



# **Blue Mountains City Council Public Inquiry**

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

## **Final Report**

**(Asbestos Terms of Reference)**

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

## **FINAL REPORT**

### **CONTENTS**

**Chapter 1: Asbestos Hearings, and Prior Reports: [1] to [23]**

**Chapter 2: Asbestos, The Statutory Regime, and Council Admissions: [24] to [34]**

**Chapter 3: Chronology of Key Facts: [35] to [171]**

**Chapter 4: SafeWork Investigation, Tooma Reports, EPA Investigation, and  
Ombudsman Report: [172] to [206]**

**Chapter 5: Finding on Asbestos Terms of reference**

**(a) TOR 1: [207] to [285]**

**(b) TOR 2: [286] to [299]**

**(c) TOR 5: [300] to [321]**

**(d) TOR 6: [322] to [370]**

**(e) TOR 7: [371] to [385]**

**(f) TOR 9: [386] to [394]**

**Recommendations: [395] to [398]**

**Summary of Findings: [399] to [427]**

# Chapter 1.

## Asbestos Hearings, and Prior Reports

### (a) Introduction

1. On 28 November 2017 allegations were broadcast on radio that children at the Wentworth Falls Preschool were being exposed to asbestos. They were not. There was a weathered piece of asbestos on the facade of the portico at one of the Preschool's entrances that had already been the subject of some attention by an expert company. The Blue Mountains City Council (**the Council**) was issued with a Prohibition Notice later the same day by SafeWork NSW, requiring the Pre-School to close temporarily for a number of days. On 6 December 2017, the Council was issued with an Improvement Notice by SafeWork in relation to the Pre-school. The NSW Ombudsman has since found that both of these notices were unlawfully issued<sup>1</sup>, in that the inspector who issued them did not have a "reasonable belief" that this was required, in breach of ss.191 and 195 of the Work Health & Safety Act 2011 (**WHS Act**).
2. These notices formed part of the reasons for the then Minister for Local Government issuing the Council with a letter dated 12 December 2017 indicating an intent to suspend it for a period of 3 months pursuant to s.438M of the Local Government Act 1992 (**LGA**). After receiving submissions from the Council, the then Minister decided to issue it with a Performance Improvement Order (on 22 January 2018), rather than to suspend it.
3. In February 2018, further allegations were made on a radio program that are detailed in an Interim Report for this Inquiry dated 7 May 2019. These allegations were referred to by the then Minister in a letter she sent to the Council dated 14 February 2018 in which she again gave notice of an intent to suspend the Council's Governing Body for a period of 3 months. Ultimately, following court proceedings, the Minister decided not

---

<sup>1</sup> Report to Parliament dated 21 August 2020 titled "Investigation into actions taken by SafeWork NSW Inspectors in relation to Blue Mountains City Council workplaces"

to suspend the Council. She instead established this Public Inquiry (**the Inquiry**) on 27 June 2018 under the power given to her in s.438U of the LGA.

4. There are nine Terms of Reference. In general, they required Investigation into the Council's management of asbestos, and certain employment, working environment and organisational structure issues. The conduct was inquired into by reference to the guiding principles, roles and obligations on the Council and the Governing Body set out in various provisions of the LGA referred to in the Terms of Reference. The Terms of Reference form Appendix "A" to this Final Report.
5. Public hearings for Term of Reference 4 were conducted on 8, 9 and 12 April 2019. TOR 4 involved an inquiry into the processes adopted by the Council in engaging the law firm Clyde & Co (and a partner of that firm, Mr Michael Tooma) to undertake an independent investigation into certain asbestos-related incidents involving the Council, and the processes of engaging the law firm McCullough Robertson (and a partner of that firm, Ms Scarlet Reid) to conduct an independent investigation into "employment issues" within Council. An interim report dated 7 May 2019 was provided to the Minister – by this time, the Honourable Shelley Hancock MP - and subsequently tabled in Parliament.
6. It became necessary to re-open hearings into TOR 4. This was because on 16 May 2019, shortly after the First Interim Report had been made public, assertions were broadcast on radio that the Commissioner had been "misled" by Council at the April Hearings, and a witness had lied.
7. Further public hearings were conducted into TOR 4 on 11, 17 and 26 June 2019. Those hearings clarified that the Commissioner was not misled by the Council at the previous public hearings, and the Council witness referred to had not lied under oath. A Supplementary Interim Report provided to the Minister on 31 July 2019 confirmed these matters, and all of the findings made in the First Interim Report. That report has also been tabled in Parliament. Should anyone wish to do so, both the First Interim Report and the Supplementary Interim Report can be read at [www.olg.nsw.gov.au/public-inquiries/blue-mountains-city-council-public-inquiry](http://www.olg.nsw.gov.au/public-inquiries/blue-mountains-city-council-public-inquiry), or on the website for the Parliament of NSW.

8. Terms of Reference 3, 6 and 8 relate broadly to the employment and organisational structure issues mentioned previously. Public hearings in relation to these terms of reference were held between 2 and 12 September 2019, at the Blue Mountains Cultural Centre in Katoomba. Prior to this, there had been two days of private hearings. An Interim Report dated 14 January 2020 was provided to the Minister, and has also been subsequently tabled in Parliament. That report is also available to be read at [www.olg.nsw.gov.au/public-inquiries/blue-mountains-city-council-public-inquiry](http://www.olg.nsw.gov.au/public-inquiries/blue-mountains-city-council-public-inquiry), or on the website for the Parliament of NSW.

**(b) The Asbestos Terms of Reference.**

*(i) Public hearings and written submissions*

9. It was not appropriate to inquire into all Terms of Reference at the one time. This was not only because of the different factual matters to be considered, but because other government agencies were investigating matters directly relevant to the Terms of Reference. In particular, SafeWork, the Environmental Protection Agency, and the NSW Ombudsman, were conducting inquiries into matters relating to the asbestos management Terms of Reference. Because of this, public hearings into the asbestos terms of reference (TOR 1, 2, 5, 6 (part only), 7 and 9) were not commenced until 8 March 2020. Those hearings were adjourned on the advice of the Office of Local Government as a result of the Covid-19 Pandemic. Hearings were resumed on 28 September 2020, and concluded on 9 October 2020, following which a timetable was set for the lodging of written submissions by the various interested parties. The last of the submissions were received on 24 December 2020. Prior to the conclusion of the public hearings, each of SafeWork, the EPA, and the Ombudsman, had concluded their inquiries. For SafeWork, this resulted in the Council providing it with an Enforceable Undertaking. For the EPA, it resulted in no further action being taken against the Council. For the Ombudsman, it resulted in his report to Parliament dated 21 August 2020.

*(ii) Assistance provided to Inquiry by SafeWork, EPA, OLG, and Ombudsman's report*

10. In addition to the various persons who gave evidence at the hearings, which included employees and former employees, senior staff, and members of the Governing Body,

the Commissioner was greatly assisted by statements and supporting documents provided by Mr Tony Williams (Director, Construction Services, Metropolitan) of SafeWork, and Mr Jason Bentley, the Chief Investigator for the EPA. Their evidence concerned these regulators' dealings with the Council in relation to asbestos management, and also the level of cooperation provided by Council to them. On the issue of cooperation with the Minister's Performance Improvement Order, the Inquiry was further assisted by the evidence of Ms Lyn Brown, the Manager of Investigations for the Office of Local Government. Their evidence was unchallenged, and saved a great deal of hearing time.

11. The findings made by the NSW Ombudsman (Mr Michael Barnes) in his report to Parliament dated 21 August 2020 titled "Investigation into actions taken by SafeWork NSW Inspectors in relation to Blue Mountains City Council workplaces", was also of assistance to this Inquiry in relation to six Prohibition and Improvements Notices issued to the Council that he examined. Although highly unlikely to have been entertained, no challenge was made to the Ombudsman's findings.

*(iii) Assistance from the Council*

12. During the course of the asbestos public hearings, at the request of the Commissioner, on 26 August 2020 the Council produced a document titled "*Summary of Organisational Failures Regarding the Management of Asbestos*" (**Organisational Failures Document**). The admissions made in this document were properly made, helpful to the Inquiry, and saved hearing time. They reflect the attitude taken by Council and its legal representatives to this Inquiry.
13. As found in this Final Report, certain conduct (and omission) by the Council in respect to the management of asbestos, in the period 1 January 2013 to November 2017, warrants criticism. Following the commencement of the WHS Act, the Council was slow to develop asbestos management plans, or adequate plans, and asbestos registers for all of its workplaces. It found itself, for too long, non-compliant with the WHS Act and Regulations. There were other failings. As noted also in this report, that situation has been remedied since late 2017.

14. Leaving to one side the asbestos terms of reference – but not for a moment discounting their importance – it is clear from the findings in prior interim reports that many things broadcast on radio concerning the Council in the period late 2017 through early 2018, and then again following the publication of the First Interim Report, were factually inaccurate. These included assertions made about members of the Council’s staff (including senior staff) and even of some members of its Governing Body. The phrase “factually inaccurate” is probably too coy. What was publicly said that prompted some of the terms of reference was utter tripe. From the evidence given to this Inquiry it is accepted that the many false assertions broadcast in the period late 2017 to February 2018 caused a great deal of distress to some employees of the Council, and had a widespread negative impact on the organisation as a whole. This may be an understatement. Similar distress was caused at least to some members of the Governing Body. It was shared by persons of different political affiliation. It is accepted that these untrue allegations had a lasting, negative effect on people within the Council that was ongoing during all of the public hearings.
15. Further, prior to this Inquiry being established, the employees and senior staff of the Council participated in two independent inquiries – one conducted by Mr M Tooma of Clyde & Co lawyers in relation to asbestos matters, and one by Ms S Reid of McCullough Robertson Lawyers. Before and after this Inquiry was established, the Council was actively engaged in investigations by SafeWork (as well as working with SafeWork to further develop its asbestos management procedures), the EPA, and with the Ombudsman’s investigation. Then there is this Inquiry which included more than 30 days of public hearings, and required the extensive commitment of some of the most senior Council staff, and the production of what amounts to tens of thousands of pages of documents.
16. Despite the above, the Council and its legal representatives at all times cooperated with the Inquiry in a helpful, mature, and non-defensive fashion.

*(iv) Some general observations about this report*

17. Given that these submissions are made in the context of a Public Inquiry involving issues which, rightly, are of concern to many associated with the Council and the wider community, it is necessary to clarify some matters at the outset. Not every document

(which amount to tens of thousands of pages) tendered at the hearing, nor every bit of oral evidence given, is referred to in this Final Report. All relevant evidence has however been considered for making key findings. It has not been necessary however to make a finding about every incident, event or action covered in the evidence in order to properly answer the terms of reference.

18. Further, it would not have been a proper function of this Inquiry to perform the role of other regulatory agencies such as SafeWork, the EPA, or the Ombudsman. Rather, an Inquiry like this is in general entitled to and should rely on the expertise within these agencies, any findings they have made in their own investigations, and the opinions that senior people within those organisations hold. There might sometimes be exceptions to this, but not for this Inquiry. Re-performing the work of SafeWork, the EPA or the Ombudsman was not a task set by the terms of reference, nor was it the task of this Inquiry to in some way critically review their work, and far less to interfere.
  
19. A submission was made by Cr Brown (who was given leave to be represented at the Public Hearings) that the Inquiry should undertake an investigation of each “*allegation of asbestos exposure and mismanagement*” since 2012.<sup>2</sup> Cr Brown submitted that further funds should be sought from the Minister/Office of Local Government to facilitate this. Cr Brown’s submission is entirely well intended, but that is not a reasonable construction of the scope of the terms of reference. Even if it were open to this Inquiry to do so, the terms must be construed to give effect to the intent of the Minister in establishing the Inquiry. That intent is to be discerned from the language used in the terms. There is nothing in the way they are drafted that suggests that the Minister contemplated that such an investigation would be undertaken. The notation in the TORs that the Inquiry is limited to the “*carrying out of provisions of the LG Act*” makes plain that the role of this Inquiry is not to undertake a function reserved for regulatory agencies. Further, to undertake the investigation suggested by Cr Brown would consume an immeasurable amount of time, and significant public resources. The evidence of Mr Williams from SafeWork (which is accepted) is that the Council is now at least well on the way to being an “exemplar” in asbestos management by a council. In light of that, there would have been limited public utility in this Inquiry investigating

---

<sup>2</sup> See Letter from Stringybark Legal dated 11 September 2020.



every matter of fact, dispute, or disagreement about historical matters concerning asbestos management.

20. With the exception of Terms of Reference 3 and 4, which she says are primarily investigative, Cr Brown has submitted that *“equal focus of the inquiry should be an advisory one focusing on the conduct of the Council and the governing body with regard to asbestos management issues”*: Brown submissions in chief at [8]. This again is a well-intentioned submission from Cr Brown, but the Terms of Reference are not drafted in a manner that indicates that advice is sought concerning asbestos management. The terms are directed instead to investigating whether this Council, in relation to its handling of asbestos, has acted in accordance with relevant provisions of the LGA referred to in them. It is principally a fact-finding inquiry which then requires an expression of opinion as to whether, based on those facts, the Council and its Governing Body have complied with relevant obligations set out in the LGA. This Inquiry was not funded or resourced, nor was it the intention of it based on its Terms of Reference, to provide wide-ranging advice on how Councils should best manage asbestos. That would have required an inquiry funded so as to engage a range of independent experts with expertise in fields traversing the handling of asbestos, through to managerial experts relating to local government.
21. In any event, despite the implied suggestion to the contrary in Cr Brown’s submission, the issues raised in the asbestos terms of reference have been the subject of a significant amount of evidence, and thorough investigation, including in relation to the Governing Body and its decision-making processes. Findings have been made in relation to the terms of reference that required consideration of whether the Governing Body had fulfilled its functions under relevant provisions of the LGA. The Mayor (on more than one occasion), the CEO (on more than one occasion), the former General Manager (on more than one occasion) all gave oral evidence, and Mr Ryan for Cr Brown was given leave to examine them. Cr Van der Kley, Cr McGregor, Cr Schreiber and Cr Brown also gave oral evidence, as did a number of staff and senior staff of the Council. Findings were based on this evidence, as well as voluminous business records of the Council.

(v) *Counsel Assisting and OLG staff*

22. Angus Broad from the OLG acted as Officer Assisting the Inquiry. He provided unfailing industry and support to the Commissioner and the Inquiry. He was assisted from time to time by Ms Jenny Slater, and Ms Kathryn Alorati, of whom the same can be said.
  
23. Counsel Assisting the Inquiry was Mr Ross Glover – he managed more witnesses, issues and documents than anyone should ever have to, all with both great skill and good humour.

## CHAPTER 2 ASBESTOS, THE STATUTORY REGIME, and COUNCIL ADMISSIONS

### *(a) Asbestos in Australia*

24. Partly because of its resistance to high temperatures and fire, asbestos was widely used in building products in Australia until it was completely banned in 2003. The reason for that ban was that asbestos fibres cause cancer – in particular, mesothelioma, a cancer of the lining of the lung. This occurs when tiny fibres of asbestos are breathed in, becoming trapped in the lung. It is common for mesothelioma to develop and be diagnosed many years – even decades – after exposure to asbestos fibres.
25. Friable asbestos (meaning loosely bound) is more dangerous than “bonded” asbestos. Friable asbestos can contain fibres many times thinner than human hair, and can easily be breathed in by humans. In a 2010 report titled “*Responding to the Asbestos Problem*” (Ex 82, p 5), the New South Wales Ombudsman stated:

*“It is generally accepted that asbestos poses a very significant health hazard in Australia. Exposure to asbestos fibres is known to cause mesothelioma, asbestosis, and lung cancer. While asbestos is relatively safe in a bonded form, asbestos poses a risk to health by inhalation whenever asbestos fibres become airborne and people are exposed to these fibres. Non-friable asbestos containing materials that has been subjected to extensive weathering or deterioration also has a higher potential to release asbestos fibres into the air.”*

26. This does not mean that everyone who inhales an asbestos fibre will develop mesothelioma. In his August 2020 report to the NSW Parliament titled “*Investigation into actions taken by SafeWork NSW Inspectors in relation to Blue Mountains City Council workplaces*”, the Ombudsman stated that (Ex 131, p 82):

*“In NSW, the belief that ‘one fibre kills’ has been solidified in the collective consciousness through negligence verdicts against James Hardie and the Jackson inquiry. From the 1990s, popular culture has reinforced the knowledge of the harmful effects of asbestos.*

*What is less well known in the community, is that the ‘ambient or background air usually contains between 10 and 200 asbestos fibres in every 1000 litres.’ Most people will breathe in asbestos fibres while*

*going about their day-to-day activities. Despite this daily exposure to small amounts of asbestos, the majority of people do not fall ill as a result.”*

27. Asbestos nevertheless remains an ongoing risk to the health of people who might be exposed to it. To illustrate the importance of the proper management of asbestos, Mr Tony Williams, Director Construction Services Metropolitan of SafeWork NSW, gave the following evidence to the Inquiry in his statement of 22 September 2020 concerning the significance of asbestos to public health and safety (Ex 116):

- “8. *In 2018, 144 people died as a result of work-related traumatic injuries in Australia. During the same period, 699 people died in Australia as a result of mesothelioma as a result of historical exposure to asbestos.*
9. *Asbestos health conditions (Asbestosis, Mesothelioma & lung cancer) only become apparent after a long latency period and Australia has one of the highest measured incidence rates of mesothelioma in the world. The average Australian with Mesothelioma is male, is diagnosed at around 75 years of age, was exposed to asbestos in both occupational and non-occupational settings and lived for around 11 months after diagnosis.*
10. *The widespread use of asbestos in the past has left a legacy of asbestos containing materials in workplaces, the built environment and land across Australia. While the use of asbestos was banned in 2003, legacy asbestos and asbestos-containing materials still pose a significant health risk if not safely managed and require the dedication of considerable resources to effectively manage.*
11. *Safe management of asbestos in workplaces is a matter of significant community concern and is a priority area for SafeWork’s regulatory activity and intervention.”*

**(b) Statutory regime**

28. Because of the health risks associated with asbestos, there is an obvious need for it to be identified where it exists, and handled with expert care. This is vital in the workplace, and the work, health and safety laws of NSW reflect this. Relevantly for this report, those are the laws legislated in the *Work Health and Safety Act 2011 (WHS Act)*, and the *Work Health and Safety Regulations 2011 (WHS Regs)*. The asbestos terms of reference relate to the period 2012 until now. The Council has admitted that from 2013

until the later part of 2017 not all of its workplaces were compliant with these laws relating to asbestos. Nor, for reasons that are explored in this report, did it have proper policies in place for the management of asbestos. This led to investigations by, and the intervention of, both SafeWork and the EPA. This state of affairs has dramatically changed since mid to late 2017, as is also detailed in this report.

29. The asbestos terms of reference cover a period commencing from 2012. The WHS Act and Regs commenced on 1 January 2012. Part 8 of the WHS Regs is directed to the subject of “*Asbestos*”. The following clauses of the WHS Regs (only parts of which are set out) are of relevance to the Inquiry:

(a) Clause 422, which in part provides:

***“422 Asbestos to be identified or assumed at workplace***

*(1) A person with management or control of a workplace must ensure, so far as is reasonably practicable, that all asbestos or ACM at the workplace is identified by a competent person.”*

(b) Clause 424, which in part provides:

***“424 Presence and location of asbestos to be indicated***

*A person with management or control of a workplace must ensure that:*

*(a) the presence and location of asbestos or ACM identified at the workplace under clause 422 is clearly indicated, and*

*(b) if it is reasonably practicable to do so, indicate the presence and location of the asbestos or ACM by a label.*

*...”*

(c) Clause 425, which in part provides:

***“425 Asbestos register***

*(1) A person with management or control of a workplace must ensure that a register (an asbestos register) is prepared and kept at the workplace.*

...

*(3) The asbestos register must:*

*(a) record any asbestos or ACM identified at the workplace under clause 422, or likely to be present at the workplace from time to time including:*

*(i) the date on which the asbestos or ACM was identified, and*

*(ii) the location, type and condition of the asbestos or ACM,..”*

(d) Clause 427, which in part provides:

***“427 Access to asbestos register***

*(1) A person with management or control of a workplace where an asbestos register is kept must ensure that the asbestos register is readily accessible...”*

(e) Clause 429, which in part provides:

***“429 Asbestos management plan***

...

*(2) A person with management or control of the workplace must ensure that a written plan (an **asbestos management plan**) for the workplace is prepared.*

.....

*(4) An asbestos management plan must include information about the following:*

*(a) the identification of asbestos or ACM,*

*register for the workplace and signage and labelling.*

...

- (b) *decisions, and reasons for decisions, about the management of asbestos at the workplace,*
- (c) *procedures for detailing incidents or emergencies involving asbestos or ACM at the workplace,*
- (d) *workers carrying out work involving asbestos.”*

**(c) Council admissions**

30. On 26 August 2020, the Council provided the Inquiry with a document titled “*Summary of organisational failures regarding the management of asbestos*” (**Organisational Failures document**) (Ex 148). This document contained the following admissions:

- (a) *“There was insufficient and ineffective management of the process of becoming compliant with the requirements of the Work Health and Safety Act 2011, including timely identification of its requirements and of obstacles to effective change.”*
- (b) *“The Council did not, in respect of its workplaces, prepare and hold at those workplaces asbestos management plans in accordance with cl. 429 of the Work Health Safety Regulation 2011 (‘the Regulation’).”*
- (c) *“The Council kept at only two of its workplaces (being the Katoomba headquarters building and the Blackheath pool complex) an asbestos register in accordance with cl. 425 of the Regulation. All remaining asbestos registers that were prepared from time to time for the Council by its consultants were held at the Katoomba headquarters building.”*
- (d) *“The Council did not adopt an asbestos policy until 21 October 2017.”*
- (e) *“The Council did not identify all of the workers whose duties warranted the provision to them of training on the identification of material that should be suspected of being or containing asbestos and on what to do when such material was encountered.”*

- (f) *“There was insufficient recognition and management of the risk to good asset management (and, consequentially, related safety matters) posed by having two different directorates responsible for the same assets, one as strategic manager (in effect, ‘owner’) and one responsible for maintenance.”*
- (g) *“There was insufficient recognition and management of the risks arising from having the staff of one directorate mainly located away from headquarters and having the General Manager and most other staff mainly located at the Katoomba headquarters building, in particular the risk that a bad, or at least divergent, organisational culture could arise in parts of the directorate that was mostly accommodated away from headquarters.”*
- (h) *“There was insufficient management of the changes, to both systems and culture, involved in discontinuing the ‘purchaser-provider’ model.”*
- (i) *“Prior to February 2018, there was insufficiently rigorous management of projects executed internally, especially when compared to the management of projects executed by the Council using external providers.”*
- (j) *“The Council’s developing governance system had, in spite of a program of improvement, deficiencies that resulted, at various times, in the Council not having:*
  - (a) *sufficient systems to ensure that the General Manager and Directors and Group Managers had assurance that they were being alerted to issues and receiving needed information;*
  - (b) *sufficient systems to identify statutory, regulatory and other externally-imposed compliance requirements, to ensure that responsibilities for them were precisely assigned, and to achieve conformity with them; and*
  - (c) *sufficient organization and coordination of the Council’s policy suite (especially prior to the establishment of the Policy Control Team in 2015).”*



31. The Council also proffered the following example of the effect of those “*organisational failures*” on work conducted by Council staff at the carpark at 283 Great Western Highway, which are set out at [185] below.
32. Some further explanation beyond the Organisational Failures document was provided by Council in submissions in chief at [61]-[65]. In those paragraphs, the Council has submitted that the allocation of the tasks to develop an asbestos policy, and to bring the Council into compliance with the work, health and safety legislation regarding asbestos management, was allocated to the Built Assets Branch of Council, which although possessing “building management skills”, did not have the governance expertise that was needed to drive this project to completion. What the Built Assets Branch lacked, through no fault of their own, was expertise in issues such as “legal compliance, safety, risk management and governance” – in other words, a council-wide approach – to ensure that statutory compliance and a high standard of approach (including the drafting of policies and procedures) was taken to the management of asbestos.
33. In her submissions to the Inquiry, Cr Brown has offered some criticism of the Council as to the timing of its provision of the Organisational Failures document: Cr Brown submissions in chief at [5](ii) and [79]-[87]. The submission is made that it was “not acceptable” that the Council failed to provide the Organisational Failures document to the Inquiry until 26 August 2020, and that it had apparently sought to “defend its reputation” by not making admissions “until a late stage of the Inquiry”, evidencing, in Cr Brown’s view, that the Council has not cooperated with the Inquiry.
34. The Organisational Failures document was provided approximately a month before the recommencement of the public hearings relating to the asbestos management Terms of Reference. While it is always open to a party in an inquiry to admit failings at a very early stage, Council was in the later part of 2019 engaged with SafeWork on the Enforceable Undertaking ultimately agreed to in December 2019, and it was not until 20 August 2020 that the Ombudsman’s investigation drew to an end with publication of his report. Further, a document of the kind provided by Council on 26 August 2020 was not requested by the Commissioner until during the March 2020 hearings. The Organisation Failures document was provided a month before the hearings resumed

after the interruption caused by the Covid-19 pandemic. It was received before evidence was given by some senior managers, senior staff of the Council such as the CEO, and members of the Governing Body, including the Mayor and Deputy Mayor. The Organisational Failures document did not result in less witnesses being called, it simply provided a focus for Counsel Assisting in some of his questioning of witnesses, as well as providing an explanation by Council for some of its admitted failures, and hence assistance in drafting this report. That is not properly described as conduct that is “not acceptable”. The provision of this document was welcome, and useful, and no criticism is made of when it was provided to the Inquiry.

## CHAPTER 3 – CHRONOLOGY OF KEY FACTS

35. As many of the same facts are relevant to several of the asbestos terms of reference, this chapter records a chronological set of factual findings (most, but not all, uncontested). These findings form the core matters that are central to the findings in relation to each asbestos term of reference.

### July 2000

#### *Safety Management Procedure - Asbestos*

36. Prior to the enactment of the WH&S Act and Regulations in 2011, and the requirements in those laws to prepare and maintain asbestos plans and registers at workplaces, the Council had an excel spreadsheet that was akin to an organisation wide asbestos register. Mr Trevor Anderson, who worked for the Council from 1998 to 2019 (and who finished in the position of Program Leader, Safety & Risk), gave evidence that there was an asbestos register not long after he commenced with Council, in about 1999-2000. He described it as “rudimentary”, a view echoed by Mr Trevor Keys (still a health a safety advisor to Council), who said it was “pretty ordinary”, but did nevertheless identify buildings with asbestos, and where that asbestos was: T1544.9-16 (19/3/20). This spreadsheet was maintained in the “property section” of the Council. There was some evidence that it was deleted from the Council’s records, and “disappeared”, but this seems unlikely - an asbestos register was viewed by Willis for the purposes of its engagement referred to in [38] below.

37. The existence of the asbestos register referred to by both Mr Anderson and Mr Keys is consistent with the “*Safety Program Procedure - Asbestos*” (Ex 82, p 1), which was in place as of July 2000. The “*Aim*” of that procedure was to “*prevent asbestos related disease in the workplace*”, and it made express reference to the preparation of an asbestos register on “each site” designed to:

*“...indicate the location, type of material and the condition of the material. It should include asbestos cement sheeting even where this is in good condition and does not require removal.”*

## 2012

### *Willis Gap Analysis 2012*

38. In early 2012, the Council engaged Willis Australia Limited to perform a “gap” analysis of their Occupational Health and Safety practices against the new WH&S Act. Willis conducted a two-day audit, and prepared a report dated April 2012 titled “*Work Health & Safety Harmonisation Gap Analysis*” (*Willis Gap Analysis*): Ex 82, p 38.
39. The Willis Gap Analysis identified a number of “*high risks*” facing the Council, including “*management of asbestos*”, and “*asbestos management*”: Ex 82, p 41. They recommended the Council do the following:
- conduct “*an asbestos survey ... on all buildings which have been constructed before 2000*”;
  - prepare and maintain an asbestos register; and
  - develop an asbestos management plan
40. In their submissions in chief, the Council places some reliance on the fact that the Willis Gap Analysis did not advise the Council to have asbestos management plans and asbestos registers for all of its various workplaces. This matter is discussed further in relation to TOR 1.
41. Seemingly flowing from the recommendations made by Willis, on 24 September 2012, Mr Corbett (then Director, City & Community Outcomes) created a task described as “*Asbestos Register Update*”, and allocated it to Mr Alan Cattermole (the then Manager, Built Assets, who worked at the Council from 2000 to 2014). Mr Corbett’s instructions were that:
- “...[g]iven the prominence of the asbestos register and associated actions in the *Workplace Health Safety Gap Analysis*, I would appreciate an update report on the status of this register and the actions in place to address risk management gaps”: Ex 82, p 193B.

### *NSW Model Asbestos Policy*

42. In November 2012, the then Division of Local Government published a Model Asbestos Policy for NSW Councils (*Model Asbestos Policy*). It contained advice on the management of asbestos, and made clear that councils had to:
- have asbestos identified in workplaces by competent persons;
  - prepare and maintain asbestos registers at workplaces; and
  - prepare an asbestos management plan for workplaces.
43. At about the same time, the Local Government Association of NSW published a document titled “*Developing your council’s asbestos policy: A guide to the Model Asbestos Policy for NSW Councils*”: Ex 82, p 167. This guide contained instructions to councils about the preparation and maintenance of an asbestos register at workplaces built before 31 December 2003, and for the preparation of an Asbestos Management Plan: Ex 82 p 185.

### *Responsibility for Asbestos Policy given to Built Assets Branch*

44. On 26 November 2012, the Department of Premier and Cabinet sent councils a “*Circular*” concerning the Model Asbestos Policy: Ex 82, p 166. Mr Cattermole forwarded it to Mr Corbett, Mr George Thompson and Mr Kitching (the latter two forming part of the Council’s “Built Assets” team) observing “[s]omewhat timely state reform in this regard – we will build this into our response”: Ex 82, p 193B.<sup>3</sup>
45. On 28 November 2012, the adoption of an Asbestos Policy was discussed at the Executive Team meeting: Ex 82, 193A. The drafting of the policy was allocated to Mr Corbett, Mr Drew (then, Director, City Services) and Mr Morgan (then Director, Development, Health & Customer Services). Mr Cattermole asked Mr Thompson to review the Model Asbestos Policy and ascertain whether there was a capability within the Built Assets team to action its development: T 1136.12-28. Mr Thompson’s evidence was that he sought to convey to Mr Cattermole that the Built Assets team did

---

<sup>3</sup> Email from Mr Cattermole to Messrs Corbett, Thompson and Kitching, 26 November 2012 at 11.46 am.

not have the capability – that is, neither the capacity nor the expertise - to do this: T 1137.2-25 (11.3.20). Mr Cattermole had no recollection of this, but said at the public hearings that he would have found people with the appropriate expertise had this view been made known to him: T 985.14-42 (02.10.20).

46. In early December 2012, Mr Thompson sought “*an asbestos register quote*” from Noel Arnold & Associates: Ex 82, p 195. Mr Thompson said this was done because the Built Assets team did not have the capacity to complete those tasks, which to some degree supports the view that he did raise this with others at Council: T 1137.38-1138.18 (11.3.20). A proposal from Noel Arnold was received on 13 December 2012, but no engagement followed.
47. Mr Corbett was aware of the proposal to engage consultants like Noel Arnold, as on 7 December 2012 he emailed Mr Cattermole on the “*Asbestos Register Update*” task, stating (Ex 82, p 193B):

*“What is the status on the Asbestos Register below and adaptation of the model asbestos policy... referred to Built Assets ...*

*I last recall that you were seeking an external specialist to audit unchecked buildings as a first step to update the Asbestos Register.*

*In relation to the Policy we should aim to submit to Council in the new year along with Register update.”*

48. On 10 December 2012, Mr Cattermole forwarded that email to Mr Thompson and Mr Kane-White (the Council’s Facilities Manager and Officer) stating: “*note the timing I am proposing, if you can do quicker, then good!*”

## **2013**

49. On 13 February 2013, Mr Corbett submitted a memorandum to the Council’s Governance and Risk Steering Group on the subject of “*Asbestos Management at Blue Mountains City Council*”: Ex 82, p 224. That memorandum set out a “*series of actions required for the successful implementation of the Model Asbestos Policy for NSW Councils*”, those being (Ex 82, p 225):

- “1. *Exhibition and Adoption of new Draft Asbestos Policy- scheduled for April 2013 to proceed to adoption for exhibition. Currently in production.*
2. *The draft Asbestos Policy will be submitted to Council via the Governance and Risk Committee;*
3. *Draft the Asbestos Management Plan - April - August 2013, then submit to Governance and Risk Committee*
4. *Desktop review existing Asbestos Register and amend to be compliant with new Policy- Complete by end of April 2013. Currently under review;*  
  
*Detail site audit for buildings - May 2013 - April 2014 Unresourced at this time. \$80,000 Funding identified for 2013-14.*
5. *Implement outcomes of audit 2013-15, as per available budget.*  
  
*A review of budget priorities for remaining 2012-13 is proposed to progress potentially high-risk sites this financial year.”*

50. On 16 February 2013, Mr Kitching and Mr Thompson received a fee proposal from Airsafe to “*complete an asbestos audit and register for forty...selected Blue Mountains City Council assets...to comply with Work Health and Safety requirements*” (Ex 82, p 226), although nothing was immediately done to engage Airsafe. Responsibility for development of the Council’s asbestos policy continued to reside in the Built Assets team, and Mr Thompson’s evidence was that he kept Mr Cattermole updated as to the progress of its development. Little progress was made, and Mr Thompson explained this was due to a lack of capacity: T 1140.8-24 (11.3.20). It was simultaneously, but incongruously, a “*priority focus*”, but “*pushed to the ... side by other things*”: T 1141.30-1142.5 (11.3.20). After Airsafe were retained they undertook a survey of 34 Council buildings, and produced a single Asbestos Management Plan and Asbestos Register to cover all of them: Ex 82, pp.464-600.

