

**BALRANALD SHIRE COUNCIL  
PUBLIC INQUIRY  
REPORT**

**25 November 2019  
Roslyn McCulloch**

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## Executive Summary

On 24 January 2019, I was appointed by the former Minister for Local Government, the Hon Gabrielle Upton MP, to hold a public inquiry pursuant to section 438U of the *Local Government Act 1993* (LG Act) into certain matters relating to Balranald Shire Council.

As Commissioner, I was appointed to inquire, report and provide recommendations as to whether all civic offices at the Council should be declared vacant.

The terms of reference for the Inquiry are as follows:

1. In exercising its functions pursuant to sections 21, 22, 23 and 24 of the LG Act, the governing body is meeting its obligations to provide strong and effective leadership in a manner consistent with the guiding principles set out in sections 8A, 8B and 8C of the LG Act, including whether its leadership with respect to Council's management of its responsibilities relating to long term financial planning, public land management and provision of services is appropriate;
2. In exercising its functions pursuant to sections 21, 22, 23 and 24 of the LG Act Council is meeting its obligations to act as a responsible employer, providing a safe, consultative and supportive working environment for the general manager and other staff in a manner consistent with the guiding principles set out in section 8A(1)(i) of the LG Act and any other statutory requirements considered relevant ;
3. In exercising its functions pursuant to sections 21, 22, 23 and 24 and Part 2, Divisions 2 and 3 of Chapter 9 of the LG Act, the governing body's Mayor and councillors' conduct and decision-making both collectively and/or individually demonstrates an understanding of their role under sections 226 and 232 of the LG Act.
4. In exercising its functions pursuant to sections 21, 22, 23 and 24 of the LG Act, the governing body acts in accordance with the guiding principles set out in s 8A of the LG Act including whether the governing body commands the confidence of its community.
5. In exercising its functions pursuant to sections 21, 22, 23 and 24 of the LG Act, Council has complied with its obligations as Reserve Trust Manager under the Crown Lands Act 1989 of the Balranald Caravan Park.
6. Any other matter that warrants mention, 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.

Public notice of the Inquiry was published in *The Guardian*, *The Riverina Grazier* and *Robinvale Sentinel* on 27 March 2019. The notice included the terms of reference and invited submissions relevant to the terms of reference. A Notice of Hearings was advertised in *The Guardian*, *The Riverina Grazier* and the *Robinvale Sentinel* on 19 June 2019.

Information relating to the Inquiry was published on a dedicated website and on the Council's website. The information included the Inquiry's terms of reference, a copy of the Notice of Hearings, a detailed information paper outlining the Inquiry's procedures and transcripts of the hearings.

During the Inquiry, extensive documentation was obtained from the Council and the Office of Local Government (OLG), public submissions were received, and public hearings held. The hearings were held in Sydney on 22 July 2019 and in Balranald on 31 July to 8 August 2019.

During the hearings, the Inquiry heard from the Mayor and each of the other seven councillors. The Inquiry also heard from Ms Lyn Brown from the OLG, Mr Alan McCormack, former and current senior staff of the Council and from several members of the community who had lodged submissions and/or that I considered had information that may be relevant to the terms of reference.

The body of the report provides an analysis of the relevant evidence relating to each term of reference. My formal findings are detailed in the findings section of this report.

I have recommended that all civic offices at the Council be declared vacant and an administrator be appointed until the ordinary Council elections in 2024, amongst other things.

In making this recommendation, I have been mindful that the dismissal of the elected Councillors will mean that temporarily, Balranald Shire will not be governed by democratically elected representatives. My decision to make that recommendation is made with the best interests of the residents and ratepayers of the Shire and the staff of the Council firmly in my mind. I believe that in order to maintain the positive work towards long term financial stability for the Council, and to protect the interests of the constituents and staff of the Council, a clean break is required. The plans which have been adopted need time to be properly implemented without being watered down or abandoned. The community and the Council staff need some breathing space and time to heal from the rifts which have arisen.

I have also taken into account the Intergovernmental Agreement to Guide NSW State-Local Government Relations on Strategic Partnerships, which provides as follows:

“COMMITMENT TO DEMOCRATIC LOCAL GOVERNMENT

6.12 The NSW Government commits to ensuring that the term of any Administrator appointed under the *Local Government Act 1993* is as brief as possible, with a view to quickly returning the council to democratically elected representatives.”

## **Personnel Assisting the Inquiry**

I authorised Ms Katrina Annis-Brown to assist in the conduct of the Inquiry under the provisions of section 12(2) of the *Royal Commissions Act 1923*.

## **Background to the Inquiry**

The Council was elected to office on 17 September 2016. Of the eight councillors elected, five were members of the previous council.

In November 2015, the OLG conducted preliminary enquiries into the operation of the Bidgee Haven Hostel (Hostel). This followed the Council's receipt of a report reviewing the operation of the Hostel. The report indicated that there were serious deficiencies that the Council needed to address in relation to the operation of the Hostel.

Information was subsequently provided by the Council suggesting that it was taking action to address the issues identified in the report. The OLG wrote to the Council noting the information provided and reinforcing the need for ongoing action to ensure the proper operation of the Hostel and for the elected Council to be kept informed of the actions being taken.

In February 2016, the NSW Treasury Corporation (TCorp) produced a financial update on the Council. A review by OLG of TCorp's financial update and the Council's recent financial statements indicated that the Council was suffering from significant and present financial risks. This included inadequate forward planning and difficulty working within and providing for a surplus budget.

In August 2016, the OLG visited the Council to conduct preliminary enquiries. The evidence indicated that the Council had insufficient controls over financial transactions and poor financial management practices. This was exacerbated by the absence of a current long term financial plan and coherent asset management plan. Further, the evidence indicated that the Council's corporate governance practices were ineffective and/or inconsistent with its legislative obligations and that the Council's failure to meet those obligations had been occurring for some time.

The preliminary enquiries report highlighted significant concerns about the performance of the Council and contained 13 recommendations aimed at assisting the Council to improve its performance.

In November 2016, the Minister for Local Government, considered that action must be taken to improve the Council's performance and sent the Council a Notice of Intention to Issue a Performance Improvement Order (PIO). The Notice invited the Council to make submissions in respect of the proposed Order.

While the information subsequently provided by the Council outlined its plans to resolve the issues, the OLG considered that it failed to sufficiently demonstrate how and when the findings and recommendations of the report would be addressed.

In April 2017, the Minister for Local Government issued a PIO and appointed a temporary adviser to the Council. The PIO required the Council to prepare and implement, with the assistance of the temporary adviser, a plan to improve its performance.

Following consideration of the Council's final compliance report and the temporary adviser's report, it was apparent to the OLG that there were ongoing and new issues

of concern that needed to be addressed. The OLG considered that the evidence indicated that the Council was continuing to fail to meet the reasonable expectations of the Minister and the community. In particular, the OLG was concerned that the governing body of the Council appeared to be unable or unwilling to understand and fulfil its role. The OLG considered that the community and the Council would benefit from a public inquiry and a report from an independent commissioner.

Following consideration of a report from the OLG on 24 January 2019 the Minister for Local Government established this Inquiry.

## Term of Reference 1: Long Term Financial Planning

### 1.1 Bidgee Haven Hotel

1. Balranald Shire Council had come to the attention of the OLG in connection with the behaviour of Cr O'Halloran as early as 2013. However it was not until the Chief Executive Officer of the OLG received a letter dated 4 September 2015 from Cr Lynda Cooke regarding the Hostel that the focus of the OLG in relation to Balranald Shire Council shifted to financial matters.
2. Cr Cooke's complaint enclosed a copy of a report prepared by Sarah Salt, consultant registered nurse, regarding the Hostel (Salt Report). Salt Report recorded numerous incidents of poor and absent record keeping and inadequate clinical procedures. The report was critical of the manner in which claims were made under the Aged Care Funding Instrument (ACFI). The report made numerous findings which included:

*"1. Most ACFI claims are overstated and not supported by any form of good documentation. It would be very hard to achieve the same sort of levels if the claims were accurately completed. If the ACFI validators came to review the claims, I do not believe that some the claims (sic) would be downgraded."*

3. In the period 2014 – 2017 the Hostel accumulated losses in the vicinity of \$1.3M. Ultimately and ironically, a review of the funding packages for all residents resulted in a significant increase in federal funding. Since 2017 the Hostel has operated at a profit. The hostel is no longer a drain on the Council's finances however the circumstances which brought it to the attention of the OLG are relevant to Term of Reference 3 in this report.

### 1.2 2016 TCorp Report

4. On 16 February 2016, the NSW Treasury Corporation (TCorp) published a financial update on Balranald Shire Council. It had previously last reviewed the Council's finances in April 2013 when it had found increasing operating deficits since 2011 which were forecast to continue and declining levels of asset renewals with a forecast to deteriorate further. The 2013 TCorp report had relied on advice from the Council that asset management plans had been completed and that no infrastructure backlog existed.
5. The 2016 TCorp report found that the operating ratio of the Council had deteriorated since 2011 (from 10% to 40%) and was forecast to continue at a level well below the TCorp benchmark of 0%. That operating ratio was also significantly lower than the average of the eight far west Councils. When the operating ratio was analysed by fund, the consolidated, general and sewer funds were all found to be well below the TCorp benchmark with the sewer fund declining from a formerly positive position.
6. The TCorp report observed depreciation rates for Balranald Shire Council of or exceeding 3.5% which far exceeded depreciation rates of the other eight far west Councils of less than 2%. The infrastructure backlog had increased

significantly since the prior TCorp report and the building and infrastructure asset renewal ratio remained stubbornly significantly below the TCorp benchmark.

7. The findings of the 2016 TCorp report were that there had been no improvement in the operating ratio, that further work was required on asset management plans in order to determine the correct level of infrastructure backlog, that depreciation expenses appeared to be significantly overstated, investment in asset renewals had declined and the performance of the sewer fund had declined and was incurring significant operating losses.

### **1.3 OLG Report on Preliminary Enquiries**

8. On 11 July 2016 the Manager, Investigations OLG wrote to the Council outlining the concerns of the Office which were:
  - present financial risks which would continue unless significant measures were taken to deal with a number of underlying issues;
  - poor forward planning and absence of a surplus budget;
  - possible failure to comply with regulatory requirements of the LG Act; and
  - absent or out of date policies and processes.
9. On 19 July 2016 two principal investigators from the OLG attended at the Council and interviewed the Mayor, Cr Byron, the General Manager, Aaron Drenovski, the Director Corporate and Community Development, Elizabeth White and the Director of Infrastructure and Development, John Stevenson.
10. In August 2016 a report on the preliminary enquiries into Balranald Shire Council was published. That report found that:
  - there had been large operating deficits in the 2012/13, 2013/14 and 2014/15 financial years of \$4.9M, \$7.3M and \$2.9M, respectively;
  - Council was budgeting for an operating deficit of \$4.5M in 2016/17 even after reducing its depreciation expenditure by \$2.4M since 2013/14;
  - there was no coherent asset management plan or long term financial plan to guide its decision making and, in particular, no clear plan as to how infrastructure, property, plant and equipment (IPPE) assets would be managed in conjunction with the long term financial plan; and
  - significant variations in depreciation expenditure and the value of assets in different financial years raised concerns about the accuracy and reliability of those figures.
11. The report also found that corporate governance within the Council required urgent attention and improvement, that there was no internal audit plan or framework, no risk management plan and no fraud control.

12. The report made thirteen recommendations associated with its findings which were:
  1. That Council finalise and resolve to adopt a LTFP (Long Term Financial Plan) that has clear links to Council's Asset Management Plan.
  2. That Council review its Quarterly Budget Review Statement with Councillors to ensure accuracy and relevance for decision-making at a strategic level.
  3. That all elected Councillors undertake financial and Code of Conduct training directly after the next election.
  4. That Council undertake a comprehensive review of all its policies and ensure they are submitted to Council for adoption.
  5. That Council develop a plan to improve its document management processes and system which will meet the requirements of the *State Records Act 1998*.
  6. That until Council has an audit committee, Councillors review responses to the issues raised in the external auditor's management letters on an annual basis at a Council meeting.
  7. That Council's progress in implementing the recommendations from the external auditor's management letter is reported to Council each month.
  8. Council should establish an audit committee and an internal audit framework pursuant to OLG's *Internal Audit Guidelines*.
  9. That Council develop a fraud and corruption policy and conduct a fraud risk assessment.
  10. That in addition to the current arrangements, credit card statements for the Mayor and the General Manager be reviewed, approved and signed off by another Councillor in line with expenditure that has been approved within Council's budget.
  11. That for any staff provided with a credit card, their transactions are signed off and approved by the General Manager.
  12. That Council develop an end of year plan to complete and finalise Council's audited financial statements each year and report regularly to a Council meeting on its progress.
  13. That Council pursue un-presented payments including several EFT payments and cheques dating back to August 2014 and February 2014, respectively.
13. On 4 November 2016 the Minister for Local Government gave the Council notice of his intention to issue a PIO, enclosing a copy of the report on preliminary enquiries and the draft PIO.

14. On 18 November 2016 the Council responded to the notice of proposed PIO, enclosing an implementation plan developed at a workshop on 15 November 2016, confirming that the Council would appoint a Temporary Adviser as proposed in the draft PIO and requesting that the Minister not issue a formal PIO on the basis that the Council would undertake the required actions under the draft PIO within the prescribed period.

#### **1.4 Morrison Low Asset Management Maturity Assessment**

15. In February 2017 Morrison Low published an Asset Management Maturity Assessment of Balranald Shire Council pursuant to the Far West Initiative (which Initiative has since been dismantled). Morrison Low had been engaged by the OLG to undertake asset management assessments of each of the eight far west Councils as one of the key steps to establishing a long term solution for the region, its Councils and communities. The report scored Balranald with an overall below average level of competency in asset management compared to NSW Councils.
16. Even compared to other far west Councils, Balranald Shire Council:
- Had a lower asset consumption ratio than all other Councils. The ratio is calculated by dividing the written down value of assets by current replacement cost of depreciable assets and should generally be between 75% and 50%. The asset consumption ratio for Balranald Shire Council was 52.1%.
  - Had a backlog ratio of 10.9%. The backlog ratio is calculated by dividing the cost to bring assets to a satisfactory standard by the value of assets, and should be less than 2%.
  - A renewals ratio of 77.8%. A renewals ratio is calculated by dividing asset renewal values by depreciation cost and should be greater than 100%.
  - A maintenance ratio of 55%. The maintenance ratio is calculated by dividing actual maintenance cost by required maintenance cost and should be 100%. The score for Balranald Shire Council was the second lowest in the group of eight.
17. The report acknowledged that the accuracy of financial recording and condition ratings had a strong correlation with the reliability of the asset condition data. The report rated the confidence level of the data supplied by the Council as medium or low for assets other than buildings, sewer and water supply infrastructure.
18. The report summarised the needs, issues and barriers for Balranald Shire Council as:
- undertake ongoing condition inspection of assets and train operational staff to do inspections;

- obtain accurate asset valuations and, in particular, properly reflect depreciation in the value of those assets; and
- significantly improve asset reporting across all classes and in particular for unsealed road maintenance expenditure.

### **1.5 PIO and Temporary Adviser**

19. On 24 April 2017 the Minister for Local Government issued the PIO and appointed Alan McCormack as the Temporary Adviser to the Council. The PIO required Council to develop an implementation plan acceptable to the Minister that addressed the findings and recommendations from the report on preliminary enquiries dated August 2016. The PIO required the implementation plan to be submitted to the Minister within ten weeks and for a final compliance report to be submitted to the Minister within twelve weeks of the Minister's satisfaction with the implementation plan.

### **1.6 2017 TCorp Report**

20. On 5 May 2017 TCorp published a Financial Assessment and Sustainability Report into Balranald Shire Council. Its key observations in relation to long term sustainability were:
- developments in agriculture, mining and renewable energy may increase growth in the local government area providing additional rate revenue, job opportunities and population to the Shire;
  - Bidgee Haven Hostel continues to operate at a loss but Council will develop a four year improvement plan to consider its options such as imposing a special rate variation (SRV) to subsidise the losses or at a worst case, to sell the facility;
  - the Council is undergoing a cultural change to help to retain long term and good quality staff to enable senior management to focus on strategic issues for the Council; and
  - updated and Integrated Planning and Reporting (IP&R) documents will assist Council to prioritise workflow.
21. Based on the TCorp review of the Council's historic financial information, it concluded that Council's Financial Sustainability Rating (FSR) remained as Weak (as it had been in 2013) but had decreased to the bottom of the Weak scale and was close to falling into the Very Weak category.
22. The summary concluded:
- “Despite these comments, TCorp does consider that Council is attempting to address many of its issues. However, the size of the task confronting the Council cannot be underestimated and the Council needs to be closely monitored.”

