



WINGECARRIBEE SHIRE COUNCIL PUBLIC INQUIRY

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

REPORT

**Ross Glover
Commissioner**

30 June 2022

I acknowledge the Gundungurra and Tharawal people as the traditional custodians of the land described as the Wingecarribee Shire. I pay my respect to Elders past, present and emerging.

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Executive Summary

This Executive Summary contains a summary of the findings directed to the Terms of Reference, and the recommendations set out in the body of this Report. It is not a substitute for the detailed expression of those findings and recommendations, or the matters on which they are based, set out below.

Findings

Term of Reference 1

1. For the reasons set out in Chapter 4 below, in my view:
 - a. The Councillors (whether taken as a whole or viewed individually) had a high level understanding of their roles and responsibilities but did not display a full understanding of them.
 - b. There were repeated instances of inappropriate behaviours by some Councillors during meetings, briefings, and in other interactions with staff, which were not adequately or effectively addressed by the other Councillors.
 - c. The failure of the other Councillors to effectively respond to those instances of behaviour contributed to the creation of a permissive environment in which they could occur, which in turn contributed to the dysfunction within the Governing Body.
 - d. An adversarial relationship had developed during the 2016 Term between the Governing Body and some aspects of the community.
 - e. The dysfunction within the Governing Body had a negative impact on the organisation, including its staff.
 - f. The dysfunction within the Governing Body affected its ability to fully perform its strategic planning function, which at least contributed to a number of identified shortfalls in the Council's strategic planning framework.
 - g. Although the nature and extent of the failures by each of the Councillors differ, and the more egregious examples of inappropriate conduct were limited to three Councillors, in my view the evidence supports a conclusion that the Councillors as a whole did not adequately, reasonably and appropriately discharge their roles and responsibilities at all times during the 2016 Term.

Term of Reference 2

2. For the reasons set out in Chapter 5 below, in my view:
 - a. The evidence establishes that there were instances of “*improper interference*” by individual councillors in operational matters during the 2016 Council Term.
 - b. The evidence does not permit me to make findings as to the extent and frequency of that “*improper interference*”, however a limited number of individual examples have been identified.
 - c. The evidence does not support a conclusion that the Governing Body as a collective group engaged in “*improper interference*” in operational matters during the 2016 Council Term.

Term of Reference 3

3. For the reasons set out in Chapter 6 below, in my view:
 - a. Although the Councillors were in a position to direct and control the affairs of the Council prior to the Suspension Order having been issued, in doing so:
 - i) there were many instances of conduct from some Councillors that were inconsistent with the roles and responsibilities of a Councillor, and which had an adverse effect on the functioning of the organisation and its staff;
 - ii) the dysfunction within the Governing Body affected its ability to perform its statutory role fully and adequately.
 - b. Although there are indications that some of the Suspended Councillors have demonstrated a better capacity to direct and control the affairs of the Council in compliance with their roles and responsibilities as specified by the LGA:
 - i) those Councillors have not displayed a greater level of understanding of their roles and responsibilities;
 - ii) some of the submissions made and post-suspension conduct are indicative a failure to understand the roles and responsibilities of a councillor, and some of the central foundational principles that apply to local government in New South Wales;
 - iii) there is nothing to indicate that Council meetings would not be affected by the kinds of dysfunction that had previously occurred or would be conducted with a greater adherence to applicable meeting procedures.

- c. On balance, it is doubtful that the 2016 Council would remain free from dysfunction of the kind seen during the 2016 Term.

Term of Reference 4

- 4. For the reasons set out in Chapter 7 below, in my view:
 - a. The 30 March 2022 Media Release contained various statements that had no basis in fact. It included comments that were apt to bring the Council organisation into disrepute, raise alarm within the community, and which could negatively affect those staff within the organisation, who are responsible for its day to day operations. In my view, that such statements were made by some of the Suspended Councillors demonstrates a lack of awareness by them of the effect of their own actions and statements on the organisation.
 - b. The rebuild of the Council organisation which has commenced will take a considerable time to complete and is not yet a mature stage.
 - c. Former Clr Markwart's comments during the 14 February 2018 concerning use of the gavel were not inappropriate, threatening or intimidatory. That they were received in that way is further evidence of the breakdown in the relationship between the Governing Body and at least some elements within the community.
 - d. Clr Gair did not intend anything that he said in his interaction with Ms Haslinger after the 29 January 2021 Extraordinary Meeting to be a threat or to otherwise intimidate her.
 - e. There is considerable force in the view that the Council requires more time to reform itself in order to give an incoming governing body the best chance of success, including to avoid a return to the dysfunction that has been a feature of governing bodies over the past decade.

Recommendations

Having regard to the findings set out in the body of this Report, and for the additional reasons set out in Chapter 8 below, I make the following recommendations for the consideration of the Minister:

1. The Minister recommend to the Governor that the Civic Offices of the Wingecarribee Shire Council be declared vacant forthwith.
2. That the elections for the Wingecarribee Shire Council be deferred to coincide with the state-wide local government elections in 2024.
3. That a standardised mandatory induction program be developed for all councillors to in New South Wales covering (at least):

- a. the statutory roles and responsibilities of a councillor (including detailed guidance on the distinction between the strategic roles of a councillor and the operational function of the council staff);
 - b. the Model Code of Conduct, including how breaches of it are dealt with;
 - c. the Model Code of Meeting Practice and meeting procedure, including clear guidance for moving motions, amendments, foreshadowed motions, rules of debate, and acts of disorder and how they may be dealt with;
 - d. councillor misconduct, and the available responses to it;
 - e. other “core” councillor skills necessary to fulfil the statutory obligations of a councillor.
4. That a standardised mandatory training for Mayors and Deputy Mayors be developed in relation to the Model Code of Meeting Practice (which can be supplemented to include any variances in the particular Code adopted by the particular council) and skills and techniques for chairing meetings, including particular focus on meeting procedure, maintaining order, and techniques and powers for dealing with acts of disorder.
 5. That consideration be given to amending cll 183 and 184 of the *Local Government (General) Regulation 2021* to make attendance at compulsory induction training (including of the kind referred to in recommendations 3 and 4 above, if adopted) mandatory within a short period following election (as a councillor, or Mayor or Deputy Mayor), say six months.
 6. That consideration be given to amending the Procedures for the Administration of the Model Code of Conduct for Local Councils in NSW to require that, in circumstances where a councillor has been found following an independent review to have been in breach of the Code of Conduct:
 - a. The Conduct Reviewer include in their report a short summary of the breach(es) of the Code of Conduct that have been found, which identifies the factual circumstances and a list of each provision contravened;
 - b. The resolution of Council reported to the public meeting and recorded in the Minutes must include:
 - i) an identification of the Councillor who was in breach of the Code of Conduct;
 - ii) a short summary of the conduct that constituted the breach of the Code of Conduct found by the independent reviewer from the report as identified in sub-paragraph (a) above, including an identification of the provision(s) of the Code of Conduct that had been contravened; and

- iii) a summary of the action taken by the governing body in response to that report, including the reasons for any departure from the recommendation of the independent conduct reviewer (if that be the case).
7. That consideration be given to requiring councils to maintain a public register of each established breach of the Code of Conduct by councillors, recording:
- a. the councillor who was in breach of the Code of Conduct;
 - b. a short summary of the conduct that constituted the breach of the Code of Conduct found by the independent reviewer including an identification of the provision(s) of the Code of Conduct that had been contravened; and
 - c. a summary of the action taken by the governing body in response to that report, including the reasons for any departure from the recommendation of the independent conduct reviewer (if that be the case).
8. That the Model Code of Conduct be amended to capture other circumstances where conflicts of interest may arise and which do not fall within the current definition of “personal interest”, including where a councillor has aided an applicant or objector to a development application or for any other service to Council.
9. That consideration be given to amending the *Local Government Act* to make the division between “operational” and “strategic” responsibilities clearer by making it clear in the statute that a councillor is not permitted to direct or seek to influence (whether directly or indirectly) council staff in the performance of their duties.

Glossary of key defined terms used in this report

In this Report, references to **Council** or **WSC** are references to the organisation. References to the **Councillors**, the **Governing Body** or the **Elected Body** are references to the elected councillors.

The following table sets out the key defined terms and abbreviations used in this report, which have that meaning unless otherwise indicated. Other defined terms used have the meaning given to them in the body of this Report.

Defined Term	Meaning
2005 LG Regulation	<i>Local Government (General) Regulation 2005 (NSW).</i>
2008 Council	The governing body elected following the elections held on 13 September 2008.
2012 Council	The governing body elected following the elections held on 8 September 2012.
2016 Council/2016 Councillors	The governing body elected following the elections held on 16 September 2016. To the extent that the term is used in the period after former Clr Markwart's resignation, it does not include him.
2019 Code of Conduct	The Code of Conduct adopted by WSC on 12 June 2019.
2019 Code of Meeting Practice	The Code of Meeting Practice adopted by WSC on 12 June 2019.
2021 LG Regulation	<i>Local Government (General) Regulation 2021 (NSW).</i>
30 March 2022 Media Release	Media release issued by Clr Gair, Clr Nelson, Clr Andrews, Clr McLaughlin and former Clr Markwart on 30 March 2022.

Defined Term	Meaning
Clr/s	Councillor/s.
Council	The Wingecarribee Shire Council.
Councillors	The elected councillors of the Wingecarribee Shire Council in the 2016 Council (unless otherwise indicated). To the extent that the term is used in the period after former Clr Markwart's resignation, it does not include him.
Councillor Handbook	Councillor Handbook dated October 2017.
Elected Body	The elected councillors of the Wingecarribee Shire Council in the 2016 Council (unless otherwise indicated). To the extent that the term is used in the period after former Clr Markwart's resignation, it does not include him.
Ex	Exhibit, for e.g., Exhibit A is referred to as Ex A.
Governing Body	The elected councillors of the Wingecarribee Shire Council in the 2016 Council (unless otherwise indicated). To the extent that the term is used in the period after former Clr Markwart's resignation, it does not include him.
Interim Administrator	Mr Viv May PSM.
Inquiry	This inquiry.
LGA	<i>Local Government Act 1993 (NSW).</i>

Defined Term	Meaning
Minister	The Minister for Local Government at the relevant time.
Notice of Intention to Issue a Performance Improvement Order	The Notice of Intention to Issue a Performance Improvement Order issued by the Minister on 19 August 2020.
Notice of Intention to Issue a Suspension Order	The Notice of Intention to Issue a Suspension Order issued by the Minister on 2 March 2021.
OLG	Office of Local Government.
Performance Improvement Order	The Performance Improvement Order issued by the Minister on 8 September 2020.
Public Hearings	The public hearings of this Inquiry held on held on 28, 29, 30, 31 March and 1, 4, 5, 6, 7, 8, 11, 12, 13, 14 and 28 April 2022.
Road Map Report	The “ <i>Our Road Map: Moving Forward to Reset our Organisation</i> ” Report, presented to the ordinary meeting of Council on 16 March 2022.
Report	This report.
Reynolds Report	The report of Ian Reynolds dated 18 December 2020.
Suspended Councillors	The collective group of suspended councillors, namely Clr Gair, Clr Andrews, Clr Nelson, Clr McLaughlin, Clr Whipper and Clr Scandrett.

Defined Term	Meaning
<i>Suspension Order</i>	The Suspension Order issued by the Minister on 12 March 2021.
T	Transcript of the Public Hearings. For example, T2.1 is a reference to Transcript page 2, line 1.
<i>Terms of Reference</i>	The terms of reference of this inquiry.
<i>Turkington Report</i>	The report of Norman Turkington dated 5 November 2020.
WSC	The Wingecarribee Shire Council.

CHAPTER 1: INTRODUCTION

The establishment of the Inquiry

1. On 31 August 2021, the then Minister for Local Government, the Hon Shelley Hancock MP, appointed me as Commissioner to conduct a public inquiry into the Wingecarribee Shire Council pursuant to s 438U of the *Local Government Act 1993* (NSW) (**LGA**).¹
2. Shortly after my appointment, Mr Angus Broad and Ms Bron Hewson were appointed as Officers Assisting the Inquiry. Mr David Parish of the New South Wales Bar was subsequently appointed as Counsel Assisting.

The nature of this Inquiry

3. During my opening remarks at the commencement of the Public Hearings, I made some observations about the nature of this Inquiry². They warrant brief repetition at the outset of this report for the benefit of the reader.
4. This is an administrative inquiry established under s 438U of the LGA. That means that the Inquiry has a number of features but also some limitations that must be kept in mind. They include the following matters:
 - i. First, the Inquiry is confined to the Terms of Reference. I have no power to inquire into matters which, on a reasonable reading of the Terms of Reference, are not within their terms.
 - ii. Secondly, the purpose of this Inquiry is to make findings and, if appropriate, recommendations to the Minister for her consideration. Any findings made by me are expressions of my opinion as to what the evidence reveals, and they do not determine legal rights. For example, any finding I may make that a person has not complied with their obligations under the LGA, the Code of Conduct or the Code of Meeting Practice (or in any other respect) is only an expression of my opinion as to those matters. That opinion does not bind anyone, including the Minister, and does not determine legal rights or obligations.
 - iii. Thirdly, any findings or recommendations I may make are not binding on the Minister. It is a matter for the Minister whether any of the findings or recommendations expressed below should be accepted in whole or in part.

¹ Ex A, p 1.

² Transcript of the Public Hearings (**T**), pp 2-8.

- iv. Fourthly, I have no power to implement any recommendations, impose any sanction, or take any other action based on the findings I may make. It is the Minister's function to determine what steps, if any, should be taken following a consideration of this Report.
 - v. Finally, the rules of evidence do not apply to this Inquiry. However, the rules of procedural fairness do apply. Findings of fact are to be made rationally, and in accordance with proper standards of satisfaction that may vary depending on whether the asserted factual matter is adverse to the interests of any person.
5. It should also be understood that it is not the function of this Report to refer to every issue or incident referred to in the evidence. In this respect, some of the Councillors took issue with the evidence of some witnesses in their Final Submissions³. As will become clear, I have not found it necessary to make specific findings about a number of the factual matters that were referred to in the evidence, or to resolve some of the disputes between witnesses about certain events or issues. Accordingly, that an issue, incident, document, submission, or any aspect of the evidence is not specifically referred to does not mean that it has been ignored or overlooked. Rather, findings necessary to the resolution of the Terms of Reference have been made, and the evidence relevant to those findings has been identified. That process does not necessitate a resolution of every issue, or contested matter, referred to in the evidence.

The conduct of the Inquiry

Notice of Inquiry and Information Paper

6. On 16 September 2021, following the announcement of this Inquiry, a Notice of Inquiry was published in the local press and an Information Paper was published on the Inquiry webpage⁴.

Initial submissions

7. On 16 September 2021, a public call for submissions relevant to the terms of reference was issued and published on the Inquiry webpage⁵.
8. In response to that call more than 120 initial submissions were received. Consistent with the approach taken in other inquiries conducted under s 438U of the LGA, I determined that those submissions should not be made available publicly. There were a number of reasons for that, including that a large number of them referred to issues that fell outside the Terms of Reference or raised issues which were not appropriate to be explored in an inquiry of this kind. Further,

³ See, e.g., Nelson 30 May 2022 Submission; Markwart 23 May 2022 Final Submission; Gair 23 May 2022 Final Submission.

⁴ <https://www.olg.nsw.gov.au/wp-content/uploads/2021/09/WSPI-Information-Paper.pdf>

⁵ <https://www.olg.nsw.gov.au/wp-content/uploads/2021/09/WSPI-Call-for-submissions.pdf>

a submission is, by its nature, an expression of opinion by its author as to the matters stated in it. It does not have evidentiary value of itself.

9. Accordingly, while each of the submissions were reviewed considered, and many of them identified issues and lines of inquiry that were pursued during the Public Hearings, they do not form part of the evidence on which my findings are based. That evidence is found in the evidence adduced during the Public Hearings, being both oral evidence of witnesses and the documents tendered.

Practice Direction

10. On 8 March 2022, I issued a Practice Direction for the conduct of the Public Hearings⁶. A copy of that Practice Direction was published on the Inquiry webpage, and a copy of it was sent directly to those persons who were most directly affected by the TORs, including each of the suspended councillors.
11. The Practice Direction set out various matters relating to the conduct of the Public Hearings. I refer to some of those matters further below.

Public Hearings

12. The Public Hearings were held on 28, 29, 30, 31 March and 1, 4, 5, 6, 7, 8, 11, 12, 13, 14 and 28 April 2022.
13. The Public Hearings were held in the WSC Council Chamber and were live streamed on the Inquiry webpage. Recordings of each day were also maintained on the Council's YouTube page.
14. In addition, daily written transcripts were made available on the Inquiry webpage⁷ as were copies of any documentary exhibits⁸, save for a limited number in respect of which I made non-publication directions⁹.

The live stream of the Public Hearings

15. In the Notice of Hearings and the Practice Direction, I set out my decision to limit the categories of persons who may be physically present in the hearing room (in addition to those assisting

⁶ <https://www.olg.nsw.gov.au/wp-content/uploads/2022/03/Practice-Direction-for-Public-Hearings.pdf>

⁷ <https://www.olg.nsw.gov.au/public-inquiries/wingecarribee-shire-council-public-inquiry/wingecarribee-shire-council-public-inquiry-transcriptions/>

⁸ <https://www.olg.nsw.gov.au/public-inquiries/wingecarribee-shire-council-public-inquiry/wingecarribee-shire-council-public-inquiry-exhibits/>

⁹ The reasons for such a direction included that the documents contained the personal information of persons who were not the focus of the Terms of Reference and that the documents referred to staffing matters within the Council (some of which I was informed were ongoing).

the Inquiry) to those persons most directly affected by the Terms of Reference. I made that direction primarily in order to minimise the risk that one of the Inquiry team members would contract COVID-19 and be required to self-isolate. If that had occurred, the inevitable consequence would have been that the Public Hearings would have had to have been aborted and rescheduled. The resultant delay would have been measured in weeks, not mere days, and much of the considerable amount of work that went into planning and organising the Public Hearings would have had to have been re-done. Pleasingly, the Public Hearings were able to proceed with only minimal impact from the ongoing effects of the pandemic.

16. To ensure that as many people as possible could view the proceedings, I directed that they were to be live-streamed on the Inquiry webpage.
17. I was made aware that during the opening day of the Public Hearings, there had been some – albeit limited – complaint about the direction that I had made. Those complaints included that by so doing, the Inquiry was “*anything but public*”. I addressed those misguided complaints in my remarks on the first day of the Public Hearings¹⁰.
18. I have been informed that as of 3 May 2021, there had been almost 12,000 views of the live stream or the recordings across the 15 days of the Public Hearings. The proceedings on 14 April 2022 received in excess of 1,200 views alone. On any view, the Inquiry was able to be viewed by a far greater number of people than may have been possible to accommodate in the hearing room. The live stream also ensured that those members of the public who would not otherwise be able to attend in person were able to view the proceedings, whether in real time or later as the recording remained accessible on the Council’s YouTube page.
19. Accordingly, I am satisfied that the measures that I took were not only appropriate, but they also had the additional benefit that many more people were able to view the proceedings than would ordinarily be the case.
20. Due to the *ad hoc* nature of inquiries of this kind, it may not always be possible for future hearings in public inquiries to be live-streamed. In the present case, that was only made possible by the Council making the Chamber, associated technology, and highly skilled information technology staff available to the Inquiry for the duration of the Public Hearings. However, given the obvious interest of the members of the community in this Inquiry, I would respectfully encourage Commissioners of a subsequent public inquiries of this kind to consider live streaming any public hearings where that facility is reasonably available and if otherwise appropriate in all the circumstances.

¹⁰ T61-63.

Applications for leave to appear at the Inquiry

21. The Practice Direction set out a process whereby persons who were affected by the Terms of Reference could seek leave to appear (including by legal representation) at the Public Hearings.
22. Mr James Riley, solicitor, was granted leave to appear for Mr Mooney and Mr Burgess whilst those witnesses gave evidence. Clr Scandrett (on six occasions) and Clr McLaughlin (twice) sought and were granted leave to appear for purpose of asking questions of particular witnesses. No other application was made for leave to appear at the Inquiry, whether generally or to examine a particular witness.

Witnesses called at the Public Hearings

23. Evidence was adduced from 39 witnesses during the Public Hearings. The witnesses fell into the following categories:
 - i. representatives or members of industry, community, and interest groups, including the Southern Highlands Chamber of Commerce, Moss Vale and Rural Chamber of Commerce; Southern Highlands Key Stakeholders Group; Friends of Bowral; Friends of Wingecarribee; Berrima Residents Association; and WinZero;
 - ii. other members of the community;
 - iii. former councillors;
 - iv. former staff;
 - v. the 2016 Councillors;
 - vi. the Interim Administrator;
 - vii. the current General Manager.
24. As is usual in inquiries of this kind, witnesses in categories (a) and (b) were selected by Counsel Assisting from among those who made submissions to the Inquiry. The basis on which they were selected was set out by Counsel Assisting on Day 1 of the Public Hearings¹¹. Criticism by some Councillors of the range of witnesses called fails to pay any regard to those matters¹². I also observe that the Practice Direction set out a procedure whereby an affected

¹¹ T56.18-57.35.

¹² See, e.g., Nelson 30 May 2022 Final Submission, p 19.

person could nominate witnesses that they would wish to have called during the Public Hearings. No application of that kind was made.

25. In accordance with the Practice Direction, each witness was called and examined by Counsel Assisting. At the conclusion of Counsel Assisting's examination, each witness was given the opportunity to identify additional topics about which they wished to give evidence and had not been adequately addressed during their examination. If those topics were relevant to a consideration of the Terms of Reference, that evidence was then adduced through further examination by Counsel Assisting.
26. The Practice Direction set out a procedure by which those persons affected by the Terms of Reference, or the evidence given by a particular witness, could seek leave to examine that witness following the examination by Counsel Assisting. As outlined above, applications of that kind were made by Clr Scandrett and Clr McLaughlin. On each occasion, subject to my discretion as to whether to permit a particular question, leave was granted to them to examine the relevant witness¹³.

The credibility of the witnesses called during the Public Hearings

27. Counsel Assisting submitted that I can be comfortably satisfied that each of the witnesses who gave evidence during the Public Hearings "*to a material degree did their best to give candid and honest evidence*"¹⁴. The essence of that submission is that I should conclude that each witness gave evidence honestly and gave their best effort to give accurate evidence at all times. I accept that submission.
28. Former Clr Markwart submitted that Counsel Assisting's submission in that respect was "*demonstrably false*" and "*incorrect*"¹⁵. That submission was based upon a proposition that due to similarities in some of the witnesses' recollections of certain events, it is highly probable that they discussed them prior to giving evidence. Former Clr Markwart also submitted that (in his view) there was "*an attempt by some witnesses to paint Council and Councillors in a poor light sometimes by selectively and rewording what occurred*"¹⁶. Clr Gair submitted that he

¹³ In accordance with my discretion I refused leave for some of the proposed questions to be asked on several grounds, including that the manner in which the questions were framed made them unfair to the witness, the questions contained multiple propositions making any answer unclear or unintelligible, the questions assumed matters that had not yet been agreed to by the witness, the questions were confusing, the questions were directed to matters not within the knowledge of the witness, the questions went to issues falling outside the Terms of Reference, and that the questions sought to adduce evidence that was irrelevant to the Terms of Reference.

¹⁴ CA Final Submissions, [64].

¹⁵ Markwart 23 May 2022 Final Submission, pp 3 and 28.

¹⁶ Markwart 23 May 2022 Final Submission, p 28.

believed that “a number of witnesses misled the inquiry...in an attempt to damage my, and some cases other Councillors [sic] and former staffs [sic] reputations”¹⁷.

29. To the extent that Clr Gair and former Clr Markwart suggest that any witness who gave evidence to the Inquiry did not do so in accordance with their oath or affirmation, that is a serious allegation. There is no proper basis for me to make such a finding, and I decline to do so. Having observed each of the witnesses who gave evidence to the Inquiry, I am satisfied that they gave truthful evidence to the best of their recollections. That witnesses described a particular incident in a similar way may suggest that they had spoken about the incident in the years since it occurred. However, the prospect that those discussions had occurred falls a considerable way short of justifying a finding that those witnesses gave untruthful evidence in order “*paint Council and Councillors in a poor light*”.
30. The same can be said for a witness who gives evidence that does not accord with the recollection of others or a witness who gives evidence which is at odds with evidence given by witnesses or what is recorded in a document¹⁸. Issues of that kind are commonly experienced by tribunals of fact in various contexts. They do not (without significantly more) justify the serious conclusion that the witness gave knowingly untruthful evidence.
31. Similarly, there were a number of witnesses who were associated with the same interest groups or had similar concerns about particular issues. The Station Street Project was one example, as was the evidence given by those witnesses involved in local business groups. To the extent that their evidence included similar themes or concepts, that is to be expected given their engagement in the same or relevantly similar issues and is not a matter that detracts from the reliability of their evidence generally.

Ms Prendergast

32. I am aware that there has been some public interest and speculation as to whether the former General Manager, Ms Prendergast, would be called as a witness. To that end, Clr Scandrett took the opportunity in his final submission to record his “*disappointment*” that Ms Prendergast did not give evidence¹⁹. Accordingly, it is appropriate that I deal with that issue briefly in this report.
33. As I understand the position, Ms Prendergast now resides in New Zealand. Accordingly, she was not readily compellable to give evidence before the Inquiry. Ms Prendergast was invited

¹⁷ Gair 23 May 2022 Final Submission, sub-para (1). See also sub-para (b).

¹⁸ cf Markwart 23 May 2022 Final Submission, p 29.

¹⁹ Scandrett 23 May 2022 Final Submission.

to provide the Inquiry with a submission and to voluntarily give evidence via video-link. Those invitations were not taken up.

34. In setting out those matters, I should not be taken to be critical of Ms Prendergast. As set out below, the evidence supports a conclusion that Ms Prendergast was adversely affected by the circumstances within Council in the lead up to her departure from the organisation²⁰. There is also evidence that the conduct of some of the Councillors, including examples that were directed to Ms Prendergast, was at (at times) inconsistent with the Code of Conduct and Code of Meeting Practice²¹. In that context, it is entirely understandable that Ms Prendergast would not wish to volunteer to give evidence or make a submission. I make no criticism of her for that.
35. Ultimately, as will be seen below, that Ms Prendergast did not give evidence has not affected my ability to make findings that fully answer the Terms of Reference.

Exhibits

36. In the conduct of the Inquiry, I issued various summonses seeking the production of certain documents. Thousands of pages of material were produced in answer to those summonses. A significant number of those documents were tendered by Counsel Assisting during the Public Hearings. I also permitted documents to be tendered after the conclusion of the Public Hearings.
37. A total of 53 Exhibits (some of which comprised thousands of pages individually) were tendered. Selected portions of the recordings of Council meetings were also tendered. In addition to those clips, I have also had regard to the other recordings of Council meetings which are available on the Council's YouTube page as necessary, and they were taken to have been "*notionally tendered*" as submitted by Counsel Assisting²².
38. On occasion, I have found it necessary in this Report to refer to some uncontroversial matters of background or history which are not conveniently recorded in the documentary exhibits or the oral evidence. In those instances, I have identified the source material by web-link.

Non-publication directions

39. In accordance with my power under s 12B of the *Royal Commissions Act 1923* (NSW), I permitted some evidence to be received in private session (for a variety of reasons, including that the relevant witness feared retribution if the evidence was given during the Public

²⁰ See, e.g., Ex E, p 83; Ex UU (Letter from Ms Prendergast to OLG dated 9 June 2020); T803.19-28, 828.36-45 (Paull).

²¹ See generally Chapters 3 and 4 below.

²² CA Final Submissions, [248].

Hearings), and I made some non-publication directions in relation to some documentary exhibits. Ultimately, I have not found it necessary to rely on that material in reaching the conclusions set out in this report. Rather, all of my conclusions are based on the oral evidence adduced during the Public Hearings, together with the exhibits that have been tendered and made publicly available.

