiry	9
G.	Chronology of Intervention	11
H.	Legislative Framework for the Governing Body	16
I.	Impression and Integrity of Witnesses	16
J.	Preliminary Findings	18
K.	Term of Reference 1	53
L.	Term of Reference 2	79
M.	Term of Reference 3	92
N.	Term of Reference 4	97
O.	Findings Sought	109
P.	Recommendations Sought	111
Q.	Conclusion	112

A. INTRODUCTION

1. On 31 August 2021 the Minister for Local Government appointed the **Commissioner** Ross Glover to hold a Public Inquiry into the Wingecarribee Shire Council (**the Council**) pursuant to section 438U of the Local Government Act 1993 (**the Act**).¹
2. Between 28 March 2022 and 28 April 2022, the Inquiry held 15 days of hearings in respect of four terms of reference that the Commissioner was ordered to inquire into and report on:

1. Whether members of Council's governing body fully understand their roles and responsibilities and have adequately, reasonably and appropriately carried out their roles and responsibilities during the current term of Council (Term 1).

¹ Page 1 Exhibit A: Government Gazette No. 424 dated 1 September 2021

2. Whether, during the current term of Council, there has been improper interference by the elected body of Council, or by individual councillors, in operational matters, with particular reference to staffing and planning functions (Term 2).

3. Whether members of Council's governing body have been and will continue to be in a position to direct and control the affairs of Council in accordance with the Local Government Act 1993 and to otherwise fulfil its statutory obligations (Term 3).

4. Any other matter that warrants inquiry, particularly those that may impact on the effective administration of Council's functions and responsibilities or the community's confidence in the Council being able to do so (Term 4).²

3. I make these submissions as Counsel Assisting pursuant to the directions of the Commissioner dated 19 April 2022. Their purpose is to survey the evidence made to the Inquiry both in documentary form and by way of oral evidence then explain why it leads to certain findings or recommendations that I submit ought to be made by the Commissioner.
4. It is open to the Commissioner to accept or reject the findings and recommendations I make. It is also open to the Commissioner in his report to make findings or recommendations outside those that I urge upon him.
5. Pursuant to paragraph 2 of the directions made on 19 April 2022, affected parties will have an opportunity to respond to these submissions by no later than 5.00pm on 23 May 2022.
6. The evidence referred to in these submissions is available on the Office of Local Government Inquiry website or [this link](#) subject to any confidentiality orders that attach to exhibits. There are several further exhibits that are tendered contemporaneously with these submissions. These are in Appendix B.

B. SUMMARY OF SUBMISSIONS

7. The Commissioner can make the following findings preliminary to the analysis of the terms of reference:

² Page 1 Exhibit A

- a. There were reputational and work, health and safety risks facing Council as a consequence of the behaviours of some of the Councillors;
 - b. The community had lost an material amount of trust and confidence in the Governing Body;
 - c. There was a perception in the community that the planning decisions at the Governing Body level were not open, transparent and fair;
 - d. The statutory obligation of the Councillors to uphold and represent accurately the policies and decisions of the governing body extends to not undermining such a decision;
 - e. The Commissioner cannot excise the conduct of one or two Councillors from the roles and responsibilities of the Councillors as members of the Governing Body. The terms of this Inquiry must look at the functioning of the Governing Body as a whole;
 - f. The Minister had no power to suspend individual Councillors; and
 - g. The Governing Body's response to the Notices of Intention were late, inadequate and indicative of an improperly functioning governing body.
8. The Commissioner can make the following findings under the terms of refence:
- a. The Councillors' subjective understanding of their roles and responsibilities was high level, without nuance, and at least in the case of some Councillors, warped to fit their own sense of mission on the Governing Body (Term 1);
 - b. There is a weight of specific examples that amount to misconduct or acts of disorder, particularly in meetings, which suggests Councillors did not adequately perform their roles and responsibilities (Term 1);
 - c. As a result of dysfunction among the Governing Body, the Councillors failed to properly carry out some of their strategic planning obligations (Term 1);
 - d. There was a failure of all Councillors as part of the Governing Body to ensure that the workplace they directed and controlled was safe and free from bullying and harassment (Term 1);

- e. There was some improper interference in staffing and planning matters by Councillors but it is difficult to say what the extent or severity of this interference was (Term 2);
- f. There was a culture within the Governing Body that led to Councillors micromanaging aspects of the Council that amounted to improper interference, probably caused by a lack of trust between Councillors and Council staff (Term 2);
- g. When presented with grey areas, Councillors lacked the capacity and judgement to ascertain what conduct was within the purview of the obligation to direct and control and what conduct constituted improper interference (Term 2);
- h. Some Councillors have warped their understanding of their roles and responsibilities to fit their own sense of personal mission which in their own minds (at least their manifested conduct) justify actions that contribute to the dysfunction of the Governing Body. There is no indication this will change if those Councillors are returned (Term 3);
- i. There is no reason to think the Council meetings will be significantly less disruptive or dysfunctional given the subsisting majority:minority split that at least Councillor Scandrett says contributed to the dysfunction (Term 3);
- j. The conduct of some Councillors post-suspension garners little optimism for the effective acquittal of the returned Governing Body's roles and responsibilities. In their attempts to defend themselves against perceived criticism of the interim administrator, they have undermined the confidence of the community in Council staff and the new general manager Lisa Miscamble, the very people they will need to have a close trusting relationship with to run an efficient Council (Term 3);
- k. The acts of some Councillors post-suspension suggest they do not have an appropriate insight into how their conduct affects Council staff or undermines the confidence of the community (Term 4);
- l. The Councillors who put their names to such an inept and grossly inaccurate press release (Exhibit O) have shown they may not have the capacity to direct and control an organisation the size and complexity of the Shire Council or lead a community they have comprehensively misled (Term 4);

- m. To rebuild the Council's culture and better serve its community, the new general manager needs a period of clear air absent a dysfunctional Governing Body to commence effecting this change (Term 4); and
 - n. It is likely that if the Councillors are returned they will restore the planning powers to their hands if at all possible. This would reinstate a source of dysfunction and a culture where the community holds a perception that planning is not a level playing field (Term 4).
9. The Commissioner should make the following recommendations to the Minister in his report:
- a. The Minister should recommend to the Governor that all civic offices in the Wingecarribee Shire Council be declared vacant pursuant to section 255 of the Act;
 - b. The period of interim administration should remain until the next State local council elections in September 2024;
 - c. The induction and training of councillors should be standardised and include:
 - i. Proper training in respect of what powers are available to councillors when there is disruption by a minority of councillors;
 - ii. More fulsome training in respect of councillors obligations under Work Health and Safety legislation;
 - iii. Proper and standardised records of who attends;
 - iv. Extra training in the chairing of meetings given to the mayor and deputy mayor.
 - d. There should be more clarity in the Act around the reporting and publication of code of conduct complaints. In particular, the complaint, the investigation, the name of the subject councillor, and the outcome should be readily available for the community to access;
 - e. Some consideration should be given as to whether the training received by councillors around the distinction between operational and strategic is appropriate given the dichotomy is not clearly found in the Act and that it does not use that nomenclature.

Alternatively, the Act could strengthen and clarify the distinction between the councillors roles and the role of staff.

C. DEFINITIONS

10. The focus of the Inquiry are the councillors who were elected to the Wingecarribee Shire Council for the term 2016 to 2020. Because the word “council” can be applied to various of the constituent parts that make up the body politic I will attempt to define at this stage the terminology I propose to use with some attempted consistency across these submissions.
11. I will generally refer to the six suspended councillors as the **Councillors** although this may from time to time also encompass Ken Halstead and Garry Turland who resigned on or about 8 March 2021, and Gordon Markwart who resigned in August 2020.³
12. The Councillors sitting as the body politic will generally be referred to as the **Governing Body** consonant with the terminology in the Act,⁴ although it may be convenient to sometimes refer to them as the Council where appropriate. Generally though, the **Council** will refer the entire organisation encompassing the Councillors and the staff notwithstanding the fact that the Act generally uses council synonymously (or at least without distinction) with Governing Body.⁵
13. I have taken this approach because it appears to me witnesses have used Council to refer to either the staff (to the exclusion of the Councillors) or the entirety of the organisation as opposed to the Governing Body. Where it appears to me from my question in the hearing or the context of the answer from the witness, that the witness is referring to the staff in particular when using the term Council, I will distinguish it with [staff].
14. The **General Manager** will be a reference to Ann Prendergast who filled that role for the majority of the 2016-2020 term unless I stipulate otherwise. It may be necessary to distinguish from time to time between **Senior Staff** and the General Manager on the one hand, and staff who report to them in the organisational structure of the Council on the other. This terminology is consistent with the Act.⁶ If I have asked a question or a witness

³ T649.28

⁴ Section 223 of the Act

⁵ Compare section 222 and 223 with Chapter 11 of the Act where the provisions distinguish between the general manager, senior staff and “council” which can only be referring to the governing body

⁶ Section 332 of the Act

has given an answer using the term executive I will attempt to use Senior Staff in these submissions for consistency.

15. The code of conduct and code of meeting practice incorporated into the Act regulate the roles and responsibilities of the Councillors. These codes have evolved over the course of the 2016-2020 term. They are adopted from the Model Code of Conduct for Local Councils in NSW and the Model Code of Meeting Practice for Local Councils in NSW. All relevant codes in the form they existed over the course of the term are in Exhibit A.
16. Unless I am referring to a specific event which allows me to identify a specific version of the code, I will use the 12 June 2019 code of conduct when referring to the **Code of Conduct**.⁷ This version was the first significant update since 2013⁸ and has sufficient similarities to previous and subsequent versions to act as a representative code.
17. Likewise, for the same reasons I have set out for the code of conduct, where I refer to the:
 - a. **Code of Meeting Practice** I am referring to the 12 June 2019 version of the code of meeting practice⁹
 - b. **Councillors Handbook** I am referring to the October 2017 version of the Councillors Handbook.¹⁰
18. I have generally referred to the Wingecarribee Shire Council as the **Shire Council** for reasons of brevity and because that shorthand was adopted during the hearings.

D. THE HEARINGS

19. Between 28 March 2022 and 28 April 2022, the Inquiry sat over 15 days and heard from 39 witnesses.
20. The Inquiry received 123 submissions. Eighteen of the examined witnesses were from the community. The witnesses were chosen based on the relevance of their submission to the terms of reference; their willingness or availability to attend and give evidence; and the diversity of their views. Notwithstanding the best efforts to obtain a range of impressions

⁷ Page 697 Exhibit A

⁸ See the table of revisions at page 672 Exhibit A

⁹ Page 991 Exhibit A

¹⁰ Page 450 Exhibit A

and experience, certain themes came through that made some repetition of themes unavoidable. This was not by design of any selection criteria applied.

21. The community witnesses came from a range of backgrounds and had a range of experiences with Council. There were members of chambers of commerce and commercial stakeholder groups.¹¹ Members of interest groups such as Friends of Bowral¹² and Friends of Wingecarribee,¹³ Berrima Residents Association,¹⁴ and WinZero gave evidence.¹⁵
22. The Inquiry also heard from ex-councillors from the 2012 to 2016 term¹⁶ and ex-staff members,¹⁷ as well as the current suspended Councillors including the Mayor (Duncan Gair), the present general manager (Lisa Miscamble), and the interim administrator (Viv May).
23. The former general manager Ann Prendergast was not called as a witness. She did not provide a submission. The best evidence available to the Inquiry was that she was living outside Australia. The Inquiry has no power to compel a person outside the jurisdiction to attend for examination.

E. BACKGROUND TO THE GOVERNING BODY 2016 TO 2020

24. The elections for the 2016-20 term of the Shire Council were held during the State-wide elections on 19 September 2016. Candidates were declared elected (in order of position with affiliation and first preference votes) as follows:
 - a. Duncan Gair (IND: 1,296);
 - b. Graham McLaughlin (LAB: 609);
 - c. Grahame Andrews (IND: 638);
 - d. Gordon Markwart (GRN: 314);
 - e. Larry Whipper (IND: 837);
 - f. Garry Turland (IND:287);

¹¹ T65.19: Steve Horton (Southern Highlands Chamber of Commerce and Industry); T319.12: Brigid Kennedy (Moss Vale and Rural Chamber of Commerce); T241.36: Mark Bourne (Moss Vale and Rural Chamber of Commerce and Southern Highlands Key Stakeholders' Group).

¹² T117.01 John Barrett

¹³ T92.44: Sara Haslinger

¹⁴ T392.03: Clive West

¹⁵ T366.30: Derek White

¹⁶ T705.29 Juliet Arkwright; T330.33 Holly Campbell

¹⁷ T277.05 Richard Mooney; T159.40 Nick Wilton

- g. Ken Halstead (IND: 909);
 - h. Ian Scandrett (IND: 433); and
 - i. Peter Nelson (IND: 37).¹⁸
25. At the first ordinary meeting of Council on 28 September 2016, Ken Halstead was elected mayor and Councillor Scandrett deputy mayor.¹⁹ On 26 September 2018, Councillor Gair was elected mayor and Garry Turland was elected as deputy mayor.²⁰

F. LEGISLATIVE FRAMEWORK FOR THE SUSPENSION AND PUBLIC INQUIRY

26. Chapter 13 of the Act sets out how councils are made accountable for their actions. Part 6 sets out the purpose and use of Performance Improvement Orders (**PIOs**).
27. Under section 438A(1) of the Act, the Minister may issue a PIO in respect of a council if the Minister reasonably considers that action must be taken to improve the performance of the council. Under that provision, it is necessary for the Minister to set out reasons why they have decided to issue the order and the actions necessary to improve the performance of the council.
28. Under section 438B of the Act, the regulations are empowered to make specific criteria to be considered. At the relevant time, these criteria were prescribed at the relevant time by clauses 413D and 413DA of the *Local Government (General) Regulation* 2005.
29. The Minister must give notice of an intention to issue a PIO under section 438C of the Act and provide the council with the terms of the proposed PIO, the reasons why it is proposed and the actions that may be taken if the order is not complied with.
30. Relevantly in the present Inquiry, a council must provide a written report to the Minister of its compliance with the PIO under section 438F of the Act, and the Minister may appoint a temporary advisor pursuant to section 438G to provide advice and assistance to the council for the purposes of ensuring that it complies with the PIO and to monitor its compliance with the performance improvement order.²¹

¹⁸ Page 8 Exhibit A

¹⁹ Paragraph 6.2 Minutes of the Ordinary Meeting of Council dated 28 September 2016; page 6 Exhibit F

²⁰ Page 1984 Exhibit F

²¹ Section 438G(4) of the Act

31. The next mechanism available to the Minister under Chapter 13 of the Act is the temporary suspension of council under Part 7. Under section 438I of the Act, the Minister may suspend a council for a period specified in the order if the Minister reasonably believes that the appointment of an interim administrator is necessary to restore the proper or effective functioning of the council.
32. The criteria and notice that must be given in respect of a temporary suspension of council is in broadly the same form as that used for PIOs: the Minister must consider the criteria specified by the regulation (section 438J of the Act); the Minister must first give notice of intention to suspend the council which includes setting out the reasons why it is proposed to be suspended the duration. It also sets out the steps that may be taken by the council to respond (section 438K of the Act).
33. If a suspension order is made, then the Minister must appoint an administrator of the council under section 438M of the Act. The effect on the suspended councillors is that they are not entitled to exercise any functions of the civic office and are not entitled to any form of further remuneration, as they would otherwise be entitled to as holder of the civic office (section 438L of the Act).
34. Pursuant to section 438N of the Act, an interim administrator is to provide a report to the Minister no less than 14 days before the end of the initial suspension period of the council.
35. The maximum period for which a council can be initially suspended by under an order of the Minister is three months by virtue of section 438O of the Act. This may be extended if the Minister reasonably believes that an extension is necessary to restore the proper or effective function of the council. The maximum total period for which a council can be suspended under this provision is six months.
36. Under Part 8 of Chapter 13 the Governor or Minister may appoint a person as commissioner to hold a public inquiry and to report to the Governor or Minister with respect to any matter relating to the carrying out of the provisions of this Act, or any other Acts conferring or imposing functions on the council (section 438U of the Act).
37. Pursuant to section 438W of the Act, the Minister may suspend a council pending the inquiry the Minister considers it in the public interest to do so. The Minister must appoint an interim administrator during the period of suspension and the holding of a public inquiry pursuant to section 438Y of the Act.

38. The Governor has the power to dismiss the mayor and councillors and declare all civic offices vacant by declaration recommended by the Minister following the holding of a public inquiry under section 255 of the Act.

G. CHRONOLOGY OF INTERVENTION

39. On 16 March 2020, Mayor Gair wrote to Minister Hancock noting incidents of personal attacks and insults amongst Councillors, breaches of the codes, and similar conduct towards staff both during briefings, during meetings, and after meetings. It was the Mayor's view that this was becoming a significant work health and safety issue.²²
40. On 24 March 2020, Mayor Gair emailed John Davies of the Office of Local Government noting the ongoing behaviour concerns in relation to Mr Halstead and Turland in particular:

While it may appear that these concerns could be dealt with via a Code of Conduct complaint, I believe with the mounting evidence already provided in terms of the conduct of these councillors at council meetings that these concerns should be addressed via other mechanisms. Are there any provisions in the Local Government Act 1993 or powers held by the Office of Local Government to put councillors on notice in relation to their conduct in meetings, towards staff and other councillors?

This behaviour is of great concern to me, the only way currently to combat the constant tirade is to block emails from these councillors however this is not the preferred option in addressing this aggressive and bullying behaviour.²³

41. On 24 April 2020, the Deputy Secretary of Local Government Planning and Policy wrote to the General Manager expressing concerns about Councillor behaviour:

The Office of Local Government (OLG) has been monitoring recent meetings of the Council through its webcasts and an OLG staff member attended the Council's extraordinary meeting of 11 March 2020 as an observer. Based on its observations, OLG is concerned that some councillors have conducted

²² Page 69 Exhibit E

²³ Page 83 Exhibit E

themselves in a manner that is not consistent with the Council's obligation to be a responsible employer.

Councillors need to be mindful of the impact of their behaviour on others, including staff and their fellow councillors, and the importance of recognising the duties they owe under the Work Health and Safety Act 2011 (WHS Act) to take reasonable care that their acts or omissions do not adversely affect the health and safety of others.

This duty is reflected in the Model Code of Conduct for Local Councils in NSW and, by extension, the Council's adopted code of conduct. The Model Code of Conduct also places obligations on councillors not to engage in conduct that causes, comprises or involves intimidation or verbal abuse or that constitutes harassment or bullying behaviour or is unlawfully discriminatory. At meetings, councillors must not engage in bullying behaviour towards the chair, other council officials or any members of the public present.²⁴

42. On 19 August 2020, the Minister for Local Government, Shelley Hancock MP, issued a Notice of Intention to Issue a Performance Improvement Order to the Council under section 438A of the Act²⁵ (the **PIO Notice of Intention**) that included a draft PIO.
43. The PIO Notice of Intention stipulated (amongst other things):

The reasons why I, as Minister, propose to issue a Performance Improvement Order (section 438A(3)(a)):

1. There are reputational and work, health and safety risks facing Council as a consequence of the behaviours of some councillors.
2. There is evidence of hostility and acrimony between councillors that, if unaddressed, is likely to lead to dysfunction.
3. There are behaviours that indicate that some councillors may not understand their obligations under the code of conduct when dealing with staff of the Council.

²⁴ Page 2 Exhibit E

²⁵ Page 1 Exhibit B

4. There are behaviours that indicate that some councillors may not understand their obligations under the code of conduct when dealing with each other.²⁶

44. On 24 August 2020, the Governing Body met for an Extraordinary Meeting of Council to consider the PIO Notice of Intention.²⁷

45. On 25 August 2020, Mayor Gair and Acting General Manager Barry Paull sent a letter to Minister Hancock noting the Extraordinary Meeting of Council and setting out the resolutions passed by way of motion at the meeting, which stated:²⁸

THAT Council acknowledges the Minister for Local Government's correspondence, dated 19 August 2020, notifying Council of the Minister's intention to issue a Performance Improvement Order on Council under Section 438A of the Local Government Act 1993.

2. THAT Council advise the Minister that it accepts the "Reasons for the Order" as detailed in Schedule 1, accepts the "Action required to improve performance" in Schedule 2, and accepts the proposal for "Appointment of temporary advisers" in Schedule 3, as proposed in the Draft Order.

3. THAT Council provide all necessary assistance to the proposed "Temporary Adviser" when appointed, including access to relevant documents and video files for the term of this Council.

4. THAT the Wingecarribee Shire Council agrees with the intent of the proposed Performance Improvement Order to be issued under the provisions of Section 438A of the Local Government Act 1993 and Clauses 413D and 413DA of the Local Government (General) Regulation 2005 as listed (a) - (f). Particular emphasis should be placed upon (a) with regard to legislative responsibilities.

²⁶ Page 2 Exhibit B

²⁷ Page 3698 Exhibit F

²⁸ Page 4 Exhibit B

5. 'THAT' the Minister for Local Government ensure that any 'investigation' undertaken by any representative of her be comprehensive and include both elected representatives of the Shire and members of staff of the Council.

46. On 8 September 2020, Minister Hancock issued a PIO under section 438 of the Act²⁹ which provided the reasons reflected in the PIO Notice of Intention.
47. Pursuant to section 438G of the Act, Minister Hancock appointed Norm Turkington and Ian Reynolds as temporary advisors to the Council.³⁰ Under their appointment each had three terms of reference:

Mr Reynolds:

- Attend Council meetings for the purpose of providing advice and assistance to the Chair in respect of meeting procedures and dealing with acts of disorder
- Provide advice and assistance to the council for the purpose of ensuring that it complies with the performance improvement order
- Monitor the council's compliance with the performance improvement order

Mr Turkington:

- Undertake a structured mediation process with all councillors to negotiate agreement on respectful behaviours in their dealings with each other and council staff
 - Provide advice and assistance to council for the purpose of ensuring that it complies with the performance improvement order
 - Monitor the council's compliance with the performance improvement order
48. On 5 November 2020, Acting General Manager Barry Paull provided a PIO Compliance Report to the Minister.³¹
49. On 2 March 2021, Minister Hancock issued a Notice of Intention to Issue a Suspension Order under section 438K of the Act³² (**Notice of Intention to Suspend**). It set out her intention to issue a suspension order to suspend the Councillors for a period three months

²⁹ Page 835 Exhibit B

³⁰ Page 837 Exhibit B

³¹ Page 27 Exhibit B

³² Page 4 Exhibit E

and appoint an interim administrator under section 438M of the Act. The substance of the notice is set out in more detail below in Section J.

50. On 9 March 2021, the Governing Body held an Extraordinary Meeting of Council to consider the Notice of Intention to Suspend. The Governing Body passed certain resolutions which are set out in more detail and analysed later in these submissions.³³
51. Mayor Gair and Acting General Manager Paull then wrote to Minister Hancock on 9 March 2021 setting out the resolutions passed.³⁴ At about this time, some Councillors also made representations to the Minister in their personal capacity.
52. Councillor Nelson wrote to Minister Hancock on 8 March 2021³⁵ and Councillor Whipper wrote to Minister Hancock on 2 March 2021.³⁶
53. Minister Hancock issued the suspension order under section 438I of the Act on 12 March 2021 and appointed Viv May as interim administrator under section 438M of the Act.³⁷
54. On 10 May 2021, Viv May wrote to Minister Hancock pursuant to section 438N of the Act. He formally sought that his appointment be extended until the September 2021 elections.³⁸
55. On 24 May 2021, Minister Hancock ordered the extension of the suspension until 10 September 2021 pursuant to sections 438M and O of the Act with Viv May remaining interim administrator for that period.³⁹
56. On 10 August 2021, the interim administrator Viv May wrote to Minister Hancock formally recommending a public inquiry under section 438U with concise terms of reference and a 6 month time frame so that local democracy can be returned.⁴⁰
57. On 31 August 2021, Minister Hancock appointed Commissioner Glover to hold a public inquiry under section 438U and she considered it in the public interest to suspend the

³³ Page 4129 Exhibit F

³⁴ Page 20 Exhibit E

³⁵ Page 231 Exhibit B

³⁶ Page 233 Exhibit B

³⁷ Page 838 Exhibit B

³⁸ Page 777 Exhibit B

³⁹ Page 841 Exhibit B

⁴⁰ Page 806 Exhibit B

Council pursuant to s438W, continuing the appointment of Viv May as interim administrator during the suspension of the Council under section 438W of the Act.⁴¹

58. On 5 September 2021, Minister Hancock suspended the ordinary elections of the Shire Council due to be held on 4 December 2021 for 12 months pending the outcome of this Inquiry.⁴²

H. LEGISLATIVE FRAMEWORK FOR THE GOVERNING BODY

59. A council is a statutory creation of the Act.⁴³ It is a body politic.⁴⁴ It is not a body corporate and does not have the same status, privileges and immunities of the Crown, although the law of the State applies to it as if it were a body corporate.⁴⁵
60. The Council is constituted by the governing body of the council. Elected representatives (the councillors) comprise the governing body.⁴⁶ The guiding principles for councils is set out in section 8A of the Act and includes planning strategically using the integrated planning and reporting framework. This framework is set out in section 8C of the Act.
61. The functions of a council are set out in Chapters 5 to 8 of the Act.
62. The roles of the governing body are set out in section 223 of the Act. The roles of councillors are set out in section 232. The Mayor constitutes a separate statutory office and those powers are set out in Chapter 9 Part 2 Division 2 of the Act. The general manager also has statutorily prescribed office and role set out sections 334 and 335 of the Act. Each of these provisions are set out more fully below.