### **1.7 Implementation Plan**

23. On 28 June 2017 the Council adopted the Implementation Plan and the Temporary Adviser to the Council, Mr McCormack, published a report dated 3 July 2017 to comment on the Implementation Plan. The report had regard to the PIO and identified other areas of risk and deficiencies and provided commentary on how those could be addressed. The report acknowledged that the majority of the 13 items in the PIO had been rectified and made further recommendations regarding long term financial planning.
24. The further recommendations of the Temporary Adviser in relation to financial sustainability were:
  1. That Council ensure an authentic and informed LTFFP is presented to Council in August 2017.
  2. That Council consider the future operations of the Balranald Caravan Park to ensure the park continues to be a major asset for the District and produces realistic income with minimum risk.
  3. That Council consider divesting the management and possibly ownership of the Bidgee Haven Hostel in Balranald to ensure income losses do not impact on Council's limited budget and risks to Council are minimised.
  4. That regardless of the success or otherwise of the application for IWCM business plans be prepared for the water and sewer funds.
  5. That the "sugar hit" from the sale of the Caltex Service Station be applied to current areas of deficiency (such as staff levels) or modernisation of approaches (such as Document Management System) or building up Reserves. Council should determine a plan of where the proceeds will be applied or conserved.
  6. That Council undertake a rates review to ensure the correct categorisation of properties to ensure equity and income maximisation.
  7. That preparations commence for a general Special Rates Variation (SRV) and that Council look at the possibilities of SRVs for mines and solar farms approved or planned.
  8. That Council embed the recently adopted Business Improvement Plan into its operations.
  9. That Council look to adopting s 94 or s 94A plans to ensure future income opportunities are not lost.
  10. That a review of all fees and charges be undertaken, before the next budget, with a view to establishing full cost recovery or identifying the reasons for not pursuing full cost recovery.
  11. That a review of plant charges and on costs be made, before the next budget, to ensure profitability is maximised and all overheads are correctly charged and recovered.

12. That Council recognise that approaches in previous years of not funding depreciation have reduced the cash position of Council and Council commit to cash funding of depreciation.
13. That a long term financial and improvement plan be prepared for the visitor's information centre.
14. That Council move quickly to fill staff vacancies as identified in the latest staff structures as presented to Council.
15. That Directors of Council be given more security of tenure.
16. That Council consider a Staff Education Assistance and Encouragement Policy.
17. That Council look to a succession planning approach with staff.
18. That Council monitor Secondary Employment to ensure worker safety is paramount, work obligations are not compromised and conflicts of interest are minimised.
19. That Council require the General Manager and Directors to undergo personality profiling and follow up interviews to align their personalities with the rigours of the roles.
20. That Council's newly appointed Performance Review Panel conduct two formal assessments annually and also meet quarterly for discussions with the General Manager.
21. That the General Manager's Performance Agreement be a meaningful agreement which reflects the aspirations and obligations of Council including subscribing to Fit for the Future requirements, adherence to the Business Improvement Plan, strategic planning and community engagement.

The report's recommendations in other areas were:

22. That Council undertake a definite and sustained campaign of community engagement.
23. That Council undertake a service level review to inform the planning documents.
24. That Councillors recognise the dignity and authority of the position of the Mayor at all times.
25. That the Mayor preside over all gatherings where Councillors are present (Meetings and Workshops). Further that the Mayor familiarise himself with the respective Codes, governing behaviour by Councillors and Staff (Code of Conduct, Code of Meeting Practice and Councillor/Staff Interaction Policy) and enforce good behavioural practices.

26. That Council do more to “sell itself” by promoting positive news and achievements.

### **1.8 Morrison Low Overarching Asset Management Plan**

25. In July 2017 Morrison Low completed the Overarching Asset Management Plan (OAMP) for the Council.
26. Consistent with the Morrison Low Asset Management Maturity Assessment published by Morrison Low in February 2017, the OAMP found asset renewal and maintenance ratios well below benchmarks and backlog ratios well above benchmarks and worsening, across all asset areas.
27. In relation to transport assets, the plan supported Council's approach of attempting to reduce the backlog in renewals and maintenance. The report found that overall the road transport network condition appeared to be in good condition based on what it considered to be reliable data.
28. In relation to building assets, the report noted that most building assets were in good condition and that the data upon which that rating was given was considered to be reliable. It noted, however, that Council would need to invest further money in ongoing renewal of building assets to maintain this sustainability.
29. In relation to the sewer assets, the report noted the condition of most sewer assets to be in a good or satisfactory condition but noted limited renewal and maintenance funding which would worsen over time and impact the asset conditions and create a backlog. The report rated the data on which the sewer asset conclusions were reached as uncertain.
30. In relation to water supply assets the report found the systems to generally be in a reasonable condition but noted that present funding levels were insufficient to continue to provide existing services at current levels even in the medium term. The report rated the information upon which the condition of the assets was based to be uncertain.
31. On 15 August 2017 the Council resolved to provide to the Minister an amended Implementation Plan incorporating the 13 recommendations of the PIO and the 26 additional recommendations of the Temporary Adviser.
32. On 31 August 2017 a Compliance Report Assessment for the PIO was prepared by the OLG. The Report was prepared to assist the Minister to determine whether the Implementation Plan prepared by the Council to satisfy the PIO was satisfactory. The Report found that the Council had complied with the requirements under the PIO but that it should adopt the Implementation Plan and continue to work with the Temporary Adviser.
33. On 13 December 2017 Grant Gleeson, Director Legal and Lyn Brown, Manager Investigations of the OLG attended at the Council, met with the Temporary Adviser, the Acting General Manager and those Councillors who attended a workshop. The purpose of the visit was to ensure that Council was still on track to deliver its Implementation Plan.

34. On 19 December 2017 the Minister formally indicated her satisfaction with the amended Implementation Plan and requested a written report on its progress within twelve weeks.

### **1.9 Morrison Low Long Term Financial Plan**

35. In January 2018 the Long Term Financial Plan 2017-2027 (LTFP) was published by Morrison Low. The executive summary of that report found that since the TCorp Report of 2013, there had been no insignificant improvement in the operating ratio, asset management plans had been reviewed and the infrastructure backlog calculated, depreciation expenses had been reviewed and adjusted downward and investment in asset renewals had stabilised. It assessed the Council's then current financial position as unsustainable.
36. The LTFP recommended measures to improve the Council's financial sustainability which included:
- A permanent Special Rate Variation (SRV) of 10%, including the rate cap, per year for seven years commencing in 2018/19 and 2019/20 for sandmining rates.
  - Productivity improvements resulting from the service review program, the review of the aged care facilities operation and the 39 actions under the PIO.
  - Additional capital renewal expenditure to address the backlog ratio and additional funds for asset maintenance.
37. At an extraordinary meeting on 8 February 2018 the Council resolved to adopt the updated LTFP, adopt the OAMP, adopt the revised Delivery Program and place it on exhibition and to make an application to IPART for a permanent SRV of 10%, (including the rate cap) per year for seven years to commence in 2018/19. The minutes record that Cr O'Halloran voted against the motion and Cr Jolliffe did not enter the meeting until after the motion.
38. On 20 February 2018 the Council adopted the revised Implementation Plan for the PIO. The revised Implementation Plan included the 13 recommendations of the PIO and the 26 additional recommendations of the Temporary Adviser. The Implementation Plan as at February 2018 indicated the following items remain to be completed:
- 4. review certain Council policies
  - 5. ongoing refinement of the document management system
  - 9. the appointment of an internal auditor
  - 15. the selective tender for the lease of the Balranald Caravan Park
  - 16. strategy for the ongoing management/ownership of Bidgee Haven Hostel

- 17. development of business plans for the water and sewer funds
  - 19. rates review 2019/2020
  - 20. implementation of SRV if approved
  - 22. adoption of s 94 or s 94A plans
  - 23. review of all fees and charges to enable full cost recovery
  - 24. review of all plant charges to enable for cost recovery
  - 26. long term and financial and improvement plan for the visitors information centre
  - 27. filling of staff vacancies
  - 28. appointment of Director Corporate and Community Development
  - 29. development of staff training plan
  - 30. succession planning for staff
  - 32. personality profiling for directors
  - 33. performance review panel assessment
  - 34. General Manager's performance agreement
  - 36. service level review to inform planning documents
  - 37. training on Code of Conduct, Code of Meeting Practice
39. On 5 March 2018 the Council reported to the Minister in relation to the Implementation Plan under the PIO and enclosed a copy of that Implementation Plan.

#### **1.10 Compliance Report and Temporary Adviser's Comments**

- 40. On 13 March 2018 the Council published a Compliance Report under s 463F LG Act. The Compliance Report detailed the steps Council had taken to comply with the PIO and the additional recommendations of the Temporary Adviser, and outlined further steps to be undertaken.
- 41. As the tenure of the Temporary Adviser concluded with the submission of the Compliance Report by the Council, Mr McCormack provided his comments on the Council's Compliance Report to the Council and those comments were then forwarded to the Minister.
- 42. He generally concurred with the comments of the Council in the Compliance Report but expressed the following:

"My view is that there are still major problems besetting the Council. In fact it is those problems which have contributed to

the identified issues in the PIO. Whilst the Implementation Plan overcomes some immediate and obvious concerns, there are still major forces impacting on good governance and administration by Balranald Shire Council. These are seen as:

- lack of respect in the Council Chambers and in Staff dealings,
- poor morale throughout the organisation,
- low standing in the community,
- inadequate staff numbers and capabilities and
- lack of basic local government procedures by Elected Members including differentiation between operational and strategic matters"

43. Mr McCormack made specific comments in relation to selected items under the PIO including:

"3. Councillor training – the effectiveness of that training is not obvious and some Councillors express that they receive little benefit from it

15. Balranald Caravan Park – dealings with the function of the Balranald Caravan Parks in recent months provide an example of the malaise of Balranald Shire Council. Council is currently undertaking a tender process for the lease of the Caravan Park for the next two years. The competitive nature of this Tender is restricted in that Council has resolved that tenders be sought on the same basis of the previous contract. Council adopted a Master Plan and Business Plan for the Caravan Park (15 August 2017) but soon after rejected that Plan. The manner in which the Council has treated some aspects of the former caravan park lease and new tender procedures raised concerns. Some Councillors seem more interested in preservation of the former arrangements without looking to the greater public interest. I consider that Council's involvement in the Balranald Caravan Park should be subject to an investigation under s 430 of the Local Government Act. I am not satisfied that Council has complied with item 16.

17. Bidgee Haven Hostel – recent information suggest a welcome turnaround in the financial position. The hostel has been a contentious issue in the Balranald community. Council will be under continuance surveillance as it proceeds with its strategies.

20. Special Rates Variation (SRV) – Council has resolved to apply for a substantial SRV despite a large expression of community concern. Councillors should be aware that a decision to apply to IPART for the SRV does not guarantee approval. However, the decision taken by Council to proceed is applauded.

27. Staff Vacancies – I do have a concern that the new General Manager will need support from all Councillors. This has not been evident with senior staff in the past. Indeed where previous General Managers have attempted to point out the correct approaches, they have been subject to criticism. Without the counsel of the former General Manager, and the Interim General Manager, the Council would be in a far worse position than where it is today."

### **1.11 IPART approves SRV**

44. In May 2018 IPART approved the SRV for Balranald Shire Council. The decision allowed the Council to increase its general income by 10% over seven years or 94.87% in total. That meant an increase in rating income from \$1.4M in 2017/18 to \$2.7M in 2024/25. In its application, the Council indicated that it intended to increase rates uniformly. It would be a matter for the Council to determine how it allocated the increased rating revenue across different categories of ratepayer.

45. The SRV approval was subject to conditions:

- The additional income be used for operating and capital expenditure on key assets – buildings, roads, bridges and drainage networks, and improving its financial sustainability.
- The Council report annually to IPART until 2027/28 on:
  - actual revenues, expenses and operating balance against projected as outlined in the LTFP;
  - any significant variations from proposed expenditure in LTFP and reasons;
  - expenditure consistent with Council's application for the SRV and reasons for any significant differences; and
  - the outcomes achieved as a result of the actual expenditure.

### **1.12 Overstated Asset Conditions**

46. On 16 August 2018 the General Manager, Mr Kitzelmann, reported his concerns regarding the Council's financial sustainability, in particular related to infrastructure. He observed that generally, assets were substantially degraded compared to the condition stated in the OAMP. The matters of most particular concern were:

Water Treatment Plans/Reticulation Networks

- water treatment plants were at capacity and the components were nearing the end of their useful life
- the raw water network was degraded and regular water leaks and breakages were experienced

- the supply pool within the river was not sufficient to meet demand
- water pressure and storage in townships did not comply with the firefighting standards

#### Sewerage Treatment Facilities

- settlement ponds were not adequately servicing treatment requirements
- pumps and pipes required major upgrades

#### Rural Roads

- 60% of the gravel road network required resheeting (approximate cost \$4M)
- gates and grids were damaged beyond repair (approximate cost \$4M)

#### Buildings and Facilities

- overall in a state of neglect
- some premises were without firefighting systems
- significantly overstated valuations.

### 1.13 PIO Compliance Assessment Report

47. On 14 December 2018, the OLG prepared a Compliance Report Assessment and concluded that there was evidence that the Council had completed the majority of the recommendations in the Implementation Plan. The Report noted, however, a number of underlying issues which were impacting on the proper and effective functioning of the Council, namely:

- reluctance on the part of the governing body to make decisions on more controversial and important matters (e.g. SRV, Caravan Park lease, Bidgee Haven Hostel)
- lack of cohesion on the part of the governing body and inability to provide adequate and consistent direction to the General Manager
- failure to maintain a healthy and safe work environment for Council staff
- failure to communicate regularly and/or effectively with the community
- lack of focus by the governing body on setting Council's strategic direction and differentiating between Council's strategic and operational arms.

48. The report concluded that although the PIO and the appointment of the Temporary Adviser had enabled the Council to recognise the significant risks facing its operations, there continued to be a lack of capacity or willingness by the Council to take responsibility for the underlying issues impacting on its effective administration. The report recommended that the Minister exercise her powers under s 438U LG Act to hold a public inquiry.

#### **1.14 Audit Office Management Letter January 2019**

49. In January 2019 the Audit Office of NSW provided a management letter for the year ending 30 June 2018 to the Council. It raised twelve issues, five of which were assessed as high risk. Those high risk issues were:
1. Caravan Park revenue – there is no way for Council to verify that the amounts remitted by the Caravan Park Operators are accurate and complete.
  2. Re-evaluation of infrastructure property plant and equipment (IPPE) – valuations recommended in accordance with OLG guidelines.
  3. Approval for termination payments – recommended final review and approved by the General Manager.
  4. Procurement procedures – manual required to ensure compliance with regulatory requirements and ready access to contract information.
  5. IT – a change management policy was required to avoid unauthorised changes or manipulation of software.

#### **1.15 2019/2020 Rates**

50. In May 2019 the 2019/20 Draft Operational Plan for the Council was prepared. That plan included proposed rates and fees and charges for the 2019/2020 financial year. Increases in certain rates and charges caused consternation within the community and on 25 June 2019 the Council issued a media release to explain the extent of consultation for the Draft Operational Plan and to explain the purpose of the proposed “pedestal charges”. Pedestal charges were a sewer usage charge based on the number of toilets (or pedestals) within a business.
51. The Draft Operational Plan was considered in an extraordinary meeting of Council on 29 May 2019, an extraordinary meeting on 27 June 2019 and finally adopted, with some variations compared to the original Draft Operational Plan, on 29 July 2019.
52. The circumstances of the Council's decision relating to those variations is addressed under Term of Reference 3. The outcome of the variations to the Draft Operational Plan were that the rates for the gypsum mines were significantly reduced, the pedestal charge was halved while the volumetric discharge rate per kilolitre was increased from 25c to \$1.00. The rent for the Football Club rooms and oval was increased by 30% to \$3,090.00, rather than doubled.

53. The reduced rates for the gypsum mine did not affect the overall rates collected by Council as there was an increase in business rates to offset the reduction in rates which would otherwise have been collected from the gypsum mines.
54. While the decisions to make those adjustments to the rates and charges were open to the Council, it does appear that the Council was reacting to the few and noisy rather than considering the interests of the community as a whole when making those decisions.

#### **1.16 Public Land Management**

55. The main issue before the Inquiry relating to public land management concerned the Council's role as Reserve Trust Manager of the Balranald Caravan Park. That matter is dealt with in Term of Reference 5 and I do not repeat it here other than to note the serious concerns held by the probity auditor regarding the Council's failure to comply with its obligations as Reserve Trust Manager.
56. Another matter which concerned the Council's responsibilities relating to public land management concerned the Balranald Waste Management Facility.
57. On or about 15 August 2018 Council self-reported a potential breach of conditions for the operation of that facility to the NSW Environment Protection Authority. The General Manager, Mr Kitzelmann and the then Director of Infrastructure Development, Mr Pretorius identified a number of serious concerns including:
  - cross-contamination of waste cells
  - improper compacting and covering of waste
  - depositing of waste outside cells
  - dangerously high stacking of waste outside cells
  - dangerously high stacking of waste without barriers to prevent public access
  - windblown waste escaping onto neighbouring properties
  - storage of contaminated chemical containers without bunding or containment systems
  - building and construction materials (including suspected asbestos) deposited outside cells
  - decommissioned pits and cells not properly compacted and capped
  - inappropriate and damaged boundary fencing
  - depositing and burial of tyres

- poor directional signage
- open excavation activities without barriers or temporary fencing.

58. In his evidence to the Inquiry Mr Kitzelmann said that the issues regarding the waste facility were in the process of being rectified, largely via an arrangement with Cleanaway, the contractor removing waste from the construction of the solar farms within the Shire. An agreement had been entered between the Council and Cleanaway which provided for the Council to accept the waste from the solar farms. That waste is predominantly pallets and cardboard boxes which are mulched by Cleanaway and used to cap some of the old waste cells. The agreement also provided for Cleanaway to clean up the balance of the waste facility. In addition there was a small amount of revenue to the Council which will be used for future upgrades of the waste facility.

59. Bidgee Haven Hostel is also located on public land but the issues which relate to it concern the administration of the facility rather than the management of the land. The facility itself presents as an attractive and well maintained retirement hostel set in gardens.

### **1.17 Provision of Services**

60. Very little of the evidence before the Inquiry related to the provision of services by the Council. The Temporary Adviser, Mr McCormack offered these comments:

“I thought, yes, the services that the Council provides are really good. I mean, if physical appearance is a barometer, the towns of Balranald and Euston are really pretty, attractive places. So, I thought they were using their money really well. It's just there wasn't enough of it.” (T 30)

61. The former Acting General Manager, Mr Stewart, considered the Balranald Visitor's Centre to be an important asset and helpful in attracting visitors to the town.