*Asbestos Management Team and the “7 step plan”*

51. On 23 August 2013, a memorandum was prepared for the Council’s Executive Management Team headed “*Asbestos Management Team*”: Ex 82, p 248. It contained the following passage (Ex 82, pp 248-249):

*“Following the release of the MAP a review showed that council departments have independently made every endeavour to identify and manage the risk of Asbestos exposure. However, these systems/procedures, documents are not managed by an overarching plan and fall short of best practice.*

*See examples listed below of independent processes that exist within BMCC:*

- *Too Much Rubbish For Your Big Bin*
- *Building Services Tradesman Manual*
- *Extra Bulky Household Item Collection (form)*
- *Booked Kerbside Cleanup Service (form)*
- *Building Services Environmental Management Procedure*
- *Recycling Incoming Materials Process Flowchart*
- *Procedure For Disposal Of Asbestos At The Waste Disposal Depots*
- *Waste Management Facilities Fees And Charges*
- *Stockpile Inspection Procedure*
- *Recycling - Contact Centre Procedure*
- *Recycling & Transport Services Disposal Rates*
- *Contact Centre Procedure - Asbestos Handling*
- *Waste Collection - Asbestos In Garbage Bin*
- *Asbestos and Fire Damaged Building - Guidance Note*
- *Work Method Statement (Part 1) - Asbestos*
- *Contact Centre Procedure - Asbestos Removal*
- *Safe Work Procedures for Open Spaces & Recreational Team in Asbestos Areas*

*In an ad hoc way, the forms and procedures in these documents do manage risk to Trades, Waste Management, Cleaners, Contractors and residents. The review process coupled with the introduction of MAP will allow council to streamline the process, identify and address any gaps and further reduce any risk of exposure to Asbestos for staff and residents.” (emphasis added)*

52. Mr Grant McKay (Manager, Governance and Risk from mid-2014), accepted in his evidence that to say – as the above memorandum did – that the Council had made “every endeavour to identify and manage the risk of Asbestos exposure” was wrong. It was misguided, or an exaggeration. Further, Mr McKay said that the policies and procedures did not adequately manage the risk to “trades, waste management, cleaners, contractors and residents”. Those policies and procedures (such as they were) fell short of best practice and did not adequately manage the risk posed by asbestos: T 818-820 (30.9.20). Nevertheless, the view about “every endeavour” does not appear to be one that was not genuinely held. It was the wrong, but the honestly held belief.



53. The memorandum also set out a “7 step plan” relating to asbestos management, which was as follows (Ex 82, p 249):

***“Step One - Engage selected Contractor to carryout audit***

*“Airsafe” is the selected preferred company which specialises air quality, they will provide the Council at end of the process with an updated Asbestos register*

***Step Two - Contractor to carryout audit to selected buildings***

*Airsafe will carry out an inspection to 42 buildings those known/suspected to contain asbestos this will form the first part of their audit program; this is due to be completed at the end of September 2013.*

***Step Three - Contractor to provide a condition report***

*Airsafe will provide a report on their findings of the asbestos audit, this task will be completed Mid October 2013*

***Step Four - Planning & Implementation meeting with City Services***  
*Meeting to be arranged between Built Assets and City Services, to develop and implement a plan of works resulting from the audit process.*

***Step Five - Second round audits***

*Identify and prioritise the remainder of the buildings in preparation for a second round of audits; due for completion prior to end of current site audits. September 2013.*

***Step Six - Updated policy to be provided to Council***

*Updated Asbestos Policy to be provided to Council by; “Noel Arnold”, due for completion mid-August 2013. Presented to Council for adoption process September 2013.*

***Step Seven - Model Asbestos Policy for NSW Councils***

*In consultation with the NSW Department of Premier & Cabinet staff, there is a desire for the NSW Government to see all Councils adopt their Draft Asbestos plan, to ensure continuity across all NSW Councils, to this end three of Council staff have enrolled in the Asbestos policy training program due to commence in October 2013, this will ensure that the draft plan will be completed, ready to be tabled end of November 2013.*

*Presented to Council for adoption process December 2013.”*

54. In September 2013, Noel Arnold & Associates supplied Mr Thompson with a form of Asbestos Policy for the Council: Ex 127. That policy did not take the form of the Model Asbestos Policy, but contemplated the existence of an “asbestos/hazardous materials

*register and AMP for council facilities” and made express reference to Pt 8.3 of the WHS Regs, including cll 422 (identification of asbestos by competent persons), 425 (preparation and maintenance of an asbestos register), 429 (preparation and maintenance of an asbestos management plan), 435 (duty to provide health monitoring to certain workers), and 445 (duty to train relevant workers in identification and safe handling of asbestos). In its submissions, the Council is critical of the advice it says it was given for the creation of a singular asbestos management plan and asbestos register: Council’s submissions in chief at [26]. During this time, Mr Kitching and Mr Thompson worked on the preparation of a Draft Asbestos Policy based on the Model Asbestos Policy: Ex 82, p 308. Associated with that work, they attended a training workshop: Ex 89.*

55. On 28 November 2013, following his attendance at the workshop, Mr Thompson sent an email to Mr Cattermole in which he outlined what he saw as the challenges in the preparation of an asbestos policy, and the various statutory requirements imposed on the Council by the WH&S legislation. Relevantly the email stated:

*“The workshop has raised a number of issues as to who should be imputing into the Asbestos Policy as it covers a number of departments throughout Council, whilst Tony has sent out an invitation to managers to nominate staff to attend a meeting to discuss and provide their input, I feel that given the importance of the project that the direction should come from senior management.*

*From a Built Assets perspective we have taking the lead role in moving the draft Asbestos Policy forward, however the draft policy deals with buildings rather than all of Councils assets, i.e. Storm water pipes may contain Asbestos, Council waste disposal facilities, dumping of hazard material on Council land, etc.*

*Another item is the establishment of roles and responsibilities of Council, who is responsible for what, this is not clearly understood by Council staff.*

*The other issue that needs to be addressed is the procedures for the safe handling of Asbestos in various situations, I believe that there are Safe work Method Statements which address the requirements of Work Cover, but I am not sure who reviews them and keeps them up to date.*

*A full Asbestos register needs to be put in place, at the present time it only contains buildings and falls short of containing all of Councils assets.*

*The development of an Asbestos Management Plan should address most of the issues raised, however there needs to be a coordinated approach throughout council to achieve the desired outcome.*

*Could you please advise as to what steps we should take to progress this matter.*

*We have a legal requirement under Work Health and Safety Regulation 2011 under the following section.*

**Part 8.3 Management of asbestos and associated risks**

421 Application of part a3

422 Asbestos to be identified or assumed at workplace

423 Analysis of sample

424 Presence and location of asbestos to be Indicated

425 Asbestos register

426 Review of asbestos register 427 Access to asbestos register

428 Transfer of asbestos register by person relinquishing management or control

429 Asbestos management plan

430 Review of asbestos management plan”

**2014**

56. On 7 November 2013, Airsafe was engaged to inspect 34 council assets in order to identify all asbestos containing material in those workplaces: Ex 82, p 464 at 474. The results of that inspection were contained in a report from Airsafe dated 10 April 2014 headed “*Asbestos Register*”: Ex 82, p 465.
57. During early July 2014, the Built Assets Team formulated a set of criteria for the selection of buildings to be included in the “second round asbestos audits”: Ex 82, p 1032A.

58. On 30 September 2014, approval was sought and given for Council to engage Airsafe to carry out the “*Stage 2 Asbestos Audits*”: Ex 82, p 661. The proposed engagement of Airsafe proceeded on 13 October 2014: Ex 82, p 676.
59. On 19 December 2014, Airsafe provided its “*Asbestos Register...Round 2*” detailing its inspection of 73 “*council assets*”: Ex 82, p 664.

## 2015

60. In about February 2015, Mr Nicholls assumed the role of Director, City and Community Outcomes. By then Mr Corbett, Mr Cattermole and Mr Thompson had left the Council (T 1134.9-21 (11.3.20); T 1444.36-37 (18.3.20); T 974.17-21 (02.10.20)) and the City & Community Outcomes directorate was not “*actively working on an asbestos policy*”: T 1216.28-32, 1216.46-1217.1 (12.3.20).

### *2015 Willis Report*

61. While these relatively senior people left, Mr McKay had joined the Council in July 2014 in the position of Manager, Governance and Risk. His evidence was that he soon identified a number of areas requiring improvement, including the process for developing policy as it related to safety matters, which he considered to be “*inadequate*”: T 801.9-802.21 (30.9.20). Mr McKay formed the view that the Council “*didn’t have the best control over its safety practice*” and that “*safety needed to be reformed...[and] needed to be improved*”: T 803.5-24 (30.9.20). Partly as a result of this, in July 2015 the Council engaged Willis to conduct a review of the Council’s Safety Management System: Ex 82, p 1001 at 1004.
62. On 18 August 2015, approval was sought and given for the Council to engage Airsafe to carry out “*stage three asbestos audits*”: Ex 82, p 1000.
63. In October 2015, Willis issued a report titled “*Safety Management System Review*” (***2015 Willis Report***): Ex 82 p 1001. One witness somewhat graphically described this report as a “hatchet job”. To the extent this implied that the 2015 Willis Report was deliberately commissioned to undermine the current state of affairs of safety management within the Council, that statement was not made good by the other evidence. The 2015 Willis Report identified a number of “*control weaknesses in the*

*current safety management system” including “WHS policies which do not align with the Work Health & Safety Act 2011”:* Ex 82, pp 1004-1005. One of those control weaknesses was a lack of *“systemic means of keeping abreast of relevant legislative change, changes to approved Codes of Practices or other accepted technical standards. A considerable amount of the documentation presented during the review reflected obsolete legislative requirements.”* The 2015 Willis Report put forward 26 recommendations in order for the Council to be considered as having a fully functional safety management system. The Council offered some criticism of this report in that while it advised it that its work health and safety policies did not align with the WH&S Act 2011, it did not expressly advise the Council that it was not compliant with clauses 425 and 429 of the WHS Regulations relating to the preparation and maintenance of asbestos management plans, and asbestos registers, for all workplaces.

64. The 2015 Willis Report was the catalyst for what became the *“Safety Improvement Project”* (T 820.44-47 (30.9.20)), an initiative that was dealt with extensively in the Interim Report relating to Terms of Reference 3, 6 and 8 dated 14 January 2020 (from [91] onwards).

*SafeWork improvement notices – Blaxland Waste Management Facility*

65. Also in October 2015, SafeWork issued six improvement notices in relation to the Council’s Blaxland Waste Management Facility: Ex 120, pp 3-14; Ex 116, [28]. The basis of those notices included that the inspector believed that the Asbestos Management Plan for that facility was not *“comprehensive and did not cover unexpected finds”*: Ex 116, [28]. Council was required to take a number of steps, including revising the Asbestos Management Plan for that facility. Those notices were complied with to SafeWork’s satisfaction: T 664.14-21 (29.9.20).
66. On 6 November 2015, Mr Gary Johnston (then Asset Auditor, Business & Asset Services) sent an email to Ms Rebecca Rafter (Program Leader, Business and Asset Services) referring to the Asbestos Register rounds 1 and 2 (being the Airsafe reports), and seeking her approval to *“draft a plan to start to manage the risks using the Asbestos registers as a guide for the priority actions points and control measures”*: Ex 82, p 1040.

67. On 25 November 2015, Airsafe issued its report headed “*Asbestos Register...Stage 3*”: Ex 82, p 1041.
68. In November 2015, an updated version of the Model Asbestos Policy was released by the Office of Local Government (Ex 82, p 1303), and in February 2016 Local Government NSW issued a further version of its guide “*Developing your council’s asbestos policy*” (Ex 82, p 1375).

## 2016

### *Safety Improvement Project begins*

69. The purpose of the Safety Improvement Project was to respond to the 2015 Willis Report: see, e.g., Ex 18, p 4; Ex 71, p 227; T 135.25-29, 137.37-138.8, 139.38-140.22 (3.9.19); T 336.10-41 (5.9.19). It had three phases. The objective of Phase 1 was “[T]o be compliant with the WHS Act 2011 and regulations”. Reflecting its significance, it was sponsored by the then General Manager, Mr Greenwood: T 139.19-140.22, 183.35-42 (3.9.19); T 351.15-25 (5.9.19); Ex 18, p 2.
70. In February 2016, the position of Project Lead, Safety Improvement Project was created: Ex 71, pp 1-4. One of the core responsibilities of that position was to “*lead a project to mature and further develop council’s safety management system in accordance with the findings of the Safety Management Review that occurred in September 2015*”: Ex 71, p 5-6. In April 2016, Mr Shellshear commenced in the role of Project Lead, Safety Improvement Project: Ex 71, p 17. He left that role in August 2016: T 347.11-13 (5.9.19).
71. On 26 May 2016, Ms Jasmine Cooper (Executive Officer) prepared a memorandum to the Executive Leadership Team regarding the work of the Council’s Policy Control Team (a team created in May 2015 on Mr McKay’s initiative, with the purpose of considering draft policies): Ex 82, p 1471. The Policy Control Team had been established in mid-2015 as a sub-committee of the Governance and Risk Steering Group to create a control mechanism for policy development, in order to standardise policy developed within Council, and to oversee the implementation of such policy: T 1118.35-47 (10.3.20). Its function was to assist in the development of policy by the particular area within Council responsible: T 1119.14-24 (10.3.20). The memorandum

recorded that the Policy Control Team had, over the preceding 12 months, undertaken an “*organisation wide audit of policies and their associated risks to the organisation*”.<sup>4</sup>

72. Following that audit, the current state of policy was described as being “*generally out-of-date and lacking historical oversight*”: Ex 82, p 1472. The Policy Control Team identified a number of “*policy gap areas as falling into a Priority 1 for development*”. Asbestos policy was one of those gap areas: Ex 82, pp 1477-1478). The task of developing the policy was assigned to the City & Community Outcomes directorate (Ex 82, p 1494), and it was the responsibility of that directorate, and its Director, to drive its development: T 1123.22-1124.5 (10.3.20); T 833.28-835.25 (30.9.20).
73. Despite that allocation, Mr Nicholls (the then Director, City & Community Outcomes) was of the view that City & Community Outcomes was not responsible for broader asbestos policy across the organisation. His view was that responsibility for those matters rested with People & Systems, and that City & Community Outcomes were responsible for building asset management: T 1228.17-39 (12.3.20). This lack of organisation wide unity and coherence was a failure that for a time had an almost crippling effect on getting the Council fully compliant with the WH&S laws concerning asbestos – a matter recognised by the Council in its “Organisational Failures” document (ex 148) (see [30] above).

### *Labelling*

74. On 9 June 2016, Mr Johnston (at that time Acting Program Leader, Operations) sent an email to Mr Parsons (then, the Program Leader, Facilities and Recreation) noting that City Services had been required to implement the control measures from the various Airsafe reports where possible, particularly regarding labelling. Mr Johnston suggested that a meeting was required in order to agree on a label and a process for installing them to reduce any unnecessary stress that may be caused by labelling the presence of asbestos containing material in some buildings. Mr Parsons’ evidence was that there were discussions taking place about the approach to be taken to labelling of asbestos containing material, including the wording to be used, the type of labels, their size, and

---

<sup>4</sup> For a description of the process undertaken in conducting that audit, see Ms Cooper’s evidence at T 1119.35-47, T 1121.4-14 (10.3.20).

where they were to be placed, as well as communication plans. Informing those discussions was a concern that placing labels may cause alarm, particularly in certain properties such as restaurants: T 1055.14-46 (10.3.20). The evidence reveals that discussions of that nature continued into 2017 until the issue was ultimately resolved with the advice of SafeWork (see further at [83] below).

75. Mr Johnston also asked Mr Parsons whether “*the Asbestos Policy and associated Asbestos Management Plan containing the procedures to maintain and monitor the condition of existing (ACM) in good condition until it can be effectively removed has been drafted. If so could we please have access to them.*”: Ex 82, p 1514. Mr Parsons’ evidence was that he was aware that Mr Kitching was working towards the development of the Council’s asbestos policy, but that as at the end of December 2016, it was not a priority due to “*other work that we were trying to complete at the time*” and was not a task that was seen as requiring urgency at that time: T 1056.39-1057.6, 1058.15-41 (10.3.20).

#### *2016 Mulligan Safety Consultancy*

76. On about 9 September 2016, Mr Mark Mulligan was engaged as a consultant to undertake the role of Project Lead, Safety Improvement Project: Ex 71, pp 39-41. His engagement concluded on 23 December 2016. His role as a consultant for the purposes of the Safety Improvement Project has already been covered in the Interim Report dated 14 January 2020 at [91] to [130].
77. On 12 December 2016, a memorandum was prepared for Mr Nicholls (the then Director, City & Community Outcomes): Ex 82, p 1600. That memorandum includes the following:

*“The initial rounds of Asbestos audits and any works identified as being required were completed in 2015.*

*Following the release of the Model Asbestos Policy for NSW Councils 2012 (MAP) a review showed that council departments have independently made every endeavour to identify and manage the risk of Asbestos exposure (Ref: list of procedures and policies contained within original doc. 13/141759).” (emphasis added)*



The words underlined were a something of a stretch. For one thing, the Council was still not at this time compliant with the WH&S laws regarding asbestos management, given that a number of workplaces did not have asbestos management plans and asbestos registers. Additionally, the Council still had no asbestos policy. With the information which came to light in 2017, Mr Nicholls (and no doubt others within Council) ultimately came to the view that there were shortcomings and deficiencies (including failure to comply with legislation) in how it had managed asbestos. Mr Nicholl's evidence was that prior to SafeWork's investigation in May 2017 at the Springwood Depot, there was a lack of understanding of the breadth of application of the required asbestos policy, and it was viewed narrowly as largely being focussed on buildings: T 1234.17-39 (12.3.20).

## 2017

78. In January 2017, a draft Work Health & Safety Asbestos Procedure was prepared by Mr Anderson to provide to the Council's Peak Safety Steering Group: Ex 82, p 1601. Mr Anderson's evidence was that the draft procedure was considered by the PSSG, which requested amendments, and that before those amendments were completed, the Council had resolved to engage an external consultant to prepare it. Mr Anderson's evidence was that the content of the document "*virtually just mirrors what we'd had for many, many years*": T 1345.44-1346.22 (13.3.20).

### *Asbestos Working Group*

79. In early 2017, an "*Asbestos Working Group*" was established by Ms Rafter: Ex 11, p 1. Her evidence was that the purpose of that group was to attempt to advance the outstanding issues arising from the 2015 Willis Review: T 549.19-37, 551.7-553.9 (28.9.20). Not inconsistently with this, Mr McKay said its purpose was to "*accelerate the remediation work*" being done in respect of signage, the policy and plan and the asbestos register: T 813.40-814.3 (30.9.20). The members of that group were Mr McKay, Ms Rafter, Daniel Long, Mr Johnston, Mr Kitching, and Mr Kane White.
80. Mr McKay's evidence was that it was in the context of this group that he first became aware of the specifics of the Council's approach to asbestos management issues and, in particular, that the Council did not have an asbestos policy, and that it was not complaint with its statutory obligations. His evidence was that despite conversations with senior

managers and managers within Council which sought to identify the principal risks to it, risks associated with asbestos management had not been identified as being one of principal concern: T 804.29-36, 807-808.24, 812.47-813.14 (30.9.20).

*Johnston non-conformance report February 2017*

81. On 3 February 2017, Mr Johnston sent an email to Ms Rafter (cc others) to which he attached a “*Non-Conformance Report*” concerning an audit he conducted of asbestos containing material located at the Council’s Katoomba Depot: Ex 82, p 1610. In that report, Mr Johnston identified a number of matters, including asbestos containing material in poor condition, a lack of a work system to control maintenance work that may involve or affect asbestos containing material, and a lack of labelling of the presence of ACM. Mr Johnston also noted, correctly, that “*it does not appear that Council has a current Asbestos Policy*”. That report was subsequently provided to members of the Council’s Executive Leadership Team, including Mr Mark Bruhn (who was appointed Director, Service Delivery in September 2016), and Mr McKay: Confid T 119.28-45, 35-47 (17.3.20); T 556.18-44 (28.9.20); Ex 110.
82. Ms Rafter’s evidence was that by February 2017, it was well known throughout Council that there was no asbestos policy: T 554.25-555.11 (28.9.20). How well known is not clear, but Mr Johnston obviously knew, as others must have.

*Further Labelling concerns 2017*

83. On 21 February 2017, Mr Johnston sent another email to Ms Rafter (Ex 82, p 1623) in which he noted that a meeting had been requested by Mr Bruhn to discuss “*the Asbestos Audit and how we are going to manage communications*”. Also in February 2017, there were discussions concerning the requirements to label the presence of asbestos containing material: see, e.g., Ex 82, pp 1625-1626. There was concern that in applying labels indicating the presence of asbestos or asbestos containing material, there was a risk of creating unnecessary alarm. The consensus view was that a plan had to be put in place to manage the labelling process: see, e.g., T 653.42-655.23 (28.09.20); T 879.30-38 (30.9.20). This was a matter discussed by the Asbestos Working Group at about this time: Ex 82, pp.1625-1626. Mr Long gave evidence at the public hearings about the labelling concerns: T 653.7-655.23 (28.9.20). He arranged a meeting with representatives of both the Centium Group and SafeWork to get some guidance

concerning signage where he says he was told that if every single piece of asbestos were labelled, it could “create hysteria”: T 654.4 (28.9.20). Ultimately, an approach was taken that all asbestos was labelled in depots, public toilets and sporting amenity blocks and buildings of that kind, but not in every tenanted building. Mr Long said the Council was advised by SafeWork that this was appropriate: T 655.23 (28.9.20). Mr McKay gave similar evidence to Mr Long on this issue: T 879.30-880.16 (30.9.20).

84. On 2 March 2017, a meeting with the subject of “*Asbestos Action Plan*” was held. The minutes of that meeting record (Ex 82, p 1627):

(a) that the safety measure of installing signage indicating the presence of asbestos containing material had not been completed at all locations and “*in doing this it could cause some public concern*”;

(b) “*C&CO are currently developing an Asbestos Policy based on the NSW State Gov model asbestos policy and an Asbestos Management Plan will follow*”; and

(c) a brief would be developed for Executive Leadership Team for the proposed plan of implementing signage.

85. Shortly after that meeting, Mr McKay attended a further meeting in which Mr Johnston raised a number of allegations concerning the Council’s “*management or mismanagement of asbestos*”. Mr McKay referred Mr Johnston’s concerns to Mr Bruhn and Mr Nicholls to be “*investigated and investigated properly...*”: T 843-847 (30.9.20).

*Johnston non-conformance report 3 March 2017*

86. On 3 March 2017, Mr Johnston issued a further “*Non-conformance Report*” (Ex 82, p 1628), in which he referred to a “*desktop audit*” of the Council’s Asbestos Management System. He also made the following observations:

(a) no asbestos policy could be located;

(b) an Asbestos Register was not present at several locations that have been identified as containing asbestos containing material; and

- (c) an Asbestos Management Plan could not be located for any location – which did not comply with reg 429 of the WHS Regs.
87. Mr Johnston’s 3 March non-compliance report was initially “*assigned*” to Mr McKay, and it was later re-assigned to Mr Nicholls: see, e.g., Ex 82, p 1639A. Mr McKay’s evidence was that a number of the issues raised in Mr Johnston’s report were discussed at the meeting of the Asbestos Management Working Group the previous day: T 841.38-843.21 (30.9.20).
88. On 16 March 2017, Mr Johnston sent an email to Mr Bruhn about his “*Concerns with the Asbestos Management Process*”: Ex 82, Ex 1639A. In that email, he asserted that the Council was “*not taking its responsibility to ensure the health and safety of all employees, PCBU’s and the community seriously*” and that “*BMCC has been placed at great risk with the failure to put in place an asbestos management system as is required by the Work Health and Safety Regulation...*”. The following day, Mr Bruhn indicated that Mr Johnston’s report and email would be passed to Mr Nicholls as the Director responsible for the asset management of buildings: Ex 82, p 1639A.
89. On 16 March 2017, concerns were raised at the WHS Committee Meeting for the Council’s Springwood Depot about the lack of an asbestos register at the depot, and that there should be “*stickers...to notify staff that there is asbestos present*”: Ex 82, p 1633 at 1634.

#### *Asbestos procedure*

90. On 2 May 2017, an Asbestos Procedure was presented to the Council’s Peak Steering Safety Group for endorsement. That procedure was not endorsed at that meeting, and the PSSG determined that additional work was required before the Procedures could be resubmitted: Ex 82, p 1696-1697.
91. On 3 May 2017, Mr Kitching sent a memorandum to Mr Bruhn (copied to Mr Parsons) on the subject of “*Asbestos Management Planning*”: Ex 82, p 1701. That memorandum included the following passage:

*“Populating the MAP with current, updated and controlled procedures requires cross-directorate participation to ensure each operational procedure/document is referenced in the MAP and included the appendices.*

*A series of consultation meetings will take place where each group required to deal with asbestos will develop schedules to identify, review and submit protocols for inclusion into the MAP.*

*Once done the MAP will then be submitted to the PCT for review.”*

92. By this time – May 2017 – development of the Council’s asbestos policy had urgency to it: T 1060.9-16 (10.3.20). It was due to be completed by the end of June: Ex 82, p 1702.
93. On 8 May 2017, a memorandum was provided to Mr Parsons headed “*Asbestos Management Update*”: Ex 82, p 1712. That memorandum contained the following passage:

*“Council was prompted to review its asbestos management following the release of the Model Asbestos Policy (MAP). It was clear that the Council already ran and managed many of the systems/procedures recommended in the state policy but these were not centralised or referred to by an overarching document. Examples of existing processes include Managing waste, Buildings Asbestos Register, Contaminated Land Register, Responsibility to Workers (WHS), BMCS MAN 0001, BMCS PRO 0029 SWP/ Asbestos and the Development Application process.”*

94. On 9 May 2017, a memorandum was prepared for Mr Bruhn (copied to Mr Parsons) regarding “*Asbestos Management*”: Ex 82, p 1714. That memorandum included the following passage:

*“Asbestos Policy and Asbestos Management Plan.*

*The intention is to use the Model Asbestos Policy (MAP) for NSW Councils template provided by the Office of Local Government Nov 2015. This is a slight departure from the norm as the MAP contains Asbestos Policy and Plan.*

*Buildings are a relatively small part of the whole when it comes to asbestos management. Environment, Waste Collection, WMF, Service Delivery (SD), Cleansing, Development & Customer Services (DA’s*

*etc.), Civil & Traffic, all have much longer term management requirements, as Buildings expect to continue the removal process until Council Buildings are asbestos free. This therefore requires a whole of council approach.”*

95. Mr Nicholls’ evidence was that as more work was done to develop the Council’s asbestos policy, there was a realisation that it required a broader approach across Council, beyond buildings and assets, to include procedures and how the Council approaches asbestos management more generally: T 1236.4-1237.30 (12.3.20). Mr McKay’s view was that the “*whole of council approach*” referred to in that memorandum to the development of the Council’s approach to asbestos management was one which should have been adopted from the outset: T 849.13-21 (30.9.20). This is almost certainly correct. It appears also to be the Council’s view based on the Organisational Failures document (Ex 148).
96. On 9 May 2017, Mr Long sent an email to Messrs Parsons and Kitching (Ex 82, p 1718) in which he stated:

*“Asbestos Management Plan*

*As we discussed a lot of focus has been on the Asbestos Management Policy however the critical document from SD’s point of view is the Asbestos Management Plan. The need for this document is actually reflected in the model Asbestos Policy document...The need for an Asbestos Management Plan is also referenced under WHS Regulation 2011 section 429”*

97. Mr Long’s observation concerning the distinction between an asbestos policy and plan was obviously correct. This point was reinforced later that day by Mr Johnston who responded to Mr Long’s email (Ex 82, p 1716) as follows:

*“Further to your e-mail below, I feel that for some time now there appears to be a great deal of confusion regarding the management of asbestos and council’s obligations to comply with the WHS and Local Government Acts. This has, in my opinion, placed the health and safety of all council employees, PCBU’s and the community at great risk.*

*Firstly it appears that council incorrectly believes that the MODEL ASBESTOS POLICY (MAP) is a form of, or is an ASBESTOS MANAGEMENT PLAN (AMP). This is simply not the case. These are two completely separate documents that are controlled by 2 different*

*Acts. The MODEL ASBESTOS POLICY is referred to under the Local Government Act (however I am not sure that it is required under the Law). Whereas the ASBESTOS MANAGEMENT PLAN is controlled by the Work Health and Safety Regulation 2011; clause 429 Asbestos management plan and it IS required by Law.”*

98. Also on 9 May 2017, Mr Kitching sent a memorandum to Mr Bruhn, copied to Messrs Nicholls, Turner, Parsons, and Harris: Ex 82, p 1714. That memorandum, includes the following passage:

*“A search of Sharepoint identifies 145 documents concerning or addressing asbestos related issues. Many Councils are not as far advanced as BMCC regarding asbestos and while this process is not yet complete we need to maintain the momentum...”*

99. Mr Nicholls indicated that the passage reflected the understanding within Council, and that the inadequacies in the Council’s policies and procedures in those respects was not a matter known at that time: T 1239.6-32 (12.3.20).

100. On 10 May 2017, a meeting was held concerning “Ongoing Asbestos Inspections”: Ex 82, p 1721. The minutes of that meeting record the following:

“1. General discussion

1.1 *General discussion around what is in place relating to asbestos management noted a range of protocols and safe work plans/ safe work method statements already in use;*

1.2 *GM. SK. Noted, asbestos Policy/Management requires a whole of Council approach.*

*It was further noted that Buildings are a relatively small part of the whole when it comes to asbestos management. Environment, Waste Collection, Waste Management Facilities (WMF), Service Delivery (SD), Trades, Cleansing, Development & Customer Services (DA’s etc.), Civil & Traffic (UG Pipes & Drains), all have much longer term management requirements as Buildings expect to continue the removal process until Council Buildings are asbestos free. This therefore requires a whole of council approach.”*

And:

“3. Competent person & Training

3.1 *Each Directorate is well covered in relation to asbestos management through a range of protocols and SWMS;*

3.2 *A whole of Council asbestos policy and management plans for each directorate are not yet complete; ...”*

101. Mr McKay’s evidence was that the view expressed in item 3.1 that each directorate was “*well covered in relation to asbestos management*” was, with the benefit of hindsight, “*overly optimistic*”: T850.1-852.33 (30.9.20).

102. Also on 10 May 2017, the Council’s Executive Leadership Team approved the engagement of Centium Group for a period of three months “*to bring policies and procedures up to date as a priority*”: Ex 82, p 1721A. Centium Group produced a report dated 2 June 2017 titled “Asbestos Management Plan: Immediate Actions Report” (Ex 82.1740) with reference to clause 429 of the WHS Regulation. Again, in its submissions the Council is somewhat critical of Centium for what it submits was its failure to expressly advise the Council that asbestos management plans were required for each workplace: Council’s submissions in chief at [31]. It was however well past the date when this should have been known by Council in any event.