I. IMPRESSION AND INTEGRITY OF WITNESSES

63. Before turning to the effect of the evidence on the terms of reference, it is necessary to briefly survey the oral evidence from the hearings and the integrity of that evidence.
64. There is no reason for the Commissioner to be concerned that witnesses colluded or had their evidence tainted by other witnesses or people to any significant degree that would

⁴¹ Page 1 Exhibit A

⁴² Page 842 Exhibit B

⁴³ Section 219 of the Act

⁴⁴ Section 220 of the Act

⁴⁵ Section 220 of the Act

⁴⁶ Section 222 of the Act

impact on the findings to be made in this Inquiry. The Commissioner can comfortably find that all witnesses to a material degree did their best to give candid and honest evidence.

65. Some witnesses were associated with the same interest groups or had similar concerns about a particular issue. The Station Street by-pass is an example of this.⁴⁷ Their evidence had commonalities in tone and theme that would be a natural result of their engagement in issues of concern to them. Similarly, those witnesses who had been either directly affected by, or involved in the recovery after, the 2019/2020 bushfires had similar recollections of events and a common tone and theme.
66. In contradistinction to the commonalities of some witnesses, there were witnesses who had polar opposite reactions to events that took place that at first glance might lead to a suggestion there is some concern about the veracity of the evidence being given. It is my submission that the Commissioner does not have to make any such finding that evidence was deliberately incorrect or that there is any concern with the credibility of witnesses.
67. The divergence in evidence in respect of specific recollections is more explicable by the natural tendency of people to experience events in different ways and the inherently subjective nature of the questioning on some topics.
68. A good example is the questioning of ex-senior staff members Richard Mooney and Nick Wilton about the culture of the Council at the time they were employed there. Msrs Mooney and Wilton did not think the culture was toxic⁴⁸ but they had certain positions of power and came across as resilient and pragmatic witnesses. Moreover, whether something is “toxic” is susceptible to varying definitions and background experiences. These submissions address the particular question of staff culture below but the point at this stage is to note that witnesses can have different perceptions. That does not mean their evidence is unreliable or untrustworthy.
69. There were consistent themes through the evidence of the witnesses.
70. The matter of the meeting on 14 February 2018 ought to be addressed under this topic. There was evidence from several members of the community that ex-councillor Gordon Markwart had inappropriate or perhaps even threatening remarks at the part of the meeting

⁴⁷ John Barrett (Friends of Bowral); Alan Olsen (Highlands Matters); Jan Wilson

⁴⁸ T169.22 (Wilton) and T308.04 (Mooney)

he chaired. While it does not bear directly on a term of reference, in fairness to the witnesses who gave evidence and particular Mr Markwart it ought to be briefly disposed of.

71. Alan Olsen,⁴⁹ Jan Wilson,⁵⁰ and John Barrett⁵¹ gave evidence that Mr Markwart said words to the effect: “I have a gavel and I know how to use it” in a way that they found threatening, intimidating,⁵² or at the least inappropriate.
72. The Inquiry was played the audio tape of the meeting. At the relevant point Mr Markwart said:

So, we are the community's elected representatives. I asked everyone here, councillors and the audience, to respect the councillors here and let them do their work and make their decision.

To date I have never had to use the gavel, I certainly hope I never will, but I do know where it sits. So, at this stage I'd like to basically introduce this item and hand over the councillors 12.1, Station Street Upgrade, the project update.

So, please ...

73. There was nothing threatening in the tone of the delivery of the words heard on the audio file. Mr Markwart gave evidence that Jan Wilson said to him after the meeting “You can wipe that smirk off your face.”⁵³
74. There is no reason to find that Mssrs Olsen and Barrett, and Mrs Wilson contrived their evidence or colluded in the way the complaint was presented. But there is equally no reason to find that either the content or the tone of that passage was threatening or calculated to intimidate.

J. PRELIMINARY FINDINGS

75. In order to address the terms of reference it will be necessary for the Commissioner to make several findings of fact or interpret particular legal obligations in order to both

⁴⁹ T225.39

⁵⁰ T198.22

⁵¹ T127.47

⁵² T225.47; T199.08

⁵³ T665.30

address various further facts that form part of the terms of reference and resolve certain matters that may form part of the evidentiary matrix (or explain evidence given).

76. It is open on the evidence for the Commissioner to make the following findings preliminary to the ultimate issues that will need to be decided by the Inquiry:
- a. There were reputational and work, health and safety risks facing Council as a consequence of the behaviours of some of the Councillors;
 - b. The community had lost a material amount of trust and confidence in the Governing Body;
 - c. There was a perception in the community that the planning decisions at the Governing Body level were not open, transparent and fair;
 - d. The obligation to uphold and represent accurately the policies and decisions of the Governing Body extends to not undermining a decision;
 - e. The Commissioner cannot excise the conduct of one or two Councillors from the roles and responsibilities of the Councillors as members of the Governing Body;
 - f. The Minister had no power to suspend individual Councillors; and
 - g. The Governing Body's response to the Notices of Intention were late, inadequate and indicative of an improperly functioning governing body.

There were reputational and work, health and safety risks facing Council as a consequence of the behaviours of some of the Councillors

77. This was a reason given by Minister Hancock as to why she proposed to issue a Performance Improvement Order.⁵⁴ I have set out below why the Governing Body and Councillors have obligations in respect of work, health and safety risks and it cannot seriously be doubted that such responsibilities exist.
78. In any event, it was accepted by the Governing Body that such risks *did* exist at the time of the issuance of the PIO Notice of Intention: the Council passed a resolution agreeing with Minister Hancock on 24 August 2020 when MN 334/30 resolved:

⁵⁴ Notice of Intention to Issue a PIO dated 19 August 2020; page 1 Exhibit B

2. THAT Council advise the Minister that it accepts the "Reasons for the Order" as detailed in Schedule 1, accepts the "Action required to improve performance" in Schedule 2, and accepts the proposal for "Appointment of temporary advisers" in Schedule 3, as proposed in the Draft Order.

79. Then in the following year upon the issuance of the Notice of Intention to Suspend, the Minister cited:

Allegations of harassing and bullying behaviour towards Council staff have been made. Concerns have been raised by both councillors and staff about the impact of these behaviours on the health and well-being of staff at the council. These concerns have been ongoing for some time. The Office of Local Government has previously attempted to work with Council to improve the underlying behaviours that gave rise to disruption at Council meetings and on Council premises, including warning letters, providing observers to meetings and conducting workshops with councillors and senior staff.⁵⁵

80. This was not directly addressed in the Governing Body's resolution passed on 9 March 2021 or their letter to Minister Hancock on 9 March 2021⁵⁶ other than:

3. THAT Council notes that the majority of councillors adhered to the requirements of the Performance Improvement Order issued by the Minister on the 8 September 2020 and it's a minority of councillors that have not adhered to the requirements of this order.⁵⁷

81. Notwithstanding the Governing Body passed a resolution agreeing with Minister Hancock in respect of the initial reasons for issuing the PIO and implicitly accepting that risks were extant at the time of suspension (albeit according to the resolution passed only caused by a "minority of councillors")⁵⁸ it is necessary to give some further explanation as to why it is open to find that such risks existed.

82. It should be accepted that it is not necessarily easy to find a homogenous culture existed over an organisation the size of the Shire Council. The experience of working in an organisation will be affected by an employee's own resilience, expectations, and the team

⁵⁵ Notice of Intention to Issue a Suspension Order dated 2 March 2021; page 4 Exhibit E

⁵⁶ Page 20 Exhibit E

⁵⁷ Page 21 Exhibit E

⁵⁸ Resolution 3 set out at page 21 Exhibit E

they are working in. However the interviews, surveys and reports provide as good an illumination as possible (given the limitations) of the experiences of staff working at the Council.

83. Staff surveys of the Council staff were conducted on a regular basis, including in 2016 and 2019.⁵⁹ The 2019 report received completed surveys from 229 staff.⁶⁰ Focus groups were also held.⁶¹

84. It was evident from the surveys that bullying and harassment was present and constituted a risk to the organisation:

As aforementioned, there is a low agreement that the WSC is a workplace with little risk of harassment, discrimination, or violence. The qualitative data supports these quantitative results. Moreover, it appears that some respondents do not feel supported in reporting bullying and harassment in the workplace. Additionally, exit interview data suggests that staff are leaving the organisation due to perceptions of incivility, bullying and harassment. This poses a significant psychosocial risk for individuals who may experience or be exposed to bullying and harassment. Additionally, WSC needs to consider the legal, financial and reputational risks associated with this and ensure that they are meeting their legislative responsibilities with regards to bullying and harassment.⁶²

85. The survey cited data from exit interviews that suggested staff were leaving due to perceptions of incivility, bullying and harassment.⁶³ The survey results were comparable to the 2016 survey that covered the previous 2012-2016 term which Barry Paull called “the most dysfunctional council I’ve ever worked for.”⁶⁴

86. Earnest Consulting interviewed 19 members of staff and 83 members of the community in preparing its report dated 27 July 2021.⁶⁵ The report identified the following themes arising from interviews with staff members:⁶⁶

⁵⁹ Page 3 Workplace Wellbeing Survey (Final Report) 11 June 2019; Exhibit OO

⁶⁰ Page 3 Workplace Wellbeing Survey (Final Report) 11 June 2019; Exhibit OO

⁶¹ Page 3 Workplace Wellbeing Survey (Final Report) 11 June 2019; Exhibit OO

⁶² Page 19 Workplace Wellbeing Survey (Final Report) 11 June 2019; Exhibit OO

⁶³ Page 19 and 20 Workplace Wellbeing Survey (Final Report) 11 June 2019; Exhibit OO

⁶⁴ T796.12

⁶⁵ Page 434 Exhibit B

⁶⁶ Page 435 Exhibit B

- Interference by Councillors to pre-determine recommendations especially on Planning Proposals
- Council adopting a strategic policy then continually amending it so that it never gets actually finalised (e.g., the Local Housing Strategy)
- Poor or no leadership from senior staff and the elected council which manifests in lack of trust in their decision making and a lack of authority to make decisions
- Not enough staff due to vacant positions not being filled which appears to be a deliberate strategy
- Changes to the way customer service staff function at the front counter removed a lot of corporate knowledge resulting in more enquiries going to the professional staff
- No triaging of requests, such that requests for repairs being sent to the development engineers rather than to assets
- Old IT systems (noting that new updated system is now being installed)
- Too many hours taken up by being “on duty”
- No “technician” to check the completeness of applications resulting in time being consumed for the assessment staff to check the application before they can start on an application
- Poor outdated Development Control Plans (DCPs)
- Inconsistency between various strategic policies of Council, such as Council’s position to promote tourism and the contents of the Local Environmental Plan (LEP) that effectively prohibits those land uses
- Poor non-competitive pay rates and working conditions
- Managers have no visibility of their budgets
- Managers appear to have little impact on Human Resources staff to get job offers out in a competitive marketplace
- Little or no communication to the affected staff on changes in IT or customer service function.

87. Not all of these themes are attributable to the conduct or responsibilities of the Councillors but at least those that bear on strategy (or explicit and obvious matters such as interference) can be attributed to Councillor conduct.

88. Moreover, there is an available causative link between failure of the Governing Body to properly direct and control the General Manager on the one hand, and the performance of the Senior Staff on the other. The Governing Body has a statutory obligation to monitor the General Manager's performance⁶⁷ and consult with her in directing and controlling the affairs of council.⁶⁸ The General Manager may only appoint or dismiss senior staff after consultation with the Governing Body.⁶⁹
89. Therefore, it is open to find that the observations of Earnest Consulting (that there was poor leadership from all levels of senior management and other failures of senior staff)⁷⁰ can at least be partly attributed to a failure of Councillors to perform their role.
90. The incoming general manager Lisa Miscamble met with approximately 70 staff during her first weeks in her position to get an indication of their roles and personalities as well as to get an impression of where the organisation was, and where it could hope to be in 12 months' time and into the future.⁷¹
91. When asked about these interviews, Ms Miscamble observed of the staff:

As a general comment people were proud to - sorry, I would say - they are very committed to their work, they were proud to work with the council. A number expressed that over the last few years they didn't feel that they had that same level of pride. There was a feeling that different areas were siloed. Bullying, mentioning of bullying or intimidation was raised a number of times.

At the time I started meeting with individual staff there were concerns about when the next election would be and the impact of that, but I would also say in those discussions there was cautious optimism about change moving forward, as general comments.

Q. Do you have any impression what created that cautious optimism about change moving forward?

⁶⁷ Section 223(1)(i) of the Act

⁶⁸ Section 223(2) of the Act

⁶⁹ Section 337 of the Act

⁷⁰ Observations from Earnest Consulting; page 437 Exhibit B

⁷¹ T1458.24

A. From the conversations that were had in that time I think that one of the comments was made is, was that "We can now exhale". I think there was a feeling from individuals that they actually had time to focus on what they needed to do perhaps without some of the distractions that were happening at a political level or at a senior staff level, without wanting to sound critical of anybody, that was the feedback that I was receiving. I think they also saw that with some of the changes that there'd be an opportunity to actually move forward.

Q. And the bullying and intimidation that you mentioned, was that at a staff-staff level, at a senior staff-junior staff level, or at a councillor-senior staff level or indeed councillor-staff level?

A. A combination. Examples between councillors and staff and also between senior staff or management and then between management and staff officer level.

92. John McMahon was the acting general manager for 12 weeks shortly after the commencement of suspension.⁷² He gave the following evidence:

Q. Can you give me your impressions that you gleaned from talking to staff?

A. Look, there was a toxic culture here, they were very apprehensive to open up to me initially, then over time they did. The culture basically came from council and from senior staff, and it was sad really, because there were some very, very good workers, some very good people here in the organisation, they were thrown to their depths because of the way the council and the staff - the senior staff - worked together.

Q. Can you describe what you mean by toxic?

A. As a general manager joining this shire, there was a lot of hearsay about how the council/councillors related to each other, how they ran the council. In my period of running the waste board on behalf of Wingecarribee, Wollondilly-Camden and Campbelltown as the regional waste board and in my period as director of works and general manager, I experienced six new general managers in that period of time and basically every term of council they seemed to have a

⁷² T491.47

new general manager, there was no consistency. So, there was this feeling inside the organisation that things weren't going well and, if it starts at the head, it runs all the way through the organisation then.⁷³

93. It must be acknowledged that this was not the experience of all employees. Richard Mooney was the Chief Financial Officer and then a group manager of a portfolio that encompassed corporate finance, revenue, payroll, fleet and property services. His evidence was as follows:

Q. Yes, thank you. There's been observations and evidence that the council was a toxic workplace at least at the time of suspension. Do you have a view on that?

A. Yeah, I'd refute that.

Q. Can you tell us why?

A. I think, as is the case with any organisation that has over 450 people, is that you will find that there are essential different cultures, different levels of energy within each various part of the buildings.

I'm very proud - personally speaking, I'm very proud of the team of people that I led who supported me, an exceptionally talented group of people who I believe were very focused, knew their roles, knew that they were supported, knew that the support that they provided was appreciated, and there are a good handful of the parts of the business that I could say had similar cultures within that branch. That's not to say that there weren't other parts of the business where there were very poor cultures, but it certainly wasn't a situation, in my view, that the culture across the organisation was toxic.⁷⁴

94. This is an entirely valid impression informed by his own subjective experience. However, Mr Mooney went on to say:

There may be some examples provided through community surveys - not community, I'm obviously talking about consultation. There are some examples of staff surveys which have been provided, and yeah, there are some matters which the broader workforce had issues with: the need to design and

⁷³ T492.16

⁷⁴ T308.01 to .22

modernise our remuneration framework was a major bugbear with a lot of staff. Those types of surveys in my experience allow staff the opportunity to really drive home on those points that they've been dissatisfied about that hadn't been addressed for a long time.

I see that as being very different to someone coming to work and sitting down all day and having nothing on their mind except for the fact that how annoyed they are: that doesn't happen, you know. People come to work, they want to enjoy their day's work, they want to be able to know that they can do it safely most importantly and then also, you know, go home to their friends and families.⁷⁵

95. This observation suffers from three problems: *firstly*, it misstates and minimises the concerns that were coming through in the staff surveys. For example, in 2019 rather than seizing on an opportunity to ventilate grievances as Mr Mooney suggests, staff were fearful of responding to the survey in case responses were used in a punitive way.⁷⁶ The notable themes included perceived lack of adequate communication, lack of consistent feedback and bullying and harassment.⁷⁷
96. *Secondly*, the proposition that surveys were being used to allow staff the opportunity to drive home satisfaction is indicative of a senior management not responsive to the needs of their staff.
97. *Thirdly*, questions of safety in modern workplace law cannot be restricted to all consuming concerns about physical safety. A workplace is not safe merely because a staff member is not at risk of having a mineshaft collapse in on them. The Council staff had a legal right to protection from bullying and harassment and if that protection was lost, whether it was affected their ability to do their job or how often they turned their mind to it is neither here nor there.
98. I do not highlight this to make specific criticism of Mr Mooney, but it illustrates that contemporaneous documentation of events and broad surveys have more evidentiary value in assisting the Commissioner make findings.

⁷⁵ T308.24 to .41

⁷⁶ Page 4 Workplace Wellbeing Survey Final Report 11 June 2019; Exhibit OO

⁷⁷ Page 6 Workplace Wellbeing Survey Final Report 11 June 2019; Exhibit OO

99. The Inquiry also received evidence from Nick Wilton who was the former Group Manager of Planning Development and Regulatory.⁷⁸ He gave the following evidence about the workplace culture:

Q. One of the matters reported on by the interim administrator to the Minister was a perception of a toxic culture within staff at council. What was your impression of the culture at council? Do you agree with the interim administrator's view on that?

A. Look, is it - are you referring to the toxic culture within council generally or is it within my group?

Q. Within the council generally, general staff?

A. Look, I wouldn't go as far as say it's a toxic culture. I would go as far as saying that there was a culture at times within council that wouldn't be consistent with what I would say to be a, you know, a functioning council, a proper functioning council.

Q. There was also reference to reputational damage and work health and safety issues. Can you give me your impressions on that? Do you agree/disagree with that or want to qualify?

A. Look, from the perspective of a workplace health and safety issue, you know, look, executive and senior staff at the 10 council meetings on occasion would be really feeling that there was almost bullying that was occurring at those meetings. You know, there was certain reputational issues that would come about as a result of that, not only for senior staff but also for the council as well.

100. Mr Wilton came across as a witness who was more resilient⁷⁹ and better able to deal with the interpersonal conflict that may have existed between Councillors themselves and when they interacted with; at least more so than the average member of staff. This made his evidence all the more concerning.

⁷⁸ T160.19

⁷⁹ T169.44 is evidence that Mr Wilton was perhaps able to externalise and move on from councillor conflict

101. A survey of the oral evidence should end with the examination of Mayor Gair. After being shown a clip of a meeting in which Mr Turland made comments directed to either the General Manager or a staff member, Mayor Gair was asked:

Q. Do you recall what, if any, action was taken afterwards?

A. No.

Q. You've given some evidence about the Code of Conduct and you've given some evidence about the Office of Local Government. That was, I think, eight men of a certain age sitting there while another man of a certain age made threats to a staff member. Do you think as an act of common decency something should have been done about that by one of you?

A. Hindsight says, and looking as I say at the video clips, I'd say, yes.

Q. Would you find it acceptable if someone talked to one of your four children like that in their workplace?

A. That's a valid point.⁸⁰

102. It is hardly indicative of a healthy workplace with appropriate councillor-staff interactions when the Mayor accepts he would not want his own children to be treated in such a way if they had worked for the organisation he led.

103. Mayor Gair also said in examination:

Q. Do you think that staff having a sense of dread or anxiety in appearing at briefing sessions is indicative of a dysfunctional governing body?

A. It would be part - definitely part of it, yes.

Q. We have multiple instances of incident reports detailing bullying, harassment and intimidation by councillors in the 2016-2020 term. Do you think that makes for a safe workplace?

A. No.

⁸⁰ T1383.37 to T1384.06

Q. Do you think the governing body and councillors have an obligation to ensure that the shire council is a safe workplace?

A. Yes.⁸¹

104. Ultimately, the Commissioner can avoid making any findings about the validity or the semiotics of the phrase “toxic.” It is undoubtedly experience of some Council staff on the evidence reviewed. But notwithstanding it is a convenient and evocative phrase to encapsulate a mood, it is too subjective and ambiguous to usefully inform the terms of this Inquiry.
105. It is sufficient to focus on the workplace culture within the boundaries of the reasons given by the Minister. When the evidence is considered in its totality, it is open for the Commissioner to find that there were reputational and work, health and safety risks facing Council as a consequence of the behaviour of some Councillors that took the form of bullying, harassment and intimidation.
106. The weight of the evidence supports a finding that these risks existed for some time prior to the issuance of the PIO Notice of Intention and was subsisting at the time of the suspension.
107. I will address in Term 1 how the behaviour of some Councillors interacted with the roles and responsibilities of the entire Governing Body.

The community had lost a material amount of trust and confidence in the Governing Body

108. There is a considerable amount of evidence in both documentary form (surveys and reports undertaken) and from witnesses at the Inquiry that supports a finding that the community had lost trust and confidence in the community to a relevant and material degree. The downward trend and standing are undeniable on the evidence presented.
109. Consultants with KPMG held a roundtable that focussed on the Southern Highlands Destination Strategy and the Council’s economic development framework.⁸² The following key themes came out of the meeting:

⁸¹ T1374.38

⁸² KPMG Report on Roundtable dated 13 July 2021; Exhibit J

A high level of dissatisfaction with the Destination Strategy, its factual accuracy and its lack of interaction with other policies/strategies and its lack of defined actions:

- A view that council, through its published strategies, the actions and interpretations of its officers and its culture is anti-development;
- A significant issue for the region is housing affordability and diversity, and this is impacting on the availability of appropriate staff in many sectors, particularly tourism and hospitality;
- Similarly transport infrastructure, both connecting and bypassing townships and communities, is lacking or poorly maintained; and
- The Tourism strategy should be separate from, or a subset of, a broad-based

110. These are predominantly strategic matters within the purview of the Governing Body.

111. A report was also written by the Small Business Commissioner⁸³ that was commissioned by the Minister for Finance and Small Business.⁸⁴ The Small Business Commissioner held three face-to-face consultation sessions in Bowral, Robertson and Moss Vale.⁸⁵ Businesses could also make online submissions and the author of the report received 57 responses to an online survey distributed to local businesses.⁸⁶

112. The key themes from interactions that business had encountered with the Council over the past two years included:

- Council took an adversarial approach when dealing with small businesses
- Councillors and council staff have their own agenda which is different to ratepayers
- Local economic development was not valued or its commercial assets appreciated
- DAs were required for minor activities
- There were delays from Council in responding to matters
- Council was generally unprofessional and not effective at planning for the future

⁸³ Page 461 Exhibit B

⁸⁴ Page 463 Exhibit B

⁸⁵ Page 464 Exhibit B

⁸⁶ Page 464 Exhibit B

- There was poor communication from Council
- Council ‘kicked the can down the road’ on important challenges that need to be addressed
- Development charges were not consistent for similar developments and in some instances prohibitive
- High staff turnover and in some instances the inexperience of council staff have had a negative impact on small business.⁸⁷

113. The Small Business Commissioner also noted that it had:

...examined a 2018 survey conducted by Business Illawarra (then the Illawarra Business Chamber). This survey suggests many local businesses are unsatisfied, with 83 per cent of respondents indicating their interaction with Council was harmful to their business. Council was also seen as a key contributor to negative business conditions in the Southern Highlands. On these measures Council performed unfavourably compared to the State and Federal governments. Qualitative feedback provided by the survey mirrors the feedback received in the Commission’s survey and this consultation process.⁸⁸

114. Setting communication strategies and engagement with regular stakeholders is a core function of Councillors.⁸⁹ It was reported by the Small Business Commissioner that:

Businesses characterised communication from Council as ‘too little, too late’. For example, one business raised that when Council closes roads at short notice this does not allow businesses to make alternative arrangements.