62. The current Director of Infrastructure and Development, Raymond Davy, described Balranald as a really nice town without significant social problems.

### **1.18 Conclusions**

63. Although the long term financial planning for the Council has improved significantly since prior to the PIO, it is still not a rosy picture. The Council's income from continuing operations for the year ended 30 June 2018 was \$13,902,000.00 and its total expenses from continuing operations was \$13,170,000.00. The operating result from continuing operations was a modest \$732,000.00.

64. Continued surplus budgets will be necessary to improve the backlog, renewal and maintenance ratios of its assets. The Council is in the process of revaluing its assets to determine the reliability of the existing OAMP and LTFF. If the value

of those assets is significantly less than has been assumed to date, the task facing the Council will be even greater than currently predicted.

65. It is concerning that not all Councillors appear to appreciate the need for the application of sound and consistent financial principles to the business of Council.
66. An example is the approach of Cr Ugarte to the introduction of the SRV. He said to the Inquiry when asked whether he was opposed to the SRV:

“No. I think what I opposed was the 10 per cent because what I wanted to – I never opposed the variation, we had to have it, but I don't like even numbers, I wanted a bit of a negotiation and it was a very contentious matter for the community and basically what I wanted to do is to listen to all the submission that the people were saying. We are (indistinct) community, we were suffering from drought, the economy wasn't the best, so we cannot just come and slap them with a 10 per cent number. So I was saying – what I was saying to the Council and to the community, that – I think we received 150 submissions or something like that. Somehow we need to listen because what people – the feeling that people have every time we have consultation is that we are not listening. So I was saying why don't we go eight, who don't we go nine, what about something that we get that feels something like a democracy. Obviously we are in dire straits but that was basically that. I wanted to get to – like anything I do, when we get people's concerns, we need to listen.” (T 309)
67. Cr Ugarte seemed overly concerned with the number of submissions which were opposed to the SRV compared to the parlous state of the Council's financial position and the consequences of failing to act. He appeared to be willing to horse trade the annual rate of the SRV without any real regard to the impact that would have on the Council's future financial plan.
68. It is hardly surprising that the majority of submissions opposed the SRV. The public was not as aware as the governing body of the financial crisis facing the Council. It was the role of that body to properly inform the public and explain the need for what many regarded as drastic measures, as difficult as that task may have been.
69. Decisions relating to the financial management of the Council are for the elected members to make, not the general public during consultation process.
70. Although the Long Term Financial Planning for the Council is currently on track, the good work which has been done could be diminished or reversed by unsound Council decisions in the future. The evidence received during the Inquiry did not dispel the possibility of the Council reverting to its “old ways” once the spotlight of the PIO and the Inquiry have gone.

## **Term of Reference 2: A Safe, Consultative and Supportive Working Environment**

71. The evidence presented to the Inquiry demonstrates a regrettable history of the Council failing to meet its obligations to act as a responsible employer by providing a safe, consultative and supportive working environment for the General Manager and other staff. The evidence before the Inquiry goes back to 2013, however anecdotally problems between the Council and the staff predated those events.
72. It should also be noted that the majority of issues that have arisen between the Councillors and the staff have been limited to a small number of Councillors, however the Council as a whole seems to have been unable to prevent problems arising between the Councillors and the staff.
73. A number of particular incidents were the subject of evidence, both documentary and on oath. The main incidents of concern are outlined below.

### **2.1 Chris Littlemore – General Manager**

74. By letter dated 17 July 2013, the then General Manager, Chris Littlemore made a Code of Conduct complaint against Cr Lynda Cooke. Mr Littlemore alleged that following a Council meeting on 16 July 2013, Cr Cooke, in the presence of other Councillors described Mr Littlemore as “deceitful”.
75. By letter dated 26 July 2013 Mr Littlemore made a Code of Conduct complaint about the Mayor, Cr Stephen O'Halloran, alleging that on three occasions Cr O'Halloran had attempted to persuade Mr Littlemore to withdraw the complaint made against Cr Cooke, contrary to the requirements of the Code of Conduct.
76. On 31 July 2013 the Council by its complaints coordinator, Robert Rayner, engaged Graham Evans of O'Connell Workplace Relations carry out a preliminary assessment of the complaint against Cr Cooke.
77. On the same day then Director of Economic and Community Development, Ms Robyn Ryan informed Mr Rayner that Cr O'Halloran had told her that he wanted the General Manager to drop the complaint, that the complaint would not go anywhere and that the General Manager would not be supported over Cr Cooke.
78. On 13 August 2013 the preliminary assessment of the complaint by Mr Littlemore against Cr Cooke was published (the O'Connell Report). Paragraph six of that report concluded:

“It is considered that a preliminary assessment of the evidence on this issue as set out above supports the view that the General Manager's complaint discloses prima facie evidence that Cr Cooke may have breached the Code of Conduct including Council's Code of Meeting Practice and DLG Circular 10-10.”

79. The O'Connell Report recommended that the matters in contention be referred back to the Mayor for resolution by alternative and appropriate strategies such as explanation, mediation, informal discussion, negotiation or apology as set out in clause 6.10(c) (of the Code of Conduct).
80. On 14 August 2013 a letter was sent by Mr Rayner as Acting General Manager to Cr O'Halloran enclosing the O'Connell Report and drawing attention to the recommendation in the report to resolve the complaint.
81. On 15 August 2013, following a telephone conversation between Mr Evans, the author of the O'Connell Report and Cr O'Halloran, a letter was sent by O'Connell Workplace Relations to confirm the preferred action to be undertaken by the Mayor to resolve the complaint namely:
1. Brief your fellow Councillors on the matter in a confidential manner;
  2. Discuss the matter privately with both Cr Cooke and the General Manager (on his return to Balranald);
  3. Impress upon both parties the need to accept their differences but to show each other respect in the future and to comply with the applicable conduct and behaviour standards that apply to them.
  4. If they are unable to meet the above requirements, further remedial action involving the conduct reviewer will be necessary.
82. On 19 August 2013 Mr Littlemore returned from leave and was provided with a copy of the O'Connell Report.
83. On 20 August 2013 Cr O'Halloran informed Mr Rayner that he had spoken to the General Manager and to Cr Cooke and that the matter had now been resolved.
84. On 21 August 2013 Mr Littlemore informed Mr Rayner that the Mayor had discussed the complaint with him but had not spoken to Cr Cooke regarding the complaint. Another Councillor had confirmed to Mr Littlemore that the Mayor had not spoken to the Councillors during the closed portion of the Council meeting on 20 August 2013 regarding the Code of Conduct complaint.
85. The Council minutes of the Ordinary Meeting of 20 August 2013 record that the Council, on the Motion of Crs Cooke and Jolliffe moved into "closed committee".
86. The Council then considered a confidential report regarding the renewal of the contract of the General Manager. The reporting officer was Cr O'Halloran and the report recommended that:
1. Council offer the General Manager a 5 year contract from 1 September 2013
  2. The Mayor be authorised to negotiate the terms of the contract.

87. It was resolved on the Motion of Crs Cooke and Jolliffe that the General Manager's contract not be renewed and that the General Manager be advised accordingly.
88. On 23 August 2013 Mr Rayner referred Mr Littlemore's complaints against Crs Cooke and O'Halloran to the Chief Executive of the Division of Local Government, Department of Premier and Cabinet pursuant to s 26 Public Interest Disclosures Act 1994.
89. On 26 August 2013 Mr Littlemore made a further Code of Conduct complaint against Cr Cooke on the basis that Cr Cooke had a non-pecuniary interest in a matter on which she both moved a motion and voted, namely, the resolution not to reappoint the General Manager, while a Code of Conduct complaint against her by the General Manager remained outstanding.
90. Also on 26 August 2013 Mr Littlemore made a lengthy Code of Conduct complaint regarding the conduct of Cr O'Halloran which included allegations that Cr O'Halloran:
- had threatened his career prospects;
  - had failed to comply with the recommendations of the O'Connell report;
  - orchestrated a vote not to approve an extension to the General Manager's contract and used his casting vote as Mayor to resolve not to renew the General Manager's contract;
  - attempted to influence the Acting General Manager in the execution in his responsibilities in the preparation of a business paper;
  - attempted to interfere with the appointment of staff and other matters relating to staff;
  - had engaged in abusive behaviour during Council and other meetings; and
  - had interfered in Council resolutions and Council operations.
91. Also on 26 August 2013 Crs Purtill and Byron lodged Code of Conduct complaints against Crs O'Halloran and Cooke arising from the motion in the meeting on 20 August 2013 moved by Cr Cooke to not renew the General Manager's contract.
92. On 12 September 2013 the Chief Executive, Division of Local Government, Department of Premier and Cabinet took the somewhat unusual step to personally write to each Councillor of the Council informing them of the investigation of Code of Conduct complaints by the General Manager and several Councillors and warning them of the offence of "detrimental action" against another person in reprisal for the making of a Public Interest Disclosure.
93. On 17 September 2013 the Council resolved that:

1. The Council authorises the Mayor to negotiate in relation to the General Manager's contract of employment.
  2. In furtherance of 1. above, the Mayor will seek the assistance of Local Government NSW and/or other legal representatives of the Council.
94. On 19 September 2013 a Deed of Settlement was entered between Mr Littlemore and the Council, the terms of which are confidential.
95. The current General Manager, Michael Kitzelmann, confirmed in his oral evidence that Mr Littlemore left the Council without taking legal action, that he entered a Deed of Release and that there was no additional payment over and above those to which he was entitled under this contract (T 378).
96. The Code of Conduct complaints against Cr O'Halloran by Mr Littlemore and Crs Purtill and Byron were the subject of a lengthy and detailed investigation report by Michael Symons of IAB (IAB Report) which was received by the Council on 16 October 2014.
97. The IAB Report made findings that Cr O'Halloran had:
- Not dealt with a Code of Conduct complaint as required by the Code of Conduct.
  - Directed the General Manager and Acting General Manager in the content of the business paper.
  - Interfered with staff recruitment.
  - Used inappropriate language in relation to staff.
  - Directed staff in the performance of their duties.
  - Made unsubstantiated and inappropriate allegations regarding the General Manager.
98. The IAB Report recommended that:
- Council revise its policies and procedures relating to the role of the Mayor, the role of Councillors and their interaction with employees and that it instigate regular training for Councillors;
  - The Mayor undertake training relative to the conduct giving rise to the breach;
  - The Mayor apologise to Ms Rose Wright (to whom the Mayor had made a derogatory comment) and to Mr Littlemore (in relation to a derogatory comment regarding alleged alcoholism) in writing;
  - The report not be made public due to the possible adverse effect on the relationship between the Council and the Aboriginal community; and

- Due to the seriousness and the nature of the allegations, as well as the number of instances, the Mayor be formally censured for misconduct.

99. During a closed part of the ordinary meeting of Council on 18 November 2014, the IAB Report was considered. The Council subsequently resolved to accept the recommendations of the IAB Report and to require Cr O'Halloran to write letters of apology to two people and to be formally censured by the Council.
100. One would have hoped that the public censuring and direction to Cr O'Halloran to make written apologies would have ended the matter, however that was not the case.
101. On 9 July 2015 the Council informed the Investigations Team, OLG, that Cr O'Halloran had failed to apologise in writing to either Ms Wright or Mr Littlemore.
102. On 27 January 2016 a report to the Acting Chief Executive, OLG considered further action against Cr O'Halloran due to his failure to apologise to Mr Littlemore and Ms Wright.
103. Ultimately, on 24 March 2017 a further report to the Acting Chief Executive, OLG recommended that no further action be taken against Cr O'Halloran. A letter dated 24 March 2017 was sent to Cr O'Halloran's solicitor which advised that no further action would be taken against Cr O'Halloran in relation to his failure to apologise to Mr Littlemore. The letter said:
- "My decision should not be seen as in any way condoning Cr O'Halloran's failure to comply with the resolution requiring him to apologise, or indeed the conduct giving rise to that resolution".
104. By way of postscript, Mr Littlemore made a written submission to the Inquiry. In it he said that working with Cr O'Halloran was one of the most stressful periods of his life.

## **2.2 Connie Mallet and Elizabeth White**

105. Connie Mallet was the Tourism Co-ordinator and Elizabeth White was the Director of Corporate and Community Development in 2016. The report of the Balranald Shire Council Tourism Committee Meeting of 4 October 2016 includes the following statement:

"There was a suggestion made by Sue O'Halloran & Cr Steve O'Halloran that the Tourism Coordinator is not effectively marketing the fact that Mango NP is world heritage listed."

106. This statement appears to be a benign description of a much more vitriolic attack on Ms Mallet which was ultimately recorded in a Code of Conduct

investigation conducted by Anti Corruption Consultants Australia Pty Ltd dated 18 May 2017 (ACCA Report).

107. Following the meeting of the Tourism Committee on 4 October 2016, Ms Mallet made a formal complaint against Cr O'Halloran, both for his conduct during that meeting and for his conduct in the period 20 October 2014 to 3 October 2016, alleging that he had engaged in misconduct and conduct in breach of the Code of Conduct.
108. The author of the ACCA Report, Michael Symons, interviewed or obtained statements from 10 witnesses and compiled a lengthy and detailed report on the allegations.
109. The ACCA Report made findings that Cr O'Halloran had:
  - conducted himself in the Tourism Committee Meeting on 4 October 2016 in a manner that was likely to bring the Council or a Councillor into disrepute in that his behaviour was improper, and that he did not treat Ms Mallet with respect at all times;
  - in the period 20 October 2014 to 3 October 2016, conducted himself in a manner that was likely to bring the Council or a Councillor into disrepute by acting improperly, in a way that was unethical, in a way that was an abuse of power and in a manner which did not treat Ms Mallet with respect at all times; and in failing to treat Ms White with respect at all times by directing derogatory comments to her
  - improperly directed an employee of the Council (Ms Mallet) in relation to her duties.
110. The ACCA Report recommended that:
  1. Cr O'Halloran undertake training in relation to his interaction with employees of the Council and his conduct as a Councillor;
  2. Cr O'Halloran provide a formal written apology to Ms Mallet and the apology be provided within one calendar month of the date of the report to the Council;
  3. The findings be made public; and
  4. Due to the serious nature of the conduct and the failure of Cr O'Halloran to remedy his conduct or express any contrition, that he be formally censured for the breaches of the Code of Conduct and that the matter be referred to the OLG for further action under the misconduct provisions of the LG Act.
111. At the meeting of the Council on 28 June 2017, a confidential report concerning the ACCA Report was considered by the Council which resolved that:
  1. Council receive the report of the conduct reviewer on the allegation of breach of the Code of Conduct by Cr O'Halloran;

2. Council censure Cr O'Halloran for breach of the Code of Conduct and refer the report under s 440 of the *Local Government Act 1993* to the OLG,
3. Cr O'Halloran undertake training within the next three months in relation to interaction with employees of Council and his actions as a Councillor; and
4. Council note that Cr O'Halloran has provided a written apology to the staff member.

### **2.3 Aaron Drenovski – General Manager**

112. Balranald Caravan Park is located on Crown Land adjacent to the Murrumbidgee River in Balranald. Balranald Shire Council was the Manager of the Crown Reserve Trust which applied to that land and in May 2017 the land was the subject of a lease to Matthew (Matt or Mat) and Bernadine (Dee) Jess (the Caravan Park Operators).
113. On 26 June 2017, the Council resolved:
  1. Appoint Sustainable Park Solutions to prepare a Master Plan and Business Plan for the Balranald Caravan Park.
  2. Advise the current lessees the Council will not exercise the lease extension option with the lease expiring on 30 November 2017.
114. That decision and the consequences which flowed from it have resulted in significant divisions within the Council and the community, numerous Council resolutions and rescission motions, damage to the reputation of the Council and ultimately, legal proceedings between the Council and the Caravan Park Operators. The decision also resulted in the then General Manager, Aaron Drenovski, and his family being subject to unwarranted public criticism, harassment within the workplace and serious criminal property damage.
115. The details of the events which followed the 26 June 2017 resolution are set out in Term of Reference 5. In short, the Council resolved to endorse the Master Plan and to invite expressions of interest for the operation of the Caravan Park, then rescinded that decision, then resolved to invite expressions of interest for a two year contract, then resolved to appoint Matt and Dee Jess under current contract conditions for two years.
116. That last mentioned Council resolution, made on 20 October 2017 came to the attention of the OLG whose Acting Chief Executive wrote to the Council on 3 November 2017 reminding Council of its obligations to ensure that its dealings were open, transparent and accountable and that they promote fairness and competition to ensure a best value outcome. The author urged the Council to give urgent further consideration to the matter before entering into a lease of the Caravan Park.
117. On the afternoon of Friday 3 November 2017, Mr Drenovski informed Matt Jess that Council was not in a position to sign the contracts. Mr Drenovski alleged

in a contemporaneous email that Mr Jess said that it would be best for him (Mr Drenovski) to leave town. That email was not produced and Mr Jess did not give evidence to the Inquiry so the veracity of that assertion is untested.

118. On the evening of 4 November 2017, a vehicle belonging to Mr Drenovski's wife was sprayed with graffiti. Mr Drenovski described the graffiti as comprising big pink writing with the words "LEAVE TOWN" on all panels. (T 58)

119. When asked whether that incident had affected his attitude to work, Mr Drenovski was visibly affected by the recollection of those events and said:

"Yes, absolutely, to think that something like that happened to my wife's vehicle, assumed to be a result of work, work issues, and the family side of it was just massive".