#### *Springwood Depot Improvement Notice*

103. On 15 May 2017, SafeWork attended the Council’s Springwood Depot following a “*request for service*” received on 7 May. As a result of that inspection, on 22 May 2017 the Council was issued with an Improvement Notice (*May 2017 Improvement Notice*): Ex 82, p 1729. Amongst the reasons the May 2017 Improvement Notice was issued was that the SafeWork inspector was concerned workers could be exposed to asbestos containing material because the Asbestos Management Plan for the Depot “*did not adequately manage the risks*” of workers working in or around asbestos containing material, or of workers and members of the public being unexpectedly exposed to asbestos containing material. The notice directed the council to take the following measures:

“1. *You must, as far as is reasonably practicable, ensure the health and safety of workers and other persons by developing, documenting, implementing, and maintaining a written asbestos management plan (AMP) for Council. This AMP is to provide*



*control measures to eliminate or minimise all potential avenues for workers, and others, to be exposed to asbestos or asbestos containing material (ACM).*

2. *All workers, supervisors, and managers are to be informed and trained in the asbestos management plan and a copy of the plan is to be readily accessible to all workers/persons.*
3. *You must ensure that the asbestos management plan is reviewed and, as necessary, revised as per Clause 430 of the Work Health and Safety Regulation, 2011.”*

104. Responding to this – and asbestos management more generally - became a “key priority” and a “high priority issue” for the Council. It was the catalyst for the application of more resources, and a broader approach across the organisation in relation to asbestos management: T 1239.10-1241.7; 1246.27-44; 1289.5-1290.8 (12.3.20).

105. On 29 May 2017, Mr Greenwood distributed a memorandum to Service Delivery managers, the Manager Environmental Sustainability, the Executive Leadership Team, and WHS Committee chairs: Ex 82, p 1724D. In that memorandum, Mr Greenwood stated:

*“You will also be aware a SafeWork NSW inspector attended Springwood Depot on Monday 15 May and issued council an improvement notice regarding aspects of our management of asbestos. Although the inspector was complimentary of our actions taken to address the immediate issues at Springwood, our broader asbestos management plans and processes need to be improved.*

*As a result, I have directed that we develop an Asbestos Management Plan to meet our present and future needs as a matter of urgency. To assist with this work we now have engaged a specialist consultant to develop the plan. This plan will provide control measures to eliminate or minimise all potential risks for workers, and others, to be exposed to asbestos or asbestos containing material. Your assistance and support will be essential in the development of the Asbestos Management Plan and I thank you in advance for your support with this important task.*

*Please be assured that we are taking this matter seriously with two things front of mind - firstly, the health and safety of all employees and secondly, making sure we learn from this experience and improve our policy and practice relating to asbestos management in the workplace. As I have said before, this matter demonstrates the importance of*

*working together to ensure we address any gaps in our workplace safety. I ask that you take this opportunity to encourage your teams to keep raising safety issues with their supervisors, safety representatives and safety committees, and applying your safe work methods in all daily tasks.*

*Please ensure that any damage to buildings and walls is reported immediately to a supervisor by completing an accident & injury notification form or by telling them directly. We must act to protect ourselves and our colleagues at all times. It is also important to ensure that before any work on council buildings is conducted that the relevant asbestos register is viewed - which will identify the location of any known asbestos containing material so appropriate precautions are taken.*

*Remember, if in doubt whether material is asbestos, report it to your supervisor immediately and do not disturb it.”*

106. The consultant referred to in Mr Greenwood’s memorandum was Centium (see [102] above). Centium commenced a consultation program on 1 June 2017: Ex 82, p 1725.

*Johnston memorandum of 30 May*

107. On 30 May 2017, Mr Johnston prepared a memorandum for Mr Greenwood (copied to Mr Liddell and Dr Dillon) headed “*Report on Blue Mountains City Council Asbestos Strategy*”: Ex 82, p 1724A. He set out a number of concerns he had about the Council’s approach to asbestos management, and provided examples of where, in his view, the Council’s processes and procedures had failed and how those failures had affected certain sites. He also asserted that a staff member had told him to ‘back off’ and ‘move on’ from the asbestos management concerns he had been raising. He pointed to various clauses in the WHS Regs that the Council was not compliant with, and raised further issues about the Springwood Depot and other Council sites. On about 2 June 2017, a meeting was held between Mr Greenwood, Mr Liddell, Dr Dillon and Mr Johnston about the issues raised in this memorandum. The evidence supports a conclusion that each of Mr Greenwood, Mr Liddell and Dr Dillon were receptive to the issues he raised: see, e.g., Confid Ex K; Confid T 82.5-83.14 (16.3.20); T 1450.46-1453.2 (18.3.20); T 1525.12-44 (09.10.20).

*Meeting between Mr Greenwood, the Mayor and Deputy Mayor re Springwood Depot*

108. On 31 May 2017, Mr Greenwood met with Cr Greenhill. The Deputy Mayor, Cr Van der Kley and Mr Liddell were also in attendance. At that meeting, Mr Greenwood informed Crs Greenhill and Van der Kley of SafeWork’s inspection and that the May 2017 Improvement Notice had been issued. He also informed those Councillors that he had become aware that the Council was not in compliance with its statutory obligations with respect to asbestos management, but that everything was being done to achieve compliance. At that meeting, Cr Greenhill requested that Mr Greenwood brief the Governing Body about those matters at the next briefing session, which was scheduled to occur on 6 June 2017: T 1458.47-1459.10, 1498.25-1500.40 (18.3.20); T 1312-1315, 1416-1419 (08.10.20).

*Centium Immediate Actions Report*

109. On about 2 June 2017, Centium issued its “*Immediate Actions Report*”: Ex 82, p 1741. It contained the following recommendations (Ex 82, p 1743):

***“Summary of Recommendations***

*The following four immediate management actions are recommended:*

1. *Communicate BMCC’s Asbestos Register – see 1.1. for details.*
2. *Take a number of immediate steps to eliminate or minimise exposure to ACM – see 1.2 for details.*
3. *Survey to identify ACM at all BMCC buildings/facilities – see 1.3 for details.*
4. *Consult, cooperate and coordinate activities with other duty holders – see 1.4 for details.*
5. *Immediately cease all intrusive maintenance and refurbishment works – see 1.5 for details.*
6. *Determine BMCC policy position on allowing staff to carry out asbestos related work – see 1.6 for details.”*

110. On 5 June 2017, a direction was given to cease all intrusive maintenance and refurbishment works until a competent person had been engaged to undertake the

actions in section 1.3 of the Centium Immediate Actions Report: see, e.g., Ex 82, p 1771.

*Councillor briefing session 6 June 2017*

111. On 6 June 2017, a Councillor briefing session was held. Mr Greenwood (still the General Manager until November 2017) gave evidence that he briefed the Councillors about the SafeWork Improvement Notices of 22 May 2017 issued for the Springwood Depot at the beginning of the session, and prior to the first agenda item: see, Ex 150, pp 1, 3, 10- 16; T 772.36-773.24 (10.9.19); T 1462.1-1463.28 (18.3.20); T 1315-1317, 1328.44-1330.19, 1388.26-1390.16, 1419.16-1421.32 (08.10.20). His evidence about this was (T 1462.38-45 (18.3.20)):

*“The briefing about asbestos management was to bring to the council’s attention the fact that we’d received the SafeWork improvement notice, to advise them of the terms of the notice, and that it was serious, and to advise the council on what steps I had taken as a result of getting that notice.”*

112. The Mayor, Cr Greenhill, described Mr Greenwood’s briefing on the SafeWork Improvement Notice in the following way (T 1420.1-12 (08.10.20)):

*“He told the councillors what he told me and what he told the Deputy Mayor. He also told us that - and he said this at the Glenbrook meeting as well, that he was setting up a process to deal with this. At both discussions he said that there was a very cooperative relationship emerging with the organisation and SafeWork New South Wales. He was going to set up effectively a panel within the organisation that would work with SafeWork independent, and he was very clear on this, independent of him and his ELT. Their job was to work with SafeWork New South Wales to go through the organisation systematically to find out where any non-compliances lay and fix them.”*

113. Cr Brown says this did not happen. Her evidence was that the SafeWork Improvement Notice was not raised at this meeting. Cr Schreiber also had no recollection of SafeWork being raised. Other evidence suggests it was, beyond there being no rational reason for either Mr Greenwood or Cr Greenhill to fabricate what was said at this briefing session, or be confused about it. The SafeWork intervention was a significant matter. This is evidenced by both Mr Greenwood’s memorandum of 29 May, and the meeting he had on this issue involving Mr Liddell, the Mayor and the Deputy Mayor

on 31 May. The SafeWork inspection of Springwood Depot on 15 May, and the improvement notice of 22 May, were not matters that could be “kept under wraps”. By far the most likely explanation is that Cr Brown is honestly mistaken. It is entirely logical that following the issuing by SafeWork of the May 2017 Improvement Notice, the General Managers memorandum of 29 May 2017, the meeting between the Mayor, the Deputy Mayor and the General Manager on 31 May, and the issuing by Centium on 2 June of their limited actions report, that the SafeWork intervention at the Springwood Depot would be a matter discussed at the first councillor briefing session following these event. A finding is made that the SafeWork Improvement Notice was raised at this 6 June briefing, generally along the lines stated by Mr Greenwood and Cr Greenhill, but Cr Brown was late to the meeting, and missed the first issued discussed: the SafeWork intervention. No criticism is made for that fact that Cr Brown ran late for a meeting – such things can be unavoidable.

*Asbestos Project Team established June 2017*

114. On 8 June 2017, an Asbestos Management Project Team was established: Ex 95: Ex 11, p 1. Mr Greenwood described its purpose as follows:

*“The purpose of the project is to complete our Asbestos Management Plan and procedures; review our current Asbestos Register; undertake priority actions identified in the Asbestos Register; and to fulfil our obligations to SafeWork regarding aspects of our management of asbestos.”*

115. In his oral evidence, Mr Greenwood expanded on this in the following way (T 1463.40-46 (18.3.20)):

*“Well, because it was, obviously a high priority; we needed a team to action it, we needed the right people on the team to action it, but you know, it just had to be driven and that, and we needed the people - we had to draw the people from the organisation to ensure that we could deliver on time.”*

116. The Asbestos Management Project Team was led by Mr McKay, and initially had the following members: Steve Kitching, Gary Johnston, Damien Taylor, Daniel Long and Lydia Kolar. Mr McKay described the function of the team as follows (T 854.15-41 (30.9.20)):

*“That team was designed to do a number of things. Its major goal was to build a real asbestos management plan and policy for the organisation. That was its major goal. But of course in so doing that there were lots of controls that needed to be built or improved so the approach we had to take was to ensure that the asbestos register was completed so we had basically a document, a very big document, three or four separate documents in fact, that were in PDF form. Not really usable in PDF form. They needed to be converted into a database. There’s a lot of work that goes in converting 7 or 800 pages of very fine information into a database. An entire approach to communication needed to occur in terms of signage, in terms of placements of signs, in terms of ensuring that proper consultation occurred. But first and foremost our most immediate priority was the identification of high risks.”*

117. Following the creation of that team, Mr McKay’s time was wholly consumed by its work: T 855.8-10 (30.9.20).

118. On 8 June 2017, Mr Long sent an email to the Council’s Executive Leadership Team (Ex 82, p 1776) in which he stated:

*“As you would be aware the BMCC Asbestos Management Project Team (Project Team) is working through a list of immediate ‘recommendations’ based on the report provided by Centium.*

*One of these recommendations, listed as 1.2, is that Council takes immediate actions to eliminate or minimise exposure to ACM. Until such time as we have confidence in our consolidated asbestos register and our asbestos management arrangements, it has been agreed that we will cease all intrusive maintenance work. Intrusive works include, but are not limited to, drilling, cutting abrading, handling, treating, coating, sealing and disturbing asbestos or ACM. Directives and instructions have been distributed by directors and group managers to relevant work groups, copies of which are now on file.*

*Could you please confirm by return e-mail by CoB Friday 9 June, that this direction has been received and is understood by your relevant work groups. Could you also take the necessary steps to develop a high level of confidence that the directive is being complied with.”*

119. During June 2017, the Asbestos Management Project Team took steps to respond to the immediate actions report, and the Council’s approach to asbestos management more broadly. For example:

- (a) work was done preparing Asbestos Registers for each site where asbestos containing material was present, or suspected, on advice from Centium: e.g. Ex 82, p 1787; and
- (b) discussions were held concerning health monitoring requirements: e.g., Ex 82, p 1792A.

120. On 23 June 2017, Mr McKay reported on the work of the Asbestos Management Project Team to the Council's Peak Safety Steering Group: Ex 82, p 1793. The minutes of that meeting record the following:

*“Grant provided an overview of the team, skills and tasks they will be undertaking in the next few weeks. He advised that a lot has been achieved in the 8 days the team has been engaged. He advised that the major goals of the team is:*

- 1. to deal with immediate risks;*
- 2. incident management; and*
- 3. development of the Asbestos Management Plan*

*Major activities completed so far include:*

- Development of asbestos register*
- Identification by consultant of 24 locations requiring immediate attention. These sites have now all been visited and necessary action taken*
- Asbestos information packets have been put together and will be distributed to locations in the next 2 weeks*
- Health monitoring checks by iCare have been arranged at each depot for 70+ staff during 4 & 5 July 2017. Further dates will be arranged if there is interest, but at this stage, the priority was for depot staff.*

*Asbestos Management Plan is being written with input from a consultant but will also require the input of certain staff.”*

121. On 28 June 2017, Mr Johnston withdrew from the Asbestos Management Project Team: Ex 82, p 1724B. Mr McKay's evidence was that he wished for Mr Johnston to remain as part of that team and that he regarded his contribution as important given his corporate knowledge: T 855.21-956.39 (30.9.20).

#### *4 July Councillor Briefing session*

122. On 4 July 2017, Mr Liddell and Mr McKay briefed the Governing Body concerning the asbestos management issues facing the Council, including the ongoing response to the May 2017 Improvement Notice: Ex 82, pp 1799-1803; Ex 134, Ex 165; T 773.29-47 (10.9.10); T 1501.4-1503.2 (18.3.20). Cr Greenhill described the briefing as follows (T 1422.9-21 (08.10.20)):

*Yes, we were updated on the progress of the independent internal committee process that Robert had talked about on 6 June. If I may, briefings - at the time the temperature was different so from 6 June we understood we had a problem - for me from 31 May. The general manager had a process for managing that involving staff members and SafeWork New South Wales and we were working through an ordinarily process. So my expectation was that we would be regularly updated on that ordinarily process. Come the end of 2017 things changed and things became far more intense and the regularity of briefings was constant.*

123. On 4 and 5 July 2017, health monitoring examinations were performed on 84 Council employees, through iCare-dust disease care: Ex 82, p 1871. This involved 41 employees from Katoomba, and 43 from Springwood.
124. On 10 July 2017, at SafeWork's suggestion, the Council sought an extension of time to comply with the May 2017 Improvement Notice (Ex 82, p 1842; T 1469.6-42 (18.3.20)). This was approved by SafeWork (Ex 82, p 1861-1864). At the time, SafeWork had indicated to the Council that it was generally pleased that the Council's progress. Mr Williams' evidence was that extensions of time for compliance with notices are relatively common, and that in considering such requests, SafeWork would look to whether the recipient of the notice could demonstrate that they have, with good diligence, been addressing the matters set out in it: T 664.32-47 (29.9.20). The May 2017 Improvement Notice was substituted with a fresh notice requiring compliance by 20 October 2017: Ex 82, p 1865.



125. On 10 July 2017, the first draft of the Council's Asbestos Management Plan was provided to SafeWork: Ex 82, p 1804. Also on the same day, Mr McKay provided Mr Greenwood with an update on the "*Progress of the Asbestos Management Plan: Immediate Actions Report*": Ex 82, p 1843. That memorandum provided an update of the work done against each of the "*immediate actions*" identified in the "*Immediate Actions Report*". That update concluded with the following (Ex 82, p 1844):

*"Although the Project Team has undertaken a great deal of work there is still much more to achieve. In undertaking the work listed above the Project Team has been in regular communication with Centium who have provided assistance and feedback. Centium have indicated that they are extremely pleased with the progress achieved in a short space of time. Additionally the Project Team has also been in communication with SafeWork NSW who has indicated that they are pleased with the progress being made by the organisation in relation to the management of asbestos."*

*Further audit work for Asbestos Register*

126. On 10 July 2017, Mr Long sent Mr Johnston an email attaching a list of Council sites that had not yet been inspected for the presence of asbestos containing material. Mr Long asked that Mr Johnston undertake a "*desktop audit*" of buildings to see "*if there are buildings that you know are no longer there*". Mr Johnston sought clarification from Mr Long as to how to prioritise his work. On 21 July 2017, Mr Long informed Mr Johnston of the "*need to expedite the first round of inspection on the list as we will need a preliminary inspection of all sites completed by CoB next Friday...*". The "*first round*" required an indication of the possibility of asbestos containing material being present prior to the Council arranging for licences assessors to undertake comprehensive inspections: Ex 82, p 1867-1869.
127. In his oral evidence, Mr Long gave an insight into the amount of work required for the asbestos audit (T 782.26-783.4 (29.9.20)):

*"A. ...we had 150 odd sites that were on that list and when I say buildings, I'm talking about things like bus shelters, picnic shelters, so what we wanted to do - and the end goal was to have a list that we could go to a company like an Airsafe or, you know, a consultant to go and do a comprehensive inspection of that site that may have ACM, so it was*

*really just a process of elimination. So let's get those buildings that we know for sure have no asbestos in them. So if it's a glass and metal bus shelter, if it's a timber and Colourbond picnic shelter, for example, those that we can just eliminate or those that were constructed after a certain time so they wouldn't have ACM in them anyway, or those that weren't there anymore, there's no point spending a lot of money on a consultant to go somewhere if the buildings not there anymore.*

*Q. From that answer do I take it you weren't seeking to identify presence of ACM in any particular building?*

*A. We were saying that if there is the possibility of ACM, then it needs to make the list that the consultant will need to, or a contractor will need to go and have a look at."*

128. Mr Jason Adams (Program Leader, Hazardous Materials) was brought in to assist with that process. Mr Adams's role was to identify potential asbestos and its type, and to also identify those facilities that had not been included in the existing register: T 588-590 (28.9.20).
129. On 20 July 2017, Mr Long delivered an "Asbestos Update" to the Springwood Depot's WHS Committee (Ex 82, p 1850) which stated:
- *Grant and Dan met with the Safe Work representative last week who is happy with the progress the AMT is making.*
  - *Clarified with the SafeWork representative regarding signage in public areas. As long as a copy of the register is on site, available and has been communicated to the lessees and user groups, stickers need only be on an area such as a back room or office.<sup>5</sup>*

#### *Asbestos Working Group*

130. On 7 August 2017, the Asbestos Management Project Team transitioned into a working group arrangement led by Mr McKay: Ex 82, p 1873. The intention of that change was to move to a "business as usual approach" by integrating the function of that team into the day-to-day operation of the Council's business. Mr McKay's evidence was that

---

<sup>5</sup> A similar report was made at a meeting held on 11 August 2017: Ex 82, p 1874.

despite the change in structure, the day-to-day operations of the team did not materially change although the team, and resourcing expanded: T 866.38-867.44 (30.9.20).

131. On 17 August 2017, a meeting of the Asbestos Management Working Group was held. At that meeting, Mr McKay reported that the Council's Asbestos Management Plan was now "*owned and maintained by Governance & Risk*": Ex 82, p 1879-1880. Mr McKay's evidence was that this change reflected an "*acknowledgement that the maintenance of the plan had to be an integral part of safety management and the safety management system*" and that in order to drive it forward promptly and appropriately, it should fall within the purview of Governance and Risk: T 875.19-876.7 (30.9.20).
132. On 21 September 2017, Mr McKay provided an update on the "*Asbestos Project*" to the Council's Peak Safety Steering Group: Ex 82, p 1901. The minutes of that meeting record the following:

*"Grant provided an update on the project advising that it is now in the final phase, which includes the delivery of the Asbestos Management Plan and that the Asbestos Policy, which will be signed off today. Following this, training in the familiarisation of the new plan and workflows will be rolled out by 20 October 2017.*

*Rhett asked a question about expenditure of Asbestos going forward and whether any thought had been given to how this would be handled. It was advised that this matter had been discussion within the working group and future requirements would need to be determined by ELT. It was also advised that the second round of health screening has now been completed with 160+ employees being tested and the results have been all clear."*

133. On 14 September 2017, Mr McKay updated the Council's Audit & Risk Committee, informing them that "*the asbestos management work is progressing well and we are tracking very well in relation to the associated work and that we are ahead of schedule of all targets.*": Ex 82, item 4.3.
134. On 21 September 2017, a Draft Asbestos Management Policy was reviewed by the Council's Policy Control Team: Ex 82, pp 1905-1907. That review included the PCT's endorsement that the policy was "*operational*", however observed that "*ELT may determine to brief the council at conclusion of the process*".

135. Also on 21 September 2017, the Council engaged Airsafe to inspect 179 “*council assets*” to “*identify, as far as practicable, all ACM in the workplace...*”: Ex 82, p 1917. Airsafe provided the Council with its report of those inspections on 26 September 2017: Ex 82, p 1908.

*SafeWork endorsement of Council’s Asbestos Management Plan*

136. On 9 October 2017, Mr McKay reported that Mr Maddaford of SafeWork had reviewed the Council’s draft Asbestos Management Plan and Safe Operating Procedures and had, subject to certain amendments being made, indicated that he would regard the Council as having complied with the Improvement Notice which required their preparation: Ex 82, p 2108.
137. On 11 October 2017, Mr McKay presented the Council’s Draft Asbestos Management Policy and Draft Asbestos Management Plan to the Executive Leadership Team for adoption: Ex 82, p 2110-2112. That endorsement was given on about 20 October 2017, and they were submitted to SafeWork that same day: Ex 82, p 2231. Prior to the ELT endorsing the policy and plan, it received briefings, including from Centium, as to their preparation: T 1253.24-1254.24 (12.3.20).

*USU letter, and engagement with both USU and SafeWork*

138. On 23 October 2017, the United Services Union sent a letter to Mr Greenwood attaching a “*list of asbestos related issues*”: Ex 82, p 2232-2239. This letter was sent following a meeting between Mr Donley and Mr Papps from the USU, and Mr Greenwood. That list identified 166 points of concern. A copy was also sent to SafeWork: Ex 116, [31]. Amongst the issues raised in this letter was the presence of asbestos at various Council sites, including the Lawson Stockpile Site, and the Springwood Depot (amongst many other sites). Mr Kane-White accompanied SafeWork on-site inspections, and to the extent that those issues required work, it was completed: T 1109.23-1111.17 (10.3.20). According to Mr Webb, a USU delegate at the time, the matters raised in the letter were resolved to the satisfaction of the USU: T 1170.22-1172.6 (11.3.20). Mr Kane-White confirmed that the majority of concerns raised in the 166-point letter did not require or involve the intervention of SafeWork, and many were resolved within a couple of days following the letter being sent: T1111.1-17 (10.3.20).

139. On 24 October 2017, a Councillor briefing session was held at which Mr McKay presented an “Asbestos Update”: Ex 124. Mr McKay’s summary of that briefing (provided to Ms Cooper the following day) was that the following was said:

- “• *As you know, Council established a project team to improve its overall management of asbestos;*
- *One of the outcomes was the Asbestos Document Suite (Policy, Plan & SOPs), which have been completed and endorsed by ELT;*
- *The Plan details Council’s approach to managing asbestos hazards in our workplaces, including buildings, community facilities, waste facilities and where asbestos is found in the community (as these areas can become our workplace);*
- *The Plan is guided by the Council’s Asbestos Management Policy;*
- *Also included are 18 Safe Operating Practices (SOPs) that have been developed to help staff manage asbestos related work;*
- *Our updated Corporate Asbestos Register lists all asbestos identified in council assets, buildings and facilities, and is compiled from surveys conducted by specialist companies;*
- *These documents now on the council intranet and are available to all staff;*
- *Documents provided to SafeWork NSW for their endorsement;*
- *During the life of the project approximately 200 sites were inspected by specialist 3rd party asbestos assessors;*
- *Furthermore, over 100 site remediation activities, big and small were completed;*
- *Over four sessions, over 160 staff were given health screening by iCare with an excellent outcome;*
- *SafeWork NSW to address ELT tomorrow and close out the notice;*
- *Further staff communications thereafter;*
- *We will now concentrate on training staff and the detailed implementation of the plan and its’ SOPs;*

- *Total expenditure - \$302,507*
- *Remediation is ongoing - for example, Lawson Depot Stockpiles.”*

140. At about this time, a number of allegations concerning the Council’s approach to asbestos management (and other issues) were aired in the media. On being informed of those matters, Cr Greenhill asked Mr Greenwood to prepare Mayoral Minutes to appoint independent investigations into those issues. Cr Greenhill described the reasons why he wanted to pursue that course as follows (T 1423.33-1424.27 (08.10.20)):

*“Q. You became aware of broadcasts in the media about asbestos issues, I’ll call them at the moment, within the council in November 2017, correct?”*

*A. Yes.*

*Q. I think you’ve given evidence previously that you were briefed on them by --?”*

*A. Well, so I was called by, in the first day it started I was called by council’s communications manager to say this has just been said on radio. My next phone call to Robert Greenwood to say, you know, and I think this is probably fairly close to a direct quote, “What the hell is going on?” And that “what the hell is going on” conversation - and I hope no one’s offended by that language - continued the following day and a whole range of allegations were being raised that I had not heard in the discussion on 31 May, 6 June, 4 July and whatever it was, 24 October, so a whole range of other issues coming up. And in the course of a very short space of time I said to the then general manager I want you to prepare for me Mayoral minutes, with appropriate legal advice, that investigate all of these issues, and I remember saying to him I want a warts and all, root and branch, deep dive into everything that’s being said. I want to know what’s true and what’s not and I want the governing body to know.*

*Q. And I take it was a concern to you that the allegations that were reported in the media differed from the information you were receiving from, for instance, Mr Greenwood?”*

*A. Yes. If the allegations that were being raised were true, I wanted to know about it. I mean, Mr Hadley was saying a number of things about myself that I knew not to be true, so obviously, you know, I wasn’t necessarily taking everything he said as gospel because I knew he was saying things about me and my life, my marriage break up and all of that, that weren’t true, but - and I thank him for it, my family thanks him for it - but - keen to meet him, to discuss it, tried to phone him, wouldn’t*

*take my calls, but anyway. But if the issues around asbestos were in any way true, I wanted to know about it.”*

*Engagement of Mr Tooma of Clyde & Co to conduct an independent investigation of asbestos management issues*

141. On 14 November 2017, there was a meeting of the Governing Body at which it unanimously resolved to appoint Dr Dillon as the Acting General Manager with effect from 17 November 2017: Ex 1, p 57. In addition, the Governing Body unanimously passed a resolution which included the following (Ex 1, p 59):

“1. *That the Council notes over recent days very serious allegations have been made against the Council in relation to the management of asbestos (including asbestos in Council owned properties) by the Council;*

2. *That the Council instructs Trevor Cork of McPhee Kelshaw solicitors, to engage an independent investigator to investigate and report on these allegations and any further related matters that the Council solicitor and independent investigator deem merit further investigation;*

...”

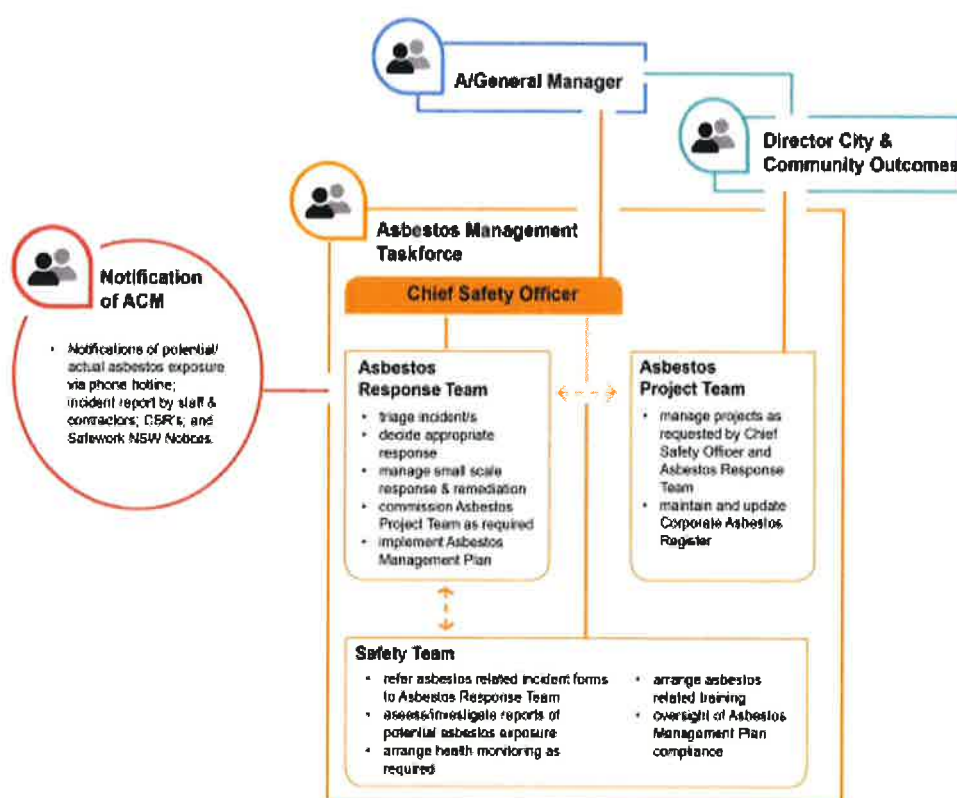
142. The independent investigator engaged by Mr Cork was Mr Michael Tooma, a partner in the law firm Clyde & Co, who has specialist knowledge in the field of work health and safety. He authored a series of reports on aspects of the Council’s asbestos management. These reports were not tendered in evidence, as legal professional privilege has been found to apply to them (by a determination of the NSW Civil and Administrative Tribunal). Mr Tooma’s recommendations have been made public however, and have been adopted by the Council. Much of Term of Reference 4, the Interim Report dated 7 May 2019, and the Supplementary Interim Report dated 31 July 2019, involved the engagement of Mr Tooma.

143. On 20 November 2017, the Council’s Executive Leadership Team established an Asbestos Response Team, and allocated funding for “*small scale asbestos remediation works*”: Ex 82, p 2288.

144. On 29 November 2017, Dr Dillon invoked the emergency response provision contained in s 55(3)(k) of the LGA to enable the Council to engage necessary services to respond to notices and directions issued by SafeWork without the need to go to tender: Ex 11, p 18. Mr Nicholls described the circumstances as involving “*considerable urgency in getting the asbestos-related advice set up very quickly*”: T 1258.10-1259.27 (12.3.20).

*Asbestos Management Taskforce, rearrangement of Council’s structure dealing with asbestos, and appointment of Mr Harris*

145. Following consultation with SafeWork, on 6 December 2017 the Council established an Asbestos Management Taskforce: Ex 11, p 2. That taskforce had the following structure (Ex 11, p 16):



146. Mr Alan Harris commenced work at the Council at this time (early December 2017) as its Chief Safety Officer. He described the function of the Asbestos Response Team in his evidence in this way (T 914.26-915.19 (30.9.20)):

*“...The best description is they were a first responder. So they were specifically set up to deal with incidents that the Blue Mountains, incidents within the Blue Mountains local government area, within the*



*confines of variabilities and licences that council could deal with without having to call on LAA or an AR to do each and every one of those things. Which gave council a significant benefit in one, it was significantly cheaper to do that, and plus it built into the council structure a degree of expertise which was obviously a very, very good thing. So in a day-to-day sense should a member of the Blue Mountains City Council or a member of the public in terms of illegal dumping or just asbestos finds out in the local government area ring through to council or ring through to the front desk, within an hour for the most we could actually have a team out there analysing that site and making a decision what needs to be done.*

...

*...they received - a number of reporting mechanisms were established. A telephone hotline was initially established and it ran for a number of years whereby members of the public could actually - it was advised, could actually ring a specific hotline number to report asbestos issues. We also had an online form that could be utilised by staff or the staff could actually ring through. Of course all three of those mechanisms, those conduits were used..."*

147. Following a restructure of the Council in 2019, the Asbestos Response Team's role was expanded to cover all hazardous materials, and it has consequently had its name changed to the "Hazardous Materials Team": Ex 160, tab 12, p.2. The Hazardous Materials Team's Project Leader is Jason Adams, who in his evidence at the public hearings described the team as well-resourced, and one which will be provided with "external assistance or consultants" if that is required: T 610.18-611.25.
148. On 6 December 2017, Mr Nicholls provided a memorandum to the Council's Executive Leadership Team concerning resourcing for the newly established Asbestos Management Project Team: Ex 82, p 2307. That team was established for the purpose of responding to major remediation projections and to bring together specialist teams to undertake them: T1254.31-1255.15 (12.3.20). The Asbestos Response Team could refer large or complex projects to the Asbestos Management Project Team: T1257.28-45 (12.3.20).
149. On 8 December 2017, a Project Management Plan in respect of an Asbestos and Hazardous Materials Register Process and Procedures was developed: Ex 82, pp 2341-2350. The purpose of that project included ensuring that those registers that had been created were maintained: T 1259.33-1260.22 (12.3.20).