Participants and survey respondents indicated there is a lack of formal or regular stakeholder engagement with businesses or business chambers and a lack of an effective engagement plan(s) to seek input from the community.⁹⁰

115. This was reflected in oral evidence too.⁹¹

⁸⁷ Page 471 Exhibit B

⁸⁸ Page 471 Exhibit B

⁸⁹ See for instance sections 232(1)(c) and (e) of the Act

⁹⁰ Page 473 Exhibit B

⁹¹ T68.35 (Steve Horton); T326.18 (Brigid Kennedy)

116. In respect of strategic planning, the Small Business Commissioner wrote:

Stakeholders advised their view that Council's strategic plans do not deliver clear thinking about the future, outline how outcomes will be achieved or give appropriate focus to small businesses which are rarely mentioned in strategic documents. The Southern Highlands Destination Plan 2020 2030 was referred to as having insufficient opportunity for industry input and for not including clear actions for implementation or key performance indicators.

Stakeholders highlighted there are no planning documents outlining a specific vision for small businesses operating in the region. Stakeholders suggested that plans often seem to favour existing businesses and preserving the status quo rather than improving the environment for new businesses to start and grow.

Stakeholders expressed their perception that public consultation does not seem to result in changes to council plans. For example, it was suggested that the Wingecarribee Shire Housing Strategy did not progress despite multiple rounds of consultation and requests for submissions, with business stakeholders still unclear on outcomes.

The business community is trying to expand the ecosystem to support 7-day per week trade (rather than just weekends) with tourism, events and artisan industries, but it was suggested that Council has not acted to support these efforts. Furthermore, it was suggested that proposals for events that align with existing council priorities are frequently refused, delayed or require large financial contributions from the proponent for approval.⁹²

117. It was also noted that matters such as infrastructure had not kept pace with growth and population numbers.⁹³

118. While some of the witnesses who gave such evidence had also participated in the Small Business Commissioner's report,⁹⁴ the weight of the evidence was not confined

⁹² Page 474 Exhibit B

⁹³ Page 475 Exhibit B

⁹⁴ T68.04 to .11 (Steve Horton);

to a narrow range of interests who were amplifying their voice across multiple platforms.

119. Earnest Consulting in its review of planning independently identified many of the same themes that arose from the KPMG Report of Roundtable, the Small Business Commissioner report, and indeed even the 2012 Division of Local Government Promoting Better Practice Program Review Report. In particular, a lack of co-ordination between planning instruments⁹⁵ and that:

The LEP and DCPs at WSC are in need of being updated and made consistent with Council's other policy directions. This leads to the need to update and synchronise the planning contribution and headworks charges, along with "Works in Kind" procedures and the Voluntary Planning Agreements policy.⁹⁶

120. The countervailing evidence that the plans were appropriate, up-to-date and fit for purpose generally came from the Councillors.⁹⁷ Although at least Mr Turland seemed to accept the DCP for no longer fit for purpose.⁹⁸
121. The Wingecarribee Shire Council Community Research Report⁹⁹ also supports the conclusion that there had been a material loss of trust and confidence in the Governing Body over the course of the 2016-2020 term.
122. The overall satisfaction of Council dropped from 85% in 2010 to 65% in 2021. There was a 12% drop from 77% to 65% in the two years from 2019 to 2021.¹⁰⁰
123. Malcolm Ryan was asked to put these scores in context he said that "I would have resigned if that happened to me, that's appalling."¹⁰¹ He was then asked:

Q. And, just putting this again at the overall satisfaction level, although I appreciate your comments at finer integers are also important, but an overall satisfaction score that drops by 20 per cent on a continual downward trend, some jumps being bigger than others, is that also something that would cause you concern?

⁹⁵ Page 437 Exhibit B

⁹⁶ Page 440 Exhibit B

⁹⁷ T680.19 (Gordon Markwart)

⁹⁸ T1273.32ff

⁹⁹ Page 484 Exhibit B

¹⁰⁰ Page 498 Exhibit B

¹⁰¹ T751.31

A. Absolutely. Yeah, that means whatever you've done for the last four years hasn't worked.

Q. Yes.

A. Or five years, whatever that period was --

Q. Sorry, I didn't tell you. It went from 85 to 65 between 2010 to 2021.

A. That's terrible.

Q. What about an overall satisfaction score of 65 as a stand-alone point of data; what does that indicate to you?

A. Well, it's got to be one of the least satisfied communities in the state, I would have thought. I would have thought usually the aim of satisfaction ought be up near 80 per cent, and you should at least attempt to maintain it, if not slowly improve it.¹⁰²

124. Given that the benchmark rating is 83% for comparable councils,¹⁰³ the Commissioner can find that the Shire Council has one of the least satisfied communities in the State.
125. The Commissioner can reject the evidence of Mayor Gair that the dissatisfaction rating was explicable by external events such as COVID and the bushfires in 2019/2020.¹⁰⁴ Given the underperformance against benchmark indexes of similar councils and the lack of cogency in the logic of his argument, it cannot be seriously considered as an explanation for the community satisfaction trend. The *response* by the Governing Body may have had a bearing on the rating (this is addressed in more detail below) but the Commissioner should not accept that the external events *per se* explain the trend.
126. As for the Councillors, from 2019 to 2021 there was a decline in those surveyed who were somewhat satisfied, satisfied, or very satisfied, and an increase in those surveyed who were not very satisfied or not at all satisfied. These last two categories comprised 45% of the

¹⁰² T752.10

¹⁰³ Page 498 Exhibit B

¹⁰⁴ T1398.41 Exhibit B

total number surveyed.¹⁰⁵ In a question asking about thinking overall about the Councillors, the last two categories comprised 51% of those surveyed.¹⁰⁶

127. There is a clear link between the performance of the Council overall in these surveys and the behaviour of Councillors: the performance of councillors was the largest single driver of overall satisfaction at 22.5% of those surveyed.¹⁰⁷
128. The Wingecarribee Shire Council Bushfire Response and Recovery Review Report 2021¹⁰⁸ also corroborates the evidence that the Governing Body had lost the trust and confidence of the community to a material degree.
129. There were 72 community submissions made to the authors of the report and there were two community listening sessions held online.¹⁰⁹ The report found that the Council lacked leadership and direction during and recovering from the fires.¹¹⁰ Council had not “acknowledged the actions of any employees or volunteers many of whom went above and beyond community expectations.”¹¹¹
130. The key themes that came out of the community meetings included a lack of empathy, no proper plan for recovery, responses either too lack or a lack of response at all, a failure of response and recovery compared to Wollondilly Shire Council. There were also positive stories of individual actions of staff.¹¹²
131. The key themes that came out of the community surveys were:
- Council as a whole did not respond well to the bush fires and recovery.
 - Community meetings: lacked information and structure. Overall, there was a lack of information from council and the mayor was heavily criticised for his performance and lack of empathy at the meetings
 - Mayoral Relief Fund: Gratitude from residents that it was established. However, disparity between response to Balmoral to that at Wingello was clearly evident

¹⁰⁵ Page 501 Exhibit B

¹⁰⁶ Page 503 Exhibit B

¹⁰⁷ Page 513 Exhibit B

¹⁰⁸ Page 272 Exhibit B

¹⁰⁹ Page 289 Exhibit B

¹¹⁰ Page 278 Exhibit B

¹¹¹ Page 279 Exhibit B

¹¹² Page 296 Exhibit B

- Recovery Committees: Lack of community representation, council should have been better organised. Lack of communication from committees to community
- Recovery plans: What recovery plans? Unprofessional and incompetent stakeholder engagement for recovery
- Recovery Funding: Most funding was spent on council. A full-time grants officer should have been appointed.
- Submissions to the Royal Commission and NSW Bushfire Inquiry: Council should have been an advocate for the community, but they showed a complete lack of empathy by not making submissions.

132. Sara Haslinger gave evidence to the Inquiry about the effect the Governing Body response to the bushfires had on her. She described her interactions with Councillors as horrendous.¹¹³ She was of the view that the response to the bushfires would have been easier if council had not existed:

The council offered nothing other than angst and more - more sense of trauma and anger and frustration. There was literally no purpose for any of the interactions by council that were positive, and so, from my perspective, yeah, it would have been much better had they just not existed.¹¹⁴

133. There was consistent evidence from a variety of witnesses that there was an adversarial relationship between Councillors and members of the community. This evidence came from both community¹¹⁵ members and Councillors themselves.¹¹⁶ Mayor Gair described some specific conduct by Mr Halstead as beyond adversarial and “downright rude.”¹¹⁷ Mayor Gair himself was criticised by both members of the community and other Councillors for a lack of empathy towards bushfire victims.¹¹⁸ This led to a lack of leadership and a loss of trust from some in the community that the Governing Body had the ability to manage events that arose.¹¹⁹

¹¹³ T94.40

¹¹⁴ T99.29

¹¹⁵ T79.32 (Horton); T127.45 (Barrett); T362.15 and T363.29 (Jones); T371.08 (White)

¹¹⁶ T1287.34 to T1287.21 (Turland); T1132.30 (Nelson at least in respect of Station St); T1220.25 (Halstead at least in respect of Station St)

¹¹⁷ T1396.12

¹¹⁸ T148.13 (Stokeld); T557.09; T911.17 (Scandrett)

¹¹⁹ T149.24

Station Street By-pass

134. Perhaps surprisingly given its background hum through much of the oral evidence at the hearings, the Station Street by-pass warrants little independent examination by the Commissioner in his report. It is not within the terms of reference to examine the merits of individual decisions of the Governing Body let alone this issue specifically.
135. Even if there were some need to examine the merits of the Station Street by-pass, it is difficult if not impossible to pass judgement on the complex interaction of factors that are required to plan and complete a project of this kind.
136. However, the Station Street by-pass is indicative of the relationship between the community and the Councillors and serves as a symptom as much as a cause of the discord in the community caused by Councillor behaviour and their communication and consultation with the community. It appears to have fed the impression of an adversarial approach by Councillors towards their own community.¹²⁰
137. There was an impression in the minds of at least some of those who opposed the Station Street by-pass that there was a lack of consultation on the project¹²¹ and that there was a sense Council and community were opponents rather than working together.¹²²
138. An example of this was that Mr Halstead while mayor had to apologise for his behavior towards Laurel Cheetham¹²³ during a council meeting to discuss the proposed project.
139. Another example was Councillor Nelson's interactions with Mr and Mrs Wilson. Mrs Wilson produced a bundle of correspondence between her husband and Councillor Nelson. Included in the bundle was an email from Councillor Nelson to Mrs Wilson in which he wrote:

And I am the one with the VOTE so u don't count.¹²⁴

¹²⁰ T200.07 to .37

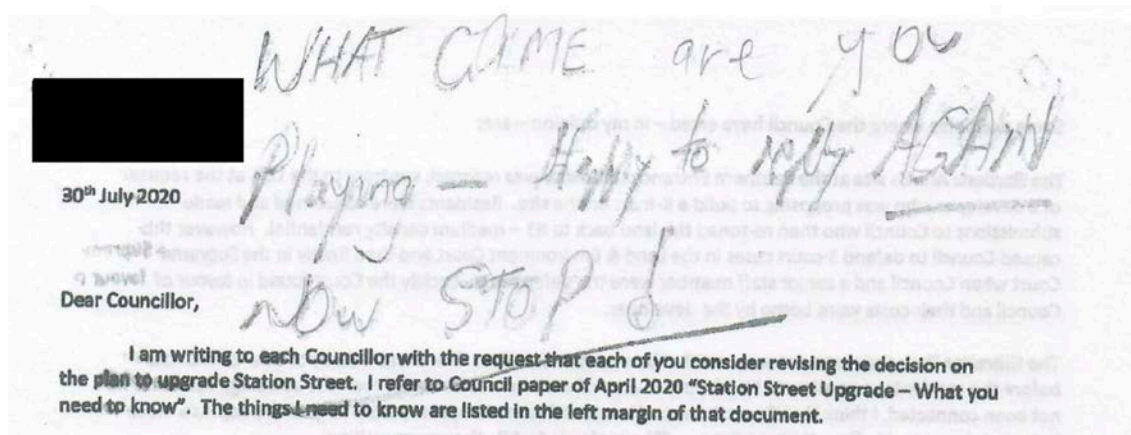
¹²¹ T143.14

¹²² T143.36

¹²³ T1396.12

¹²⁴ Email from Peter Nelson to Jan Wilson 25 June 2020 at 1:09pm; Exhibit H

140. The exchange between the Councillor Nelson and the Wilsons climaxed with the Councillor personally delivering Mr Wilson's letter back to him with a handwritten message across the top:¹²⁵



141. The fuller exchange of emails produced gave context to the exchange which included several more emails from groups aligned with Mr and Mrs Wilson but it hardly excuses the failure of judgement from Councillor Nelson in delivering scrawled messages personally to the letter box of ratepayers.
142. Councillor Nelson also took an active interest in Paul Samulski's position on the Southern Highlands Chamber of Commerce as Council and Government Liaison Director after Mr Samulski wrote to all Councillors shortly following the issuance of the Notice of Intention to Suspend.¹²⁶
143. Following this email, Councillor Nelson wrote to the head of the chamber of commerce asking him to "take appropriate action to sack Mr Samulski from the position of Council Liaison Office between the Chamber and the Wingecarribee Shire Council."¹²⁷ Councillor Nelson was asked:

Q. Do you think this is indicative of council culture, in the sense that there was an adversarial approach to people who disagreed with them in the community?

A. No, it's not the normal approach, it's a one-off, and I think in hindsight I should have taken it to the mayor in the first instance and had it dealt that way.¹²⁸

¹²⁵ Exhibit H

¹²⁶ Email from Paul Samulski to Mayor Gair and Councillors dated 4 March 2021; Exhibit Q

¹²⁷ Email from Peter Nelson to Steve Horton dated 5 March 2021 at 7:28am; Exhibit Q

¹²⁸ T1161.24

144. Mr Samulski also gave evidence that Councillor McLaughlin had approach a member of the National Party around the same time to seek that Mr Samulski's membership be revoked.¹²⁹
145. It is understandable that Councillors making difficult decisions that require weighing up competing interests may feel under attack from sections of the community from time to time. But part of the role of Councillors involves exercising leadership and facilitating communication with the community they represent.
146. It is possible that some weight ought to be given to Barry Paull's observation that in a community like the Shire Council's with a high proportion of well educated and very articulate retired people, there might be a higher level of engagement with stronger opinions and a sense that they should be entitled to voice them.¹³⁰ This may lead to circumstances in which, on certain issues sections of the community simply will not accept the decisions of the Governing Body.¹³¹
147. Whether there is any truth to that observation, the Commissioner can at least accept that on certain issues there were members of the community who were highly engaged, organised, and motivated in their opposition to the project. But this makes it even more vital that the Governing Body's communications and consultation with the community is effective, respectful and well-prepared when advocating for change on potentially contentious matters.
148. Instead, it appears that Councillors had a habit of engaging members of the community in a similar way to that which they engaged each other from time to time in Council meetings. The lack of community buy-in and discord this created was most evidently on display with the Station Street by-pass project and the bushfire response.
149. An example of the adversarial approach during the bushfire response was Mayor Gair's treatment of a telephone call from Ms Haslinger's architect in early 2020. Ms Haslinger's pro bono architect had rung the Council to discuss DA fees.¹³² Ms Haslinger noted:

The architect wasn't even - like, through some kind of architect professional body they had amazingly offered free architectural services to everyone who lost their homes, and so this woman we'd never met,

¹²⁹ T789.08

¹³⁰ T811.33 to 812.07

¹³¹ T811.33 to 812.07

¹³² T97.44

she was an architect in Queensland and she said, "Look, please let me do this for you. I will find out all the council fees for rebuilding your home, I'll get all of that ground work done for you, and then I'll put together some basic designs for a new house as quickly as I can", and so, that's what she was doing for us.¹³³

150. The Mayor and other Councillors listened to a tape recording of the phone call¹³⁴ and the Mayor then went on radio and called the telephone call mischievous and mentioned Ms Haslinger by name.¹³⁵
151. This has some resonance with Barry Paull's evidence that staff members had to apologise to professionals or experts who attended meetings or briefings from time to time for the conduct of the Councillors.¹³⁶
152. It is accordingly open on the evidence for the Commissioner to find that for various reasons, a material amount of trust and confidence had been lost by the community in their elected representatives.

There was a perception in the community that the planning decisions at the Governing Body level were not open, transparent and fair

153. The approach the Governing Body took to the approval of development applications was a recurring theme in the written and oral evidence to the Inquiry.
154. Under clause 3.13 and 3.14 the Code of Conduct:

3.13: You must ensure that land use planning, development assessment and other regulatory decisions are properly made, and that all parties are dealt with fairly. You must avoid any occasion for suspicion of improper conduct in the exercise of land use planning, development assessment and other regulatory functions.

3.14 In exercising land use planning, development assessment and other regulatory functions, you must ensure that no action, statement or communication between yourself and others conveys any suggestion of

¹³³ T98.05

¹³⁴ T1358.32

¹³⁵ Exhibit T

¹³⁶ T803.34

willingness to improperly provide concessions or preferential or unduly unfavourable treatment.¹³⁷

155. These prohibitions are broad. In particular, clause 3.14 of the Code of Conduct focuses on the actions that might “convey any suggestion.” Accordingly, the Councillors, Senior Staff and staff must not only ensure there is no improper concessions preferential or unduly favourable treatment, they must ensure their actions convey no suggestion of it, whether it exists or not. The *perception* caused by their acts or omissions are therefore directly relevant.
156. The Small Business Commissioner found that some businesses found the reasons for rejecting applications or requests “unclear, unreasonable, or unprofessional...for example it could be that councillors ‘didn’t like’ an idea despite council staff seeming supportive and the application satisfying the relevant requirements.”¹³⁸
157. This was not just confined to development applications:
- Several businesses in consultations expressed concern regarding the role and decisions of Council’s previous administration and councillors. It was noted that council staff would make recommendations in accordance with an established strategy or policy, only for these to be overturned or rejected by councillors without reason(s) or advice to the applicant or the community. Further concerns were raised by businesses regarding role clarity, purpose and functions of Council and councillors.¹³⁹
158. Malcolm Ryan gave evidence that he had been left with this impression in discussions with members of the community in the preparation of his reports for Earnest Consulting, although he did not have any specific instances to back it up.¹⁴⁰
159. Paul Samulski, a developer who had several interactions with Councillors about planning matters, was left with the impression that there were instances of Councillors becoming directly involved in the planning process on behalf of an objection or applicant.¹⁴¹
160. Councillor Andrews gave evidence:

¹³⁷ Page 703 Exhibit A

¹³⁸ Page 472 Exhibit B

¹³⁹ Page 18 Small Business Commissioners Report; page 478 Exhibit B

¹⁴⁰ T739.33

¹⁴¹ T779.37

Q. Were you left with the impression at all, during council meetings at least, that councillors were becoming involved in development applications or other planning matters in a way which suggested preferential or unfavourable treatment?

A. I certainly agree that there was more than an impression, that there was involvement by, on occasion, councillors, yes --

Q. Can I just --

A. Without proof.¹⁴²

161. The Commissioner can take this to mean that Councillor Andrews agreed that it may have *appeared* that way but he could offer no specific evidence that such treatment had been given. This is evident from his later evidence:

A. I think it's important that I do [expand on my previous answer] because I sort of mention it in my submission, that on occasion and possibly on many occasions over the three years it was quite obvious that some councillors were arguing the case and gave the feeling - once again, the feeling or the impression to me, that they had or would have had some involvement with the applicant over and above the normal debate on an application before us on any given council meeting.

So, my opinion, there was definitely an impression that some councillors may have been favouring an applicant, but almost definitely would have had conversation with that applicant.

THE COMMISSIONER: Q. What about the flipside? What about favouring objectors or having had involvement with objectors; did you get that impression from time to time?

A. Exactly the same, absolutely.¹⁴³

162. Mr Markwart gave evidence that he saw instances on Councillors speaking towards something very strongly despite there being a known relationship.¹⁴⁴ He also gave evidence:

¹⁴² T1033.09

¹⁴³ T1033.42

¹⁴⁴ T674.05

Q. Do you agree that, if that perception [or favourable treatment in planning matters] does leak into the community, that someone is able to find a councillor and lobby them, that that can create a perception in the community that that's favourable treatment?

A. I believe that is true and I believe that did happen.¹⁴⁵

163. Jim Clark was a councillor for three terms of the Council. He gave evidence:

I live at Bundanoon, if there was going to be a development their people would approach me and ask me about it to give them some information on how they should approach it. Sure, there is steps that the community can make submissions, but to me it's - and I've made submissions since I've left council on proposals out my way, but it's just a bit like, you're putting in a submission, you get minimal information, you go online and have a look at the plans, and you put in a submission and that's pretty much it, you don't really - you don't get the involvement that you would get going to a council meeting and seeing who's voting for what and the debate about it.¹⁴⁶

164. Without meaning any specific criticism of Mr Clark, this is precisely the sort of conduct that may lead to a culture of preferential treatment or at least its perception within other members of the community. There *is* a process to object under the Environmental Planning and Assessment Act. Community members should not feel it is necessary to attach a Councillor to a cause in order to have their voices heard on planning decisions. It gives undue weight to the loudest voices and favours those who Councillors think are the right kind of people or deserving of a voice to make objections.

165. The most obvious example of a Councillor involving himself in planning decisions that could be perceived as preferential treatment is the assistance Councillor McLaughlin gave to objectors against a development application lodged by Montrose House and Berry Farm in 2016.¹⁴⁷ A code of conduct investigation found that Councillor McLaughlin forwarded a number of internal emails to the objectors and assisted them in drafting objections.¹⁴⁸

¹⁴⁵ T676.15

¹⁴⁶ T644.07

¹⁴⁷ Page 37 Exhibit C

¹⁴⁸ Page 53 and 54 Exhibit C

166. The code of conduct complaint was ultimately addressed through the conflict of interest provisions rather than the perception provisions of clause 3.13 and 3.14 to “avoid any occasion for suspicion” of improper conduct or “conveys any suggestion” of willingness to improperly provide concessions or preferential or unduly unfavourable treatment.
167. This may raise a question as to whether the code of conduct provisions relating to conflicts of interest are sufficient but from the point of view of this finding, the Commissioner can take into the factual matrix when determining whether there was a valid that perception existed in the community about an uneven playing field when it came to planning matters.
168. While it is difficult to identify specific instances outside code of conduct complaints, given that the perception or an unfair playing field is something Councillors themselves agreed was fostered, and given it is not the Commissioners’ role to make conclusive findings on specific instances, it is open for the Commissioner to find that there was at least a *perception* in the community that the planning decisions at the Governing Body level were not open, transparent and fair.

Section 232(1)(f): to uphold and represent accurately the policies and decisions of the governing body extends to not undermining a decision.

169. The Commissioner ought to read this provision as applying the corollary negative obligation on a Councillor not to take steps to undermine or inaccurately misrepresent a policy of the decision of the governing body.
170. The obligation under this clause recognises that Local Government is distinguishable from State and Federal politics. This tier of government is purely a creature of statute and the statutory obligations imposed on councillors extend to acting in the best interests of the community *as a whole* and not just those who voted for them.¹⁴⁹ The Councillor Handbook¹⁵⁰ states:

While councillors are free, subject to their obligations under the council’s Code of Conduct, to advocate a position on matters that are before the council for a decision, once a decision has been made they are required to ‘uphold’ the policies and decisions of the council.