120. On 6 November 2017, the Acting Chief Executor, OLG again wrote to the Council suggesting that it urgently reconsider its decision not to call for tenders.

121. On 9 November 2017 the Temporary Adviser overseeing the implementation of the Performance Improvement Order, Alan McCormack, wrote to the Mayor, Cr Byron. That memorandum included the following:

"I am also aware that the General Manager has been subject to open criticism for this decision. Councillors would know that the General Manager does not vote at Council meetings yet he is being victimised for carrying into effect a decision by the Councillors...

One of my particular concerns is the health and wellbeing of the General Manager and vicariously his family. They are members of the Balranald community and have been exposed to very unjust circumstances. I remind Councillors that, as an employer, the Council has to protect its employees where they are carrying out their duties with Council. I asked Council to keep this in mind as the issue progresses.

Indeed Council must ensure that, in all Council's operations, Staff undertake their duties in a safe and non-threatening environment."

122. At an extraordinary meeting on 10 November 2017 the Council rescinded its decision of 20 October 2017 to appoint Matt and Dee Jess under current contract conditions for two years and resolved to proceed with a select tender for the lease.

123. At an extraordinary meeting on 8 December 2017, following consideration of a confidential report, the Council made the following resolutions:

- That the General Manager's Contract be terminated with mutual agreement.
- That the Council authorises the Mayor and Deputy Mayor to negotiate with the General Manager in relation to the General Manager's Contract of Employment.

- That the staff structure be suspended until the new General Manager is appointed.
  - That Council endorses the action of the Mayor to appoint Mr Bob Stewart as Acting General Manager.
124. On 12 December 2017 Mr Drenovski and the Council entered a confidential Deed of Settlement. When asked whether, if the Council had not terminated his contract, he would have found it difficult to stay at the Council, Mr Drenovski said:

“Absolutely. Like, it’s a small community. Everyone knows.” (T 58)

#### **2.4 Bidgee Haven Hostel Committee Meetings**

125. The Bidgee Haven Hostel (formerly Balranald Retirement Hostel) was managed by a committee of the Council. It was described as a Section 355 Committee, however it did not make independent decisions about the Hostel but rather, was only authorised to consider matters for recommendation to the Council<sup>1</sup>.
126. From 20 October 2016 the Committee comprised Crs Byron, Allen and O’Halloran, six members of the public, the Hostel Coordinator and the Director of Corporate and Community Development, Ms Charmaine Murfet.
127. On 17 November 2017, Mr McCormack reported to the OLG that the Director of Corporate Services and other staff dreaded attending the meetings as they were often verbally attacked by Councillors and committee members.
128. This was not the first evidence of conflict between staff and committee members concerning the Bidgee Haven Hostel. In October 2015, the Coordinator of the Bidgee Haven Hostel, Ms Geri McConnell resigned, allegedly due to conflict within the Committee. Contract staff were then brought in to operate the Hostel at a cost of about \$5,000 per week per employee. The operation of the Hostel continued to deteriorate, however, as did its financial position and public reputation. Over the period 2014 to 2017, the Hostel accumulated losses in the vicinity of \$1.3M.
129. In 2017 the former coordinator, Ms McConnell, was persuaded to return to the Hostel. The funding packages for all residents were reviewed which resulted in a significant increase in Federal funding. As a result of that additional funding and changed management and staffing arrangements, in 2017/2018 the Hostel made a profit of about \$140,000 and it continues to operate on a surplus.
130. While the current operation of the Hostel Committee seems to be civil and effective, that was not always the case. In an informal report to the OLG dated 17 November 2017, Mr McCormack stated

“The Hostel Committee is a particularly vocal and critical committee. It seems that the Committee has the impression that the Council is there

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<sup>1</sup> Minutes of the Ordinary Meeting of 20 October 2016

to serve it, rather than the other way around. Councillors and staff are "fair game" at Hostel Committee meetings to the point where staff are reluctant to attend. The Council has not been able to achieve a productive working relationship with this Committee."

## **2.5 Connie Mallet**

131. On 17 December 2017 the ordinary meeting of Council considered a master plan for the Discovery Centre precinct. The Tourism Coordinator, Connie Mallet addressed the Council to explain the master plan. The report on the master plan included a section which contained a "SWOT" analysis i.e. an analysis of the strengths, weaknesses, opportunities and threats presented by the proposed Discovery Centre.
132. Cr O'Halloran was concerned that the reporting staff member was being critical of Council. He was very loud and used an aggressive tone which had upset Ms Mallet. The then General Manager, Robert Stewart, gave evidence to the Inquiry that:
- "I don't believe it was unreasonable she was upset, given the manner in (which) that discussion that occurred." (T 71)
133. Ms Mallet resigned in January 2018 and told Mr Stewart that the meeting at which the master plan had been discussed was a contributing factor to her decision. She felt that the Council was not supporting the Discovery Centre. Mr Stewart expressed the view that Ms Mallet's work was of an extremely high standard and that she was very competent, attracting the Red Bull Tree Climbing Event to Balranald which was very significant.
134. As events transpired, the Discovery Centre was built and was described by Mr Stewart as "one of the jewels in the crown of Balranald in terms of what it did and stopped people on that highway." (T 71)

## **2.6 Galina Adamek**

135. On 2 January 2018 Customer Service Officer Galina Adamek, whose husband was Council's Works Supervisor, received a telephone call from Cr O'Halloran. In a contemporaneous file note Ms Adamek recorded that Cr O'Halloran asked her if she had had a good Christmas and in the same breath he said something like "you tell that husband of yours to clean up the cemetery otherwise his job might be on the line".
136. Later on 2 January 2018 the Acting General Manager, Mr Stewart, sent emails to all Councillors and senior staff. The first, at 12:18pm reminded Councillors that they should not involve themselves in operational matters at any times, that ratepayers or residents should utilise the Customer Request Management System but if that failed to obtain the appropriate action, Councillors could contact the Directors or the Acting General Manager to discuss the issue.
137. The second email at 4:53pm related to relationships and contact between Councillors and staff. It reminded Councillors that they must not direct staff other than by appropriate direction to the General Manager, nor should they

direct or influence or attempt to direct or influence any staff member in the exercise of their functions. The email referred to Council's policy on interactions between Councillors and staff adopted on 20 October 2016 and quoted relevant provisions of it. The email concluded:

“As General Manager I have an obligation to ensure the workplace safety of all staff and this is reinforced through Council policy and legislation. I take this responsibility seriously to minimise risk to individuals and the organisation”.

138. Shortly after those emails Mr Stewart received a telephone call from Cr O'Halloran who suggested that he should not have sent the emails and that it would have been better if he had “counted to 10 before pressing the button”. (T 70)
139. Cr O'Halloran's conduct towards Ms Adamek was the subject of a complaint to the OLG. On 10 August 2018 the Chief Executive, OLG ordered Cr O'Halloran to, inter alia, apologise in writing to Ms Galina Adamek, cease engaging in misconduct and be suspended from civic office for a period of two months.

## **2.7 Robert Stewart – Acting General Manager**

140. Mr Stewart was appointed as Acting General Manager in December 2018. He had filled in as the Director of Infrastructure and Development from 19 December 2016 to 9 June 2017, having been the General Manager at Tumut Shire Council for about seven years and then nearly a year as the interim General Manager for Snowy Valleys Council.
141. It didn't take long for Mr Stewart to ruffle feathers at Balranald Shire Council.
142. On 5 January 2018 Cr O'Halloran rang Cr Byron, who was then Mayor, to make a complaint on behalf of the Caravan Park Operators. The RMS booking facility license had been allowed to lapse due to human error and the Caravan Park Operators mistakenly believed they had lost all of their bookings up to Easter. An unidentified female Customer Service Officer had told the Caravan Park Operators that she would arrange for the license fee to be paid the following day. Cr Byron recorded that Cr O'Halloran said to him:

“She has got to go and so does the GM. I have the numbers to get him. You should call a meeting”.
143. Cr Byron asked Cr O'Halloran to put the request in writing but that did not occur.
144. Cr Byron then contacted Mr Stewart who arranged for the license fee to be paid and the RMS system to resume operation, without any loss of data.
145. In the evening of 5 January 2018 Cr Byron received a further telephone call from Cr O'Halloran which was the subject of a contemporaneous file note. In the file note Cr Byron recorded that Cr O'Halloran said that he had been rung by the Caravan Park Operators who said that they had not been paid (the

rent rebate to which they were entitled under the lease). The file note records that Cr O'Halloran said to Cr Byron about Mr Stewart:

"He seems to think he is an administrator and can do anything. We should get rid of him and others and start again".

146. On 9 January 2018 Cr Byron received a telephone call from Cr O'Halloran which was the subject of a contemporaneous file note. In the file note Cr Byron recorded that Cr O'Halloran allegedly called Mr Stewart a "smartarse" and said of Mr Stewart "he has to go".
147. Despite his lengthy experience in local government, Mr Stewart had not previously experienced calls for his dismissal. (T 69) No motion for his dismissal was brought to the Council during his tenure. That may have been due to his particular character and experience, his relatively short time at the Council, the fact that he was an Acting General Manager, the balance of power within the Council at the time or a combination of these factors. Nonetheless, he experienced the undermining of his position by being threatened with dismissal just as Mr Littlemore and Mr Drenovski before him, and Mr Kitzelmann after him, had experienced.

## **2.8 Extraordinary meeting 8 February 2018**

148. An extraordinary meeting of the Council was held on 8 February 2018 to consider the budget and a SRV application to IPART. Prior to that meeting, Councillors had a briefing session with Morrison Low, the author of the LTFP 2017 - 2027 and the earlier OAMP.
149. At the meeting on 8 February 2018 Cr O'Halloran arrived late and began yelling and becoming very aggressive toward the Mayor, Cr Byron. The Mayor tried to call order and eventually told Cr O'Halloran to leave the meeting but he did not. He sat down and declined to vote on any matters of the meeting. A contemporaneous file note of a conversation of an officer of the OLG with Mr Stewart records that the Councillors and staff at the meeting were visibly shaken by Cr O'Halloran's conduct.
150. Cr O'Halloran's conduct was subsequently the subject of a complaint to the OLG. On 10 August 2018 the Chief Executive, OLG ordered Cr O'Halloran to, inter alia, apologise to the Mayor, Cr Bryon at a Council meeting in his presence and to cease engaging in misconduct. This complaint was dealt with at the same time as the complaint concerning Ms Adamek which resulted in Cr O'Halloran being suspended from civic office for a period of two months.

## **2.9 Special Advisor's comments March 2018**

151. At the conclusion of his term as a Temporary Adviser to the Council, Mr McCormack provided comments to accompany the Compliance Report relating to the PIO. Whilst the nature of his appointment was to assist the Council to comply with the PIO, his time with the Council staff and members gave him some insight into the reasons for the Council's poor financial performance.

152. He said at page 3 of his comments:

“My view is that there are still major problems besetting the Council. In fact it is those problems which have contributed to the identified issues in the PIO. Whilst the Implementation Plan overcomes some immediate and obvious concerns there are still major forces impacting on good governance and administration by Balranald Shire Council. These are seen as

- lack of respect in the Council Chambers and in Staff dealings,
- poor morale throughout the organisation,
- low standing in the community,
- inadequate staff numbers and capabilities and
- lack of basic local government procedures by Elected Members including differentiation between operational and strategic matters.

By its own admission Balranald Shire Council acknowledges it has suffered reputational loss. (see Compliance Report) and I have seen little evidence of Council attempting to change this.

It is of concern to me that these underlying issues will continue despite the PIO. I am not convinced that the elected members appreciate the gravity of the situation and that work to date is viewed by some as a “box ticking” exercise.”

153. Later in the comments, after lamenting the lack of financial acuity of most Councillors, Mr McCormack stated:

“In fact some Councillors shun the responsibility for major decisions and there is a tendency to attempt to sheet home the responsibility to Staff.”

154. When commenting on staff vacancies Mr McCormack said:

“I do have a concern that the new General Manager will need support from all Councillors. This has not been evident with senior staff in the past. Indeed when previous General Managers have attempted to point out the correct approaches they have been subject to criticism. Without the counsel of the former General Manager, and the interim General Manager, the Council would be in a far worse position than where it is today.”

## **2.10 Michael Kitzelmann – General Manager**

155. Michael Kitzelmann commenced as General Manager on 12 March 2018. It was a turbulent time within Balranald Council. The Compliance Report under PIO was about to be submitted to the Minister. The Council had adopted an OAMP and a LTFP and the Council had passed a series of inconsistent resolutions in relation to the caravan park lease.

156. From the outset contemporaneous notes record that a significant amount of Mr Kitzelmann's time was consumed by dealing with queries from Cr O'Halloran on a range of operational issues and particularly regarding the caravan park lease.
157. Prior to Mr Kitzelmann commencing as General Manager the Council had, at an extraordinary meeting on 28 February 2018, considered a confidential report regarding the caravan park tender documents.
158. The Council resolved, inter alia, to award the tender to Tenderer A (Matt and Dee Jess), to move sewer and water charges to Schedule 3 (Special Conditions) of the caravan park lease agreement and for the Council to make a financial contribution to water and sewer charges and advertise in accordance with s 356 of the LG Act.
159. At the ordinary meeting on 22 March 2018, although the caravan park lease was not on the agenda, Cr O'Halloran talked about it and continued to do so for at least 15 minutes despite attempts by the Mayor, Cr Byron, to bring the meeting to order. Cr O'Halloran wanted to know why a tender was required, he asserted that a probity advisor was a waste of money and he said that Council should be paying for the water rates and charges as there were water leaks all over the property.
160. At the ordinary meeting of Council on 17 April 2018 the Council resolved:
- To enter discussions with Tenderer A to clarify any departures or qualifications prior to conducting the formal procedure for the awarding of the lease
  - The Council award the tender for the lease to Tenderer A subject to:
  - Presentation of all outstanding information as required within the tender specification;
  - Completion of the formal negotiations between both parties in relation to compliance with the tender specifications; and
  - Ministerial approval.
161. On 19 May 2018 the caravan park lease agreement was delivered to the Caravan Park Operators to execute however a dispute arose as to the terms of the lease. That dispute became the subject of Supreme Court proceedings heard in October 2019. The Council extended the period within which the lease could be signed until 13 June 2018 but no agreement was reached between the Council and the Caravan Park Operators. Ultimately a notice to quit was served and the legal proceedings were commenced. The Caravan Park Operators remain in occupation of the caravan park but pursuant to one of the outcomes of the proceedings have agreed to vacate by 1 December 2019.
162. On 14 June 2018 Crs O'Halloran, Ugarte and Mannix directly approached Mr Kitzelmann to find out what had occurred at a meeting between Mr

Kitzelmann and the Caravan Park Operators on 13 June 2018. Cr O'Halloran is alleged to have accused the staff of changing the business papers and the resolution of the Council and directed Mr KitzeImann to reissue the contract in accordance with his belief of what the Council resolution was (which excluded the Council water and sewer rates from the payments required to be made by the lessees). Cr O'Halloran is alleged to have told Mr KitzeImann:

"You should eat humble pie and give the Jesses what they want."

163. Later on 14 June 2018 Cr Jolliffe met with Mr KitzeImann and is alleged to have verbally berated him, demanding that the Caravan Park Operators be given the opportunity to sign what he described as "the original contract". Cr Jolliffe is alleged to have acted in an extremely aggressive manner and claimed that Mr KitzeImann had misrepresented the circumstances of the meeting on 13 June 2018 with the Jesses'. Cr Jolliffe is alleged to have said:

"You are to stop wasting Council's money getting advice and reporting to the OLG. You work for the eight of us in there and not OLG and you will implement the decisions we make. You work for us."

164. Mr KitzeImann informed Cr Jolliffe that he would not implement unlawful resolutions to which Cr Jolliffe is said to have replied:

"You will do as directed and if OLG don't like it they can sack us."

165. On 15 June 2018 a workshop was held with the Councillors and senior staff to discuss the caravan park issues. The meeting got out of control and Mr KitzeImann and two Directors (Ms Bilske and Mr Pretorius) were called liars and were insulted. They were extremely distressed and ultimately left the meeting.
166. Throughout the entire workshop Cr Jolliffe is said to have sat in his chair glaring at Mr KitzeImann in an attempt to intimidate him and by taking a continued aggressive stance with a direct unflinching stare even when Mr KitzeImann was responding to other members within the chamber.
167. At the same workshop, Cr O'Halloran is said to have asserted that Mr KitzeImann was being subject to outside influence (with reference to the Council's independent legal advice and advice from the OLG), that the minute keeping was not accurate and that the operational staff did not record the intent of the Council's resolution. When the Director of Corporate and Community Services, Terri Bilske reported that the actual return from the caravan park had reflected a downturn in takings from four years ago Cr O'Halloran said of her:

"You can't trust this woman's figures." (T 191)

168. On 10 July 2018 a formal Code of Conduct complaint was made by Mr KitzeImann with input from the Direction of Corporate and Community Services, Ms Bilske regarding matters relating to the caravan park lease. That complaint is yet to be resolved.