150. On 12 December 2017, the Minister issued a notice of intention to issue a suspension order (*First Suspension Notice*): Ex 1, pp 147-150.

151. On 12 December 2017, Dr Dillon gave a report to the Council's Governing Body recommending (Ex 82, p 2459):

- “1. *That the Council endorses the deferral of the 2017/18 Asset Works Program projects, listed in this report;*
2. *That the Council includes the deferred asset works projects, listed in this report, for consideration within the 2018/19 Asset Works Program;*
3. *That the Council endorses the reallocation of \$528,200, resulting from the deferral of the 2017/18 Assets Works Program projects, to be available to fund asbestos and hazardous materials capital works projects in 2017/18;*
4. *That the Council endorses the allocation of up to \$350,000 from Council's Risk Reserve to be available to fund the provision of expert assistance on asbestos and hazardous material management, including the preparation of remediation plans for major sites;*
5. *That the Council notes that Acting General Manager has used the emergency provision under Section 55(3)(k) of the Local Government Act 1993 to engage Regional EnviroScience and SLR Consulting to assist Council with the management of asbestos and hazardous materials; and*
6. *That the Council receives a further update report on funding for asbestos and hazardous materials remediation projects in the first quarter of 2018.”*

152. The Governing Body resolved to accept those recommendations: Ex 102.

153. Also on 12 December 2017, Cr Greenhill recommended that the Governing Body approve the appointment of Dr Dillon as General Manager for a fixed period of up to one year, with a view of appointing a permanent General Manager with a commencement date of 18 November 2018: Ex 71, p 389. The Governing Body approved that appointment: Ex 1, p 143-144.

154. On 19 December 2017, an Extraordinary Meeting of the Council was held. At that meeting, the Governing Body considered and approved the proposed response to the First Suspension Notice: Ex 1, p 186-187.<sup>6</sup> On 20 December 2017, the Council submitted its response to the First Suspension Notice: Ex 82, p 2406.

155. On 22 December 2017, the then Minister responded indicating that she had determined not to issue a suspension order but gave notice of an intention to issue a Performance Improvement Order (which was ultimately issued on 22 January 2018): Ex 1, p 314.

## 2018

156. Throughout late 2017 and into early 2018, SafeWork issued the Council with a number of notices relating to asbestos management issues: see Ex 120. They are dealt with later in this report. During that period, various Council staff had regular and ongoing engagement with SafeWork in relation to those notices, and the Council's work to meet them: see, e.g., Ex 82, pp 2540-2542, 2557-2559. Each notice was complied with.

157. In the period from about December 2017 until mid-2018, the Governing Body received regular briefings from management, including in written form, about the Council's work to improve its asbestos management practices and its dealings with SafeWork and the EPA: see, e.g., Ex 149, Ex 158, Ex 11, pp 21-22; T 919.43-920.17 (30.9.20); T 1422.9-21, 1426-1428 (08.10.20); T 1430.44-1431.38, 1531.19-1532.39 (09.10.20).

158. In January 2018, there was a handover of some projects from the Asbestos Project Team to the Asbestos Response Team: Ex 82, p 2521. The projects involved in that "*handover*" were smaller projects that the Project Team had assumed responsibility for, but which were within the scope of the Asbestos Response Team's ability to complete: T1263.21-1264.5 (12.3.20).

---

<sup>6</sup> Although Crs Brown and Schreiber voted against the motion, it appears that the Governing Body was unanimous as to the content of the response to the First Suspension Notice given that Crs Brown and Schreiber proposed an alternate motion (Minute 484, Ex 1, p 185) which included the identical endorsement in paragraph 1.

159. On 18 January 2018, Mr Nicholls issued a directive concerning the use of soil and other materials from construction sites, which included a direction that (Ex 82, pp 2526-2527):

*“B. Re-use of materials from Council stockpiles*

*No soil or other material is to be reused from Council stockpiles, either temporary or permanent or informal, unless there has been an assessment of the soil or other material by a licenced asbestos assessor, and a report approved by the relevant Business Unit Manager in C&CO that this report confirms that the material is not contaminated.*

*This will be in place from the date of this memo until advised.”*

160. That direction was given as a result of a concern that there had been a practice within Council of reusing soil from construction sites and that there were stockpiles of materials not kept in Council depots, and in relation to which there was uncertainty as to whether they contained any asbestos or asbestos containing material. Mr Nicholls wanted to ensure that such material was not re-used unless it had been tested for the presence of asbestos: T 1264.18-1265.25 (12.3.20); T 925.47-927.9 (01.10.20).
161. On 18 January 2018, Cr Greenhill authorised the allocation of a total of \$1,100,000 to facilitate ongoing remediation and clean-up work as a result of regulator investigations: Ex 82, p 2528. That approval was given by exercising the Mayor’s delegated authority during the period 12 December 2017 to 30 January 2018 given at the Ordinary Meeting on 12 December 2017: see, e.g., Ex 82, p 2529.
162. On about 1 February 2018, a Multi-Agency Asbestos Management Committee was established: Ex 92, pp 2602-2607. That committee include representatives of the Council, the Mayor or his delegate, SafeWork, the EPA, the United Services Union, as well as Council Staff/Union delegates. The Terms of Reference of that Committee (adopted on 1 March 2018) described the purpose of the committee as (Ex 82, p 2681):

***Purpose***

*The Blue Mountains Multi-Agency Asbestos Management Committee (BM-MAMC) is an advisory group and has no executive powers. BM-*

*MAMC may make recommendations to the General Manager, Blue Mountains City Council (BMCC).*

*The role of the Committee is to provide advice to the Council in relation to the Council's management of asbestos and to ensure that all relevant parties work together constructively and effectively in this regard.*

163. On 6 February 2018, SafeWork initiated a Joint Revisit Program. The purpose of that program was to “*identify any outstanding asbestos control issues on council owned properties, and to ensure that outstanding concerns or issues identified during the revisit are resolved in a timely manner*”: Ex 82, p 2640. It was established to address the “*worker and community concerns*” in relation to asbestos management issues involving the Council: Ex 116, [35]-[36]. The revisit program involved inspections of council sites by SafeWork, the Council, the Council’s asbestos consultants, and staff/USU representatives. Before a site would be “*closed off*” all parties (including the USU) had to agree that there were no outstanding issues: see, e.g., Ex 82, p 2684. That process was described by SafeWork’s Mr Williams as being “*standard*”: T 701.46-702.8 (29.9.20). As of 6 February 2018, 34 revisits to 28 identified sites had been undertaken, with “no outstanding” issues found by SafeWork inspectors at these sites: Ex 82 p2640. At the conclusion of the revisit program in November 2018, there were no outstanding issues at the sites that were included in that program: Ex 116, [37].
164. On 14 February 2018, the Minister issued a further notice of intention to issue a suspension order (*Second Suspension Notice*): Ex 1, pp 343-344. The Second Suspension Notice referred to the allegations concerning Mr Tooma’s prior relationship with Mr Mulligan, who the Minister described as being the “*Council’s (then) Chief Safety Officer*”. Mr Mulligan was never engaged or employed as the Council’s Chief Safety Officer. That was Mr Harris, who commenced with the Council in December 2017. There was no prior relationship between Mr Mulligan and Mr Tooma that created a conflict for Mr Tooma in his investigation, a matter on which findings were made in the Interim Report dated 7 May 2019.

165. At an extraordinary meeting of the Council on 20 February 2018, the Governing Body resolved that the Council submit a response to the Second Suspension Notice in the terms considered during that meeting: Ex 1, p 441-442.<sup>7</sup>
166. On 22 February 2018, the Council provided the EPA with a clearance certificate in relation to the Park Street Depot, completing compliance with the EPA's clean up notice in relation to that facility: Ex 136, [29].
167. Also on 22 February 2018, the Council submitted its response to the Second Suspension Notice: Ex 1, pp 552-561. That notice was the subject of Court proceedings dealt with briefly in the Interim Report dated 7 May 2019. Ultimately, the Council was not suspended.
168. On 27 February 2018, a report was given to the Governing Body recommending the allocation of a further \$2,080,342 to fund remediation projects and the work of the Asbestos Response Team: Ex 82, pp 2669-2672. This included:
- \$945,742 for the Katoomba Waste Management Facility
  - \$250,000 for the Lawson Stockpile remediation
  - \$235,000 for the Blackheath Tip remediation
  - \$650,000 for the Asbestos Response Team

The Governing Body approved that funding request: Ex 103.

169. During the period from January to March 2018, the Council (through the Asbestos Response Team) developed and implemented Asbestos Management Plans for those individual workplaces where ACM was present: T 930.5-47, 937.36-44 (01.10.20).

## **2019**

170. In early 2019, the Council's Asbestos Management Plan was updated.

---

<sup>7</sup>. Again, although that resolution was passed by a majority, it appears that all Councillors were in favour of submitting that response given that the alternate motion (supported by each of Crs Christie, Brown and Schreiber (Minute 35, p 439) included that same approval.

171. On 20 May 2019, a revised Asbestos Management Policy was endorsed by the Council's PCT: Ex 82, p 3268.

## CHAPTER 4: SAFEWORK, TOOMA, EPA, and OMBUDSMAN INVESTIGATIONS

### SafeWork Investigation

172. SafeWork's involvement with the Council from 2013 onwards was outlined by Mr Tony Williams, its Director, Construction Services Metropolitan, in a statement he provided to the Inquiry dated 22 September 2020 (and accompanying documentation – Ex 116).

#### *October 2015 – Blaxland Resource Recovery and Waste Facility*

173. On 13 October 2015, a SafeWork (then called WorkCover) inspector attended the Council's Blaxland Resource Recovery and Waste Management Facility, following which six improvement notices were issued to the Council. The investigator issued the notice because they held the view that:

- (i) the asbestos Management Plan at this workplace was not comprehensive and did not cover unexpected finds;
- (ii) air monitoring was required;
- (iii) the PPE provided to workers was not in accordance with the Asbestos Management Plan;
- (iv) workers had not been adequately trained for carrying out asbestos-related work;
- (v) HEPA filters were required to be fitted to excavators and health monitoring of workers was required.

#### *May 2017 – Springwood Depot*

174. On 7 May 2017 SafeWork were advised of an alleged exposure of workers to asbestos at the Council's Springwood Depot site. A SafeWork Inspector attended the site on 15 May, and the May 2017 Improvement Notice was issued to the Council because this workplace had no asbestos management plan (see details of the notice outlined in [103] above). A three-month period was given for the preparation of this plan, which was subsequently extended by agreement to 20 October 2017.



### *USU involvement*

175. On 24 October 2017 SafeWork was copied into correspondence from the United Services Union from Mr Greenwood, the then General Manager of the Council, which outlined 166 concerns regarding the management of asbestos at various council workplaces. This letter from the USU was the catalyst for a meeting between SafeWork inspectors, Union delegates, health and safety representatives of the Union who were employees of Council, and Council management. The Union's letter also led to SafeWork inspectors undertaking site inspections of all of the sites the subject of the letter that had raised the 166 concerns. By September 2018, all 30 of the Council workplaces that were of concern to the Union workers had been inspected and reinspected by SafeWork inspectors, and who were satisfied that the issues of concern that had been raised had been addressed (see [138] above).

### *SafeWork notices: Katoomba Waste Management Facility*

176. On 24 November 2017, SafeWork issued the Council with a Prohibition Notice giving directions relating to the Katoomba Waste Management Facility: Ex 87 p6. The EPA had been at this site prior to this (see [192] to [197] below). This required all operations to cease at what was known as the "platform" area of the facility, as well as remediation, and removal of asbestos containing material. The Prohibition Notice was issued because the inspector was of the view that workers were being exposed to an "immediate risk" to their health from the possible inhalation of asbestos fibres. Further notices were issued by SafeWork in relation to the KWMF as follows:

- (a) For the same reasons as outlined above, also on 24 November 2017, Prohibition Notices were issued in relation to the "*connecting road between the platform and transfer station*" at the facility, and the "*Waste Transfer Station Building*": Ex 87 p 8-10.
- (b) Two Improvement Notices were issued on 27 November 2017, requiring a qualified independent specialist to provide a report concerning the extent, location, and nature of asbestos contamination at the "*top level (domestic dumping area)*" of the facility, and on various items of plant: Ex 87 p 14-17.

- (c) A further Improvement Notice dated 27 November 2017 was issued requiring health monitoring of workers (past and present) at the facility: Ex 87 p 18.

- 177. The matters the subject of these Improvement Notices and Prohibition Notices were also the subject of an EPA investigation (detailed below), which resulted in the EPA issuing a Clean Up Notice, and an Official Caution.
- 178. The notices issued by SafeWork and the EPA were complied with, which involved the engagement of several companies with relevant expertise in the identification, handling, and removal of asbestos.

#### *Lawson Stockpile and Carpark Sites*

- 179. During this period of SafeWork's investigations, it received complaints concerning possible exposure of workers to asbestos-containing materials at two Council workplaces: 2-6 Park Street, Lawson ("the Lawson Stockpile Site") and 283 Great Western Highway, Lawson ("the Lawson Carpark Site").
- 180. Following its inspections and investigation, SafeWork formed the view that in relation to both of these workplaces, the Council had contravened the following Regulations of the WH&S Regulations:
  - (i) clause 425(1) – failure to prepare and keep an asbestos register;
  - (ii) clause 429(2) – failure to prepare asbestos management plans for these workplaces;
  - (iii) clause 445(1) – failing to ensure persons who may be involved in asbestos removal work are “trained in the identification and safe handling of and suitable control measures for asbestos and ACM”; and
  - (iv) clause 479(1) – failing to ensure if there is an uncertainty that an analysis of a sample is undertaken to “determine if asbestos or ACM is present”.

*May 2019 SafeWork Prosecution Notices re Lawson Stockpile and Carpark Sites, and Enforceable Undertaking*

181. On 6 May 2019 SafeWork commenced prosecutions against the Council in respect of each of the alleged breaches of the WH&S Regulations at the Lawson Carpark and Stockpile Sites: Ex 82, pp 3191-3260.
182. On 18 June 2019, the Council submitted a proposal to SafeWork to resolve the proceedings by way of an Enforceable Undertaking: Ex 82, pp 3272-3280.
183. That Enforceable Undertaking was entered into on 5 December 2019 (see Ex 82 p 3573-96) and it and the other evidence before the Inquiry indicate that the circumstances that gave rise to SafeWork's allegations that the Council had breached the WH&S Regulations were the following:
- (i) In about 2012 the Council entered into negotiations with what was then the NSW Roads and Maritime Services to lease the site at 283 Great Western Highway, Lawson to establish an informal (unsealed) car park to service the adjoining Lawson Mechanics Institute hall.
  - (ii) During this time, the Council commissioned a contamination report for what became the car park site by Sydney Environmental Soil Laboratory. A report prepared by that company indicated that there was bonded asbestos found at the site. It was found to be chrysotile asbestos. This form of asbestos, if damaged, can readily crumble into fibres that pose serious health risks to those who might breathe them in. SESL recommended the implementation of an asbestos management plan to ensure appropriate identification and removal of asbestos contamination at the car park site.
  - (iii) In 2016, the Council decided to undertake development work at the Carpark site to create a sealed car park in place of what had originally intended to be an informal car park. The works required the excavation of topsoil and substrata from the car park site. This work was performed by Council workers. During excavations, foundations of an old house were located. No further analysis of the material uncovered was undertaken by the Council to determine if asbestos

or asbestos-containing material was present. Approximately 500 tonnes of soil were excavated from the carpark site and taken to the stockpile site.

- (iv) Between 17 November and 12 December 2016, a Council worker was directed to sift the excavated soil from the car park site with a machine called a shaker. This was to remove bricks and rubble so that the recovered soil could be re-used. On 20 December 2016, 12 loads (approximately 110 tonnes) of this excavated construction and demolition material was transported in trucks from the stockpile site to the Blaxland Waste Management Facility.
- (v) There were no asbestos registers or asbestos management plans in place for either the Lawson Carpark or Stockpile Sites.
- (vi) Workers at the sites had not been trained in the identification and safe handling and suitable control measures for either asbestos, or asbestos-containing material.

184. Prior to the Enforceable Undertaking being entered into, a period of consultation about it was undertaken by the Council. This included briefing the Governing Body and all of the employees of the Council. Rectification work was undertaken which included the testing, removal and disposal of about 1,945 tonnes of material from the Lawson Stockpile site. Asbestos management plans and asbestos registers were prepared, and training was undertaken for relevant staff. Both sites, and the alleged contraventions of the WH&S Regulations, were also the subject of Mr Tooma's independent investigation in early 2018. Over \$1.23 million was spent on rectification work by the Council. As part of the Enforceable Undertaking, Council also committed to workplace strategies relating to asbestos management that are outlined in the terms of the Enforceable Undertaking (Ex 82 p. 3573). These strategies are also at significant cost to the Council.

*Admitted "Organisational Failures" re Lawson Sites*

185. The Council made specific reference to the Lawson Stockpile and Carpark sites in its Organisational failings document (Ex 148). It said this:

*“By way of significant example, the development of the car park at 283 Great Western Highway, Lawson (‘car park site’), and the subsequent handling of soil and debris excavated from the car park site, involved the following:*

- (1) The Council did not have an asbestos management plan for the car park site as required by cl. 429 of the Regulation.*
- (2) The Council did not have an asbestos register for the car park site as required by cl. 425 of the Regulation.*
- (3) The Council’s systems did not ensure that all relevant people were aware of the greater-than-usual risk that asbestos containing material might be on the car park site and of the evidence of that risk (the report prepared in 2012 by SESL Pty Ltd).*
- (4) The Council’s project planning for the car park failed to deal with that risk.*
- (5) The Council deployed to the project staff who were not adequately trained in the identification, safe handling and suitable control of asbestos and asbestos containing material.*
- (6) The Council’s then safety system and work culture (including the fact: that relevant workers were not aware of, or did not heed, the procedures that the Council did have in place) did not ensure that work stopped, and appropriate action was taken, when workers found material that should have been suspected of containing asbestos. All relevant parties-the site ‘owner’ and manager, and the workers doing the work and their supervisor-should each have felt a duty and authority to stop the work until a resumption was demonstrated to be safe. None did and at least some considered that the decision lay elsewhere.*
- (7) In the result, some Council employees dealt with material excavated from the car park site that was not tested and should have been.*
- (8) The Council did not appropriately store and later handle and dispose of material that was removed from the car park site.”*

186. Mr Williams made it clear in both his written statement and in his oral evidence at the public hearings that the Council at all times cooperated with SafeWork, complied with the various notices issued to it, and “has performed, or is performing, each of the actions identified” in the Enforceable Undertaking: Ex 116 at [56].

### **Tooma Investigation**

187. Asbestos Management at the Lawson Carpark and Stockpile sites were also part of Mr Tooma's investigation. While a claim of legal professional privilege has been made (and justified) in relation to the Interim Report he prepared on this, the recommendations he made have been made public, and have been implemented.
188. Mr Tooma also prepared a report for the Council concerning its approach to the Model Asbestos Policy, and the development of its Asbestos Management Plan, and Asbestos Registers. That report is also protected by legal professional privilege, but his recommendations have again been made public, and been implemented.

### **EPA Investigation**

189. The Chief Investigator of the EPA, Jason Bentley, provided the Inquiry with a written statement dated 19 March 2020 (Ex. 136) and also gave oral evidence at the public hearings.
190. Mr Bentley informed the Inquiry that the EPA, like SafeWork, was also involved in investigations into the asbestos issues at the Lawson Carpark and Stockpile sites.

### *Clean Up Notice*

191. On 8 November 2017, the EPA was advised by a member of the community that asbestos hazard signs had been installed at the Lawson Stockpile site. After contacting the Council, Mr Long of the Council requested the EPA to issue a Clean-Up Notice for the stockpile site. An inspection was undertaken by EPA officers on 28 November 2017, on which day Mr Long advised them that the Council had transported soil from the Lawson Carpark and Stockpile sites which might contain asbestos. A Clean Up Notice was ultimately issued by the EPA.

### *Official Caution*

192. On 22 November 2017, the EPA was advised by the Council that sampling of the waste at the Katoomba Waste Management Facility ("KWMF") had revealed the presence of asbestos in a stockpile of approximately 1,500 tonnes of waste. This stockpile was inspected by the EPA on 1 December 2017, and asbestos-containing material was observed. A Clean Up Notice was shortly thereafter issued by the EPA in relation to

the KWMF on 4 December 2017 Ex 136, Ex JB-1, Tab 15. This required the preparation and implementation of a remediation plan to remove all of the asbestos from the KWMF by 28 February 2018. However, in consultation with the EPA and by agreement, an extension of time was granted to the Council to achieve full clean up later in 2018.

193. On 6 December 2017, the EPA issued a Clean-Up Notice in respect of a residence at 22 Currawong Ave, Valley Heights: Ex 136, Ex JB-1 Tab 2.
194. On 12 December 2017, the EPA issued a clean-up notice in relation to the Park Street Depot, requiring the Council to remove all asbestos contaminated material by 27 January 2018: Ex 136, [26], Ex JB-1, tab 3. The time for compliance was later extended to 28 February 2018: Ex 136, [27]-[28].
195. On 19 November 2018, the EPA issued the Council with an “*Official Caution*” in relation to the contamination that had occurred at the Katoomba Waste Management Facility: Ex 136, [66]; Ex JB-1, tab 29. The caution records that:

*“From on or about 22 November 2017 (**the relevant time**), Council had received and was storing asbestos waste on the resource recovery platform at the Premises. The EPA reasonably suspects that the practices and procedures Council had in place at the relevant time failed to ensure asbestos waste was not received at the Premises.”*

And:

*“The EPA has reasonable grounds to believe that Council committed an offence under section 64(1) of the Act by contravening condition 01.1 of the Licence from on or about 22 November 2017 at the Premises by not carrying out licensed activities in a competent manner (**the alleged offence**). Further, the EPA believes that there is sufficient evidence to prove the alleged offence.”*

196. The reasons for the EPA imposing the caution were stated as follows:

*“Given the nature of and the circumstances surrounding the alleged offence, including but not limited to:*

- *that the EPA’s investigation did not reveal evidence of Council knowingly or deliberately receiving asbestos waste,*

- *consideration to the improvements made by Council and their cooperation and compliance with the EPA during the investigation, and*
- *having regard to the Attorney General's Caution Guidelines under the Fines Act 1996, the EPA considers it appropriate to issue Council with this Official Caution for the alleged offence."*

197. In addition to these matters, Mr Bentley's evidence to the Inquiry in both his statement and his oral evidence at the public hearings made clear that in his view, the Council had cooperated with the EPA and responded appropriately to all notices issued by it.

### **Ombudsman's Report**

198. The New South Wales Ombudsman published a report dated 29 August 2020 titled "*Investigation into actions taken by SafeWork NSW Inspectors in relation to Blue Mountains City Council Workplaces*" (**Ombudsman's Report**) This was a Special Report to Parliament under ss.26 and 31 of the *Ombudsman Act 1974*.

199. The Ombudsman (Mr Michael Barnes) made certain findings about the lawfulness and reasonableness of various Prohibition Notices and Improvement Notices issues issued by SafeWork to the Council.

200. The Ombudsman investigated a Prohibition Notice issued to the Council in relation to the Wentworth Falls Preschool on 28 November 2017, and an Improvement Notice in relation to that preschool on 6 December 2017. Some of the background facts to this matter were covered in evidence to this Inquiry. On 28 November 2017, allegations were made on 2GB that the children at the Preschool were being exposed to asbestos. They were not. There was a weathered piece of asbestos on the fascia of the portico at one of the Preschool's entrances that had already been the subject of attention by an expert company. This, it should be added, was bonded asbestos. In any event, the Ombudsman found that the Prohibition Notice of 28 November 2017 was issued contrary to law as the Inspector who issued it did not have a "reasonable belief" (as required under s.195 of the WH&S Act) that the issuing of it was warranted. It would appear that the Inspector was directed to issue the Notice by his Executive Director in Sydney. The Ombudsman, for the same reasons, found that the Improvement Notice



issued to the Council in respect of the Wentworth Falls Preschool on 6 December 2017 was also issued contrary to law.

201. The Ombudsman also investigated the circumstances of SafeWork issuing an Improvement Notice on 1 December 2017 to the Council regarding its property Heatherbrae House. Heatherbrae House is a Child Care Centre. There was a complaint made that there was a fireplace in a playroom around which the children sat which contained asbestos-containing material. There was asbestos-containing material in the chimney of the fireplace, but it was sealed and posed no risk. The Ombudsman found that this Improvement Notice was issued contrary to law, again because the Inspector who issued it did not have a reasonable belief it was warranted.
202. The Ombudsman investigated two Prohibition Notices issued to the Council on 25 January 2018 in relation to the Springwood Depot. A SafeWork Inspector had issued two Improvement Notices in relation to the Springwood Depot prior to this on 4 December 2017. These Notices included a requirement that a competent person “*seal all exposed edges and holes found in Waste Services office, the Amenities Block and the Carpenter’s Storage Shed*”. This work was performed by SafeWork licensed contractors who issued a Clearance Certificate on 21 December 2017.
203. Despite this, complaints were made about the quality of the work. On 23 January 2018, the Inspector who had issued these Improvement Notices inspected the work that was done and was satisfied it had been done competently, and that any concerns with the quality of the works done by the contractor “*were minor and could be easily addressed*”. On 24 January 2018, some criticism was made on 2GB about the actions of the SafeWork Inspector. A different Inspector was then sent to the Springwood Depot who issued the two Prohibition Notices to the Council of 25 January 2018. While not concluding that the Notices were issued unlawfully, the Ombudsman concluded that SafeWork’s conduct in issuing them was “unreasonable”, in that:
  - (a) the second Inspector’s belief and reasoning were not sufficiently documented;
  - (b) there was a failure to consider relevant contextual factors; and

- (c) the overriding of the first Inspector's decisions, absent evidence that the first Inspector had made any incorrect decision, was an unreasonable approach to enforcement.
204. The Ombudsman also investigated the circumstances of the issue of a Prohibition Notice to the Council dated 13 March 2018 in respect to the Lawson Carpark. SafeWork's conduct in issuing this Prohibition Notice was also found by the Ombudsman to have been unreasonable conduct as the Inspector's reasoning was not supported by adequate records, he had not made appropriate enquiries, and seemed to have acted upon the direction of his Director, and not from his own knowledge. The Ombudsman was critical of an Inspector claiming to have formed a required statutory belief based on the views of another Inspector.
205. The above are, in summarised form, an outline of the findings made by the Ombudsman. They are noted for the purposes of this Report. As mentioned above, it would be inappropriate for this Inquiry to make its own findings in relation to these Prohibition and Improvement Notices in circumstances where the Ombudsman has conducted an investigation, including the taking of sworn evidence. The Ombudsman's findings were unchallenged, and are accepted by this Inquiry for its purposes. It is unnecessary to summarise all the detailed findings of the Ombudsman. His report speaks for itself, and is available to be read online.
206. It finally can be noted that following the publication of the Ombudsman's Report, and in accordance with Recommendation 1 of it, on 15 September 2020 SafeWork publicly issued a response in which it apologised for the fact that its *"compliance activity and some of its processes were not up to the standard expected of a best practice regulator"*. SafeWork also acknowledged *"the substantial work being done by Blue Mountains City Council to manage asbestos safely in its workplaces and will continue to work with the Council in pursuing a collaborative working relationship"*.

## CHAPTER 5 – SPECIFIC FINDINGS ON ASBESTOS TERMS OF REFERENCE

### TOR 1

*“In exercising its functions pursuant to sections 23 and 24 of the LG Act, the Council and its governing body has since 2012 dealt with, and is dealing with, asbestos management issues at the Council in accordance with the guiding principles in section 8A(1)(a), (c) and (2)(c), (e) and the role of the governing body in section 223(1)(a), (b), (d), (g), (h) and (l) of that Act”*

207. TOR 1 requires findings to be made concerning both the Council, and then the Governing Body, as to whether they have “dealt” with “asbestos management issues” in accordance with relevant provisions of the LGA. These matters are considered separately, with findings made concerning the Council first. As will be seen, it is necessary to make findings in relation to a number of separate issues and events, before making general findings in respect to the relevant provisions of the LGA.

### The Council

#### Relevant provisions of the LGA

208. As is apparent from all of the asbestos terms of reference, consideration as to how both the Council and the Governing Body have dealt with asbestos management issues requires a consideration of various provisions of the LGA. For TOR 1, those provisions are set out below.

209. Section 23 of the LGA provides:

*“A council may do all such things as are supplemental or incidental to, or consequential on, the exercise of its functions.”*

210. Section 24 of the LGA provides:

*“A council may provide goods, services and facilities, and carry out activities, appropriate to the current and future needs within its local community and of the wider public, subject to this Act, the regulations and any other law.”*

211. Section 8A of the LGA sets out a number of guiding principles for councils. For the purposes of TOR 1, it relevantly provides:

*“(1) Exercise of functions generally the following general principles apply to the exercise of functions by councils—*

*(a) Councils should provide strong and effective representation, leadership, planning and decision-making.*

...

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

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

...

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

...

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

212. The object of section 8A of the LGA is described in the 2017 Councillor Handbook as follows (Ex 74, p 7):

*“The Local Government Act 1993 has been amended to prescribe new principles for local government. The object of the principles is to guide councils to carry out their functions in a way that facilitates strong, healthy and prosperous local communities.”*

213. Section 8A of the LGA was introduced in September 2016.<sup>8</sup> Prior to the commencement of the 2016 amendments to the LGA, section 8 provided:

*“(1) A council has the following charter:*

---

<sup>8</sup> *Local Government Amendment (Governance and Planning) Act 2016*. The same observation applies in relation to each TOR that refers to s 8A.

- *to provide directly or on behalf of other levels of government, after due consultation, adequate, equitable and appropriate services and facilities for the community and to ensure that those services and facilities are managed efficiently and effectively*
- *to exercise community leadership*
- *to exercise its functions in a manner that is consistent with and actively promotes the multicultural principles*
- *to promote and to provide and plan for the needs of children*
- *to properly manage, develop, protect, restore, enhance and conserve the environment of the area for which it is responsible, in a manner that is consistent with and promotes the principles of ecologically sustainable development*
- *to have regard to the long term and cumulative effects of its decisions*
- *to bear in mind that it is the custodian and trustee of public assets and to effectively plan for, account for and manage the assets for which it is responsible*
- *to engage in long-term strategic planning on behalf of the local community*
- *to exercise its functions in a manner that is consistent with and promotes social justice principles of equity, access, participation and rights*
- *to facilitate the involvement of councillors, members of the public, users of facilities and services and council staff in the development, improvement and co-ordination of local government*
- *to raise funds for local purposes by the fair imposition of rates, charges and fees, by income earned from investments and, when appropriate, by borrowings and grants*
- *to keep the local community and the State government (and through it, the wider community) informed about its activities*
- *to ensure that, in the exercise of its regulatory functions, it acts consistently and without bias, particularly where an activity of the council is affected*
- *to be a responsible employer.*

*(2) A council, in the exercise of its functions, must pursue its charter but nothing in the charter or this section gives rise to, or can be taken into account in, any civil cause of action.”*

214. To the extent that it becomes necessary to consider whether the Council has complied with the provisions of section 8A, those matters only arise from September 2016. However, a number of the general principles and concepts now contained in section 8A of the LGA can be found in the “*charter*” contained in the former section 8, and hence are relevant to the period between 2012 to September 2016.

2012 to May 2017

215. The Council was not compliant with its statutory obligations with respect to asbestos management in the period commencing 1 January 2013, until late 2017. In particular (and as is conceded (Ex 148)):

(a) the Council did not prepare and hold asbestos management plans (or adequate such plans) at all of its workplaces in accordance with cl 429 of the WHS Regs; and

(b) with the exception of two workplaces, the Council did not hold asbestos registers at each of its workplaces in accordance with cl 425 of the WHS Regs.

216. Individual asbestos registers were finalised for various workplaces from about July 2017: see, e.g., Ex 82, p 1843. Individual asbestos management plans for those workplaces where they were required were prepared and rolled out during early 2018: T 930.5-47 (01.10.20). Both resources are now available on the Council’s publicly accessible website: Ex 130.

217. The management of asbestos was a “*high risk area*” for the Council given its potential to pose a danger to public health, and to pose a risk to staff, the community, and contractors: see, e.g., T 806.27-46; T 1418.25-47 (08.10.20). Compliance with the Council’s statutory obligations concerning asbestos management, including by having asbestos registers and asbestos management plans at individual workplaces (to the extent required), should have been a priority for the Council at all times, and the Council should have been fully complaint well prior to the end of 2017: see, e.g., T 816.18-

817.45 (30.9.20); T 1419.2-22 (08.10.20). It should not have taken the Council until then to achieve that compliance.