Final submissions

40. On 19 April 2022, I made the following direction concerning closing written submissions:

- “1. Counsel Assisting is to provide final written submissions by email to wingecarribee.publicinquiry@olg.nsw.gov.au by no later than 5.00 pm on 9 May 2022.
2. Any suspended Councillor, any former councillor of the 2016 term, the Wingecarribee Shire Council, the Interim Administrator, or any other person that considers that they are directly affected by the Terms of Reference or the evidence given during the Public Hearings of the Inquiry and who wishes to make final written submissions, including any submissions that respond to the submissions made by Counsel Assisting, must provide that submission by email to wingecarribee.publicinquiry@olg.nsw.gov.au by no later than 5.00 pm on 16 May 2022.
3. Counsel Assisting is to provide any submissions in reply to the submissions received in accordance with direction 2 above by email to wingecarribee.publicinquiry@olg.nsw.gov.au by no later than 5.00 pm on 23 May 2022.

Any final written submissions provided in accordance with directions 1-3 above must include references to the evidence, by identifying the particular exhibit(s) and/or identifying the relevant page(s) of the transcript on which reliance is placed.

If, in making a final written submission, any person wishes to place any documents before the Commissioner that are not already in evidence, copies of those documents must be attached to that person’s submission.”

41. That direction was published on the Inquiry webpage²³, and I read it into the record at the conclusion of the public hearings on 28 April 2022. A copy of it was also sent directly to each of the Councillors, the Interim Administrator, and the Council.

42. On 9 May 2022, and prior to the receipt of Counsel Assisting’s submissions, I determined that it was appropriate to extend the time for submissions in directions 2 and 3 made on 19 April 2022 by one week to 23 May 2022 and 30 May 2022 respectfully, to give the Councillors further time to review and respond to Counsel Assisting’s submissions should they wish to do so. Further extensions of time were sought by some of the Councillors, which were granted. The

²³ <https://www.olg.nsw.gov.au/wp-content/uploads/2022/04/Directions-Final-Written-Submissions.pdf>

last submission made by a Councillor was received on 30 May 2022. Counsel Assisting's Reply Submissions were received on 6 June 2022.

43. The Inquiry received the following final submissions:
- i. Final Submissions of Counsel Assisting dated 9 May 2022 (**CA Final Submissions**).
 - ii. Final submissions from some community members;
 - iii. Final Submissions from Clr Gair dated 23 May 2022 (**Gair 23 May 2022 Final Submissions**)
 - iv. Further final submission from Clr Gair dated 24 May 2022 (**Gair 24 May 2022 Final Submissions**);
 - v. Final Submission from Clr Nelson dated 30 May 2022 (**Nelson 30 May 2022 Final Submission**)²⁴;
 - vi. Final Submissions from Clr Scandrett dated 23 May 2022 (**Scandrett 23 May 2022 Final Submission**);
 - vii. Final Submissions from Former Clr Markwart dated 23 May 2022 (**Markwart 23 May 2022 Final Submission**)²⁵;
 - viii. Final Submissions from Clr Andrews dated 27 May 2022 (**Andrews 27 May 2022 Final Submission**)
 - ix. Submissions in reply from Counsel Assisting, dated 6 June 2022 (**CA Reply Submissions**).
44. During the Public Hearings, two undated submissions from Clr Nelson and a submission dated 13 April 2022 former Clr Markwart, were received. Those submissions were treated as forming part of their final submissions and have been considered as such.
45. For completeness, I record that:

²⁴ Clr Nelson made an initial final submission on 23 May 2022, but sought and was granted an extension of time to complete it. Accordingly, it is only necessary to refer to the completed submission which was received on 30 May 2022.

²⁵ The Markwart 23 May Final Submission contains a suggestion that he was unable to fully complete it prior to it being due for submission. At my direction, the Officers Assisting the Inquiry contacted former Clr Markwart to ascertain whether he sought more time to be able to supplement his submission. In response to that contact, former Clr Markwart indicated that he did not seek to place any additional material before the Inquiry.

- i. on 20 May 2022, the Inquiry was informed by the Council and the Interim Administrator that neither intended to make a final submission and that “[a]fter careful consideration, Council and the Interim Administrator have decided not to lodge any further submissions as we believe that we have been afforded amply opportunity to participate in the process to date.”²⁶; and
- ii. neither Clr McLaughlin, Clr Whipper, former Clr Turland, nor former Clr Halstead made a final submission²⁷.

46. Ultimately, more than 500 pages of Final Submissions were received.

47. I have had careful regard to each of the final submissions received in reaching the conclusions set out in this Report. I have also considered, again, the initial submissions made to the Inquiry by each of the Councillors to ensure that I have considered each of the issues they have sought to raise.

The purpose and function of submissions

48. Former Clr Markwart submitted: “I trust adequate information is provided to demonstrate that the Counsel Assisting’s views are only his opinion and alternative views are equally valid or even more so.”²⁸

49. To be clear - the submissions of Counsel Assisting (and indeed everyone who made a submission) are made for my consideration²⁹. They do not bind me to make a particular finding, nor do they amount to a finding or recommendation in and of themselves. Those submissions are not evidence. That Counsel Assisting has made a submission that a particular finding is available (or not available) on the evidence, or that a particular recommendation could be made to the Minister, does not mean that I am constrained to do adopt the course that he urges. When considering each of the submissions, I have had regard to competing views and critically considered and reviewed each of them. Those made by Counsel Assisting are no different. As will be seen below, I have not accepted all the submissions made by Counsel Assisting.

50. This Report sets out my own consideration of the issues, evidence, and submissions in reaching the findings and making the recommendations set out below.

²⁶ Email from Ms Racomelara dated 20 May 2022 at 3.09 pm.

²⁷ At my direction, the officers assisting the inquiry contacted each of them to ascertain whether they would be making a final submission. No submission was received in response to that contact.

²⁸ Markwart 23 May 2022 Final Submission, p 3.

²⁹ As is made clear in CA Final Submissions at [3]-[4].

Acknowledgements

51. I wish to acknowledge the assistance provided to me by the Officers Assisting the Inquiry, Mr Angus Broad and Ms Bron Hewson.
52. Both Ms Hewson and Mr Broad provided an enormous level of assistance throughout the conduct of the Inquiry with great industry and dedication. As I observed during the Public Hearings, the work that goes into preparing for hearings and in the day-to-day conduct of an inquiry of this kind should not be underestimated. Many months of time consuming work went in to ensuring that a thorough exploration of the issues relevant to the Terms of Reference could be undertaken at the Public Hearings.
53. Additionally, the assistance provided by both Ms Hewson and Mr Broad during the Public Hearings was invaluable. I have little doubt that without the assistance of both of them, the Public Hearings would not have been able to proceed as efficiently and effectively as they did. I am grateful to them both for their support throughout the duration of the Inquiry.
54. I also wish to thank Counsel Assisting, Mr David Parish. His approach to the conduct of the Public Hearings ensured that the true issues at the heart of the Terms of Reference were able to be explored thoroughly, fairly, and efficiently³⁰.

Cooperation with the Inquiry: The Council and the Councillors

55. It is appropriate that I record that the Council has fully cooperated with the Inquiry at all times. That cooperation has included the following:
 - i. First, I issued several summonses to produce material, each of which was responded to appropriately and without delay, sometimes on very short notice.
 - ii. Secondly, the Council made available both the Council Chamber and some additional office space in the Civic Centre for the exclusive use of the Inquiry during the Public Hearings. One of the challenges that is faced by an *ad hoc* inquiry of this kind is that the Inquiry does not have premises of its own from which to conduct hearings. That the Council willingly made the Chamber and associated resources available contributed significantly to the efficient conduct of the Public Hearings. It also enabled them to be live-streamed, which ensured they were accessible to a large number within the community.

³⁰ To the extent necessary, I reject former Clr Markwart's colourful criticisms of the conduct of Counsel Assisting: see, e.g., Markwart 23 May 2022 Final Submission pp 1, 3, and 17. Those criticisms, apparently prompted by the content of Counsel Assisting's Final Submission, are ill-founded. It is not necessary for me to dwell on them further.

iii. Thirdly, the Council also made available Mr Ian Vong, Coordinator ICT Operations, who provided a great deal of information technology assistance to the Inquiry, and Ms Marissa Racemelara, Strategic Governance Executive, as a liaison between the Inquiry and the Council. I am aware that both provided a great deal of assistance to those assisting the Inquiry. I also acknowledge the assistance provided by Mr John Crawford, Chief Information Officer, on 28 April 2021, which and enabled the last day of evidence to be live streamed in the same way as every other. The assistance of each of them directly and materially contributed to the efficient and open conduct of the Inquiry. No doubt each of them were also supported by other Council staff, for which I am also grateful.

56. I also record that each of the Councillors co-operated with the Inquiry in an appropriate and fulsome manner. I was especially aided in my consideration of the issues by the submissions made by each of them.

CHAPTER 2: THE TERMS OF REFERENCE

57. The Terms of Reference for this Inquiry were to inquire into and report to the Minister on the following matters³¹:

- “1. Whether members of Council’s governing body fully understand their roles and responsibilities and have adequately, reasonably and appropriately carried out their roles and responsibilities during the current term of Council.
2. Whether, during the current term of Council, there has been improper interference by the elected body of Council, or by individual councillors, in operational matters, with particular reference to staffing and planning functions.
3. Whether members of Council’s governing body have been and will continue to be in a position to direct and control the affairs of Council in accordance with the Local Government Act 1993 and to otherwise fulfil its statutory obligations.
4. Any other matter that warrants inquiry, particularly those that may impact on the effective administration of Council’s functions and responsibilities or the community’s confidence in the Council being able to do so.”

The Scope of the Terms of Reference

58. The Terms of Reference identify the matters to be inquired into, but they also identify the limits of what may be appropriately considered and made the subject of findings and recommendations. Accordingly, it is necessary to consider the Terms of Reference to ascertain their meaning and boundaries.

59. In doing so, like any text of its kind, it is necessary to construe the Terms of Reference by reading them as a whole, viewing each Term of Reference in its wider context. It is also relevant to consider the context in which this Inquiry was established – both factual and statutory. It was submitted that such an approach resulted in an inappropriate “*interpretative opinion*” being adopted of the Terms of Reference³². That submission misunderstands the ordinary processes applied to inquiries of this kind.

60. Only former Clr Markwart addressed the scope of the Terms of Reference in his final submission³³. One overarching submission made by former Clr Markwart on the scope of the Terms of Reference was that “[o]f particular interest was that the terms of reference would only be applied to the Governing Body as a whole and that term 4 would be limited to some kind of context that was not defined. I submit that in my opinion this was incorrect.”³⁴

³¹ Ex 1, p 2.

³² Markwart 23 May 2022 Final Submission, p 4.

³³ See, e.g., Markwart 23 May 2022 Final Submission, pp 3-5.

³⁴ Markwart 23 May 2022 Final Submission, p 4.

61. I will address the proper scope of Term of Reference 4 below, however the suggestion that the Terms of Reference would “*only be applied to the Governing Body as a whole*” appears to flow from a misunderstanding of the proposition advanced by Counsel Assisting in paragraph 76(e) of his final submission³⁵. I do not understand Counsel Assisting’s submission that I “*cannot excise the conduct of one or two Councillors from the roles and responsibilities of the Councillors as members of the Governing Body*” to constitute a submission that each of the Terms of Reference can only be resolved by viewing the Governing Body as a whole, without consideration of the individual Councillors where appropriate. Rather, when read together with the rest of Counsel Assisting’s submissions³⁶, that submission is directed to an argument advanced by some of the Councillors that the fault for the issues faced by the Council lay with two or three councillors only³⁷.
62. In any event, in my view it is not possible to answer each of the Terms of Reference by a consideration of the Governing Body as a whole only. For example, Term of Reference 2 expressly requires a consideration of the conduct of the Councillors, both collectively and individually.

Term of Reference 1

63. Term of Reference 1 requires me to inquire into and report as to whether, in the current term of Council (i.e., the 2016 Term) “*...members of Council’s governing body fully understand their roles and responsibilities and have adequately, reasonably and appropriately carried out their roles and responsibilities...*”
64. The scope of Term of Reference 1 is clear from its terms. It raises two central, but overlapping, issues. They are:
- i. whether the members of the 2016 Council fully understood their roles and responsibilities; and
 - ii. whether the members of the 2016 Council “*adequately, reasonably and appropriately*” carried them out.
65. The first limb requires an assessment of the Councillors’ understanding of their roles and responsibilities. In addressing that limb, it is necessary to consider not only how the Councillors described their understanding of their own roles and responsibilities when giving evidence, but also what their conduct reveals about that understanding.

³⁵ See Markwart 23 May 2022 Final Submission, p 5.

³⁶ For example, CA Final Submissions at [172]-[180].

³⁷ I consider that argument in the context of Term of Reference 1 below.

66. That conduct also informs an assessment of whether the Councillors carried out their roles and responsibilities “adequately, reasonably and appropriately”. Whilst that assessment includes aspects of individual conduct, it necessarily also involves a consideration of the functioning of the Governing Body as a whole.

Term of Reference 2

67. The Scope of TOR 2 can also be readily discerned from its terms.

68. It requires a consideration of whether the Governing Body as a whole, or individual Councillors “improperly interfered” with the operational matters.

69. The reference to “improperly interfered with operational matters...” is a reference to the divide in functions between the governing body on the one hand and the staff on the other. That division was generally described in the evidence as the “operational” vs “strategic” divide – the former being the domain of council staff, and the latter the governing body.

Term of Reference 3

70. Term of Reference 3 requires a consideration of whether:

- i. the “governing body have been and will continue to be in a position to direct and control the affairs of Council in accordance with the Local Government Act 1993 and to otherwise fulfil its statutory obligations”; and
- ii. whether they will be in a position to do so moving forward.

71. Former Clr Markwart submits that Term of Reference 3 requires a focus on the individual Councillors³⁸. To an extent, I agree. However, an assessment that was limited to a consideration of whether the individual Councillors were in a position to direct and control the affairs of the Council in accordance with the LGA, and whether they will be in a position to do so in the future would in my view be an incomplete consideration of the issue raised by Term of Reference 3. In this respect, the ability or otherwise of individual Councillors, assessed without reference to the composition of the Governing Body, does not provide a complete picture of whether the Governing Body as constituted were or will be in the requisite position.

Term of Reference 4

72. Term of Reference 4 (**TOR 4**) is the broadest of the Terms of Reference.

³⁸ Markwart 23 May 2022 Final Submission, p 4.

73. It is evident from the submissions received, and the approach to some of the evidence given, that Term of Reference 4 was understood by some as being broad enough to capture any instance where it might be thought that the performance of the Council of Councillors on a particular issue, in response to a particular matter, was lacking. It was also the Term of Reference identified by many of the Councillors in asserting that this Inquiry extends to the conduct of the Interim Administrator and, it appears, certain members of the New South Wales Parliament. In my view, on any reasonable reading, Term of Reference 4 is not so broad.

74. The scope of Term of Reference 4 is informed by its context. It would be an improper application of the Terms of Reference to expand its scope of operation beyond the topics which are the focus of Terms of Reference 1, 2, and 3 – that is, the Councillors. To the extent that additional support for that conclusion were required, on 1 September 2021 Minister Hancock released a media statement that included the following (emphasis added)³⁹:

*“...A public inquiry will help **get to the bottom of the issues which have significantly impacted on the Council’s performance and resulted in suspension of councillors and appointment of an interim administrator.***

...

It is vital that the good work of the interim administrator to address these serious issues is allowed to continue without inference from councillors and that’s why it is in the public interest that they be suspended during the public inquiry.

...

The public inquiry terms of reference focus on the relationship between councillors and council staff, roles and responsibilities in relation to staffing, planning, development and regulatory functions, as well as compliance by council with its statutory obligations including work, health and safety laws.”

75. The Minister’s contemporaneous statement makes abundantly clear that the purpose of the Inquiry was identified as being to “*get to the bottom of the issues which have significantly impacted on the Council’s performance and resulted in suspension of councillors and appointment of an interim administrator*”. As will be seen below, that suspension resulted from the performance and behaviour of the Councillors. It is unsurprising therefore, that the focus of the Terms of Reference was described as being “*the relationship between councillors and council staff, roles and responsibilities in relation to staffing, planning, development and regulatory functions, as well as compliance by council with its statutory obligations including work, health and safety laws.*”

76. Nothing about the Minister’s contemporaneous statement about the reason for the establishment of the Inquiry or the focus of the Terms of Reference supports a conclusion that

³⁹ Ex B, pp 257-258.

it was intended to extend beyond the conduct of the Councillors, including to the conduct of the Interim Administrator or members of the New South Wales Parliament.

77. Accordingly, I consider that the proper ambit of Term of Reference 4 is that it permits inquiry into matters related to the conduct or performance of the Councillors in discharging their roles and responsibilities, which come to my attention and warrant inquiry but do not otherwise fall within the ambit of Terms of Reference 1, 2, or 3.

Former Clr Markwart's additional submissions on the scope of the Terms of Reference

78. In addition to the submissions identified above, former Clr Markwart also made the following submission concerning the approach I have taken to the Terms of Reference⁴⁰:

“Clearly the terms of reference are not as limiting as actually adopted. By applying the terms of reference to the Governing Body as such, it seriously limited the inquiry from the broader picture and resulted in an inquiry focussed on finding fault with the organisation as a whole and smearing all members of the Governing body with a number of adverse findings.

Some selective application of these terms of reference took place. Specifically in the inclusion and a press release issued by some Councillors, which received a great amount of attention and focus during the inquiry when in fact, the press release did not fall under the restrictive terms of reference. It appears the application of the terms of reference was very subjective. The testimony from some witnesses that there was pressure applied by State MPs to Council staff on the other hand, received nothing more than a cursory moment examination and did not figure in the Counsel Assisting's submission despite it being an indisputable factor in the action of some Council staff or Councillors.”

79. In my view, that submission must be rejected. There was no “selective” application of the Terms of Reference in the conduct of the Inquiry. The Inquiry was not “*focussed on finding fault with the organisation as a whole and smearing all members of the Governing body with a number of adverse findings*”. That complaint appears to be based, at least in significant part, on the fact that the Inquiry did not examine the conduct of the Interim Administrator, certain members of the New South Wales Parliament, and perhaps others. For the reasons outlined above, on any reasonable view of the Terms of Reference, those matters fell well outside the boundaries of this Inquiry.
80. To the extent that former Clr Markwart, or any of the other Councillors, wished to raise concerns about the conduct of the Interim Administrator, this Inquiry was not the appropriate forum in which to do so. That is not a function of a “*selective application*” of the Terms of

⁴⁰ Markwart 23 May 2022 Final Submission, p 5.

Reference or improper “*interpretative approach*”. It follows from a proper, and reasonable, consideration of the scope of the Terms of Reference.

81. Finally, I note that former Clr Markwart also submitted that⁴¹:

“The inquiry only highlighted negative aspects of Council which in itself indicates the inquiry was tilted to negative findings. No comparisons were made in relation to other Councils. Without such comparisons it is not possible to determine if this Council is better or worse than others. In my opinion an inquiry which seeks to report only negatives in relation to any organisation as a whole, will always find against that organisation.”

82. To some extent, there is merit in former Clr Markwart’s observation that inquiries of this kind often have as their focus negative issues or events. That is to be expected given that inquiries under the LGA are invariably appointed following an incident, ongoing issues, or period of poor performance. There would be little apparent need for an Inquiry where those circumstances were lacking. However, that does not mean the “*inquiry was tilted to negative findings*” in an improper or inappropriate way as appears to have been suggested. As made clear by the Minister’s contemporaneous media statement⁴², the issues that were affecting the Council during the 2016 Council Term were the focus of the Terms of Reference. The evidence adduced is directed to those Terms of Reference. That the issues highlighted by the Terms of Reference, and thus explored in the evidence, might be considered to be “*negative*” reflects the nature of those issues, rather than the approach taken to the Terms of Reference.

83. I also do not accept that comparisons with other councils, or a consideration of whether the Wingecarribee Shire Council or its Governing Body was “*better or worse*” than any other, is capable of bearing on a proper consideration of the Terms of Reference in the present case. The Terms of Reference expressly relate to the 2016 Governing Body, and its understanding and performance of its roles and responsibilities. A comparison of those same issues in other councils cannot have any relevant bearing on the assessment of those matters. In this respect, a conclusion that another council had similar (or worse) issues does not mitigate against any conclusion that may be made about the 2016 Council, its understanding of its roles and responsibilities, and the performance of those roles and responsibilities. For example, it is no answer to a finding that the Councillors did not fully understand their roles and responsibilities, or adequately, reasonably, and appropriately perform them, to say that another governing body had the same shortcomings. That may say something about the state of local government in New South Wales generally, but it does not affect a consideration of the issues raised by the Terms of Reference as they relate to the 2016 Council.

⁴¹ Markwart 23 May Final Submission, p 5.

⁴² Extracted above; Ex B, pp 257-258.

What this Inquiry is not about

Individual Development Applications or interactions with Council

84. Many of the initial submissions received were directed to particular Development Applications, or other interactions with the Council that related solely to a particular resident's circumstances. I accept that those were matters of significance to the authors of those submissions.
85. However, it is plain from a reasonable reading of the Terms of Reference that the purpose of this Inquiry is not to review the merits of individual applications, or to review isolated interactions. Whilst a consideration of individual applications or issues can inform a consideration of the issues at the heart of the Terms of Reference by, for example, revealing consistent themes (and some evidence of that kind was adduced), it is not the primary function of this Inquiry to review the merits of those interactions or decisions and make findings about them.

The Interim Administrator, members of the New South Wales Parliament, and the OLG

86. As observed elsewhere in this Report, several of the Councillors in their initial submissions, during their evidence, and in their final submissions sought to raise matters concerning the conduct of the Interim Administrator and the local members of the New South Wales Parliament⁴³. An example of this was the media release issued by Clrs Gair, McLaughlin, Nelson, and Andrews, and former Clr Markwart on 30 March 2022 (**30 March 2022 Media Release**)⁴⁴ (the content of which published in the *Southern Highlands Express*⁴⁵), in which it was asserted that:

"The inquiry needs to examine whether the Administrator has breached the Code of Conduct on numerous occasions, particularly regarding his involvement in staff operational matters, and the major decisions made behind closed doors without accountability or transparency"

87. Clr Gair's final submission included various criticisms of conduct of the Interim Administrator and the local state Members of Parliament⁴⁶. Former Clr Markwart made similar criticisms in his final submission⁴⁷, as did Clr Nelson⁴⁸. Some of the Councillors also directed various

⁴³ See e.g., Gair 23 May 2022 Final Submission, sub-paras (e), (f), (g), (m).

⁴⁴ Ex O.

⁴⁵ Ex N.

⁴⁶ See, e.g., Gair 23 May Final Submission, sub-paras (b), (e), (j), (g), (p), (q), (7).

⁴⁷ See, e.g., Markwart 23 May Final Submission, pp 3, 11-13, 16, 17, 97, 99.

⁴⁸ See, e.g., Nelson 30 May 2022 Final Submission, pp 8, 9, 13, 15.

criticism toward the OLG, suggesting that it failed to take appropriate action during the 2016 Term⁴⁹.

88. For the same reasons set out above, none of the conduct of the Interim Administrator, members of the New South Wales Parliament, or OLG are matters that fall within the Terms of Reference as they are properly understood.

The merits of the Station Street Project or any other project

89. The Station Street project (whether described as a bypass, distributor road, upgrade, or otherwise) was a significant matter for the Council over a very long period and was referred to often in the evidence. However, it is not the function of this Inquiry to conduct a merits review of that project, or to review each aspect of its history.
90. The relevance of the Station Street project to this Inquiry is that it provides the context in which certain matters arose, or in which certain interactions occurred. The same applies to any other project in which the Council was involved, and which was referred to in the evidence.

⁴⁹ See, e.g., Gair 23 May Final Submission, sub-para (2); Markwart 23 May Final Submission, pp 4-6, 24, 104.

CHAPTER 3: BACKGROUND

91. In this section of the Report, I address general background matters which are relevant to the consideration of the Terms of Reference.

The Wingecarribee Shire⁵⁰

92. The Wingecarribee Shire is located 110 kilometres from the Sydney CBD and has a total area of approximately 2,700 square kilometres. It is bordered by Wollondilly, Wollongong, Shellharbour, Kiama, Shoalhaven, and Goulburn Mulwaree Local Government Areas.

93. The Shire is home to over 2,150 species of flora, more than 50 threatened animal species, including a koala population of more than 3,000 (representing approximately 10% of the wild population in New South Wales), 15 threatened ecological communities and more than 69 plant community types. The Shire also features large areas of high conservation value, including part of the World Heritage Greater Blue Mountains Area and two declared wilderness areas.

94. A basic map of the Shire reveals not only its size, but its varied composition of towns and villages spread across its length and breadth.⁵¹



⁵⁰ The matters set out in this section of the Report have been drawn from the WSC 2020/2021 Annual Report (Ex A, pp 372-449) (**2020/2021 Annual Report**) unless otherwise indicated.

⁵¹ WSC 2019/2020 Annual Report: Ex A, p 267.

95. As at the time of publication of the 2020/2021 Annual Report, the Shire had an estimated resident population of 51,760 – 31.6% of whom were aged 60 or over. There were 36,813 enrolled voters at the 2016 election⁵².
96. As of 30 June 2021, the Council had 495 full time equivalent employees.

The composition of the 2012 and 2016 Councils

The 2012 Council

97. The 2012 Council provides the context in which the 2016 Council first came into office, and it is therefore relevant factual background.
98. The 2012 Council was comprised as follows⁵³:
- i. Clr Juliet Arkwright;
 - ii. Clr Duncan Gair;
 - iii. Clr Graham McLaughlin;
 - iv. Clr Garry Turland;
 - v. Clr Ian Scandrett;
 - vi. Clr Jim Clark;
 - vii. Clr John Uliana;
 - viii. Clr Holly Campbell; and
 - ix. Clr Larry Whipper.
99. Between⁵⁴:
- i. 2012 and 2014, Clr Arkwright was Mayor and Clr Whipper was the Deputy Mayor;
 - ii. 2014 and 2015, Clr Gair was Mayor and Clr McLaughlin the Deputy Mayor; and
 - iii. 2015 and 2016, Clr Whipper was the Mayor and Clr Scandrett the Deputy Mayor.

⁵² Ex A, p 8.

⁵³ <https://www.wsc.nsw.gov.au/Council/Wingecarribee-Shire-History#section-12>

⁵⁴ <https://www.wsc.nsw.gov.au/Council/Wingecarribee-Shire-History#section-12>

The 2016 Council

100. The 2016 election was held on 19 September 2016, at which the following councillors were elected⁵⁵:

- i. Clr Grahame Andrews (IND);
- ii. Clr Duncan Gair (IND);
- iii. Clr Ken Halstead OAM (IND);
- iv. Clr Gordon Markwart (GRN);
- v. Clr Graham McLaughlin (LAB);
- vi. Clr Peter Nelson (IND);
- vii. Clr Ian Scandrett (IND);
- viii. Clr Garry Turland (IND); and
- ix. Clr Larry Whipper (IND).

101. On 28 September 2016, then Clr Halstead was elected as Mayor and Clr Scandrett was elected as Deputy Mayor for the period between September 2016 and September 2018⁵⁶.

102. On 26 September 2018, Clr Gair was elected as Mayor and then Clr Turland was elected as Deputy Mayor for the two-year period between September 2018 and September 2020⁵⁷.

103. As a consequence of the postponement of the Local Government elections scheduled for September 2020, the 2016 term was extended until September 2021. On 4 September 2020, Clr Gair was re-elected as Mayor for that period and Clr Andrews was elected as Deputy Mayor⁵⁸.