¹⁴⁹ Section 232(1)(d) of the Act

¹⁵⁰ Page 450 Exhibit A (October 2017 version)

The requirement to uphold the policies and decisions of the council should be read in the context of the implied freedom of political communication under the Australian Constitution. In practical terms, councillors remain free to speak about the policies and decisions of the council but they must accept and abide by them and must not misrepresent them.¹⁵¹

171. This distinction from other levels of government is also reinforced by the prohibition against participating in binding caucus votes (other than a decision to elect the mayor or deputy mayor).¹⁵² Accordingly the Commissioner should find that the Councillors had a statutory obligation not to undermine or misrepresent a decision of the governing body once a resolution had been passed.

The Commissioner cannot excise the conduct of one or two Councillors from the roles and responsibilities of the Councillors as members of the Governing Body

172. It is a recurring theme in the response of Councillors that Councillor Scandrett and Mr Turland (and sometimes, it appears, Mr Halstead) were part of a disruptive minority responsible for the conduct of the kind that has been exposed in this Inquiry.¹⁵³
173. Before addressing below whether or not Councillors *should* have done something about the possibly disruptive behaviour of a minority it is appropriate to analyse whether or not they had any such obligation to do so.
174. Under the Act, the Council is the employer of the staff and there is no direct contractual or statutory obligation on a councillor as employer. However, obligations do exist under the *Work Health and Safety Act 2011* that imposes duties upon officers of a public authority the definition of which includes councillors.¹⁵⁴
175. This is reflected in the Code of Conduct which states:¹⁵⁵

Work health and safety

¹⁵¹ Paragraph 2.1.1 Roles and responsibilities; page 467 Exhibit A

¹⁵² Clause 3.15 to 3.18 Code of Conduct 12 June 2019; page 704 Exhibit A

¹⁵³ Page 21 Exhibit E

¹⁵⁴ While an elected member of a local authority does not conduct a business or undertaking by virtue of the exception under section 5(5) of the *Work Health and Safety Act 2011* (thus not giving rise to a primary duty under sections 19 and 27 of that Act), section 252 of that Act imposes separate duties on councillors

¹⁵⁵ Clause 3.12 Code of Conduct 12 June 2019; page 703 Exhibit A

3.12 All council officials, including councillors, owe statutory duties under the Work Health and Safety Act 2011 (WH&S Act). You must comply with your duties under the WH&S Act and your responsibilities under any policies or procedures adopted by the council to ensure workplace health and safety. Specifically, you must:

- a) take reasonable care for your own health and safety
- b) take reasonable care that your acts or omissions do not adversely affect the health and safety of other persons
- c) comply, so far as you are reasonably able, with any reasonable instruction that is given to ensure compliance with the WH&S Act and any policies or procedures adopted by the council to ensure workplace health and safety
- d) cooperate with any reasonable policy or procedure of the council relating to workplace health or safety that has been notified to council staff
- e) report accidents, incidents, near misses, to the general manager or such other staff member nominated by the general manager, and take part in any incident investigations
- f) so far as is reasonably practicable, consult, co-operate and coordinate with all others who have a duty under the WH&S Act in relation to the same matter.

- 176. Moreover even if no such responsibility existed in a separate Act and the Code of Conduct (which it does) it is a guiding principle under section 8A(1) of the Act that the Council be a responsible employer and provide a consultative and supportive working environment for staff.
- 177. The Code of Conduct also explicitly prohibits harassment or bullying behaviour (which is set out in some detail and which will be specifically referred to below) and conduct that would be contrary to the Council's obligations.¹⁵⁶
- 178. The Code of Meeting Practice and the Act also specify ***acts of disorder***¹⁵⁷ and a points of disorder process that can be taken to draw attention to a breach of the Code of Meeting Practice.¹⁵⁸ The Councillors had this mechanism available to them when they saw acts of harassment and bullying towards either fellow Councillors or staff.

¹⁵⁶ Clause 3.1 to 3.10 Code of Conduct 12 June 2019; page 702 and 703 Exhibit A

¹⁵⁷ The way these provisions interact and their definitions are addressed in Term 1 below

¹⁵⁸ Clause 16 Code of Meeting Practice; page 1022 and 1023 Exhibit A

179. The Commissioner should find that the roles and responsibilities of the Councillors included ensuring their own behaviour did not put the Council in breach of its work health and safety obligations or the codes incorporated into the legislation. The fact that clause 3.12 of the Code of Conduct included omissions as well as acts; required Councillors to report incidents to the general manager; and consult, co-operate and coordinate with all others who have a duty under the WH&S Act in relation to the same matter, meant that *all* Councillors had a positive obligation to take steps to prevent bullying and harassment.
180. Accordingly, there is little utility in the Commissioner finding that the matters raised during the Inquiry were the acts of a disruptive minority. While individual examples of Councillors' breaches are set out below and bears upon the ultimate matrix of facts to be considered by the Commissioner, the Inquiry cannot parse the responsibility of individual Councillors: each of them had obligations to prevent and report as much as to not commit acts of harassment and bullying or breaches of the codes.

The Minister did not have the power to suspend individual Councillors

181. I have provided a survey of the relevant powers of the Minister under Chapter 13 to issue PIOs and suspend councils. No such power exists under these provisions for the Minister to suspend individual councillors.
182. Under Chapter 13 Part 1 of the Act, there are powers for the Governing Body to formally censure a councillor for misconduct.¹⁵⁹ There are also powers for the Departmental Chief Executive to investigate misconduct either on their own initiative or (amongst other ways) by a reference from the general manager or a motion passed by the Governing Body.¹⁶⁰ There is no power for the Minister under section 440H of the Act to refer an investigation to the Departmental Chief Executive.
183. The Departmental Chief Executive has various powers to take disciplinary action against a councillor found to have engaged in misconduct including suspending the councillor from civic office for a period not exceeding 3 months.¹⁶¹
184. To the extent it forms part of the chain of logic in addressing the Councillors knowledge of their roles and responsibilities and their response to the dysfunction of the Council, the

¹⁵⁹ Section 440G of the Act

¹⁶⁰ Section 440H of the Act

¹⁶¹ Section 440I(2)(g) of the Act

Commissioner can find that the Minister did not have power to suspend individual Councillors.

The Governing Body's response to the Notices of Intention were late, inadequate and indicative of an improperly functioning governing body.

185. I will address the adequacy of the response to the PIO Notice of Intention and the Notice of Intention to Suspend below and will therefore first address whether any such criticism is open on the evidence.

186. The Notice of Intention to Suspend was issued on 2 March 2021 and relevantly said:

I am aware that there have been long-standing divisions within Council which have led to numerous code of conduct complaints and complaints about poor meeting practice. There have been ongoing requests for intervention by me and the Office of Local Government to address behavioural issues at Council and the effectiveness of Council decision-making.

Allegations of harassing and bullying behaviour towards Council staff have been made. Concerns have been raised by both councillors and staff about the impact of these behaviours on the health and well-being of staff at the council.

These concerns have been ongoing for some time. The Office of Local Government has previously attempted to work with Council to improve the underlying behaviours that gave rise to disruption at Council meetings and on Council premises, including warning letters, providing observers to meetings and conducting workshops with councillors and senior staff.

Ultimately, as a result of concerns about these issues continuing, I issued Council with a Performance Improvement Order (Order) on 8 September 2020. Councillors attended the mediation sessions and meeting training required by the Order. There were observable improvements in the conduct of meetings and general behaviours for a short time.

However, it was observed by my appointed temporary adviser that the improved behaviours that were exhibited at Council's meeting immediately following the mediation declined over subsequent meetings. This decline in civility impacted on the Mayor's chairing.

More recently it is evident that councillors appear to be unable to sustain the improvements made by the previous intervention. Council's finance committee meeting held on 22 February 2021 and Ordinary meeting on 24 February 2021 do not engender confidence that the governing body is effectively and efficiently managing the affairs of the Council.

I have formed the preliminary view that the Performance Improvement Order has been unsuccessful in effecting cultural change in the behaviour of some councillors and in improving relationships at the council.

These are serious matters. In circumstances where relationships between the councillors themselves, and between the councillors and key Council officers have broken down, that position is untenable. On the information currently available to me, I have formed the preliminary view that there are significant reputational and work, health and safety risks facing Council that must be addressed.

In light of the division and conflict evident amongst the elected members which is impacting on the ability of the Acting General Manager and other staff to undertake their work, I do not presently believe that Council is in a position to satisfactorily identify and address the issues of concern at this time. To assist Council to move forward, and to restore and retain public confidence in Council as a functional decision-making representative body, I presently consider that a period of independent administration may be required.¹⁶²

187. The Minister sought a written response within 7 days.

¹⁶² Pages 4 and 5 Exhibit E

188. The Council met on the last day available to it to provide a response to the Minister's Notice of Intention to Suspend. When asked why the meeting was held on the last day available to the Council, Mayor Gair replied:

Well, for no particular reason other than it was a normal meeting day. We checked with the, I'm sure, I'm sure we checked with the Office of Local Government to make sure that that would be totally in order, and it was, and as such we set it for that Wednesday afternoon; not to run the, you know, the eleventh-hour gauntlet, but to - to, rather than call an extraordinary meeting we would have that meeting on the off Wednesday, I think it was, and as such that was it, there was no ulterior motive, no.

Q. I'm not suggesting there was, I'm just trying to explore why you left it to the eleventh-hour gauntlet to deliberate on a response to the Minister?

A. That was why.¹⁶³

189. The Inquiry has not been able to obtain any evidence that the Council checked with the Office of Local Government as to whether such a meeting would be in order. In any event, there was no such requirement or stipulation that a meeting take place. What was required by the Notice of Intention to Suspend was a response in writing within 7 days.

190. On that point, the response was perplexing. Motion MN51/21 as passed read:

1. THAT the Notice of Intention to Suspend Wingecarribee Shire Council issued by the Minister of Local Government, the Hon. Shelley Hancock, MP (the Minister) which invites Council to make a submission within 7 days with regard to the proposed suspension by way of Council resolution be received and noted.

2. THAT the following achievements of Council during the Council term be noted

- a. Sound financial position with unmodified audit opinion for each year of the Council term
- b. Completion of Merrigang Street Reconstruction Project

¹⁶³ T1437.46

- c. Completion of Kirkham Road Reconstruction Program
- d. Completion of the expanded Wattle Street Carpark in Bowral
- e. Completion of the redevelopment of Bowral Rugby Club
- f. Completion of Bundanoon Skate Park
- g. Repair and Upgrade of Mittagong Pool
- h. Exemplary response to the 2019/20 Black Summer Bushfires, Drought, Floods and the COVID-19 pandemic and continuation of service delivery and support to the community during this period.

3. THAT Council notes that the majority of Councillors adhered to the requirements of the Performance Improvement Order issued by the Minister on the 8 September 2020 and it is a minority of Councillors that have not adhered to the requirements of this order.

4. THAT Council notes that the majority of Councillors adhered to the councillor agreements arising from the mediation workshop undertaken as a part of the Performance Improvement Order and it is a minority that have not adhered to these agreements.

5. THAT the Mayor Councillor Gair, Deputy Mayor Councillor Andrews, and Councillor Whipper request a meeting with the Minister to discuss alternative options to the suspension of all councillors.

6. THAT Council seek an extension for its submission to the Notice of Intention to Issue a Suspension Order until 17 March in order for a meeting with the Minister.

7. THAT Council call upon the Minister to reiterate that the vast majority of Councillors are not responsible for the dysfunction of Council as identified in her correspondence received by Council on 3 March 2021.

8. THAT following this meeting the Minister take decisive action against those Councillors identified by the majority of this democratically elected

Council who continue not to adhere with the requirements of the Performance Improvement Order.

191. This is almost entirely unresponsive to what the Minister actually sought. It is unclear why the Councillors thought listing their achievements addressed the allegations of harassment and bullying of staff or the concerns about the impact of these behaviours on both Councillors and staff.
192. Even if the Minister had been looking for some laundry list of achievements in reply, it is difficult to see how, from the evidence available to this Inquiry, the response to the bushfires could be characterised as exemplary.
193. For the reasons set out above, the Councillors also persisted under a misapprehension that the Minister had a power to act against a minority of Councillors and a misapprehension that they had no agency themselves to take steps to censure a fellow Councillor for misconduct.
194. It is also difficult to understand what the Councillors thought a meeting with the Minister would achieve. The Notice of Intention to Suspend was issued pursuant to statutory powers. It listed factual reasons for the intention to suspend. The Councillors did not engage with the chain of reasoning of the Minister or the facts that underpinned it at all other than to (a) blame a minority for dysfunction but in the process (b) accept implicitly that there *was* dysfunction. It appears that the entire approach was calculated through the lens of political machinations rather than any kind of understanding of the procedure set out under the Act in respect of suspensions or the powers available to deal with individual Councillors.
195. A similar late and perfunctory approach was taken in response to the PIO Notice of Intention,¹⁶⁴ although it accepted that the reasons for the issuance existed and therefore little further analysis needs to be undertaken.
196. It is indicative of the Governing Body's dysfunction and how it affected the Councillors relationship with Senior Staff that such a poorly formed and last minute response was created. One might think that a properly functioning Governing Body would have received timely accurate advice on what the Minister was seeking from them, how it should be

¹⁶⁴ Page 8 and 9 Exhibit E

provided, and what other options were open to them (if any). It is clear from the resolutions that they either did not receive that advice, or if they did, that advice was not accurate or they did not understand it.

197. Accordingly, it is open for the Commissioner to find that the Governing Body's response to the Notices of Intention were late, inadequate and indicative of an improperly functioning governing body.

K. TERM OF REFERENCE 1

Whether members of Council's governing body fully understand their roles and responsibilities and have adequately, reasonably and appropriately carried out their roles and responsibilities during the current term of Council.

198. The roles and responsibilities are contained in the Act and interact with statutorily prescribed codes of conduct and codes of meeting practice that are incorporated into the Act. The three most relevant provisions of the Act to the roles and responsibilities of Councillors are sections 8A (guiding principles of councils), 223 (role of the Governing Body), and 232 (role of Councillors).
199. While the roles are stipulated by the Act, the Commissioner ought to take broad approach as to what those roles and responsibilities were. This is for three reasons: *firstly* the actual roles set out in the provisions are purposive and not always prescriptive; *secondly*, "responsibilities" is necessarily broader than just the matters set out in the three sections of the Act: it is informed by the context and practical application of their roles; *thirdly*, the terms of reference cannot exist in a vacuum and need to be read harmoniously with each other and the analysed conduct.
200. I have also taken a broad reading of the tense used in the verb "understand." The Commissioner ought not interpret the Councillors' understanding as being restricted to their comprehension at either the time of the order for the Inquiry on 31 August 2021 or their appearance at the Inquiry in April 2022. Their comprehension must necessarily extend to their time during the 2016-2020 for Term 1 to have any meaningful content.
201. If the Commissioner wishes to take a narrower approach, many of the examples raised below which may be caught by a broader approach can nevertheless be considered under

Terms 3 and 4 as they bear on considerations as to whether the Councillors should be returned and how the Council can function efficiently and effectively in the future.

202. To first address what those roles and responsibilities actually entail, it is appropriate to start with section 8A of the Act:

Guiding principles for councils

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

- (a) Councils should provide strong and effective representation, leadership, planning and decision-making.
- (b) Councils should carry out functions in a way that provides the best possible value for residents and ratepayers.
- (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.
- (d) Councils should apply the integrated planning and reporting framework in carrying out their functions so as to achieve desired outcomes and continuous improvements.
- (e) Councils should work co-operatively with other councils and the State government to achieve desired outcomes for the local community.
- (f) Councils should manage lands and other assets so that current and future local community needs can be met in an affordable way.
- (g) Councils should work with others to secure appropriate services for local community needs.
- (h) Councils should act fairly, ethically and without bias in the interests of the local community.
- (i) Councils should be responsible employers and provide a consultative and supportive working environment for staff.

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

- (a) Councils should recognise diverse local community needs and interests.
- (b) Councils should consider social justice principles.
- (c) Councils should consider the long term and cumulative effects of actions on future generations.
- (d) Councils should consider the principles of ecologically sustainable development.
- (e) Council decision-making should be transparent and decision-makers are to be accountable for decisions and omissions.

(3) Community participation Councils should actively engage with their local communities, through the use of the integrated planning and reporting framework and other measures.

203. Section 223 of the Act sets out the role of the governing body and reads:

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

- (a) to direct and control the affairs of the council in accordance with this Act,
- (b) to provide effective civic leadership to the local community,
- (c) to ensure as far as possible the financial sustainability of the council,
- (d) to ensure as far as possible that the council acts in accordance with the principles set out in Chapter 3 and the plans, programs, strategies and policies of the council,
- (e) to develop and endorse the community strategic plan, delivery program and other strategic plans, programs, strategies and policies of the council,
- (f) to determine and adopt a rating and revenue policy and operational plans that support the optimal allocation of the council's resources to implement the strategic plans (including the community strategic plan) of the council and for the benefit of the local area,
- (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,
- (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,

- (k) to consult regularly with community organisations and other key stakeholders and keep them informed of the council's decisions and activities,
- (l) to be responsible for ensuring that the council acts honestly, efficiently and appropriately.

(2) The governing body is to consult with the general manager in directing and controlling the affairs of the council.

204. Section 232 of the Act sets out the role of individual councillors and reads:

- (1) The role of a councillor is as follows--
 - (a) to be an active and contributing member of the governing body,
 - (b) to make considered and well informed decisions as a member of the governing body,
 - (c) to participate in the development of the integrated planning and reporting framework,
 - (d) to represent the collective interests of residents, ratepayers and the local community,
 - (e) to facilitate communication between the local community and the governing body,
 - (f) to uphold and represent accurately the policies and decisions of the governing body,
 - (g) to make all reasonable efforts to acquire and maintain the skills necessary to perform the role of a councillor.
- (2) A councillor is accountable to the local community for the performance of the council.

205. There is also a separate provision setting out the role of mayor in section 226 of the Act:

The role of the mayor is as follows--

- (a) to be the leader of the council and a leader in the local community,
- (b) to advance community cohesion and promote civic awareness,
- (c) to be the principal member and spokesperson of the governing body, including representing the views of the council as to its local priorities,
- (d) to exercise, in cases of necessity, the policy-making functions of the governing body of the council between meetings of the council,
- (e) to preside at meetings of the council,
- (f) to ensure that meetings of the council are conducted efficiently, effectively and in accordance with this Act,
- (g) to ensure the timely development and adoption of the strategic plans, programs and policies of the council,
- (h) to promote the effective and consistent implementation of the strategic plans, programs and policies of the council,
- (i) to promote partnerships between the council and key stakeholders,
- (j) to advise, consult with and provide strategic direction to the general manager in relation to the implementation of the strategic plans and policies of the council,

- (k) in conjunction with the general manager, to ensure adequate opportunities and mechanisms for engagement between the council and the local community,
- (l) to carry out the civic and ceremonial functions of the mayoral office,
- (m) to represent the council on regional organisations and at inter-governmental forums at regional, State and Commonwealth level,
- (n) in consultation with the councillors, to lead performance appraisals of the general manager,
- (o) to exercise any other functions of the council that the council determines.

206. Sections 8A, 223, 226, and 232 of the Act are broadly framed and aspirational in nature. It is the code of conduct and code of meeting practice that provide more prescriptive obligations on councillors. The codes have statutory force as follows:
207. Pursuant to section 440(5) the Councillors must comply with the code of conduct adopted by the council and pursuant to section 360(5)¹⁶⁵ the Councillors must conduct themselves in meetings and committees in accordance with the code of meeting practice.
208. Not only is the adherence to the code of conduct and code of meeting practice mandated, it is part of the grounds that can made up acts of disorder and misconduct. **Acts of disorder** are described as anything prescribed by the regulations for the purposes of Chapter 14 of the Act and the code of conduct.¹⁶⁶
209. The regulations changed in 2021 but the same definition appeared in the previous iteration of the regulations¹⁶⁷ and provides:

For the purposes of section 490A of the Act, a councillor commits an act of disorder if the councillor, at a meeting of a council or a committee of a council—

- (a) contravenes the Act, this Regulation or any provision of the code of meeting practice adopted by the council under section 360(3) of the Act, including any provisions incorporated in the adopted code that are prescribed by this Regulation as mandatory provisions of the model code of meeting practice, or

¹⁶⁵ While section 360 was amended during the term of the 2016-2020 council the relevant obligation to conduct themselves in accordance with the code did not change other than to become subclause (5) rather than subclause (6).

¹⁶⁶ Section 490A of the Act

¹⁶⁷ Regulation 194 and 256(1) of the Local Government (General) Regulation 2005 is relevantly identical to regulation 182 of the Local Government (General) Regulation 2021.

- (b) assaults or threatens to assault another councillor or person present at the meeting, or
- (c) moves or attempts to move a motion or an amendment that has an unlawful purpose or that deals with a matter that is outside the jurisdiction of the council or committee, or addresses or attempts to address the council or committee on such a motion, amendment or matter, or
- (d) insults, makes unfavourable personal remarks about, or imputes improper motives to, any other councillor or a member of staff or delegate of a council, or
- (e) says or does anything that is inconsistent with maintaining order at the meeting or is likely to bring the council or committee into contempt.

210. **Misconduct** under section 440F of the Act is defined as:

(1) ...

- (a) a contravention by the councillor of this Act or the regulations,
- (b) a failure by the councillor to comply with an applicable requirement of a code of conduct,
- (c) a failure by a councillor to comply with an order issued by the Departmental Chief Executive under this Division,
- (d) an act of disorder committed by the councillor at a meeting of the council or a committee of the council,
- (e) an act or omission of the councillor intended by the councillor to prevent the proper or effective functioning of the council or a committee of the council.

...

(3) A reference in this Division to misconduct includes a reference to misconduct that consists of an omission or failure to do something.

211. The interaction of these sections and regulations means that a failure to comply with the code of meeting practice is an act of disorder (subs (1)(d)) a breach of the mandate to

comply with the code (subs (1)(a) importing section 360(5) of the Act) and therefore misconduct. A failure to comply with the code of conduct is misconduct as defined by force of section 460F(1)(b) of the Act and a breach of the mandate to comply with the code under section 440F of the Act.

Whether members of Council's Governing Body fully understand their roles and responsibilities

212. The Councillors do not *fully* understand their roles and responsibilities.
213. Each of the Councillors including the three ex-councillors were asked what they understood their statutory roles or obligations to be. The answers were mostly high level and without specific reference to the actual content of the provisions in the Act. Consistent themes through the answers included: to behave well¹⁶⁸ and to not be a bully,¹⁶⁹ be responsible,¹⁷⁰ listen to people, and¹⁷¹ taken into account all information in decision making.¹⁷² Some Councillors properly identified the role of the Governing Body to set policy and strategic direction rather than become involved in the day-to-day management.¹⁷³ Some were much vaguer about what the roles actually were under the Act.¹⁷⁴
214. It may seem surprising that given most of the later Councillors had watched at least some of their fellow Councillors be examined, that they had not prepared for the specific question; at least it appeared that they had not boned up on the Act roles and responsibilities before appearing at the Inquiry.
215. Mayor Gair was also asked about his understanding of the statutory role of the mayor. He answered initially that the mayor's the mayor¹⁷⁵ and then elaborated:

Oh, right. Well, the same as councillor, and then above and beyond that, that the mayor works in general with the general manager, chairs the review performance – the performance of the general manager, chairs

¹⁶⁸ T876.04 (Scandrett); T838.44: integrity, truth and respect (Whipper);

¹⁶⁹ T658.26 (Markwart); T1075.02 (McLaughlin refers to "honest open and fair"); T1347.09 ("represent community in an honest open manner")

¹⁷⁰ T658.26 (Markwart)

¹⁷¹ T658.26 (Markwart)

¹⁷² T658.26 (Markwart)

¹⁷³ T1074.03 (McLaughlin); T1119.14 (Nelson); T1347.08 (Gair)

¹⁷⁴ T1029.06 (Andrews)

¹⁷⁵ T1351.47

council meetings, is spokesman for the council on the official position of council, represents the community at various functions or wherever they are invited to attend, and in general hopefully shows leadership.¹⁷⁶

216. It should not be expected that Councillors have a photographic recall of each of the relevant provisions but equally those provisions are more than just the recitation of admirable qualities.
217. Some Councillors, once taken to specific sections of the Act, had a good grasp of their meaning and effect.¹⁷⁷
218. Others appear to have constructed their own set of obligations. Councillor Scandrett understood his roles and responsibilities to derive from his oath of office which he carried around like some kind of prop, and cross-referenced it to the obligation to ask questions; particularly about financial matters.¹⁷⁸
219. Only Mr Halstead referred to the correct section of the Act and none of the other Councillors sought to refresh their memory by direct reference to section 232 of the Act. But even Mr Halstead, who was at least able without prompting to refer to the correct section of the Act, once citing it, could not give a full answer with any real specificity. Further, he did not appear to be aware of section 8A or 8C that were inserted into the Act by amendments shortly before the commencement of the 2016-2020 term.¹⁷⁹
220. This was not unique to Mr Halstead, but it was evident in some of his answers that there was a disconnect between a theoretical understanding of what the Act said and what in practice constituted behaviour that conformed with the Act:

Q. What about the behaviour of individual councillors; did you observe any dissent or degradation in the behaviour of some of the councillors in the second half of the 2016 term?