218. A finding is made that the failure of the Council to have the policies and procedures necessary to achieve compliance during the period was a serious failure.
219. In many ways, the serious failure from between 2013 to mid-2017 is baffling. It is a failure that occurred despite the matters and events listed in the next paragraph. These make good two apparently conflicting points. First, they demonstrate that the Council should have been compliant with all relevant asbestos work, health and safety laws well before late 2017. They underscore it is surprising this was not achieved. Secondly, however, they do show that the Council was always doing something, and making some progress, towards achieving compliance, and developing asbestos procedures and policies throughout this period.
220. The matters and events of particular relevance are:
  - (a) The Willis Gap Analysis of April 2012, which recommended an “asbestos survey”, and preparation of an asbestos register and plan (see [38] above).
  - (b) The Model Asbestos Policy published and circulated by the Office of Local Government in November 2012 (then called Division of Local Government), which contained guidelines for – amongst other matters – the preparation of an asbestos management plan, and asbestos registers (see [42] above).
  - (c) The communications between Mr Cattermole and Mr Corbett in December 2012 concerning the “status” of an asbestos register (see [47] above).
  - (d) The communication between Mr Kitching and Mr Thompson regarding engaging Airsafe to “complete an asbestos audit and register for forty...assets...to comply with” WH&S requirements (see [50] above).
  - (e) The 7 Step plan of August 2013, which talked of an asbestos management plan being completed by November 2013 (see [53] above).

- (f) The draft asbestos policy prepared by Noel Arnold & Associates in September 2013 that contemplated the existence of an asbestos register and management plan (see [54] above).
- (g) The audit work done by Airsafe through 2014 (see [56] above).
- (h) The 2015 Willis Report which told the Council it was not compliant with the WH&S Act and Regs (see [61] above).
- (i) The SafeWork Improvement Notices issued in October 2015 in relation to the Blaxland Waste Management Facility, which was found to have an inadequate asbestos management plan (see [65] above).
- (j) The Safety Improvement Project (commenced in 2015), and the organisation audit of 2016 that revealed that the Council's policies, including its asbestos policy, were "generally out of date and lacking historical oversight" (see [69] above).
- (k) The non-conformance reports of Mr Johnston dated 3 February and 3 March 2017 (see [81] and [86] above).

221. Some other matters stand out as to why this serious failure occurred over a five-year period. For example:

- (a) The Council's failure to adopt an Asbestos Policy until October 2017: While there was no statutory requirement to adopt such a policy, had this been done in a timely fashion following the Model Policy being circulated to councils in November 2012, it would likely to have gone a long way to seeing the Council become complaint with asbestos related legislation: that is, to have adequate asbestos management plans and registers at each workplace well prior to 2017.
- (b) Proper and adequate processes were not in place to ensure that the senior staff received adequate, accurate, and timely reporting concerning the Council's compliance, or otherwise, with its obligations relating to asbestos management:



see, e.g., Ex 148; T 1435.14-47 (09.10.20). This is because a “*whole of Council*” approach to the development of its approach to asbestos management was not implemented until 2017.<sup>9</sup> Prior to then, responsibility for the development of the Council’s asbestos policy primarily sat within one area of the Council – Built Assets - which (on the evidence) lacked the capacity and resourcing to drive that through to completion. This is not an adverse finding against any individual in Built Assets. It is a finding of organisation wide failure against the Council.

- (c) Sometimes over optimism, or a degree of unintended exaggeration, were used in Council communications concerning its progress or compliance with asbestos management, that gave a false impression to those these messages were sent to: see, for example, [51]-[52] and [100]-[101] above.
- (d) The SafeWork improvement notices in relation to the Blaxland Waste Management Facility in September 2015 (see [65] above) were not reported to all members of the Council’s Executive Leadership Team, including the General Manager, or the Governing Body at the time.<sup>10</sup> This was part of why the Council at this time missed an opportunity for an organisation wide review of its approach to asbestos management, and its compliance with relevant WH&S laws – one which, if it had been reported up, Cr Greenhill says would have been taken: see, e.g., T 829.10-831.6 (30.09.20); T 1432.46-1433.42 (09.10.20).

222. Despite its serious failure to become fully complaint with the laws relating to asbestos management until 2017, it would be unfair and inaccurate to make a finding that the Council did nothing regarding asbestos management in the period 2012 to mid-2017. The chronology of facts outlined in Chapter 3, and the matters outlined in above, evidence that things were done, albeit sometimes not with the urgency that they should have been. There was, as an example, a recognition that an Asbestos Policy should be prepared almost immediately following the release of the Model Policy. The Council

---

<sup>9</sup> See, e.g., T 766.18-768.18 (29.9.20); T 849.13-31 (30.9.20).

<sup>10</sup> See also T 1522.28-44 (09.10.20).

also engaged Airsafe to undertake inspections of Council assets, and prepare registers identifying the location and condition of asbestos containing materials. The identification of asbestos, and the preparation of registers, was a big task for this Council given the number of old buildings in its property portfolio. Audits were conducted, some progress was made, and work health and safety reviews were conducted by Willis as outlined above. The Council also conducted its own audit, and put in place the Safety Improvement Project in 2015. Nevertheless, the creation of an asbestos policy, plans and registers were not advanced with the speed and diligence needed. In his evidence at the Public Hearings, the Council's former General Manager, Mr Greenwood, accepted that the Council should have been compliant with its statutory obligations concerning asbestos management by the end of 2013: T 1425.18-39 (18.3.20).

223. While the Council – properly – did not seek to fully excuse its slowness in achieving compliance with Work, Health and Safety laws concerning asbestos, some explanations beyond the Organisational Failures document (Ex 148) were proffered. They were as follows:

- (a) The Council has suggested that the Willis Gap report put it on the “wrong path” by giving advice concerning an asbestos register and an asbestos management plan in the singular: Council's submissions in chief at [11]. It is a stretch to suggest that the Willis Gap Analysis Report put the Council on the “wrong path”. The report, for example, did not expressly state that one singular asbestos management plan and asbestos register would be compliant with the WH&S Regulations, and as the Council points out in footnote 20 of its submissions in chief, the report makes reference to “the initial register”, “register holders”, and “the registers”.
- (b) At [16] of the Council's submissions in chief, criticism is offered against Airsafe for not advising the Council in a fee proposal dated 16 February 2013 for a proposed engagement in which Airsafe was to “*complete an asbestos audit and register for forty (40) selected Blue Mountains City Council assets*” (Ex 82, p.233), and that an asbestos register and an asbestos management plan were required for each workplace. While a fee proposal would not ordinarily be

considered a safe place from which Council should obtain its advice concerning its statutory obligations under the WHS Regulations, it is true that in its report to Council dated 10 April 2014 concerning this audit of council buildings, a single asbestos register was prepared, although one that listed the individual built assets inspected, and individually identified asbestos-containing material within them.

- (c) The Council has also noted in its submissions that the Model Asbestos Policy for NSW Councils that was released by the Division of Local Government on 26 November 2012 did not expressly state that councils with multiple workplaces would require asbestos management plans and asbestos registers for each of those workplaces: Council's submissions in chief at [21]-[24]. It was also noted that the Model Asbestos Policy was published only about a month before the Council was required to be fully compliant with the new provisions of the WH&S Regulations. That is true, but does not excuse a council for being non-compliant with work, health, and safety legislation.
- (d) Criticism was also made by the Council of a draft Asbestos Management Policy prepared for it by Noel Arnold & Associates in September of 2013: Ex 127. The Council again point to advice given about preparation of a singular asbestos management plan and register. However, the Council's internal document concerning this under the heading "Asbestos Requirements" makes clear reference to clauses 425 and 429, including the need to have an asbestos register and an asbestos management plan for a "workplace". A council like this one could not rationally have considered that it only had one workplace.
- (e) The Council has again submitted that it was kept on the wrong path by the Willis Report of 2015, which while advising that its WHS policies "did not align with the *Work Health and Safety Act 2011*", did not advise the Council that it was not compliant with clauses 425 and 429 of the WHS Regulation: Council's submissions in chief at [28]. The suggestion is made that Willis failed to provide advice that should have been given. No finding to that effect is made (nor could it be made absent the opportunity for Willis to make its own submissions), but it seems another stretch in any event. The Council must be

taken to have been aware by this time that it was not compliant with Work, Health and Safety legislation regarding asbestos management.

- (f) The Council has also pointed to some confusion by a person or people within its Built Assets Group between having a Model Asbestos Policy, and the requirement under the WHS Regulations to have an Asbestos Management Plan at all workplaces: see Council's submissions in chief at [69]. That confusion of course should not have existed, and could not have existed if the legislative requirements were read, or read properly.
- (g) Mr Greenwood felt that – along with structural and organisational impediments – that the loss to the organisation of relevantly experienced senior staff like Mr Cattermole and Mr Corbett in late 2014-2015 was significant (T1444.9-1445-10 (18.3.20)).
- (h) The effect of Mr McKay's evidence was that there was work being done, but insufficient "coordination ...across directorates", such that at a higher level there was no overarching organisation wide knowledge as to where things were at, and – more pertinently – where they were not (meaning not compliant (T 889.4-26 (30.9.20)). This evidence aligns with the admissions made in the Organisational Failings document (Ex 148).
- (i) Cr Greenhill also made mention of directorates within Council not coordinating with each other regarding asbestos management (almost being "at war" with each other), and a lack of any meaningful information finding its way to the Governing Body. This too picks up themes from the Organisational Failings document. He also made mention of the significance of the 2013 bushfires – not as an excuse for the Council's non-compliance with asbestos laws, but as a matter that took away focus and resources: (T 1436.31-1437.45 (09.10.20)).

224. The Council has also made a submission that preparing asbestos registers and asbestos management plans for its various workplaces was a "large project": see Council's submissions at [36]-[39]. This submission is accepted. The Council owns hundreds of buildings, and the task of completing asbestos management plans and asbestos registers

for all of them – not forgetting that many of these assets were required to be surveyed for the presence of asbestos – was a large and expensive task. That is not an excuse for the Council not being compliant with the relevant laws until the latter part of 2017, but it would be unfair to make any criticism of the Council, or to make findings against it, without considering the proper context for the task it had. That context was that compliance with the asbestos requirements of the WH&S Regulations was a large job for the Council and took up a great deal of resources, both human and financial.

225. These matters are, to varying degrees, some form of explanation for the serious nature of the Council's delay in becoming compliant with safety laws. Although no witness said this directly, it seems that the impetus to become compliant with laws relating to asbestos management became lost or at least caught up with the progress of the more general Safety Improvement Project which had its genesis in the 2015 Willis Report. It is also clear that when reports or memoranda were prepared regarding asbestos management, they tended to indicate matters were being progressed with more momentum than they were, and that policies and procedures that were already in place were adequate. Mr Greenwood's evidence was that based on the reports provided to him he was under the impression the Council had appropriate policies in place and was compliant with its obligations. He said it was only from the time SafeWork became significantly involved in May 2017 at the Springwood Depot that he understood that the Council's policies were inadequate, and it was not compliant with the laws concerning asbestos management: T 1407.38-1408.17, 1410.33.-1413.2, 1426.6-1427.6, 1442.2-1443.1,1443.39-1444.7, 1520.45-1521.13 (18.3.20). It is accepted that Mr Greenwood genuinely held this view, and had the understanding that he explained in his evidence. However, the fact that the General Manager of the Council was unaware that it was non-compliant with work health and safety laws relating to asbestos for approximately five years is a serious failure of the organisation, and its then organisational structure. Mr Greenwood accepted this in his evidence: T 1478.28-34 (18.3.20). His state of knowledge also seems at odds with the decision made by the Executive Leadership Team on 10 May 2017 to engage Centium "*to bring policies and procedures [relevant to asbestos] up to date as a priority*": Ex 82, p1721A.

226. While the matters mentioned above do provide layers of explanation for the Council's non-compliance with asbestos laws, the explanation can also be brought down

(although not exclusively as outlined above) to a more fundamental factor, raised by Dr Dillon in her evidence. As she said, *“people weren’t looking up and reading the Act and seeing that it was requiring in actual fact plans at every site that may have contained ACM.”*: T 1516.16-18 (09.10.20). To this could be added the requirement to have asbestos registers. If an organisation is going to bring itself into conformity with legislative requirements, it is essential for persons with relevant responsibility to both read the text of that legislation, to properly understand it (or obtain advice concerning any uncertainties as to requirements), and then to promptly take action necessary to achieve compliance. One or more of these sequential steps was not undertaken by persons within Council for a significant period of time.

*Cr Brown submissions regarding the Council and its “corporate image”, and not acting “ethically”*

227. One matter that must be addressed is the submission made by Cr Brown at [13] of her submissions in chief that in respect of Term of Reference 1 (and 2 and 9) the Council has *“sought to defend its corporate image rather than act in the best interests of the residents and the community”* and has failed to act *“fairly, ethically in the interests of the local community”*.
228. There are findings of failure that must be made regarding the Council’s management of asbestos in the period 2013 to the middle of 2017. To suggest that the Council failed to act “ethically” though, or sought to advance its corporate image above acting in the interests of the “residents and the community”, are not submissions that are made good by the whole of the evidence. An allegation of organisational wide failure to act ethically is a very serious one. The Council was too slow in becoming compliant with WH&S laws regarding asbestos management. It acknowledges this. There are other failings identified below. Cr Brown obviously feels strongly about these failures, and her concerns are genuine. An allegation of unethical behaviour however is not accepted.
229. The failings made by Council resulted from human error – a failure to recognise fully what was needed, and to implement it with far greater speed. There was a failure by Council to put proper organisational structures and governance systems in place to carry through the large change and undertakings required by the asbestos safety and management laws legislated in the WHS Act and Regs. To the extent any individual

may have failed more seriously than others is not a basis on its own for finding an organisation (or an individual) to be “unethical”. Those failings were addressed by SafeWork, who issued a number of notices to the Council seeking improvement, and on some cases prohibition notices. All of these notices had been complied with. The same can be said for any notices issued by the EPA. There was nothing that amounts to what could be described as an organisation wide “moral” failure in relation to asbestos management. There was always an ongoing attempt through the whole period 2012 to the middle of 2017 for the Council to become compliant with asbestos management laws, and to put in place good and best practice policies and procedures. This took too long. There are instances where workers may have been exposed to asbestos which are, as a matter of obviousness, highly regrettable. It is equally regrettable that some council staff require ongoing health monitoring. The Council should have adopted a comprehensive asbestos management policy well before it did, and asbestos management plans and asbestos registers should have been prepared and maintained at Council assets and workplaces before they finally were. These failings occurred for a number of reasons, including those admitted by the Council in Ex 148. None of these failings, shortcomings and regrettable matters properly support a finding that people within the Council were unethical, or that the Council’s focus in asbestos management was on its “corporate image” rather than the interests of residents and the community.

#### **Findings re TOR 1 for the period 1 January 2013 until June 2017: The Council**

230. TOR 1 requires a consideration of how the Council (in this case, its relevant staff) “dealt with, and is dealing with, asbestos management issues ...in accordance with the guiding principles in section 8A(1)(a), (c) and (2)(c) and (e) of the LGA. For the period 2012 until September 2016 however, these provisions were not in operation. The then s.8 “Charter” was instead in place.
231. Those parts of s.8 that are relevant up to September 2016 are the requirements for the Council:
- *to have regard to the long term and cumulative effects of its decisions*

- *to bear in mind that it is the custodian and trustee of public assets and to effectively plan for, account for and manage the assets for which it is responsible.*

232. For the period since the enactment of s.8A of the LGA, until May 2017, the following findings are made on the basis of the facts found in Chapter 4:

- (a) the Council failed to provide “*strong and effective leadership, planning and decision-making*” as required by s.8A(1)(a) of the LGA on the issue of asbestos management.
- (b) the Council failed to act “*strategically ...for the provision of effective and efficient services and regulation to meet the diverse needs of the local community*” (8A(1)(c)), in the sense that the Community needs Council to manage its assets pursuant to effective regulations that ensure risks – including the risk posed by asbestos – is minimised as far as possible, if not eliminated entirely;
- (c) the Council failed to “*consider the long term and cumulative effects of actions on future generations*” in relation to the issue of asbestos management within Council assets in that period (s.8A(2)(c)).

233. These findings are justified on the basis that:

- (a) The Council did not have, or did not have adequate, asbestos management plans at all of its workplaces, as required by clause 429 of the WHS Regs.
- (b) The Council did not have asbestos registers at all of its workplaces as required by clause 425 of the WHS Regs.
- (c) There was no Asbestos Policy until October 2017.

234. No finding is made that the Council failed to comply with s.8A(2)(e) that “*Council decision-making should be transparent and decision-makers are to be accountable for*



*decisions and omissions*". The Council's failings in relation to asbestos management were not kept a secret. There was no lack of transparency with how Council approached the changes brought in by the WH&S Act and Regs, or with the Council's Safety Improvement Project, nor with anything of significance regarding asbestos management following this. As to accountability, if it ever would have been appropriate to "point the finger" at one or more persons for the failure of the Council to become compliant with asbestos management laws under the WH&S Act and Regs until the later part of 2017, no such persons are still employed by the Council. That should not be taken as an indication that any adverse finding would have been made in relation to any particular person. It merely identifies that the part of s.8A(2)(2) relating to decision makers being "accountable" does not arise (probably at all, but certainly not usefully) for consideration by this Inquiry.

235. A major turning point for the Council becoming compliant with work health and safety laws concerning asbestos management was the intervention of SafeWork in May 2017, and the subsequent Councillor briefing sessions in June and July 2017. However, progress, identified above, occurred prior to SafeWork's intervention in May 2017. For example, safety generally had been given greater priority from the time of the 2015 Willis Report in mid-2015, and the commencement of the Safety Improvement Project sponsored by the then General Manager Mr Greenwood. This led first to the employment of Mr Shellshear in April 2016, and then to the engagement of Mr Mulligan in September 2016. Other matters of significance prior to SafeWork issuing the Improvement Notice for Springwood Depot on 22 May 2017 include:

- (a) the establishment of the Asbestos Working Group in early 2017, and that group's efforts to advance the development of the Council's asbestos management practices<sup>11</sup>;
- (b) the recognition by May 2017 that a "*whole of council*" approach was required to more speedily advance the development of the Council's asbestos policy;

---

<sup>11</sup> Whether or not it achieved those aims is not, for present purposes, the point. Rather, the significance of those matters was that there was a recognition within Council of the need to improve the Council's position in respect of asbestos management and steps taken towards that objective.

- (c) the resolution of the Council's Executive Leadership Team on 10 May 2017 to engage a "*specialist for 3 months to bring policies and procedures up to date as a priority*".

236. This leads to the intervention of SafeWork on 15 May 2017, and the Improvement Notice it issued on 22 May 2017 for the Springwood Depot. The evidence before the Inquiry establishes that from this point on:

- (a) responding to the issues raised by SafeWork;
- (b) improving the Council's policies and procedures in relation to asbestos management; and
- (c) becoming fully compliant with all relevant provisions of the WH&S Act and Regs

became the Council's "*highest priority*": see, e.g., T 1442.41-1443.10, 1445.33-1446.8 (18.3.20).

237. Of the more important steps the Council took from May 2017 where that it:

- (a) Established an Asbestos Management Response Team on 8 June 2017.
- (b) Prepared and delivered individual asbestos registers to those Council sites that required them during June/July 2017, and prepared an asbestos database.
- (c) Prepared (to the satisfaction of SafeWork) and adopted an Asbestos Policy, and an Asbestos Management Plan with accompanying Asbestos Standard Operating Procedures, in October 2017, and continued to update those documents (see, e.g., Ex 160, Tab 4).
- (d) Employed a Chief Safety Officer, and initiated an Asbestos Response Taskforce, which included an Asbestos Response Team and a Project Team.

- (e) Engaged Airsafe to inspect and prepare registers in respect of those council assets which had not yet been inspected.
- (f) Prepared individual asbestos management plans for those workplaces where they were required in early 2018.
- (g) Cooperated fully with SafeWork, and complied with each of notices issued by SafeWork.
- (h) Responsibly addressed the United Services Union's "*166 point*" letter, both with officers from the Union, and with SafeWork.
- (i) Participated in SafeWork's "revisit program", which brought together representatives of the Council, SafeWork and the USU to resolve particular issues at nominated sites. On completion of that program, it was agreed between those parties that there were no outstanding issues.
- (j) Entered into the SafeWork Enforceable Undertaking, and in doing so, agreed to implement a number of other improvements to the Council's asbestos management policies and procedures, and prepare materials for the benefit of other councils in relation to asbestos management issues.
- (k) Responded to the issues raised by the EPA, cooperated with that agency, and complied with each of the notices issued by the EPA.
- (l) Adopted a "*Stockpile and Layover Establishment and Management*" procedure in September 2018: Ex 160, tab 1.
- (m) Adopted a "*Legislative Compliance Policy*": Ex 160, tab 9.
- (n) Developed a "*Communication & Engagement Strategy*" in relation to asbestos management: Ex 82, pp 2987-3027.

- (o) Adopted an “*Asbestos Elimination Program*”, which involves budgeted works each year with a view to ultimately eliminating asbestos containing materials in council assets: T 936.30-937.18 (01.10.20); T 1535.3-44 (09.10.20); Ex 82, p 3070.
- (p) Made available updated asbestos awareness training, train the trainer courses and “*toolbox*” talks: T 861.40-862.15 (30.9.20); Ex 82, p 3601-3606.
- (q) Spent very large sums on remediation of asbestos.
- (r) Provided health monitoring to any staff member who wished to take it up, irrespective of what their duties: see, e.g., T 945.28-946.21.

238. Based on the above, it is clear that the Council mobilised significant resources (both human and financial) in responding to the asbestos management issues from May 2017, and ultimately – and with diligence and speed – put in place best practice and legally compliant policies, procedures, plans, and documents relating to the management of asbestos. The evidence of Mr Williams was that (partly because of the working relationship between the Council and SafeWork) the Council was “*on the path to being an exemplar*” in relation to asbestos management: T 685.38.

*Finding: Katoomba Waste Management Facility*

239. SafeWork issued a series of notices in relation to the Katoomba Waste Management Facility that are detailed above at [176]-[178]. The EPA issued an “Official Caution” [197]. That Official Caution was issued because the EPA determined that the Council had failed to carry out some of its duties at the KWMF “in a competent manner” as it “failed to ensure asbestos waste was not received” at this facility: Ex 136 at [66]. These matters justify a finding that in relation to the KMWF, until November 2017, the Council failed in its obligations under s.8A(1)(a) and (c), and 8A(2)(c) concerning the management of asbestos. This has been rectified since then. Issues relevant to the KWMF are also addressed in the findings made for TOR 6.

*Finding: Lawson Stockpile and Carpark Sites*

240. The notices issued by SafeWork in relation to the Lawson Stockpile and Carpark Sites that lead to a SafeWork prosecution (see [181]-[184] above), the need to enter into an Enforceable Undertaking, and the matters admitted by the Council in its Organisational Failures document (exhibit 148) (see [185] above) justify a finding that the Council failed in its obligations under s.8A(1)(a) and (c), and 8A(2)(c) concerning the management of asbestos. This has been rectified since then. Issues relating to these sites are also addressed in the findings for TOR 6.

*Cr Brown's further submissions*

241. In relation to Term of Reference 1 (and also 2, 5 and 9), Cr Brown has submitted that having been alerted to the failure of the Council to be compliant with the WHS Act and Regulations from mid-May 2017, the Council took inadequate actions to deal with that issue until 12 December 2017 when a Chief Safety Officer was appointed and failed to act with reasonable care and diligence for this approximate 5 month period from May to December 2017: Cr Brown submissions in chief at [96]-[99], and again from [100]-[123]. In a related submission concerning Term of Reference 8, Cr Brown submits that adequate funding was not made available for the management of asbestos between May and November 2017: Cr Brown's submissions in chief [124]-[129].

242. At [135]-[178] of her submissions in chief, Cr Brown complains that from November 2017 the Council CEO, Dr Dillon, "*did not take the necessary steps to ensure the Mayor and other councillors are given timely information and advice*". She provides a number of examples, including the time given to the councillors to read the Mayoral Minutes of 14 November 2017 regarding the engagement of the independent experts Mr Tooma and Ms Reid and the failure to provide councillors with unredacted copies of Mr Tooma's reports, and the time given to read them. She complains that "*the lack of access to the reports has had a material effect in compromising the Council's understanding of the asbestos management issues on which they were required to make decisions*": Cr Brown's submissions in chief at [153]. She also complains about a lack of time to consider whether the Council should have gone ahead with legal action to seek an injunction against the Minister suspending the Council in February 2018.

243. Minds can always reasonably differ about how much time people need to absorb material in order to make informed decisions. Cr Brown's opinion about these matters is not sufficient on its own to support the finding she contends for. She has had access for a long period of time to redacted versions of Mr Tooma's reports. In relation to resolutions to appoint Mr Tooma and Ms Reid, or to seek an injunction against the Minister's decision to suspend the Council, as a matter of obviousness these were decisions that had to be taken urgently. They were not the kinds of decisions that Council was required to make where long periods of contemplation and reflection were available. The subject matter was very urgent business and required an urgent response. There is no way of making that process perfect. Nothing about the process in any event has primary relevance to the issue about whether the Council has or has not fulfilled its obligations under the LGA in relation to the management of asbestos. The decision to appoint someone like Mr Tooma, however, to conduct an independent investigation (as distinct from the method by which he was appointed) was obviously a decision made by Council demonstrating an intent to have an independent person make findings of fact about what had occurred at certain workplaces, and make recommendations about how to fix and address any failings.

244. In her submissions, Cr Brown has also suggested that the Council "should not have been concerned about placing asbestos signs on buildings for fear of upsetting the tenant or the public": Brown submissions in chief at [20]. She suggested that the Council acted for the "sake of its reputation" in this regard and not in the best interests of the local community: Brown submissions in chief at [19]-[20]. As Counsel Assisting has said in his submissions in reply, this criticism by Cr Brown should not be accepted. Apart from anything else, it ignores the evidence that guidance was sought by the Council from both an independent expert (Centium Group), and more importantly, from the key regulator (SafeWork) in relation to decision-making concerning the labelling of asbestos. The Council's ultimate approach was endorsed by it. Rather than deserving criticism, that approach taken by Mr Long was a mature and appropriate one.

### **Findings TOR 1: The Council**

#### **June 2017 to October 2020**

245. For the reasons outlined above in [236]-[237], aside from the matters outlined in [239] – [240] above, a finding is made that from May 2017 onwards the Council did manage,

and is managing, the issue of asbestos in accordance with each of the guiding principles identified in each of s 8A(1)(a), (c) and (2)(c) and (e) of the LGA. Based on the same matters, a finding is made that the Council is now on the path of being an “exemplar” in relation to the management of asbestos and the risks posed by it.

### **TOR 1: The Governing Body**

246. Section 223 of the LGA deals with the role of the Governing Body. Relevantly for the purposes of TOR 1, it provides:

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

*(a) to direct and control the affairs of the council in accordance with this Act,*

*(b) to provide effective civic leadership to the local community,*

*...*

*(d) to ensure as far as possible that the council acts in accordance with the principles set out in Chapter 3 and the plans, programs, strategies and policies of the council,*

*...*

*(g) to keep under review the performance of the council, including service delivery,*

*...*

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

*...”*

247. Section 223 of the LGA was also subject to substantial amendment in 2016. Prior to that amendment it simply provided that *“The role of the governing body is to direct and control the affairs of the council in accordance with this Act.”* To the extent that there is a need to consider compliance with the particular provisions of section 223 identified in TOR 1, those matters can only arise in the period after 23 September 2016.<sup>12</sup>

---

<sup>12</sup> The same observation applies to each TOR which refers to s 223 of the LGA.

248. That senior management was not fully aware at least of the Council's ongoing non-compliance with work health and safety laws concerning asbestos had a flow on effect – it meant that this state of affairs was not brought to the attention of the Governing Body in any of the usual ways senior management pass on matters of significance. There appears to be no Mayoral Minutes, Minutes of Meetings, Councillor Briefings, or information sessions that raised the issue of the Council's approach to asbestos management and non-compliance with the law in the period 2012 up to and until the Councillor Briefing session of 6 June 2017 following the Improvement Notice issued by SafeWork in May.
249. There is no evidence upon which a finding could rationally be made that the Governing Body was aware of the Council's deficiencies in its compliance with its statutory obligations relating to asbestos management until 6 June 2017 – the date of the Councillor Briefing Session where SafeWork's inspection of the Springwood Depot and the May 2017 Improvement Notice were discussed. A finding is made that the Governing Body did not know of the Council's non-compliance with its statutory obligations.
250. The question as to whether the Governing Body should have known does however have to be addressed. Clearly, this state of affairs should have been brought to their attention before June 2017. The Mayor, Cr Greenhill, said in his evidence that the Governing Body was generally aware of the introduction of the WH&S Act in 2011, and that (as a matter of obviousness) the Council would need to be compliant with any obligations or duties imposed upon it by that legislation. He also said the following (T 1412.35-1414.36 (08.10.20):

*“A. ....I was aware that there was specifically a project around ...aimed to bring the council into compliance. It would come up from time to time also during weekly briefings and also with my one-on-one briefings when I became Mayor in 2013 with the General Manager, and the advice we were given was that we were progressing well. There were no red flags but the matters were discussed. The governing body was aware that the projects were there. We were aware of what the projects sought to do and we were given opportunities to interrogate progress..... the level of awareness of our state of compliance was that we had to ensure we were complying and that there was some work to do to ensure that we were compliant. We had dashboards that were presented to us at*



*those briefings. They were also presented to the public. And they required us to go through all of our buildings, all of our assets to check the state of them and then make a judgment about where compliance sat. There was certainly no statement to say there is, you know, a yawning gap between where we are and the legislation but there was a determined effort to go through all of our assets and make sure we were compliant.....There was an understanding that there were some areas that we may not be compliant in and we wouldn't know that until they were analysed. But there was certainly never a point in time when briefings said, "We have analysed a building and we have found that we're noncompliant". When we were asked how were we going, the response was, "No, things are going well. We're satisfied that the council is in good shape. We'll continue to analyse" - I mean this council has a lot of old buildings and a lengthy and exhaustive process, we were told, was underway. Obviously my knowledge of that now as compared to my knowledge then is different, but at that time the impression we were strongly given was that there were no red flags, that we were going through our assets, that we were satisfied that we were compliant as we went through, it was possible we would find non-compliances. If we did we'd deal with them.....our involvement wasn't passive. In questions we were being asked all the way through at no point was there a red flag to suggest a noncompliance with the legislation. (emphasis added)*

251. An example of a “*service dashboard*” dated December 2014 (Ex 155) supports Cr Greenhill’s evidence as to the impression given to the Governing Body, at least at that time, in relation to the state of the Council’s compliance and the work being done in that respect: T 1505.23-1509.35 (09.10.20). This service dashboard “Summary of Service and Asset Plans” shows that as part of the “risk management strategy” Council was maintaining an “asbestos register” and “labelling” buildings for asbestos.

252. Dr Dillon gave the following evidence about the significance of those reports, including the “*Service Dashboard*”:

*“...The service dashboard document that was tabled, that was part of integrated planning and reporting, part of our efforts to do a couple of things, update our asset management plans, but also something that the governing body gave leadership on and we worked very hard on operationally, which was ensuring that we were effectively managing the 1.2 or 1.3 billion worth of ageing built assets. Now that excerpt from that dashboard, that document went on public exhibition, it went up to council, was adopted.....*

*What I wanted to say is that the timing of that was late 2014. The Airsafe audited buildings hadn't been completed. They were halfway through it.*

*They still were doing more in 2015 and what happens in that document, it was showing three possible options that would go to community. We increased level of service, they pay higher rates, we maintain service or we have less level of service, which would be the status quo because there wasn't enough money to renew and maintain all the aging built infrastructure. So we were basically going to community to say, hey, the governing body, we recognise, and the council recognises we need to effectively manage all this. So what's mentioned there, it will often say here were some of the risks in each service area and here's how we were mitigating and controlling them. So in the case of the two references to asbestos that related to primarily commercial buildings and community Feldman buildings, what they said is the risk was that we've only assessed the high priority, the buildings with high priority asbestos. It was saying we haven't assessed the medium and low level buildings with, that have been assessed for - we hadn't finished the assessment of the medium and low priority and in the risk mitigation strategy it mentions a whole range of things from updating registers and putting signage on, but also complying with the asbestos policy.*

*So there's two points I'll make to that. Firstly, the governing body would have been hearing this was all in hand, we're halfway through, we're auditing the buildings, we're managing and mitigating the risk, and they would have from that assumed we were even complying with the asbestos policy....”*

253. Cr Greenhill's evidence was that his understanding about the state of the Council's compliance with its statutory obligations with respect to asbestos management changed following his meeting with Mr Greenwood on 31 May 2017: T 1416-1419 (08.10.20). Cr Van der Kley's evidence was to the same effect: T 1312.44-1313.19 (08.10.20).
254. As noted above, in the period commencing 6 June 2017, the Governing Body was made aware of the nature of the asbestos management issues raised by SafeWork, and were updated by the senior staff at briefings in June, July and October. Regular, weekly briefings (including from time to time, written briefings) commenced in about December 2017.
255. Based on the evidence before the Inquiry, it would not be reasonable to make a finding that the Governing Body should have known matters that were not brought to their attention prior to June 2017 and onwards. There was nothing in the reports given to the Mayor, or in briefings given to the Governing Body as a whole, that alerted them to the fact that prior to Mid-2017 the “ball had been dropped” regarding compliance with asbestos related Work Health and Safety laws.