104. In August 2020, then Clr Markwart resigned as a councillor for health reasons⁵⁹. For the avoidance of any doubt, references in this report to the collective Governing Body or Councillors (and other like terms) that relate to the period following former Clr Markwart's resignation cannot and do not include a reference to him.

⁵⁵ See, e.g., Ex A, pp 8 and 18. See also: <https://www.wsc.nsw.gov.au/Council/Wingecarribee-Shire-History#section-13>

⁵⁶ Ex F, pp 4-8.

⁵⁷ Ex A, pp 94, 271; Ex F, p 1984.

⁵⁸ Ex A, p 271.

⁵⁹ T649.22-28; Ex A, p 271.

105. On 9 March 2021, then Clr Halstead resigned as a Councillor at the conclusion of an Extraordinary Meeting of Council held that day⁶⁰.
106. On about 12 March 2021, then Clr Turland resigned as a Councillor⁶¹.
107. As can be seen above, five of the nine Councillors from the 2012 Term were returned, along with then Clr Halstead (who had been a member of previous councils), and three first-term Councillors. A number of the Councillors had already served multiple terms, including periods as Mayor and/or Deputy Mayor. In this respect, prior to the commencement of the 2016 Council Term:
- i. Clr Gair was first elected in 1995, and was re-elected in each of 1999, 2004, 2008 (Mayor from 2008-2010), and 2012 (Mayor from 2014-2015);
 - ii. then Clr Halstead was first elected in 1995, and was re-elected in 2008 (Deputy Mayor 2008-2009, Mayor from 2010-2012);
 - iii. Clr McLaughlin was first elected in 2008 (Deputy Mayor from 2009-2010), and was re-elected in of 2012 (Deputy Mayor from 2015-2016);
 - iv. Clr Whipper was first elected in 1999 and re-elected in 2004, 2008 (Deputy Mayor from 2010-2012), and 2012 (Deputy Mayor from 2012-2014, Mayor from 2015-2016); and
 - v. Clr Scandrett was first elected in 2012 and served as Deputy Mayor during that term between 2015-2016.
108. Save for the three first term councillors (being Clr Andrews, Clr Nelson, and then Clr Markwart), the majority of the 2016 Council came with experience – and some, vast experience – in the role of councillor. In addition, Clr Nelson was also highly experienced in local government having worked in various councils, including WSC, throughout his career⁶².
109. That wealth of experience should have provided the 2016 Council with a strong platform from which to discharge its roles and responsibilities fully, reasonably, and appropriately.

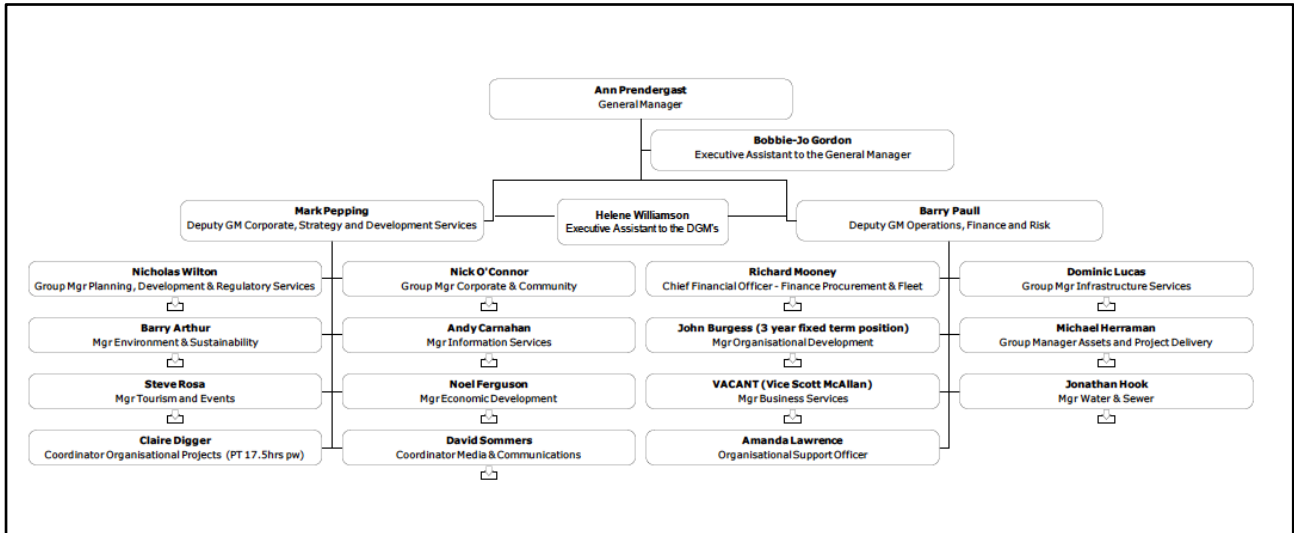
⁶⁰ Ex F, p 4,135.

⁶¹ <http://media.wsc.nsw.gov.au/wingecarribee-shire-council-suspended/>

⁶² See, e.g., T1111.31-1113.34 (Clr Nelson).

The Council's organisational structure

110. It is useful to note the organisational structure of the Council as it was at the commencement of the 2016 Council Term. The following diagram conveniently records the structure at that time⁶³:



111. The two division structure remained broadly the same at the time of the suspension of the 2016 Council, although (as would be expected), there were some changes in the title descriptions and the staff who occupied them⁶⁴. It is not necessary to dwell on those differences in this report.

Dysfunction in the governing body during the 2008 and 2012 Councils

112. In April 2012, the then Division of Local Government (now the OLG) issued a Promoting Better Practice Program Review Report concerning the Council (*Promoting Better Practice Program Report*)⁶⁵. Although the Promoting Better Practice Program Report concerns position of the Council towards the end of the 2008 Council Term, it is nevertheless relevant and convenient to consider it in the context of the 2012 Council as it illustrates some of the issues that were extant at the time the 2012 Council was elected.

113. The Promoting Better Practice Program Report considered a range of matters. Of particular relevance for present purposes are the consideration of:

- i. the adherence to the Code of Meeting Practice, and adoption of appropriate meeting procedures⁶⁶;

⁶³ Ex A, p 4.

⁶⁴ Ex A, p 5; T278.1-21 (Mooney).

⁶⁵ Ex EE.

⁶⁶ Ex EE, pp 19-23.

- ii. the interaction between councillors and staff⁶⁷;
- iii. the relationship between members of the governing body⁶⁸; and
- iv. the adequacy of councillor induction and training⁶⁹.

114. As to the interaction between councillors and staff, the Promoting Better Practice Program Report stated⁷⁰:

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

115. The Promoting Better Practice Program Report also raised concerns as to the relationships between Councillors, which were described as “poor”, and observed the use of the Code of Conduct process as a method of “scoring political points”⁷¹. The relationships between councillors were described as having “an adverse effect on staff morale and is eroding the community’s confidence in Council’s ability to demonstrate effective leadership, good governance, high standards of ethical behaviour and accountability to the community”.⁷²

116. Ultimately, in what was a prophetic statement, the Promoting Better Practice Program Report stated (emphasis added)⁷³:

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

⁶⁷ Ex EE, pp 24-26.

⁶⁸ Ex EE, p 25.

⁶⁹ Ex EE, p 26.

⁷⁰ Ex EE, p 24-25.

⁷¹ Ex EE, p 29. See also, p 25.

⁷² Ex EE, p 31.

⁷³ Ex EE, p 25.

117. The Promoting Better Practice Program Report makes clear that issues surrounding the level of councillor involvement in operational matters, their relationship with staff, the relationships between members of the governing body, and the effects of each of those matters on the performance of the functions of the governing body and the Council were all matters of concern at the end of the 2008 Council. Those conclusions were consistent with the evidence given by a number of witnesses.
118. For example, Clr Gair 's evidence was that towards the end of the 2008 Council, a culture was introduced which developed through the 2012 Council and intensified during the 2016 Council Term⁷⁴. Similarly, Mr Paull gave evidence that *“the 2008 council was probably the most challenging period in my time in this organisation”* but that the dysfunctionality amongst the councillors was worse in the 2012 Council⁷⁵. Tellingly, Mr Paull gave evidence that the former General Manger (Mr Hyde) had described the most difficult thing he had done after serving in the Australian Defence Force during the First Iraq War was to be the General Manger of WSC⁷⁶.
119. On the other hand, former Clr Halstead described the 2008 Council as being *“fairly normal”* and *“typical of local government”*⁷⁷. Similarly, Clr McLaughlin considered that the councillor interactions during the 2008 Council were *“pretty good”*⁷⁸.
120. The overwhelming weight of the evidence supports a conclusion that issues identified towards the end of the 2008 Council Term, developed through the 2012 Council Term such that the 2012 Council was, at least at times, dysfunctional. That dysfunction largely manifested itself in the relationships between members of the governing body and included there being personal animosity between some councillors which carried into the chamber.⁷⁹ Mr Paull's evidence on that issue is particularly telling (emphasis added)⁸⁰:

“Q. *Can I take the period prior to the 2016 term, just focus on the 2012-2016 term, can you give me your general impressions about the conduct of councillors in meetings and the conduct of councillors insofar as they interacted with you and other staff?*

A. *Just clarification: in the term of the 2012 council?*

Q. *2012 council, yes?*

⁷⁴ See, e.g., T1445.10-13 (Clr Gair).

⁷⁵ T797.26-798.11 (Mr Paull). See also the evidence of former Clr Turland at T1258.26-1259.6, 1261.14-20, 1337.30-37.

⁷⁶ T797.26-43 (Paull).

⁷⁷ T1196.5-17 (former Clr Halstead).

⁷⁸ T1063.36-1064.11 (Clr McLaughlin).

⁷⁹ T656.36-657.20 (former Clr Markwart); T711.25-713.31 (former Clr Arkwright); T796.3-797.10 (Mr Paull); T1196.27-46 (former Clr Halstead); T1260.29-1261.20 (former Clr Turland).

⁸⁰ T796.3-34.

- A. ***Look, my frank response is that the 2012 council was probably the most dysfunctional council I've ever worked for. It really didn't function from day one. It was, what you've seen in the last 18 months of the council of 2016 pretty much went on for the entire term of that council. I believe at various times that we topped the state in terms of Code of Conduct matters. We had incurred several hundred thousand dollars in consultant fees et cetera in dealing with those Code of Conduct matters. From the point of view of the staff: it was challenging. Was it more challenging than towards the end of the 2016 council? Probably not.***
- Q. *Can you give me some examples which led to your impression of the sort of dysfunction that was occurring in the 2012 term of council?*
- A. ***Personal animosity between councillors, it spilled over into the chamber. Councillors shouting at each other, councillors making claims against each other, councillors lodging Codes of Conduct, councillors trying to - during the debate, I suppose, belittle other councillors: it wasn't pleasant.***

121. Clr Gair's evidence (from the perspective of someone who was a member of each of the 2008, 2012 and 2016 Councils) was that the dysfunctional culture which first appeared during the 2008 Term, grew throughout the 2012 Term and into the 2016 Term⁸¹. In that context, Clr Gair was of the view that the situation within the 2012 Council was such that it could have been the subject of a performance improvement order at that time, and that the "*counselling or training from the OLG*" would work for a "*short space of time and then councillors just reverted to previous behaviour...that's the way it carried on*"⁸².

122. Former Clr Clark's evidence was that the 2012 Council deteriorated, resulting in the senior staff being "*besieged by councillors*"⁸³, and that the OLG were monitoring the performance of the 2012 Council resulting in a view that "*they would somehow resolve the issues, you know, come up with a magic solution...*"⁸⁴

123. The dysfunction that was evident in the 2012 Council also provides the context in which new councillors (including former Clr Turland and Clr Scandrett) were first elected. In this respect, the following passage from former Clr Turland's evidence is illuminating (emphasis added)⁸⁵:

"Q. *Thank you. We've had quite a bit of evidence suggesting that the 2012-2016 term was at least as rancorous and dysfunctional as the 2016-2020 term. You don't have to agree with that proposition, but in terms of the trends, did you see that it was as --*

A. ***It was as toxic...***

⁸¹ T1445.10-16 (Clr Gair).

⁸² T1344.28-38 (Clr Gair).

⁸³ T640.10-641.3 (former Clr Clark).

⁸⁴ T641.29-32 (former Clr Clark).

⁸⁵ T1260.29-1261.20 (former Clr Turland).

- Q. *Can I just ask you a few questions about induction and the training you received. Do you recall, do you have any recollection, about the nature and extent of the training you received in 2012?*
- A. *Yeah, yeah, very much so, 2012 and in 2016 we all had, and probably a couple of times through those years, to be honest with you, would be with Dr Lindsay Taylor, lawyer; good bloke, came down and explained the process to us. **As a new councillor in 2012 it was all brand new, I had to learn pretty quickly, and that was okay, you actually followed your peers and you learnt from them pretty well how the system worked, you know, and that's probably what I did and maybe that was wrong in some cases. But I've seen in 2008 at the end when I was thinking about standing for council, the same sort of reaction from parties and then back into 2012-16, you know, we had, you know, Whipper and Gair grandstanding me following what they were doing because that's what they did; and yes, it's probably wrong, but you learn from watching others.***

and later that⁸⁶:

*“...**the issues grew all the way through from 2008 and 2012 and 2016**, and I must say to be honest with you, my performance might have been - **but I was led from what was already being taught by watching, and that's a shame.**”*

124. The import of Clr Turland's evidence extracted above was that some of the behaviours that he exhibited in meetings (and about which he was challenged during his evidence) were a product of the environment which he entered when first elected. I do not accept that dysfunction in the 2008 and 2012 Councils excuses or mitigates a failure by any the Councillors to perform their roles and adhere to their responsibilities as prescribed by the LGA. To that end, former Clr Turland's concessions in the passage of his evidence extracted above that to the extent that he repeated the same behaviours that he had observed from others was “*probably wrong*” and that it was a “*shame*” that he had done so were appropriately made. However, there is at least some merit in former Clr Turland's observation that new councillors learn their role, at least in part, by observing their peers. The dysfunction that was evident in the 2012 Council did not provide the optimal environment for new councillors to observe and learn their new role.
125. Further, having regard to the totality of the evidence, I am satisfied that the dysfunction which persisted within the 2008 and 2012 Governing Bodies provided an environment where that dysfunction could, and did, continue and grow over the duration of the 2016 term. In this respect, former Clr Markwart's observations as a first term councillor are particularly apposite (emphasis added)⁸⁷:

*“...I believed the 2002 - sorry, **2012-2016 council term appeared to have set the standard reasonably low**, and when we came to 2016 I think it lifted a little bit because we changed some councillors, but it began to gradually fall again, and **I think***

⁸⁶ T1337.33-37 (former Clr Turland).

⁸⁷ T671.22-34.

the bar was set low in the previous council, this council basically continued that direction. That was my perception.

Q. *That tells one something's going wrong, does it not?*

A. *Oh, absolutely. I think it was limited to a certain number, but that is still something going wrong, and it affected the whole council.*

126. Other witnesses gave similar evidence. For example:

- i. Clr Gair gave evidence to similar effect, stating that *"the culture was introduced in 2012-2016. To a degree in the later stages of the 2008-2012 council, but was introduced in 2012-2016. It then expanded, bloomed and flowered in the 2016-2020 session..."*⁸⁸
- ii. Clr Whipper gave evidence was there the last two terms *"become quite volatile"* and that he had *"seen a bit of a decline in those last two terms..."*⁸⁹
- iii. Former Clr Campbell (who was a member of the 2012 Council) gave evidence that the 2012 and 2016 Council terms *"...were so volatile and aggressive, I think most councillors lost sight of the reason they're there, the purpose they're there, which was for the community"* and that *"[i]t was a 'gotcha' situation more often than it was anything else, so while they understood while they were there, it all got lost."*⁹⁰

127. It is not necessary for me to reach conclusions as to the cause of the dysfunction that emerged in the 2008 Council Term and developed during the 2012 Council Term, nor is it necessary for me to reach conclusions as to what effect that such dysfunction may have had on the organisation. They are not matters falling within the Terms of Reference. However, that such an environment emerged in the 2008 Council Term and then developed in the 2012 Council Term is relevant to a consideration of the Terms of Reference in other ways. In particular, the evidence reveals that dysfunction within the governing body of the Council was not a new development in the 2016 Council. Rather, the overwhelming weight of the evidence supports a conclusion that there have been levels of dysfunction (albeit fluctuating at times) within the Governing Body over the last decade. It also identifies the context in which the 2016 Council commenced its term.

⁸⁸ T1445.10-16 (Clr Gair).

⁸⁹ T835.15-23 (Clr Whipper).

⁹⁰ T336.39-337.4 (former Clr Campbell).

Ministerial Intervention in the 2016 Council

Background to the Minister's intervention

128. On 16 March 2020, Clr Gair wrote to the then Minister⁹¹. That letter contained the following passage (emphasis added):

*“As the Mayor of Wingecarribee Shire Council, I wish to express my deep concern and disappointment in the conduct of some members of the current Council. Over the course of this Council term **the conduct of councillors has degenerated to personal attacks and insults amongst councillors, breaches of the Code of Meeting Practice and Code of Conduct.** The Council was not been [sic] able to consider all matters on the agenda for the Ordinary Council meetings on 12 and 26 February, in addition the meeting on 26 February and 11 March had to be adjourned for 15 minutes due to the poor conduct of Councillors, this includes one councillor refusing to leave the Chamber after being directed by myself to do so.*

Similar to outlined [sic] above the conduct towards staff in the Chamber, post Council meeting and councillor briefing sessions is also of significant concern, it is my view this is becoming a significant work health and safety issue.

I am of the view that this Council coming [sic] dysfunctional and I wish to request a [sic] urgent meeting with you to further discuss these concerns.”

129. The letter provided links to the recordings of Council Meetings held on 26 February and 11 March 2020. It is evident that a copy of that letter was not provided to all other Councillors. For example, in response to a request by then Clr Halstead during the meeting on 24 August 2020, Clr Gair confirmed that he did not intend to make the letter available to the other Councillors *“because it was addressed to the Minister”*⁹². That circumstance was a point of tension between some of the Councillors.

130. On 24 March 2020, Clr Gair sent an email to John Davies (of the OLG) raising *“further concerns in relation to the conduct of some members of Wingecarribee Shire Council”*. Clr Gair attached various emails from then Clrs Turland and Halstead and stated (emphasis added)⁹³:

*“I have attached emails recently sent by Clr Garry Turland and Clr Ken Halstead as an example of this concerning conduct which appears to be escalating with the COVID-19 situation. **This behaviour is impacting significantly on the well being of staff, other councillors and myself, it is also impacting significantly on the staff and my ability to focus on the business of Council including responding to COVID-19 and bushfire recovery.** My response to Clrs Turland and Halstead this morning is also attached to this email.*

⁹¹ Ex E, p 69.

⁹² At approximately 8:54 into the recording of the meeting: https://www.youtube.com/watch?v=ge7-glyyCO8&list=PL7UUICap7_qMYEJyJd7U0uN5AL5-3Y23a&index=2

⁹³ Ex E, p 83.

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

131. Clr Gair gave the following evidence concerning advice given by the OLG⁹⁴:

"THE COMMISSIONER: Q. Well, you've given some evidence of things you say you saw constitute bullying and harassment; what did you do about it?"

*A. As I say, there is a litany of complaints to the OLG. I rang the Minister directly with the then Minister – then GM, Ann Prendergast, **we spoke to the Minister directly and asked her intervention: nothing happened.** We approached with the general manager and the governance officer, group manager. **We arranged a meeting at Nowra, I think it was 2018, November. We went down to the Office of Local Government in Nowra and we put our case before them and we were told, "There is due process to be followed, follow due process". Now, due process is codes of conduct, admonishments, whatever, and I know that there is sections for - there for censuring of councillors.** Look, the Code of Conduct was reviewed and it was reviewed from hitting a councillor with a duck feather to reviewed to hit them with a wet lettuce leaf.*

...

Q. ...You gave some evidence that the OLG told you these things were to be dealt with in due process, that is the available process including the Code of Conduct; correct?

A. Correct.

Q. Having received that advice did you take any steps under that Code of Conduct process or any other process available to councillors in relation to what you considered bullying or intimidatory behaviour?

A. At that point of time, nay."

132. The evidence indicates that a tele-conference took place between the then Minister and Clr Gair (and others) on or about 24 April 2020⁹⁵.

133. That same day the then Deputy Secretary of Local Government, Planning and Policy, wrote to Ms Prendergast stating⁹⁶:

"I am writing to express my concerns about the behaviour of some councillors at Council meetings and the misuse of notices of motion to allege breaches of the Council's code of conduct outside of the proper processes.

⁹⁴ T1376.5-1377.27 (Clr Gair). It is now apparent that former Clr Markwart was given the same advice by the OLG: Markwart 23 May 2022 Final Submission, p 9.

⁹⁵ Ex E, pp 71-82; T1376.5-11 (Clr Gair).

⁹⁶ Ex E, pp 2-3.

...

The Office of Local Government (OLG) has been monitoring recent meetings of the Council through its webcasts and an OLG staff member attended the Council's extraordinary meeting of 11 March 2020 as an observer. Based on its observations, OLG is concerned that some councillors have conducted themselves in a manner that is not consistent with the Council's obligation to be a responsible employer. Councillors need to be mindful of the impact of their behaviour on others, including staff and their fellow councillors, and the importance of recognising the duties they owe under the Work Health and Safety Act 2011 (WHS Act) to take reasonable care that their acts or omissions do not adversely affect the health and safety of others.

...

I would strongly encourage councillors to reflect on their behaviour and to ensure that they conduct themselves in the future in a manner that is consistent with their duties under the WHS Act and their obligations under the Council's code of conduct.

..."

134. That letter was considered in closed council during the meeting on 13 May 2020, at which all Councillors were present save for then Clr Halstead⁹⁷.

The Performance Improvement Order

135. On 19 August 2020, Minister Hancock issued a Notice of Intention to Issue a Performance Improvement Order in accordance with s 438C of the LGA (**Notice of Intention to Issue a Performance Improvement Order**)⁹⁸. Attached to that Notice was a draft Performance Improvement Order⁹⁹.
136. As required by ss 438(3)(a) and 438G of the LGA respectively, the draft performance improvement order identified the reasons why the Minister proposed to issue a performance improvement order and appoint temporary advisers. Those matters were also set out in the Notice of Intention to Issue a Performance Improvement Order. The reasons why the Minister proposed to issue a performance improvement order were identified as follows¹⁰⁰:

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

⁹⁷ Ex F, pp 3379, 3409 (Item 13.3), and 3432 (Item 19.2).

⁹⁸ Ex B, pp1-3.

⁹⁹ Ex KK.

¹⁰⁰ Ex B, p 2; Ex KK.

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

137. Those "reasons for order" closely align with the issues raised by Clr Gair in his letter to the Minister dated 16 March 2020 and his email to Mr Davies of the OLG on 24 March 2020 referred to above.

138. Accordingly, the overwhelming inference that arises on the evidence is that the proposed imposition of a performance improvement order arose in response to the complaints about Councillor behaviour made by Clr Gair and represented an exercise of the "powers" that were available to in order to "put councillors on notice in relation to their conduct in meetings, towards staff and other councillors" referred to by Clr Gair in his email of 24 March 2020 to Mr Davies.

139. The reasons why the Minister proposed to appoint temporary advisers were¹⁰¹:

"1. *In my opinion, a temporary adviser with requisite professional qualifications is needed to bring councillors together to address the acrimony and hostility that is apparent.*

2. *In my opinion, a temporary adviser with requisite skills in meeting procedure is needed to provide advice and assistance with the conduct of Council meetings.*"

140. The draft performance improvement order identified the proposed temporary advisers as being Mr Norm Turkington and Mr Ian Reynolds and invited the Council to make submissions to the Minister in respect of the proposed performance improvement order no later than 7 days from the date upon which the notice was served.¹⁰²

141. On 24 August 2020, an extraordinary meeting of Council was held to discuss the Notice of Intention to Suspend the Council (**24 August 2020 Extraordinary Meeting**).¹⁰³ The minutes of the 24 August 2020 Extraordinary Meeting record that all eight Councillors were present (former Clr Markwart having resigned by that time) and that the following motion was moved¹⁰⁴:

¹⁰¹ Ex B, p 2.

¹⁰² Ex B, p 2.

¹⁰³ Ex B, pp 4-13.

¹⁰⁴ Ex B, p 4. The original motion proposed by Clr Gair comprised paragraphs 1, 2 and 3. Paragraphs 4 and 5 were suggested as an amendment by former Clr Halstead and ultimately became part of the motion as moved.

MOTION moved by Mayor Clr T D Gair and seconded by Clr G McLaughlin

1. **THAT** Council acknowledges the Minister for Local Government's correspondence, dated 19 August 2020, notifying Council of the Minister's intention to issue a Performance Improvement Order on Council under Section 438A of the *Local Government Act 1993*.
2. **THAT** Council advise the Minister that it accepts the "*Reasons for the Order*" as detailed in Schedule 1, accepts the "*Action required to improve performance*" in Schedule 2, and accepts the proposal for "Appointment of temporary advisers" in Schedule 3, as proposed in the Draft Order.
3. **THAT** Council provide all necessary assistance to the proposed "Temporary Adviser" when appointed, including access to relevant documents and video files for the term of this Council.
4. **THAT** the Wingecarribee Shire Council agrees with the intent of the proposed Performance Improvement Order to be issued under the provisions of Section 438B(2) of the *Local Government Act 1993* and Clauses 413D and 413DA of the *Local Government (General) Regulation 2005* as listed (a) – (f). Particular emphasis should be placed upon (a) with regard to legislative responsibilities.
5. **THAT** the Minister for Local Government ensure that any 'investigation' undertaken by any representative of her be comprehensive and include both elected representatives of the Shire and members of staff of the Council.

142. Paragraph 5 of that motion refers to an "*investigation*". An amendment to that motion was also moved that sought to include "*community representatives*" in that "*investigation*".¹⁰⁵

143. Nothing in the draft performance improvement order or in the Notice of Intention to Issue a Performance Improvement Order referred to an "*investigation*", whether by the two temporary advisors who were referred to in that notice or any other person. I have reviewed the video recording of that meeting and note that despite both Clr Gair and the then Acting General Manager, Mr Paull, making clear that what was being proposed was not an "*investigation*"¹⁰⁶, the Councillors (including Clr Gair as mover of the motion) proceeded regardless, and the motion was passed unanimously¹⁰⁷. Similarly, the amendment seeking to introduce "*community representatives*" into the performance improvement order process bore no resemblance to what was being proposed by the Minister. In my view, the way in which that aspect of the motion (including the amendment) was framed reveals a lack of understanding of the performance improvement order process, notwithstanding the clear terms in which the Notice of Intention to Issue a Performance Improvement Order was expressed, and the correct advice given during the meeting by Mr Paull.

144. During the 24 August 2020 Extraordinary Meeting, several of the Councillors spoke to the circumstances which faced the Council at the time. In those remarks:

- i. Clr Gair stated that he had been in contact with the OLG and the Minister and had sought an "*investigation into the Council*" and that following that request the Minister had issued

¹⁰⁵ Ex B, p 4.

¹⁰⁶ At approximately 25:10 (Clr Gair) and 29:10 (Mr Paull) in the recording.