169. In his oral evidence to the Inquiry Mr Kitzelmann expressed a reluctance to be completely open with the Councillors for fear that his words would be used negatively by some individuals against him. (T 190) He said he has been threatened with the sack several times by Cr O'Halloran. In one instance the threat was second hand when Cr O'Halloran said to the then Director of Infrastructure in the presence of an executive assistant, in relation to Mr Kitzelmann:

"We need to sack him. Don't think our boy's working out for us." (T 190)

170. In relation to the workshop on 15 June 2018 Mr Kitzelmann said to the Inquiry:

"There was a lot of abusive yelling, finger pointing and tempers flared. I would like to say that it was in the best interests of having an open conversation but just inappropriate conduct, but unfortunately there were quite heated words. I had been subject to some intimidation tactics by unknown persons and two of the Councillors or three of the Councillors' response was "you need to understand that the operators of the caravan park, they're local people with a young family and you'll just have to get over it." (T 192)

171. The intimidation tactics to which Mr Kitzelmann referred in his oral evidence were events on the evening of 13 June 2018. From around midnight until 3am spotlights on a vehicle or vehicles were directed into Mr Kitzelmann's home. He described the event in his oral evidence as follows:

"Unknown persons - putting it nicely - decided it was a good idea to use intimidation tactics of pulling right up, putting the big spotlights on the front of the vehicle on and spotlighting the house in the wee hours of the morning and lighting up the entire house, then taking off revving the engine. That went on for a few hours. Subsequently the police directed that I install security cameras at that residence and that the executive staff have security cameras installed." (T 219)

172. He later said:

"The concern that I had was a couple of days later Councillor O'Halloran approached me and informed me that I was mistaken, they weren't doing that to being intimidating and to cause trouble, they were looking for their hunting dogs. I have spoken to the guys about it and they were looking for their hunting dogs." (T 219)

173. In relation to the impact on the staff generally Mr Kitzelmann said in his evidence:

"One of the other issues which is a serious concern is the staff are doing the job they are directed to do. But they are suffering reprisal because of doing their job. That is a concern. I have some staff members who openly say they don't feel comfortable going into the business houses because they get

abused , not by the business house itself, the operators, but by other people in there. And that's for doing their job. They shouldn't have that. They are doing as they are directed.

I actually did a radio interview and I talked about the fact that, "Please, just remember they are doing as they are told. They don't make the decisions. They are your friends, your neighbours, your family. Please, be respectful," because some of the staff are very fragile at the moment as a result of the abuse they are copping, and most of it is unjustified. Well, no abuse is ever justified, but most of the comments are founded on misinformation." (T 222)

174. In a conversation with an investigator from the OLG on 8 April 2019 Mr Kitzelmann stated that his mental health was suffering due to the ongoing harassment and abuse from Councillors. Ms Bilske who, was with Mr Kitzelmann at the time and on speaker phone, said:

"I do not know how he has lasted this long and I am very concerned about him".

175. Mr Kitzelmann informed the investigator that he had sought the assistance of Employee Assistance Program (EAP) and other support networks.

## **2.11 Conclusions**

176. The undeniable conclusion from the evidence to the Inquiry is that the Council has failed to meet its obligations to act as a responsible employer, particularly in regards to the interaction between Councillors and Council staff members. In particular the position of General Manager at the Council has been characterised by the General Manager being the target of unacceptable behaviour in Council meetings, Council workshops and in day-to-day interactions. Each of the General Managers has been undermined and been threatened with dismissal by Councillors. Overwhelmingly, it is the conduct of Cr O'Halloran that has been the cause of this unsafe work environment. The numerous Code of Conduct complaints which have been upheld against him and the censuring and suspension from civic office, seem to have had little effect on Cr O'Halloran's behaviour.
177. The other Councillors appear to be powerless to prevent this behaviour and, on isolated occasions, one or two of the other Councillors have encouraged it by similar behaviour.
178. Part of this behaviour may be due to Cr O'Halloran's apparent inability to prevent himself from being enmeshed in the operational aspects of the Council. He seems to fail to understand his role as a Councillor is to make decisions as a member of the governing body but not to implement them.
179. As a result of the nature of the work environment, Council has lost valuable staff members and risks losing more if the nature of the work environment is not altered.



### Term of Reference 3: Mayor/Councillors Understanding Their Role

180. The role of the Mayor is described in s 226 Local Government Act 1993 (LG Act) as:

- (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.*

181. The role of a Councillor is defined in s 232 of LG Act as:

- (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.*

### **3.1 The Mayor**

182. Since 2013 there have been three different Mayors of Balranald Shire Council, Crs O'Halloran, Cr Byron and Cr Purfill.

#### **Councillor O'Halloran**

183. In 2013 the Mayor was Cr O'Halloran. Cr O'Halloran's conduct at that time was the subject of a Code of Conduct complaint which culminated in the IAB Report received by Council on 16 October 2014. The background to and the findings of that report have been addressed earlier in this report in relation to Term of Reference 2. Consideration of that Report leads to the conclusion that Cr O'Halloran's conduct as examined in that report did not demonstrate that he understood his role under s 226 LG Act and in particular in relation to sub paragraphs (a), (b), (e) and (f).
184. Cr O'Halloran continued in the role of Mayor until 16 September 2014 when Cr Byron was elected Mayor.

#### **Councillor Byron**

185. During his term as Mayor, Cr Byron was the subject of a Code of Conduct complaint by Cr Cooke to the OLG concerning the Bidgee Haven Hostel. The essence of Cr Cooke's complaint concerned a Council resolution of 21 July 2015 to request an audit of the fees claimed by the Hostel, by the Aged Care Funding Instrument (ACFI) Review Office.
186. That decision was overturned as the result of a late item added to the agenda of the meeting on 26 August 2015, upon the casting vote of the Mayor. The report stated (in reference to the proposed request for an audit by the ACFI Review Office):

"ACS\* advised that it was unprecedented and would be unwise to contact the Department for an ACFI audit. The main thing is for Council to correct this process going forward and to ensure the ACFI packs for residents contain the appropriate evidence so that Council is not over-claiming. The longer the period between the old documentation and the new, the less likelihood that Council will be charged a penalty for over-claiming. The Department could impose sanctions and it could also affect accreditation going forward. If the Department conducts and (sic) audit outside of Council contacting them, it would most likely only be a desk-top audit due to our remoteness."

\* Aged & Community Services of NSW & ACT, author of the Salt Report.

187. Cr Cooke was concerned that the Council may be committing a fraud by its decision not to request an audit and thereby be informed of any over-charging by the Council.

188. The OLG investigated the complaint and referred it to the Department of Social Services (which was responsible for ACFI funding at the time) and the New South Wales Police.
189. A rescission motion was lodged in respect of the resolution of August 2015 to not request an audit and that motion was carried at the meeting of 15 September 2015.
190. In October 2015 a request for an audit was made of the Department of Social Services and in due course an audit was conducted. The outcome of that audit, contrary to the opinion of the author of the ACS report, Ms Salt and the suspicion of Cr Cooke, was that there had in fact been an under-claiming of rebates. As a consequence, the funding to the Hostel was significantly increased following the audit.
191. Despite the outcome of the audit, the resolution of 26 August 2015, which was decided on the casting vote of the Mayor, did not reflect well on him as the leader of the Council.
192. Firstly, the matter was discussed in a closed meeting. Section 10A LG Act governs the parts of a meeting which can be closed to the public. The report stated that it was confidential "in accordance with" s 10A(1)(d) on the basis that it was commercial information of a confidential nature that would, if disclosed, prejudice the commercial position of the person who supplied it." There is no s 10A(1)(d) LG Act. That appears to be a reference to s 10A(2)(d). That was an oft-repeated error made in Council reports relating to the closure of meetings.
193. There was nothing in the report that was considered in the closed meeting that contained any commercial information of a confidential nature. The Hostel was conducted by the Council as a community facility and the community had a right to know the reasons why the Council was reversing its resolution made on 21 July 2015.
194. The other reason the resolution of 26 August 2015 did not reflect well on Cr Byron as Mayor was that there was the potential at that time for the Council to have been found to have over-claimed funding from the Department of Social Services. The proper course would have been for the Council to proceed with the proposed audit. As events transpired, that did occur, but only due to the successful rescission motion heard on 15 September 2015.
195. At the meeting on 15 September 2015 the Bidgee Haven Hostel was again discussed during a closed portion of the meeting. The same basis for closure of the meeting was put forward. It was the obligation of the Mayor as the person in presiding over the meeting, to ensure that only matters which were authorised under s 10A were discussed during the closed part of the meeting. Cr Byron failed in that obligation.
196. Cr Byron remained as Mayor until Cr Purfill was elected Mayor on 18 September 2018.

## **Councillor Purfill**

197. At the extraordinary meeting on 27 June 2019 the Council considered three variations to its proposed rates and charges for the 2019/20 financial year. Those variations were:
- rates for the gypsum mines
  - sewer pedestal charges
  - football club fees
198. The operator of Balranald Gypsum, Peter Morton, addressed the Council on the unaffordability to his business of the proposed rate increase for the three mines operated by Balranald Gypsum. The proposed rates were calculated by reference to rates charged by neighbouring Councils for extraction industries and having regard to the likely impact of the activity on the Council's road infrastructure. It was proposed to increase the rates for the three mines from \$4,000.00 to \$46,000.00.
199. The proposed sewer pedestal charges were the subject of numerous submissions and representations from motel owners who opposed any pedestal charge. The pedestal charge had been calculated on the actual cost of providing the sewer service to businesses which provided tourist or residential accommodation. It was consistent with the recommendations of the LTFP and the provisions of the Implementation Plan to ensure that the Council charges reflected the actual cost of provision of services.
200. The draft Operational Plan proposed to increase the rent paid by the Football Club for the club room and the fully maintained football oval from \$2,300.00 per annum to \$5,200.00 per annum. An expired Crown lease for the facilities has required Balranald Football Club to pay market rental for the club premises and oval.
201. When the report regarding the draft Operational Plan came up for consideration in the extraordinary meeting of 27 June 2019, at the invitation of the Mayor, Cr Purfill, Cr O'Halloran moved and Cr Jolliffe seconded a motion to move into a committee of the whole and to move into a confidential meeting.
202. It is apparent from the video recording of the meeting that Cr Purfill equated a committee of the whole with a confidential meeting however this is far from the case. Clauses 12.1-12.4 of the Model Code of Meeting Practice for Local Councils in NSW (Code of Meeting Practice) adopted by Balranald Shire Council on 16 April 2019, permits the Council to resolve itself into a committee of the whole to consider any matter before the Council. The effect of such a resolution is to suspend the limitation on the number and duration of speeches but for the provisions of the Code of Meeting Practice to otherwise apply.

203. The closure of Council meetings is dealt with in clauses 14.1-14.8 of the Code of Meeting Practice. Clause 14.1 reflects the provisions of s 10A LG Act and are limited to specific typed of matters including:
- personnel matters,
  - personal hardship of any residential ratepayer,
  - commercially sensitive or confidential information,
  - matters relating to the security of the Council, Councillors, Council staff or property,
  - legal advice,
  - information relating to a place or item of Aboriginal significance on community land, and
  - alleged contraventions of the Code of Conduct.
204. The nature of the discussion during the extraordinary meeting of 27 June 2019 involve none of those types of matters and ought to have been conducted in public and on record.
205. Cr O'Halloran appeared to understand that there was insufficient reason to close the meeting. In his evidence to the Inquiry he said:
- “Q. There was no reason to have that meeting closed, was there?
- A. I accept that but it happened and if it's my fault, I'll take the blame.” (T 335)
206. While Cr O'Halloran was prepared to take responsibility for that decision on that particular occasion, there appears to be a general practice on behalf of the Council to close its meetings when difficult matters are being discussed even though those matters do not fall within the provisions of s 10A LG Act. This is not just a responsibility of one Councillor. It is a responsibility of the whole Council, including the Mayor or presiding chairman, and the General Manager to ensure that the provisions of the Code of Meeting Practice are followed appropriately. The result of improperly closing a Council meeting is that the public is deprived of hearing the debate between the Councillors about the matters under consideration. That secrecy fosters distrust, innuendo and misinformation which appear to be prevalent in the Balranald Shire community.
207. In his 3 July 2017 report on the amended Implementation Order, the Temporary Adviser, Mr McCormack considered it necessary to include the following items as part of the expanded Implementation Plan:
- “24. That Councillors recognise the dignity and authority of the position of Mayor at all times.

25. That the Mayor preside over all gatherings where Councillors are present (meetings and Workshops). Further that the Mayor familiarize himself with the respective Codes governing behaviour by Councillors and Staff (Code of Conduct, Code of Meeting Practice and Councillor/Staff Interaction Policy) and enforce good behaviour practices.

24/25. The Mayor of Council (or the Chairman if not the Mayor) has a distinct role at Council Meetings. It is recognized that Council does not subscribe to the strictest requirements of Council's Code of Meeting Practice and that some informality prevails at Council meetings. Nevertheless, the Mayor and the Councillors should be aware that Council meetings do need to be conducted with dignity. The Mayor has a special role to control and direct the Meetings. All Councillors should be afforded the same courtesies and their views respected. Similarly Staff should be treated cordially. Errant behaviour is to be curtailed. The Mayor should ensure balance in this regard. The position of the Mayor, in undertaking his responsibilities, must be respected."

208. At the conclusion of his report the Temporary Adviser listed the memoranda he had issued to the Mayor since his appointment in order to improve performance, modernise procedures and to expedite meetings. One of those memoranda related to the closing of Council meetings. This was a matter evidently of concern to the Temporary Adviser and which has persisted to the present day.

### **3.2 Improper Closure of Council Meetings**

209. Section 232(1)(a) LG Act requires each Councillor to be an active and contributing member of the governing body.
210. Raymond Davy, in his evidence to the Inquiry, said that there was a real lack of debate within the Council which was probably contributed by tensions between Councillors which predated his arrival to the Council. He said that it was often difficult to get Councillors to move staff recommendations because nobody wanted to be on the record as being involved in decisions and even when they were moved there was only perfunctory discussion of them. He said that in particular Crs Allen, Roberts and Mannix really contributed to debate and that debate was completely dominated by O'Halloran and Jolliffe. Mr Davy acknowledged that he had only a fairly small sample space for observing Council meetings and that there had been some improvement in the last couple of meetings prior to his evidence in July 2019 but his conclusion was:

"I think that the lack of broader discussion around issues from people with different perspectives probably lets the community down". (T 125)

211. A similar sentiment was expressed by Mr Kitzelmann in his evidence to the Inquiry (T 207-208).
212. Cr Allen disagreed with the suggestion that he shied from debate saying:

"I don't feel the need to comment on every item that I see. I read the agenda comprehensively before each meeting and every item doesn't require comment. If I believe in an issue, I will definitely raise my voice and make my opinion known to Council." (T 253)

213. Cr Roberts agreed that she did not speak very much at Council meetings, she said in her evidence:

"I find that I get talked over, I am not respected and when I do choose to talk, I will talk about things I am passionate about, I could look around and there will be several Councillors with their heads down writing and they are not listening. So unless it is something I'm really passionate about, I'll speak up or if I think something needs saying I certainly will. But I don't believe there is a lot of – not protection, but obviously there is a Councillor there that has a lot to say and he doesn't really leave a lot of room for anyone else to say anything and he can be quite intimidating." (T 227)

214. Cr Roberts later identified that Councillor as Cr O'Halloran.

215. Cr Mannix agreed that he did not actively participate in debate in meetings. He said in his evidence to the Inquiry:

"Cr O'Halloran speaks on probably every line item even if he doesn't have to, but he does. I am the one that tries to follow committee meeting procedures and, you know, the quicker we get through them, the quicker we get home, but not unless I have to speak on them." (T 237)

216. Cr Mannix said that he had not participated in a debate within a Council meeting in the previous 12 months to giving evidence at the Inquiry on 1 August 2019.