A. I mean, some councillors are more vocal, but --

Q. What about straight out acts of disorder and misconduct?

¹⁷⁶ T1352.19

¹⁷⁷ T839.07: Councillor Whipper's understanding of the obligation to uphold and represent accurately a decision of the Council

¹⁷⁸ T894.39 to T895.11

¹⁷⁹ NSW Act No. 38 2016

A. I don't know that I'd class what I saw as misconduct. What I would suggest to you is that some councillors, and it was not, say, two or three all the time, for example, but you know, in normal discussion in a meeting sometimes it does get vocal, and some were more - I suppose, vocal you could say, or concerned about issues that they had concerns of or were bringing up and were not convinced that they were being dealt with properly.

So, you know, I would say there were some councillors that were therefore - or therefore felt that they weren't being treated properly and I don't think they were; in other words, some of the issues they were entitled to have dealt with were not being dealt with appropriately.¹⁸⁰

221. This evidence may have been given more weight if it were not for the fact that the Inquiry had available to video and audio for meetings of the term in which obvious acts of disorder and misconduct clearly happened on a regular basis. It is a neat distillation of the construction of grey areas and justifications by some Councillors that do not exist in the plain words of the Act.
222. The Councillors tended understand at a conceptual level that there was a distinction between the operational and the strategic roles of Council and that the latter was the domain of the Councillors and the Governing Body.¹⁸¹ It is not clear however if all Councillors appreciated what this actually entailed in practice.¹⁸² Some examples are given in the next section.
223. Other Councillors appeared to understand the concepts but could not rationalise the actual roles with their perception of what their roles are. Councillor Scandrett for instance was evidently proud that he held an unidentified mandate from an unidentified part of the community.:

I was described by a person who supported me for election as "being like a dog with a bone", so I was certainly persistent on various issues

¹⁸⁰ T1210.07

¹⁸¹ T659.28 (Markwart); T843.47 (Whipper); T875.16 (Scandrett); T1028.26 (Andrews); T1074.19 (McLaughlin)

¹⁸² For instance Councillor Scandrett considered that telling staff to put up corflutes was not operational because "we had a communications policy:" T871.38

and certainly to the pledges I made to the community that elected and re-elected me.¹⁸³

224. This seemed to be his justification for potential breaches of the codes:

Q. But can you tell me if you agree with the proposition, for instance, that one can prevent the proper or effective functioning of the council but in a polite way?

A. I think you're going to acts of disorder again as we were a while ago and some comments in that space. I didn't set out to commit acts of disorder to disrupt the council. *I set out to represent the community that elected me* and, if there were - how can I put it - if there was no listening on that I would speak - I'd raise my voice a bit or whatever to pursue a point. I was energetic in that regard.¹⁸⁴ (my emphasis)

225. This goes beyond not understanding the minutiae or nuance of section 232 of the Act: it fundamentally misunderstands the entire role of Local Government. Councillors do not have constituents or parties or mandates upon which they rest their political capital and prosecute their agenda. They do not get to run off the leash once a decision is made that they do not think fits with some perceived mandate or perceived community interest.

226. It should be noted that the Councillor Handbook states:

Councillors play a vital role in meeting the needs of local communities. They serve their communities by listening to people in the local area and then representing those views on council. They make decisions that can change local communities and environments.¹⁸⁵

227. But that does not give Councillors a licence to identify an issue that they perceive they have been voted into office on and prosecute that issue regardless of the decisions of the Governing Body or the other views in the community. Councillors have a statutory obligation to represent the *collective* interests of the community¹⁸⁶ and uphold and represent

¹⁸³ T880.40

¹⁸⁴ T881.12

¹⁸⁵ Page 5 Councillor Handbook; page 458 Exhibit A

¹⁸⁶ Section 232(1)(d)

accurately the decisions made by the Governing Body whether they agree with them or not.¹⁸⁷

228. Even if my interpretation of the Act is not correct, there is no caveat in either the Act or the incorporated codes that permit the obligations to be ignored “to pursue a point.”¹⁸⁸

229. Mr Turland had a similar misplaced sense of priorities. Asked about an incident on 24 February 2021 that gave rise to multiple incident reports by staff of bullying and harassment, he was asked:

Q: Do you think that was appropriate to go and do that?

A. Well, I think it is because we weren't being told the truth and the process. It was all to make sure Gair had the numbers on the night in relation to Station Street, because he needed the numbers, whatever else was on the business paper, but I remember 9th of - 9 December, was it, 9 December, the meeting?

Q. I think it was 24 February.

A. February, okay.

Q. Does that ring a bell?

A. Oh ...

Q. It was around that time?

A. Yeah.

Q. Do I take it then that, at least on your evidence, because the underlying reason in your view was justified, then any behaviour which may have been outside the ordinary levels of appropriate behaviour were justified?

A. Um, as far as I'm concerned I was - I was strong enough to ask the questions that needed to be answered because nobody else would bother. In relation to work screens --

Q. What about the tone in which you did it?

¹⁸⁷ Section 232(1)(f)

¹⁸⁸ T881.12

A. Well, I think you can hear that I'm fairly bold in the way that I control my actions.

Q. I'm just asking you to concentrate on 24 February at this stage.

A. Yep.

Q. Do you think the tone which you used was appropriate at the time?

A. It's the tone that I would use every day in the week, as I am now.¹⁸⁹

230. Mr Turland was also taken to a clip of a meeting in which he appeared to make threats to the General Manager or a member of staff. He was asked:

Q. And it might be suggested to me that your engagement with either Ms Lidgard or the general manager about that issue would contravene one or more provisions of 3.1. If that suggestion was ultimately made to me, what would you say to it?

A. Yeah, there's probably a few in there that would class, people could consider, but under the issue that was brought up I was passionate that the law had been broken.

Q. Yes. Yes, Mr Parish.

A. How else do I bring it up? That's the problem. What lever do I have? The mayor has abused the system as far as I'm concerned with two legal opinions; the general manager's running around and played the tape without going through the proper process.¹⁹⁰

231. Mr Halstead also seemed to have a hierarchy of conduct that excused certain behaviours if he was "just asking questions." He was asked about an email he sent to Mark Pepping and Mayor Gair about storm water flows in a development on Bloomfield Close and Hordens Road.¹⁹¹ His email read:

Dear Mark,

Information noted.

¹⁸⁹ T1305.30

¹⁹⁰ T1302.29

¹⁹¹ T1238.11

I assume that you realise the serious nature of this matter.

It seems to me that Council staff may not have been as thorough as they could have been on the processing of the development application. Who analysed the predicted storm flows under the provisions of Australian Rainfall and Runoff? Staff or Consultant?

This is a very serious matter that cannot be "swept under the carpet" any longer.

Legal action by property owners against the Council would most likely succeed. The council has a "Duty of Care" to its ratepayers to ensure that a safe environment exists.

I am very concerned that the storm flows shown in the photo would cause damage to property and more concerning endanger lives, particularly children.

It is likely that the Council will be held liable In a Court of Law.

A factual report should be presented to the Council after your inspection in my opinion.¹⁹²

232. The following exchange occurred when Mr Halstead was asked about that email:

Q. Is that something, on reflection, which may have transgressed over from strategic into operational?

A. No, it's asking a question, it's not telling someone how to do something. That's asking a question about it. Having been out there and seen the loss to property and damage to property, it was a reasonable question to ask, particularly having regard to the fact that it could end up in court.¹⁹³

233. The email clearly goes well beyond simply asking a question. However, for the purposes of this section of the submissions the relevant matter to note is that the rationalisation for the email was that it was part of his role to ask questions that seemed to take precedent to any other role or responsibility.

234. Mr Turland's seemed to hold a similar view that he was "just asking questions" when confronted by conduct that could breach the codes¹⁹⁴ and Councillor Scandrett similarly

¹⁹² Page 89 Exhibit E

¹⁹³ T1238.23

¹⁹⁴ T1305.30 (Turland); T979 (Scandrett)

saw being “charged” to ask questions on behalf of the community as a primary purpose that took precedence to other norms of behaviour.¹⁹⁵

235. These two Councillors in particular consistently breached their roles and responsibilities in the way they behaved in council meetings, their interactions with the media,¹⁹⁶ and their interactions with staff. These are dealt with in more detail below.
236. It is overly simplistic to ascribe their conduct to either an ignorance of their roles and responsibilities or a wilful breach of them. Rather, their oral evidence was indicative of an unsophisticated justification of their contumelious conduct: that they were somehow crusading Cassandras: saying what others were too afraid to say or do; and that this calling justified their consistent breaches of their statutory obligations.
237. The Commissioner can find therefore that the Councillors’ subjective understanding of their roles and responsibilities was high level, without nuance, and at least in the case of some Councillors, warped to fit their own sense of mission on the Governing Body.

Did Councillors adequately, reasonably and appropriately carry out their roles and responsibilities during the current term of Council?

238. The second part of Term 1 is whether the Councillors actually *carried out* their roles and responsibilities. In some ways this relieves the Commissioner of reconciling the true scope and depth of the Councillors’ understanding of their roles and responsibilities: if they did not apply that understanding to their conduct it matters little the extent to which they ignored what they understood or they simply ignored their obligations.
239. The examples in the evidence that follow reveal that in some respects the Councillors satisfactorily carried out their financial roles and responsibilities, but the weight of the evidence is that in material respects they failed to adequately, reasonably and appropriately carry out their roles and responsibilities.

Financial Sustainability of the Council

240. The best evidence of the Councillors acquittal of their obligations to ensure the financial sustainability is the overview of the Council finances in the report of Finch Consulting

¹⁹⁵ T893.19

¹⁹⁶ Exhibits PP and QQ

dated 29 April 2021.¹⁹⁷ Given the complexity of this area and the various factors that can be feed into a conclusion on the state of the Council's finances, the Commissioner ought to prefer the conclusions of Finch Consulting over a detail analysis of the available raw data.

241. The financial position of the Council was reported as sound and the key performance indicators put the Council close to or better than the benchmark.¹⁹⁸ The cash and investment balances were relatively positive.¹⁹⁹
242. The Finch Report found that the Council had spending plans of \$295million in capital works over the next five years with 50% of the spending derived from cash reserves and surpluses.²⁰⁰ There appeared to be a very tight and possibly insufficient working capital for funding needs.²⁰¹
243. However, the operating budgets available to him and the overall conclusions of the Finch Report, suggest that as members of the Governing Body, the Councillors were able to adequately ensure as far as possible the financial sustainability of the Council.²⁰²

Meetings

244. The Inquiry was shown excerpts of Council meetings between 2019 and 2020 that involved various levels of threats, intimidation, bullying, and behaviour calculated to bring the Council into disrepute. These indisputable breaches of the Code of Conduct and Code of Meeting Practice are set out in Appendix A. In particular, it was common practice to ignore the rulings of the Chair (clause 3.19 Code of Conduct); failing to yield to the Chair (clause 7 Code of Meeting Practice) Councillors making personal attacks on staff and each other (clause 7.6(h) Code of Conduct).
245. Counsel Assisting and officers have reviewed all council meetings available to view online. The incidents set out in Appendix A are not aberrations. It is open to the Commissioner to find there was a culture within the Governing Body that condoned blatant Code of

¹⁹⁷ Page 598 Exhibit B

¹⁹⁸ Page 599 Exhibit B

¹⁹⁹ Page 599 Exhibit B

²⁰⁰ Page 600 Exhibit B

²⁰¹ Page 606 Exhibit B

²⁰² Section 223(c) of the Act

Meeting Practice and Code of Conduct breaches are part of the rough and tumble of Shire Council meetings.

246. Some of the community witnesses called who had attended meetings were at best disappointed and at worst repulsed by the behaviour of the Councillors. When asked whether he had attended a council meeting Graham Kelly observed:

A. One of the biggest regrets of my career is that on one occasion I did attend a meeting of this council, and I say one of the biggest regrets of my career is that I was appalled and embarrassed about the proceedings.

Q. Can I ask when that was, was that in this 2016-2020 term?

A. Yes, it was in connection with the approval of the operating plan for 2019-20. The reason that I was so appalled was that, as was the then practice of the council, they had invited a young, I think, Anglican Minister, obviously a devout and thoughtful person who prayed that people should show respect for one another, which I thought was apposite. I'm not a believer, I took an affirmation as you can well have perceived, but I do have respect for people of faith. As the meeting came to unfold one of the councillors stood up with a point and the mayor told him to, "Shut up and sit down". That I found appalling enough in itself, but then the mayor smiled at the councillor - at the man of religion, or maybe I should say "smirked", and said, "I suppose we've got a way to go". I thought that was insulting and devaluing and disrespectful.

Q. Do you recall who the mayor was at the time that that event happened?

A. Most definitely Duncan Gair.²⁰³

247. There was also evidence that Council had developed a practice of drawing staff members into debates about the information in reports during Council Meetings.²⁰⁴
248. While not all the meetings have been tendered, the Commissioner can have regard to all meetings as the need arises and can treat them as being notionally. The meeting excerpts

²⁰³ T470.36 Exhibit B

²⁰⁴ T614.31

speak for themselves: Councillors did not adequately, reasonably and appropriately carry out their roles and responsibilities in meetings.

Briefing Sessions

249. The Inquiry did not have any audio-visual evidence of the briefing sessions during the 2016-2020 term of Council. However the weight of evidence from Councillors and staff was that the behaviours manifested at meetings were present at briefing sessions as well.²⁰⁵ There was evidence that staff members approached briefing sessions with a sense of dread that was a continuation from previous terms. Jim Clark gave evidence:

There was, yes, there definitely was instances of even briefings where it got quite heated, and I couldn't understand why it got so heated about these briefings, you know, it was like quite unnecessary for people to get upset to that extent over a briefing and, you know, there was anger shown towards council staff, which I thought was quite unfair: you know, don't shoot the messenger if you don't like the message, that was my feeling, so yeah, especially in that last term things were not ideal, the atmosphere was not ideal, and yeah, I think it detracted from the way council performed. Even though, I think we - council had performed well financially and, you know, development applications got through, but council was battling against this sort of headwind of people not helping the situation, like causing problems. To me, it was quite remarkable that individuals would choose to behave that way and disrupt council operation really.²⁰⁶

250. Against the trend of this evidence, Mr Halstead and Mr Turland disagreed. Mr Halstead's impression was that behaviour was considerably better at briefing sessions.²⁰⁷ Mr Turland thought the briefing sessions "were pretty good."²⁰⁸ This is probably explicable by reference to the evidence set out above that Councillor Scandrett, Mr Turland and Mr Halstead appeared to have a different metric as what constituted proper behaviour when it came to asking questions.

²⁰⁵ T1127.25 (Nelson); T638.07 (Clark)

²⁰⁶ T638.07

²⁰⁷ T1213.24

²⁰⁸ T1264.43

251. It is also explicable by Mayor Gair's evidence when he said that, while briefing sessions usually ran well, there were always differences of opinion and that certain questions came from councillors that could inflame a situation.²⁰⁹
252. It is difficult to understand how a session that is designed to provide information and not debate or decide on issues can admit space for opinions and inflammatory questions.
253. However, this may explain why some Councillors did not see anything wrong with their conduct in briefing sessions or that of others, while some staff approached them with anxiety and dread: those Councillors who saw nothing wrong with the conduct of the briefing sessions were the same ones who had little insight into how "just asking questions" could affect staff members and the effective functioning of Council. Barry Paull's evidence explains it to some extent:

Q. Did you witness or hear about similar conduct by councillors in those briefing sessions in the 2016-2020 term?

A. Absolutely, I mean, it was embarrassing sometimes with consultants and professional people that we brought to council to participate in those information sessions at various times. For various matters we had to bring expert professional people in from outside the organisation, and it got to the point where we had to warn them before they came into the meeting that they were probably going to get a torrid time, and on occasions they did; they remained professional and, when they left, we'd often have to apologise for the conduct that went on in the meeting that they were participating in, but it was what - it is what it was.

Q. Can I ask why those times were torrid? Was it aggressive questioning but questioning that was nevertheless on point, or was it questioning that was perhaps tangential, irrelevant, or uninformed?

A. I respect the fact that councillors are entitled to ask questions, searching questions, and get professional well-informed answers: have no problem with that at all. And, a large majority of the councillors did, but there were a small number of councillors that for various reasons, in my opinion, were always

²⁰⁹ T1373.07

after the "gotcha moment" in terms of trying to - I've got the staff now, I've got something to hold over them, I've got something to belt them with.²¹⁰

254. Evidence that suggests staff had to apologise to people outside the organisation for the behaviour of Councillors is hardly supportive of a group who adequately, reasonably and appropriately carry out their roles and responsibilities.

Failure to perform strategic planning role

255. There is evidence that the Councillors did not undertake their some of their strategic planning obligations in a timely manner or occasionally at all. Earnest Consulting interviewed 19 members of staff and 83 members of the community in preparing its report dated 27 July 2021.²¹¹ The report identified the following themes arising from interviews with staff members:

Council adopting a strategic policy then continually amending it so that it never gets actually finalised (e.g., the Local Housing Strategy)

Poor outdated Development Control Plans (DCPs)²¹²

Inconsistency between various strategic policies of Council, such as Council's position to promote tourism and the contents of the Local Environmental Plan (LEP) that effectively prohibits those land uses

256. The Review of Council Finances by Finch Consulting on 29 April 2021 it found:

Councils Resourcing Strategy 2017-2027 incorporates several key planning documents:

- Long Term Financial Plan
- Workforce Plan
- Strategic Asset Management Plan

²¹⁰ T803.34

²¹¹ Page 434 Exhibit B

²¹² Page 435 Exhibit B

These planning documents were the culmination of the Fit for the Future assessment, community consultation program in 2015 and IPART application for a Special Rate Variation in 2016 and set the scene for the future development of the Shire.

We reviewed these documents to assess their application over recent years and to determine Council capacity to resource future plans.

In reviewing the Workforce plan and the Strategic Asset Management Plan, we noted that they had not been updated since inception, although it is acknowledged that there is only a statutory requirement to renew the Resourcing Strategy every four years .

In 2015/16 staff turnover rate was approximately 19 per cent. This is higher than the industry average of approximately seven per cent. The Workforce Plan identified proposed strategies to satisfy the workforce gap analysis. We have seen no evidence of the review of outcomes or evidence of ongoing monitoring, particularly at the elected Council level.

The Strategic Asset Management Plan provides an assessment of the “Level of Service” of relevant assets classes. We noted that many of the “current performance” indicators were described as “yet to be measured or assessed” or “policy to be developed”. We have seen no evidence of review and confirmation of assumptions for this plan.

The Long Term Financial Plan is typically updated annually as part of Council’s annual budget process, however future years are not necessarily aligned with other two key planning documents.

In response to our comments in relation to updating of the Resourcing Strategy, Management has advised that the delay in the local government elections has put back plans for community consultation and subsequent renewal of the Resourcing Strategy.

As indicated earlier, Council has established a dedicated Project Delivery Branch and we understand that asset management practice areas have significantly improved in the last 2-3 years. As the Resourcing Strategy is the overarching planning document in the asset management program, regular updating, monitoring and performance reviews at a governance level should assist this Branch in satisfying governance accountability.²¹³

257. The Council did not have in place a Local Recovery Plan in place prior to the bushfires in 2019/2020. This greatly hampered the initial and ongoing recovery effort according to the Wingecarribee Shire Council Bushfire Response and Recovery Review Report 2021.²¹⁴
258. Mr Horton gave evidence that in his view the strategic planning was deficient and that members of his chamber of commerce needed to see how the Council's strategic framework fitted together to build confidence that what is actually going to happen.²¹⁵
259. Mr McManus gave evidence that the Heritage Advisory Committee considered matters that were not even heritage items if such if they were on a list that had not been determined:

And, just to say, Commissioner, the consultant report was 2009, it was looked at and reported on to council in 2012. The report from the council and the consultants recommended that 400 items be listed and be placed on public exhibition and this is what happened.

In November of that year, we're talking 2012, the council decided that it would only list the items that it owned and any items that people were happy to have listed. So, this was totally contrary to best management practice which was, of course, to list on the basis of heritage significance. So, as a result of those 400, only 80 went forward. The council on the same meeting in November 2012 deferred 251 items.

Now, these have been a complete thorn in the side ever since because, although they deferred them for further consideration, they did nothing; neither the staff nor the council, did nothing to bring them back, look at them again.²¹⁶

²¹³ Page 609 to 610 Exhibit B

²¹⁴ Page 272 Exhibit B

²¹⁵ T87.37

²¹⁶ T449.07

260. The practical effect of this is that residents who had made development applications in respect of non-heritage properties were having their applications scrutinised by the Heritage Advisory Committee because their property was on a draft list that had been deferred by Council. This unsatisfactory situation is the responsibility of the Governing Body.
261. Upon her review of strategic planning after taking up her position as general manager, Ms Miscamble found gaps that needed to be filled. She identified a need to flesh out the strategic framework.²¹⁷
262. It appears that some of the evidence given by Councillors can be taken to admit that dysfunction between Councillors was hampering strategic planning decisions. Councillor Scandrett noted that some of the attacks in meetings stemmed from failures to develop strategic plans for tourism and strategic development.²¹⁸ Mr Turland noted a failure to implement the housing strategy in a timely way that appeared to be linked to issues he had raised and appeared to points of tension between Councillors.²¹⁹
263. Other Councillors defended the strategic achievements of the Governing Body. Council Nelson said that:

So, that was council moving towards its strategic planning which was to provide responsible financial management, improving our local community assets, protecting our natural environment, delivery of significant infrastructure projects, better service alignment and delivery, a business transformation and community well-being.²²⁰

264. On balance however, the weight of evidence supports a finding that while the Councillors had not completely abrogated their strategic planning responsibilities, there is some indication that the dysfunction between the Councillors and the culture of distrust between some in the Senior Staff impacted on the adequacy of the strategic planning at the Council.