¹⁰⁷ Although the minutes do not record the actual vote, at approximately 54:00 of the 24 August 2020 Extraordinary Meeting, Clr Gair declared the motion "*carried unanimously*".

the Notice of Intention to Issue a Performance Improvement Order, a development that he supported¹⁰⁸. Later in the meeting, Clr Gair stated that “*we are being sidelined by acrimony and harassment*”¹⁰⁹;

- ii. Clr McLaughlin stated that “*certain councillors that would like to burn the house down...they’ve gone out to this community and undermined a good council for their own benefit...and this has led to a bit of dysfunction in this council...*”¹¹⁰;
- iii. Clr Nelson stated that “*the Minister is correct that council must improve its performance...*”¹¹¹;
- iv. Clr Whipper stated “*...what we are facing now through my interpretation is the fact that there are elements within the council that are not abiding by the Code of Meeting Practice nor do they appear to want to abide by the rules of meeting procedure...All the training in the world...doesn’t mean anything if there are other agendas at hand...What really saddens me is that we’re neglecting through all these distractions, all these agendas...all this talk of administration and some elements of council trying to manipulate and manoeuvre that, what we’re doing is we’re not serving this community...*”¹¹²

145. On 25 August 2020, Clr Gair (as Mayor) and Mr Paull (as Acting General Manager) wrote to the Minister, advising that the Notice of Intention to Issue a Performance Improvement Order had been considered at the 24 August 2020 Extraordinary Meeting and stated that “[a]t this meeting Council resolved to make the following submission to your notice to issue a Performance Improvement Order as follows...” and set out the text of the resolution that had been passed. Thus, the resolution was advanced as the “*submission*” in response to the Notice of Intention to Issue a Performance Improvement Order.

146. It is doubtful that what the Minister called for in the Notice of Intention to Issue a Performance Improvement Order was a mere recitation of a resolution passed by Council, as opposed to a written document setting out the Governing Body’s position in relation to the “*reasons for order*” and the proposed terms of the draft performance improvement order. However, I accept that the response was appropriate in the circumstances given that the effect of the resolution that was passed was that the Councillors accepted each of the “*Reasons for Order*” and the action proposed without qualification. That is, by passing the resolution and forwarding it to the

¹⁰⁸ From approximately 18:20 and following in the recording. Those comments do not sit comfortably with Clr Gair’s evidence that following his approach to the Minister in March 2020 “*nothing happened*”: T1376.5-1377.27 (Clr Gair). Plainly, something did happen – the Notice of Intention to Issue a Performance Improvement Order was issued, a step welcomed by Clr Gair at that time.

¹⁰⁹ From approximately 50:45 and following in the recording.

¹¹⁰ From approximately 31:08 and following in the recording.

¹¹¹ From approximately 36:50 and following of the recording.

¹¹² From approximately 42:30 and following of the recording.

Minister as the “*submission*” in response to the Notice of Intention to Issue a Performance Improvement Order, the only available conclusion is that the Councillors accepted that the circumstances identified by the Minister in the “*reasons for order*” were in existence, and that those circumstances justified the imposition the measures proposed in the draft performance improvement order¹¹³.

147. On 8 September 2020, the Minister issued a Performance Improvement Order in identical terms to the draft attached to the Notice of Intention to Issue a Performance Improvement Order (***Performance Improvement Order***)¹¹⁴. The “[*a*]ction required to improve performance” was as follows¹¹⁵:

Action required to improve performance – section 438A(3)(b)
<ol style="list-style-type: none">1. All councillors undergo training in relation to:<ol style="list-style-type: none">(a) their role as elected representatives;(b) their obligations under work, health and safety legislation with particular reference to bullying;(c) their obligations under Council’s “<i>Councillor’s Access to Information and Interaction with Staff</i>” policy;(d) their obligations under Council’s Code of Conduct with a focus on the proper disclosure and management of conflicts of interests and respectful behaviours; and(e) meeting procedures and the respectful participation at Council and committee meetings.2. The Mayor undergo training on the effective chairing of meetings.3. All councillors participate in a structured mediation process to be undertaken by a temporary adviser appointed under this Order.

148. At the time the Performance Improvement Order was issued, the Minister issued a Media Statement, in which she stated (emphasis added)¹¹⁶:

“The local community deserves high standards of leadership and conduct from its elected representatives. ...

*Following strong representations from residents as well as local MPs Nathaniel Smith (Member for Wollondilly) and Wendy Tuckerman (Member for Goulburn), **it has become clear that long-term division and conflict among councillors has impacted on council meetings, decision making and community confidence.***

*Under the Local Government Act, **all councillors are required to work together in the best interests of the community. I urge councillors to put their political differences aside and focus on serving their local community.**”*

¹¹³ All of the remaining Councillors were present at the 24 August 2020 Extraordinary Meeting and all voted in favour of the resolution: Ex B, pp 4-5, 8-9; https://www.youtube.com/watch?v=ge7-qlyyCO8&list=PL7UUICap7_qMYEJyJd7U0uN5AL5-3Y23a&index=2

¹¹⁴ Ex B, pp 835-837.

¹¹⁵ Ex B, p 836.

¹¹⁶ Ex B, p 14.

Compliance reports

149. The Performance Improvement Order required the Council to report to the Minister on the completion of the required training and the mediation process two and four months after the date of service of the PIO¹¹⁷.
150. On 5 November 2020, Mr Paull (then Acting General Manager) forwarded an “*OLG Performance Improvement Order Compliance Report*” to the OLG and the Minister’s office (***First PIO Compliance Report***)¹¹⁸. In that report, Mr Paull reported that the Councillors had:
- i. engaged in a structured mediation process facilitated by Mr Turkington; and
 - ii. undertaken two training sessions delivered by Ms Maire Sheehan from LGNSW. In addition, Ms Sheehan had provided training to the Mayor on the effective chairing of meetings.
151. Attached to the First PIO Compliance Report were copies of materials used during the various training sessions.
152. On 11 December 2020, the Council lodged a further compliance report in relation to the PIO (***Second PIO Compliance Report***)¹¹⁹. In that report, signed by Clr Gair and Mr Paull, the Council reported on the engagement with Mr Reynolds.

PIO Action 1: Councillor training

153. The First PIO Compliance Report records that Ms Sheehan delivered training sessions over two days on 30 September and 7 October 2020 and provided training to the Mayor (Clr Gair) on “*the effective chairing of meetings*” on 29 October 2020¹²⁰.
154. The First PIO Compliance Report attached material presented by Ms Sheehan during the training sessions on the following topics¹²¹:
- i. “*Roles and Functions*” and “*Code of Conduct*”¹²²;
 - ii. “*Motion Procedure*”¹²³;

¹¹⁷ Ex B, p 836.

¹¹⁸ Ex B, pp 26-29.

¹¹⁹ Ex B, pp 217-218.

¹²⁰ Ex B, p 27.

¹²¹ Ex B, p 28.

¹²² Ex B, pp 30-102.

¹²³ Ex B, pp 103-106.

iii. “Code of Meeting Practice”¹²⁴; and

iv. “Cognitive bias”¹²⁵.

155. A review of that material reveals that Ms Sheehan conducted detailed training on the roles and responsibilities of councillors, including a thorough review of the relevant legislative provisions and their content, the Model Code of Conduct and the Model Code of Meeting Practice¹²⁶.

156. Following those training sessions, Mr Paull sent an email to the Councillors to “confirm the Council’s procedures for Councillor interaction with staff” and attached a copy of the “Councillor’s Access to Information and Interaction with Staff Policy”.¹²⁷ Also attached to the First PIO Compliance Report was a copy of a presentation on “A point of order”, delivered by Mr Paull in about July 2018¹²⁸. That presentation set out various matters concerning points of order generally, including (relevantly to the issues raised by in this Inquiry) the following¹²⁹:

“A Point of Order”

- May also be raised when there is an allegation a Councillor has committed an Act of Disorder :
- See part 10, Clause 256 Local Government (General) Regulations 2005
 - Contravenes the Act, Regulation(s), Code of Conduct
 - Assaults or threatens to assault another councillor or person present at the meeting
 - Moves or attempts to move a motion or amendment that has an unlawful purpose, or deals with a matter outside the jurisdiction of council or committee etc.
 - Insults or makes personal reflections on or imputes improper motives to any councillor
 - Says or does anything that is inconsistent with maintaining order at the meeting or is likely to bring the council or Committee into contempt

157. As will be highlighted below, instances of Councillors taking “points of order” when confronted with acts of disorder in a Council meeting were exceptionally rare. Rather, many of the “points of order” that were taken during meetings were not proper points of order at all, but fell into categories identified in the following slide from Mr Paull’s presentation¹³⁰:

¹²⁴ Ex B, pp 107-152.

¹²⁵ Ex B, pp 153-155.

¹²⁶ Ex B, pp 30-101 (“Roles and Functions, Code of Conduct” presentation), pp 102-106 (Motion procedure presentation), pp 107-151 (“Code of Meeting practice Councillor Workshop” presentation), pp 152-155 (Information to support decision making presentation).

¹²⁷ Ex B, pp 202-206.

¹²⁸ Ex B, p 28.

¹²⁹ Ex B, p 212.

¹³⁰ Ex B, p 211.

What is NOT a Point of Order

- Disagreeing with what another councillor has said
- Contradicting what another councillor has said
- Claiming a councillor has not been factual or has misrepresented what another councillor has said.
- Debating what another councillor has said
- Offering an explanation or adding to what has been already been debated

PIO Action 2: Training on meeting procedures

158. Mr Ian Reynolds was appointed as an adviser to Clr Gair on meeting processes and procedures. On 18 December 2020, Mr Reynolds submitted his report to the Minister (***Reynolds Report***).¹³¹

159. As recorded in the Reynolds Report, Mr Reynolds¹³²:

- met with Clr Gair on 16 September and 22 September 2020;
- met with Mr Paull (Acting General Manager) on 16 and 22 September and 1 December (by telephone) 2020;
- met with the Deputy General Manager, Corporate Strategy and Development (Mr Burgess) on 22 September 2020;
- observed the Extraordinary Council Meeting of 16 September 2020;
- observed the Ordinary Council Meetings on 23 September, 14 October, 28 October, 11 November, and 25 November 2020 and the Finance Committee meeting of 28 October 2020;
- held a “*coaching session*” with the Mayor and Acting General Manager on 28 October 2020 to discuss Mr Reynolds’ observations of the meetings he had observed by that time and “*potential measures to improve meeting processes*”;

¹³¹ Ex B, pp 213-222.

¹³² Ex B, pp 219-220.

vii. conducted individual discussions with six councillors following the preparation of the 11 December PIO compliance report. The opportunity to meet with Mr Reynolds was offered to all Councillors.

160. In relation to the Extraordinary Meeting of 16 September 2020, Mr Reynolds indicated that the meeting was “*largely orderly*”, but he noted that “*the Mayor provided “off the cuff” advice regarding process to the Meeting which needed to be corrected by the Acting General Manager during the Meeting. This gave opportunity for some disruptive behaviour by one Councillor.*”¹³³

161. In relation to the Ordinary Council Meetings on 23 September and 14 October 2020, and the Finance Committee Meeting on 21 October 2020, the following observations are recorded in the Reynolds Report¹³⁴:

OBSERVATIONS ARISING FROM FIRST 3 MEETINGS

1. A lack of clarity around process enabled “game playing” and facilitated unhelpful verbal exchanges. In particular, the conflation of Questions/Statements/Moving Motions caused unnecessary confusion and required the Mayor to intervene more than he might otherwise have needed to do
2. On occasion, the Mayor contributed to debate without vacating the Chair which compromised his ability to chair the Meeting at those stages
3. No use was made of the *En Bloc* motion process in any observed meeting resulting in the need to separately consider all items, even when there was no debate or difference of views between Councillors on an issue
4. Despite instruction to Councillors, at least one Councillor continued to use a digital background which interfered with the Mayor’s ability to recognise that Councillor’s wish to raise a question or contribute to debate and gave rise to that Councillor considering he was being deliberately ignored by the Mayor
5. On occasion, the Mayor appeared unsure as to process and needed to be assisted by the A/GM as to the order of proceedings, correct process etc
6. On occasion, a motion needed to be “word smithed” during the Meeting. The Mayor became involved in this process on occasion which compromised his ability to chair the Meeting at those stages
7. On occasion, the Mayor responded to procedural questions/issues where it may have been more appropriate for the matter to be referred to the A/GM
8. On one occasion, a suggestion arose from the floor which appeared to contravene policy. The Mayor and staff attempted to deal with the matter during the meeting where it may have been preferable to call for a report on ways of achieving an outcome rather than “conceding” on the spot which, inter alia, encourages that sort of activity in future

162. Mr Reynolds gave evidence that he observed “*a strong sense of disunity in the elected body; also, probably a sense of a disjoint between the senior staff and at least some of the elected body*”¹³⁵. He also observed that the processes adopted during meetings – particularly concerning the moving of motions – were “*opaque*”, were not in accordance with the Code of Meeting Practice and enabled “*game playing*” by some councillors¹³⁶.

¹³³ Ex B, p 219.

¹³⁴ Ex B, p 220.

¹³⁵ T598.26-37 (Reynolds).

¹³⁶ T599-602 (Reynolds).

163. Mr Reynolds set out observations of the meetings on 28 October (which took place immediately after the “*coaching session*” and followed the structured mediation process conducted by Mr Turkington), 11 November and 25 November 2020 in his report. Those observations included that: councillors “*generally exhibited an improved regard for meeting process*”, the “*Mayor was more assertive following the training and following the Coaching Session*”, and that application of strategies identified in coaching session resulted in “*immediate improvement in meeting processes*”. However, it is apparent that those improvements were not long lasting, with Mr Reynolds observing¹³⁷:

- i. some “*passive/aggressive behaviour was still evidenced by some Councillors and civility declined over the second tranche of Meetings observed*”;
- ii. the application of the strategies identified in the coaching session was “*less comprehensive in subsequent meetings enabling potential disruptive interventions by a small number of Councillors*”; and
- iii. the “*...decline in civility impacted on the Mayor’s chairing giving rise to frustrations with a small number of Councillors*”.

164. The Reynolds Report also set out Mr Reynolds’ “*observations arising from individual discussions with councillors*”¹³⁸. They were as follows:

1. A majority expect a return to physical meetings in the Chamber will facilitate an improvement in the conduct of Meetings as technology issues will no longer impact on proceedings and the ability to “socialise” will be enhanced
2. Use of social media by some Councillors in the online environment was unhelpful and distracting
3. There appears to be an intractable interpersonal conflict between several Councillors which impacts on both Council Meeting process and relations between some Councillors and Council Staff. Ongoing counselling for Councillors, including the Mayor, (such as via Council’s Employee Assistance Program) may be desirable to manage this circumstance on an ongoing basis
4. Meeting Procedures need to be followed correctly by all participants to facilitate orderly Meetings

165. Ultimately, Mr Reynolds identified a series of “*process improvements*” in order to improve the conduct of council meetings¹³⁹.

166. As to the effect of online meetings, Mr Reynolds gave evidence that the need to conduct meetings online contributed to the difficulty in functioning of meetings¹⁴⁰. No doubt it did have

¹³⁷ Ex B, pp 220-221.

¹³⁸ Ex B, p 221.

¹³⁹ Ex B, p 222.

¹⁴⁰ T617.1-24 (Reynolds).

that effect, but that does not provide a complete explanation for how the meetings were conducted in that period. A great many businesses, government agencies, courts, tribunals, and other workplaces quickly transitioned to a form of online environment during the pandemic. Ultimately, the success or failure of that transition rested with the participants in that process. In this respect, as Mr Reynolds observed (correctly in my view) the “*online environment was difficult but not impossible if people had been of goodwill and cooperative...*”¹⁴¹ Ultimately, whatever difficulties the online environment presented in the conduct of meetings, I agree with Mr Reynolds observations that it “*served to provide a platform...for previous behaviours to be more manifest*”¹⁴² The online environment “*amplified*”¹⁴³ the existing disunity in the governing body and the lack of adherence to applicable processes at Council meetings, but the evidence does not support a conclusion that it was the predominant cause of those issues.

167. Mr Reynolds’ observation that there was “*intractable interpersonal conflict between several Councillors...*” is also significant. As to that observation, Mr Reynolds gave evidence that (emphasis added)¹⁴⁴:

*“...my general impression across the time that I was there was that there were - **there appeared to be significant levels of mistrust between two groups of councillors, four on one "side", three on the other with one a floater. Not helped by the fact, I suppose, there were nine councillors before and the extension of the council term, I understand, had led to one councillor resigning, which left eight and quite often an even split of voting. So that, my observation was that there appeared to be a level of distrust between the two groups of councillors.***

There appeared to be a level of distrust between some of the councillors and the staff, the senior staff, and my observation was that that apparent level of distrust was also expressed by the staff of that group of councillors, so there appeared to me to be a bit of a disjoint between some of the councillors and staff and vice versa and certainly between the two groups of councillors. And that, whilst there'd been mediation training and I commented on process improvements for them, neither of those initiatives, if I can use that word, appeared likely to address that underlying level of distrust.”

168. Other witnesses also gave evidence that there was a lack of trust between some of the Councillors, and between some of the Councillors and the executive staff¹⁴⁵. I return to this issue again below; however, it is convenient to observe at this point that a strong working relationship, founded on mutual trust and respect, between the governing body and the senior

¹⁴¹ T618.36-38 (Reynolds).

¹⁴² T618.41-619.4 (Reynolds).

¹⁴³ T6189.46 (Reynolds).

¹⁴⁴ T619.37-620.1-12 (Reynolds).

¹⁴⁵ T178.12-43 (Wilton); T503.22-43 (McMahon); T821.11-26 (Paull). Mr Paull’s evidence was that the lack of trust began as early as 2008, although it “*ebbed and flowed*” over time. See also T1260.11-13, 1318-1323 (former Clr Turland). Clr Gair submitted that “*lack of trust*” was between former Clr Turland, former Clr Halstead and Clr Scandrett: Gair 23 May 2022 Final Submission, sub-para (f).

staff is critical for the proper functioning of a Council, including the performance of its statutory functions¹⁴⁶.

169. Mr Reynolds was well placed to make the observations set out in the Reynolds Report and in his evidence. He is exceptionally experienced in local government¹⁴⁷. He also worked with Cllr Gair and Mr Paull in seeking to improve meeting processes and engaged with several of the other Councillors who took up the opportunity. Mr Reynolds' views are consistent with my own observations of the interactions between Councillors during numerous Council meetings and my consideration of the matters raised during their evidence.

PIO Action 3: The structured mediation

170. In accordance with the terms of the Performance Improvement Order, Mr Norman Turkington was appointed to conduct a mediation process and to address hostility and acrimony among councillors. He issued a report dated 5 November 2020 titled "*Helping the Councillors find ways to negotiate agreement on respectful behaviours in their dealings with each other and with council staff*" (**Turkington Report**).¹⁴⁸

171. The Turkington Report set out the processes undertaken but – quite properly – does not divulge or record details of the confidential mediation sessions. It is a touchstone of the mediation process that it is a confidential one, which enables all participants to speak freely without concern that the discussions may be used against one's interest at a later stage. The process facilitated by Mr Turkington was no different.

172. Relevant for present purposes is Mr Turkington's summary of the "*Learnings from the Situation Exploration phase*" of the mediation process. Those "*learnings*" were set out in the Turkington Report as follows¹⁴⁹:

¹⁴⁶ See, e.g., T816.22-24 (Paull); T1494-1495 (Miscamble).

¹⁴⁷ See, e.g., T596.31-597.1 (Reynolds).

¹⁴⁸ Ex B, pp 15-25.

¹⁴⁹ Ex B, p 19.

Areas of agreement

- There are many decisions where you are able to agree quite easily
- You are in the grip of serious conflict; things are difficult for some, and have been so for a few years
- It can take some years to make some decisions
- You are not happy with how some decisions are made in Council meetings
- Many of you often feel angry and emotionally tired by events in the meeting
- It will be difficult for things to change
- All are on council for their constituents and the community betterment
- It wasn't always like this

Areas of disagreement

- Whose behaviour will need to change, for you to work more effectively together
- The motives of others for being on Council.

173. The Turkington Report also records the agreements reached by all Councillors following the mediation process. Those agreements were as follows¹⁵⁰:

The main agreements arising from the workshop were these:

1. We agree that we are here to serve the community
2. We agree to respect the meeting process and the Chair, and apply the rules consistently
3. We agree to not interrupt the person speaking
4. We agree to respect other's views without denigration
5. We agree to avoid denigrating (personal or degrading) comments about others in the media including social media
6. We agree we will not send offensive and/or denigrating emails, text messages etc to other councillors or staff
7. We agree to instruct the Mayor (Duncan) to establish a meeting between Councillors and senior staff to agree on communication protocols
8. We agree we will apply Sound Ethics, Principles and Integrity to all our activities; that Due Process must be followed; and Natural Justice afforded all.

174. Mr Turkington observed the 28 October 2020 Council Meeting and recorded the following matters in his report (bold in original):

“Observation

Norm Turkington observed the Council meeting held on 28 October 2020 via Facebook streaming to help assess how the Councillors interacted with each other. This could be an informal measure of success they were having in achieving the main agreements arising from the mediation workshop. It could also help to establish a

¹⁵⁰ Ex B, p 21.

baseline against which to assess their continued constructive engagement with each other and the staff.

The full meeting was observed for 2.5 hours. In that time, it was noticed that there were clear examples of respectful behaviour, including appropriate manners such as 'thank you' etc. There was due regard given to the Mayor to assist him in conducting the meeting. It was also observed that engagements with the staff were professional and appropriate. There were no examples observed of any violation of the agreement reached on 21 October 2020.

This observation suggests that there is hope that the agreement they reached on the 21st October 2020 will be successful and can contribute to the main aim of this Structured Mediation Process: to help all Councillors find ways 'to negotiate agreement on respectful behaviours in their dealings with each other and with council staff'.

Next Steps

In large measure, the ongoing improvement in how the Councillors work together relies on the efforts and goodwill of each of the participants.

...

175. Unfortunately, despite Mr Turkington's hope for the future, the improvements observed during the 28 October 2020 meeting were not long lasting.

The Suspension Order

The Notice of Intention to Issue a Suspension Order

176. On 2 March 2021, the Minister issued a notice of intention to issue a suspension order (**Notice of Intention to Issue a Suspension Order**)¹⁵¹. Given its significance, much of the content of the Notice of Intention to Issue a Suspension Order bears repeating in this Report. It stated (emphasis added):

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

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

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

¹⁵¹ Ex B, p 223.

...

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

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

...

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

177. The Minister invited the Council to provide a written submission in respect of the proposed suspension within 7 days of the date of the Notice of Intention to issue a Suspension Order.
178. On 2 March 2021 at 11.53 pm, Clr Whipper sent a response to the Notice of Intention to Issue a Suspension Order directly to the Minister¹⁵². That subject ascribed to the response was “Disappointment over indiscriminate statements made by Wendy Tuckerman and Nathaniel Smith”, and in it Clr Whipper stated (emphasis added):

“I feel sad to see this council dragged into disrepute by less than a handful of currently self-serving councillors. In my opinion the community is suffering not at the hands of a holistically dysfunctional Council, but due to actions of those who refuse to put personal animosity aside. Although I work closely with and do not dislike these individuals personally, I am seriously concerned by their behaviours. We have had one of those councillors publicly calling for this council to be sacked. Apart from grabbing media attention and feeding the frenzy of a section of community who appear to be attempting to manipulate any opportunity to gain traction in the lead up to the next Council election it is doing nothing other than creating turmoil and hindering our ability as democratically elected representatives to serve this community.”

179. On 9 March 2021 at 9.58 AM, Clr Nelson also sent a response to the Notice of Intention to Issue a Suspension Order directly to the Minister¹⁵³. That response included the following passage (emphasis added):

“In your letter dated 2 March 2021 you mentioned the disruption in the Finance meeting held on 22 February 2021. At that meeting certain Councillors breached the

¹⁵² Ex B, p 233.

¹⁵³ Ex B, pp 230-232.

Code of Conduct by releasing confidential information from a councillor information session held in December 2020. Also at the Ordinary Meeting of Council held on 24 February 2021 no sooner had the Mayor opened the meeting than he was interrupted by particular councillor who called for the meeting to be abandoned. Later, when council moved into closed council, the Mayor expelled Councillor Turland from the meeting, the time being 7.48pm. This, of course, is minuted.

*No other councillor has caused such consistent disruption. **I now ask you to reconsider suspending the whole council - you have the power under the recent changes to the Local Government Act to suspend one or two councillors that are at fault.***

*In addition, staff at the Office of Local Government can inform you which **councillors have been continually sending offensive e-mails to other councillors** - those e-mails have been forwarded to the Office of Local Government.*

*I also refer you to the Confidential Document dated 21 October 2021 which was facilitated by Mr Norm Turkington in which all councillors agreed to abide by the three (3) principles and eight (8) points of agreement. **It is evident that the offending councillors have continually breached that agreement, not the other six (6) councillors.***

The 9 March 2021 Extraordinary Meeting

180. On 9 March 2021 at 4.00 pm, an Extraordinary Meeting of Council was held to consider the Notice of Intention to Issue a Suspension Order (**9 March 2021 Extraordinary Meeting**)¹⁵⁴.
181. The evidence does not reveal why the meeting was called on the very day that the response to the Notice of Intention to Issue a Suspension Order was due and not earlier¹⁵⁵. Clr Gair suggested that it was because the Council usually met on a Wednesday¹⁵⁶, but that does not provide an explanation as 9 March 2021 was a Tuesday. As Clr McLaughlin frankly recognised during his evidence, “*in hindsight it doesn’t sound very smart*” to have held that meeting on the very last day that a response to the Notice of Intention to Issue a Suspension Order was due¹⁵⁷.
182. Prior to the 9 March 2021 Extraordinary Meeting commencing, there was a meeting between the Councillors. It was described by Clr Gair as a “*discussion*” between Councillors to try to reach common ground on a motion “*that could be put to the Minister to show that we do not necessarily need to be suspended*”¹⁵⁸. Hope of unanimous agreement as to the form of the notice of motion was extremely optimistic at best. That is because the proposed motion presented during that meeting (or “*discussion*”) included the following¹⁵⁹:

¹⁵⁴ Ex F, pp 4129-4137.

¹⁵⁵ T861.1-9 (Clr Whipper); T1093.5-9 (Clr McLaughlin); T1123.30-41 (Clr Nelson).

¹⁵⁶ T1438.1-8 (Clr Gair).

¹⁵⁷ T1093.5-14 (Clr McLaughlin).

¹⁵⁸ https://www.youtube.com/watch?v=fBexpDlrBXM&list=PL7UUICap7_qMYEJyJd7U0uN5AL5-3Y23a&index=8 at approximately 7.30 of the recording.

¹⁵⁹ Ex E, p 22.

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| <p>7. <u>THAT</u> Councillor Scandrett is requested to tender his resignation from Civic Office as a Councillor of Wingecaribee Shire Council effective immediately and if Councillor Scandrett refuses to resign then <u>THAT</u> Council request that the Minister to suspend Councillor Scandrett immediately.</p> <p>8. <u>THAT</u> Councillor Turland is requested to tender his resignation from Civic Office as a Councillor of Wingecaribee Shire Council effective immediately and if Councillor Turland refuses to resign then <u>THAT</u> Council request that the Minister to suspend Councillor Scandrett immediately.</p> |
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183. It is unsurprising that neither former Clr Turland nor Clr Scandrett agreed with a notice of motion calling for their own resignations or failing that, their suspension by the Minister.
184. The proposed notice of motion was also based on an incorrect premise – that is, that the Minister could suspend an individual councillor on request of the “*Council*”. I return to the issue of Ministerial power later in this Report, but it is convenient to note at this point that none of the Councillors who advanced the proposition that the Minister could suspend an individual councillor were able to identify the source of power in the Minister to do so. That is because it does not exist. Significantly, the proposed notice of motion (although not ultimately presented to the 9 March 2021 Extraordinary Meeting) highlights the deep divisions, acrimony, and disunity that existed in the 2016 Council at that time.
185. I have viewed the recording of the 9 March 2021 Extraordinary Meeting in its entirety¹⁶⁰. In my view, it is useful to examine that meeting in some detail as it provides an insight into the functioning of the Governing Body immediately prior to its suspension.
186. The 9 March Extraordinary Meeting commenced by Clr Scandrett immediately (i.e., in the second minute of the meeting) raising a “*point of order*” concerning the application of COVID-19 restrictions, apparently in an attempt to increase the size of the public gallery. On being advised by the Acting General Manager (Mr Paull) that the meeting was being conducted in accordance with the Council’s COVID-19 Safety Plan¹⁶¹, Clr Scandrett sought to argue the point further. To bring an end to the debate about that issue, Clr Gair stated that the answer to Clr Scandrett’s request to admit more people into the Chamber was “*No*”. Clr Scandrett replied with the argumentative comment “*‘No’ to the Community*”¹⁶². On any view, that exchange carried with it the imputation (whether subjectively intended by Clr Scandrett or not) that the Acting General Manager had not performed his role adequately or appropriately, and his adherence to the Council’s COVID-19 Safety Plan was detrimental to the community. Clr Scandrett made further comments on that issue later in the meeting¹⁶³. Exchanges of that kind

¹⁶⁰ https://www.youtube.com/watch?v=fBexpDlrBXM&list=PL7UUICap7_qMYEJyJd7U0uN5AL5-3Y23a&index=8

¹⁶¹ At approximately 2.40 of the recording.