## **Findings TOR 1: Governing Body**

### **January 2013 to June 2017**

256. Consequently, while this matter is further explored below in relation to TOR 2, a finding is made that the Governing Body did not fail to perform its roles and obligations set out in s223(1)(a), (b), (d), (g), (h), and (l) of the LGA in relation to asbestos management issues.

### **6 June 2017 to October 2020**

#### *Cr Brown's Submission*

257. As part of her submissions in relation to Term of Reference 1 (and also 2 and 9), Cr Brown has submitted that the Governing Body has not acted in the best interests of the local community because it has not made Mr Tooma's independent expert reports publicly available. The Council did resolve on 15 December 2017 to make Mr Tooma's reports available to the public once he had completed them. A resolution was later passed not to do this, although Mr Tooma's recommendations have been made publicly available. The submission is made by Cr Brown that "*[t]he preparedness of the Council to not honour that commitment speaks of its prioritisation of the Council's reputation over the transparency and trust of the community*": Cr Brown's submissions in chief at [22].

258. In his submissions in reply, Mr Glover made the following points concerning Cr Brown's submission, and the underlying facts upon which it should be judged:

- (a) When Council's solicitor Mr Cork originally engaged Mr Tooma, it was done so on the basis that legal professional privilege would be able to be claimed over his reports.
- (b) While on 15 December 2017 the Governing Body resolved that Mr Tooma be authorised to "publicly release his report", it was always understood that the entirety of his reports may not be capable of being publicly released without procedural fairness being offered to various persons named, and without carrying a risk associated with defamation. For that reason, when Mr Tooma's reports were first available in February 2018, the copies supplied to the

Governing Body were redacted to the extent of removing the names of people and other identifying features.

(c) At some stage after Mr Tooma's engagement, Mr Cork had discussions with him about "what a public report would look like" (see generally T 1587-1590 (9, 10, 20)). In early February 2018 Mr Tooma was the subject of adverse commentary by Mr Hadley in one of his radio broadcasts, a matter upon which findings were made in the first Interim Report dated 7 May 2019. It seems this prompted Mr Tooma to quickly finish his remaining reporting work without any process being undertaken to offer procedural fairness to people named in the reports of the kind contemplated prior to any of his reports being made publicly available. Because of this, and the risks associated with defamation, legal professional privilege has been maintained over Mr Tooma's reports.

259. There are good reasons why most reports to Government or Parliament should be made publicly available. The concerns of the Governing Body and Council, however – relating to procedural fairness and defamation actions – are matters of substance that point to it being a reasonable and rational decision to not make these reports publicly available. Further, it is a reasonable position to take that the public interest is more closely associated with Mr Tooma's recommendations being made publicly available, as distinct from findings he may have made about individual actions in his reports. There is a difference between what is in the public interest and what might be, at a level of mere curiosity, of some interest to members of the public. It would not be in the public interest for people to be the subject of adverse commentary of published reports (assuming they have been) if they were denied procedural fairness. It would not be in the interests of the Council or the residents of the Blue Mountains that the Council exposed itself to the risk of defamation litigation.

260. Cr Brown has also made a submission that the Council has not acted in the best interests of the community in relation to a resolution passed by the Governing Body following the death of Mr Maurice Pugh on 8 January 2020. Mr Pugh worked for the Council for a long time. He died of mesothelioma. The death of a council employee from mesothelioma is clearly tragic. The cause of Mr Pugh's illness, including whether he was exposed to asbestos fibres while working for the Council, was not a matter explored

in evidence. For a public inquiry established under s.438U of the LGA, it would not be appropriate to conduct such an inquiry. Cr Brown has said in her submissions that Mr Pugh's partner had passed on to Council that his main concern following his diagnosis was "*that men who had left the Council before and after him should be contacted and arrangements made for them to be screened regularly*": Cr Brown's submissions in chief at [28]. The Governing Body thereafter passed a resolution to notify "*fellow workers of Maurice Pugh who left the Council between 2010 and up to the present time*" and also "*current and past employees of Council who worked with Maurice Pugh*": Cr Brown's submissions in chief at [29]. Cr Brown clearly does not think that the resolution passed by the Governing Body went far enough, and proposed an amended resolution that was not successful that she has set out at [33] of her submissions in chief. For its part, in its submissions in reply, the Council has submitted that whilst great sympathy is due to Mr Pugh's family, the circumstances of his illness are not within the Inquiry's Terms of Reference: Council's submissions in reply at [11]. That submission is not without force, but in any event, any differences between the resolution passed by the Governing Body concerning Mr Pugh, and that which Cr Brown favours, are not the basis for making any findings adverse to the Council in relation to its handling of asbestos relevant to the provisions of the LGA referred to in TOR 1 (or TOR 2).

261. It is convenient at this point to briefly deal with other submissions made by Councillor Brown in relation to Term of Reference 1 that she also makes in relation to other asbestos management Terms of Reference. Presumably as a means of suggesting that the Council and the Governing Body have not dealt with asbestos management issues in accordance with the provisions of the LGA referred to in the Terms of Reference, she has submitted that "*the actions of the Council in attacking former staff and members of the Governing Body at public hearings are remarkably similar to the "shoot the messenger" concern which has been held by so many staff members and attributed to the concerns which led to this Inquiry*": Cr Brown's submissions in chief at [39].
262. There were no instances at the public or private hearings of this Inquiry where former staff or members of the Governing Body were "attacked". Mr Singleton, on a restrained number of occasions, put to a witness, at a private hearing, that they were lying. There

were proper grounds for that question, and a consequent submission to that effect. On some occasions, as is perfectly normal, it was put to witnesses that they may have overlooked a matter, or should consider something else, or might be mistaken. None of this was done disrespectfully, or in a manner that could be described as an “attack”. The submission made at [39] of Cr Brown’s submissions in chief is rejected.

263. At [41]-[75] of her submissions in chief, Cr Brown has made a number of observations about the Ombudsman’s report. These submissions have again been put to support the proposition outlined in [13] of her submissions in chief that the Council has defended its “corporate image” rather than acting in the best interests of residents and has not acted fairly, ethically or in the interests of the local community. In relation to the Ombudsman’s report, she says these findings have been misrepresented by senior staff of the Council, and also by members of the Governing Body. The following are matters of note pertinent to Cr Brown’s submissions:

- (a) In his report to Parliament dated 21 August 2020, the Ombudsman made findings in relation to 6 Notices issued by SafeWork to the Council between November 2017 and 13 March 2018. These included both improvement and prohibition notices. The notices were variously found to be unlawfully issued, or to have been issued in circumstances that amounted to unreasonable conduct: see generally [198] to [206] above. At [47] of her submissions in chief, Cr Brown makes the submission that it is *“reasonable to conclude that a greater number of notices”* were the subject of the Council’s complaint to the Ombudsman than the 6 that were the subject of the Ombudsman’s findings. As Counsel Assisting has pointed out in his reply (see [35]), there is nothing in the Ombudsman’s report upon which that finding could be made. This is relevant to a statement made by the Mayor on 25 August 2020 that Cr Brown complains about. She says the Mayor said the following words:

*“And now we have the Ombudsman or cross-section of notices issued by SafeWork in the period and finds them to be either unreasonable ... or unlawful ... councillors ... we must not ignore the fact that every notice is examined. Every notice the subject of the complaint ... every one of them was found to have been unlawful or inappropriately issued. All of them.”*

Cr Brown says that these statements made the Mayor are untrue. This is, presumably, premised on her theory that the complaint made by Council to the Ombudsman extended beyond the 6 Notices that he made adverse findings about. There is no evidence about that at all, no basis for drawing that as a rational conclusion, and hence no basis for making a finding that what the Mayor said was untrue.

- (b) At [54] and [55] of her submissions in chief, Cr Brown complains about something that Cr Hollywood apparently said on Facebook on 22 August 2020. That is of little relevance to this Inquiry. Cr Hollywood also apparently said at a Council meeting on 25 August 2020 that the “*asbestos crisis was manufactured*”. If that is Cr Hollywood’s opinion, she is entitled to it. That opinion is not a proper basis for making findings as to whether or not the Governing Body has or has not complied with obligations under the LGA concerning asbestos management. That is to be judged by what the Governing Body has actually done and is doing, not the expressions of opinion of an individual councillor on Facebook, or a throwaway line at a Council meeting.
- (c) Cr Brown also complains that Cr McGregor described the Ombudsman’s findings as evidence of a “political conspiracy”. In his evidence to the Inquiry, Cr McGregor said that his comments were not related to all aspects of the Council’s management of asbestos, but related specifically to the findings in the Ombudsman’s report. Again, Cr McGregor is entitled to have an opinion about the Ombudsman’s report. That opinion, again, is not a basis for making findings about whether the Council or the Governing Body is complying with relevant provisions of the LGA. That is determined by such concrete things as whether or not the Council is complying with and has complied with SafeWork notices, whether it has brought itself into a position of statutory compliance in relation to asbestos management issues, and the relevant expert opinions about these matters of someone like Mr Williams from SafeWork.
- (d) Cr Brown also complains about an advertisement placed in the Blue Mountains Gazette on 16 September 2020 by the Council in response to the Ombudsman’s report. That advertisement contained, in bold type, the words “NSW

**Ombudsman recommends SafeWork NSW apologise to Blue Mountains Council, staff and ratepayers and pay compensation”. Cr Brown submits that this statement is not correct, and that the Ombudsman’s report did not recommend an apology to staff or ratepayers. The recommendation that was made by the Ombudsman (Ex 131, p.90) was this:**

*“SafeWork apologise to the Blue Mountains City Council for the way it conducted its compliance activities in 2017/2018 and acknowledge the detrimental impact on Council, staff and ratepayers from its actions.”*

The full text of that recommendation appeared in the same advertisement that Cr Brown complains about. While in the literally read text of this statement the subject of the apology is the Council, a statement by SafeWork would not conventionally be construed as though it is a legislative provision. If it is not an apology to staff and ratepayers, it is heavily flirting with being such. In any event, to suggest again, as Cr Brown does, that the highlighted words from the advertisement are evidence of failings by the Council or the Governing Body in relation to their obligations under the LGA is misplaced.

- (e) Cr Brown also complains that the advertisement quotes the Mayor as saying *“Blue Mountains Council has been the victim of a politically-motivated and prolonged attack in which the State’s safety regulator, SafeWork NSW, was weaponised for political ends”*: Cr Brown’s submissions in chief at [63]. Cr Brown suggests that this statement infers that all of SafeWork’s notices were politically motivated. Whatever the merits of the comments attributed to the Mayor, on no sensible reading of those words does it imply that every notice issued by SafeWork to the Council concerning asbestos was either unlawfully issued or unreasonably issued. It just does not say this.
- (f) At [65] and [66] of her submissions in chief, Cr Brown makes a criticism of a statement attributed to the CEO that is a direct quote from the Ombudsman’s report. That cannot be the subject of an adverse finding in relation to the Council’s obligations under the LGA concerning asbestos.



- (g) At [67]-[69] of her submissions, Cr Brown criticises the Mayor, Cr Greenhill, by suggesting that evidence he gave at the public hearings implied that all of SafeWork's notices were questionable. In his evidence, extracted by Mr Glover at [44] of his submissions in reply, the Mayor was sufficiently clear that he was not suggesting that the Ombudsman's findings are a basis for an inference that all of the SafeWork notices were unlawful. What he was suggesting was that, in his opinion (which is open to him), *"you can't draw an inference that the rest are all okay, which is a very different proposition"*. Again, the Mayor is entitled to draw inferences from the Ombudsman's report. They are not relevant to whether the Council and the Governing Body are fulfilling obligations they have under the LGA concerning the management of asbestos.
- (h) There is then a reference made to a statement that Dr Dillon made to the Blue Mountains Gazette on 2 November 2020 concerning the Katoomba Waste Management Facility in which she makes no reference to the Ombudsman's report, and yet it is said by Cr Brown to misrepresent that report: Cr Brown's submissions in chief at [73]. That submission is rejected.

264. Cr Brown emphasises in her submissions that the Ombudsman's findings were "restricted" to 6 notices and "4 sites". She states in her submission that "only 6" SafeWork notices were found defective. It can be safely assumed that SafeWork as a regulator does not consider that "only 6" unlawfully issued or unreasonably issued notices is good enough. It can be assumed that as a regulator that seeks best practice, it would be disappointed if it issued any improvement or prohibition notices that were issued in an unlawful fashion, or that are found to have been unreasonably issued. That SafeWork issued prohibition and improvement notices on the Council that were unlawful, or unreasonably issued, is a significant matter. That they related to asbestos, and concerned a pre-school amongst other workplaces, arguably elevates the significance. The Council was subject to adverse media comments about this, as well as action from the Regulator that it should not have taken. It is not surprising then that the findings of the Ombudsman's report engendered some passion from members of the Governing Body, and the senior staff of the Council. They are entitled to feel disappointed that SafeWork unlawfully or unreasonably issued prohibition and improvement notices, just as they are entitled to feel aggrieved that these matters were

to an extent played out in the media. It would probably be odd if members of the Governing Body and someone in the position of Dr Dillon did not publicly respond to the Ombudsman's findings. Within reason they are entitled to. Given their positions, they are probably obliged to. They are entitled to engage with the residents of the Blue Mountains about the Ombudsman's findings.

265. Cr Brown clearly feels as though there has been some misrepresentation or exaggeration in relation to those responses. She is entitled to that view, but that is not a finding made in this report. Neither the opinion of Cr Brown, nor of any other Councillor, is in a direct way relevant to assessing whether the Council is managing asbestos in accordance with relevant obligations under the LGA.
266. Further, the Mayor or the CEO's responses to the Ombudsman's report, or what Cr Hollywood says on Facebook, or what Cr McGregor says in a council meeting, are also of marginal relevance to making a determination as to whether the Council and the Governing Body have acted with "care and diligence" in relation to the handling of asbestos. That matter is not to be determined on the basis of what was said in the advertisement referred to by Cr Brown. It is to be judged by the responses that the Council has made to all of the SafeWork notices issued against it. It is to be judged by the Council's response to the notices issued by the EPA. It is to be judged by the Council's level of cooperation and engagement with those two regulators, and the Office of Local Government. It is to be judged by the Council's compliance with Work, Health and Safety laws. It is to be judged by the Council's safety procedures and policies, including those specifically relating to asbestos. It is to be judged by the on-the-ground actions of relevant Council staff in relation to the identification and safe handling of asbestos, asbestos-containing material, and possible asbestos-containing material. Asbestos can be a deadly substance. Potential asbestos fibres must be handled and disposed of with all necessary care and diligence, and in accordance with all statutory and other safety obligations. However, as a matter of obviousness, the advertisement referred to, and the expressions of opinion on Facebook or at Council Meetings, are of minimal relevance to the dangers relating to asbestos, and how this hazardous substance must be managed by an organisation like the Council. A complaint that the Council is not acting with care and diligence in relation to asbestos management

because of these matters misses the point about the kind of care and diligence that is relevant to the management of a hazardous material like asbestos.

*The “hourglass model”*

267. Cr Brown in her evidence, and in her submissions, asserted that the Mayor and the CEO did not always perform their roles in compliance with how they are defined in ss 226 and 335 of the LGA respectively. She suggested that in some important respects the Mayor acted as a kind of “gatekeeper” between the CEO and the Governing Body, such that some relevant and important information was provided to him by Dr Dillon that either did not reach the Governing Body, or in relation to which there was an inappropriate delay in that information reaching it. This included matters relating to the management of asbestos by the Council.
268. Before making any findings in respect to this, the relevant sections of the LGA should be set out in full. Section 226 of the LGA defines the role of the Mayor, and is in the following terms.

**226 Role of mayor**

*The role of the mayor is as follows:*

- (a) to be the leader of the council and a leader in the local community,*
- (b) to advance community cohesion and promote civic awareness,*
- (c) to be the principal member and spokesperson of the governing body, including representing the views of the council as to its local priorities,*
- (d) to exercise, in cases of necessity, the policy-making functions of the governing body of the council between meetings of the council,*
- (e) to preside at meetings of the council,*
- (f) to ensure that meetings of the council are conducted efficiently, effectively and in accordance with this Act,*

- (g) *to ensure the timely development and adoption of the strategic plans, programs, and policies of the council,*
- (h) *to promote the effective and consistent implementation of the strategic plans, programs, and policies of the council,*
- (i) *to promote partnerships between the council and key stakeholders,*
- (j) *to advise, consult with and provide strategic direction to the general manager in relation to the implementation of the strategic plans and policies of the council,*
- (k) *in conjunction with the general manager, to ensure adequate opportunities and mechanisms for engagement between the council and the local community,*
- (l) *to carry out the civic and ceremonial functions of the mayoral office,*
- (m) *to represent the council on regional organisations and at inter-governmental forums at regional, State and Commonwealth level,*
- (n) *in consultation with the councillors, to lead performance appraisals of the general manager,*
- (o) *to exercise any other functions of the council that the council determines.*

269. The role of the General Manager is set out in s.335, which is in the following terms:

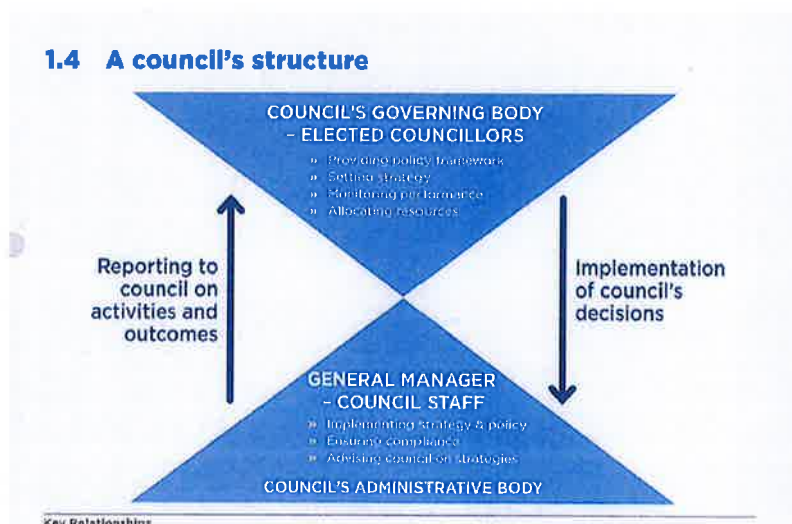
**335 Functions of general manager**

*The general manager of a council has the following functions:*

- (a) to conduct the day-to-day management of the council in accordance with the strategic plans, programs, strategies, and policies of the council,*
- (b) to implement, without undue delay, lawful decisions of the council,*
- (c) to advise the mayor and the governing body on the development and implementation of the strategic plans, programs, strategies, and policies of the council,*
- (d) to advise the mayor and the governing body on the appropriate form of community consultation on the strategic plans, programs, strategies, and policies of the council and other matters related to the council,*
- (e) to prepare, in consultation with the mayor and the governing body, the council's community strategic plan, community engagement strategy, resourcing strategy, delivery program, operational plan and annual report,*
- (f) to ensure that the mayor and other councillors are given timely information and advice and the administrative and professional support necessary to effectively discharge their functions,*
- (g) to exercise any of the functions of the council that are delegated by the council to the general manager,*
- (h) to appoint staff in accordance with the organisation structure determined under this Chapter and the resources approved by the council,*
- (i) to direct and dismiss staff,*
- (j) to implement the council's workforce management strategy,*
- (k) any other functions that are conferred or imposed on the general manager by or under this or any other Act.*

270. As can be seen from these two provisions, the combination of s226(j) and (k) with s.335(c), (d), (e) and (f) make it sufficiently clear that there are likely to be occasions when on matters of a council’s policies, plans, programs and strategies, a mayor and a general manager (or CEO) are likely to consult and work closely together at times that do not at first necessarily involve other councillors. As Ms Lyn Brown (Manager Investigations, OLG) said in her evidence, such interactions are “*normal and expected*”, and there is nothing unusual in the fact that the rest of the governing body are not involved in them: T 714.15-715.31 (29.9.20). That of course does not detract from a councillor’s role as set out in s.232 of the LGA, nor does it lessen the obligation on a general manager to give councillors as well as the mayor “timely information and advice” on matters in order for them to fulfil his or her functions as set out in s.335(f). However, that information might first go to a mayor in no way evidences that it has not gone to the rest of the councillors in a “timely” manner – that is to be determined on its own facts and circumstances, not on the basis that a mayor knew or was consulted first about something.

271. To assist councillors in their understanding of their legislative responsibilities, and how reporting and decision making between the staff of council and the governing body is structured by the LGA, the Councillor’s Handbook (Ex. 74) published by the Office of Local Government contains an instructional diagram that is as follows (Ex 61):



272. The Handbook also contains the following about councillor workshops or briefing sessions:

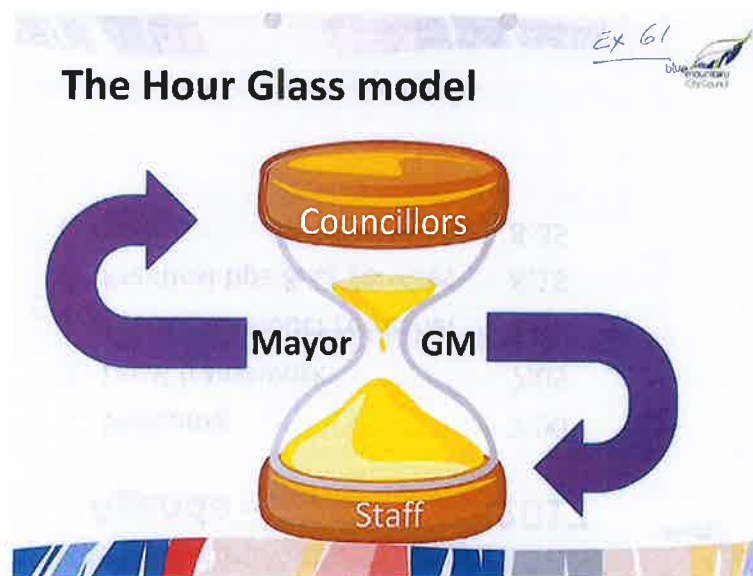
***Workshops or briefing sessions***

*Councils may hold workshops for the purpose of conducting in-depth discussions on certain topics. Formal decisions are not made at workshops but these sessions provide the time needed to explore more important or complex issues in detail. A workshop may involve councillors, council staff and invited participants.*

*Workshops should not be used for detailed or advanced discussions where agreement is reached and/or a de-facto decision is made. Any detailed discussion or exchange of views on an issue, and any policy decision from the options, should be left to the open forum of a formal council or committee meeting.*

*The Office of Local Government recognises the value of workshops or information sessions in developing councillor knowledge and expertise, and in assisting them to discharge their role as public officials*

273. The Council prepared its own diagram for explaining to councillors the role of the CEO, the Mayor and Council staff, and the structure by which reporting and decisions are made. It was prepared for the purposes of a meeting held on 10 October 2017, and is referred to as the “hourglass model”. It is as follows (Ex 61):



274. At [100] to [123] of her submissions, Cr Brown asserts that after the Mayor and the Deputy Mayor were made aware of the SafeWork Improvement Notice issued on 22 May 2017, *“no significant actions were taken by the governing body which can be described as displaying reasonable care and diligence for 5 months until 14 November 2017 at which time the independent investigations were initiated”*. She says it is not good enough for the Mayor to assert the *“governing body took action by being briefed and being satisfied the Council was taking appropriate action”*. She says that the Mayor’s position is “unsustainable” as evidenced by this exchange in the evidence on 9 October 2020:

MR RYAN: Thank you. Did the governing body pass any resolution between 6 June and November the 14th seeking assurances from the managing staff of the council?

A. The governing body met with the management of council and satisfied itself as to the actions taken.

Q. When did they do that?

A. On 6 June, on 4 July and on 24 October.

Q. So isn't it the case, though, that they were briefings, they weren't meetings, and they in fact didn't meet?

MR GLOVER: I object.

WITNESS: The council satisfied itself that the general manager and his staff were taking appropriate steps, as I've outlined earlier in my evidence, to deal with the issues that were being raised at that time.

MR RYAN: I'm putting it to you that there is no written record where the council resolved that it satisfied –

A. That doesn't imply it didn't happen.

Q. Well, in fact there's only one way –

A. I don't agree with that proposition. The governing body's job is to satisfy itself that appropriate steps are being taken. The governing body did that.

Q. Do you agree that the governing body makes decisions by way of resolution at a properly constituted council meeting?

A. Yes, but you don't need to make decisions. If you're happy that the general manager and staff are taking appropriate steps, there are no decisions to make but to satisfy yourself that those steps are being taken. That the governing body did.



275. There are a number of matters to address in Cr Brown's submission. It is accepted, as she submits, that a council's governing body cannot make a decision by attending a briefing. Decisions in the form of resolutions are obviously passed at meetings of council, not at briefings. However, that does not mean a council has to pass a resolution to indicate, every time staff report on what actions they are taking, that the governing body is "satisfied" about that. Cr Brown says however that "*there is no mechanism in the LGA or in common law that a collegiate governing body can reach a state of satisfaction without meeting and lawfully reaching that conclusion by majority vote*". That is not entirely accepted. That submission carries the implication that every time council staff report to the governing body on actions they are taking – whether in a briefing, or at a council meeting – a resolution must ensue to the effect that the councillors are or are not "satisfied" by this. That seems like a recipe for paralysing council meetings rather than leading to good decision making.
276. When a governing body is informed by council staff of actions they are taking, there may not be a need for any particular formal decision making or resolution to follow. There is not an automatic need for a "state of satisfaction" to be reflected in a resolution of any particular kind. There might be times when a governing body does pass a resolution concerning actions or conduct of council staff – for example, the governing body may be dissatisfied with what is occurring, and pass a resolution to that effect at a meeting, which might also call for further or different action. Unless that is the case though, or unless there is another reason, a general state of satisfaction by a council does not have to be the subject of a resolution at a meeting. Sometimes a statute might require a decision maker to be "satisfied" of a particular fact before they can validly exercise a power. That is very different to what the Governing Body needed to do concerning the Council's management of asbestos. They were informed of failings regarding asbestos management from the time of the briefing of 6 June 2017, and at and following that time informed of what steps staff were taking – frequently with SafeWork – to remedy these matters. No particular decision making from the Governing Body was necessary on this matter, until such time as further information persuaded the councillors of the desirability of approving the independent investigations that were subject of resolutions in November 2017.

277. As for the submission that *“no significant actions were taken by the governing body which can be described as displaying reasonable care and diligence for 5 months until 14 November 2017”*, there is no identification of what “actions” should have been taken by the Governing Body. Compliance with the relevant asbestos laws was a job for the staff of the Council. The Executive Leadership Team had resolved to do that with priority (and the assistance of Centium) on 10 May 2017. A number of matters referred to at [236]-[237] were being attended to. The Council was working closely with SafeWork. The Governing Body knew this. It is difficult to see in those circumstances what the Governing Body could have usefully resolved in the period May to November 2017. The staff were doing what they had to do regarding asbestos management, they were cooperating with SafeWork, and ensuring compliance with regulatory action. The Governing Body knew that. If any councillor thought at this time that something more could or should be done, they were free to propose a resolution.
278. At [120] of her submissions in chief, Cr Brown suggests that the failure to pass what she says were necessary resolutions regarding the state of “satisfaction” the governing body needed to have regarding asbestos management matters between May and November 2017 was probably due to the *“combination of believing briefings were akin to council meetings, the ‘hourglass’ culture of overreliance on the Mayor and a lack of awareness of the importance of having formal written reports as a way of documenting the professional advice given to councillors.”* While the totality of this submission is not accepted, to the extent it implies a criticism of the “hourglass” diagram prepared by Council (Ex 61) there is some force to Cr Brown’s concerns.
279. The diagram referred to above from page 8 of the Councillor’s Handbook provides councillors with a useful summary of council reporting and decision-making structure relevant to them. It is, of course, no substitute for actually reading relevant provisions of the LGA (such as ss226, 232 and 335 (amongst others)), as the Mayor said in his evidence: T1453 (9 Oct 2020). However, the Council’s Hourglass model is so simplistic it is potentially unhelpful. Simplicity in description or diagram is not necessarily a bad thing, but the “hourglass” is so simple that on its own it is as prone to mislead as to inform. For proper guidance as to these matters, a better approach

would be for the Council to rely on what is in the OLG Councillor's Handbook, and the provisions of the LGA itself.

280. Having said that, no finding is made that the Mayor has acted as some inappropriate “gatekeeper” holding up the flow of relevant information from the CEO to the Governing Body, or that Dr Dillon has facilitated this. This was denied by Cr Van Der Kley, Cr McGregor, the Mayor and Dr Dillon, and the “gatekeeper” theory is not established on the evidence. Of course, in a situation of pressure such as the Council found itself in during the period May 2017 to early 2018, or for decision making of great importance, discussions between the Mayor and the CEO (and potentially other senior staff) prior to the governing body being informed either at a briefing or Council meeting through a Mayoral Minute, might be perfectly normal, and wise. An example of this is the meeting between the Mayor, the Deputy Mayor, the then General Manager and Mr Liddell on 31 May 2017 regarding SafeWork’s inspection and subsequent compliance action concerning the Springwood Depot. There was no evidence though of a kind that suggests either the Mayor or the CEO were not properly fulfilling their statutory roles as set out in s.226 and s.335 of the LGA.

### **Findings TOR 1: The Governing Body**

#### **6 June 2017 to October 2020**

281. Based on the evidence concerning the Governing Body from the time of the Councillor Briefing of June 2017, a finding is made that the Governing Body took all appropriate steps to ensure that the Council properly addressed the asbestos management issues that had come to light. In particular, the evidence summarised above demonstrates that the Governing Body:
- (a) received briefings from Council Management as to those matters on June, July, and October 2017, and commencing in later 2017 on a weekly basis;
  - (b) approved the allocation of significant resources to fund remediation projects and asbestos management work more generally (including through the Mayor under delegated authority): see, e.g., Ex 82, pp 2351-2354; 2528-2533; 2628-2631; Ex 103; Ex 104; T 1431.40-1432.44, 1439.12-25 (09.10.20).

282. Further, when confronted in November 2017 with the suggestion that the information it had been given by management about the Council's approach to asbestos management had been incomplete or incorrect (via allegations aired in the media), the Governing Body resolved to appoint an independent investigator. Cr Van der Kley described the rationale for that decision as follows (T 1320.10-33 (08.10.20)):

*“Q. In the response to the allegations that were made in the media in November 2017 you've referred to the appointment of the independent investigators. Was one of the reasons why you thought that was a good idea was so that the council could try to understand what had gone wrong, if anything?”*

*A. Exactly. Because we were only hearing bits and pieces and we needed to know exactly what went wrong.*

*Q. When you say “we were only hearing bits and pieces” what do you mean by that?*

*A. I mean we were only hearing what was in the press, what was on Ray Hadley, we were reading the transcripts and so forth. And the council needed, or the governing body, let me say it that way, the governing body needed to find out exactly what went wrong and what was going on, because it was just - it wasn't - we weren't working properly. We needed to be able to know where the problems lie, fix them and that's why we commissioned the two reports.*

*Q. When you say you were hearing things through the media, was that information that was coming through the media different from what was coming through management?*

*A. Yes.”*

283. Cr Greenhill's evidence on this topic was as follows (T1423.33-1424.26 (08.10.20)):

*“Q. You became aware of broadcasts in the media about asbestos issues, I'll call them at the moment, within the council in November 2017, correct?”*

*A. Yes.*

*Q. I think you've given evidence previously that you were briefed on them by --?*

*A. Well, so I was called by, in the first day it started I was called by council's communications manager to say this has just been said on radio. My next phone call to Robert Greenwood to say, you know, and I think this is probably fairly close to a direct quote, “What the hell is going on?” And that “what the hell is going on” conversation - and I hope no one's offended by that language - continued the following day and a whole range of allegations were being raised that I had not heard in the discussion on 31 May, 6 June, 4 July and whatever it was, 24*

*October, so a whole range of other issues coming up. And in the course of a very short space of time I said to the then general manager I want you to prepare for me Mayoral minutes, with appropriate legal advice, that investigate all of these issues, and I remember saying to him I want a warts and all, root and branch, deep dive into everything that's being said. I want to know what's true and what's not and I want the governing body to know.*

*Q. And I take it was a concern to you that the allegations that were reported in the media differed from the information you were receiving from, for instance, Mr Greenwood?*

*A. Yes. If the allegations that were being raised were true, I wanted to know about it. I mean, Mr Hadley was saying a number of things about myself that I knew not to be true, so obviously, you know, I wasn't necessarily taking everything he said as gospel because I knew he was saying things about me and my life, my marriage break up and all of that, that weren't true, but - and I thank him for it, my family thanks him for it - but - keen to meet him, to discuss it, tried to phone him, wouldn't take my calls, but anyway. But if the issues around asbestos were in any way true, I wanted to know about it."*

284. That was an appropriate course to take to ensure that the Governing Body had a clear picture of the issues facing the Council.
285. For the period June 2017 to October 2020, a finding is made that the Governing Body properly performed its roles and obligations set out in s223(1)(a), (b), (d), (g), (h), and (l) of the LGA in relation to asbestos management issues.