The Supposed Disruptive Minority

²¹⁷ T1463.10

²¹⁸ T1003.04

²¹⁹ 1274.11

²²⁰ T1187.34

265. It is open for the Commissioner to find there is some force to the complaints of Mayor Gair and others aligned with him that there was a disruptive minority made up primarily of Councillor Scandrett and Mr Turland.
266. There is considerable evidence that supports a finding that there was a consistent course of conduct by these two Councillors that at times could amount to breaches of the Code of Conduct and Code of Meeting Practice and at times trespassed into bullying and harassment.
267. Notwithstanding Councillor Scandrett's view that persistent questioning from a position of power is excusable if done politely,²²¹ and Mr Turland's view that he was "just asking questions"²²² the Commissioner can find that the examples of their behaviour in evidence unequivocally breached the roles and responsibilities they had and which therefore amounted to misconduct under the Act.
268. Mr Turland was subject to numerous complaints from staff. A selection of incident reports are in Exhibit E.²²³ There is also evidence of rude and aggressive emails sent by him to other Councillors.²²⁴ Annexure A also sets out conduct that breaches both the Code of Conduct and Code of Meeting Practice.
269. As set out above, when asked about a selection of incidents Mr Turland generally rationalised it as part of his role to ask questions and get to the bottom of matters that he felt were inadequately addressed.
270. Councillor Scandrett's manner and tone were significantly different from Mr Turland's. While it contained a veneer of civility compared to Mr Turland's self-confessed "bold" tone²²⁵ the questioning was often freighted with imputations of incompetency or inappropriateness:

Q. In those briefing sessions were you critical of staff for what you describe as "back of the envelope" calculations?

A. Never to the general staff; I think councillors engaged in robust discussion with Mr Paull.

Q. Well, when you say "robust discussion"?

²²¹ T881.12

²²² T1305.30 (Turland); T979.47 (Scandrett)

²²³ Pages 55 to 68 Exhibit E

²²⁴ Page 52 and 83 Exhibit E

²²⁵ T1306.10

A. Asking questions, as is our responsibility here. I mean, our role is to carry out the best - do things that give the best possible value for residents and ratepayers, and I –

Q. In doing that, did you question competence of staff about these matters?

A. Well, I didn't say anything about the competence of staff in those discussions, I just continued to ask – it was incredulous that we couldn't have worked out the electricity costs of moving that power to allow the project to proceed. It was all --²²⁶

271. It should be remembered that harassment can include creating a hostile environment.²²⁷ The persistent loaded questioning by Councillor Scandrett is indicative of an inability to accept the information given to him or accept that a decision made that he did not agree with nevertheless had to be supported by him as a Councillor. There are numerous meetings in which he persists in pursuing his issue of importance over the chair and sometimes against the objection of fellow Councillors.
272. However, while the conduct of Councillor Scandrett and Mr Turland and the flaws in their justification for their conduct was particularly obvious, the blame for the dysfunction of the Governing Body does not lie solely at their feet, and the habits they were allowed to develop were the result of the culture within the Governing Body and the utter failure of the Councillors to accept they were in a position of power; that they had statutory obligations to ensure the staff were able to be in a workplace without bullying and harassment; that they were part of a Governing Body that had the same obligations; and that they had obligations to prevent, report, and take reasonable care to ensure that their acts or omissions do not adversely affect the health and safety of other persons.
273. Councillor Scandrett gave evidence that he felt bullied and harassed for the purpose of trying to get him to stop asking questions on behalf of the community “which I am charged to do.”²²⁸ He said this occurred both in respect of meeting procedure but also there was an example where Mr Turland alleged that illegal works had been done in Councillor Scandrett’s farm with the implied threat that carried with it that some form of action would be taken by the Governing Body.²²⁹

²²⁶ T979.32

²²⁷ Clause 3.7 Code of Conduct; page 702 Exhibit A

²²⁸ T893.19

²²⁹ T887.38

274. It is open for the Commissioner to find that some Councillors engaged in harassment and bullying of staff within the definition given to those terms by the Code of Conduct.²³⁰ It is less clear whether the conduct *between* Councillors constituted harassment and bullying. It is certain open for the Commissioner to so find. Nevertheless, given that Councillors had obligations to prevent and report harassment and bullying, the Commissioner can find that the omissions of Councillors to prevent the harassment and bullying of staff (and potentially fellow Councillors) is sufficient to establish that such breaches of their roles and responsibilities existed.

Criticism of Staff and Bringing Council into Disrepute

275. Councillors had obligations under the Code of Conduct not to bringing the Council or council officials into disrepute.²³¹ There were also obligations not to make personal attacks against staff or engage in conduct contrary to the general conduct provisions (clause 3.1) in public forums including social media.²³²

276. The Code of Conduct also contained restrictions on the use of social media that would have a negative affect on the Council.²³³

277. There are multiple examples where Councillors breached these prohibitions.²³⁴ The use of the media to settle scores and prosecute their grievances is the distilled essence of the failure to judgement and understanding of their roles by some of the Councillors. In particular, multiple Councillors seemed to use the media fight anterior battles that had gone against them in council meetings, and undermine confidence in the Governing Body. The use of the media by Councillor Scandrett was the most egregious and inappropriate example but he was by no means alone.

278. In the days following the contentious Council meeting on 29 January 2020 after the bushfires of 2019/2020, Councillor Scandrett made several calls for the entire Governing Body to be sacked on Facebook and on radio shows.²³⁵ It is difficult to think of a more obvious act designed to bring the Council into disrepute.

²³⁰ Clause 3.6 to 3.11 Code of Conduct; page 702 and 703 Exhibit A

²³¹ Clause 3.1 Code of Conduct; page 702 Exhibit A

²³² Clause 7.6(h) Code of Conduct; page 720 Exhibit A

²³³ Clause 8.21 Code of Conduct; page 723 Exhibit A

²³⁴ Page 78 Exhibit E; Exhibit PP; Exhibit QQ Exhibit O; T1354.41

²³⁵ Exhibit PP

279. Mssrs Turland and Halstead issued a press release that called for a 25% pay cut for administration staff during the Coronavirus pandemic.²³⁶ Not only does it undermine the morale of the staff they have a responsibility towards, no power even existed to enact such a paycut. This paycut was being ventilated in the press at the same time Mssrs Turland and Halstead were seeking that council meetings be suspended for the during the pandemic. Mr Halstead was asked:

Q. And that amendment No.1 forwarded by you or moved by you and seconded by Councillor Halstead was:

THAT the business Of Council be conducted by the Mayor and Deputy Mayor as representing the whole 9 councillors from 26 March 2020.

Do you see that?

A. Correct.

Q. So, your response to the coronavirus pandemic was, it was to try and pass a motion whereby the mayor and deputy mayor undertook the roles of you and the other councillors; is that correct?

A. Correct.

Q. Do you see a hypocrisy in that, given that you also called for senior staff to continue working their full amount for a 25 per cent pay cut?

A. No, I don't.²³⁷

280. It is open for the Commissioner to find that this was indicative of the inability of the majority of Councillors to understand how their conduct affected the morale and functioning of Council staff.

Conclusion Term of Reference 1

281. The weight of evidence indicates that the Councillors understood in general terms that the Act prescribed norms of behaviour that they were to adhere to. The specificity and nuance of the roles and responsibilities varied between Councillors but was generally below what would be expected from a diligent and engaged leader of the community.

²³⁶ Page 78 Exhibit E

²³⁷ T1237.1

282. There was a tendency amongst at least three Councillors distort their roles and responsibilities to fit their own pursuit to pet issues or a single-minded sense of crusade.
283. Given that the Term 1 covers both their understanding and adherence to the roles and responsibilities, this Inquiry does not have to resolve whether their evidence was an ex-post facto justification for their behaviour or a genuine misunderstanding of their roles and responsibilities. But if the Commissioner does wish to resolve the question, it is open of the evidence to find that Councillor Scandrett, Mr Turland, and Mr Halstead all genuinely believed and were candid in their evidence that their obligations under the Act allowed them to rank their obligations and subordinate them to what they subjectively believed to be the most important issue to them.
284. In addition to the specific examples of legislative breaches that amount to misconduct or failures in the strategic planning functions noted above, there was a failure of all Councillors as part of the Governing Body to ensure that the workplace they directed and controlled was safe and free from bullying and harassment.
285. It is also open to find that rather than providing civic leadership to the community that consulted regularly with community organisations and other key stakeholders and keep them informed of the council's decisions and activities, the Governing Body was divisive and consumed with personality clashes. This eroded trust and confidence in the community and created an adversarial relationship with at least some parts of it.

L. TERM OF REFERENCE 2

Whether, during the current term of Council, there has been improper interference by the elected body of Council, or by individual councillors, in operational matters, with particular reference to staffing and planning functions.

286. The prohibition on interference by the Governing Body and Councillors in operational matters is set out in a series of interacting provisions of the Act and the Code of Conduct.
287. Section 352 of the Act addresses the independence of the staff. It reads:
- (1) A member of staff of a council is not subject to direction by the council or by a councillor as to the content of any advice or recommendation made by the member.

(2) This section does not prevent the council or the mayor from directing the general manager of the council to provide advice or a recommendation.

288. This is part of a number of provisions which draw a line between the different roles of the constituent parts of a council. When section 223 (Role of the governing body) is read with section 335 (Functions of a general manager) and section 352 of the Act, it can be seen that the Act explicitly demarcates between the direct and control functions of the governing body and the day-to-day management in the hands of the general manager.
289. There is some use in drawing an analogy as the Councillor Handbook does between a board of directors in a corporation and the governing body.²³⁸ However the similarities only go so far, and adhering too closely to the analogy is apt to mislead. Both statutory and equitable obligations have developed in respect of directors over several hundred years. By contrast, councillors are a creature of statute. Their roles are proscribed and prescribed by legislation. There are explicit restraints on how councillors can interact with staff (set out below) that do not so constrain directors.
290. The Commissioner can focus on roles and responsibilities of the Councillors and the way they interact with staff as they are set out in the Act and the incorporated codes rather than by analogy to directors of corporations. This is expressed as *operational versus strategic* in the Councillor Handbook. While this nomenclature is not used in the Act itself, the Councillor Handbook distinguishes between:

The strategic nature of the roles of elected members compared to the operational roles of the general manager and council staff.²³⁹

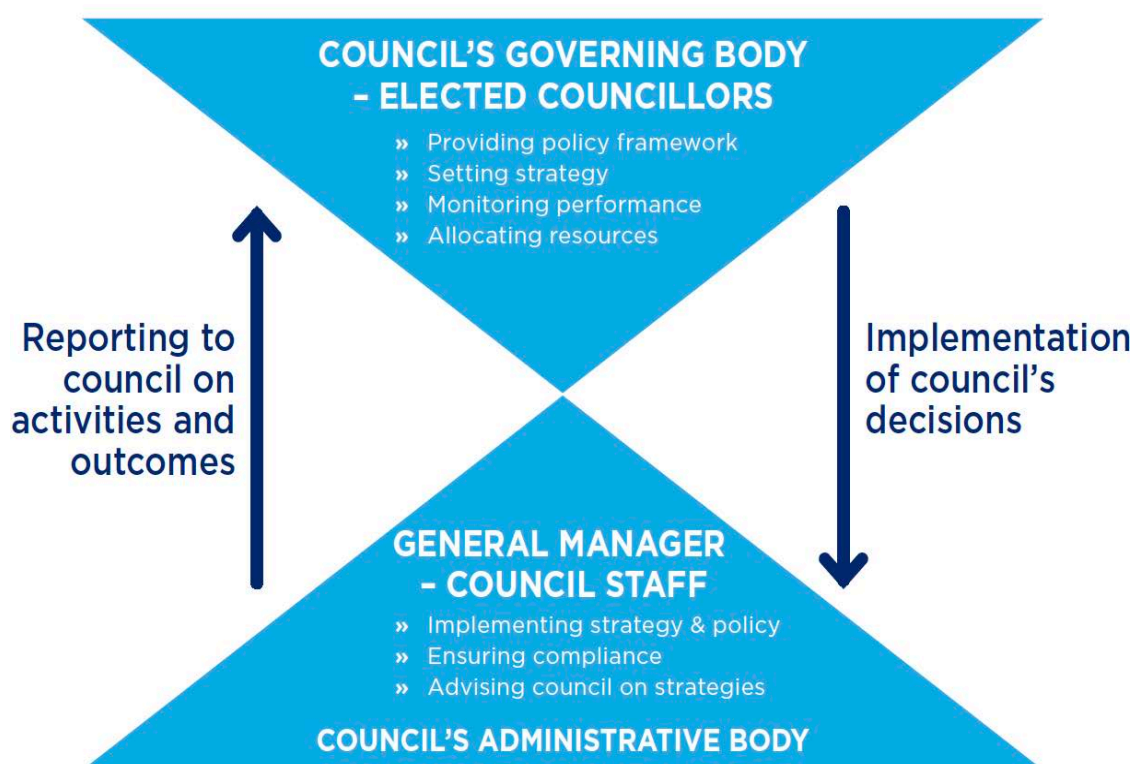
291. The Councillor Handbook provides a useful diagram that pictorially represents the distinction between the governing body and the general manager-council staff.²⁴⁰

²³⁸ Page 13 Councillor Handbook; page 466 Exhibit A

²³⁹ Page 47 Councillor Handbook; page 598 Exhibit A

²⁴⁰ Page 8 Councillor Handbook; page 461 Exhibit A

A council's structure



292. The Commissioner can find that this was well understood by the Councillors,²⁴¹ at least some specifically and most of them in a general sense.

293. While Term 2 makes particular reference to staffing and planning matters, the separation between operational and strategic and the prohibition on Councillors trespassing on the functions of the staff is not restricted to staffing and planning matters.

294. The Code of Conduct provides:

7.1 Each council is a body politic. The councillors or administrator/s are the governing body of the council. Under section 223 of the LGA, the role of the governing body of the council includes the development and endorsement of the strategic plans, programs, strategies and policies of the council, including those relating to workforce policy, and to keep the performance of the council under review.

7.2 Councillors or administrators must not:

²⁴¹ T875.16 (Scandrett); T1027.12 (Andrews)

- a) direct council staff other than by giving appropriate direction to the general manager by way of council or committee resolution, or by the mayor or administrator exercising their functions under section 226 of the LGA
- b) in any public or private forum, direct or influence, or attempt to direct or influence, any other member of the staff of the council or a delegate of the council in the exercise of the functions of the staff member or delegate
- c) contact a member of the staff of the council on council-related business unless in accordance with the policy and procedures governing the interaction of councillors and council staff that have been authorised by the council and the general manager
- d) contact or issue instructions to any of the council's contractors, including the council's legal advisers, unless by the mayor or administrator exercising their functions under section 226 of the LGA.²⁴²

295. There is also an extensive list of specifically prohibited interactions:

7.6 You must not engage in any of the following inappropriate interactions:

- a) councillors and administrators approaching staff and staff organisations to discuss individual or operational staff matters (other than matters relating to broader workforce policy), grievances, workplace investigations and disciplinary matters
- b) council staff approaching councillors and administrators to discuss individual or operational staff matters (other than matters relating to broader workforce policy), grievances, workplace investigations and disciplinary matters
- c) subject to clause 8.6, council staff refusing to give information that is available to other councillors to a particular councillor

²⁴² Page 719 Exhibit A

- d) councillors and administrators who have lodged an application with the council, discussing the matter with council staff in staff-only areas of the council
- e) councillors and administrators approaching members of local planning panels or discussing any application that is either before the panel or that will come before the panel at some future time, except during a panel meeting where the application forms part of the agenda and the councillor has a right to be heard by the panel at the meeting
- f) councillors and administrators being overbearing or threatening to council staff
- g) council staff being overbearing or threatening to councillors or administrators
- h) councillors and administrators making personal attacks on council staff or engaging in conduct towards staff that would be contrary to the general conduct provisions in Part 3 of this code in public forums including social media
- i) councillors and administrators directing or pressuring council staff in the performance of their work, or recommendations they should make
- j) council staff providing ad hoc advice to councillors and administrators without recording or documenting the interaction as they would if the advice was provided to a member of the community
- k) council staff meeting with applicants or objectors alone AND outside office hours to discuss planning applications or proposals
- l) councillors attending on-site inspection meetings with lawyers and/or consultants engaged by the council associated with current or proposed legal proceedings unless permitted to do so by the council's general manager or, in the case of the mayor or administrator, unless they are exercising their functions under section 226 of the LGA.

296. Term 2 should be interpreted as extending to all instances of interference and not just those in the staffing or planning domain. If I am wrong about this, then examples of interference set out below that do not fall within staffing or planning come within Term 3 and 4.

Evidence of Improper Interference

297. There are various suggestions from second-hand sources that interference in staffing and planning functions existed. Viv May received second hand representations about individual Councillors and mayoral interference.²⁴³ It was also apparent to him that inference with statutorily prescribed staff independence occurred in councillor briefings and workshops, although records of this interference are scant.²⁴⁴
298. There is also evidence that councillors in previous terms of Council interacted with staff in a manner that may have been in breach of section 352 of the Act. In the 2012 Division of Local Government Promoting Better Practice Program Review Report²⁴⁵ the authors noted:

One of the areas of concern raised by a number of staff was the issue of how relationships between councillors and Council staff are managed. This is notwithstanding that Council has a policy on ‘Councillors’ Access to Information and Interaction with Staff’ dated October 2007. Unfortunately, it appears that this policy has not been read and/or is being ignored. In addition, the policy contains outdated references to the code of conduct and the Act and should be reviewed and updated accordingly.

Of specific concern to the review team was the number of staff who indicated that councillors are “hands on” when it comes to raising concerns or issues on behalf of constituents, that councillors are delving into operational matters and are criticising staff in public forums. The review team observed this during the Council meeting, particularly during the matters referred to as ‘Visitor Items’ (referred to previously in the report under the heading ‘Meetings’). It was evident that some councillors are using this as an opportunity to debate the content of staff reports, often in an overbearing manner, and appear to be pressuring staff as to the recommendations they should make. Councillors are reminded that it is a breach of section 352 of the Act to direct or influence staff in the performance of their duties. Staff should feel that they are able to provide free

²⁴³ Page 3 Interim Administrator submission dated 21 October 2020; Exhibit L

²⁴⁴ Pages 3 and 4 Interim Administrator submission dated 21 October 2020; Exhibit L

²⁴⁵ Exhibit EE

and frank advice based on their professional experience and expertise and in accordance with Council policies.²⁴⁶

299. While the previous term is outside the terms of reference, given the evidence that there was a continuation of the culture from the previous terms of Council and the fact that six of the nine councillors from the previous term were returned, the Commissioner can give some weight to the 2012 report as at least indicative if not corroborative of more generalised evidence given to the Inquiry. When read with the other available evidence it may at least speak of a cultural problem extending back multiple terms.

Mr Halstead and Potholes

300. There is no factual controversy that Mr Halstead attended on the infrastructure staff and gave them a masterclass on how to fix potholes. Mr Halstead admits and even appears to be proud of his education session.²⁴⁷ The staff were less enthusiastic. John Burgess recalled:

A. ...One incident where the then mayor had the approval of the general manager to address the infrastructure staff in how to fix potholes. So, all staff were brought in and they were directed by Councillor Halstead, or Mayor Halstead at that stage, as to how they should fix potholes, and some of the staff were castigated.

The managers of those staff were - one couldn't accept that permission had been given for a councillor to tell the staff how to fix potholes, albeit recognising that Councillor Halstead was in fact a qualified engineer, but the staff themselves in an attempt to make sure that they were safe had in fact engaged the USU to represent them and say, why do we have to attend a compulsory pothole filling exercise?²⁴⁸

301. Barry Paull said:

In 2018 a councillor attended the infrastructure services depot at Moss Vale and instructed the group manager out there to bring all of the maintenance staff in and that he was going to conduct a training session with them as to how they

²⁴⁶ Pages 24 and 25 Exhibit EE

²⁴⁷ T1222.31

²⁴⁸ T424.04

were to patch a pothole and that they were all to attend. That particular instruction I wasn't aware of until after the event had happened.

The group manager came to me and was most upset that that had occurred, a lot of staff out there were very upset that they'd basically been treated like school children and been through a session where they'd been told that they weren't patching potholes appropriately and this is how they were to patch potholes, so that was inappropriate.²⁴⁹

302. When asked whether he considered this crossed the line from strategic into operational, Mr Halstead had the following exchange:

Q. You might have transgressed over strategic and into operational?

A. If you want to get into semantics, yes, probably.

Q. I'll use the plainest language I know then: do you accept that what you did was wrong in that situation?

A. No, I don't.

Q. Why was it not wrong if it was an operational matter and you're a councillor?

A. I don't consider that was an operational matter in terms of a specific job; this was talking about a specific method of doing things --

Q. You literally gave - telling someone how to fix potholes as an example of operational before. What's the distinction with what you did?

A. Because this was general, it was not specific. I mean, I consider that was offering advice, not telling them, "This is how I expect you to do it", I'm saying, "This is how a pothole could be repaired once and once only, full stop". I consider that as a positive, a positive, um, issue, a chance of the council staff doing something properly and, my God, they did.

Q. Can I just explore that a bit more. Do I understand the distinction in your mind to be that, if you are giving a high level general piece of advice as a councillor, albeit one who has experience as an engineer and as you do, that is

²⁴⁹ T807.42

to be distinguished from instructions as to the repair of specific potholes, for instance?

A. Correct.²⁵⁰

303. This explanation is nonsensical. Mr Halstead was either being disingenuous or he does not understand the basic distinction between operational and strategic. Viv May said of the incident:

And, you know, you have the example of a mayor wanting to tell staff - and the unions raised this with me, because I met with them - in how to fill potholes, and it's allowed by the general manager? You know, that's just not on.²⁵¹

304. Instructing Council staff how to fill in potholes is an obvious instance of interference and the Commissioner can comfortably find that to be so.

Mayor Gair and the Pin Oaks

305. Mayor Gair gave evidence that he had provided a written direction to the acting general manager of the time Barry Paull to have eight pin oak trees along the Station St by-pass route removed forthwith.²⁵² This direction was issued prior to the completion of a Review of Environmental Factors (**REF**).
306. Neither Mr Paull nor Mayor Gair remembered a precise date of when the direction was given²⁵³ but it must have been in the range of late March early April 2020 when Mr Paull was acting general manager and was probably a short time after the resolution passed to proceed with the removal of the Pin Oak trees.²⁵⁴
307. It appears that Mayor Gair thought putting it in a letter would avoid the prohibition on Councillors directing or influencing or attempting to direct or influence any other member of the staff of council or delegate. He gave evidence:

So, if I had have just had a conversation with Mr Paull and said, "I want you to cut those trees down", then there is an opportunity for members of the public or certain councillors to say, you just had a quiet word with him in the

²⁵⁰ T1223.16

²⁵¹ T529.28

²⁵² T1385.40

²⁵³ T1385.10;

²⁵⁴ Page 3342 Exhibit F

office. If I was going to have these trees removed, which was a condition that the council had resolved to be done, then I wanted direct - a direct result - correspondence from the general manager that reasons why he could or he could not.²⁵⁵

308. This explanation makes little sense. The Commissioner should not find that it is open to direct or influence a staff member provided it is in writing.

309. It is open for the Commissioner to find that this letter was a clumsy and unlawful attempt by Mayor Gair to make the Station Street by-pass a *fait accompli* by removing a considerable source of community tension in the dead of night. It seems at least that the Mayor understood he was potentially improperly directing a staff member and the letter was some kind of attempt to ameliorate it.²⁵⁶

310. But it is equally open to find that it was a misunderstanding of the stage the project was at and once Mr Paull corrected him the matter was dropped. Mayor Gair said:

Now, this conversation lasted about 3 minutes, and he just said, "Can't do it", he said, you know, "There's still further works to be done before this can be approved", so that gave me the answer I needed and it wasn't raised again.²⁵⁷

311. Further, as Mayor Gair himself noted, it would not have been possible to under the removal in such covert circumstances: notifications would have been needed and work sites would have been required.²⁵⁸

312. It may be that the Commissioner does not have to resolve the intention of Mayor Gair other than to note it as an example of improper interference with a Council staff member. Mr Paull gave evidence he felt he had been pressured to remove the Pin Oaks.²⁵⁹ He understood that what he was being directed to do was at least not legal.²⁶⁰ It is improper for Councillors to pressure staff. That is sufficient for Term 2.

²⁵⁵ T1386.29

²⁵⁶ T1386.29

²⁵⁷ T1386.39

²⁵⁸ T1386.45

²⁵⁹ T816.44; T817.32

²⁶⁰ T817.30. Mr Paull would not comment on whether the direction was illegal but he appeared to accept both in his answer and subsequent actions that it was not appropriate

313. The Inquiry was shown a video²⁶¹ of Councillor Scandrett talking to workers of the Resource Recovery Centre after a union meeting.²⁶² In the video he criticises decisions of the Council in respect of the use of an environmental levy fund and its application to a regional art gallery.²⁶³
314. It is clearly in breach of various prohibitions for a Councillor to talk to Council staff following a union meeting about decisions made by Council that the Councillor criticises. It goes beyond just improper interference. Amongst other things, such behaviour it fails to uphold a decision of Council; transgresses into operational matters; brings the Council into disrepute; and criticises Council officers in a public forum.
315. Whether intentional or not, Councillor Scandrett's justifications for his conduct were either nonsensical or obviously contradicted by the video:
- a. He gave evidence that he was there to listen: "Often you just have to listen to them, to residents and ratepayers, Commissioner; it helps with people who are frustrated."²⁶⁴ Perhaps Councillor Scandrett listened to them before the filming, but the video shows a roughly two minute monologue from the Councillor criticising Council decisions. There is little listening from Councillor Scandrett taking place.
 - b. It appears he thought there was some defence to his conduct by being outside on the public road after the union meeting rather than onsite.²⁶⁵ The location is irrelevant, as is the fact it took place after the union meeting.
 - c. He said on the video after a question from a journalist that he was there as a private citizen. This artificial distinction can be easily dismissed. There is no indication he made such a distinction before specifically being asked the question; there is no reason why Mr Oppitz the union official would invite a private citizen to address a group of Council staff after a union meeting; and there is no reason a private citizen would critique a decision of Council while linking it to their opposition to those decisions.