¹⁶² At approximately 3.10 of the recording. The community, of course, had full access to the meeting as it was live-streamed in accordance with cl 6.18 of the 2019 Code of Meeting Practice.

¹⁶³ At approximately 22.20 of the recording.

are inconsistent with the 2019 Code of Meeting Practice and the 2019 Code of Conduct¹⁶⁴. It was an unfortunate way to commence what was a very important meeting.

187. Immediately thereafter, Clr Turland raised an issue concerning the use of a “*mute button*” by the chair¹⁶⁵. No use of a “*mute button*” had occurred during the meeting in the less than four minutes it had been ongoing, and thus it is difficult to see how that matter was relevant to the business being considered. What followed was argument between Clr Gair and former Clr Turland about whether the chair has “*precedence*”¹⁶⁶. The 2019 Code of Meeting Practice is clear - the chair of the meeting (ordinarily, the mayor) has “*precedence*”¹⁶⁷. Initiating argument with the chair about that uncontroversial proposition was also inconsistent with the 2019 Code of Meeting Practice and the 2019 Code of Conduct¹⁶⁸. It was entirely irrelevant to the business before the Council, and it is difficult to see why the issue was raised during that meeting given that it had been the subject of a question on notice from former Clr Turland (which described Clr Gair as having used a “*gag button*”) which had been answered during the Ordinary Meeting of Council held on 13 May 2020¹⁶⁹. That exchange perpetuated the already unhelpful start to the meeting.
188. Only once those interventions had been dealt with were the formal aspects of the meeting able to be completed, after which Clr Gair sought to introduce the item of business. There was only one – the Notice of Intention to Issue a Suspension Order. He was immediately interrupted by former Clr Turland who sought to insist (and in the face of resistance from the chair, argue) that he should be permitted to speak to move an “*amendment*”¹⁷⁰. At that time, no motion had been moved and seconded so there the occasion to move an “*amendment*” had not arisen¹⁷¹. The interjection was also inconsistent with the maintenance of order at the meeting¹⁷².
189. At that point, only six minutes into the meeting, an objective observer would be left with little confidence that each of the “*Meeting Principles*” identified in cl 2.1 of the 2019 Code of Meeting Practice (and various other provisions of it) were being, and would be, observed during the 9 March 2021 Extraordinary Meeting.

¹⁶⁴ For example, it was disruptive conduct, and was otherwise inconsistent with the orderly conduct of meetings contrary to clause 3.21 of the 2019 Code of Conduct. It was also conduct that was likely to bring the council or council officials into disrepute contrary to cl 3.1(a) of the 2019 Code of Conduct.

¹⁶⁵ At approximately 3.30 of the recording.

¹⁶⁶ At approximately 4.00 of the recording.

¹⁶⁷ 2019 Code of Meeting Practice, cll 7.1 and 7.9: Ex A, p 1052.

¹⁶⁸ Including, for example, cll 2.1 and 16.11(e) of the 2019 Code of Meeting Practice: Ex A, pp 1040 and 1068-1069 and clauses 3.19 and 3.21 and 3.22 (in that it likely constituted an “*act of disorder*”) of the 2019 Code of Conduct.

¹⁶⁹ Ex F, p 3418.

¹⁷⁰ At Approximately 6.20 of the recording.

¹⁷¹ At that time, there was no “*motion*” (as it had not yet been moved or seconded) and thus there could be no “*amendment*”: see 2019 Code of Conduct, clauses 11.1, 11.10-11.16 (Ex A, pp 1057-1058).

¹⁷² 2019 Code of Meeting Practice, cll 2.1 and 16.11(e).

190. Ultimately, Clr Gair moved the following motion, which was seconded by Clr Whipper¹⁷³:

- MOTION** moved by Mayor Clr T D Gair and seconded by Clr L A C Whipper
1. ***THAT*** the Notice of Intention to Suspend Wingecarribee Shire Council issued by the Minister of Local Government, the Hon. Shelley Hancock, MP (the Minister) which invites Council to make a submission within 7 days with regard to the proposed suspension by way of Council resolution be received and noted.
 2. ***THAT*** the following achievements of Council during the Council term be noted
 - a. Sound financial position with unmodified audit opinion for each year of the Council term
 - b. Completion of Merrigang Street Reconstruction Project
 - c. Completion of Kirkham Road Reconstruction Program
 - d. Completion of the expanded Wattle Street Carpark in Bowral
 - e. Completion of the redevelopment of Bowral Rugby Club
 - f. Completion of Bundanoon Skate Park
 - g. Repair and Upgrade of Mittagong Pool
 - h. Exemplary response to the 2019/20 Black Summer Bushfires, Drought, Floods and the COVID-19 pandemic and continuation of service delivery and support to the community during this period.
 3. ***THAT*** Council notes that the majority of Councillors adhered to the requirements of the Performance Improvement Order issued by the Minister on the 8 September 2020 and it is a minority of Councillors that have not adhered to the requirements of this order.
 4. ***THAT*** Council notes that the majority of Councillors adhered to the councillor agreements arising from the mediation workshop undertaken as a part of the Performance Improvement Order and it is a minority that have not adhered to these agreements.
 5. ***THAT*** the Mayor Councillor Gair, Deputy Mayor Councillor Andrews, and Councillor Whipper request a meeting with the Minister to discuss alternative options to the suspension of all councillors.
 6. ***THAT*** Council seek an extension for its submission to the Notice of Intention to Issue a Suspension Order until 17 March in order for a meeting with the Minister.
 7. ***THAT*** Council call upon the Minister to reiterate that the vast majority of Councillors are not responsible for the dysfunction of Council as identified in her correspondence received by Council on 3 March 2021.
 8. ***THAT*** following this meeting the Minister take decisive action against those Councillors identified by the majority of this democratically elected Council who continue not to adhere with the requirements of the Performance Improvement Order.

191. Former Clr Turland moved an amendment (seconded by former Clr Halstead) that took the following form¹⁷⁴:

¹⁷³ Ex F, p 4134.

¹⁷⁴ Ex F, p 4135.

1. THAT Council accepts the decision that Minister Hancock, MP makes on the Notice of Intention to Issue a Suspension Order as reported by Nathaniel Smith, MP and Wendy Tuckerman, MP and the direction of Minister Hancock, MP.
2. THAT Council submits this submission to the Notice of Intention to Issue a Suspension Order to the Minister for Local Government by Close of Business Wednesday 10 March 2021.
3. THAT Council has failed the community on its public communication policy on providing Councillors and the community information on major projects. Items of contention are listed below:
 - Frankland Street sale;
 - Mittagong swimming pool - \$6m cost and closed for four years out of five years;
 - Berrima Overpass - failure to provide Councillors and community information in a timely manner on the failure of this project;
 - Station Street upgrade - failure to provide information to the community on the increased budget costs and on this project;
 - Royal Commission and NSW Government Bushfire Inquiries - failure to make submissions on time, being five months late and three pages in length;
 - Asbestos on local roads costing the community over \$2m;
 - Civic Centre Project - not providing real time accurate costs on the budget and variations;
 - Bowral Memorial Hall - no explanation of \$500,000 more in the tender process selected by the Mayor using his casting vote;
 - Excessive delays on development applications, providing profoundly misleading files and statements made by staff;
 - The Mayor using his casting vote on many items that are in the public interest; and
 - The Mayor in breach of the Code of Meeting Practice on multiple occasions.

192. During the debate there were several other exchanges, which were both unhelpful to the orderly conduct of the meeting and were inconsistent with the 2019 Code of Meeting Practice and/or the 20019 Code of Conduct. Some examples include:

- i. while Clr Scandrett was speaking against the notice of motion moved by Clr Gair, Clr McLaughlin took a point of order to the effect that Clr Scandrett was not being relevant to the business to be considered at the meeting. The point of order was dealt with promptly by Clr Gair and Clr Scandrett was permitted to continue speaking. During that process, Clr Scandrett asserted that Clr McLaughlin's point of order was a "*filibusting [sic] attempt to gag me*"¹⁷⁵. That hyperbolic statement imputes an improper motive in Clr McLaughlin for taking the point of order, which does not appear evident from the recording¹⁷⁶;
- ii. while Clr Whipper was speaking in favour of the notice of motion moved by Clr Gair, Clr Scandrett interjected with a "*point of order*" the basis of which was an assertion that something that Clr Whipper had said was knowingly incorrect¹⁷⁷. That was not a proper point of order¹⁷⁸.
- iii. Clr Turland raising another "*point of order*" (it was not a point of order in accordance with the 2019 Code of Meeting Practice) concerning the use of the "*mute button*" (which had

¹⁷⁵ At approximately 23.40 and following of the recording.

¹⁷⁶ See, e.g., 2019 Code of Meeting Practice, cl 16.11(d) and 2019 Code of Conduct, cl 3.1(a).

¹⁷⁷ At approximately 26.50 of the recording.

¹⁷⁸ 2019 Code of Meeting Practice, cl 16.1; Ex B, p 211.

not occurred during that meeting).¹⁷⁹ There was then argument between former Clr Turland and the chair. It was not a point of order, and in pressing the issue former Clr Turland failed to respect the rulings of the chair and give him precedence¹⁸⁰;

- iv. Clr Scandent spoke about the existence of code of conduct complaints made about him, and argued with the chair when directed that such matters should not be discussed in the meeting¹⁸¹;
- v. comments by some councillors (primarily former Clr Halstead) which expressly criticised the conduct of Council staff and other Councillors¹⁸².

193. That exchanges of that kind occurred from the commencement of the meeting, and throughout its duration, provides a clear example of what Mr Reynolds described as a “*strong sense of disunity*” within the governing body¹⁸³. It also suggests a lack of focus on the task at hand in favour of point scoring by some Councillors. Indeed, the conduct of the meeting would have done little to maintain or restore confidence in ability of the Governing Body to appropriately, reasonably, and adequately fulfil its role. It also reveals a general disregard by at least some Councillors for adherence to the 2019 Code of Conduct and the 2019 Code of Meeting Practice. The Interim Administrator later described that meeting as “*at best...a debacle*”¹⁸⁴. There is considerable force in that description.

194. Throughout the debate, much of the discussion did not directly engage with the matters identified in the Notice of Intention to Issue a Suspension Order as the basis of the proposed action. Only Clr Nelson referred in any detail to the various matters set out in it. Clr Whipper also observed that the Notice of Intention to Issue a Suspension Order identifies dysfunction in the Council by “*some councillors*”¹⁸⁵. Many of the Councillors expressly opposed the proposed action (i.e., the suspension of the Council)¹⁸⁶, and some made comments concerning the approach taken by the local Members of the New South Wales Parliament and the then Minister¹⁸⁷, but none suggested during that meeting that the facts and circumstances identified by the Minister in the Notice of Intention to Issue a Suspension Order were inaccurate.

195. In my view, it is significant that none of the Councillors disputed any of the grounds identified in the Notice of Intention to Issue a Suspension Order during the 9 March 2021 Extraordinary

¹⁷⁹ At approximately 40.35 and following of the recording.

¹⁸⁰ 2019 Code of Conduct, cl 3.19.

¹⁸¹ At approximately 54.15 and following of the recording; 2019 Code of Conduct, cll 3.19 and 9.13.

¹⁸² At approximately 37.35 and following of the recording; 2019 Code of Conduct, cl 3.1(a).

¹⁸³ T598.26-37 (Reynolds).

¹⁸⁴ Ex B, p 244.

¹⁸⁵ At approximately 57.40 and following of the recording.

¹⁸⁶ At least one supported it (former Clr Turland), and two abstained (former Clr Halstead and Clr Scandrett).

¹⁸⁷ E.g., Clr Whipper at approximately 26.15 and following of the recording, Clr McLaughlin at 34.45 and following of the recording, Clr Halstead at 36.30 and following of the meeting.

Meeting. That strong inference that arises is that that they were not able to do so. That inference is reinforced by the evidence given during the Public Hearings.

196. Rather, the primary focus of many of the Councillors in that meeting appears to have been to pass a resolution seeking a meeting with the Minister to explore options other than the suspension “*of all councillors*”¹⁸⁸. That is not what the Notice of Intention to Issue a Suspension Order called for. It unequivocally invited a written response as to why the Council ought not be suspended. It appears that many of the Councillors thought that they could dissuade the Minister from issuing a suspension order through discussion with her. Again, that is clearly not what the Minister invited. Further, given Clr Gair’s submission that “*the die had been cast and it would not have made an iota of difference as to what was put forward*”¹⁸⁹, it is difficult to see what the proposed discussion would have achieved.
197. The approach adopted by the majority of the Governing Body in this respect also suffers from the problem that it appears to have been based – in part - on a fundamental misapprehension that the Minister could, to adopt the words used by Clr Whipper during that meeting, “*cherry pick*” councillors against whom action would be taken. That was a concept propounded on other occasions by each of Clrs Gair, Nelson, Andrews, McLaughlin and former Clr Markwart. I return to this issue below, but it is sufficient for present purposes to again note that the assumption was wrong. That the response to the Notice of Intention to Issue a Suspension Order was based on that (incorrect) assumption is indicative of a lack of understanding by those Councillors of the statutory framework in which all councillors hold office. Regrettably, it appears that advice was not sought about that proposition¹⁹⁰.
198. Ultimately, the amendment moved by former Clr Turland was lost, and the notice of motion moved by Clr Gair passed¹⁹¹. Following the conclusion of the 9 March 2021 Extraordinary Meeting, Clr Gair and Mr Paull forwarded the following letter to the Minister¹⁹²:

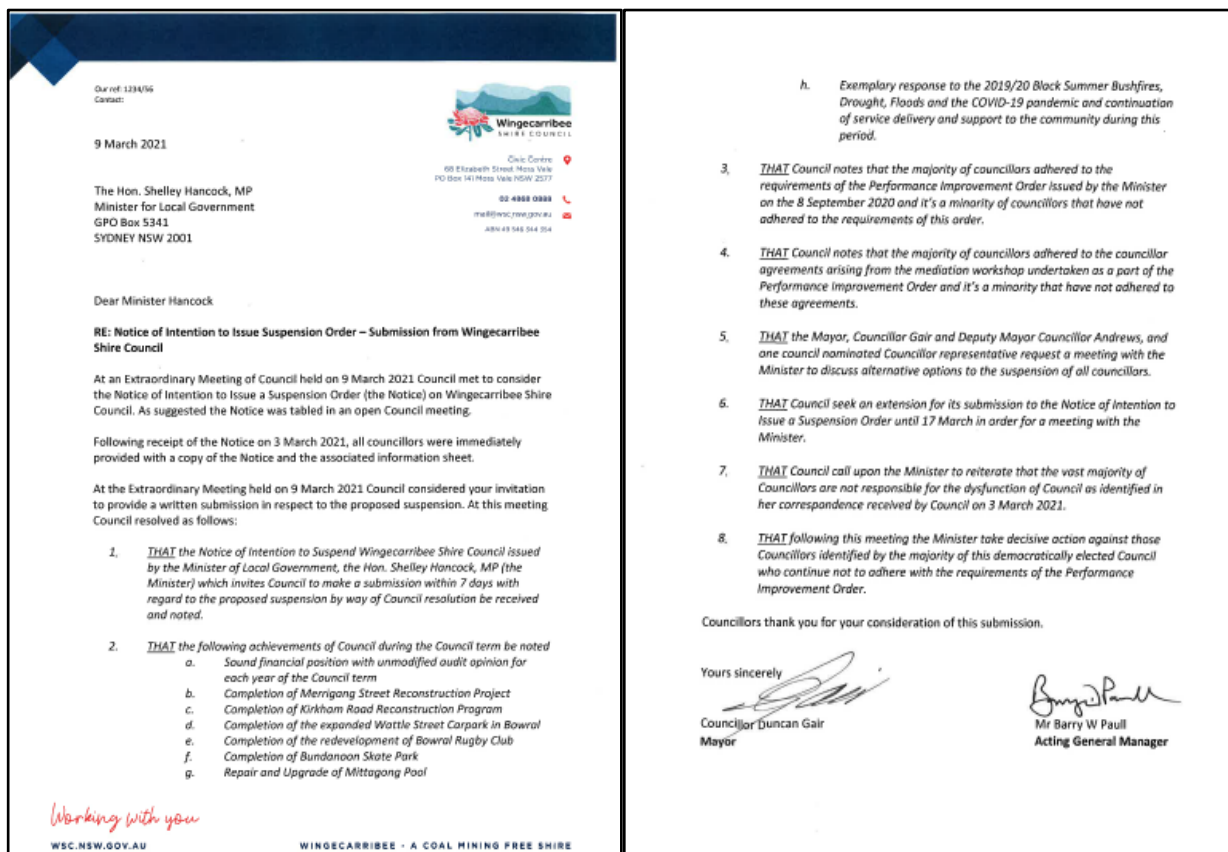
¹⁸⁸ See, for example, at approximately 18.15 of the recording; see also Clr Whipper at approximately 28.50 of the recording, and Clr Andrews at approximately 43.00 of the recording.

¹⁸⁹ Gair 23 May 2022 Final Submission, sub-para (6).

¹⁹⁰ T1423.21-40 (Clr Gair).

¹⁹¹ Ex F, pp 4134-4135.

¹⁹² Ex B, pp 236-237.



199. For the most part, that letter merely repeated the text of the motion passed at the 9 March 2021 Extraordinary meeting. It did not provide any written reasons as to why the Council ought not be suspended, and consistently with the debate during the 9 March Extraordinary Meeting, it did not dispute that the matters identified in the Notice of Intention to Issue a Suspension Order were accurate. That is telling.

200. On 12 March 2021, the Minister issued an order pursuant to s 438I of the LGA suspending the WSC for a period of three months (**Suspension Order**)¹⁹³. By that same order, pursuant to s 438M of the LGA, the Minister appointed Mr Viv May PSM as the interim administrator of the Council (**Interim Administrator**) during the period of suspension.

Extension of the suspension and the appointment of this Inquiry

201. On 10 May 2021, the Interim Administrator provided the Minister with his first report pursuant to s 438N of the LGA (**10 May 2021 IA Report**)¹⁹⁴. In the 10 May 2021 IA Report, the Interim Administrator reported that he had interviewed all the Suspended Councillors, along with certain others. The Interim Administrator also reported on the receipt of a number of reviews that had been commissioned. Having recorded those preliminary matters, that Interim Administrator stated:

¹⁹³ Ex B, p 238.

¹⁹⁴ Ex B, pp 239-240.

“These reports have now been received and while no concerns are flagged in relation to Council’s general financial position, both reports highlight governance short comings and recommendations that must be addressed. Both reports have been forwarded to the Office of Local Government and a further independent report relating to development issues at the Council is nearing completion and will also be forwarded.

There is no question in my mind that there is much to be done to restore the community’s confidence in Wingecarribee Shire Council. The elected body and the former executive of the Council showed a complete disregard for the community they were elected and employed to serve. A lack of respect, transparency and communication has led to constant suspicion of decision-making processes and there is much evidence that Council had simply stopped listening. It is my view that the executive of the Council were providing favored [sic] information to some members and this has not helped to address behavioral [sic] issues at Council and the effectiveness of Council decision making.

The Wingecarribee Shire community has lost trust in their elected representatives and a lack of leadership in the governing body and executive staff has severely impacted on the health and safety of many staff. The executive staff have now all left the Council and this provides the opportunity, following the appointment of a new General Manager, to restructure the organisation as, in my view, it is presently both cumbersome and complex. Roles at both the elected and operational areas are just not understood and from a resident’s point of view, very difficult to navigate.”

202. The Interim Administrator was asked about those matters when giving evidence. Relevantly, he gave the following evidence (emphasis added)¹⁹⁵:

“Q. ...In the last paragraph on that page you say, third line:

A lack of respect, transparency and communication has led to constant suspicion of decision-making processes ...

Do you see that?

A. Yes.

Q. What led you to express that view?

A. ***I took the view there was no respect: councillors with each other, councillors with executive staff, councillors where they shouldn’t have been with operational staff. And the operational staff had built walls, because there was no leadership from the general manager and the acting general manager, in my view, to protect the staff. The councillors - and I don’t think this lack of respect has just happened in the last council, I think it’s been going on here for a long time from the feedback I get, but it just was taken to a new height and, you know, the lack of respect became adversarial in a way. I’ve heard people talk about point-scoring, and gotcha moments: you know, that doesn’t help the council deliver its services.***

¹⁹⁵ T528.36-529.32 (May).

- Q. *As part of that answer, I think I understood you to be talking about councillors crossing into the operational divide; is that what you have in mind?*
- A. *Oh, yes.*
- Q. *And have you received reports of that sort of thing happening?*
- A. ***Early on, and I did...here there was a blurring and I think that was facilitated by the general manager, because the general manager didn't stop it. And, you know, you have the example of a mayor wanting to tell staff - and the unions raised this with me, because I met with them - in how to fill potholes, and it's allowed by the general manager? You know, that's just not on.***

203. Later in the 10 May 2021 IA Report, the Interim Administrator recommended the extension of the suspension until the elections that had been scheduled to take place in September 2021.

204. On 24 May 2021, the Minister extended the suspension for a further period of three months and continued the Interim Administrator's appointment during that period¹⁹⁶. On 27 May 2021, the Minister released a media statement announcing the extension, and in the rationale for the extension was explained as follows (emphasis added):

*"I am satisfied that this extension, beyond the current three-month suspension period ending on June 11, is **necessary to allow Mr May to continue his efforts to reinstate the proper and effective functioning of Wingecarribee Shire Council.***

*This includes **organisational restructuring, improving work health and safety conditions for staff, conducting reviews, strengthening decision making and community engagement.**"*

205. On 24 July 2021, the Minister postponed the local government elections that had been scheduled to take place on 4 September 2021 for three months, to be held on 4 December 2021¹⁹⁷.

206. On 10 August 2021, the Interim Administrator provided the Minister with his second report (**10 August 2021 IA Report**)¹⁹⁸. In the 10 August 2021 IA Report, the Interim Administrator set out a summary of the "*independent Reviews/Audits*" that had been commissioned by him and tabled at Council meetings. When giving evidence, the Interim Administrator described the background to the commissioning of those reviews as follows (emphasis added)¹⁹⁹:

*"It was trying to - when you get appointed as an administrator or as an interim administrator, **I think some people think you get riding instructions: you don't. You are just asked, "Can you try and restore public confidence in the operation of the council?"** And, these reports, and I know there was a few of them, but there's a lot more things that I could have asked for reports on from the residents, but this was as **a result of me listening to residents' concerns and I took the view that,***

¹⁹⁶ Ex B, p 241.

¹⁹⁷ https://gazette.legislation.nsw.gov.au/so/download.w3p?id=Gazette_2021_2021-347.pdf

¹⁹⁸ Ex B, pp 244-252.

¹⁹⁹ T541.40-542.3 (May). See also T560.14-29 (May).

unless I tried to address some of these concerns, it'll just go on and on, and there had to be some closure.

*I think the fire reports you said you were going to come back to, so I can leave that one. But, you know, **some of the petty cash stuff; you know, it seems minor, but it just sends a message about the whole organisation**, and I think I've got the experience to know where to look and when to look, and **I discounted a lot of what I was told because in reality some of it was an opportunity to have a go, but some was genuine, and I tried to pick out what I thought would add value to the administration period to try and restore public confidence in the council**, and hence that's why a lot of those reports were done and, you know, some of them at the end of the day provide a good headline but **they are part of a jigsaw puzzle, in my view.**"*

207. On 31 August 2021, the Minister appointed this Inquiry. In doing so, the Minister continued the suspension of the Council.

208. On 5 September 2021, the election that was scheduled for 5 December 2021 was deferred for 12 months from the date of that order in accordance with s 318(1)(a)(ii) of the LGA²⁰⁰.

Post-suspension reviews

The external review reports commissioned by the Interim Administrator

209. As set out in the 10 August 2022 IA Report, the Interim Administrator commissioned a number of external reviews of aspects of the Council's operations. Those reviews relevantly included²⁰¹:

- i. Review of Council Finances (Finch Consulting) (***Review of Council Finances Report***);
- ii. Governance, Human Resources and Statutory Reporting at Wingecarribee Shire Council (Samantha Charlton) (***Governance, HR and Statutory Reporting Review Report***);
- iii. Interim Report on the Planning, Development and Regulatory Area (Earnest Consulting) (***Interim Planning Function Review Report***);
- iv. Righting the Wrongs – Second Report on Planning, Development and Regulatory Services (Earnest Consulting) (***Final Planning Function Review Report***);
- v. Wingecarribee Shire Council Bushfire Response and Recovery Review 2021 (Dave Owens, Risk-e Business Consultants) (***Bushfire Response Review Report***);

²⁰⁰ Ex B, p 842.

²⁰¹ Ex B, pp 245-246.

- vi. Tourism and Economic Branch Expenditure Review (Finch Consulting) (***Tourism and Economic Branch Expenditure Review Report***);
- vii. Purchase Card Review (Finch Consulting) (***Purchase Card Review Report***);
- viii. Report on the Economic Development Roundtable (KPMG) (***Economic Development Roundtable Report***).

210. A comprehensive review of each of the findings and conclusions in those reports is beyond the scope of this report. It is also not the object of this Inquiry to re-conduct those reviews, or to resolve disagreements that some may have with the findings of them.

211. The significance of those reviews is that an objective reader of the reports that they generated would readily recognise that a number of issues, and various shortcomings, that warranted attention by the Council had been identified. In the paragraphs that follow, I have set out some of the issues identified in those reports. It is important to note, however, that the reports were not limited to shortcomings and some identified areas or examples of good performance by the Council and its staff.

Bushfire Response Review Report

212. The Bushfire Response Review Report²⁰² contained the following conclusions/observations²⁰³:

- i. Leadership and decision making in the response and recovery from the bushfires was “*non-existent*”²⁰⁴;
- ii. “*The Emergency Management Plans for the Wingecarribee Shire Council lacked content or were non-existent in a number of areas*”²⁰⁵;
- iii. “*Local and District Ignition Plans did not exist prior to the fires*”²⁰⁶;
- iv. “*There was no council policy or plan on how to close parks and reserves during extreme fire danger periods*”²⁰⁷;

²⁰² Ex B, pp 272-372.

²⁰³ This summary is not intended to be exhaustive.

²⁰⁴ Ex B, p 277.

²⁰⁵ Ex B, p 277.

²⁰⁶ Ex B, p 277.

²⁰⁷ Ex B, p 277.