217. It was a suggestion to the Inquiry by those who had observed Councillors in meetings that some Councillors did not appear to have read the business papers prior to Council meetings. Each of the Councillors denied this suggestion. Cr Roberts said that she read the business papers and then, if she needed any clarification, she would consult with the General Manager and others prior to the relevant meeting. Cr Roberts said she didn't have knowledge of whether other Councillors were or were not reading their business papers but said:

"I probably get the feeling possibly not or they're not understanding it because there is a lot of questions sometimes." (T 235)

218. Similarly, Cr Allen said:

"There had been times when it appears that they (other Councillors) aren't completely aware of each item, or the details of each item." (T 253)

219. Cr Allen said that on occasions it was his perception that Cr O'Halloran had not read the complete agenda because he would ask a question which would be answered in the next page of the item.
220. In his evidence, Cr Ugarte said, of the Council decision on 28 June 2017 not to extend the contract of the Caravan Park Operators:
- "I think there were two motions there and I think we didn't read it well and that's the thing...we made a mistake." (T 313)
221. He said later:
- "I wish I would have read better and everybody, because we all want – our intention wasn't that. We made a strategic mistake that we wanted to amend and when we tried to amend it, we had all this legal barriers, as you said, that we couldn't fix." (T 314)
222. Council records relating to the closure of meetings have been examined from January 2015 to date. Apart from the example discussed above, there are numerous examples of circumstances in which meetings have been closed in the absence of circumstances justifying the closure of the meetings under s 10A or where meetings have been closed for incorrect reasons under s 10A.
223. Part 1 Chapter 4 of the LG Act deals with Council meetings and operates from a presumption that all Council meetings will be open to the public, that public notice of the time and place of the meeting will be given and that the agenda and associated business papers will be available to the public. Sections 10A and 10B deal with the parts of a Council meeting that may be closed to the public and it is useful to set out here the provisions of those sections:

*10A Which parts of a meeting can be closed to the public?*

- (1) A council, or a committee of the council of which all the members are councillors, may close to the public so much of its meeting as comprises:*
- (a) the discussion of any of the matters listed in subclause (2), or*
  - (b) the receipt or discussion of any of the information so listed.*
- (2) The matters and information are the following:*
- (a) personnel matters concerning particular individuals (other than councillors),*
  - (b) the personal hardship of any resident or ratepayer,*
  - (c) information that would, if disclosed, confer a commercial advantage on a person with whom the council is conducting (or proposes to conduct) business,*
  - (d) commercial information of a confidential nature that would, if disclosed:*
    - (i) prejudice the commercial position of the person who supplied it, or*

- (ii) confer a commercial advantage on a competitor of the council, or
  - (iii) reveal a trade secret,
  - (e) information that would, if disclosed, prejudice the maintenance of law,
  - (f) matters affecting the security of the council, councillors, council staff or council property,
  - (g) advice concerning litigation, or advice that would otherwise be privileged from production in legal proceedings on the ground of legal professional privilege,
  - (h) information concerning the nature and location of a place or an item of Aboriginal significance on community land,
  - (i) alleged contraventions of any code of conduct requirements applicable under section 440.
- (3) A council, or a committee of the council of which all the members are councillors, may also close to the public so much of its meeting as comprises a motion to close another part of the meeting to the public.
- (4) A council, or a committee of a council, may allow members of the public to make representations to or at a meeting, before any part of the meeting is closed to the public, as to whether that part of the meeting should be closed.
- (5) , (6) (Repealed)

10B Further limitations relating to closure of parts of meetings to the public

- (1) A meeting is not to remain closed during the discussion of anything referred to in section 10A (2):
- (a) except for so much of the discussion as is necessary to preserve the relevant confidentiality, privilege or security, and
  - (b) if the matter concerned is a matter other than a personnel matter concerning particular individuals, the personal hardship of a resident or ratepayer or a trade secret—unless the council or committee concerned is satisfied that discussion of the matter in an open meeting would, on balance, be contrary to the public interest.
- (2) A meeting is not to be closed during the receipt and consideration of information or advice referred to in section 10A (2) (g) unless the advice concerns legal matters that:
- (a) are substantial issues relating to a matter in which the council or committee is involved, and
  - (b) are clearly identified in the advice, and
  - (c) are fully discussed in that advice.
- (3) If a meeting is closed during the discussion of a motion to close another part of the meeting to the public (as referred to in section 10A (3)), the consideration of the motion must not include any consideration of the matter or information to be

*discussed in that other part of the meeting (other than consideration of whether the matter concerned is a matter referred to in section 10A (2)).*

- (4) *For the purpose of determining whether the discussion of a matter in an open meeting would be contrary to the public interest, it is irrelevant that:*
- (a) *a person may misinterpret or misunderstand the discussion, or*
  - (b) *the discussion of the matter may:*
    - (i) *cause embarrassment to the council or committee concerned, or to councillors or to employees of the council, or*
    - (ii) *cause a loss of confidence in the council or committee.*
- (5) *In deciding whether part of a meeting is to be closed to the public, the council or committee concerned must have regard to any relevant guidelines issued by the Departmental Chief Executive.*

224. In April 2013 the Director General of the Division of Local Government, Department of Premier and Cabinet published guidelines pursuant to s 10B(5) LG Act to assist Councils in deciding when a Council meeting should be closed and how to balance the public interest in protecting confidential information with the public interest in ensuring accountability through open meetings. The guidelines are written in plain English and provide useful examples to assist Councillors to understand their role.
225. It is apparent from the following examples that the Councillors, in the period January 2015 to date, have not complied with the provisions of s 10A and 10B LG Act nor had sufficient regard to the Director General's guidelines.

### **Meeting of 24 June 2015**

#### *Cristal Mining Rates*

226. The report was asserted to be confidential in accordance with s 10A(2)(e) LG Act on the basis that the report contained "information that would, if disclosed, prejudice the maintenance of law". The report related to a request by Cristal to defer any recategorisation of its land for rating purposes until production had commenced on the site. The Council had received written legal advice about the timing of the recategorisation of that land, amongst other things. The Council would have been entitled to discuss in a confidential meeting the contents of that legal advice pursuant to s 10A(2)(g) which permits the Council to close so much of its meeting as comprises advice concerning litigation, or advice that would otherwise be privileged from production in legal proceedings on the ground of legal professional privilege. Such a privilege applies to documents whose dominant purpose was the provision of legal advice.
227. In s 10A(2)(e) the words "prejudice the maintenance of law" refers to information which would interfere with the prevention, detection,

investigation, prosecution and punishment of offences. No information of that nature was included in the report.

228. The balance of the report relating to Cristal mining rates, excluding the legal advice, should have remained in the public domain, and any debate regarding when the recategorisation of the Cristal mine land would occur, should have been conducted in an open Council meeting.

### **Meeting of 21 July 2015**

#### *Aggregation of Rates*

229. The report asserted that the matter was confidential under s 10A(1)(d)(i) LG Act on the basis that the matter to be discussed involved "commercial information of a confidential nature that would, if disclosed confer a commercial position of a person who supplied it." Not only does the report refer to a section of the LG Act which does not exist, it appears to be a meaningless amalgam of s 10A(2)(d)(i) and (ii). Section 10A(2)(d)(i) relates to commercial information of a confidential nature that would, if disclosed, prejudice the commercial position of the person who supplied it. Section 10A(2)(d)(ii) relates to commercial information of a confidential nature that would, if disclosed, confer a commercial advantage on a competitor of the Council.
230. The matter under consideration was whether rates applying to unsold allotments in a subdivision could be "aggregated" to treat them as a single parcel. The report contained no information that would have conferred a commercial advantage on a competitor of the Council. One can only presume that the author of the report intended for the report to be classified as confidential on the basis of s 10A(2)(d)(i). There is nothing in the report which suggests that the commercial position of the person who supplied the information would be prejudiced by the disclosure of the report. Further, the matter being discussed was the question of rates which would be applicable to land. It did not disclose commercial information about the land owner and should not have been the subject of a confidential report or discussed in a closed meeting of the Council.

#### *Bidgee Haven Hostel*

231. The report cited the reasons for confidentiality in identical terms to those relating to the Aggregation of Rates issue dealt with at the same Council meeting. The comments in relation to the incorrect section reference and the incorrect translation of s 10A(2)(d)(i) are not repeated.
232. This report concerned the Salt Report into the Bidgee Haven Hostel (see paragraph 2). The purpose of the report was to advise Council of the possible over-claiming of ACFI funding and to seek permission to contact ACFI review officers to conduct an audit of the ACFI claims for Bidgee Haven Hostel. There was nothing in the report that would have prejudiced the commercial position of a person who supplied information. While it might have been embarrassing for the Council to have publically disclosed the possibility of

over-claiming of ACFI funding, it was an incorrect use of s 10A to close that part of the meeting to the public.

### **Meeting of 26 August 2015**

#### *Aggregation of Rates*

233. The report asserted the matter was confidential on the basis that the information would “confer a commercial position of a person who supplied it”. As for the report dealing with the same topic to the meeting of 21 July 2015, the reason for confidentiality referred to a section of the LG Act which does not exist and for a reason which was nonsensical.
234. For the reasons set out in in paragraph [230], the information should not have been the subject of a confidential report or discussed in a closed meeting of the Council.
235. Section 10A does permit a Council meeting to be closed if the personal hardship of any resident or rate payer is to be discussed. It is clear from the report that evidence of financial hardship was not under consideration at that meeting.

#### *Bidgee Haven Hostel*

236. The report relied on the same reasons for confidentiality as the report dealing with the same subject to the meeting of 21 July 2015. For the same reasons as set out in paragraphs [214]-[215] the Council meeting ought not to have been closed to discuss this report.

### **Meeting of 15 September 2015**

#### *Bidgee Haven Hostel*

237. The meeting of 15 September 2015 was closed, again purportedly pursuant to s 10A(1)(d), for business relating to “commercial information of a confidential nature that would, if disclosed, prejudice the commercial position of the person who supplied it”.
238. This was the meeting at which the rescission motion in respect of the resolution of 26 August 2015 to not request an audit by ACFI officers was heard. There was no report as it was a rescission motion however the rescission motion ought to have been heard in an open Council meeting for the same reasons that the meeting of 26 August 2015, at which the original resolution was made, should not have been closed (see paragraphs [186]-[193]).

### **Meeting of 19 July 2016**

#### *Rating of Mining Projects*

239. The report asserted that it was confidential in accordance with s 10A(2)(c) LG Act on the basis that it included “information that would, if disclosed, confer a commercial advantage on a person with whom the Council is conducting (or

proposes to conduct) business". The report related to the levying of rates on mineral sands mining operations. The report appended a written legal advice. To the extent that the meeting discussed that advice, the Council was entitled to close the meeting pursuant to s 10A(2)(g). There was no entitlement to close the meeting pursuant to s 10A(2)(c) LG Act. To the extent that the report addressed matters other than the legal advice it ought to have been discussed and considered in an open Council meeting.

### **Meeting of 16 August 2016**

#### *Cristal Mining Project*

240. The report asserted that it was confidential in accordance with s 10A(2)(c) LG Act on the basis that it included "information that would, if disclosed, confer a commercial advantage on a person with whom the Council is conducting (or proposes to conduct) business". This was an update on the topic described as Rating of Mining Projects considered at the meeting 19 July 2016. The update concerned the timing of the commencement of the Cristal Mining project and associated funding under the Wool Track funding program. So far as the Council was concerned, the Wool Track funding related to an upgrade of the unsealed sections of the Balranald - Ivanhoe Road. The funding was to be released once clearing operations had been commenced by Cristal. The Council was not conducting or proposing to conduct business with Cristal but rather the timing of the funding was dependant on the commencement of the mine. The meeting ought not to have been closed to the public.

### **Meeting of 20 September 2016**

#### *Business Rates Mineral Sands*

241. The report was said to be confidential in accordance with s 10A(2)(c) LG Act on the basis that it related to "information that would, if disclosed, confer a commercial advantage on a person with whom the Council is conducting (or proposes to conduct) business".
242. The report concerned proposed rates to be applied to the mineral sands operations of Iluka and Cristal. The Council was not conducting or proposing to conduct business with either of the operators. The report solely related to the development of appropriate rates for those properties and should not have been the subject of a confidential report or a closed meeting.

### **Meeting of 18 July 2017**

#### *Kilpatrick Road Project*

243. The report was said to be confidential in accordance with s 10A(2)(c) LG Act on the basis that it related to "advice concerning litigation or advice that would otherwise be privileged from production in legal proceedings on the grounds of legal professional privilege". The report related to works

undertaken by contractors to Council to widen a 1.6 kilometre section of Kilpatrick Road. A number of issues had arisen during the course of the works for which the Council had originally set aside \$150,000.00. The problems which were encountered had resulted in an increase in the total cost of the works to about \$270,000.00. There is no reference in the report to any legal advice. The meeting of 18 July 2017 ought not to have been closed in order to discuss the Kilpatrick Road report.

244. The resolution of the Council was that the report be accepted and, on the motion of Councillors O'Halloran and Joliffe, "that Council hold a workshop in Euston with Councillors and Staff to look at Kilpatrick Road as soon as full costings are available". The outcome of the consideration of that report was that its subject matter remained out of the public arena. While it might have been embarrassing for the Council to have to publically disclose a significant overspending on a road project, that is what ought to have happened. The proposed workshop to discuss the matter further would not be open to the public and would ensure that the matter remained "under the radar".

#### **Meeting of 19 September 2017**

##### *Kilpatrick Road update*

245. The report asserted that it was confidential in accordance with s 10A(2)(g) LG Act on the basis that it involved "advice concerning litigation, or advice that would otherwise be privileged from production in legal proceedings on the ground of legal professional privilege". Again, there was nothing in the report that related to legal advice. The report was an update to the Council on Kilpatrick Road, particularly regarding the over expenditure. The meeting was improperly closed to permit its consideration and should have been open to the public.

#### **Meeting of 17 October 2017**

##### *Bidgee Haven Hostel*

246. This report was asserted to be confidential in accordance with s 10A(2)(g) LG Act on the basis that it involved "personnel matters concerning particular individuals (other than Councillors)". Section 10A(2)(g) relates to legal privilege. There is nothing in the report that related to legal advice. The author of the report presumably intended to refer to s 10A(2)(a) LG Act. The content of the report related only tangentially to personnel. It concerned the operations of the hostel and its current and possible future management structure. It did not name any individuals but referred only to employment positions. The meeting of 17 October 2017 was improperly closed for the purpose of discussing the Bidgee Haven Hostel.

##### *Kilpatrick Road Update*

247. The report asserted that it was confidential in accordance with s 10A(2)(g) LG Act on the basis that it involved "advice concerning litigation, or advice that would otherwise be privileged from production in legal proceedings on the

ground of legal professional privilege". As with the reports relating to this issue considered at the meetings of 18 July 2017 and 19 September 2017, there was no reference to legal advice in the report and no lawful basis for the meeting of 17 October 2017 to have been closed to consider the Kilpatrick Road update.

### **Meeting of 20 February 2018**

#### *Recruitment of GM*

248. The meeting was closed pursuant to s 10A(2)(f) LG Act for "matters affecting the security of the council, councillors, council staff or council property". The report in fact related to the progress of and actions for the recruitment of the General Manager. The subject matter of the report did not relate to the security of the Council, Councillors, Council staff or Council property so s 10A(2)(f) was not a proper basis for closure of the meeting.
249. The report did not relate to personnel matters concerning particular individuals as at that point the proposed General Manager had not been selected. The report ought to have been considered in an open Council meeting.

#### *Sale of Caltex service station*

250. The report asserted that it was confidential in accordance with s 10A(2)(e) LG Act on the basis that it included "information that would, if disclosed, prejudice the maintenance of law". As discussed at paragraph [227], that provision of the Act is aimed at keeping confidential information which would interfere with the prevention, detection, investigation, prosecution and punishment of offences. There was no information in the report of that nature. The report did refer to a Deed of Settlement, the terms of which were confidential. The meeting could legitimately have been closed pursuant to s 10A(2)(g) LG Act on the basis that it contained advice that concerned litigation.

#### *Bidgee Haven Hostel*

251. The report asserted that it was confidential in accordance with s 10A(2)(a) LG Act on the basis that it related to "personnel matters concerning particular individuals (other than Councillors)". As with the report on the same topic to the meeting of 17 October 2017, there was no reference in the report to a particular individual. The report provided a thumbnail history of the Hostel's finances since 2014 and some of the likely causes for its significant losses and the more recent improvement in its finances. It was part of a series of reports which considered the manner in which the Hostel ought to operate in future. It was a matter of great public interest and ought to have been discussed in an open Council meeting.

#### *Waiving of (sic) Reduction of Water Service Connection Fee*

252. This report asserted it was confidential in accordance with s 10A(2)(a) LG Act on the basis that it related to "personnel matters concerning particular

individuals (other than Councillors)". The report did not relate in any way to personnel of Council. It addressed a request by landowners in Euston to reduce the raw water service provided to their property from a 50mm to a 20mm service. The landowners had not used any water but had paid \$832.16 in raw water access charges. Normally the Council charged a fee for any change to water meters. The landowners requested the waiver of that fee due to the length of time they have waited for a response from Council (5 months). The Council was permitted to waive the fee if there was hardship or if the matter fell within any other category in respect of which the Council had determined payment should be so waived or reduced. In the latter case, the Council would need to give public notice of the proposed waiver or reduction of the fees. The report made no reference to hardship but did recommend waiver of the connection fee and public notice of the Council's decision.

253. There was no other basis upon which the meeting should have been closed to consider the request for waiving the water connection fee. As there was no consideration of a hardship case, the Council should have discussed the waiver of fees in a public forum.

#### **Meeting of 17 April 2018**

##### *Bidgee Haven Hostel*

254. As with previous reports relating to Bidgee Haven Hostel the report asserted that it was confidential in accordance with s 10A(2)(a) LG Act on the basis that it concerned "personnel matters concerning particular individuals (other than Councillors)".
255. While the report did name a former contract employee, the subject matter of the report was a response to a report by that person assessing the Bidgee Haven Hostel. The report addressed a matter of significant public interest which should have been discussed in an open Council meeting. A redacted version of the report could have been prepared to avoid identification of the former employee. In any event, the report did not relate to personnel matters relating to that employee but was a response to a report prepared by that person and should have been discussed publically.

#### **Meeting of 17 July 2018**

##### *Rating of Atlas Mine*

256. This report related to the same subject matter as the report entitled Cristal Mining Project considered at the meeting of 24 June 2015 when the Council resolved to the effect that it intended to proceed to re-categorise the land as "Business" as soon as works commenced under the consent.
257. The report to the meeting of 17 July 2018 was asserted to be confidential in accordance with s 10B(2)(b) LG Act on the basis that it related to information concerning "the personal hardship of any resident or ratepayer." Section 10B(2)(b) relates to legal advice, not personal hardship. Section 10A(2)(b) relates to personal hardship. The use of the term "personal" in s 10B(2)(b)

means that the ratepayer must be a person not a company in order for s 10A(2)(b) to allow a meeting to be closed. In any event there was no evidence of hardship within the report and the meeting was improperly closed.

### **Meeting of 16 October 2018**

#### *Bidgee Haven Hostel*

258. The report asserted it was confidential in accordance with s 10A(2)(a) LG Act on the basis that it involved “personnel matters concerning particular individuals (other than Councillors)”. For the reasons given at paragraphs [251] – [255], the meeting should not have been closed as the report did not relate to personnel matters concerning particular individuals.
259. In fact the report sought Council approval to write off fees and interest totalling \$23,370.22. A former resident of the hostel had passed away and the estate of that resident had been distributed. The outstanding fees had been allowed to accumulate because the Council had failed to properly invoice the former resident.
260. The circumstances of the debt was certainly embarrassing to the Council however that was no justification for the closure of the Council meeting to discuss the report.

### **Meeting of 27 June 2019**

#### *Rates and charges for 2019/20*

261. The circumstances of the closure of this meeting to discuss variations to the rates and charges for the 2019/20 financial year are discussed at paragraphs [197]-[206] and are not repeated.