## TOR 2

*In exercising their functions pursuant to Part 2 of Chapter 9 of the LG Act, the mayor and councillors of the Council have since 2012 exercised, and are exercising, a reasonable degree of care and diligence in dealing with asbestos management issues at the Council in accordance with section 439(1) of the Local Government Act 1993*

### Relevant provisions of the LGA

286. Insofar as it relates to the functions of the Mayor and the Councillors, Pt 2 of Ch 9 of the LGA includes the following provisions:

(a) Section 223 provides:

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

- (a) to direct and control the affairs of the council in accordance with this Act,*
- (b) to provide effective civic leadership to the local community,*
- (c) to ensure as far as possible the financial sustainability of the council,*
- (d) to ensure as far as possible that the council acts in accordance with the principles set out in Chapter 3 and the plans, programs, strategies and polices of the council,*
- (e) to develop and endorse the community strategic plan, delivery program and other strategic plans, programs, strategies and policies of the council,*
- (f) to determine and adopt a rating and revenue policy and operational plans that support the optimal allocation of the council’s resources to implement the strategic plans (including the community strategic plan) of the council and for the benefit of the local area,*
- (g) to keep under review the performance of the council, including service delivery,*
- (h) to make decisions necessary for the proper exercise of the council’s regulatory functions,*

- (i) *to determine the process for appointment of the general manager by the council and to monitor the general manager's performance,*
- (j) *to determine the senior staff positions within the organisation structure of the council,*
- (k) *to consult regularly with community organisations and other key stakeholders and keep them informed of the council's decisions and activities,*
- (l) *to be responsible for ensuring that the council acts honestly, efficiently and appropriately.*

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

(b) Section 226 sets out the role of the Mayor (see [268] above).

(c) Section 232 provides:

*"(1) The role of a councillor is as follows—*

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

*(2) A councillor is accountable to the local community for the performance of the council."*

287. Section 223 of the LGA was substantially amended in 2016, and to the extent that there is a need to consider the Council's compliance with the particular provisions of section 223 identified in TOR 2, those matters can only arise in the period after September 2016.

288. Similarly, both sections 226 and 232 were also the subject of amendment in 2016.<sup>13</sup> Prior to that amendment:

(a) Section 226 provided:

*“The role of the mayor is:*

- *to exercise, in cases of necessity, the policy-making functions of the governing body of the council between meetings of the council*
- *to exercise such other functions of the council as the council determines*  
*to preside at meetings of the council*
- *to carry out the civic and ceremonial functions of the mayoral office.”*

(b) Section 232 provided:

*“(1) The role of a councillor is, as a member of the governing body of the council:*

- *to provide a civic leadership role in guiding the development of the community strategic plan for the area and to be responsible for monitoring the implementation of the council's delivery program*
- *to direct and control the affairs of the council in accordance with this Act*
- *to participate in the optimum allocation of the council's resources for the benefit of the area*

---

<sup>13</sup> *Local Government Amendment (Governance and Planning) Act 2016 (NSW).*



- *to play a key role in the creation and review of the council's policies and objectives and criteria relating to the exercise of the council's regulatory functions*
- *to review the performance of the council and its delivery of services, and the delivery program and revenue policies of the council.*

(2) *The role of a councillor is, as an elected person:*

- *to represent the interests of the residents and ratepayers*
- *to provide leadership and guidance to the community*
- *to facilitate communication between the community and the council."*

289. The effect of the 2016 amendments was to further define the roles of each of the Governing Body, a councillor, and the Mayor. To the extent that it is necessary to have particular regard to the terms of those provisions in answering TOR 2, it is necessary to bear in mind the differences in the content of those provisions during the period covered by the TOR.

290. Section 439(1) of the LGA provides:

*"(1)Every councillor, member of staff of a council and delegate of a council must act honestly and exercise a reasonable degree of care and diligence in carrying out his or her functions under this or any other Act."*

#### The focus of TOR 2

291. TOR 2 requires a finding to be made as to whether, "*in dealing with asbestos management issues at the Council*", the Mayor and the Governing Body did so in accordance with s 439(1) of the LGA. The central matters to be inquired into and reported on then are whether, in dealing with "*asbestos management issues at the Council*" since 2012, the Mayor and each other Councillor:

- acted honestly; and
- exercised a reasonable degree of care and diligence in carrying out his or her functions.

## Findings

292. The core factual findings of relevance are:

- (a) In the period 2012 to June 2017, to the extent that any information of substance was given to the Governing Body concerning asbestos management, there was nothing to alert its members to the serious failings in the Council's asbestos management, and its non-compliance with WH&S laws relating to asbestos.
- (b) Until the weeks of 31 May 2017 (the date of the meeting between Mr Greenwood, Mr Liddell, the Mayor and the Deputy Mayor) and 6 June 2017 (the Councillor Briefing session), the Governing Body was not made aware of the Council's long-term non-compliance with the Work, Health and Safety laws relating to asbestos, or that there were failings in relation to the Council's management of asbestos.
- (c) On 31 May 2017, the Mayor and Deputy Mayor were briefed on the actions of SafeWork, including that the May 2017 Improvement Notice was issued.
- (d) At the request of the Mayor, Mr Greenwood (the then General Manager) briefed the Governing Body about those matters at the next scheduled Councillor briefing session on 6 June 2017.
- (e) The Governing Body received further briefings about the "*asbestos management issues*" facing the Council in July and October 2017.
- (f) Following allegations being raised in the media about (among other matters) the Council's approach to asbestos management, the Governing Body resolved to appoint – through its solicitor Mr Cork – an expert work health and safety lawyer (Mr Tooma of Clyde & Co) to conduct what was a comprehensive independent investigation into matters relating to the Council's management of asbestos, and to make recommendations to achieve best practice.

(g) On those occasions when the Governing Body was requested to approve the allocation of resources to enable the Council to address those “*asbestos management issues*”, including responding to SafeWork, the EPA, and undertaking significant remediation projects, it did so.

293. There is no evidence that either the Mayor or the members of the Governing Body did not act honestly. A finding is made that they did act honestly at all relevant times in relation to asbestos management.

294. The evidence also does not support a finding that the Mayor or Governing Body failed to exercise a reasonable degree of care and diligence in carrying out their functions. Had they been better informed prior to mid-2017, particularly in relation to the Council’s long-term non-compliance with asbestos laws, then a different finding might be open. They were not informed of the true position in the manner that they could have reasonably expected to have been. Once they were alerted to the true position from June 2017, the Mayor and the Governing Body have acted with care and diligence in carrying out their roles when it comes to asbestos management. That finding is made.

#### *Cr Brown submissions*

295. Cr Brown, contrary to the finding made above, is of the view that the Mayor and Governing body did not act with reasonable care and diligence in relation to asbestos as required by s 439(1) of the LGA. The basis for her view is that she is of the belief that the Governing Body had responsibility to ensure that “*all the statutory plans and procedures are in place*” relating to work, health and safety. She felt the Governing Body had just “*just missed this completely*”, and that they “*needed to ensure and to be monitoring the performance of the council and to be asking questions*”.

296. Cr Brown’s view is not without any force. The Governing Body does have the role of “ensuring as far as possible” the Council acts in accordance with the Guiding Principles outlined in s.8A of the LGA (s.223(1)(d)). They must also “keep under review the performance” of the Council (s.223(1)(g)). Each individual Councillor must “make all reasonable efforts to acquire and maintain the skills necessary” to perform their role as a councillor (s.232(1)(g)). Further, when a big legislative change occurs like the introduction of the WH&S Act and Regs, there would have been merit in a Councillor

briefing session about these new laws, and some follow up session from management to assure the Governing Body that the Council was compliant with these new laws.

297. However, some care needs to be taken in not confusing the role of the General Manager and his or her senior staff, and the role of the councillors on the Governing Body. Ensuring a Council is compliant with the laws applicable to local councils, including Work, Health and Safety laws, is primarily the role of management and staff. Had the Governing Body been informed of failings relating to how management was dealing with issues and legal requirements relating to asbestos, the position might be different, but there was nothing brought to the Governing Body's attention that would have caused councillors to have the kind of concerns they clearly did after June 2017. Councillors do have responsibilities as outlined in various provisions of the LGA, particularly in ss.223 and 232, but real caution has to be exercised before imposing on them obligations that primarily belong to management. Problems and failings in relation to asbestos management simply were not brought to the attention of the Governing Body until mid-2017. A finding that they did not act with reasonable care and diligence when they did not overlook or ignore something that was brought to their attention as either a problem, or oversight, or a failing, is not reasonable. The dashboard briefings did nothing to alert the councillors that there were problems – to the contrary: see [250]-[252] above. At least in the circumstances here, it was up to management to put the Governing Body on notice that the Council was not compliant with its statutory obligations, or was facing significant "*asbestos management issues*". This did not occur until mid-2017, from which point the Governing Body acted with proper care and diligence (as did management).

## **Findings TOR 2**

298. For the period January 2013 to June 2017, the evidence does not justify a finding that in exercising their functions pursuant to Part 2 of Chapter 9 of the LG Act, the Mayor and Councillors of the Council did not exercise a reasonable degree of care and diligence in dealing with asbestos management issues at the Council in accordance with section 439(1) of the Local Government Act 1993.
299. For the period June 2017 to October 2020, a finding is made that the Mayor and Councillors of the Council have at all times exercised a reasonable degree of care and

diligence in dealing with asbestos management issues at the Council in accordance with section 439(1) of the Local Government Act 1993.

## I. TOR 5

*In exercising functions pursuant to section 24 and Part 3 of Chapter 13 of the LG Act, the Council and its governing body has since 2012 made funding decisions so as to address asbestos management in accordance with the guiding principles in sections 8A(1)(b) and 8B and the role of the governing body in s. 223(1)(c) and (l) of that Act.*

### Relevant provisions of the LGA

300. Section 24 of the LGA provides:

*“A council may provide goods, services and facilities, and carry out activities, appropriate to the current and future needs within its local community and of the wider public, subject to this Act, the regulations and any other law.”*

301. Part 3 of Ch 13 of the LGA deals with issues of “Financial Management” of councils.

302. Section 8A(1)(b) of the LGA provides:

*“(1) Exercise of functions generally the following general principles apply to the exercise of functions by councils—*

*...*

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

303. Section 8B of the LGA provides:

*“The following principles of sound financial management apply to councils—*

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

*(b) Councils should invest in responsible and sustainable infrastructure for the benefit of the local community.*

*(c) Councils should have effective financial and asset management, including sound policies and processes for the following—*

*(i) performance management and reporting,*

- (ii) *asset maintenance and enhancement,*
- (iii) *funding decisions,*
- (iv) *risk management practices.*
- (d) *Councils should have regard to achieving intergenerational equity, including ensuring the following—*
  - (i) *policy decisions are made after considering their financial effects on future generations,*
  - (ii) *the current generation funds the cost of its services.”*

304. Section 8B was introduced into the LGA by the *Local Government Amendment (Governance and Planning) Act 2016* (NSW), which took effect from 23 September 2016. Prior to that amendment, there was no equivalent to s 8B in the LGA.

305. For the purposes of TOR 5, s 223 provides:

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

*...*

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

*...*

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

306. As noted above, the provisions of s 223 referred to in TOR 5 were only introduced following amendments taking effect in September 2016. Accordingly, to the extent that regard is to be had to the period prior to that date, the former version of s 223 should be considered.

307. As with TOR 1 and, to a lesser extent TOR 2, the issues raised by this term of reference draw into focus the differences in the approach adopted by the Council circumstances between the periods, first, from 2012 to June 2017, and second, from June 2017 onwards.

**2012 to June 2017**

308. As set out above, the evidence indicates that there was no appreciation at the level of senior management or the Governing Body of the nature or extent of the “*asbestos management issues*” facing the Council during that period. Accordingly, the evidence does not reveal that any particular funding decisions were directed to those issues.
309. Rather, the funding decisions that were made, and which touch on the question of “*asbestos management*”, were made in the wider context of asset planning and management, including the maintenance and renewal of such assets. That planning was done in the wider context of the Council’s compliance with the Integrated Planning and Reporting Framework: see, e.g., Ex 40.
310. As to the position in the period from 2012 to 2017, Cr Greenhill described the involvement of the Governing Body in resourcing towards asset maintenance, including those containing asbestos, as follows:

*“Q. In that answer you gave earlier you also mentioned buildings in the context of asset planning?”*

*A. Yes.*

*Q. And in the 2012 to 2016 period?”*

*A. Yes.*

*Q. Was there discussion around asset planning in terms of maintaining the council’s ageing buildings?”*

*A. Yes.*

*Q. And tell me if you don’t recall but did the issue of maintaining --?”*

*A. Yes.*

*Q. -- buildings with asbestos come up?”*

*A. Yes.*

*Q. Doing the best you can, I appreciate it’s a long time ago, but in what context was that being reported through the governing body?”*

*A. I remember this well because we were actually asked to go to the community and seek a rate rise of some I think 26 percent, a special rate variation to ensure that we had enough money to maintain our buildings, because the analysis was showing that they were old. Now that wasn’t just in the asbestos space, but in a range of safety areas, the buildings were old and needed to be maintained. That included asbestos*



*specifically so. I mean when I say specifically so, statedly and specifically so as part of a broad thing, a bunch of issues that had to be considered...*"

311. That need for additional funds to maintain the Council's ageing assets was reflected in the Executive Summary to the Council's Asset Management Strategy (part of the wider Resourcing Strategy 2017-2027), where the following appears (Ex 40, p 89):

*"The BMCC Local Government Area is unusual in that it has a very high ratio of infrastructure per resident compared to other urban councils due to factors such as urban development limited to a ribbon of 100 kilometres of ridge top within a mountainous World Heritage area. Furthermore, there are a number of challenges and constraints for asset management including natural disaster events and difficult to access terrain including steep gullies and cliff tops, which prove costly for construction and maintenance work.*

*For many years, maintenance and renewal funding for assets has been below the required level. This has resulted in widespread and gradual deterioration in asset condition. Additional funding from the 2015 Special Rate Variation is being used to reverse the decline in the City's ageing infrastructure. Over the next 10 years the level of asset service provision will need to be continually rebalanced against available funding while managing risk and engaging the community on service level trade-offs."*

312. Dr Dillon gave the following evidence concerning the approach to funding in 2012 to 2016 (T 1517-1519 (09.10.20)):

*"I was not working on asbestos and safety...I was doing a lot of financial and asset management, built assets, and I was doing integrating planning work and that work was led also by a very good expert who was also guiding the council and that highlighted that we recognised that we had ageing buildings, we recognised there was an asbestos management risk and we recognised there were risks that needed to be controlled and mitigated...So from a local government point of view with 1.2, I think it's currently 1.4 billion of ageing built infrastructure, 10,000 hectares of natural assets, the imperative of the governing body and the operational council was to effectively manage what was the biggest significant risk to the whole city, and this is alive and dead issue, if you don't fix ageing infrastructure. So I'm most proudest of the fact that the work I completed as Group Manager in Integrated Planning and Finance and the work of the governing body over the period 2012 to 2016 really effectively met its requirements under integrated planning, effectively looked at sort of inter-generational into the future, effectively looked at how to financially sustainably manage the finances*

*and, most importantly, effectively engaged with the community to say these are the options, this is what we're trying to do, if we can increase the rates it's going to give us more money to maintain the new buildings. And that's the link to asbestos. And I'll mention one thing, the Director from SafeWork, Kathryn Heiler, emphasised to us consistently that in the multi agencies, it's in the minutes, that asbestos management is not just about encapsulating and other things, it's also about adequately maintaining and renewing your built infrastructure and that's what I saw the governing body supporting actively and resourcing and engaging with community on in the period 2012 to 2016.*

*Q. And it was at that more general level of asset maintenance that the issues concerning asbestos management were being considered at senior management and governing body level, is that fair?*

*A. From one layer of the cheese, which is the asset management, the financial management, yes, that's right ... I attended all the strategic councillor workshops from 2012, 13, 14, 15, 16, 17 and at every one of those workshops there was a discussion on Governance and Risk and if you look through the minutes there's generally a reference to safety. What they didn't do was specifically, aside from the service dashboards, but they didn't specifically have a long session on asbestos, it was more in the context of - but they did reference the Willis Gap analysis, the harmonisation of the Safety Act and they did reference the need to be financially sustainable and in a position to adequately resource the renewal and maintenance of the aging built infrastructure."*

313. In addition to the general funding for asset management through maintenance and renewal, including those assets which had asbestos containing material, during that period there were some specific projects directed towards "*asbestos management*" in Council facilities which were reported in the Council's annual reports. For example:
- (a) The 2013-2014 Annual Report records that an "*Air Safety Quality Plan*" was implemented, which included asbestos risks for certain buildings, and that recommended rectification works were being undertaken: Ex 54, p 425.
  - (b) The 2014-2015 Annual Report recorded:
    - (i) expenditure associated with the removal of asbestos from the Lawson "*mechanics institute*": Ex 54, p 519, 537;

- (ii) resources were diverted as part of the response to the 2013 bushfires, including to deal with “*public health matters such as...asbestos*”: Ex 53, p 571;
- (iii) the ongoing implementation of the “*Air Safety Quality Plan*”, which included asbestos risks for certain buildings.

314. The evidence referred to above demonstrates that there were resources allocated to the engagement of consultants such as Airsafe (to undertake inspection of Council facilities, and to prepare registers identifying the presence and condition of ACM) and towards the improvement of the Council’s safety management system through the Safety Improvement Project (as to which, see Ex 133).

315. Having regard to the evidence concerning the understanding of the Governing Body and the Senior Management as to the Council’s position with respect to its approach to asbestos management – and in particular, that prior to May 2017, that understanding did not include an appreciation that the Council faced significant “*asbestos management issues*” or that it was not compliant with its statutory obligations - it is unsurprising that funding decisions as they related to asbestos management were made on what might be considered a “*business as usual*” approach.

#### ***June 2017 to October 2020***

316. The response of the Council to the “*asbestos management issues*” which came to be known and understood by the Senior Management from May 2017, and by the Governing Body from June 2017, involved a significant allocation of resources, both human and financial.

317. From May 2017 the Council’s Executive Leadership Team and the Governing Body supported the allocation of the resources that were necessary to fully respond to those issues. Such a finding is supported by the following matters:

- (a) On 10 May 2017, the Council’s Executive Leadership Team resolved to engage Centium to bring the Council into compliance with its statutory obligations relating to asbestos management as a priority.

- (b) Mr Nicholls' evidence was that following SafeWork issuing the May 2017 Improvement Notice the "*resources...going into asbestos*" had "*ramped up*" (T 1240.3-1241.7 (12.3.20) and that when the teams he was leading required urgent resourcing, there was no difficulty in getting what was required (T 1259.29-31). The same applied in relation to significant remediation projects, such as those conducted at the Katoomba Waste Management Facility and the Lawson Stockpile site: T1269.21-35 (12.3.20).
- (c) Mr McKay's evidence was that during 2017, the Council's efforts and resourcing in relation to asbestos management issues increased "by orders of magnitude: T 841.12-28 (30.9.20). He referred to having a "*blank cheque*" in responding to issues such as training, and that he was "*approving thousands and thousands of dollars to be allocated for all number of things*": T 861.26-44 (30.9.20).
- (d) Cr Greenhill gave evidence that the Governing Body supported all requests for additional resourcing to meet those challenges (T 1432.8-44 (09.10.20), evidence which is supported by the Governing Body's approval of the allocation of significant funding towards asbestos management issues in late 2017 and early 2018: see, e.g., Ex.103 and 104.
- (e) Dr Dillon's evidence was that when she assumed the role of General Manager (later CEO), to the extent that authorisation for funding allocation was sought to address asbestos management issues it was readily given: T 1533.10-1534.11 (09.10.20).
- (f) The large sums invested in the management of asbestos – these include, but are no doubt not limited to, large amounts spent on remediation of sites with asbestos containing materials, complying with the Enforceable Undertaking given to SafeWork, and on the Tooma independent investigation.

**Findings as to TOR 5 - The Council and the Governing Body**

318. The following findings are made:

- (a) From 2012 to Mid 2017, the application of resources towards “asbestos management” were largely applied through the Council’s approach to asset management more generally. This was not sufficient. For example, a great deal of work needed to be done by persons with relevant expertise – requiring funding – to properly audit all the Council’s built assets for asbestos containing material. Insufficient funding was allocated to this to complete this process in a timely fashion, and in relation to the preparation of asbestos plans and registers, and the preparation of an asbestos policy.
- (b) From May 2017, the Council (with the support of the Governing Body) applied significant resourcing, both human and financial, to meet the issues identified by SafeWork and the EPA, and to bring the Council into compliance with its statutory obligations concerning asbestos management (and in some cases, to adopt policies which exceed that standard). While this is by no means the only cost, the “rectification costs” referred to in the enforceable undertaking with SafeWork total over \$1.2 million alone.

319. From 2012 to mid-2017, “funding decisions” to address asbestos management were, technically, not made to the degree they should have been by the Council in accordance with all of the provisions of the LGA referred to in TOR 5. However, those failures in relation to funding decisions can be traced to the “*organisational failures*” identified above in respect to TOR 1, rather than failures associated with the Council’s approach to funding decisions generally.

320. As for the Governing Body, no adverse finding is made against it in relation to TOR 5. That would not be reasonable in light of the findings made in relation to TOR 1 and 2. The Governing Body was not aware that different funding decision might have needed to be made.

321. In the period from May 2017 and following, it is clear that both the Council and the Governing Body made funding decisions so as to ensure that the Council addressed its “*asbestos management issues*”, and did so expediently. From mid-2017 then, a finding is made that the Council and the Governing Body made “funding decisions so as to

address asbestos management” in accordance with all relevant provisions of the LGA as set out in TOR 5.

**J. TOR 6**

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

Relevant provisions of the LCA

322. For the purposes of TOR 6, following the September 2016 amendments to the LGA:

(a) Section 8A(1)(i) of the LGA provides:

*“(1) Exercise of functions generally the following general principles apply to the exercise of functions by councils—*

*...*

*(i) Councils should be responsible employers and provide a consultative and supportive working environment for staff.”*

(b) Section 223 of the LGA provides:

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

*...*

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

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

*...*

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

### The scope of TOR 6

323. TOR 6 was largely addressed in the September 2019 Hearings, and in the Interim Report dated 14 January 2020. However, to the extent that the evidence adduced in relation to the asbestos management is relevant to TOR 6, it remains open.
324. TOR 6 is principally informed by the issues identified in the TORs as a whole. Those issues fall into two broad categories – recruitment issues and asbestos management issues.
325. TOR 6 is directed to the Council’s overall compliance with the identified statutory obligations, and whether there are widespread or structural problems that can be identified. A large number of justifiable individual grievances might be evidence of a widespread problem, and an endemic failure of an organisation to provide a “*consultative and supportive working environment*” or to be a “*responsible employer*”: s8A(1)(i) LGA. Individual grievances however, even if fully or partly justified, are not always synonymous with a more sinister structural failing. There is no specific incident referred to in TOR 6, and it has been considered unnecessary to make findings on particular instances of complaint unless they might be evidence of a widespread problem relevant to TOR 6.
326. The content of the statutory obligation on a Council to be a “*responsible employer*” and to provide a “*consultative and supportive workplace*” is broad in scope. In most large organisations it is not uncommon for there to be times when staff feel they were not adequately consulted and supported. There was some evidence to that effect in respect of “*asbestos management issues*”. TOR 6 however has been mainly addressed by analysing the Council’s systems and processes directed to compliance with that obligation, rather than by making detailed findings about times or incidents where individual members of staff thought they were not adequately consulted or supported in the context of the “*asbestos management issues*” facing the Council.

### Factual Findings

327. A number of findings have already been made concerning the Council’s policies and processes directed to providing a consultative and supportive workplace and being a “*responsible employer*”: Interim Report dated 14 January 2020, [364] to [381].



328. In addition to those matters, there was evidence concerning a range of measures implemented by the Council to support those staff members affected by what might be called the “*asbestos management issues*” which faced the Council from May 2017 onwards. Those circumstances included the fact that a number of serious allegations (including in the media) were directed at named Council staff members at various levels within the organisation.

329. Mr Buchanan, the Council’s Manager for Human Resources, described the support systems offered to those who were the subject of express allegations as including (see T 1046.29-1047.4 (06.10.20)):

- (a) an Employee Assistance Program, which included the ability for staff to access professional psychological treatment at no cost to them;
- (b) the granting of leave where necessary;
- (c) facilitating changes to working arrangements and locations; and
- (d) regular contact with those staff to enquire after their well-being.

330. The issues that emerged in relation to Council’s approach to asbestos management had an effect on the staff across the wider organisation. In particular, there was a fear among some staff that arose from the matters that were being reported in the media and the risks posed by asbestos to health: T 1047.9-1048.3 (06.10.20). In addition to the support mechanisms referred to above, the Council also (T 1047.13-1049.37 (06.10.20)):

- (a) retained health professionals to address staff about asbestos, and the risks it poses to health;
- (b) provided health monitoring to staff (beyond that which was considered necessary by the relevant authorities); and

- (c) support to staff who were interviewed by a regulatory body, or who were called to give evidence before this Inquiry, including provision of time-off work and access to legal advice (at Council's expense).
331. The Council participated in the Multi-Agency Asbestos Management Committee, which included staff and USU representatives. This forum provided an opportunity for the staff and USU representatives to raise issues of concern with the Council, as well as the representatives of the regulators. Mr Webb, who was at that time a USU delegate, gave evidence that the committee worked well, and resulted in matters of concern being attended to promptly. He was satisfied with the work of the committee: T 1168.47-1170.2 (11.3.20).
332. The Council's approach to communication with staff was improved following the SafeWork intervention of May 2017, and the relationship between management and Council staff has seen the benefit of that approach: see, e.g., T 1051-1052, 1058, 1063 (06.10.20). The safety procedures and "culture" in the Council has also improved since 2017: T 1321.4-12 (12.3.20); 1394.5-1396.25, 1397.12-19 (13.3.20). These matters are evidence of a "supportive" workplace and the actions of a "responsible employer".
333. Following May 2017, management sought to work with the union, including by seeking to accommodate the USU's requests as to which contractors would, or would not, be used and to work with staff to satisfy their concerns about remediation work that was being done at Council sites: T 932.23-924.26 (01.10.20). Mr Greenwood had, prior to his departure, considered that responding to the issues raised by the USU was a matter of importance for the Council: T 1474-1475 (18.2.20).
334. Mr Harris (who was engaged as the Council's Chief Safety Officer in December 2017) gave the following evidence concerning his interactions with representatives of the USU (T 919.23-41 (30.9.20):

*"Q. What about the union, the USU, did you have any engagement with them in your role?"*

*A. Principally through Mr Bill O'Kell, yes. I think I had a good working relationship with Bill. The USU site representatives, Mr (Indistinct) and Mr Mick Karafiloff and so forth. Cordial I think, difficult at times for*

*sure. That is again no different than my previous experiences with the Transport Workers Union or the Nurses Federation or the Prison Officers Union. That's the nature of the beast, that's fine.*

*Q. Did you consider that you were able to work with the union representative?*

*A. Well we did. We did. Bill O'Kell was invited to attend some of these consultation sessions and he did attend when he could and he personally thanked the council and myself for engaging with the USU and their representatives to that way. So yes, I would say that's true."*

### **General Findings on TOR 6 regarding asbestos issues up to November 2017**

335. Save for the matters referred to below regarding the Katoomba Waste Management Facility, and the Lawson Stockpile and Carpark Sites, a finding is made that from May 2017 the Council took steps and implemented policies and processes to provide a supportive workplace in the context of the wider asbestos management issues at that time. In doing so, it took those steps as a "reasonable employer".
336. In the period January 2013 to the later part of 2017 the Council was not compliant with its statutory obligations in relation to asbestos management in the workplace and had not taken sufficient steps to achieve that compliance. Compliance with those obligations was an important aspect in guarding against the risks posed by asbestos containing material to, amongst others, Council staff. Related to this matter then, the Council fell short of being a "responsible employer" as required by s.8A(i) of the LGA.
337. Given its state of knowledge as addressed in the findings made for TOR 1 and 2, no adverse finding is made in relation to the Governing Body in relation to TOR 6.

### **Particular issues raised in the evidence re TOR 6**

338. Six specific matters were the subject of evidence such that findings are warranted. They are set out below.

#### *Katoomba Waste Management Facility, Springwood Depot and Lawson Stockpile Sites*

339. Matters relating to the management of asbestos at the Springwood Depot ([103] above regarding an inadequate asbestos management plan), the Katoomba Waste Management Facility ([176]-[178]), and the Lawson Carpark and Stockpile Sites ([179]-[184] above), have been the subject of findings: see e.g. [239]-[240]. Findings

in relation to these sites mean a finding must be made that in the period up to November 2017, the Council at times fell short of its obligations to be a “responsible employer” in relation to these specific sites under s8A(1)(i) of the LGA.

340. Mr Paul Webb and Mr Michael Breen also gave evidence of their experience of working at the Katoomba Waste Management Facility. Mr Webb is employed by the Council as a Resource Recovery Officer, and is a union delegate at the facility, and a health and safety representative. Mr Breen is a Program Leader, and until relatively recently was a member of the asbestos response team.
341. Both Mr Webb and Mr Breen gave evidence of staff being given directives concerning the handling of asbestos containing material, or possible asbestos containing material, which if literally true would be utterly inappropriate in a workplace like the Katoomba Waste Management Facility. They also gave evidence of procedures for the wearing or availability of Personal Protective Equipment which were obviously less than best practice. In addition to giving evidence at the Public Hearings, they lodged written submissions with this Inquiry.
342. Most allegations made by Mr Webb and Mr Breen were directed toward Mr Wayne Lund. Mr Lund also gave evidence at the Public Hearing. Mr Lund is the Council’s Program Leader of Resource Recovery and Waste Planning, but was the site manager of the KWMF from about September 2010 to December 2017.
343. Both Mr Webb and Mr Breen said that in the period up to the time SafeWork issued Prohibition Notices in relation to the KWMF in November 2017, they had raised various complaints with Mr Lund about sifting through potential asbestos containing material in the demolition pile. Mr Breen said in his evidence the response from Mr Lund was for him to “*suck it up*”, and that “*there’s plenty of other jobs*” at the Council if he did not like the work at the facility: T1306.1-3 (12/3/20). He and Mr Webb said that although they escalated complaints about this, and the lack of provision of proper or adequate PPE, they said the attitude of the Council was “*if you raised a problem, you became the problem*”: T1305.12-15. They accused Mr Lund of an effectively “gung-ho” approach to the handling of asbestos or asbestos containing material, with Mr Lund saying things like he used to “*eat [asbestos] for breakfast*”: T1306.47

344. Mr Lund denied these matters in his evidence. He said possible asbestos containing material was handled according to a protocol whereby it was isolated, and a coordinator and contractor (expert in the handling of asbestos) arranged: T1580.12-19 (19/3/20). He denied that concerns were raised with him regarding the unsafe handling of ACM, or about the provision of PPE. He said adequate PPE was always available, including masks: T1581.33-47.
345. Clearly, the working relationship between the three became strained. In the context of working at a site like the KW MF, Mr Lund may have said some matters more bluntly than would be said in other working environments: see his agreement about the “robust” nature of “discussions” between workers at the KW MF: T1589.22.35. Not everything said may have been interpreted as it was meant. Assigning blame to what may be miscommunications lack utility now. However, the genuineness of Mr Webb and Mr Breen’s grievance is not doubted, nor is the somewhat perplexed response from Mr Lund.
346. Amongst the reasons for their being little utility in making findings beyond the above is that, first, a finding of failure to comply with s8A(1)(i) of the LGA up to the period ending November 2017 is made in any event. Secondly, and of more importance, the situation has been entirely remedied. Mr Lund is no longer site manager of the KW MF. He has moved to a new position within Council. Further, the concerns of Mr Webb and Mr Breen about asbestos containing material at the KW MF have been resolved. Mr Webb’s grievance was satisfactorily resolved. Mr Breen also expressed the opinion that he thought the Asbestos Response Team within Council had ultimately done some “excellent work”.