- v. *"...members of the Council's Executive and Councillors did not have a good understanding of emergency management, nor did they appear to understand council's role in a crisis"*²⁰⁸;
- vi. *"Wingecarribee Shire Council did not have a Local Recovery Plan in place prior to the bush fires. This greatly hampered the initial and ongoing recovery effort..."*²⁰⁹;
- vii. *"Council was not aware of how to establish a recovery hub and no framework/toolkit existed, nor was one developed"*²¹⁰;
- viii. *"...actions and follow up was extremely limited or non-existent within Council...There is a clear failure by Council to document and finalise identified actions"*²¹¹;
- ix. There was *"limited assistance provided by Council"* in relation to the welfare of council staff, volunteers, and the community²¹²;
- x. *"Council lacked leadership and direction during and recovering from the fires. No debrief session/s for staff has been undertaken to capture what worked and areas for improvement"*²¹³;
- xi. *"The applications for and distribution of grants money caused significant community unrest due to the lack of information that was provided by council"*²¹⁴;
- xii. Community views expressed during meetings with the author of the report included that²¹⁵:

"The community was strong in their voice that council lacked empathy towards the bush fire affected community, no one from council checked up on their welfare and both groups raised the lack of any detailed submission to the NSW Bushfire Inquiry and the Royal Commission as examples of the lack of empathy shown to them by council. The General Manager refusing to speak at community meetings, residents being charged for rubbish bin replacement and water usage during the fires was also raised as small but important issues."

²⁰⁸ Ex B, p 277.

²⁰⁹ Ex B, p 278.

²¹⁰ Ex B, p 278.

²¹¹ Ex B, p 279.

²¹² Ex B, p 279.

²¹³ Ex B, p 279.

²¹⁴ Ex B, p 279.

²¹⁵ Ex B, p 296.

213. In the Gair 24 May 2022 Final Submission, Clr Gair outlined his involvement in the Bushfire response²¹⁶. That submission set out aspects of Clr Gair's direct involvement in the response, as well as some of the initiatives put in place by Council. That submission included an acknowledgement by Clr Gair that "*Council was not prepared for the catastrophe that enveloped the Shire*", however Clr Gair goes on to say that "*No Local Government area was, nor was the State Government, Federal Government or the RFS themselves.*"
214. I have no difficulty in accepting that Clr Gair, like other Councillors and many members of staff, made real and genuine efforts in seeking to assist the community respond to the bushfire crisis. I am also acutely aware that for many involved in the response, they too were directly affected by the bushfires. Clr Gair's evidence about his lived experience of that event, including the immediate threat to his own home was powerful²¹⁷. I accept without reservation that the experience would have been distressing on a number of levels. The evidence supports a conclusion that the community is, in some ways, still recovering from those traumatic times.
215. The focus of the issues highlighted in the report was the lack of policy development and preparedness, which in turn contributed to aspects of the response by the Council falling short of what it ought to have been. Given that Clr Gair accepts that the Council was not prepared for the bushfire crisis, it remains difficult to understand why he maintained (emphatically) when giving evidence that the report was "*not worth reading*", going so far as to suggest it would not be worth lining a birdcage²¹⁸.
216. Much of Clr Gair's objection appears to be to the suggestion that he, or others, "*lacked empathy towards the community*"²¹⁹. Suggestions of that kind were set out in the Bushfire Review Report as recording feedback from community members. As I read the Bushfire Review Report, it was not a finding made by its author²²⁰. In this respect, the Bushfire Review Report does not criticise the efforts or motivations of individual Council staff or Councillors who were on the ground and who undoubtedly strived to assist the community in what was a time of crisis and, sadly for many, loss. Indeed, one of the recommendations was that the staff should be recognised for those efforts²²¹. Additionally, contrary to some of the suggestions made by some Councillors²²², the Bushfire Review Report acknowledged that the Council was not the

²¹⁶ Clr Gair's Final Submission dated 24 May 2022.

²¹⁷ T1362.17-40 (Clr Gair).

²¹⁸ T1369.5-17 (Gair).

²¹⁹ See, e.g., T1368.14-1369.21 (Clr Gair); Gair 23 May Final Submission, sub-para (3). See also, Nelson 30 May 2022 Final Submission, p 4.

²²⁰ Comments of that kind are recorded in the section of the report headed "*Community Views*" and "*Community Survey Feedback*": Ex B, pp 296-297, 369, 372. Although the review did find that Clr Gair was divisive within the community, and polarised opinion during feedback sessions with some of the view that he had done job and others not. Again, however, in my view the observations as to "*empathy*" at Ex B, pp 310 and 336-337 are in the context of feedback from the community rather than a conclusion reached by the author of the report.

²²¹ See Recommendation 38: Ex B, p 285; Ex B, p 296.

²²² See, e.g., T1071.14-25 (Clr McLaughlin).

primary response agency to the fires. It was, however, “*the first and most important port of call for their community*” during times of crisis²²³.

217. Rather, the findings set out in the Bushfire Review Report focussed on the lack of preparedness and policy, which produced aspects of the Council’s response that were lacking, or which lacked cohesion or direction.

218. Had Clr Gair read the Bushfire Review Report, that ought to have been clear to him. Regrettably, he did not read it, or any of the other reports commissioned by the Interim Administrator²²⁴. For any person interested in identifying areas of the response were not successful or, perhaps more importantly, the steps that could be taken to better prepare for future natural disasters for the benefit of the Shire as a whole, the report was “*worth reading*”.

219. Clr Nelson, to his credit, read the Bushfire Review Report after giving evidence. Despite maintaining his objection to some of the conclusions expressed in it and certain features of the review process²²⁵, Clr Nelson has now formed the view that there were aspects of the Council’s response where it “*could have done better*” and has indicated his support of each of the recommendations made in that report (indeed, in some respects, Clr Nelson would go further than the author of that report)²²⁶. Those reflections tell against the report being one that was “*hardly worth reading*” or being one which raised “*relatively insubstantial issues*”.

Governance, HR and Statutory Reporting Review Report

220. The Governance, HR and Statutory Reporting Review Report²²⁷ contained the following conclusions/observations²²⁸:

- i. “*The long term effects of organisational dysfunction on the individual employees can have a significant effect on moral [sic] and productivity, but more importantly can take a large personal toll on the dedicated and committed staff of the council.*”²²⁹
- ii. “*It is evident that a lack of strategic focus by the previous Council Executive for a prolonged period, has resulted in a disconnection between staff and how they see themselves contributing to the council’s deliverables in the Community Strategic Plan*”²³⁰;

²²³ Ex B, p 277.

²²⁴ T1414-1415 (Clr Gair).

²²⁵ Also expressed by Clr Gair: Gair 23 May Final Submission, sub-para (p).

²²⁶ Clr Nelson Final Submission dated 30 May 2022, pp 14, 16.

²²⁷ Ex B, p 373-425.

²²⁸ This summary is not intended to be exhaustive.

²²⁹ Ex B, p 379.

²³⁰ Ex B, p 379.

- iii. *“The council organisational structure is poorly designed and appears to be contributing to the administrative failings at council.”²³¹;*
- iv. *“In general, staff do not appreciate the importance of conflicts of interest provisions in the Code of Conduct and the fact that these should just be seen as a minimum standard, particularly in regional and less populated areas. Wingecarribee is a regional area and the NSW Independent Commission Against Corruption (ICAC) has identified in their publication “Managing Conflicts of Interest in the Public Sector” that areas and actions involving regional areas present a greater risk in relation to conflicts of interest. The ICAC state that it is best practice for regional entities to consider additional controls that go beyond normal policy requirements in the Council Code of Conduct and to enhance recordkeeping requirements.”²³²;*
- v. *“A review of the Gifts and Benefits Register has identified a number of areas of concern in relation to the approach towards the acceptance of gifts by staff... As with conflicts of interest, the offer and acceptance of gifts and benefits in regional areas, particularly from suppliers, presents additional risks that need to be managed. It is recommended that Council bolster its approach to gifts and benefits and adopt a “thanks is enough thanks approach” and actively discourage staff from accepting gifts.”²³³;*
- vi. *“The review found that the management of delegations is an area of immediate concern for the Council to review and improve, as there are significant gaps in expert knowledge in the purpose, appropriate wording and levels of delegation, and staff have no easy way to quickly check on delegations.”²³⁴;*
- vii. *“A review of the delegation register has found that allocations of specific delegations to individual roles appears to be inconsistent, with a large number of instances of delegations not related to a particular function were found to be issued by staff in those roles.”²³⁵*
- viii. *“Historically there appears to have been a lack of sufficient importance placed on the role of council reports in the council decision making process, and there is evidence that the previous executive on occasions would not have read reports that had been approved and submitted to Council...Staff have also indicated that there have been previous occasions where reports were altered during the approval process without the knowledge of the report author. On occasions these changes were significant, and the*

²³¹ Ex B, p 379.

²³² Ex B, p 394.

²³³ Ex B, p 395.

²³⁴ Ex B, p 397.

²³⁵ Ex B, p 398.

report author did not agree with the content and/or recommendations attributed to their authorship.”²³⁶

- ix. *“Whilst it is important that the councillor induction program focusses on the skills and knowledge that all councillors need to do their roles effectively, in light of the current circumstances at WSC a particular focus, potentially as the most immediate priority, will be the establishment of effective and respectful relationships between councillors and between councillors and executive staff.”²³⁷;*
- x. *“Throughout this review the author became aware of a number of previously raised complaints made by staff that had either not been investigated or had not been sufficiently resolved and outcomes provided to the parties involved. This has led to some obvious impacts on the staff involved and overall a lack of confidence in the way the organisation has traditionally approached staff investigations and the management of bullying and harassment and other staff code of conduct issues...Whilst not within the brief of this review, sufficient anecdotal evidence was discovered to indicate that there may be a significant number of unresolved staff grievances, bullying and harassment issues, complaints and code of conduct issues that should be identified and appropriately dealt with. The new temporary executive have placed a focus on this area, and a number of reviews have already commenced, but this will be an issue that will take some time and resourcing to resolve.”²³⁸;*
- xi. *“The present external factors impacting upon the organisation will be having a significant effect on individual staff wellbeing, motivation, and productivity as well as the overall culture of the organisation...The damage that occurs to staff morale, wellbeing and culture occurs over time and the recent changes and impacts on staff will be building upon any damaging factors previously impacting on staff culture. For example, during the review, staff identified that a Staff Wellbeing Survey was conducted in 2019, however the results were never provided to staff nor were they advised of any actions taken in response to the survey. These sort of disconnects between management and staff can be quite damaging.”²³⁹*

²³⁶ Ex B, p 401.

²³⁷ Ex B, p 404.

²³⁸ Ex B, p 411.

²³⁹ Ex B, pp 415-416.

221. The Interim Planning Function Review Report and the Final Planning Function Review Report on the planning function of Council authored by Malcom Ryan²⁴⁰, included the following conclusions/observations²⁴¹:

- i. Themes from interviews with staff included *“Interference by Councillors to pre-determine recommendations especially on Planning Proposals”*, *“Poor or no leadership from senior staff and the elected council which manifests in lack of trust in their decision making and a lack of authority to make decisions”*, and *“Inconsistency between various strategic policies of Council, such as Council’s position to promote tourism and the contents of the Local Environmental Plan (LEP) that effectively prohibits those land uses”*²⁴²;
- ii. Observations from the public included: *“Outcomes on applications appear to be different for people who are seen to be friends of Councillors or senior staff”*, *“no commitment to any of the normal ideals of customer service”*, *“Inconsistent processes and outcomes”*, and *“Staff look tired and stressed”*²⁴³;
- iii. Observations made by Mr Ryan included: *“Poor leadership from all levels of senior management has left the planning staff without a framework to operate in and results in inconsistent processes and objectives”*, *“well documented applications where senior staff have directed staff on how to formulate their recommendations”*; *“Staff are stressed and overworked largely due to the high number of vacant positions”*; *“There seems to be a disconnect between Council’s strategic goals and priorities and the statutory planning instruments”*; and *“The compliance function of Council appears to be spread very thinly across several teams, resulting in a perception from the community that actions are not consistent or non-existent”*²⁴⁴;
- iv. *“There appears to be a very limited adherence by the elected council and senior staff to the normal pillars of the Local Government Act regarding the relationship between Councillors and staff. The use of the Code of Conduct, declaration of Interests in planning matters and detailed and comprehensive communication with the community are not seen to be adhered to by staff or the community.”*²⁴⁵;

²⁴⁰ Ex B, pp 426-433 (Interim Report dated June 2021) and pp 434- 446 (Righting the Wrongs Report dated 27 July 2021).

²⁴¹ This summary is not intended to be exhaustive.

²⁴² Ex B, p 435.

²⁴³ Ex B, p 436.

²⁴⁴ Ex B, p 437.

²⁴⁵ Ex B, p 438.

- v. "...there appears to be a complete lack of any serious commitment to even the most basic strategic planning functions."²⁴⁶;
- vi. "The general opinion is that the salaries and the working conditions are not attractive enough to retain good staff. In the past Council has relied on the attractive lifestyle available in the area to attract staff. The price of housing and now the reputation of Council longer works in its favour."²⁴⁷;
- vii. "The most common issue raised in all the submissions was the poor customer service. Even the simplest request such as returning phone calls, answering correspondence and polite interactions at the front counter were raised as issues. This also applied to the senior staff in the planning function and onto the previous GM."²⁴⁸;
- viii. "There were comments about the undue influence some Councillors appeared to have on application outcomes."²⁴⁹

Purchase Card Review Report

222. The Purchase Card Review Report prepared by Finch Consulting²⁵⁰ revealed that there were shortfalls in policy compliance in relation to the use of purchase cards²⁵¹.

Tourism and Economic Development Branch Expenditure Review Report

223. The Tourism and Economic Development Branch Expenditure Review Report prepared by Finch Consulting²⁵², identified various examples of non-compliance with procurement guidelines by that branch²⁵³.

Review of Council Finances Report

224. The Review of Council Finances Report prepared by Finch Consulting²⁵⁴ contained the following conclusions/observations (including that the Council's overall financial position was "sound"²⁵⁵):

- i. As to past financial performance²⁵⁶:

²⁴⁶ Ex B, p 438.

²⁴⁷ Ex B, p 440.

²⁴⁸ Ex B, p 441.

²⁴⁹ Ex B, p 443.

²⁵⁰ Ex B, pp 447-452.

²⁵¹ Ex B, pp 448-451.

²⁵² Ex B, pp 453-460.

²⁵³ This summary is not intended to be exhaustive.

²⁵⁴ Ex B, pp 598ff.

²⁵⁵ Ex B, p 599.

²⁵⁶ Ex B, p 599.

- “• Council’s audited Financial Statements for the last five years reported consolidated Operating Surpluses (before capital grants and contributions). A disaggregation of these results by Fund reveals that whilst Water and Sewer funds recorded surpluses, the General Fund recorded Operating Deficits over the same period.
 - Past operating results in the General Fund have restricted Council’s capacity to fully fund asset replacement and renewal and achieve published benchmarks for asset renewals. Published Infrastructure condition indicators reveal that the condition of key infrastructure assets has also declined over this five year period.
 - Financial sustainability and the capacity to maintain and renew infrastructure was recognised by Council in 2016 and prompted a successful application to IPART for a Special Rate Variation (SRV) which would increase general rate revenue by 45% over five years and fund projects outlined in the 2017-2027 Resourcing Strategy.
 - Delays in the delivery of maintenance and capital programs has contributed to Council not fully achieving the goals of the Resourcing Strategy.”
- ii. “The Long Term Financial Plan is projecting that both General and Sewer Funds will achieve operating surpluses for the next five years, whereas the Water fund will operate in deficit. We understand that the 2021/22 draft budget will address this issue.”²⁵⁷
- iii. “Council has not fully achieved the planned capital and operating expenditure targets nor the reduction in operating deficits proposed in the IPART Determination. The shortfall in expenditure on SRV projects of \$5.2m has been set aside in the Investing in Our Future reserve.”²⁵⁸
- iv. As to the Civic Centre Project²⁵⁹:
- “• The Office of Local Government Expenditure Review Guidelines require Council to submit an Expenditure Review (business case) before commencing the project. The Expenditure Review document lodged by Council, the week before acceptance of the prime tender for the project, was not tabled for consideration or approval of the elected Council.
 - Governance oversight and management reporting on this significant and potentially contentious project between 2016 and 2019 lacked transparency.
 - Whilst reporting to the elected Council on expenditure and funding approval may not have been fully open and transparent in the earlier years, it is apparent from our review that the elected body approved the total expenditure of the Civic Centre project via adoption of Operating Plans and approval of Revotes.”

²⁵⁷ Ex B, p 600.

²⁵⁸ Ex B, p 600.

²⁵⁹ Ex B, p 601.

Economic Development Roundtable Report

225. On 25 June 2021, KPMG facilitated an Economic Development Roundtable with representatives of various bodies with an interest in the economic development of the region and a cross-section of interested individuals²⁶⁰.

226. The “*key themes*” shared by participants and identified in the Economic Development Roundtable Report included a perceived weakness in the approach of the Council to economic development. The recorded feedback included:

- “• *A high level of dissatisfaction with the Destination Strategy, its factual accuracy and its lack of interaction with other policies/strategies and its lack of defined actions;*
- *A view that council, through its published strategies, the actions and interpretations of its officers and its culture is anti-development;*
- *A significant issue for the region is housing affordability and diversity, and this is impacting on the availability of appropriate staff in many sectors, particularly tourism and hospitality;*
- *Similarly transport infrastructure, both connecting and bypassing townships and communities, is lacking or poorly maintained; and*
- *The Tourism strategy should be separate from, or a subset of, a broad-based Economic Development Strategy.”*

227. Various recommendations were made by KPMG following the roundtable to improve Council’s performance in those areas.

Relatively insubstantial issues?

228. In the 30 March 2022 Media Release, Clr Gair was quoted as stating that “*the plethora of reports commissioned by the Interim Administrator revealed relatively insubstantial issues*” (**30 March 2022 Media Release**)²⁶¹. Troublingly, that statement was made in circumstances where Clr Gair had not read the reports²⁶². Of those who joined in the 30 March 2022 Media Release, and who also adopted that statement, (i.e., each of Clrs Gair, McLaughlin, Nelson, Andrews and former Clr Markwart) only former Clr Markwart had reviewed some (but not all) of them²⁶³.

²⁶⁰ Ex J.

²⁶¹ Ex O, p 5.

²⁶² T1414-1415 (Clr Gair).

²⁶³ See, e.g., T694.42-695.14 (former Clr Markwart); T1102.11-39 (Clr McLaughlin); T1172.41-1174.40 (Clr Nelson); T1053.38-14054.14 (Clr Andrews).

229. I return to the 30 March 2022 Media Release in more detail below, but it is convenient to set out the Interim Administrator's response to that suggestion that the reports revealed "*relatively insubstantial issues*"²⁶⁴:

"Q. *I had in my mind before morning tea, I think you used the word, it's a jigsaw puzzle, you put it all together to enable an overarching view; is that how I understand you see it?*

A. *Yes.*

Q. *And when looked at as the whole, including the bushfire report, because it's part of it, what do you say to the proposition, when viewed as a whole, those reports taken together disclose relatively insubstantial issues?*

A. *Well, I could have a one word answer, but I just think it shows a lack of understanding of what the roles and responsibilities of the council are, at both levels.*

Q. *Both levels, you mean councillor and operational staff?*

A. *Executive staff."*

230. While the individual significance of some of the matters identified in those reports could be said to be minor, and some of the reports identify positive aspects of the Council's performance (including the overall assessment of the Council's financial position in the Review of Council Finances Report), when viewed as a whole, the various issues identified in those reports are not appropriately described as being "*relatively insubstantial*". For example, in my view the conclusion in the Governance, HR and Statutory Reporting review report that "*The long term effects of organisational dysfunction on the individual employees can have a significant effect on moral [sic] and productivity, but more importantly can take a large personal toll on the dedicated and committed staff of the council*" cannot reasonably be described as an "*insubstantial issue*".

231. Another suggestion made in the 30 March 2020 Media Release was that the reports were commissioned by the Interim Administrator as an *ex post facto* attempt to find a "*smoking gun*" that justified the suspension of the Council²⁶⁵. Clr Andrews, gave evidence that he did not agree with that statement²⁶⁶. Other Councillors who joined in the 30 March Press Release agreed with and adopted it²⁶⁷. That was plainly not the purpose of the reports. The "*smoking gun*" theory advanced in the 30 March 2022 Media Release finds no support in the evidence²⁶⁸.

²⁶⁴ T542.5-17.

²⁶⁵ Ex O.

²⁶⁶ T1053.16-30, 1055.18-20 (Clr Andrews).

²⁶⁷ T696.6-47 (former Clr Markwart); T1102.19-25 (Clr McLaughlin); T1172.46-1173.4 (Clr Nelson).

²⁶⁸ Clr Nelson repeated it in his final submissions, stating "*if I was spending \$115,000 on reports about the council I would want to find the council guilty as charged*": Nelson 30 May 2022 Submission, p 14. In my view, that submission, like the smoking gun theory generally, is conspiracy based speculation which finds no support in fact.

The Small Business Commissioner's Report

232. In June 2021, the New South Wales Small Business Commissioner published a report titled “*Small Business Consultation: Wingecarribee Shire Council*”²⁶⁹ (**Small Business Commissioner's Report**).
233. Following the suspension of the 2016 Council, the then New South Wales Minister for Finance and Small Business asked the NSW Small Business Commissioner to consult with small business about their experience with the Council. Following that referral, the NSW Small Business Commissioner conducted a consultation process with a range of businesses, including by developing and conducting a survey of small businesses within the Shire²⁷⁰. Ultimately, the Small Business Commissioner made a number of recommendations²⁷¹.
234. A majority of respondents to the online survey conducted by the Small Business Commissioner were dissatisfied with the Council's promotion of economic development and favourable conditions for small business in the area, and 65% were either dissatisfied or very dissatisfied. Only 7% of respondents were satisfied or very satisfied²⁷².
235. Of relevance to the Terms of Reference were the following themes identified by the Small Business Commissioner identifying “*challenges*” that respondents to the survey had encountered when dealing with Council over the previous two years. Those themes included the following matters²⁷³:
- “• *Council took an adversarial approach when dealing with small businesses*
 - *councillors and council staff have their own agenda which is different to ratepayers*
 - *local economic development was not valued, or its commercial assets appreciated*
 - *DAs were required for minor activities*
 - *there were delays from Council in responding to matters*
 - *Council was generally unprofessional and not effective at planning for the future*
 - *there was poor communication from Council*
 - *Council 'kicked the can down the road' on important challenges that need to be addressed*
 - *development charges were not consistent for similar developments and in some instances prohibitive*

²⁶⁹ Ex B, p 461-483.

²⁷⁰ Ex B, p 463.

²⁷¹ Ex B, pp 465-466.

²⁷² Ex B, p 469.

²⁷³ Ex B, p 471.

- *high staff turnover and in some instances the inexperience of council staff have had a negative impact on small business.*"

236. Feedback from consultation conducted by the Small Business Commissioner included the following:

- i. *"A lack of transparency and consistency led to businesses speculating there is favouritism in the prioritisation process."*²⁷⁴
- ii. *"It was reported that the reasons for rejecting applications or requests seemed unclear, unreasonable, or unprofessional to businesses. For example, it could be that councillors 'didn't like' an idea despite council staff seeming supportive and the application satisfying the relevant requirements. It was also suggested that council staff were reluctant to take responsibility or make decisions given the potential for them not to be supported by senior executives or councillors."*²⁷⁵
- iii. *"Businesses described Council as seeming to shut down opportunities—even those connected with priority segments like tourism—without working with applicants to identify alternative solutions. Businesses perceive that Council does not consider the social and economic benefits of opportunities and will not assess the merits of proposals through a cost-benefit lens."*
- iv. *"Participants and survey respondents indicated there is a lack of formal or regular stakeholder engagement with businesses or business chambers and a lack of an effective engagement plan(s) to seek input from the community."*²⁷⁶
- v. *"Stakeholders advised their view that Council's strategic plans do not deliver clear thinking about the future, outline how outcomes will be achieved or give appropriate focus to small businesses which are rarely mentioned in strategic documents. The Southern Highlands Destination Plan 2020 2030 was referred to as having insufficient opportunity for industry input and for not including clear actions for implementation or key performance indicators."*²⁷⁷

237. The report identified recommendations and opportunities for the Council to further support small business within the Shire²⁷⁸.

²⁷⁴ Ex B, p 472.

²⁷⁵ Ex B, p 472.

²⁷⁶ Ex B, p 473.

²⁷⁷ Ex B, p 474.

²⁷⁸ Ex B, pp 476-480.

238. The observations and conclusions in that report were consistent with evidence of witnesses who are engaged or involved with business in the Shire²⁷⁹.

The Corporate Relations Service Review

239. In September 2021, KPMG issues its report following its review of the Council's Corporate Relations Service (Corporate Relations Service Review Report)²⁸⁰.

240. The "Executive Summary/Key Findings" records the following conclusions²⁸¹:

- i. *"The current Communications & Community Engagement strategies are not regarded as fit-for-purpose. The strategies do not establish clear objectives and do not offer specific implementation activities for how the service will support the achievement of Council's Community Strategic Plan."*
- ii. *"The strategies appear rolled over year-on-year with minimal reflection on the current operating conditions, renewed service aspirations or dynamic stakeholder needs."*
- iii. *"With ill-defined strategic objectives and a lack of assigned responsibility or targets to measure execution, the function has fallen into a reactive operating rhythm, and an inability to prioritise service delivery that matters."*
- iv. *"There are no planned or proactive crisis management activities including deliberate reputation management, despite it being a critical need. The community is interpreting the silence as a lack of honesty and transparency."*
- v. *"The fragmented service delivery is evident to the community, and in combination with the silence on the current crisis, it leads to a further erosion of trust."*
- vi. *"The Corporate Relations service delivery focus is narrow, with the residents, local journalists and internal project managers as the target audience. The service is therefore not able to appropriately respond and manage conflicting stakeholder priorities."*
- vii. *"Current activities appear to be informed by generalised assumptions about what the community wants and needs, with little evidence-based analysis of the community input."*

²⁷⁹ See, e.g., T67.8-70.1, 71.14-73.24, 74.21-89.10 (Horton); T241.40-244.13, 246.39-247.43, 248.21-252.17, 253.6-254.32, 258.10-260.42 (Bourne); T320.9-324.13, 325.10-329.28 (Kennedy).

²⁸⁰ Ex LL.

²⁸¹ Ex LL, p 6.

- viii. *“The downward community satisfaction trend identified in the community research reports highlights this fundamental mismatch between the current service design and the community needs.”*

2021 Community Satisfaction Survey

241. In February 2021, Micromex provided its report of the community satisfaction survey it conducted between 1 and 4 February 2021²⁸². The results of that survey were not released prior to the Suspension Order but were released by Mr McMahon during the period in which he was the Acting General Manager²⁸³.
242. The Community Satisfaction Survey is an integral part of the integrated planning and reporting framework in that it informs the Council of the community’s priorities and provides a metric against which the Council can assess its performance against its current strategic plans, as well as identifying new areas of focus²⁸⁴. They are an important tool used by councils to measure their own performance²⁸⁵. The significance of a community satisfaction survey was aptly summarised by Mr Ryan as follows: *“A satisfaction survey is something that council and senior staff should live on because that’s proof that they’re doing their job or they’re not doing their job.”*²⁸⁶
243. The 2021 survey results reveal a sharp decline in satisfaction in the overall performance of the Council and the performance of the Councillors. In this respect, the following page records the overall satisfaction results²⁸⁷:

²⁸² Ex B, pp 484-597.