### **Meeting of 20 August 2019**

#### *Atlas-Campaspe Mineral Sands Project*

262. The minutes record that the report was considered confidential in accordance with s 10A(2)(c) LG Act on the basis that it included “information that would, if disclosed, confer a commercial advantage on a person with whom Council is conducting (or proposes to conduct) business”. Tronox Ltd operated the Atlas-Campaspe Mineral Sands mine and Council was considering a modification application to a previous development consent granted by the state government for the mine. The purpose of the report was to discuss the proposed amendment and the effect it would have on the management and maintenance of local roads. The Council was not conducting or proposing to conduct business with Tronox Ltd, it was seeking to ensure that the potential impact on its roads from the increased haulage sought under the amendment would be properly compensated. That could have been achieved by way of a planning agreement under the EP&A Act or via a condition of development consent. Ultimately, the Council made a submission to the Department of Planning, Industry and Environment

requesting a condition of consent to require Tronox Ltd to enter into an agreement with Council regarding the use of local roads.

263. A request for the imposition of a condition of development consent to require a contribution by developer does not constitute a Council "conducting business" with that developer. The meeting of 20 August 2019 should not have been closed to discuss the proposed modification of the development consent for the Atlas-Campaspe Mineral Sands Project.

### **3.3 Councillors**

264. Under s 232(1)(f) LG Act, Councillors are required to uphold and represent accurately the policies and decisions of the governing body.
265. In his evidence to the Inquiry, Mr McCormack said that Cr Ugarte had issued a couple of media releases which did not uphold Council decisions. One related to the SRV and came out after the event and the other was in support of the Lessees of the Caravan Park. There was no documentary evidence to the Inquiry regarding public comments by Cr Ugarte regarding the SRV.
266. The Swanhill Guardian Newspaper did publish a story dated 10 November 2017 which included excerpts from a public post on Facebook made by Cr Ugarte. The article said:

"In a public post on Facebook, Cr Ugarte claimed the park's current managers Matt and Dee Jess were not offered to sign a two-year contract extension."

"This is going too far in my opinion and I'm pretty sure that the majority of the town will agree with me," Cr Ugarte said on Facebook.

"I'd also like to extend my full support to the caravan park managers (during) this extremely difficult time."

267. On 28 June 2017 the Council had resolved not to extend the current lease of the caravan park which was due to expire on 30 November 2017. The events which followed that decision are described under Term of Reference 5 commencing from paragraph [305] and are not repeated here. It is sufficient to say that Cr Ugarte was not upholding the decision of the governing body when he made his public Facebook comments which were then repeated in the Guardian Newspaper.
268. When questioned about this during his evidence to the Inquiry, Cr Ugarte was unapologetic. He regarded the Council's decision of 28 June 2017 as a mistake despite the fact that he had been an active participant in it. He said to the Inquiry:

"Let's be honest, when you make a mistake (indistinct) you try to do whatever it takes to amend it. If that takes to go to the media and talk about it, I don't see anything wrong about it. I also got my say. So I'm not doing this thinking about I'm going to put the Council into disrepair (disrepute?), I think this is my right to express how I feel." (T 311)

269. However well-intentioned, Cr Ugarte's public Facebook comments may have been, it is inappropriate for a Councillor to contradict a Council decision once it has been made. The correct forum for discussion about previous Council decisions is within the Council and not on social media or in the press.

### **3.4 Conclusions**

270. In general it appears that the Mayor and Councillors are moving towards an understanding of their respective roles under s 226 and s 223 LG Act. There are, however, matters of significant concern which remain and which need to be rectified.
271. As mentioned previously in relation to Term of Reference 3, Cr O'Halloran appears to fail to understand that his role as Councillor does not extend to the implementation and daily oversight of the Council's decisions. The consequence of that failure is that Cr O'Halloran has regularly come into conflict with Council staff members, and as a consequence, has been the subject of adverse findings in relation to his conduct.
272. Another aspect of concern is the Council's inappropriate closure of Council meetings as outlined above. Some breaches of meeting procedures do not have serious consequences however the improper closure of a Council meeting to the public is antithetical to the guiding principle in s 8A(2)(e) that Council decision making should be transparent and decision-makers are to be accountable for decisions and omissions.
273. It is evident from the numerous examples of confidential reports and the closure of Council meetings to discuss them that both the Councillors and staff do not properly understand their obligations in relation to the transparency of decision making and to the limitations on the ability to close Council meetings to discuss confidential matters. There was no evidence in the reports or minutes that the Council ever gave consideration to whether discussion of a matter in an open Council meeting would, on balance, be contrary to the public interest, as required by s 10B(1)(b). It is of particular concern that the improper closure of Council meetings has continued since the holding of public hearings in this Inquiry in which the issue was canvassed with several Councillors during the evidence. While the drafting of the reports which comprise the business papers and the setting of the agenda are tasks not undertaken by Councillors, the Councillors bear the ultimate responsibility for ensuring compliance with the requirement for open Council meetings.

## Term of Reference 4: Community Confidence in Council

275. In assessing whether the Council commands the confidence of the community, it is worthwhile considering how effectively the Council engages with the community.
276. Effective community engagement results from a strong partnership between Council and the community, including the development of alternative strategies, identification of preferred solutions and prioritisation.
277. The integrated planning and reporting framework was established to address the long term sustainability of councils and provide more accountability to communities. The framework makes clear how financial decisions made today will have an impact on service delivery into the future, as well as clarifying the limits to the Council's responsibilities and the role of other stakeholders in achieving community goal. Ultimately, community engagement is undertaken so the Council can obtain input into the development of the community strategic plan.
278. From very early in his term as temporary adviser to the Council, Mr McCormack recognised the Council's failure to consult or communicate with the community. This prompted him to recommend, for inclusion in the Council's implementation plan, that the:
- "Council undertake a definite and sustained campaign of community engagement."
279. This recommendation was subsequently included in the Council's implementation plan pursuant to the PIO.
280. On 13 November 2017, the Council published a document titled An Open Letter to the Residents of Balranald Shire. The document was signed by all councillors, except Cr O'Halloran, and referred to:
- the issuing of the PIO and the appointment of a Temporary Adviser to assist the Council to improve its financial performance and make it more sustainable;
  - recent events having indicated that the Council had not communicated well enough with the community;
  - the need to consider the future operations of the Balranald Caravan Park and to comply with the legal requirements, including seeking approval from relevant authorities, prior to entering into a lease agreement;
  - the need to consider the future management of the Bidgee Haven Hostel in response to the financial losses being incurred by the Council in operating the hostel and the risks associated with it;
  - the intent to build a strong sustainable Council that continues to provide sporting grounds, an aged care facility, library, infrastructure and other

services to the community, as well as investing in bringing visitors and new industries to the Shire;

- the increased costs to supply a wide range of services to the community and seeking the views of the community on the Council applying for a Special Rate Variation to fund many of the services;
- the small staff base with limited resources necessitating the engagement of contractors and consultants to assist in providing the current level of services; and
- a commitment to continue to communicate with the community through the monthly newsletter and other forums on how the Council is progressing.

281. While the decision to publish such a document may have been primarily due to the recommendation made by Mr McCormack, it represented an acknowledgement of the difficulties facing the Council and a willingness to work towards more meaningful consultation and communication.

282. Unfortunately, the commitment to ongoing community consultation appears to have been short lived. Instead, the available evidence indicates that the relationship between the Council and the community has further deteriorated.

283. In the comments provided by Mr McCormack in relation to the Council's Compliance Report sent to the Minister on 14 March 2018, he said at page 7:

"PIO 35 Community Engagement

It is apparent Council has not performed well in this important area. Failing to do so has alienated the community and there is evidence of a large groundswell of community unrest both in the towns and rural areas of the Shire...Council has estranged the community to the point that many people have lost confidence and relish the opportunity to be critical."

284. During the hearings, when Cr Roberts was asked about the Council's standing in the community, she said:

"Well, no good at the moment. I think this term, unfortunately I came on it this term, we're copping a lot of issues that we're facing now that not only stem from our term. I think you can look back for years and see where things have started going wrong, tough decisions weren't made and it's all come to a head in the term I'm on. And I don't think the community quite understands what has happened leading up to a lot of the issues, not all of them, but a lot of them." (T 223)

285. It is also apparent that community sentiment about decisions made by the Council is having a direct and detrimental impact on staff. Mr Kitzelmann told the Inquiry:

"I've got some staff members who say they don't even feel welcome going into the business houses in town, and that's not good. I had one of the ladies break down in tears because she had an argument with a long-term friend because they didn't agree with the decision of council, and because that particular staff member wouldn't give an opinion, it fired things up, and that's distressing.

...

And the staff understand that, even though they are subject to the decisions of council themselves because they're ratepayers here and they're community members here, they cannot provide an opinion on the decisions of council, so they don't."

286. The majority of submissions provided to the Inquiry by members of the community expressed dissatisfaction with the Council. Some of those expressions of dissatisfaction displayed a misunderstanding of factual matters which would have been avoided if there had been greater transparency and better dissemination of information to the community by the Council.
287. The public perception of the issues relating to the Hostel and to the Caravan Park would have been greatly assisted by more fulsome information being provided to the community at the time public concerns arose, and greater openness of the Council's consideration of those issues in terms of public debate. The tendency of the Council to close its meetings when difficult matters were being considered, as outlined in relation to Terms of Reference 3, has contributed to the poor esteem with which the Council is currently held by its community.

## Term of Reference 5: Reserve Trust Manager

288. In order to consider whether the Council has complied with its obligations as Reserve Trust Manager (RTM) under the *Crown Lands Act 1989* ("CL Act") of the Balranald Caravan Park, a brief examination of the relevant provisions of that Act is warranted. It should be noted that the CL Act has now been replaced with the *Crown Land Management Act 2016* ("CLM Act").
289. The relevant objects of the CL Act are to ensure that Crown Land is managed for the benefit of the people of NSW and in particular to provide for:
- (b) the management of Crown Land having regard to the principles of Crown land management in this Act;
  - (c) the proper development and conservation of Crown land having regard to those principles;
  - (d) the regulation of conditions under which Crown land is permitted to be occupied, leased etc;
  - (e) the reservation or dedication of Crown land for public purposes and the management and use of the reserved or dedicated lands;
  - (f) the collection, recording and dissemination of information regarding Crown land.
290. The principles of Crown land management are:
- (a) that environmental protection principles be observed in relation to the management and administration of Crown land,
  - (b) that the natural resources of Crown land (including water, soil, flora, fauna and scenic quality) be conserved wherever possible,
  - (c) that public use and enjoyment of appropriate Crown land be encouraged,
  - (d) that, where appropriate, multiple use of Crown land be encouraged,
  - (e) that, where appropriate, Crown land should be used and managed in such a way that both the land and its resources are sustained in perpetuity, and
  - (f) that Crown land be occupied, used, sold, leased, licensed or otherwise dealt with in the best interests of the State consistent with the above principles.
291. Part 5 of the CL Act deals with the dedication and reservation of Crown land. The Minister may, by notification in the Gazette, establish and name a reserve trust and appoint it as trustee of any one or more specified reserves. A reserve trust so established is constituted as a corporation having as its corporate name the name assigned to the trust in the notification. A reserve trust has the

functions conferred on it under the CL Act and it is charged with the care, control and management of any reserve of which it is appointed trustee: s 92 CL Act.

292. The Minister may, by notification in the Gazette, appoint a Council to manage the affairs of a reserve trust: s 95 CL Act.
293. If a Council is a manager of a reserve trust and the reserve is a public reserve, the trust has all the functions of a Council under the *Local Government Act 1993* in relation to public reserves, other than to classify it as operational land under that Act: s 98 CL Act.
294. A reserve trust may not lease a reserve or any part of it unless the trust has decided that it is desirable to do so on the terms and conditions in its decision and the Minister has consented in writing to the proposal: s 102(1) CL Act
295. Any lease granted by a reserve trust without the Minister's consent under s 102 has no effect except in such cases as the Minister may determine: s 102A(10) CL Act
296. A reserve trust is required to furnish reports and to keep records in accordance with the regulations or as may be required by the written notice of the Minister to that trust: s 122(1) CL Act
297. The *Crown Lands Regulation 2006* (CL Regulation) specifies the requirements for reserve trust reports and records. The annual report of the reserve trust is relevantly required to include:
- financial statements of income, expenditure, assets and liabilities
  - details of the value and condition of assets valued at or more than \$5,000.00
  - details of work or improvements costing more than \$5,000.00
  - insurance details
  - fire prevention and OHS measures that are in place
  - details of lease agreements granted including rent and fee levels
  - details of the purposes for which the reserve is used
  - the particulars of any pecuniary interests recorded in the book referred to in cl 1(3) of Schedule 4 of the CL Regulation
  - any other matter required to be reported under s 96A
298. A reserve trust is required to keep the following records
- (a) account books showing details of all income and expenditure
  - (b) records of assets and liabilities and improvements affected

- (c) bank, building society or credit union deposit books or statements
- (d) records of other financial instruments or investments
- (e) plant and asset register
- (f) heritage register
- (g) records of leases and licences granted or in force
- (h) insurance policies and certificates.
- (i) details of fire prevention and other occupational health and safety measures in place
- (j) such other records as may be necessary to prepare a report in accordance with clause 32.

299. In addition, if a Council is the reserve trust manager, it is required to keep such records as the Council is required to keep under the LG Act in a manner that will permit dissection of those records of the reserve separate from any other activity of the Council, and records of any decisions of the Council or any committee of the Council made in its capacity as a reserve trust manager.

300. Balranald Caravan Park is situated on Crown Land and is part of reserve number R68009 which was first Gazetted in 1938 as a Crown Reserve for rest and public recreation<sup>2</sup>. It has operated as a caravan park since the 1950s. The Council was appointed as the Balranald Caravan Park Reserve Trust in March 2008.

301. In October 2012 the Council advertised for expressions of interest to lease the Caravan Park. The report of the Balranald Shire Council Caravan Park Committee of 12 November 2012 records

BUSINESS:

1. Interview of new Caravan Park Lessee

In accordance with Council's delegation to the Committee to interview and appoint new lessees, three interviews were scheduled. One of the applicants withdrew prior to the meeting.

11.12.3322 RESOLVED

On the motion of Cr Mannix and Campbell that the lease of the Caravan Park be awarded to Mat and Dee Jess of Balranald. CARRIED UNANIMOUSLY

302. Balranald Caravan Park Trust entered a lease agreement with Mat Jess and Dee Jess ("Caravan Park Operators") on 1 December 2012. The initial lease was for a period of three years, ending on 30 November 2015. Special

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<sup>2</sup> Caravan Park lease probity audit March 2018 pg 2

condition (clause 2) of the lease provided for an option to extend the term of the lease for a further two terms, each of two years. The options were exercisable at the absolute discretion of the lessor.

303. On 24 June 2015 the Council resolved on the motion of Crs O'Halloran and Mannix that the Council enter into a further two year lease with the current lessee of the Balranald Caravan Park in accordance with the current lease conditions, with a commencement date of 1 December 2015.
304. On 26 May 2017, the minutes of the Caravan Park Committee of the Council recorded that the then current lease of the Caravan Park would expire on 30 November 2017, that the option to extend the lease on its current terms and conditions for a further 2 years was at the discretion of the Council and that if the Council wished to exercise that option it would need to inform the current lessee four months prior to the expiration of the lease.
305. At the ordinary Council meeting of 28 June 2017 Council considered a confidential report entitled "Caravan Park Future Direction". The report recorded:
- "At the Caravan Park Committee Meeting held on 26 May the committee resolved to seek external advice on options for the future leasing of the Caravan Park and how Council may maximise revenue streams while also minimising risks associated with any change in lease arrangements, for advice to the July meeting of Council."
306. The report also reported that Matt Williams of Sustainable Park Solutions (SPS) had been appointed to review the Caravan Park Facility and its financial position and he provided Councillors with verbal advice on a number of options available for the Caravan Park on 15 June 2017.
307. The report recorded that the current lease for the caravan park expire on 30 November 2017 with a two year option for extension should the Council so wish. The Council resolved:
- "That Council:
1. Appoint Sustainable Park Solutions to prepare a Master Plan and Business Plan for the Balranald Caravan Park.
  2. Advise the current lessees that Council will not exercise the lease extension option with the lease expiring on 30 November 2017."
308. On 7 July 2017 the Council wrote to the Caravan Park Operators and informed them of the Council resolution but not the reasons for it. The letter stated that the Caravan Park Operators would be advised of the process the Council would undertake to enter a new lease but said no more.
309. On 31 July 2017 the Caravan Park Operators wrote to the Council indicating that they wish to enter a second further term of the lease and asked why the

Council has decided against allowing that option. There is no evidence of any response to that letter by the Council.