*Lawson Stockpile and Carpark Sites*

347. The matters found above at [240] and admitted by the Council in its Organisational Failures document (Ex.148 and see [185]), justify a finding that in relation to these matters the Council also fell short of its obligations to be a responsible employer under s8A(1)(i) of the LGA until November 2017.

*The alleged direction by Mr Bruhn to Ms Rafter to discipline Mr Johnston*

348. An allegation was made that Mr Bruhn directed Ms Rafter to discipline Mr Johnston over having raised issues concerning the Council's approach to asbestos management in his Non-Conformance Reports of 3 February 2017 and 3 March 2017. Evidence concerning this allegation was given by "Witness 1" in a private hearing. Such evidence was given in March 2020, and again in October 2020.
349. Ms Rafter recalled that Mr Bruhn had asked her to discipline Mr Johnston about an issue, she could not recall what that issue was. Her evidence was that there was nothing Mr Bruhn ever did that suggested to her that he had been displeased with Mr Johnston's work in looking into asbestos management issues: T562.1-46 (28.9.20).
350. Mr Buchanan (Manager of HR) gave evidence about that issue (T1054.6-1055.14 (06.10.20)):

*"Q. The inquiry has been made aware of a suggestion that Mr Bruhn asked Ms Rafter to discipline Mr Gary Johnston about raising asbestos issues. Are you aware of that suggestion?"*

*A. Yes, I am.*

*Q. What do you know about that?"*

*A. So my information - so what I'm aware of, I couldn't tell you the exact dates I'm afraid, I believe it was probably March of 2017.*

*Q. That sounds about right?"*

*A. I received - I had a phone call from Rebecca Rafter, who was Gary's supervisor at the time, and so Rebecca contacted me in my role as the program leader for human resources and she said to me that Mark had come in to see her. So Mark was down at South Street Depot. Mark had come in to see Rebecca and had said that he wanted Rebecca to issue Gary a formal warning because Gary had raised an asbestos issue with Mark as Mark was coming into the administration building and that*

*wasn't the right way to do it. So what - I said to Rebecca, I said, "Well there's a couple of things. One, we're not going to do that. We're certainly not going to issue someone a warning for raising a safety issue if it's raised as a genuine safety concern. Two, even if we were to go to that, there's actually a process to go through which isn't just issuing people with warnings". So Rebecca said - look, I can't remember exactly what she said but it was to the effect that she agreed with what I said and so my follow up was, I said, "Look, really this to me is a conversation with Gary about hey, if you want to raise these issues, this is the most effective way to do it". Rebecca then was going to take that on board. Yeah, so that's the best of my recollection on that.*

*Q. Doing the best you can, if you don't recall tell me but did she tell you what Mr Bruhn's particular concern about the manner in which it was raised was?*

*A. Okay, so this is - I think the best of my recollection was the concern. It didn't seem just that it was actually raised that way, that it was raised directly to him rather than channels, but that - I think it was almost he didn't like the way that Gary actually approached, really, it was that Gary approached him and said, "Hey, you've got this problem, you've got to fix it".*

*Q. Rather than reporting it through Ms Rafter?*

*A. Correct."*

351. Despite the understandable limits of Ms Rafter's recollection, Mr Buchanan evidence, which is reliable and accepted, supports the view that Mr Bruhn did ask Ms Rafter to discipline Mr Johnston in some manner, although more likely about the time and place he had raised issues, not because they were raised in his non-conformity reports.
352. The fact that Mr Bruhn may have asked for Mr Johnston to be "disciplined" or "warned" does not alone provide a proper foundation to make a finding that the Council did not provide a "supportive workplace" or was not acting as a "responsible employer". The Council is to be judged primarily through Mr Buchanan's actions, and its Human Resources policies, processes and actions. That response to Mr Bruhn seeking to have Mr Johnston disciplined was the response of an organisation that provides a consultative and supporting working environment. Relevant also is the evidence of Mr Greenwood, who assured Mr Johnston that there was no threat to his employment as a result of him raising safety issues: T 1452 (18.3.20).

*The alleged direction to Ms Edmunds not to disclose that there was asbestos present in the Warrimoo Hall*

353. Witness 1 also gave evidence that the Council's call centre staff had been instructed not to tell members of the public about the presence of asbestos in Council facilities. In particular, Witness 1 described such a direction in relation to the Warrimoo Hall and gave evidence that Ms Vicky Edmunds had been upset that she was being told not to tell the truth to members of the public and that despite that direction, she disregarded it and had told the truth to a mother of a child who had been planning a birthday party in that hall.
354. In the evidence she gave at the Public Hearings, Ms Edmunds denied having been given such a direction: Ex 147 [23], [28]-[29]. She denied that she was upset by her interaction with a member of the public to whom she spoke about a birthday party that had been planned for the hall.
355. Ms Edmunds evidence is accepted as reliable and credible. No improper direction was given to the Council's call centre staff.

*Cleaning of the Katoomba Aquatic Centre*

356. Mr Tony Nikolich gave evidence of concerns he had about allegedly being directed to clean asbestos containing material in the toilets at the Katoomba Aquatic Centre, and about a pregnant member of the cleaning team having to do so.
357. A statement dated 8 October 2020 of Ms Sharyn Pole, the coordinator of cleaning services for the Katoomba and Springwood Aquatic Centre, was tendered by Council Assisting (Ex 144). Leave was not sought by anyone to examine Ms Pole to challenge her evidence in the statement that were contrary to Mr Nikolich's evidence.
358. The suggestion that a pregnant worker was directed to perform cleaning work despite allegedly raising concerns about asbestos containing material is not made out on the evidence.



*Asbestos signs at the Lawson Stockpile Site*

359. Issues and discussion concerning the labelling of asbestos have been addressed in the findings for TOR 1 above. Ultimately, the Council took guidance from SafeWork concerning this. During the course of the hearings however, both private and public, allegations were made regarding whether some improper attempt was made to have Council staff modify or change asbestos warning signs for the Lawson Stockpile site, in late September 2017.
360. The allegations stem from an email dated 28 September 2017, sent by Mr McKay to others within Council in which he asked, in reference to the signage, whether the “same objective” could be met, but “with more discreet signage”: Ex 82 p2107A.
361. In private hearings, one witness asserted that they had been involved in discussions with Mr McKay whereby the following matters allegedly were raised or said:
- (a) Mr McKay wanted the signs to be more “discreet”.
  - (b) The issue of signs had been brought to Mr McKay’s attention by the then General Manager.
  - (c) Mr McKay said he had the General Manager “breathing down his neck” on this matter. Mr McKay was just the “messenger”.
  - (d) Mr McKay said the Mayor, Mr Greenhill, had become “involved” in the issue.
  - (e) Mr McKay wanted to go so far as having the signs removed.
362. The same witness said they would be reporting these matters to SafeWork, and would not “lie” for Mr McKay.
363. Another witness gave evidence in a private hearing that Mr McKay had said that the signs were “too obvious” and that the General Manager had “brought it to his

attention". He said Mr McKay wanted the signs "minimised" and more "discreet". They were to be "reviewed", but "not changed".

364. Mr McKay agreed he had a conversation with Mr Liddell, during which Mr Liddell had suggested that the signs at the stockpile site were "over the top": T877.46 to 878.13. He otherwise denied the various allegations referred to in paragraph [362] above, including that he asked or directed for any signage to be changed. Through his email he sought to have the issue of the signage considered or reviewed, but he denied that in doing so that there was ever any intention of having the Council act in a way that did not comply with its legal obligations. No signs at the stockpile site were changed.
365. Mr Adams (Program Leader, Hazardous Materials) had a vague recollection, on being shown Mr McKay's email of 28 September 2017, that Mr McKay may have informed him of a conversation he had with Mr Liddell as outlined by Mr McKay.
366. Mr Greenwood, the then General Manager, denied having any conversation of any kind with anyone relating to asbestos warning or safety signs at the Lawson Stockpile Site. In particular, he denied having ever directed or asked for asbestos signage to be removed or changed at any Council site.
367. The Mayor, Cr Greenhill, made similar denials, and added that he had (at least at the relevant time) not visited or seen the Lawson Stockpile Site.

### **Resolution**

368. While a degree of time was taken up with this issue, leading to a question being put to one witness as to whether what occurred amounted to "political interference", it ultimately amounts to very little, and is easily resolved.
369. No asbestos warning or safety sign at the Lawson Stockpile Site was changed, removed, or modified as a result of Mr McKay's 28 September 2017 email. No sign was minimised, or made more "discreet" (whatever that means in the context of signs relating to a hazardous substance).

370. Mr Liddell, it seems clear enough, asked Mr McKay if the signs could be reviewed, and expressed a concern they were “over the top”. One observation that can be made about that is that such signs are designed to be “over the top”. They are safety signs. In any event, the matter went nowhere, and the signs stayed as they were. It is most unlikely that the General Manager was involved. The Mayor was not. There was no political, or other kind of interference. A question was asked – the matter ended with that.

**K. TOR 7**

***In exercising its functions pursuant to sections 23 and 24 of the LG Act, the Council has co-operated, and is co-operating, effectively with State government agencies in addressing asbestos management issues in accordance with the guiding principle in section 8A(1)(e) and the role of the governing body in section 223(1)(l) of that Act***

Relevant provisions of the LGA

371. Section 23 of the LGA provides:

*“A council may do all such things as are supplemental or incidental to, or consequential on, the exercise of its functions.”*

372. Section 24 of the LGA provides:

*“A council may provide goods, services and facilities, and carry out activities, appropriate to the current and future needs within its local community and of the wider public, subject to this Act, the regulations and any other law.”*

373. For the purposes of TOR 7:

(a) Section 8A of the LGA relevantly provides:

*“(1) Exercise of functions generally the following general principles apply to the exercise of functions by councils—*

*...*

*(e) Councils should work cooperatively with other councils and the state government to achieve desired outcomes for the local community.”*

(b) Section 223 of the LGA relevantly provides:

*“The role of the governing body is as follows—*

*...*

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

374. As noted above both provisions were the subject of amendment in 2016.

### **Findings**

#### *SafeWork*

375. Mr Williams gave evidence that:

- (a) *“SafeWork NSW has always found BMCC to co-operate with SafeWork’s compliance activities.”* (Ex 116, [45])
- (b) That the Council was *“consistently cooperative”* in its responses to the issues raised by SafeWork: T 688.45-689.13 (29.9.20).
- (c) The Council was *“cooperating very well”* in relation to its compliance with the SafeWork Enforceable Undertaking: T671.1-11 (29.9.20).
- (d) The Council *“cooperated fully with the SafeWork direct engagement in 2017/2018”*: T 685.5-9 (29.9.20).

376. Based on the unchallenged evidence of Mr Williams, no finding is open other than to find that the Council has cooperated fully with SafeWork. These matters are relevant to that:

- (a) the Council fully complied with all SafeWork notices (with only the May 2017 Improvement Notice being the subject of an extension of time);
- (b) the Council entered into the SafeWork Enforceable Undertaking in order to resolve proceedings commenced against the Council by SafeWork; and
- (c) the Council has been and is complying with the terms of the SafeWork Enforceable Undertaking: Ex 82, p 3573; Ex 116, [37], [56]; T 667.17-30, 671.1-11 (29.9.20).

377. A finding is made that the Council co-operated fully and appropriately with SafeWork.

*The EPA*

378. Mr Bentley, the EPA's Chief Investigator, gave the following evidence (Ex 136, [70]):

*“Overall, based on my experience, I consider that the nature and extent of the Council's cooperation with the EPA's investigations was reasonable.”*

379. In oral evidence, Mr Bentley expanded on this evidence as follows (T 1016.28-42 (06.10.20)):

*“Q. And finally, Mr Bentley, if you turn ahead to paragraph 67. In this section you give your views about the issue of cooperation. In paragraph 70 you say that based on your experience you consider the nature and extent of the council's cooperation to the EPA's investigations was reasonable, do you see that?”*

*A. Yes.*

*Q. What do you mean by “reasonable” in that paragraph?*

*A. Well reasonable to me means there was nothing out of the ordinary with this investigation in terms of investigating another Government authority or investigating a statutory authority or a corporation. It was just a standard, pretty much standard investigation and I considered it to be a reasonable level of cooperation.”*

380. The Council complied with each of the notices issued by the EPA: Ex 116, [23]-[31]; [51]-[63].

381. A finding is made that the Council co-operated fully and appropriately with the EPA.

*The OLG*

382. The OLG had a role in monitoring the Council's response to the Minister's Performance Improvement Order.

383. The Manager, Investigations, for the Office of Local Government is Ms Lyn Brown. At the Public Hearings she gave the following evidence:

*“Q. Yes, the council has had interaction with the Office of Local Government primarily in the context of the asbestos management issues from 2017 onwards, is that right?”*

*A. The council itself? Yes, look, I’m sorry - yes, I think it is 2017. Sorry, I haven’t got the dates in front of me but, yes, that sounds about right.*

*Q. Part of that has been the Minister’s performance improvement order, is that right?”*

*A. That’s correct. That’s correct, yes.*

*Q. Do you have a view about the level of the council’s cooperation with the activities of the Office of Local Government in monitoring the performance of that improvement order?”*

*A. Yes.*

*Q. What is that view?”*

*A. Yes. Look, you’re right, it was in 2017 was the initial contact and certainly the order came out in early 2018. I would have to say that council has been very proactive in providing any information that the Office of Local Government requested and it’s also, in my view, and certainly in my review of the file, has responded to the matters that were required by that order in a timely fashion and in a thorough fashion. So in my view council’s been very responsive to the order and has been very proactive in making sure that it has complied with the order.”*

384. Ms Brown’s evidence was not challenged, and is accepted. A finding is made that the Council co-operated fully and appropriately with the OLG in relation to its activities in monitoring the Council’s compliance with the terms of the Performance Improvement Order.

### **Conclusion as to TOR 7**

385. The evidence of each of Mr Williams, Mr Bentley, and Ms Brown establishes that the Council has, at all relevant times, fully and appropriately co-operated and (to the extent relevant) is co-operating with State government agencies in addressing asbestos management issues. A finding is therefore made that the Council has *“cooperated, and is cooperating effectively with State government agencies in addressing asbestos management issues in accordance with”* s.8A(1)(e) of the LGA. A finding is also made that the Governing Body has acted *“to ensure that the council acts, honestly, efficiently and appropriately”* regarding the management of asbestos pursuant to s.223(1)(l) of the LGA

**L. TOR 9**

*In exercising its functions pursuant to sections 23 and 24 of the LG Act, the response of Council and the governing body to the asbestos management issues raised in 2017 has been and is in accordance with the guiding principle in section 8A(1)(a) and the role of the governing body in section 223(1)(b), (g), (h), (k) and (l) of that Act.*

Relevant provisions of the LGA

386. Section 23 of the LGA provides:

*“A council may do all such things as are supplemental or incidental to, or consequential on, the exercise of its functions.”*

387. Section 24 of the LGA provides:

*“A council may provide goods, services and facilities, and carry out activities, appropriate to the current and future needs within its local community and of the wider public, subject to this Act, the regulations and any other law.”*

388. For the purposes of TOR 9:

(a) Section 8A relevantly provides:

*“(1) Exercise of functions generally the following general principles apply to the exercise of functions by councils—*

*(a) Councils should provide strong and effective representation, leadership, planning and decision-making.”*

(b) Section 223 of the LGA relevantly provides:

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

*...*

*(b) to provide effective civic leadership to the local community,*



- ...
- (g) *to keep under review the performance of the council, including service delivery,*

...

  - (h) *to make decisions necessary for the proper exercise of the council's regulatory functions,*

...

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

#### The scope of TOR 9

389. TOR 9 addresses the response of the Council and the Governing Body to the “*asbestos management issues*” raised in 2017. That is clearly a reference to the asbestos management issues highlighted by the intervention of SafeWork, and later the EPA, from May 2017 onwards.

#### Evidence

390. Following SafeWork’s intervention on 15 May 2017, and the issue of the May 2017 Improvement Notice, responding to the issues raised by SafeWork became the Council’s “*highest priority*”: see, e.g., T 1442.41-1443.10, 1445.33-1446.8 (18.3.20).

391. From May 2017 onwards there was a significant increase in the resources (both human and financial) directed to the issue of asbestos management, and an urgency was applied to advancing it. The most significant matters relating to this are set out at [236]-[237] above.

392. To the extent that those activities required support from the Governing Body by way of approval for the allocation of funding, that support was given.

393. In addition, the response of the Governing Body included:

- (a) On 31 May 2017, the Mayor requesting that the then General Manager brief the Governing Body in relation to SafeWork’s intervention in May 2017, and the fact that the May 2017 Improvement Notice had been issued, at the next scheduled briefing session.
- (b) Receiving briefings on those matters on 6 June, 4 July, and 27 October 2017, and on a more regular basis commencing in December 2017.
- (c) Providing ongoing updates to Council meetings.
- (d) Following various allegations being made in the media concerning the Council’s approach to asbestos management in about November 2017, appointing an independent investigator to examine those matters.

394. Based on the evidence, a finding is made that in relation to “the asbestos management issues raised in 2017”, the Council and the Governing Body have acted in a manner that is consistent with all relevant provisions of the LGA, and both have sought to, and have succeeding in, putting the Council in the position where it is “*on the path to being an exemplar*” in relation to the management of asbestos.

## RECOMMENDATIONS

395. Councils other than the Blue Mountains City Council face challenges in relation to asbestos management.
396. Mr Williams, Director, Construction Services, Metropolitan, for SafeWork, gave the following evidence in relation to the “*toolkit*” that the Council has under development as part of the terms of the SafeWork Enforceable Undertaking (T 669-670 (29.9.20):

*“Q. And one of the requirements of the council’s enforceable undertaking was to develop a toolkit, is that right?”*

*A. Yes.*

*Q. And from SafeWork’s perspective, what is the utility of this toolkit?”*

*A. Yeah, from our perspective we think that toolkit will be an excellent resource for councils all across the state. So clearly, you know, Blue Mountains City Council has had a significant issue to address here with managing asbestos in their environment. We believe this will help other councils, who we know are out there, we know there will be other councils who will have a similar scale of problem that Blue Mountains City Council had, or have, because the problem will exist for a long time. It will help them manage it in a way that hopefully won’t lead to needing to issue, you know, 53 notices over X number of work sites. We believe it will be a very good tool.*

*Q. And the problem you’re referring to in that answer, is that managing asbestos in ageing assets?”*

*A. Correct.*

*Q. Do you have anything else in mind?”*

*A. Well, not only ageing assets, but also waste management facilities. Even though the EPA has primary coverage of waste facilities, we work very closely with them, and we continue to see issues of asbestos dumping, asbestos - what do you call it - hiding of asbestos, you know, in waste loads and so forth. So there are a range of I think benefits and issues that councils will continue to see for many, many years to come.*

*...*

*Q. And [assuming] that it meets SafeWork’s ultimate satisfaction, do I understand from your evidence that is something that SafeWork would encourage all other councils in New South Wales to have regard to?”*

*A. Certainly would.*

*Q. And to take into account in their own asbestos management going forward, is that right?”*

*A. That’s right, yes.”*

397. While it is not necessary to make a formal recommendation, based on the expert view of Mr Williams, the Minister and the Office of Local Government may wish to consider whether it would be useful and appropriate for the “*Toolkit*” developed by the Council pursuant to the SafeWork Enforceable Undertaking to be made available to other Council’s to assist them in their ongoing asbestos management.

**Should the civic offices at Blue Mountains City Council be declared vacant?**

398. The Terms of Reference raise the question of whether the civic offices at the Council should be declared vacant. While some failings have been identified and found in relation to the management of asbestos prior to mid-2017, those failings have been remedied by the current management and Governing Body of the Council since that time. There is no basis for declaring the civic offices of the Council vacant, and hence no such recommendation is made.

## SUMMARY OF FINDINGS

399. Set out below is a summary of the findings made in abbreviated form. They cannot, however, be properly or fairly understood without being considered in the context of the various factual findings outlined in this report. To consider them outside that full context would be prone to lead to misunderstanding, and give an inaccurate impression of:

- (a) what efforts were made by Council relating to asbestos management in the period 2012 to June 2017 despite various failings; and
- (b) the extent of the work and achievements of the Council since this period in relation to asbestos management

### **TOR 1: The Council**

#### **1 January 2013 to June 2017**

400. For the period since the enactment of s.8A of the LGA, until June 2017, the following findings are made on the basis of the facts found in Chapter 4 leading up to that date:

- (a) the Council failed to provide “*strong and effective leadership, planning and decision-making*” as required by s.8A(1)(a) of the LGA on the issue of asbestos management;
- (b) the Council failed to act “*strategically ...for the provision of effective and efficient services and regulation to meet the diverse needs of the local community*” (8A(1)(c)), in the sense that the Community needs Council to manage its assets pursuant to effective regulations that ensure risks – including the risk posed by asbestos – is minimised as far as possible, if not eliminated entirely; and
- (c) the Council failed to “*consider the long term and cumulative effects of actions on future generations*” in relation to the issue of asbestos management within Council assets in that period (s.8A(2)(c)).

401. Similar findings of failure are made for the period 1 January 2013 to 16 September 2016 regarding the now repealed s.8 of the LGA.
402. There are also specific matters relating to the Lawson Stockpile and Carpark Sites and the Katoomba Waste Management Facility, that justify a finding of failure to comply with s.8A(1)(a) and (c) and 8A(2)(c) up to November 2017. The same finding is made in relation to the Springwood Depot up until May 2017.
403. No finding is made that the Council failed to comply with s.8A(2)(e) that “*Council decision-making should be transparent and decision-makers are to be accountable for decisions and omissions*”. The Council’s failings in relation to asbestos management were not kept a secret. There was no significant lack of transparency with how Council approached the changes brought in by the WH&S Act and Regs, or with the Council’s Safety Improvement Project, nor with anything of significance regarding asbestos management following this. As to accountability, if it ever would have been appropriate to “point the finger” at one or more persons for the failure of the Council to become complaint with asbestos management laws under the WH&S Act and Regs until the later part of 2017, no such persons are still employed by the Council. That should not be taken as an indication that any adverse finding would have been made in relation to any particular person. It merely identifies that the part of s.8A(2)(2) relating to decision makers being “accountable” does not arise (probably at all, but certainly not usefully) for consideration by this Inquiry.

#### **June 2017 to October 2020**

404. Aside from matters relating to the Katoomba Waste Management Facility, and the Lawson Sites referred to above (with such failure in any event ending in November 2017), a finding is made that from 31 May 2017 the Council did manage, and is managing, the issue of asbestos management in accordance with each of the guiding principles identified in each of s 8A(1)(a), (c) and (2)(c) and (e) of the LGA.
405. Based on the same matters, and the evidence of Mr Williams from SafeWork, a finding is made that the Council is now on the path of being an “exemplar” in relation to the management of asbestos and the risks posed by it.

## **TOR 1: The Governing Body**

### **January 2013 to June 2017**

406. A finding is made that the Governing Body did not fail to perform the roles set out in s223(1)(a), (b), (d), (g), (h), and (l) of the LGA in relation to asbestos management issues.

### **June 2017 to October 2020**

407. A finding is made that the Governing Body took all appropriate steps to ensure that the Council properly addressed the asbestos management issues that had come to light.

408. For the period June 2017 to October 2020, a finding is made that the Governing Body performed the roles and met the obligations set out in s223(1)(a), (b), (d), (g), (h), and (l) of the LGA in relation to asbestos management issues.

## **TOR 2**

409. For the period January 2013 to June 2017, the evidence does not justify a finding that in exercising their functions pursuant to Part 2 of Chapter 9 of the LGA, the Mayor and Councillors of the Council did not exercise a reasonable degree of care and diligence in dealing with asbestos management issues at the Council in accordance with section 439(1) of the Local Government Act 1993.

410. For the period June 2017 to October 2020, a finding is made that the Mayor and Councillors of the Council have at all times exercised a reasonable degree of care and diligence in dealing with asbestos management issues at the Council in accordance with section 439(1) of the Local Government Act 1993.

## **TOR 5 - The Council and the Governing Body**

411. From 2012 to mid-2017, the application of resources towards “asbestos management” were largely applied through the Council’s approach to asset management more generally. This was clearly not sufficient. For example, a great deal of work needed to be done by persons with relevant expertise – requiring funding – to properly audit all the Council’s built assets for asbestos containing material. Insufficient funding was

allocated to this to complete this process in a timely fashion, and in relation to the preparation of asbestos plans and registers, and the preparation of an asbestos policy.

412. From May 2017, the Council (with the support of the Governing Body) applied significant resourcing, both human and financial, to meet the issues identified by SafeWork and the EPA, and to bring the Council into compliance with its statutory obligations concerning asbestos management (and in some cases, to adopt policies which exceed that standard). While this is by no means the only cost, the “rectification costs” referred to in the enforceable undertaking with SafeWork total over \$1.2 million alone.
413. From 2012 to mid-2017, “funding decisions” to address asbestos management were, technically, not made to the degree they should have been by the Council in accordance with all of the provisions of the LGA referred to in TOR 5. However, those failures in relation to funding decisions can be traced to the “*organisational failures*” identified above in respect to TOR 1, rather than failures associated with the Council’s approach to funding decisions generally.
414. As for the Governing Body, no adverse finding is made against it in relation to TOR 5. That would not be reasonable in light of the findings made in relation to TOR 1 and 2. The Governing Body was not aware that different funding decision might have needed to be made.
415. In the period from May 2017 and following, the Council and the Governing Body made funding decisions so as to ensure that the Council addressed its “*asbestos management issues*”, and did so expediently.
416. A finding is made that from May 2017 the Council and the Governing Body made “funding decisions so as to address asbestos management” in accordance with all relevant provisions of the LGA as set out in TOR 5.



## **TOR 6**

### **General findings regarding asbestos issues**

417. Save for the matters referred to below regarding the Katoomba Waste Management Facility, and the Lawson Stockpile and Carpark Sites, a finding is made that from June 2017 the Council took steps and implemented policies and processes to provide a supportive workplace in the context of the wider asbestos management issues at that time. In doing so, it took those steps as a “reasonable employer”.
418. In the period January 2013 to late 2017, the Council was not compliant with its statutory obligations in relation to asbestos management in the workplace, and had not taken sufficient steps to achieve that compliance. Compliance with those obligations was an important aspect in guarding against the risks posed by asbestos containing material to, amongst others, Council staff. In those circumstances, the Council fell short during this period of being a “*responsible employer*” as required by s.8A(i) of the LGA.
419. Given its state of knowledge as addressed in the findings made for TOR 1 and 2, no adverse finding is made in relation to the Governing Body in relation to TOR 6.

### **Particular issues raised in the evidence re TOR 6**

#### *Katoomba Waste Management Facility, Springwood Depot and Lawson Stockpile Sites*

420. A finding made that in the period up to November 2017, the Council at times fell short of its obligations to be a “responsible employer” in relation to these specific sites under s8A(1)(i) of the LGA.

### **Findings since November 2017**

421. A finding is made that since November 2017 the Council is acting in compliance with its obligations under s.8A(1)(i) and has and is being a “responsible employer”, and is providing a “consultative and supporting working environment”.

## **TOR 7**

422. A finding is made that the Council co-operated fully and appropriately with SafeWork.
423. A finding is made that the Council co-operated fully and appropriately with the EPA.

424. A finding is made that the Council has co-operated fully and appropriately with the Office of Local Government concerning the Performance Improvement Order issued by the then Minister in January 2018.
425. A finding is made that the Council has “*cooperated, and is cooperating effectively with State government agencies in addressing asbestos management issues in accordance with*” s.8A(1)(e) of the LGA.
426. A finding is made that the Governing Body has acted “*to ensure that the council acts, honestly, efficiently and appropriately*” regarding the management of asbestos pursuant to s.223(1)(l) of the LGA

### **TOR 9**

427. A finding is made that in relation to “the asbestos management issues raised in 2017”, the Council and the Governing Body have acted in a manner that is consistent with all relevant provisions of the LGA, and both have sought to, and have succeeded in, putting the Council in the position where it is “on the path to being an exemplar” in relation to the management of asbestos.

### **RECOMMENDATIONS**

428. See [395] to [398] above.

**Commissioner Richard Beasley SC**

**18 March 2021**

## APPENDIX A – TERMS OF REFERENCE

# Blue Mountains City Council Public Inquiry

On 27 June 2018 the Minister for Local Government, the Hon. Gabrielle Upton MP announced a formal Public Inquiry into Blue Mountains City Council.

The terms of reference for the Inquiry are:

*To inquire and report to the Minister for Local Government with respect to whether:*

- 1. In exercising its functions pursuant to sections 23 and 24 of the LG Act, the Council and its governing body has since 2012 dealt with, and is dealing with, asbestos management issues at the Council in accordance with the guiding principles in section 8A(1)(a), (c) and (2)(c), (e) and the role of the governing body in section 223(1)(a), (b), (d), (g), (h) and (l) of that Act.*
- 2. In exercising their functions pursuant to Part 2 of Chapter 9 of the LG Act, the mayor and councillors of the Council have since 2012 exercised, and are exercising, a reasonable degree of care and diligence in dealing with asbestos management issues at the Council in accordance with section 439(1) of the Local Government Act 1993.*
- 3. In exercising their functions pursuant to Parts 1 and 2 of Chapter 11 of the LG Act, the Council and its governing body has since 2012 determined to employ and/or engage Mr Mark Mulligan, Mr John Hargreaves and other staff or contractors in accordance with the guiding principles in section 8A(1)(a) and (2)(e) and the role of the governing body in section 223(1)(j) and (l), as well as section 349 of that Act.*
- 4. In exercising its functions pursuant to sections 23 and 24 of the LG Act, the Council's process of engaging Clyde & Co and McCullough Robertson lawyers (through McPhee Kelshaw solicitors and conveyancers), including with respect to management of any conflicts of interest, to conduct independent investigations into asbestos related incidents and employment issues, respectively, was in accordance with the guiding principles in sections 8A(1)(b), (h), (2)(e) and 8B and the role of the governing body in section 223(1)(c) and (l) of that Act.*

5. *In exercising functions pursuant to section 24 and Part 3 of Chapter 13 of the LG Act, the Council and its governing body has since 2012 made funding decisions so as to address asbestos management in accordance with the guiding principles in sections 8A(1)(b) and 8B and the role of the governing body in s. 223(1)(c) and (l) of that Act.*
6. *In exercising functions pursuant to Parts 1 and 2 of Chapter 11 of the LG Act, the Council and its governing body since 2012 has facilitated, and is facilitating, a consultative and supportive working environment in accordance with the guiding principle in section 8A(1)(i) and the role of the governing body in section 223(1)(i), (j) and (l) of that Act.*
7. *In exercising its functions pursuant to sections 23 and 24 of the LG Act, the Council has co-operated, and is co-operating, effectively with State government agencies in addressing asbestos management issues in accordance with the guiding principle in section 8A(1)(e) and the role of the governing body in section 223(1)(l) of that Act.*
8. *In exercising functions pursuant to Parts 1 and 2 of Chapter 11 and Part 2 of Chapter 13 of the LG Act, the governing body and the senior staff of the Council has determined, reviewed and re-determined an appropriate organisational structure and resource allocation in accordance with the guiding principle in section 8A(1)(c), (2)(c) and the role of the governing body in section 223(1)(g), (h) and (l) of that Act.*
9. *In exercising its functions pursuant to sections 23 and 24 of the LG Act, the response of Council and the governing body to the asbestos management issues raised in 2017 has been and is in accordance with the guiding principle in section 8A(1)(a) and the role of the governing body in section 223(1)(b), (g), (h), (k) and (l) of that Act.*

*The Commissioner may make recommendations as the Commissioner sees fit having regard to the outcomes of the Inquiry, including whether all civic offices at Blue Mountains City Council should be declared vacant.*

*The Inquiry will be limited to matters relating to the carrying out of provisions of the LG Act, in recognition that the carrying out of certain other legislative provisions is the subject of separate investigation and/or regulatory action by SafeWork NSW and the NSW Environment Protection Authority.*

The Minister for Local Government approved the appointment of Richard Beasley SC as Commissioner to undertake the Inquiry.