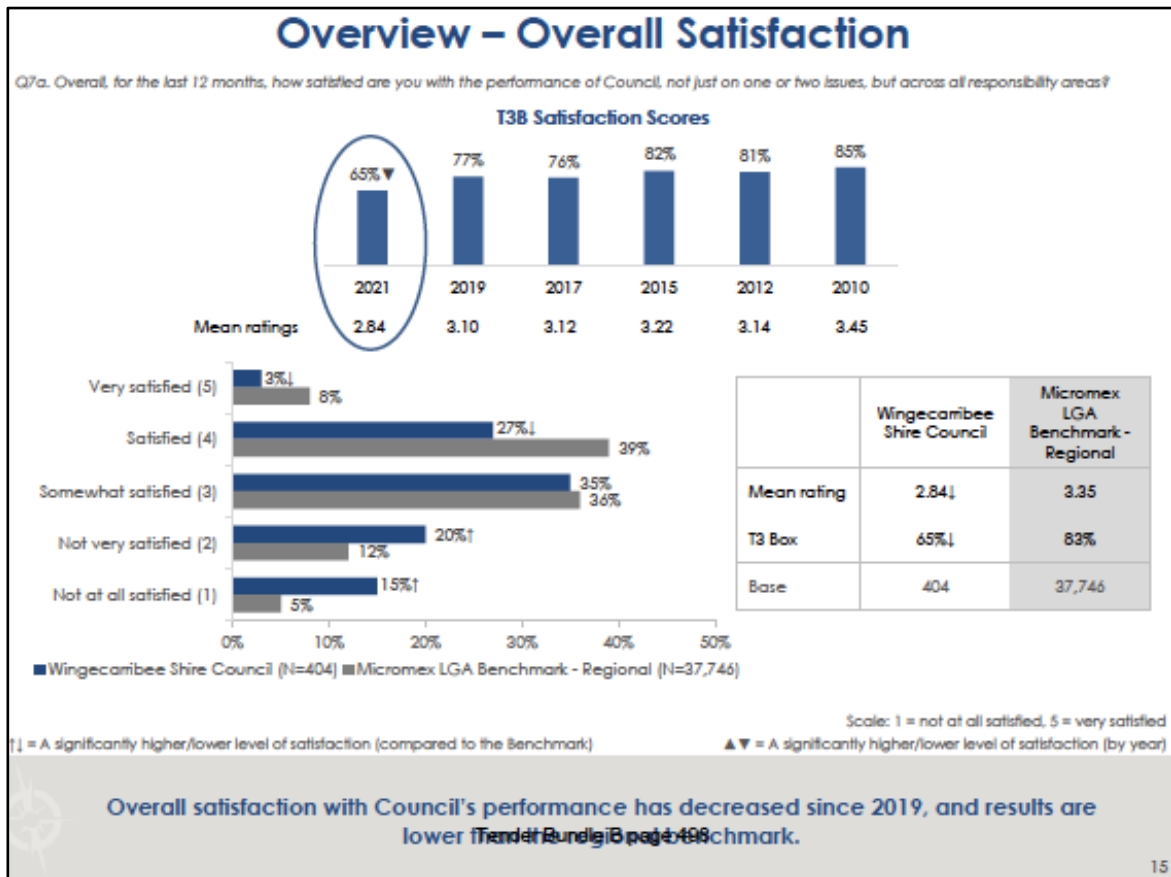
²⁸³ T564.3-565.1 (May); T 750.14-31 (Ryan).

²⁸⁴ T1483.3-1484.14 (Miscamble).

²⁸⁵ T561.43-562.18 (May).

²⁸⁶ T751.47-752.3 (Ryan).

²⁸⁷ Ex B, p 498.



244. A number of matters of significance arise from those results, including that:

- i. The survey expressly asked respondents to rate their overall satisfaction with the performance of the Council, across all areas, not just in relation to one or two issues;
- ii. The trend in the result records a 20% decline in satisfaction over 11 years, with 17% of that arising between 2015 and 2021;
- iii. The results place the Council well below the benchmark scores;
- iv. The significant areas of change from previous results are the marked increase in respondents in the “not at all satisfied” and “not very satisfied” categories, with the corresponding decline in those rating their satisfaction at “very satisfied” or “satisfied”.

245. Those results were described as “very low” by the Interim Administrator who was of the view the overall satisfaction score “should be much higher than that”²⁸⁸. Mr Ryan described the drop in satisfaction from 82% to 65% as an “appalling” and “terrible” result²⁸⁹, indicative of “one of the least satisfied communities in the state”²⁹⁰.

²⁸⁸ TT562.24-41 (May).

²⁸⁹ T751.25-32, 752,10-24 (Ryan).

²⁹⁰ T752.26-32 (Ryan).

246. The survey also revealed a significant decline over the same period in other relevant performance metrics, including the rating of:

- i. the “*Council’s Image within the community*”, which had fallen to 25% and was well below the benchmark of 61%²⁹¹;
- ii. the performance of elected councillors, with 51% of respondents responding that they were “*not very satisfied*” or “*not at all satisfied*” with the performance of the Councillors elected in September 2016, reflecting a steady decline in that category between 2017 and 2019²⁹²; and
- iii. the satisfaction with the Council’s communication, which had fallen to 68%, well below the benchmark of 80%, and had also declined significantly between 2019 and 2021 (and had declined steadily since 2012)²⁹³.

247. It is not just the score for the survey that is important, but the trend over time is also significant as that trend reflects the long-term view of the community as to the relevant performance measure²⁹⁴. The relevant trend indicated a declining view within the community of the performance of the Council overall, and the performance of the elected Councillors. However, as Clr Gair observed during his evidence, those results reveal that at least a proportion of the community was, to some extent, satisfied with the overall performance of the Council and the councillors²⁹⁵.

248. Clrs Gair and Nelson, and former Clr Markwart sought to explain those results as being attributable to the particular issues facing the Council in the lead up to the survey, including the 2019/2020 Bushfires, the COVID-19 pandemic, and the Station Street Development²⁹⁶. In my view, however, the objective data driving those results suggests a decrease in satisfaction over a sustained period, which must necessarily include a consideration of how the Council and the Councillors responded to those significant issues within the Shire. That is, the decrease in satisfaction seen in the 2021 Community Satisfaction Survey was, at least in part, informed by the handling of those important issues by the Council and the Councillors.

249. However, not all aspects of the Council’s performance were seen by the community in a negative light. There were aspects of the Council’s performance where satisfaction was high or had improved since the previous survey. Those areas include waste collection,

²⁹¹ Ex B, p 500.

²⁹² Ex B, p 503.

²⁹³ Ex B, p 523.

²⁹⁴ T567.27-37 (May).

²⁹⁵ T1401-1403 (Clr Gair).

²⁹⁶ T1397.16-1401.44 (Clr Gair); Nelson 30 May 2022 Final Submission, pp 16-17; Markwart 23 May 2022 Final Submission, pp 7-8, and 43-44.

maintenance of local parks and gardens, and town drinking water quality²⁹⁷. In that context, it is significant that the two largest “*key drivers*” which contributed to the overall satisfaction score were the low satisfaction levels with the Council’s level of communication and the performance of the Councillors²⁹⁸.

Workplace Wellbeing Surveys

250. In 2017 and 2019 the Council conducted Workplace Wellbeing Surveys²⁹⁹. For reasons not fully explained in the evidence, the 2019 Survey was not released to staff prior to the Suspension Order.

2017 Staff Wellbeing Survey

251. The 2017 Staff Wellbeing Survey Report identified the impact of councillor behaviour on the broader organisation in several respects. Under the heading “*Politics creates instability*” the 2017 Staff Survey Report stated (emphasis added)³⁰⁰:

*“As already referenced in the Leadership factor, **Councillors’ urgent, high profile and highly political requests, many of which attempt to circumvent appropriate systems and controls for getting work done, creates constant instability and issues with workflow. This factor was noted across all levels and job types within Council and was identified as causing high stress, confusion, and resentment about staffing or other resources being urgently re-directed to accommodate these requests, many of which are not consistent with Council’s formal operational plans and with the team’s priorities.***

...

*The **need to ‘stop Councillor interference’** and better manage these requests was consistently identified as **a high priority action by staff if their well being and pride in being an employee of Council was to be improved.**”*

252. Councillor behaviour was also referenced in the context of “*workplace bullying*”. In that respect, the stakeholder responses included “*Bullying and harassment by councillors is an issue and their poor behaviour in general*”³⁰¹. The most detailed consideration of the conduct of Councillors in the 2017 Survey was in the context of the identification of “*Additional Psychosocial factors relevant to WSC*”, and which were described as “*key hazards for WSC*”³⁰². They warrant repeating in the body of this Report³⁰³:

“Political interference by councillors was a recurring issue at all focus groups.

²⁹⁷ See, e.g., Ex B, p 505. See also, Ex B, p 518.

²⁹⁸ Ex B, pp 513, 515.

²⁹⁹ Ex NN and Ex OO.

³⁰⁰ EX NN, p 35.

³⁰¹ Ex NN, p 39.

³⁰² Ex NN, p 44.

³⁰³ Ex NN, pp 47-48.

Where residents complain directly to councillors, this gets picked up immediately and made a priority, despite perhaps being relatively minor compared to other work the council needs to do or has set for itself. **Roughly half of one Focus Group agreed that councillors have a direct impact on their workflow personally**, though it was noted that issues of managers being overworked and other 'flow down' problems caused by **this means everyone is at least indirectly affected in some way**.

"If a councillor or the mayor hears a complaint, gets a Facebook message, it becomes the immediate top priority. The GM's get pulled into this, needing to discuss a matter that's not important at all. Completely reactionary all the time, and filters down the organisation entirely."

"I get emailed directly by councillors [when I shouldn't be, as a direct manager]. And I forward that to higher-ups [as per proper procedure]. But it's tough because, it becomes this 'quick, drop everything and put the fire out: And in 10 min I'm getting another phone call if it's not done."

"The issue I have in my area is the political interference, and very suddenly what you're doing and what your team is doing needs to change suddenly."

"For my team, we're used to operating in that space, **but you do get to the point where you've got an overworked, frustrated team because you change direction so suddenly**. Noted that recruitment needs to emphasise political savvy"

...

Councillors can also have disputes between themselves that hinders council work and output.

"It's no secret that the councillors aren't holding hands. Some people say 'my job isn't affected by the councillors'. It is. Pressure comes from the top down every day"

"Political promises & campaign points can become prioritised despite them not being feasible or realistic. "

Many staff opine that Senior management need to more in terms of 'push back' against councillors who try to interfere directly. It's understood a new policy is being drafted and procedures being put in place, but these have not impacted work as yet.

"Senior management isn't forcing councillors to follow proper procedure, getting it through the channel. No one has a backbone to tell them. "

"It's just frustrating that we spend all this time and effort establishing the systems [to regulate requests and stop direct interference] and they don't get used"

In addition, **Council needs to do more to enrol Councillors in 'backing' Council staff when residents complain to them rather than automatically blaming them as blame erodes pride and aggravates divisiveness between Council staff and Councillors."**

The 2019 Staff Wellbeing Survey

253. On 11 June 2019, Communicorp issued its final report following the Workplace Wellbeing Survey conducted during March and April 2019 (**2019 Staff Wellbeing Survey Report**)³⁰⁴.
254. Like the 2017 Staff Wellbeing Survey Report, the 2019 Staff Wellbeing survey report dealt with a variety of issues within the organisation, including the impact of Councillor behaviour and interactions. As to that issue, the 2019 Staff Wellbeing Survey Report included the following conclusions.
255. Under a consideration of “*bullying and harassment*”, one theme identified in the responses to the survey was that “*Respondents identified that bullying and harassment is verbally discouraged, however, still occurs. It appears that this behaviour is being modelled by senior management and that workplace incivility is being tolerated. As previously identified, this poses a significant risk for WSC.*”³⁰⁵ In that context, the report set out the following response dealing expressly with the behaviour of Councillors³⁰⁶: “*Aggressive bullying behaviour by a small number of councillors is very destructive to staff morale and takes a high toll mentally.*”
256. In considering “*councillor interaction*”, the report included the following analysis (emphasis added)³⁰⁷:

*“Of those who responded to the survey, very few individuals reported having regular contact with Councillors (13%); however, it appears that a greater number of respondents' workflow is influenced by Councillor requests. This is evidenced by **20% of respondents indicating that requests from Councillors impacts their daily workload; 19% of respondents agreeing that Councillor requests often disrupt workflow and 26% of respondents agreeing that Councillors bypass current Council procedure.***

*Additionally, **12% of respondents identified that Councillor involvement negatively impacts on personal well being. Twenty percent of those who answered also identified that Councillor involvement increases workplace stress.***”

257. The “*response themes*” in relation to the “*impact of councillor interaction*” recorded the impact of Councillor requests, and attempts to get involved in operational matters, including (emphasis added)³⁰⁸:

“There is a long standing culture at WSC for Councillors to bypass the normal Customer request system and in some cases to actively use minor operational matters as a means to criticize and to get involved in operational matters. This

³⁰⁴ Ex OO, p 3.

³⁰⁵ Ex OO, p 35.

³⁰⁶ Ex OO, p 35.

³⁰⁷ Ex OO, p 47.

³⁰⁸ Ex OO, p 47.

type of behaviour creates inequities in how matters are prioritized and in some cases ignore organisational process and distort priorities.”

...

*“If we get a request for work or a certain job it seems that it is said “the councillors said to get it done immediately” or the GM said this has to be done. We are then **pulled from our normal work load and it is a case of they said jump and we have to say how high straight away.**”*

*“**When Councillors want something done we drop everything and do it, irrespective of what it is.**”*

258. As to the ability to manage Councillor requests and other interactions, the procedures available to staff were described as “*ineffective*”. There was a view held by staff that they lacked the ability to “*push back*” against inappropriate Councillor interactions, which is reflected in the following passage (emphasis added)³⁰⁹:

*“Code of Conduct is available however **staff are reluctant to pursue an issue against any Councillor as there is no protection** even if they are right in raising the issue.”*

...

***The Council is regularly ridiculed in the press and radio with at least one Councillor the focus of detrimental articles involving popular politics.** Staff know the facts but are unable to rebut the constant lies in social media.*

...

***External parties (Councillors) have a significant and direct influence on my role.** While I understand procedures are in place to ‘push back’ on these external parties - real world experience has shown this is not always achievable.”*

A “toxic” workplace?

259. The Council organisation was described by some as being “*toxic*” or having a “*toxic culture*”³¹⁰.

260. The descriptor of a “*toxic*” workplace or culture is capable of conveying different things to different people and is one that is heavily influenced by individual experience. For example, each of Mr Mooney, Mr Wilton, and Mr Paull resisted the notion that the council was a “*toxic*” workplace as that was not consistent with their own experience³¹¹. While I accept their evidence of their own experience, that does not mean that others would be wrong in describing aspects of their working environment as “*toxic*”.

261. While I do not think that the descriptor of “*toxic*” was, when used in the context of the Council, intended to convey that the entire organisation was “*toxic*” or affected by a “*toxic culture*”, it is

³⁰⁹ Ex OO, p 48.

³¹⁰ See, e.g., Ex B, pp 239-240, 251; Ex NN, p 32; Ex OO, p 21.

³¹¹ T169.17-30 (Wilton); T308.1-41 (Mooney); T829.3-25 (Paull).

plainly a label which can create confusion. Accordingly, it is not one that I intend to adopt in this Report.

262. However, it is necessary to identify some of the matters that informed the use of that label by some. In doing so, it is sufficient for the purposes of considering the Terms of Reference to observe that the evidence is overwhelming that there were aspects of behaviours within the organisation, including in particular within the 2016 Council (such as conduct during Council meetings and briefings, and in Councillor interactions with staff and each other), that had an adverse effect on at least some staff, including some who were described as being “*at the point of breaking*”³¹². Examples of that conduct are considered in more detail in the consideration of Term of Reference 1 below.
263. That Councillor behaviour was having an adverse effect on at least some staff was also accepted by the 2016 Council in its response to the Notice of Intention to Issue a Suspension Order³¹³. For example, inappropriate Councillor behaviour, including towards staff, was described by Clr Gair in a media release on 9 March 2021 as having been “*rightly highlighted ... as a major factor for the possible suspension order*”³¹⁴.
264. That is consistent with the results recorded in the Staff Wellbeing Survey Reports. In addition to the extracts concerning Councillor interaction with, and the impact of Councillor conduct on, staff, the 2019 Staff Wellbeing Survey included the following passage³¹⁵:

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

265. There was evidence that some Council staff were apprehensive about interactions with the Governing Body, and that the senior staff had to shield some staff members from that

³¹² See, e.g., Ex B, pp 239-240, 244-252, 379; Ex E, pp 2-5, 22, 24, 49-68, 83; Ex NN; Ex OO; T169.32-42 (Wilton); T282.1-21, 295.15-297.20, 301.22-304.13, 306.40-309.26 (Mooney); T426.40-428.34 (Burgess); T492.16-40 (McMahon); T532.39-534.10 (May); T803.19-806.37, 820.15-21, 828.29-829.1, 829.34-830.44 (Paull) T842.41-843.35 (Clr Whipper) T896.36-897.10 (Clr Scandrett); T1043.19-26 (Clr Andrews); T1266-1269, 1290.16-22 (former Clr Turland); T1406.29-47 (Clr Gair).

³¹³ Which expressly accepted the “*reasons for order*” which included that there were “*reputational and work, health and safety risks facing Council as a result of the behaviours of some Councillors*”.

³¹⁴ Ex E, p 24.

³¹⁵ Ex OO, p 19.

environment³¹⁶. There were also a number of incident reports in which staff detailed the effect of Councillor behaviour during meetings on them, and various other references in the evidence to the effect of Councillor behaviour on staff wellbeing³¹⁷.

266. While some members of staff were able to deal with interpersonal conflict with the result that it had limited adverse effect on them³¹⁸, in my view it should not be expected that Council staff should have to display enhanced levels of resilience in coping with inappropriate behaviours. There was a tendency in some witnesses to portray such behaviours as part and parcel of the challenge of working in local government, and that the staff got on with the job in face of it. That is no criticism of those witnesses – no doubt, they came to accept that as the norm. However, it is not the role of Council staff to merely accept and deal with such conduct in performing their role. In this context, Clr Gair gave the following evidence³¹⁹:

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

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

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

A. No.

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

A. Yes.”

267. Mr McMahon (the acting General Manager for about 12 weeks in the period after the Suspension Order had been issued³²⁰), gave evidence that:

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

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

Q. Can you describe what you mean by toxic?”

A. As a general manager joining this shire, there was lot of hearsay about how the council/councillors related to each other, how they ran the council. In my

³¹⁶ See e.g., T296.35-297.3 (Mooney); T428.10-30 (Burgess); T806.17-34 (Paull).

³¹⁷ Ex E, pp 54-68; Ex AAA.

³¹⁸ See, e.g., T169.44-170.3 (Wilton); T297.38-298.24 (Mooney).

³¹⁹ T1374.38ff (Clr Gair).

³²⁰ T491.45-47 (McMahon).

period of running the waste board on behalf of Wingecarribee, Wollondilly-Camden and Campbelltown as the regional waste board and in my period as director of works and general manager, I experienced six new general managers in that period of time and basically every term of council they seemed to have a new general manager, there was no consistency. So, there was this feeling inside the organisation that things weren't going well and, if it starts at the head, it runs all the way through the organisation then."

268. Following her appointment as General Manager of the Council, Ms Miscamble met with more than 70 staff between July and October 2021³²¹. Ms Miscamble gave the following evidence concerning those interactions (emphasis added)³²²:

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

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

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

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

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

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

269. Other observations made by staff were recorded by Ms Miscamble in her report entitled "Our Road Map: Moving Forward to Reset our Organisation" (**Road Map Report**), which was considered at the Ordinary Council Meeting on 16 March 2022³²³. The "most common themes" that arose from those interviews were described as "difficulty of the past and the negative

³²¹ Ex M, p 87.

³²² T1458.35-1459.21 (Miscamble).

³²³ Ex M.

*impact that the previous Council and some senior staff had on the performance of the Council and the organisation*³²⁴. Relevant, the comments made by staff which were recorded in the Road Map Report included:

- i. *“if an organisation can have PTSD I think we have got it”*³²⁵, and
- ii. *“councillors at the election – hopefully the new council will move forward in a positive way – as staff it has been difficult at times with the negative [sic] surrounding the whole council...”*³²⁶

270. Significantly, Mr Ryan described the Council as being *“quite a fearful workplace”*³²⁷.

271. Some of the Councillors accepted in their submissions that there had been bullying and other inappropriate conduct towards staff by some Councillors during the 2016 Term³²⁸. In this respect, Clr Nelson submitted that *“Council is not guilty of corruption or maladministration but we are at fault for letting bullying and misbehaviour to occur at information meetings and council meetings”*³²⁹.

272. A striking example of the failure to respond to that kind of conduct when it occurred, can be seen in the following passage of Clr Gair’s evidence in which he was asked about the conduct observed in clip 8 of Ex CC which former Clr Turland (on his own evidence) made comments in the nature of a threat towards the General Manager:

“Q. What, if any, action was taken in the meeting about that threat?”

A. No action as far as I’m aware.

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

A. No.

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

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

³²⁴ Ex M, p 87.

³²⁵ Ex M, p 87.

³²⁶ Ex M, p 99.

³²⁷ See, e.g., T733.5-11 (Ryan).

³²⁸ See, e.g., Markwart 23 May 2022 Final Submission, p 21; Nelson 30 May 2022 Final Submission, p 16.

³²⁹ Nelson 30 May 2022 Final Submission, p 16.

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

A. *That's a valid point.*

Q. *Do you think that more could have been done outside the Code of Conduct, outside complaints or representations to the Minister of the OLG on a simple human level to prevent bullying, harassment or threatening behaviour by members of the governing body towards staff?*

A. *I do. On hindsight, I do."*

273. In my view, the evidence supports a conclusion that the effect of the issues evident within the Governing Body had an effect on the wider organisation and that they were present and pervasive at the time the Suspension Order was issued. The effect included the negative impacts on staff morale and impacted the performance of their roles. Whilst that may not have been the experience for every employee, or every department, within the organisation, the evidence supports a conclusion that those matters extended beyond mere isolated examples or grievances identified by a small number of employees³³⁰. It also clearly demonstrates that there were "*reputational and work, health and safety risks facing Council*" because of the behaviours of some Councillors. The evidence also reveals that little, if anything, beyond Clr Gair's correspondence to the Minister and the OLG in March 2020 appears to have been done about that fact.

274. That such an environment existed is indicative that the Council was not fulfilling its obligation to be a "*responsible employer*", and for some the workplace was clearly not "*supportive*"³³¹.

Dysfunction in the 2016 Council

The 2016 Council was dysfunctional

275. The overwhelming weight of the evidence supports a finding that the 2016 Governing Body was affected by dysfunction. That evidence includes the following³³²:

- a. Clr Gair's statement in correspondence to the Minister that the Council was "*coming dysfunctional [sic]*"³³³;
- b. Clr Gair's statement in correspondence with the OLG that the behaviour of certain Councillors was "*impacting significantly on the well being of staff, other councillors and*

³³⁰ Cf T308.1-41 (Mooney).

³³¹ LGA, s 8A(i).

³³² This summary is not exhaustive, and many other references supporting this conclusion can be found in the totality of the evidence.

³³³ Ex E, p 69.

*myself, it is also impacting significantly on the staff and my ability to focus on the business of Council including responding to COVID-19 and bushfire recovery*³³⁴;

- c. Clr Gair's acceptance on several occasions during his evidence that there was dysfunction within the 2016 Council³³⁵;
- d. Clr Gair's evidence that there were reputational risks, dysfunction, and workplace safety issues of a kind identified in the Notice of Intention to Issue a Suspension Order subsisting at the time it was issued³³⁶;
- e. Clr McLaughlin's evidence that each of the circumstances identified in the Notice of Intention to issue a Performance Improvement Order remained in existence as at the date of the Suspension Order³³⁷;
- f. Clr McLaughlin's evidence that the dysfunction that was apparent in the 2012 term was not apparent in the first couple of years of the 2016 term, but the situation deteriorated thereafter³³⁸;
- g. Mr Paull's evidence that while the 2012 Council was the "*most dysfunctional council I have worked for*", the period towards the end of the 2016 Council was probably just as challenging³³⁹;
- h. Clr Andrews' evidence that following a period of reflection on the events of the 2016 Council, he came to the view that (emphasis added)³⁴⁰:

*"...once this was unfolded or has unfolded with the suspension, that there was no way that we could continue to operate while that was occurring. **We were, you know, the council - sorry, the eight elected members of the council was dysfunctional**"*

- i. Clr Nelson's evidence that some other Councillors used issues "*to cause a dysfunction in the council*"³⁴¹;
- j. Clr Scandrett's evidence that the 2016 Council had been dysfunctional, there was "*a general dysfunction in many of the council meetings*", and that the council had been

³³⁴ Ex E, p 83.

³³⁵ T1367.30-39, 1398.33-1399.8, 1406.29-40, 1422.24-26, 1422.47-1423.8 (Clr Gair).

³³⁶ T1422.36-1423.8 (Clr Gair).

³³⁷ T1100.46-1101.29 (Clr McLaughlin).

³³⁸ T1067.3-31 (Clr McLaughlin).

³³⁹ T796.3-34 (Paull).

³⁴⁰ T1057.39-43 (Clr Andrews).

³⁴¹ T1129.9-25 (Clr Nelson).

beset by dysfunction from at least 2018 onwards. He also accepted that his conduct played a part in that dysfunction³⁴²;

- k. former Clr Turland's evidence that the behaviour in Council meetings was dysfunctional, and the Council had become "*toxic*"³⁴³.
- l. Clr Whipper's evidence that there was a "*deliberate intent to bring dysfunction into the chamber*" by some Councillors³⁴⁴ and that the 2016 Term had become "*quite volatile*"³⁴⁵;
- m. Mr Mooney's evidence that during the 2016 Term there had been a "*greater focus on managing the politics than necessarily managing the business*" and that there was a "*larger focus in dealing with the dysfunctionality of council*"³⁴⁶.
- n. The resolution passed at the 24 August 2020 Extraordinary Meeting that accepted of the "*reasons for order*" and the proposed intervention set out by the Minister in the Notice of Intention to Issue a Performance Improvement Order³⁴⁷. That resolution constitutes an unqualified acceptance that there was dysfunction within the Governing Body;
- o. The statements by some of the Councillors during the 24 August 2020 Extraordinary Meeting set out above;
- p. The proposed notice of motion discussed during the pre-meeting briefing prior to the 9 March 2021 Extraordinary Meeting, which included the following³⁴⁸:

- | |
|---|
| <ol style="list-style-type: none">3. <u>THAT</u> Council notes that the majority of councillors adhered to the requirements of the Performance Improvement Order issued by the Minister on the 8 September 2020 and it's a minority of councillors that have not adhered to the requirements of this order.4. <u>THAT</u> Council notes that the majority of councillors adhered to the councillor agreements arising from the mediation workshop undertaken as a part of the Performance Improvement Order and it's a minority that have not adhered to these agreements.5. <u>THAT</u> Council acknowledge the bullying, harassment and intimidation of council staff and councillors is caused by a minority of Councillors.6. <u>THAT</u> concerns regarding the impact bullying, harassment and intimidation by a minority of Councillors was having a detrimental impact on the health and wellbeing of council staff and councillors. |
|---|

That motion was not proceeded with as it was considered "*too acrimonious*"³⁴⁹.

³⁴² T897.7-10; 931.23-36, 934.32-36, 963.28-964.21 (Clr Scandrett).

³⁴³ T1325.21-42 (former Clr Turland).

³⁴⁴ T840.26-35, 854.21-25 (Clr Whipper).

³⁴⁵ T835.15-23 (Clr Whipper).

³⁴⁶ T307.29-46 (Mooney).

³⁴⁷ Ex B, p11.

³⁴⁸ Ex E, p 22.

³⁴⁹ T1094.26-38 (Clr McLaughlin).

- q. On 9 March 2021, Clr Gair released a media release headed "*Mayor Gair calls for dysfunctional councillors to resign*" which refers to "*two dysfunctional councillors*" and expressly names Clr Scandrett as one of them³⁵⁰;
- r. The comments were made by a number of Councillors during the 9 March 2021 Extraordinary Meeting (considered above), which accepted that the Governing Body had become dysfunctional;
- s. The "*submission*" by the Governing Body on 9 March 2021 in response to the Notice of Intention to Issue a Suspension Order, including the statement that the following "*The Council call upon the Minister to reiterate that the vast majority of Councillors are not responsible for the dysfunction of Council as identified in her correspondence...*"³⁵¹. Nothing in that submission seeks to resist the propositions contained in the Notice of Intention to Issue a Suspension Order. At least those Councillors who voted in favour of the resolution (in identical terms) must be taken to have accepted that the circumstances identified by the Minister existed³⁵²;
- t. The Interim Administrator expressed the view that the 2016 Council was dysfunctional in the 10 May 2021 IA Report³⁵³;
- u. The presence of dysfunction within the 2016 Council was a theme which emerged in some of the independent reviews commissioned by the Interim Administrator³⁵⁴;
- v. Councillor behaviour at meetings was described by staff as being "*dysfunctional*"³⁵⁵; and
- w. There is ample evidence that there was a lack of trust between some Councillors, and between some Councillors and the senior staff of the Council³⁵⁶.