²⁶¹ Clip 13 Exhibit CC

²⁶² T903.04

²⁶³ T903.14

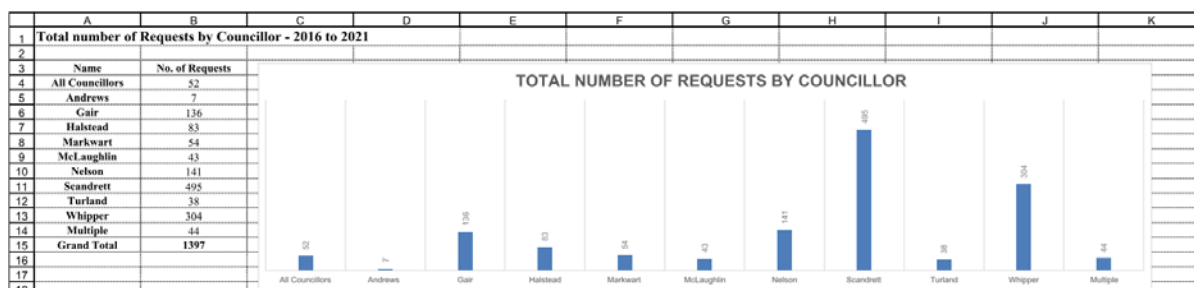
²⁶⁴ T907.20

²⁶⁵ T905.04

316. The explanation given by Councillor Scandrett is not accurate when compared against the actual footage. Whether he genuinely believes it or not is another matter that the Commissioner does not need to resolve.
317. What is clear from his evidence is that the Councillor learnt of staff grievances²⁶⁶ and that they were going to be ventilated at a union meeting.²⁶⁷ He then took this opportunity to criticise and undermine Council decisions and tie their grievances to funding decisions he made clear he opposed. Ultimately it was a case of personal political opportunism that breached multiple obligations and improperly interfered with the functions of Council staff.

Councillor Requests

318. Councillors were able to make requests through an email system called the Customer Information Centre where Councillor requests would be processed, triaged, and risk assessment before being given a priority.²⁶⁸ Exhibit BB includes a summary of the request statistics:



319. Barry Paull gave some evidence of how the request system affected him:

Q. In the 2016-2020 period was there another occasion where a councillor or a mayor during that period directed you to undertake particular tasks?

A. I was pressured on many things: emails from councillors about many things: do this, fix that road, fix these potholes, trim Mrs Jones's trees, mow the footpath out the front of Mr Smith's house, hundreds of requests from councillors. Now, they were councillor requests, they should have went through councillors' formal action request system, but councillors chose to

²⁶⁶ T906.39 to T907.17

²⁶⁷ T904.41

²⁶⁸ T826.01

send those things directly to deputy general managers. Now, was that then directing me? No, but it was then pressuring me, on many things.²⁶⁹

320. Mr Paull then explained that Councillors encouraged the community to go directly to them so that they could go around the process and get to the person they needed to get to. Mr Paull said while it was not uncommon in local government, it was not appropriate. Further:

Q. And the orderly management of matters like that, I assume, is something that's important to the efficient conduct of council business, is it not?

A. Absolutely, absolutely.

Q. And by taking these matters direct to staff, let's just assume for the moment in accordance with the interaction policy, does that hinder the efficient operation of council business?

A. Absolutely. I mean, I used to get text messages from particular councillors 24/7. The group manager below me that manages the infrastructure says it's part of the business, or used to, used to get peppered with them.²⁷⁰

321. It is difficult for the Commissioner to conclusively find that the requests were used in a way that was tantamount to interference. It was a system that was implemented and approved by the General Manager. But as Mr Paull explained, excessive use of the system could put pressure on staff. It does not appear that at least some Councillors understood there was a prioritisation and triaging of requests.²⁷¹ It does not appear that Councillors were necessarily entitled to, or needed, an answer in every case.

322. If the Commissioner does not find that it falls within Term 2 then it ought to be addressed as a matter under Term 3 and 4. It is another example where some Councillors had no understanding how their conduct could affect staff and the efficient running of Council.²⁷² Councillor Scandrett was asked:

Q. Why is it the role of the council or governing body to get involved in those sorts of issues?

²⁶⁹ T825.28

²⁷⁰ T826.26

²⁷¹ T898.11

²⁷² T898.42

A. Because in many - in a number of cases, Commissioner, they weren't - they were long-standing issues and they weren't being dealt with.

Q. So do I understand it, you understand the obligation of a councillor, if there is some issue in the operational part of the council that's not being dealt with appropriately, that it's the job of the councillor to intervene?

A. Only after it's been not answered or not dealt with for a considerable time. And "dealt with" might mean just saying "no", but people were frustrated, and this came through in all of the customer service surveys which of course came back to the GM in terms of her performance. But it's not a role I set out to do but I sort of attracted those questions in many cases, so I referred them through the proper channels, precisely through the channel.²⁷³

323. It is another example where some Councillors seemed to be able to justify their breaches of their roles and responsibilities on the basis that things were not being done how they wanted them done.

Conclusion Term of Reference 2

324. It is difficult on a survey of the available evidence to establish precisely how widespread interference by Councillors in operational matters was within the Council. There is little evidence of specific interference in staffing and planning functions other than those already set out above.
325. What *is* clearer is a culture within the Governing Body of a lack of trust between Councillors and staff that led to Councillors micromanaging aspects of the Council. There is also evidence of a lack of judgement as to when conduct is within the purview of the obligation to direct and control and when it constitutes interference. It is open to find that this was probably fed by the dysfunctional relationship between Councillors and staff.

M. TERM OF REFERENCE 3

Whether members of Council's governing body have been and will continue to be in a position to direct and control the affairs of Council

²⁷³ T899.43

in accordance with the Local Government Act 1993 and to otherwise fulfil its statutory obligations.

326. The extent to which the Governing Body has been able to direct and control the affairs of Council are a matter of degree. Clearly, the Council functioned: resolutions were passed, meetings were generally completed. There were delays to development applications and problems with morale as set out above but the applications were eventually dealt with and the staff morale was not so paralysing that nothing got done.
327. The most appropriate way to resolve the question as to whether Governing Body have *been able* to direct and control the affairs of the Council is by reference to the contemporaneous documents of the Councillors themselves such as that written on 16 March 2020²⁷⁴ and 24 March 2020 by Mayor Gair.²⁷⁵
328. While the contemporaneous documentation does not go as far as stating that the Governing Body could not direct and control the affairs of the Council, the effect of the admitted dysfunction on staff and the community is set out in some detail above.
329. It is open to the Commissioner to find that the dysfunction of the Governing Body eroded the trust and confidence of the community in their Council; that it created work health and safety and reputational risks within the workplace; and that it led to the neglect of some strategic planning instruments that including the housing strategy, economic and tourism development, and some heritage matters.

What Would Change?

330. There is little reason to think that much will change should the Councillors be returned. It is possible that least some dysfunction has been removed by the resignations of Mr Turland and Mr Halstead.
331. It is also evident that some of the disruption in Council meetings will be ameliorated by the training received by the Mayor and the return of in person meetings after the pandemic.

²⁷⁴ Page 69 Exhibit E

²⁷⁵ Page 83 Exhibit E

332. However there exists minimal evidence that Councillors are able to recognise that some of their behaviour was in breach of their obligations and (more importantly) the effect that behaviour has on staff.
333. For instance, there was no recognition from Councillor Scandrett that attending post-union meeting gathering and critiquing funding decisions was inappropriate. He provided various excuses but could not simply accept what he did was wrong.²⁷⁶ Likewise he was able to justify and rationalise in his own mind various breaches of meeting procedure
334. The media releases and Facebook posts²⁷⁷ by Councillor Scandrett are also quite clearly part of a campaign to have the Council dismissed. Like other Councillors, it appears he believes that if he expresses his criticisms as opinions that excuses him from his obligations under the Act.²⁷⁸ Unlike other Councillors, Councillor Scandrett believed that the suspension of the Councillors was “really good news” and that the suspension needed to lead to a “refreshed gene pool.”²⁷⁹
335. There is little reason for the Commissioner to find that if the Councillors were returned, that Councillor Scandrett would not hold the same beliefs and continue the same course of conduct as before, contributing disruption to Council meetings and briefings and negatively affecting staff.
336. Moreover, the same minority split that Councillor Scandrett complained of would subsist in the returned Governing Body. Councillor Scandrett gave evidence:

Q. I just want to explore with you your understanding of meeting practice. Is it appropriate for a councillor to argue with the chair of a council meeting in relation to a ruling or direction given by the chair?

A. No, but I might qualify.

Q. Do you seek to qualify?

A. Qualify, please.

Q. Yes, in what way?

²⁷⁶ See section L above and T902.25

²⁷⁷ Page 1351 Exhibit E

²⁷⁸ T953.21

²⁷⁹ Page 1350.44; T959.44

A. I think that it's a common observance that I was singled out for special treatment and the words "8:1" often came into play here.

MR PARISH: Q. Can you explain what you mean by the words "8:1"?

A. There was a voting pattern in the 16-20 council, Mr Parish, which generally amounted to eight councillors versus one councillor, and when I - we don't record the vote often, Commissioner, which I always thought we should, so I asked to have that read and those votes recorded, which begrudgingly was done; of course, that shrunk to 7:1 with Councillor Markwart retiring. But it was just a standard pattern, it was remarked on variously right – you know, media, public, et cetera, and it seemed to start with Station Street.²⁸⁰

337. It is reasonable to infer that this voting bloc pattern would continue and that Councillor Scandrett would use the same justifications to disrupt and breach the codes at a returned Governing Body.
338. It should also be remembered that the Governing Body was issued with a PIO, was given training, and then lapsed into the habits that manifested themselves prior to when the PIO was issued. That training included explanations of when to use point of order powers²⁸¹ and the powers available to the Governing Body under section 440G of the Act to refer matters of misconduct²⁸² to the Departmental Chief Executive. Yet the Councillors seemed to be under the misapprehension that the Minister had some unspecified power to suspend the alleged disruptive Councillors and some Councillors who had been through the training still had no understanding that a power to refer misconduct to the Departmental Chief Executive existed.²⁸³
339. Lastly, a review of the 24 February 2021 Council meeting should leave the Commissioner cautious about the Governing Body's capacity for reform.

The conduct of some Councillors following suspension has undermined the Council

340. In their attempt to defend their reputation and respond to what they see as criticisms from the interim administrator, they have (inadvertently it appears) undermined the Council staff.

²⁸⁰ T927.39

²⁸¹ Page 209 Exhibit B

²⁸² Page 48 Exhibit B

²⁸³ T1096.11

341. In their press release (addressed in more detail below) all current Councillors except Councillors Scandrett and Whipper wrote:

Council is now struggling to deliver services with the loss of hundreds of years of expertise and local knowhow and scores of staff vacancies it can't fill. The time to process development applications has blown out from weeks to many months with expensive external consultants now hired to try to stem the bleeding.²⁸⁴

342. This undermines the community's confidence in the Council staff and quite clearly brings it into disrepute.

343. On 27 April 2022, Mayor Gair provided an email to the Inquiry that attached an iMessage from an ex-employee of the Council who was not identified but who seemed to have a particular grievance with the Earnest Consulting report into the planning department.²⁸⁵

344. The email contained suggestions of impropriety in the appointment (amongst others) of consultants, the Local Planning Panel Chair and the current general manager Lisa Miscamble. The Commissioner can infer that Mayor Gair provided this in order to undermine the interim administrator.

345. The interim administrator was given the opportunity to provide a written statement answering the allegations and he did so on 5 May 2022.²⁸⁶ Mr May's written response provides some detail by reference to the relevant sections under the Act and sets out his relationship (if any) to the persons referred to in Mayor Gair's email.

346. At its highest, it can be said that Mr May has known some of the appointments in a professional capacity from previous roles he has held. This can hardly be surprising. Mr May has also set out the Interim Administrator Minutes for the tabling and adoption of the reports. He has also set out the considerable amount of detail provided in Interim Administrator Minutes about the appointment process.

347. To the extent the email provided by Mayor Gair was intended to taint the interim administrator, the Commissioner can find that it is baseless. What the email does do though

²⁸⁴ Exhibit O

²⁸⁵ Exhibit MM

²⁸⁶ Exhibit RR

is attempt to undermine the legitimacy of the appointment of Lisa Miscamble and therefore the Shire Council organisation as a whole.

348. This is altogether consistent with the available evidence that the Governing Body was riven by personalities and petty politicking, the staff being collateral damage to this. It is open to the Commissioner to find this has continued since their suspension and that they still have little insight into how their conduct affects Council staff.
349. The Commissioner should have serious doubts as to whether the Councillors can be returned given at least some of them are undermining the general manager they will have to work with as members of the Governing Body.

Conclusion Term of Reference 3

350. On a review of the available evidence, it is open for the Commissioner to find that:
- a. Some Councillors have warped their understanding of their roles and responsibilities to fit their own sense of personal mission which in their own minds (at least their manifested conduct) justify actions that contribute to the dysfunction of the Governing Body. There is no credible evidence that this will change if those Councillors are returned;
 - b. There is no reason to think the Council meetings will be significantly less dysfunctional given the subsisting majority:minority split that at least Councillor Scandrett says contributes to the dysfunction;
 - c. The conduct of some Councillors post-suspension garners little optimism for the effective acquittal of the returned Governing Body's roles and responsibilities. In their attempts to defend themselves against perceived criticism of the interim administrator, they have undermined the confidence of the community in Council staff and the new general manager Lisa Miscamble, the very people they will need to have a close trusting relationship with to run an efficient Council.

N. TERM OF REFERENCE 4

Any other matter that warrants inquiry, particularly those that may impact on the effective administration of Council's functions and

responsibilities or the community's confidence in Council being able to do so.

The Gair Five Press Release

351. A press release was prepared by four of the current Councillors and Mr Markwart that was designed to be published on 30 March 2022,²⁸⁷ on the third day of the hearings in this Inquiry. Titled **Sacking was political, say councillors**, it was published in the Southern Highlands Opinion²⁸⁸ and Southern Highlands Express.²⁸⁹
352. There were some small variations in the evidence from the relevant Councillors as to how the press release originated.²⁹⁰ It appears that Mayor Gair called the relevant Councillors to his house to discuss making a public statement.²⁹¹ Councillor Andrews gave evidence that it was a joint initiative of Mayor Gair and Councillor McLaughlin.²⁹² Mr Paull and the eventual author of the document, who had some background in media in Sydney, also appear to have been at the meeting.
353. The problem for the relevant Councillors is that the process and content of the press release reflect poorly on all three of the other terms of reference. If the purpose of the press release was to defend their character and competence (which they are entitled to do) against what they feel are unfair criticisms by the interim administrator (which is a valid emotion whether the criticisms are fair or not) all it did was prove the opposite and inflict collateral damage on the Council and its staff at the same time.
354. *The timing of the media release* on the third day of the Inquiry hearings may be taken to be a calculated attempt to undermine the legitimacy of the Inquiry and the community confidence in its findings. None of the relevant Councillors accepted this was the purpose or that the press release had any connection with the Inquiry²⁹³ notwithstanding the opening sentence of the press release reads: "Five former councillors have jointly welcomed the opportunity to set the record straight at the public inquiry starting this week into the Wingecarribee Shire Council, saying their suspension was political."²⁹⁴

²⁸⁷ Exhibit O

²⁸⁸ Page 29 Exhibit E

²⁸⁹ Page 27 Exhibit E

²⁹⁰ T690.46

²⁹¹ T691.01

²⁹² T1051.19. Councillor McLaughlin and Mayor Gair appear to agree: see T1097.45 and T1405.46

²⁹³ T692.34 (Markwart); T1052.02 (Andrews); T1168.32 (Nelson)

²⁹⁴ Exhibit O

355. On balance, the evidence does not suggest the press release was timed to undermine the Inquiry. That would be a serious finding to make that is not available on the present evidence. That would also be to ascribe a competency and calculation to the process that is not evidently present. However, it should be kept in mind that the Inquiry did not hear from the “wordsmith” who was largely outsourced the preparation after the initial meeting.²⁹⁵
356. ***They did not address the specific criticisms in the reports the interim administrator commissioner: they could not; they had not read them.*** It might be thought that if the purpose was to rebut what the relevant Councillors saw as unfair criticism from the interim administrator, and that criticism derived from reports the interim administrator had commissioned, then at the least the Councillors might read the reports. This was not the case.
357. Mayor Gair did not read the reports but instead based his knowledge on summaries in the interim administrator’s monthly community address.²⁹⁶ None of the other relevant Councillors read the reports either.²⁹⁷ Councillor Nelson thought he had at least read the Bushfire Report but turned out he had only read a press report summarising it.²⁹⁸ Some of them complained that they had not been afforded due process in contributing to the Bushfire Report.²⁹⁹ There is no cogent reason given as to why they could not have made a submission to the authors of the report. They seemed to be waiting for some special invitation distinct from the advertised process that at least some Councillors were aware of and did nothing about.³⁰⁰ The process is set out in the report.³⁰¹
358. ***The press release was factually inaccurate*** and at times lacked logic. This is probably inevitable when one launches an attack on the reports one has not read. Notable inaccuracies included:

The Minister rejected her own department’s advice to maintain the elected council after it had met her performance improvement conditions

²⁹⁵ T1409.32

²⁹⁶ T1414.04 to .14

²⁹⁷ T1102.31 (McLaughlin)

²⁹⁸ T1173.10 to 1173.40

²⁹⁹ T1175.03 (Nelson)

³⁰⁰ T1176.25

³⁰¹ Page 290 Exhibit B

359. There was no such evidence before the Inquiry. It is contrary to the quite open correspondence between the Council and the Minister in 2020 and 2021. It is also contrary to the chronology. Minister Tuckerman was not the minister at the time of the PIO, the suspension order, or the order for this Inquiry. At the time of the suspension order the local council elections had not been called.

360. When asked about the basis for this assertion, Mayor Gair gave a concerning incoherent answer. He produced a frequently asked questions print out³⁰² that was issued around the time the elections were called in July 2021³⁰³ but before the second report from the interim administrator that recommended an inquiry had been received by the administrator formally recommending a public inquiry.³⁰⁴ He seemed convinced this frequently asked questions flier constituted formal advice to the Minister partly because “the radio commentary the day after that was announced was very interesting.”³⁰⁵

361. There is little utility spending too much time critiquing Mayor Gair’s answers on this topic because his evidence was so fantastical. It is concerning that a person who hold his position can genuinely believe that a frequently asked question print out is formal advice to the Minister:

I am suggesting that it needs an investigation as to the processes that related to the Minister not taking her own advisor's advice and - and that was that we be reinstated.³⁰⁶

362. When pressed as to whether he was asserting that there had been political interference as evidenced by the frequently asked questions flier he was asked:

Q. Do you agree with me that saying "it just needs investigation, I'm just asking the question", is a fairly unsophisticated way of trying to imply that something improper has happened?

A. I would suggest my opinion and my thought is that there may be some evidence to show that there has been political interference.³⁰⁷

³⁰² T11425.02 and T1425.39

³⁰³ T1426.15

³⁰⁴ Page 806 Exhibit B

³⁰⁵ T1426.23

³⁰⁶ T1427.16

³⁰⁷ T1428.12

363. He then went on to say:

My - I am just saying, in my opinion, that the Minister did not take her advice from her own department and I believe without any evidence, and I'm not alleging, that there was political pressure placed on the Minister of the day to reverse the decision of the Office of Local Government: that's all I can say.³⁰⁸

364. Mayor Gair used the public forum available to him at the Inquiry, in which one of the terms was to ascertain whether he would be in a position to direct and control a 500 person multi-million dollar organisation, to call for an investigation into why the Minister did not follow the “advice” set out in a frequently asked questions pamphlet an opinion he held and believed “without any evidence.”³⁰⁹

365. Worse than that, the frequently asked questions flier (if it has an serious evidentiary value) actually proves the opposite point to that he seeks to make: at the time of the frequently asked questions flier but before the second report of the interim administrator³¹⁰ the status quo position was the return of the Council. The Minister or at least her department were maintaining that position in the absence of any advice to the contrary. Then the Minister received advice to the contrary. Then the Minister used the power to hold the Inquiry under the power given to her.

The plethora of external reports [the interim administrator] commissioned found relative insubstantial issues and no smoking gun to justify the suspension of the council.

366. It was not the purpose of the reports to find a smoking gun to justify the suspension of the Council. In any event, the reports I have set out in detail above *did* identify serious concerns.

367. It was difficult to test the basis upon which the relevant Councillors had made this assertion given none of them had read the reports.

Financial Statements of Fact

³⁰⁸ T1434.12

³⁰⁹ T1434.12

³¹⁰ Page 806 Exhibit B

368. It is simply not possible for the relevant Councillors to assert without a full understanding of the financial balance of the Council that:

Council has suffered its first loss in at least 26 years of over \$700,000, entirely due to the costs of sacking or forcing the resignation of virtually all the senior staff, and the Administrator has flagged another deficit of \$800,000 for 2022/23 and an extra-ordinary rate increase.

369. Mayor Gair admitted it was just his opinion and not meant to be a statement of fact.³¹¹ There is some evidence available to the Commissioner that there were previous operating deficits as recently as 2014/2015 but it is difficult to reconcile complicated Council budgets without knowing (for instance) whether the figure asserted by the relevant Councillors is before or after grants.
370. The press release also stated: “And he must be the first council boss ever to give grant money (\$4.1 million) back to the state government.”
371. In the report from the acting general manager at the 12 May 2021 Council meeting, the interim administrator and acting general manager reported on the Station St by-pass project. They noted a current cost estimate of \$36million.³¹² They then included the following summary of the funding:³¹³

³¹¹ T1419.28

³¹² Page 6; Exhibit K

³¹³ Page 6; Exhibit K

The current approved budget for the Station Street project is \$18.262 million. Expenditure incurred to date on the project is \$3,054,266.

The project funding strategy is as follows:

Source	Funding
Infrastructure NSW Grant	\$7,500,000
Proposed Loan Borrowings	\$3,884,000
Section 7.11 Contributions	\$2,000,000
General Fund Untied Revenue	\$1,851,000
Internal Cash Reserves	\$3,027,000
	\$18,262,000

There is a funding shortfall of \$17.7 million for the project based on the \$36 million estimate.

Council has subsequently submitted two grant applications to address the shortfall in funding. The outcome of these applications is pending. However, even in the event that Council was successful in obtaining the additional funding required for the project, the additional challenges discussed in the next section of this report, would place an unacceptable level of risk on Council being able to deliver this project.

372. It is highly misleading for the relevant Councillors to state that the interim administrator is giving \$4.1million back to the State Government without noting the \$17.7million shortfall, unless the imputation the relevant Councillors seek to convey is that the Council should press ahead \$17.7million short to retain \$4.1million.

373. Mayor Gair included it in a press release and conveyed it as a statement of fact. Now he says it is just his opinion.³¹⁴ That is misleading and disingenuous.

The assertion that the then Minister could have removed the problem councillors without sacking the whole council but there were other, political forces at play is legally untrue

374. I have set out above in my preliminary findings why the Commissioner can find that the Minister has no such power.

The attempt to draw the State Government into the suspension with ulterior motives made little sense

375. It appears the conspiracy theory that the suspension derived from a failure to approve certain developments that local MPs (apparently) backed came from Mayor Gair and was conveyed by him to the others.³¹⁵ There does not appear to be any attempt from the other

³¹⁴ T1419.28

³¹⁵ T1099.19 (McLaughlin)

relevant Councillors to fact check or test the logic of the theory. Most of the relevant Councillors do not appear to have seen a final version of the press release.

376. It is also difficult to reconcile the attempt to defend themselves from the charge that the Council was dysfunctional and the culture toxic given that they had passed a resolution agreeing that the reasons for the PIO was valid;³¹⁶ most of the relevant Councillors agreed in oral evidence that there was dysfunction; and they had available to them during the term of 2016-2020, reports such as the Workplace Wellbeing Survey dated 11 June 2019 that particularised instances of bullying and harassment and observations about a toxic culture.³¹⁷

377. Mayor Gair (the primary source of the theory) even admitted in questioning:

Q. Do you think the governing body and councillors have an obligation to ensure that the shire council is a safe workplace?