310. In August 2017 the Council received a comprehensive report from SPS which reviewed the operations of and provided a redevelopment strategy for the Caravan Park. The report included a 30 year business plan and recommended the development of a 25 year commercial lease for the park. The report recommended significant capital works to improve and add to the accommodation facilities, update amenities and provide additional guest facilities.
311. On 15 August 2017 the Council resolved:
- "That Council:
1. Adopt the master plan and business plan for the Balranald Caravan Park.
  2. Publicly invite Expressions of Interest for proposals regarding the operation and management of the Balranald Caravan Park."
312. A rescission motion was lodged in relation to that resolution and at the ordinary meeting of the Council on 19 September 2017 the Council resolved to rescind the resolution regarding the Caravan Park of 15 August 2017. The Council also resolved that a review of the caravan park lease be conducted within 12 months and that a tender based on the caravan park contract be put out for expressions of interest based on a two year contract.
313. At an extraordinary meeting of Council on 21 September 2017 the Council resolved:
1. A tender process regarding the caravan park is released on Friday, 29 September 2017 for a period of 14 working days.
  2. At the closure of the tender process within three working days, applications presented to Council for deliberation at special extraordinary Council meeting to be held at Balranald Council Chambers on Wednesday, 18 October 2017 at 2:00pm.
314. The Council advertised for expressions of interest and six were received. A report detailing the selection criteria and evaluation each of the expressions of interest was prepared. A short list of four applicants was compiled. The evaluation committee then ranked the short list. The evaluation committee considered submissions of perceived conflict of interest amongst applicants but determined that no conflict of interest existed. The report recommended that the Council invite select tenders from the four highest scoring bidders. The report recorded that legal advice had been sought on whether the Council could directly appoint from the Expression of Interest process and that the legal advice indicated that the Council should proceed in accordance with the requirements of cl 168 *Local Government (General) Regulation 2005* (LG Regulation) which requires, following invitations for

Expressions of Interest, that selected applicants be invited to tender or that the Council could decline to invite tenders from any applicants.

315. In the extraordinary meeting of the Council on 20 October 2017, the Director of Infrastructure and Development provided a report on the expressions of interest for the Balranald Caravan Park. The Report described the selection criteria and listed the top four applicants following the evaluation of the expressions of interest in accordance with those criteria.
316. Legal advice had been sought about whether the Council could appoint a lessee directly from the expression of interest process. The report stated "The legal advice received indicated that Council should be proceeding as per the requirements of s 168 of the Local Government Regulation 2000."
317. Clause 168 LG Regulation requires a Council, after considering expressions of interest, to send invitations to all applicants or such of those applicants as Council thinks would be able to fulfil the requirements of the proposed Contract, to tender for the Contract, or to decline to invite tenders.
318. The report recommended:
  1. That Council commence with the preparation of detailed tender documents for the purposes of calling a select tender process;
  2. That Council invites the three or four high scored bidders to participate in a select tender process.
319. In spite of the legal advice recorded in the report, the Council resolved, on the motion of Crs O'Halloran and Mannix, that the Council receive the expressions of interest and that it appoint Matt and Dee Jess under the current contract conditions for a two year period. The minutes recorded that Crs Mannix, Ugarte, Jolliffe and O'Halloran voted in favour of the motion.
320. The OLG was sufficiently concerned with the Council's behaviour that its Acting Chief Executive wrote on 3 and 6 November 2017 to the Council about its decision which was contrary to legal advice and to remind the Council of its obligations to act in the best interests of the wider community and to ensure that its dealings were open, transparent and accountable and that they promoted fairness in competition to ensure a best value outcome.
321. At an extraordinary Council meeting on 10 November 2017 the Council resolved to rescind its decision of 20 October 2017 to appoint the current lessees under the current contract conditions for a two year period. Council also resolved to:
  1. Proceed with a select tender and prepare tender documents to invite tenders from Matt and Dee Jess, Nigel and Wyneta Dalton and PRO Management.
  2. Extend the current lessees contract for management of the Caravan Park on a month by month basis for a period of up to six months, pending completion of the tender process.

322. The tender was ultimately awarded to the Caravan Park Operators however a dispute arose as to the terms of the lease in May 2018 (see paragraph 161).
323. Mr Kitzelmann commenced as General Manager on 12 March 2018. By 21 March 2018 he had appointed a probity advisor to examine matters relating to Balranald Caravan Park.
324. On 25 March 2018 Keith Coates, internal auditor published a probity audit relating to the caravan park lease. That audit made five recommendations, three of which were of high priority and two of moderate priority. The high priority recommendations were:
- in relation to Council's failure to respond to the letter of 31 July 2017 from the Caravan Park Operators requesting an extension of the lease, that Council respond in a timely manner to all correspondence;
  - in relation to a failure to advertise for the minimum of 14 days, that Council should comply with the regulatory requirements; and
  - in relation to the exclusion of the number one ranked applicant, Sustainable Park Holdings from the Expression of Interest process, that there was no apparent "conflict of interest" and that Council should provide and record reasons for decisions such as the exclusion of such an applicant.
325. On 31 August 2018 Mr Coates published a review of the Balranald Caravan Park Trust. The executive summary of that report stated:
- 1.1 It is my view that Balranald Shire Council has failed in its statutory and regulatory duties as the Trust Manager of the Balranald Caravan Park Trust.
- 1.2 This report will clearly demonstrate that Council has:
- failed to properly manage the net proceeds from the Balranald Caravan Park Lease agreement
  - failed to collect proceeds that are due under the terms of the Lease agreement
  - failed to apply proceeds, received under the terms of the Lease, towards the Trust
  - amended the Lease to the detriment to the Trust and its ratepayers and has not had Ministerial consent to vary the Lease
  - not verified the actual income made under the terms of the Lease

- spent ratepayer money from Council's general fund instead of utilising the relevant internal restriction
  - failed to supply annual reports to the Minister in relation to the Trust
  - failed to keep adequate records pursuant to legislative and regulatory requirements.
326. That report examined material from 2012 and only in relation to the Council's obligations under the CL Act.
327. The Caravan Park lease stated that the rent payable would be 100% of the turnover and the Council would then pay a rebate of 60% of the rent to the lessees on a weekly basis. The lease required all receipts to be provided with the reconciliation statement of the turnover for each 7 day period in question. Mr Coates' report stated:
- "3.11 I am advised that despite the requirement of the Lessee keeping receipts for all bookings, and providing copies of all receipts with the reconciliation statement/invoice, receipts have never been provided by the Lessee. I am also advised that Council as Trust Manager has never requested evidence of the receipts/takings, inspected the accounting records or actually accessed the RMS System to verify the takings. Incredibly, Council staff have advised me that when they have attempted to access the RMS System (over a number of months in 2018) they have been blocked by the Lessee. Council has actually allowed the RMS System management function to be controlled totally by the lessee who is able to restrict access at any time.
- 3.12 Thus, Council as Trust Manager, relies totally on a weekly invoice without any actual proof of the income (despite the Lease expressly requiring all receipts to be provided). In fact, Council has never sought any form of evidence to verify the amount of income claimed by the Lessee by carrying out inspections or auditing the accounting records in any given financial year. Incredibly, Council pays a 60% rebate on takings based solely on the unsubstantiated claims of the Lessee who alarmingly has blocked access for any form of verification via the RMS System."
328. The Report found that the Council had been receiving the rent on the residential lease of the dwelling within the Caravan Park on a weekly basis and applying the 60% rebate to that rent, thus allowing the lessees to pay only 40% of the residential lease fee.
329. The Report found that in the financial years 2011/12 and 2012/13 the Caravan Park net proceeds were \$9,505.00 and \$39,600.00 respectively. The proceeds, however, were not transferred into the Internal Restriction Fund for the Trust but remained part of the General Fund and there was no way to determine how the monies from those two financial years were ever utilised.

330. The Report noted that there was no correlation between the annual "net proceeds" and the actual amounts transferred into the Trust's Internal Restriction Fund. The Report stated:
- "3.16 In 2013/14 the net proceeds from the Caravan Park were \$18,638.00 and yet \$50,000.00 was transferred into the Internal Restriction Fund from the General Fund. In 2014/15 the net proceeds were \$41,801.00 and \$50,000.00 was transferred into the internal restriction from the general fund. In 2015/16 the net proceeds were \$32,501.00 and \$70,000.00 was transferred into the Internal Restriction from the General Fund and in 2016/17 the net proceeds were \$7,981.00 and \$71,000.00 was transferred into the Internal Restriction from the General Fund."
331. The Report found that the Council's General Fund had been used for expenditure on the Caravan Park up to a total of \$80,400.00 in the financial years 2011/12, 2014/15 and 2016/17.
332. In total, the Trust's Internal Restriction Fund held \$90,974.00 more than it ought to have as at the date of the Report. That sum does not include the expenditure on the Caravan Park from the Council's General Fund.
333. The Report noted that the Lessee was responsible for the payment of all charges for gas, electricity, water or other services supplied to or consumed in or on the premises. Despite that provision, the Council had been paying for water charges since 2012/13. As at the date of the report, those charges totalled \$74,626.00. There was no evidence that the Council as Trust Manager had ever adopted or officially approved those changes. The only evidence was the resolution of the Balranald Caravan Park Committee on 4 March 2016 (which acknowledged that the current lease required the lessee to pay for water charges) for Council to "continue" to pay for water charges. The Council as Trust Manager did not seek Ministerial consent to vary the lease and no formal amendment was made to the Lease.
334. The Report noted that the Lease contained a provision which excluded the Lessee from responsibility for payment of all rates, taxes, charges and fees. Although that provision was in the lease which was given Ministerial consent, the report author stated:
- "3.23 The total of Rates paid by Council since 2012/13 is \$54,543.00. I am perplexed as to why Council as Trust Manager has included such a provision as the payment of rates and other outgoings by Lessees is standard practice in the vast majority of commercial Leases."
335. The Report noted the Council had failed as Trust Manager to submit an annual report to the Minister since the 2012/13 financial year. The Report also concluded that the Council as Trust Manager had failed to keep proper and accurate records of income as required by the regulation due to its acceptance of unsubstantiated claims of revenue made by the Lessee. The Council had also failed to keep an accurate and up to date plant and asset

register or any records of occupational health and safety measures, as required the CL Regulation.

336. The conclusion of the Report was:

- 6.1 For the reasons canvassed above, it is my view that Balranald Shire Council has failed in its statutory and regulatory duties as the Trust Manager of the Balranald Caravan Park Trust.
- 6.2 Council must ensure that in future it puts in place a commercially sound Lease that provides the best outcome for the Reserve Trust and its rate payers and community as opposed to merely achieving the best outcome for the Lessees of the Caravan Park.
- 6.3 Council must also ensure that adequate controls are put in place that:
  - ensure accurate income data is received by staff from the Lessee when the invoice is received (including all receipts of the takings),
  - ensure access to the RMS System for verification of receipting and income, and
  - provide for regular inspections and audits of the RMS System and all financial records surrounding the operation of the Caravan Park.

## Conclusions

337. I concur with the findings of the Probity Auditor, Mr Coates that the Council failed to comply with its obligations as Reserve Trust Manager under the CL Act for the reasons set out in his report dated 31 August 2018. That conclusion, however, is now academic because the CL Act has been replaced with the CLM Act. The CLM Act significantly alters the obligations of the Council as the manager of reserved Crown land. In essence, that land will be managed by the Council as if it were community land or operational land (the latter only with the written consent of the Minister) under the LG Act. The effect is that a Plan of Management will be required for that land and any lease must be consistent with the Plan of Management and for an accumulated term of not exceeding 30 years. The Minister's consent will no longer be required to leases of Crown land unless they have an accumulated term of more than 30 years.
338. What is of much greater concern is the Council's apparent lack of enthusiasm to ensure that the lease for the Caravan Park would maximise the financial return to Council while minimising risk and enabling the improvement of the facilities. The whole debate conducted in the public arena was characterised by vitriol against Councillors and staff who attempted to ensure that a new lease of the Caravan Park achieved those aims.

339. While the operators of the Caravan Park have agreed to vacate the premises many hard decisions lie ahead for the Council. The Council's past conduct in relation to the Caravan Park gives me no confidence that it is up to the task.

## **Term of Reference 6: Other Matters**

340. Although the submissions and evidence to the Inquiry canvassed many matters which have not been addressed in this report, I do not consider that any are sufficiently connected to the effective administration of the Council's functions and responsibilities as to warrant separate mention.

## **Findings on the Terms of Reference**

### **Term of Reference 1: Long Term Financial Planning**

341. The focus of the Inquiry's consideration of this Term of Reference related to long term financial planning. After many years of operating on deficit budgets, with a declining infrastructure and asset base and poor financial recording practices, the Council has taken some significant steps towards improved financial stability and long term planning.
342. In particular it has implemented a SRV to increase its rate base, is continuing to develop long term financial plans and has introduced an audit committee which includes qualified professionals.
343. Those positive steps must be weighed against the division within the Council in making these decisions. For example the decision to apply for the SRV, though strongly recommended by the Council's financial advisers, was only passed in circumstances where Cr Mannix was absent from the meeting. Cr Jolliffe was absent from the chamber during the vote and Cr O'Halloran voted against the motion.
344. As observed by Mr McCormack and Mr Stewart in their evidence to the Inquiry, the Council is regularly split in its decision making, with decisions often dependant on the casting vote of the Mayor. The prospect of continued sound decision making relating to financial matters is far from assured.
345. The other elements of the Council's leadership which were referred to in Term of Reference 1 were public land management and the provision of services. The former is dealt with under Term of Reference 5 and the latter is not a matter on which I make any adverse findings.

### **Term of Reference 2: A Safe, Consultative and Supportive Working Environment**

346. I find that over many years, the Council has failed to provide a consultative and supporting working environment for its staff as required by s8A(1)(i) LG Act. While the behaviour which has led to this unsatisfactory working environment has been caused by a small minority of Councillors, it has continued over a number of years without any effective action by the Mayor or other Councillors to prevent it from occurring. I believe the behaviour is entrenched and is unlikely to change without any significant action.

### **Term of Reference 3: Mayor/Councillors Understanding Their Role**

347. My main concern regarding the conduct of the Mayor and Councillors in relation to decision making is the apparent absence of their understanding of the importance of the transparency in decision making in local government. The large number of examples of improperly closed meetings and the topics which were discussed in those closed meetings provide stark evidence of the failure of the Mayor and Councillors to understand their role. Further, it has probably assisted to generate a climate of suspicion and distrust in the community.

#### **Term of Reference 4: Community Confidence in Council**

348. At present the Council fails to command the confidence of its community. Many of the public submissions to the Inquiry were critical of the Council's handling of issues relating to the Hostel and the Caravan Park. The community concern is understandable.
349. In relation to the Hostel, this important community asset had operated at a modest profit for many years but suffered a severe financial downturn in the period 2014-2017. Fortunately the finances of the Hostel have been reversed by careful management of expenses. The reputation of the Council, however, remains tarnished by experience.
350. In relation to the Caravan Park, the reaction of the community has been vocal and damaging to the Council. The Council embarked on a course to upgrade the Caravan Park and minimise financial risk to the Council. The series of knee-jerk decisions which followed were a clear demonstration of the Council's inability to provide leadership within the community. The lack of information provided to the public about the reasons for its decisions, most of which were made in camera, exacerbated the situation.
351. Whilst the Caravan Park operators have agreed to vacate the premises, the future operation of the Caravan Park will, in all likelihood, reignite the tensions in the community and lead to further lack of leadership by the Council.

#### **Term of Reference 5: Reserve Trust Manager**

352. I find that the Council failed to comply with its obligations as Reserve Trust Manager of the Caravan Park. Due to the change in the legislative regime relating to Crown land in New South Wales, it remains to be seen whether the Council will have any greater success managing the Caravan Park under the CLM Act. The first step will be to establish a Plan of Management to guide the future of the Caravan Park. I am not confident that the Council will be able to adopt a plan without the continued controversy which has dogged its past decisions relating to the Caravan Park.

## Recommendations

Having regard to my findings, I recommend that:

1. All civic offices at Balranald Shire Council be declared vacant, effective immediately.
2. An administrator be appointed until the ordinary Council elections scheduled for 2024.
3. The administrator/s ensure the completion of the Implementation Plan approved by the Minister on 19 December 2017 in particular in relation to:
  - a reliable long term financial plan
  - ensuring the caravan park produces realistic income with minimum risk to the Council
  - continued rates review to ensure equity and income maximisation
  - the possibility of SRV for mines and solar farms
  - a developer contributions plan for all development types
  - community engagement and awareness.
4. Prior to the next ordinary Council election involving Balranald Shire Council, that an information session for prospective candidates be conducted to provide information about the obligations and burdens on future Councillors.
5. Within three months of the next ordinary Council election involving Balranald Shire Council, that mandatory training be provided to each Councillor, including training relating to the Model Code of Conduct and the Model Code of Meeting Practice.

## Abbreviations

ACCA Report	Report of Michael Symons of Anti-Corruption Consultants Australia Pty Ltd dated 18 May 2017
ACFI	Aged Care Funding Instrument
ACS	Aged & Community Services of NSW & ACT
AGM	Acting General Manager
C of C	Code of Conduct
C of MP	Code of Meeting Practice
Caravan Park Operators	Matthew Jess and Bernadine Jess (also referred to as Mat or Matt Jess and Dee Jess)
CL Act	Crown Lands Act 1989
CL Regulation	Crown Lands Regulation 2006
CLM Act	Crown Lands Management Act 2016
Council	Balranald Shire Council
Cr(s)	Councillor(s)
DCCD	Director Corporate & Community Development
DID	Director Infrastructure & Development
Discovery Centre	Balranald Shire Council Information Centre
EAP	Employee Assistance Program
EFT	Electronic funds transfer
FSR	Financial Sustainability Rating
GM	General Manager
IAB Report	Report of Michael Symons of IAB dated 16 October 2014
IP & R	Integrated Planning & Reporting
IPART	Independent Pricing and Regulatory Tribunal
IPPE	Infrastructure, property, plant and equipment
IWCM	Integrated Water Cycle Management
LG Act	Local Government Act 1993
LG Regulation	Local Government (General) Regulation 2005
LTFP	Long Term Financial Plan
Minister	Minister for Local Government
O'Connell Report	Report by Graham Evans of O'Connell Workplace Relations dated 13 August 2013

OAMP	Overarching Asset Management Plan
OLG	Office of Local Government
PIO	Performance Improvement Order
Salt Report	Report of Sarah Salt of Aged & Community Services of NSW & ACT dated 6 + 7 May 2015
SRV	Special Rate Variation
TCorp	NSW Treasury Corporation