A. Yes.

Q. Do you think the governing body of 2016-2020 failed therefore?

A. Yep, um, some. And this is the thing with our suspension, and I remember sitting where the Commissioner sits and saying to the councillors, "If we get suspended we're all going to get tarred with the same brush, it's going to be a collective 'we', and the community will not differentiate between who was responsible and who was not responsible; it is the collective", and to me that was extremely unfortunate, because you have just used the word "the governing body", and as such it wasn't the governing body as a whole, it was parts of the governing body that brought this council into disrepute.

Q. You seem to accept there that, because of the nature of the governing body, that even if it is only one or two councillors, the entire governing body is tarred with the same brush; is that how I understood your evidence?

A. You know, I came into town yesterday and three people came up to me, they didn't know anything about this and I said, "G'day" and I've known them for decades, and they were unaware of what is happening here today, or yesterday, the last couple of weeks, but they gave me a very strong opinion of what they thought of certain councillors.

Q. I'm interested in your opinion and the evidence you gave in the previous answer rather than their opinion, although maybe we'll come to that. Do I take it from your previous answer that you accept that, because of the nature of the governing body, the actions of a few councillors can tar the whole governing body?

A. I agree totally.³¹⁸

³¹⁶ See above

³¹⁷ Page 20 to 21; Exhibit OO

³¹⁸ T1375.01

378. It is difficult to understand how Mayor Gair can have this sort of insight into the condition of the Governing Body and how it is perceived but while at the same time thinking that the suspension was a product of some political fix.
379. It should be remembered that this press release was intended to be published in local newspapers and media platforms. Their stated target audience were members of their community. It is hopelessly compromised with undefined opinion, half-truths, mistruths. It is indicative of clumsy political posturing. It is sloppily prepared.
380. It is open for the Commissioner to consider under Term 4 whether a group who put their name to something so inept an attempt at public relations and who will make up four of the six Councillors if returned, have the capacity to direct and control an organisation the size and complexity of the Shire Council or lead a community they have comprehensively misled.

The Current General Manager's Roadmap

381. The Commissioner should consider under Term 4 whether the Councillors will help or hinder the current plans for the Council articulated by the present general manager Lisa Miscamble.
382. This consideration bears on whether Councillors will be in a position contribute to an efficient and functioning Council with the present general manager in the present circumstances. It will also bear on the ultimate recommendations and the timing of the period of suspension.
383. At the Council meeting of 16 March 2022, the general manager Lisa Miscamble presented document titled **Our Road Map: Moving Forward to Reset Our Organisation**.³¹⁹ She prefaces the purpose of the Road Map by noting:

The organisation is going through a period of significant change and transformation. To assist in this process the Road Map has been prepared to communicate the vision for the organisation, challenges, opportunities and the staging and initiatives to be undertaken to reset and rebuild the organisation.

The feedback from staff, residents and other key stakeholders combined with the recommendations from the various reviews undertaken show the magnitude of work that needs to be undertaken to create a strong base for the future of Council.

³¹⁹ Exhibit M

It is evident from the feedback from staff and other key stakeholders and the various reviews that have been undertaken that there are issues that need to be resolved for the organisation to be effective and efficient.³²⁰

384. The Road Map took into consideration staff and community surveys, the findings from independent reviews, feedback from over 70 staff members, State and Federal Members of Parliament, community members and organisations, and regional stakeholders.³²¹

385. The Commissioner can comfortably find from the weight of the evidence available that the premise of her report (that the feedback from staff and other key stakeholders that there are issues to be resolved for the organisation to be effective and efficient) is established.

386. Ms Miscamble concluded her comprehensive Road Map by summarising:

We need to:

- Get the basics right: communication, response and delivery: get the organisation ‘humming’
- Secure grants
- Plan for Infrastructure
- Planning & Development needs to be more dynamic
- Local economic development is critical
- Have strong governance framework, understanding the principles with clear roles & responsibilities
- Ensure appropriate training & awareness of roles, responsibilities & our legislative framework
- Foster healthy, collaborative work practices that engage our people
- Apply consistency in approach: whether internally with policy & practices or externally in the advice and approach we take
- Improve implementation of systems & processes
- Have a clear vision for the future & be proactive
- Ensure role clarity between the elected Council & Administration & ‘rules of engagement’
- Improve communication internally & externally to build trust: early and open communication & building a shared understanding (e.g. service levels for the community & councillors)

387. In her oral evidence, Ms Miscamble set out in detail the reasoning behind these action points.³²² She set out three horizons to achieve the aims set out in the Road Map. She

³²⁰ Page 9 Agenda of the Ordinary Council Meeting 16 March 2022; Exhibit M

³²¹ Page 10 Agenda of the Ordinary Council Meeting 16 March 2022; Exhibit M

³²² T1465.09

estimates that it will take approximately 3³²³ years to achieve the first horizon of refocusing, reinvigorating, and rebuilding the organisation.³²⁴

388. The Commissioner can find from the evidence he has heard that the Council needs a period to reform and rebuilding. It is more difficult to for the Commissioner to find that the Councillors accept this and will be a constructive part of that process.
389. It is worth setting out in some detail the interim administrator's evidence on this issue. When asked whether his views had changed since his last submission to the Inquiry in October 2021, he said:

It's only firmed up my view. Since the general manager [Lisa Miscamble] has been here and she's had the support of very competent local government professionals, and I'm not saying that the people who filled in aren't but they weren't at that level, so much has been uncovered.

You know, the council at the moment is getting belted up about development issues: well, it's the legacy issues which were caused by, you know, others which are causing a lot of our trouble, and a lot of people have left the organisation because they're not happy with putting the customer or the resident first, but acknowledging there's rules you've got to follow, and the micromanaging is disappearing as I'm told and, you know, I think I firmed up more that this place needs time. I can just imagine it now.

THE COMMISSIONER: Q. When you say "this place needs time", what do you mean by that?

A. What I mean is, I can just imagine if there had have been an election in December, I wouldn't have wanted to be the general manager, trying to address the issues in the organisation operationally and dealing with an incoming council.

Q. And what about looking forward to what's stated to be the elections in September of this year; is the organisation better placed or is it still in need of time?

A. Well, I've given this a lot of thought and I think the council needs more time, and I say that there's really - and I wrote myself down a little note about this, because the longer the general manager is here and the longer, you know, I think about it, this council needed a circuit breaker, it's been going on for too long, it just went to new levels and it needed a circuit breaker.

The general manager has got to be afforded the time and the opportunity to do a good job. The government is spending a lot of money on this and it's an opportunity to get it right, because it's been wrong for too long.

The other thing I come to is fairness to candidates who are presenting for election. A two-year term, the councillors won't have worked out what they want

³²³ T1473.17

³²⁴ Page 18 Agenda of the Ordinary Council Meeting 16 March 2022; Exhibit M

as a community strategic plan, there will still be a lot of issues outstanding, and for those reasons I think more time is required to get the place - well, to get it into a situation where the general manager has no excuses, it could be any general manager.

THE COMMISSIONER: Q. Yes, and from that do I understand there's two limbs to your view about that: one is, the organisation is still rebuilding itself or reforming itself to correct some of the legacy issues, and (2), in order to give the incoming governing body the greatest prospect of success in their role they need a strong organisation with them, I suppose, is the appropriate words. Have I understood the driving forces behind your views correctly?

A. Correct, and you know, I am confident from all the people I have spoken to, and there's been hundreds of them, not just a handful, that this place replaced community with personality and we're working hard to put community back at the forefront, but that's going to take time. As I said earlier, I wouldn't have liked to have been a general manager had there had been an election in December, trying to cope with - I think there's going to be a huge turnover of councillors, that's just my reaction, and dealing with that and the complexities of rebuilding and resetting what was a broken organisation.³²⁵

390. There is much force in Mr May's observations. It is open for the Commissioner to find that to effect the meaningful change needed to rebuild the Council's culture and better serve their community, the new general manager needs a period of clear air absent a dysfunctional Governing Body to commence effecting this change.
391. There is also the prospect of the Councillors being returned and undoing reforms undertaken by the interim administrator that would be detrimental to the Shire.
392. An example is the Local Planning Panel implemented by the interim administrator. This takes the planning decisions out of the hands of the Governing Body and gives it to an independent specialist panel.
393. Mr May noted that from his impression, the Councillors had lost focus on the big picture and were more interested in smaller individual development applications.³²⁶ This impression is largely supported from a review of the available Council meeting audio-visual exhibits. The flash points and tensions caused by planning matters is evident at both meetings and from some oral evidence from Councillors.³²⁷

³²⁵ T582.33 to T583.34

³²⁶ T530.26

³²⁷ T1036.12

394. Ian Reynolds noted in his role as temporary advisor that much time was taken up getting into the nitty-gritty of individual development applications at both briefings and Council meetings that was neither an efficient nor effective use of time.³²⁸
395. Many of the witnesses who were asked about the Local Planning Panel agreed it was a positive step.³²⁹ The only witnesses who gave evidence against the Local Planning Panel were Councillors³³⁰ or ex-councillors.³³¹ Councillor Andrews and Mr Turland were³³² the exception. Mr May considered the panel would be a positive move.
396. The negative view stemmed largely from a misapprehension that a planning panel did not allow the community to be heard through personal representatives.³³³ This is a misunderstanding of how the planning works and is also concerning given the development application process has always provided for standing given to objectors.
397. The Commissioner can find that the Local Planning Panel is a positive step forward for the Council when members of the community are “thrilled” at the implementation of a scheme which takes the planning powers out of the hands of Councillors³³⁴ and it is a response to a culture where individual objectors can lobby individual Councillors to put a stop to development they may, at base, simply not like.³³⁵ Ms Campbell gave evidence:
- What I did see was, if a councillor either personally knew the proponent, and either had an axe to grind against that proponent or had a friend who had an axe to grind against that proponent, it would get called up. So, it became an opportunity to cause problems for a DA on spurious terms.³³⁶
398. The weight of evidence from Councillors suggests they will return the planning powers to their hands when returned if at all possible. In all likelihood this will return the issues that made up 90-95% of the flash points between Councillors.³³⁷ It will return a culture where the community holds a perception that planning is not a level playing field.

O. FINDINGS SOUGHT

³²⁸ T.616.12; T626.05

³²⁹ T5112.02 (McMahon); T739.46 (Ryan); T781.29 (Samulski); T329.33 (Kennedy); T259.09

³³⁰ T1079.41 (McLaughlin)

³³¹ T642.22 (Clark); T676.31 (Markwart)

³³² T056.33 and T1283.31

³³³ T642.06 (Clark)

³³⁴ T329.33

³³⁵ T644.07

³³⁶ T346.04

³³⁷ T1036.12

399. It is my submission that an analysis of the evidence available to him can lead him to make the following findings in respect of the terms of reference:

- a. The Councillors' subjective understanding of their roles and responsibilities was high level, without nuance, and at least in the case of some Councillors, warped to fit their own sense of mission on the Governing Body (Term 1);
- b. There is a weight of specific examples that amount to misconduct or acts of disorder, particularly in meetings, which suggests Councillors did not adequately perform their roles and responsibilities (Term 1);
- c. As a result of dysfunction among the Governing Body, the Councillors failed to properly carry out some of their strategic planning obligations (Term 1);
- d. There was a failure of all Councillors as part of the Governing Body to ensure that the workplace they directed and controlled was safe and free from bullying and harassment (Term 1).
- e. There was some improper interference in staffing and planning matters by Councillors but it is difficult to say what the extent or severity of this interference was (Term 2);
- f. There was a culture within the Governing Body that led to Councillors micromanaging aspects of the Council that amounted to improper interference, probably caused by a lack of trust between Councillors and Council staff (Term 2);
- g. When presented with grey areas, Councillors lacked the capacity and judgement to ascertain what conduct was within the purview of the obligation to direct and control and what conduct constituted improper interference (Term 2);
- h. Some Councillors have warped their understanding of their roles and responsibilities to fit their own sense of personal mission which in their own minds (at least their manifested conduct) justify actions that contribute to the dysfunction of the Governing Body. There is no indication this will change if those Councillors are returned (Term 3);
- i. There is no reason to think the Council meetings will be significantly less disruptive or dysfunctional given the subsisting majority:minority split that at least Councillor Scandrett says contributed to the dysfunction (Term 3);

- j. The conduct of some Councillors post-suspension garners little optimism for the effective acquittal of a returned Governing Body's roles and responsibilities. In their attempts to defend themselves against perceived criticism of the interim administrator, they have undermined the confidence of the community in Council staff and the new general manager Lisa Miscamble, the very people they will need to have a close trusting relationship with to run an efficient Council (Term 3).
- k. The acts of some Councillors post-suspension suggest they do not have an appropriate insight into how their conduct affects Council staff or undermines the confidence of the community (Term 4);
- l. The Councillors who put their names to such an inept and grossly inaccurate press release (Exhibit O) have shown they may not have the capacity to direct and control an organisation the size and complexity of the Shire Council or lead a community they have comprehensively misled (Term 4);
- m. To rebuild the Council's culture and better serve its community, the new general manager needs a period of clear air absent a dysfunctional Governing Body to commence effecting this change (Term 4);
- n. It is likely that if the Councillors are returned they will restore the planning powers to their hands if at all possible. This would reinstate a source of dysfunction and a culture where the community holds a perception that planning is not a level playing field (Term 4).

P. RECOMMENDATIONS SOUGHT

- 400. Based on the forgoing submissions, it is my view that the Commissioner can make the following recommendations to the Minister in his report:
 - a. The Minister should recommend to the Governor that all civic offices in the Wingecarribee Shire Council be declared vacant pursuant to section 255 of the Act.
 - b. The period of interim administration should remain until the next State local council elections in September 2024.
 - c. The induction and training of councillors should be standardised and include:

- i. Proper training in respect of what powers are available to councillors when there is disruption by a minority of councillors;
 - ii. More fulsome training in respect of councillors obligations under Work Health and Safety legislation;
 - iii. Proper records of who attends training;
 - iv. Extra training in the chairing of meetings given to the mayor and deputy mayor.
- d. There should be more clarity in the Act around the reporting and publication of code of conduct complaints. In particular, the complaint, the investigation, the name of the subject councillor, and the outcome should be readily available for the community to access.
- e. Some consideration should be given as to whether the training received by councillors around the distinction between operational and strategic is appropriate given the dichotomy is not clearly found in the Act and it does not use that nomenclature. Alternatively, the Act could strengthen and clarify the distinction between the councillors' roles and the role of staff.

Q. CONCLUSION

401. The 2012 Division of Local Government Promoting Better Practice Program Review Report³³⁸ is prophetic. It reads:

If poor relationships between councillors and staff, and between councillors, are allowed to continue, this could have a destabilising effect on the Council. It is clear to the review team that staff morale is being adversely affected by councillor behaviour. Councillors should be leading by example, making decisions in the best interests of the whole community and resolving differences in a professional and mature way.

402. The relationship between Councillors and staff and between Councillors themselves did not materially improve. Some witnesses were of the opinion that the 2016 term was as bad

³³⁸ Exhibit EE

as the 2012 term.³³⁹ Some appear to be of the opinion the 2012 term was worse.³⁴⁰ There is little credible evidence that the relationships between the antagonists significantly improved. From at least 2018, the Governing Body became increasingly dysfunctional.³⁴¹

403. There is no doubt that the Councillors the subject of this Inquiry commenced the 2016-2020 with the intention to serve their community and make their Shire a better place, whether that was by preserving the qualities of this unique area that already existed, forging a path to a better and more sustainable future, or the difficult task of doing both. The time and effort required to serve their community is significant and the commitment of the Councillors is admirable. It is in many ways a thankless and difficult job.
404. But ultimately, the dynamics that existed between the Councillors and the culture that had festered over several terms infected the ability of the Governing Body to properly perform its roles under the Act. While Councillors may have been able to write off discord and disruption as robust debate or incisive questioning, the damage their conduct inflicted on their relationship with the community and the Council staff was significant. This is evident from any witness who had actually viewed the Councillors interact at a meeting. The poor relationships between Councillors and staff, and between Councillors, *was* allowed to continue, and it *did* have a destabilising effect on the Council, its staff, and the community it serves. This destabilising effect exacerbated trauma in the aftermath of the bushfires, it undermined the confidence of the community in the Councillors' ability to deliver projects that improved the future economic and social prospects of the Shire, and it contributed to a workplace that was not safe.

D. Parish

9 Wentworth Chambers

9 May 2022

³³⁹ T796.11 (Barry Paull)

³⁴⁰ T1260.31 (G Turland)

³⁴¹ T897.08 (Clr Scandrett); T843.18 (Clr Whipper); T1055.33 and T1057.43 (Clr Andrews); T1065.07, T1065.38, and T1066.29 (Clr McLaughlin); T1325.42 (G Turland)

Appendix A

Analysis of Videos		
Video		Code of Conduct Breaches
Video 1	Clr Scandrett makes allegations re Clr Turland	<p>Clr Scandrett:</p> <p>3.3 - You must treat others with respect at all times</p> <p>6.5 - You must act in accordance with council's Code of Meeting Practice</p> <p>6.6 - You must show respect to the chair, other council officials</p>
Video 2	Clr Scandrett seeks amendment to the Minutes & declares an interest	<p>Clr Scandrett:</p> <p>4.17 If you determine that a non-pecuniary conflict of interests is less than significant and does not require further action, you must provide an explanation of why you consider that the conflict does not require further action in the circumstances.</p> <p>6.5 - You must act in accordance with council's Code of Meeting Practice</p> <p>6.6 - You must show respect to the chair, other council officials</p> <p>Mayor:</p> <p>6.6 - You must show respect to the chair, other council officials</p>

Video 3	Clr Scandrett refuses to leave the meeting	Clr Scandrett: 6.5 - You must act in accordance with council's Code of Meeting Practice 6.6 - You must show respect to the chair, other council officials
Video 4	Sale of Council owned property – makes allegations regarding councillors	Clr Scandrett: 3.3 - You must treat others with respect at all times 6.5 - You must act in accordance with council's Code of Meeting Practice 6.6 - You must show respect to the chair, other council officials
Video 5	Turland alleges councillors misled by staff	Clr Turland: 3.1 You must not conduct yourself in carrying out your functions in a manner that is likely to bring the council or holders of civic office into disrepute - is an abuse of power or otherwise amounts to misconduct - causes, comprises or involves bullying, intimidation, harassment or verbal abuse 3.3 You must treat others with respect at all times 6.6 - You must show respect to the chair, other council officials 6.7 You must not engage in any of the following inappropriate interactions: f) Councillors and administrators making personal attacks on council staff in a public forum

		<p>GM:</p> <p>3.3 You must treat others with respect at all times</p> <p>6.6 - You must show respect to the chair, other council officials</p>
Video 6	Animal shelter – Turland attacks staff	<p>Clr Turland:</p> <p>3.3 You must treat others with respect at all times</p> <p>6.5 - You must act in accordance with council's Code of Meeting Practice</p> <p>6.6 - You must show respect to the chair, other council officials</p> <p>6.7 You must not engage in any of the following inappropriate interactions:</p> <p>f) Councillors and administrators making personal attacks on council staff in a public forum.</p>
Video 7	Notice of Motion not included in business papers – Clr Turland fires up dispute with GM – Clr Halstead fires up – Clr Scandrett calls the Mayor a coward – Mayor closes meeting	<p>Clr Turland:</p> <p>3.1 You must not conduct yourself in carrying out your functions in a manner that is likely to bring the council or holders of civic office into disrepute - is an abuse of power or otherwise amounts to misconduct - causes, comprises or involves bullying, intimidation, harassment or verbal abuse</p> <p>6.5 - You must act in accordance with council's Code of Meeting Practice</p>

		<p>6.7 You must not engage in any of the following inappropriate interactions:</p> <p>f) Councillors and administrators making personal attacks on council staff in a public forum.</p> <p>Clr Halstead:</p> <p>3.1 You must not conduct yourself in carrying out your functions in a manner that is likely to bring the council or holders of civic office into disrepute - is an abuse of power or otherwise amounts to misconduct - causes, comprises or involves bullying, intimidation, harassment or verbal abuse</p> <p>6.5 - You must act in accordance with council's Code of Meeting Practice</p> <p>6.6 - You must show respect to the chair, other council officials</p> <p>Clr Scandrett:</p> <p>3.1 You must not conduct yourself in carrying out your functions in a manner that is likely to bring the council or holders of civic office into disrepute - is an abuse of power or otherwise amounts to misconduct - causes, comprises or involves bullying, intimidation, harassment or verbal abuse</p> <p>3.3 You must treat others with respect at all times</p>
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Video 8	Playing phone recording Clr Turland threatens staff Clr Scandrett makes allegations regarding staff advice, makes inappropriate remarks to GM and disputes her advice – Clr Scandrett give document to member of the press, fails to leave the chamber when requested to do so	<p>Clr Turland:</p> <p>3.1 You must not conduct yourself in carrying out your functions in a manner that is likely to bring the council or holders of civic office into disrepute - is an abuse of power or otherwise amounts to misconduct - causes, comprises or involves bullying, intimidation, harassment or verbal abuse</p> <p>3.3 You must treat others with respect at all times</p> <p>6.6 - You must show respect to the chair, other council officials</p> <p>Clr Scandrett:</p> <p>3.3 You must treat others with respect at all times</p> <p>6.5 - You must act in accordance with council's Code of Meeting Practice</p> <p>6.6 - You must show respect to the chair, other council officials</p>
Video 9	Place of meeting – Clr Turland talks over Mayor	<p>Clr Turland:</p> <p>6.5 - You must act in accordance with council's Code of Meeting Practice</p> <p>6.6 - You must show respect to the chair, other council officials</p>
Video 10	Clr Turland alleges favouritism on the part of the Mayor	<p>Clr Turland:</p> <p>6.6 - You must show respect to the chair, other council officials</p>
Video 11	Clr Turland & Clr McLaughlin talk over Mayor – mayor mutes the meeting	<p>Clr Turland:</p>

		<p>6.5 - You must act in accordance with council's Code of Meeting Practice</p> <p>6.6 - You must show respect to the chair, other council officials</p> <p>Clr McLaughlin:</p> <p>6.5 - You must act in accordance with council's Code of Meeting Practice</p> <p>6.6 - You must show respect to the chair, other council officials</p>
Video 12	Clr Scandrett puts forward a motion and speaks over the Mayor – makes allegations about the Mayor	<p>Clr Scandrett:</p> <p>3.1 You must not conduct yourself in carrying out your functions in a manner that is likely to bring the council or holders of civic office into disrepute - is an abuse of power or otherwise amounts to misconduct - causes, comprises or involves bullying, intimidation, harassment or verbal abuse</p> <p>3.3 You must treat others with respect at all times</p> <p>6.5 - You must act in accordance with council's Code of Meeting Practice</p> <p>6.6 - You must show respect to the chair, other council officials</p>
Videos 13 & 14	Clr Scandrett addresses staff meeting – engages in operational issues	<p>Clr Scandrett:</p> <p>3.1 You must not conduct yourself in carrying out your functions in a manner that is likely to bring the council or holders of civic office into disrepute. Specifically,</p>

		<p>you must not act in a way that contravenes the Act, associated regulations, council's relevant administrative requirements and policies, is detrimental to the pursuit of the charter of a council</p> <p>6.2 Councillors or administrators must not in any public or private forum, direct or influence or attempt to direct or influence, any other member of the staff of the council in the exercise of the functions of the member</p> <p>6.7 You must not engage in any of the following inappropriate interactions:</p> <p>a) Councillors approaching staff and staff organisations to discuss individual or operational staff matters</p>
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Appendix B

Further Tendered Exhibits List

Ex No	Description	Tendered
MM	Email from Mayor Gair dated 27 April	In Chambers
NN	2017 Workplace Wellbeing Survey (Draft)	In Chambers
OO	Workplace Wellbeing Survey (Final Report) 11 June 2019	In Chambers
PP	Transcript of Hadley interview with Clr Scandrett	In Chambers
QQ	Turland interview on ABC Afternoons	In Chambers
RR	Administrator's response to Mayor Gair email	In Chambers
SS	Clr McLaughlin's letter to the editor	In Chambers
TT	Planning Function Interim Report – Malcolm Ryan	In Chambers