276. The evidence is conflicting as to whether the dysfunction that was evident in the 2016 Council was present from the outset, or whether it developed over time³⁵⁷. I have not found it necessary to resolve that issue. Whether it was present from the outset, emerged during the term, or was always present and worsened over time does not matter. The evidence overwhelmingly leads

³⁵⁰ Ex E, p 24.

³⁵¹ Ex B, pp 236-237.

³⁵² Albeit that Clr Whipper sought to draw a distinction between elements of the governing body and the whole.

³⁵³ See, e.g., Letter from the Interim Administrator to the Minister dated 10 May 2021: Ex B, pp 239-240; Interim Administrator Community Update: Ex B, p 781.

³⁵⁴ See, e.g., Wingecarribee Shire Council, Bushfire Response and Recovery Review 2021: Ex B, p 272 at 312, 371; Governance, Human Resources & Statutory Reporting at Wingecarribee Shire Council: Ex B, p 373 at 379

³⁵⁵ Incident Report dated 12 March 2020: Ex B, p 60.

³⁵⁶ This issue is referred to above and dealt with more detail below.

³⁵⁷ See, e.g., T657.10-20 (former Clr Markwart); T1057.27-43 (Clr Andrews); T1375.32-38, 1446.43-1447.12 (Clr Gair).

to the same conclusion – the 2016 Council was dysfunctional from no later than 2018 and continued to be so until the Suspension Order was issued.

277. Some of the Councillors advance the proposition that the dysfunction in the 2016 Council was attributable to “some” or a “minority” of Councillors only – namely former Clr Turland, Clr Scandrett and (to a lesser extent) former Clr Halstead. I address that argument in the context of a consideration of Term of Reference 1 below. However, on one view, it does not matter how the 2016 Council came to be dysfunctional. Even if I were to assume, without necessarily deciding, that the dysfunction was largely caused by the conduct of a minority of Councillors the evidence reveals that their conduct affected the functioning of the governing body as a whole³⁵⁸, and the wider organisation including the wellbeing of staff. It also affected the ability of the 2016 Council to perform its strategic role and diverted some senior staff from their primary roles to manage the politics playing out within the governing body³⁵⁹.

278. In my view, a dysfunctional governing body is not one that is well placed to meet its statutory obligations. That is the position in which the 2016 Council found itself.

279. Before leaving this issue, three features of the dysfunction in the 2016 Council warrant brief comment, those being: the relationships between the Councillors themselves, the relationships between at least some of the Councillors and some of the senior staff, and the relationship between the Governing Body and the community.

The relationship between members of the 2016 Governing Body

280. The overwhelming weight of the evidence reveals that there was a breakdown in the relationships between some of the Councillors³⁶⁰. One feature of that breakdown was a lack of trust between them. In this respect, Mr Reynolds concluded that “*There appears to be an intractable interpersonal conflict between several Councillors which impacts on both Council Meeting process and relations between some Councillors and Council Staff*”³⁶¹.

281. Mr Reynolds expanded on that conclusion in his evidence as follows (emphasis added)³⁶²:

“Q. ... *In respect of the third one: There appears to be an intractable interpersonal conflict between several Councillors which impacts both Council Meeting process and relations between some Councillors and Council Staff. Ongoing counselling to Councillors including the Mayor, (such as [the] ... [EAP]*

³⁵⁸ See, e.g., T671.9-34 (former Clr Markwart)

³⁵⁹ See, e.g., T307.29-46 (Mooney). The performance of the strategic role of the Councillors is dealt with below.

³⁶⁰ See e.g., T304.39-42 (Mooney); T1016.16-23 (Clr Scandrett); T1043.9-1044.27 (Clr Andrews); T1069.14-1070.23 (Clr McLaughlin); T1260.4-20, 1282.46-1283.3, 1318.41-47 (former Clr Turland); T1343.30-32 (Clr Gair).

³⁶¹ Ex B, p 221.

³⁶² T619.21-620.12 (Reynolds).

program); may be desirable to manage this circumstance on an ongoing basis. Can you tell me about how you came to that impression, without having to detail individual conversations that you had?

- A. Yes, my general impression across the time that I was there was that there were - **there appeared to be significant levels of mistrust between two groups of councillors, four on one "side", three on the other with one a floater. ... my observation was that there appeared to be a level of distrust between the two groups of councillors... And that, whilst there'd been mediation training and I commented on process improvements for them, neither of those initiatives, if I can use that word, appeared likely to address that underlying level of distrust.**"

282. A symptom of that breakdown in the relationship was that the Councillors stopped socialising together following council meetings. Former Clr Turland's evidence was that during the 2016 term, he was no longer invited to dinner with other councillors after council meetings from about 2018 onwards and things had "*deteriorated to the point we weren't welcome*". Clr Nelson's evidence was that former Clr Halstead stopped attending due to health reasons (for which no criticism is made of him) and that Clr Scandrett only attended one dinner³⁶³.

283. As I understand it, gatherings of that kind are (or at least have been) a common feature in local government. They provide an opportunity for councillors to spend time together away from formal council business and provides a forum for tensions to subside and for relationships to be developed and nurtured³⁶⁴. That even a few of the Councillors were either not invited or did not participate (it does not matter which) is a symptom of the lack of cohesion in the governing body, consistent with Mr Reynolds' evidence. It does not matter how or why that lack of cohesion occurred. The issue is that it had become entrenched in the 2016 Council.

284. The lack of cohesion and unity within the 2016 Council was also obvious to the wider community. For example, Mr Bourne gave evidence that "*it was well-known and its well documented in the press over many years, there were personal conflicts between elected councillors that weren't productive*" and that "*there did not seem to be a united culture within the elected councillors, that they were all working for their community, it seemed to be about personal preferences and maybe some disputes they had internally*"³⁶⁵. It was also obvious to Council staff, as the responses recorded in the Staff Wellbeing Surveys considered above reveal.

285. Part of that conflict within the Governing Body was reflected in evidence given by some Councillors that there had been interactions between them that they would characterise as

³⁶³ T 1114.8-14 (Clr Nelson).

³⁶⁴ T1113.46-1114.25 (Clr Nelson).

³⁶⁵ T255.2-23 (Bourne).

bullying³⁶⁶. One such example, was raised by Clr Scandrett concerning the existence of an 8:1 voting pattern, in which he was in the minority.

286. In his evidence, Clr Scandrett described that voting pattern as bullying³⁶⁷. A witness who observed it, suggested it was “undemocratic”³⁶⁸. Even if there was an established 8:1 voting pattern, I would not conclude that, in and of itself, it amounted to “bullying”, nor was it “undemocratic”. As Clr Gair submits (correctly in my view), when it did occur, the most obvious reason was because the other members of the Governing Body simply did not support the proposal advanced by Clr Scandrett³⁶⁹. Further, a review of the minutes of Council meetings during the 2016 Term reveals that many matters did not fall along those lines (discernible because of Clr Scandrett’s preference for having his dissenting vote recorded)³⁷⁰. That there is a minority within a collective decision making body is nothing out of the ordinary of itself – that is an ordinary feature of the democratic process. Much more is required before that circumstance could be said to constitute “bullying”.

287. Having regard to the evidence, I agree with Mr Reynolds’ assessment that there was “irretractable interpersonal conflict between several Councillors which impacts both council meeting process and relations between some Councillors and Council Staff”³⁷¹. There is nothing to suggest that those relationships are likely to be repaired.

The relationship between some Councillors and some of the senior staff

288. As set out above, there was ample evidence that there had been a breakdown in trust between some of the Councillors and some of the senior staff³⁷². The breakdown of that trust is significant as it is matter, of itself, that can adversely impact on the ability of a council to function effectively, and lead to dysfunction³⁷³. Put simply, an absence of trust between senior staff and members of the governing body makes it very difficult for a council to effectively meet its statutory obligations³⁷⁴.

³⁶⁶ See, e.g., T892.22-894.12, 996.38-998.42, 1001.45-1003.2 (Clr Scandrett); T10137.43-47 (Clr Andrews); T1126.3-46 (Clr Nelson).

³⁶⁷ See, e.g., T884.37-43, 892.22-36 (Clr Scandrett).

³⁶⁸ T196.3-197.5 (Wilson).

³⁶⁹ Gair 23 May 2022 Final Submission, sub-para (i). See also Nelson 30 May 2002 Final Submission, pp 5-6.

³⁷⁰ See generally, Ex F. T928.6-17 (Clr Scandrett).

³⁷¹ Ex B, p 221.

³⁷² See, e.g., T178.12-43 (Wilton); T503.16-43 (McMahon); T620.2-12 (Reynolds); T799.45-800.8, 831.11-26 (Paull), T1319.45-1322.16, 1325.21-24 (former Clr Turland).

³⁷³ See, e.g., T502.4-503.43 (McMahon); T830.46-831.9 (Paull).

³⁷⁴ T1495.23-28 (Miscamble).

289. The importance of trusting relationships between the governing body and senior staff was aptly described by Ms Miscamble as “critical”³⁷⁵, and that a lack of trust that manifests in public exchanges³⁷⁶:

“...can undermine the decision-making process, it can create uncertainty, it sets a tone: you know, you want a productive, healthy, safe, happy workplace and when relationships and interactions aren't respectful or trustworthy - you know, they don't demonstrate trust, again, that undermines that productive and happy culture. It maybe has the potential to limit the extent of advice that can be provided if staff feel that they're going to be criticised or torn apart for giving professional advice, it can make them hesitant.”

290. Ms Miscamble went on to describe that an environment of that kind (emphasis added)³⁷⁷:

“...diverts resources away from actually achieving what you need to achieve; it can make the organisation and council very insular and turn inward rather than outward; and, rather than focusing necessarily on the delivery of what the community is wanting or needing, it becomes more about how is this going to be taken, what might happen if I raise, and that's not the environment that you want, you need an environment where people feel confident and comfortable in giving that advice and having respect and trust.”

291. The breakdown in that relationship during the 2016 Council influenced the ability of staff to give frank and fearless advice³⁷⁸. Such a circumstance hampers the ability of a council to perform its statutory functions notwithstanding the best endeavours of staff to fulfil their roles in the face of those issues.

The relationship with the community

292. It is clear that the community had lost a material amount of confidence in the Council, and the Governing Body, during the 2016 Term and that in some respects, the relationship between the Council and aspects of the community had become “adversarial”³⁷⁹.

293. The evidence that supports that conclusion includes³⁸⁰:

- i. The results of the Community Satisfaction Surveys set out above, which record a significant decline (and a trend of decline) in the overall satisfaction with the Council and the performance of the Councillors. So poor were the results, that Mr Ryan described

³⁷⁵ T1493.24-1494.16 (Miscamble).

³⁷⁶ T1494.18-1495.1 (Miscamble).

³⁷⁷ T1495.9-21 (Miscamble).

³⁷⁸ See, e.g., T502.4-503.42 (McMahon).

³⁷⁹ See, e.g., T79.20-80.4, 89.2-10 (Horton); T362.3-36, 364.34-47 (Jones); T372.8-44 (White); T727.12-34 (former Clr Arkwright); T1132.22-30, 1149.40-150.2 (Clr Nelson); T1220.20-37 (former Clr Halstead); T1287.29-1288.24 (former Clr Turland).

³⁸⁰ This list is not intended to be exhaustive. See also the references collected in CA Final Submission, [108]-[152].

them as “*appalling*” and being reflective of one of the “*least satisfied*” communities in the State³⁸¹;

- ii. The report following the roundtable facilitated by KPMG (considered above), which recorded that there was a high level of dissatisfaction with the “*Destination Strategy*” and other strategic decisions taken by the Council³⁸²;
- iii. The Small Business Commissioner’s Report (considered above) which identified an “adversarial relationship” between the Council and the small business community within the Shire, and that “*83% of respondents [indicated] their interaction with Council was harmful to their business*”³⁸³.

294. There was evidence of interactions between some Councillors and members of the community that demonstrate the breakdown in the relationship. Those interactions include:

- i. Former Clr Halstead’s public criticism of Ms Cheetham whilst Mayor (described by Clr Gair as “*downright rude*”) and for which he later apologised³⁸⁴;
- ii. Clr Nelson’s correspondence with Mr and Mrs Wilson concerning the Station Street Development, in which he wrote:
 - i) “*And I am the one with the VOTE so u don’t count*”³⁸⁵
 - ii) “*What game are you playing – happy to reply again now stop!*”³⁸⁶
- iii. Clr Nelson’s correspondence to the Southern Highlands Chamber of Commerce in response to a letter written by Mr Samulski expressing his dissatisfaction with the performance of the Councillors³⁸⁷. In that letter, Clr Nelson called on the head of the Chamber to “*take appropriate action to sack Mr Samulski from the position of Council Liaison Officer...*”.
- iv. There was evidence that Clr McLaughlin had approached a member of the National Party around the same time to raise the issue of Mr Samulski’s membership of that party³⁸⁸.

295. Another example of the nature of the relationship between the Councillors and the community was Clr Gair’s description during a radio interview (that was later the subject of an article

³⁸¹ T751-752 (Ryan).

³⁸² Ex J.

³⁸³ Ex B, p 471. See also, T68.35ff (Horton) and T326.18ff (Kennedy).

³⁸⁴ T758.22-760.2 (Cheetham); T1221.34-1222.5 (former Clr Halstead); T1396.1-12 (Clr Gair).

³⁸⁵ Ex H.

³⁸⁶ Ex H.

³⁸⁷ Ex Q.

³⁸⁸ T789.3-29 (Samulski); CA Final Submissions [144].

published on the station's website) of the phone call made by Ms Haslinger's architect as being "devious, mischievous and intentional", and in relation to which "legal and police advice" would be sought³⁸⁹. To the objective reader or listener, a statement of that kind suggests that the phone call to the Council was staged in some way, with the purpose of embarrassing the Council.

296. Clr Gair was asked about the basis for those statements, and gave the following evidence (emphasis added)³⁹⁰:

"Q. Can you explain to me why you believed it's a mischievous phone call?"

A. *I was told that the person who had dealt with that phone call had done it in a professional manner and had followed all procedure and, as such, was doing his job - because it was a young fellow - was doing his job in answering a ratepayer's - ratepayer's questions in relation to what was required for a DA for the construction of a new house.*

Q. *If the young council worker was just doing his job, that's all fine and good, but what therefore makes the call devious, mischievous and intentional?*

A. *That after getting the advice that the – whoever contacted The Telegraph, and I don't know who contacted The Telegraph - had said the council was making them pay DA fees for a house that had been burnt down, and both of those didn't correlate and I just felt that that was – that was mischievous to go to a newspaper and say the council was a homewrecker and the policy was plain. I was just a little bit - well, there's the policy; I didn't know the house had been burnt - a house had been burnt down.*

Q. ***You're referring there to the subsequent act following the phone call of going to the media; is that what you're referring to as mischievous, devious and intentional rather than the actual phone call itself?***

A. ***Probably a little bit of both because subsequent to that conversation with the general manager, I think about two or three weeks later - not sure when and I'm not gonna put a finger on it - we had done a site inspection as we formally did on a Wednesday prior to a council meeting, and there were about five, six councillors who were on that bus or had returned to the Council Chambers, and we went into the NAATI Room [sic] and we were - normally at that time we'd have lunch, and the general manager said, "I would like all councillors to hear this conversation that was made in relation to the complaints that council were homewreckers. ""***

297. The article which records the statement by Clr Gair refers to the phone call to council, as opposed to the contact with the *Daily Telegraph*³⁹¹. In that context, none of the answers given by Clr Gair identify any basis for the statement that the phone call to Council was "devious, mischievous and intentional", or identify the basis for the suggestion that there was conduct

³⁸⁹ Ex T.

³⁹⁰ T1358.38-1359.28 (Clr Gair).

³⁹¹ Ex T.

that warranted “*legal and Police advice*”. Rather, as revealed by Clr Gair’s evidence, the substance of his complaint appears to be directed to the article that was published in the *Daily Telegraph*.

298. A transcript of the call was available to the Inquiry. Nothing about the call (which Clr Gair and certain other Councillors had listened to) gives the impression that it was anything other than a genuine inquiry. Ms Haslinger denied the suggestion that the call was “*a set-up*” or contrived in some way³⁹². I accept that it was a genuine inquiry made on her behalf. Although it is true that the caller did not use the word “*bushfire*”³⁹³, that the property had been “*burnt down*” was expressly stated. Given that the call was made in the immediate aftermath of a bushfire crisis, it would have taken but a moment’s reflection by Clr Gair to recognise the prospect that the property had been bushfire affected³⁹⁴. In that context, it is difficult to see how that call could be reasonably described as being “*devious, mischievous and intentional*”.

299. Ms Haslinger gave evidence that she was able to be identified from that interview by friends of her mother, who had reported to her mother that the Mayor had made comments about her on the radio³⁹⁵. Clr Gair’s evidence was that “*I don’t think, I do not believe I would have used her name on radio*”. In his final submission, he described the suggestion that he had used Ms Haslinger’s name on radio as “*false*”³⁹⁶. On this issue, Clr Gair supplied a statement from Mr Day (the interviewer on that occasion) with his final submission³⁹⁷. That statement set out Mr Day’s recollection that nothing that would identify Ms Haslinger was said during that interview, with a particular focus on whether Clr Gair’s comments “*defamed a resident*”.

300. Ms Haslinger’s evidence sits in contrast to those recollections. I found Ms Haslinger to be an impressive witness, who gave clear and considered evidence. I accept that she was able to be identified by her people known to her mother from that interview. Accepting for present purposes that Ms Haslinger’s name was not used during the interview by Clr Gair, presumably she could be readily identified in any event as she had been featured in the *Daily Telegraph* article that Clr Gair responded to in that interview³⁹⁸. Further, whether or not Ms Haslinger was able to be identified by the wider public from listening to the interview alone does not matter. The fact is that comments suggesting impropriety by her, or her agents, were made by the Mayor of the day and she was able to be identified by those known to her. Clr Gair accepted that it was inappropriate for the “*mayor to go on radio and single out a specific person*”³⁹⁹. On

³⁹² T98.45-99.20 (Haslinger).

³⁹³ A point made by former Clr Markwart and Clr Nelson: Markwart 23 May Final Submission, pp 49-50; Nelson 30 May 2022 Final Submission, p 4.

³⁹⁴ No criticism is directed to the Council staff member who took that call.

³⁹⁵ T97.15-98.43 (Haslinger).

³⁹⁶ Gair 23 May Final Submission, sub-para (4).

³⁹⁷ T1358.24-1361.29 (Clr Gair); Ex XX.

³⁹⁸ See, Ex E, pp 45-46; Ex T.

³⁹⁹ T1361.26-42 (Clr Gair).

balance, in my view that is what likely occurred irrespective of whether Ms Haslinger's name was used.

301. Even if I am wrong about that factual question, Clr Gair's comments remain significant. That is because they involve the Mayor responding to criticism of the Council in the press by making allegations that a resident had engaged in "*mischievous*", and perhaps illegal, conduct where the circumstances do not identify a reasonable basis for that conclusion (and nor was he able to identify one when giving evidence).
302. Other examples of that type of relationship were evident in the treatment of some development applications. Pejorative descriptions of applicant as seeking to use "*loopholes*" or being critical of persons seeking to make profit through development were made⁴⁰⁰. Although in isolation language of that kind would not warrant comment or criticism, it was a further symptom of the adversarial relationship that had developed between some of the Councillors and some members or groups within the community.
303. Another theme that was explored in the evidence was that the Council had "*stopped listening*". The Road Map Report captures those themes in the context of identifying a "*need to repair and restore the relationship between Council – both the elected Council and the Administration – and the community*"⁴⁰¹.
304. During the Public Hearings, there was much evidence about the breakdown in that relationship in relation to the Station Street Project. As noted above, it is not the role of this inquiry to engage in a merits review of the Station Street Project, or any other. It is sufficient to note that there were those in the community who were strongly opposed to the project.
305. However, it is for the Council to make a decision in relation to the particular issue or project. Obviously enough, not every decision is going to find favour with everyone in the community. Some decisions may be deeply unpopular within the community, at least in the short term. It is a necessary function of government at all levels to make decisions that may be immediately unpopular if they are in the long term benefit of the community as a whole. One of the difficulties in the present case was that there was a divide between the Council and Councillors on the one hand, which considered that it had done enough, and that more consultation would not change the result, and those within the Community on the other, who wanted to have a say in the final vision for the project⁴⁰². That occurred in the context of an ongoing deterioration in the confidence held by the community in the Council and the Councillors.

⁴⁰⁰ T771.25-773.41 (Samulski).

⁴⁰¹ Ex M, p 60.

⁴⁰² A divide highlighted in Clr Nelson's submissions in relation to other projects: Nelson 30 May 2022 Final Submission, pp 10-11.

306. On this issue, Mr Paull have the following evidence⁴⁰³:

“Q. *There's been evidence to this inquiry that, at least in the perception of some, the attitude from councillors towards the public was adversarial; is that something you agree with or an impression you are left with?*

A. *Look, there were certainly issues where councillors had strong views and they didn't always align with lobby groups or individuals from the community. We live in a community where, and I'm generalising a little bit, but again it's my view, that we have quite a few people who are well educated, very articulate, a high number of people retired, often they're people that have worked in either the private sector or the public sector at a very high level, they're people who are used to making decisions and being decision-makers, so when they have an opinion about something, and that's a strong opinion, they voice that opinion and that's perfectly fine. I think that on occasions when councillors didn't agree with that opinion they took that as council not communicating or council not engaging.”*

307. Mr Paull's evidence in that respect was, at least in the context of the Station Street Project, consistent with that given by Mr Mooney⁴⁰⁴. It is also consistent with the evidence of some of the Councillors to the effect that the criticism that they, and the Council, more generally had “*stopped listening*” was, in substance, a complaint that they had “*stopped agreeing*” with the views of the relevant section of the community⁴⁰⁵.

308. Ultimately, it is not for me to determine whether consultation in relation to the Station Street Project (or any other issue) was adequate. As Counsel Assisting submits, where there are issues that generate significant community interest and concern from a highly engaged, motivated and organised section of the community it is “*even more vital that the Governing Body's communications and consultation with the community is effective, respectful and well-prepared when advocating for change on potentially contentious matters*”. However, as set out above, the evidence supports a conclusion that some of the Councillors had, on occasion, engaged with “*members of the community in a similar way in which they engaged each other from time to time*”⁴⁰⁶ about contentious issues.

309. The adversarial relationship that developed was not limited to the Station Street Project. It extended to other areas in which there was disagreement between the relevant section of the community, and the Council and Councillors. In this respect, it is apparent there was a view held by at least some of the Councillors that there those within the community who would make things deliberately difficult in order to bring a project to a halt or bring about their desired

⁴⁰³ T811.29-47 (Paull).

⁴⁰⁴ See, e.g., T291.17-294.27 (Mooney).

⁴⁰⁵ See, e.g., T700.39-701.2 (former Clr Markwart); T1396.30-39 (Clr Gair).

⁴⁰⁶ CA Final Submission, [146]-[148].

outcome. Opponents of the Council's position were dismissed as "*naysayers*"⁴⁰⁷ or the "*noisy minority*"⁴⁰⁸. On the other hand, there were those within the community that felt that they were raising genuine and legitimate issues, and that the Council (including the Governing Body) was not engaging with them. That is why they felt that they were not being listened to. That tension is reflective of the adversarial relationship that had developed. It is likely that such a dynamic compounded the deterioration of trust in which the Council was held within at least parts of the community.

310. In my view, the discord between about the level and type of community involvement in the decision making process was a symptom of the increasing dissatisfaction of the Council and the Councillors within the community. That might have been avoided (or at least minimised) if a clear policy, which set out what the community could expect in terms of the provision of information and opportunities for input, had been applied. If such a policy had been applied, it was not successful in setting and managing expectations as there were fundamental disagreements between the Council and sections of the community about the adequacy and type of consultation at various times.
311. In this respect, a clear policy setting out each stage of the consultation process, and what it involved, provides guidance and clarity to both the Council and the community about the level and type of consultation, the opportunities for community involvement, and what can be expected of the Council in that process. Those matters may vary depending on the type of issue. For example, some council operations may require notice of what the Council is doing without seeking input, whereas as others may be appropriate for a lengthy and wide-ranging consultation process. At the very least, such a policy would remove the scope for disagreement about the process itself, which is what occurred in relation to the Station Street Project. In my view, that disagreement at least contributed to a perception within the community that they were not being listened to, and that the Council was not being open and transparent.
312. In my view, a policy of that kind should include a step whereby a decision of Council is advised to the community and, where the subject of competing views during consultation, a brief explanation for how that decision was arrived at. It is apparent from the evidence that final step was missing, which likely contributed to the perception of some in the community that they were not being listened to or things were being kept from them.
313. A policy of that kind will not produce universal agreement between the community and the Council on all issues. Nor will it eliminate the prospect that, at some future time, some within the community will be dissatisfied with the consultation process, or the outcome of it. To expect

⁴⁰⁷ See, e.g., T1448.20-28 (Clr Gair)

⁴⁰⁸ Nelson 30 May 2022 Submission, pp 2-3.

otherwise would be fanciful. However, the benefit of such a policy is that it provides clarity to those involved on the process on what the process is, and what can be expected of it.

314. I do not propose to make any recommendation to the Minister about that issue, as it is not clear to me whether issues of that kind stretch beyond the experience of this Council. Although it is not my role to make recommendations to the Council, I have included those remarks in this Report for its benefit, should it wish to consider them in developing its consultation strategy going forward.

Matters of balance: Achievements of the 2016 Council

315. It is important in Inquiries of this kind to be alive to the risk that the focus of attention is confined to instances where the Council or Councillors have fallen short of requisite standards or expectations. As noted above, inquiries of this kind are almost always appointed where there has been an incident, ongoing issue, or period of poor performance. In that context, the Terms of Reference usually focus attention on those issues (as is the case here).

316. There is also some merit in former Clr Markwart's submission that "*As with all inquiries, most evidence is provided by those who believe they have been wronged in some way. Those who are satisfied rarely provide testimony or evidence unless compelled to do so*"⁴⁰⁹. Every witness who gave evidence before the Inquiry was compelled to do so by way of summons. However, the substantive point made by former Clr Markwart is that those who are satisfied do not often come forward to report their satisfaction. Whether considered in the context of inquiries of this kind, or more generally, that observation has merit.

317. Throughout the conduct of the Inquiry, I have been acutely aware that the experience of some members of the community is not necessarily universal. One witness, or one community group, cannot speak for the community as a whole. In considering the totality of the evidence, I have been cautious not to equate the individual views or experiences of some witnesses as reflecting those of whole of the community. Accordingly, it is important to also look to other indicators of community satisfaction.

318. That it is appropriate to observe (as I did above) that the 2021 Community Satisfaction Survey identified a number of aspects of the council's performance that were rated highly by the community. It is in that context that I also consider that it is important and appropriate to observe some of the achievements of the Council during the 2016 Council Term. The purpose of doing so is to observe that the dysfunction within the Governing Body did not prevent all the Council's work. Things were able to be done and projects were able to be completed. For

⁴⁰⁹ Markwart 23 May 2022 Final Submission, p 20.

example, the 2021 Annual Report records the following matters as “*highlights*” for organisation⁴¹⁰:

- “*Opening the Berrima All Abilities Playground and securing funding to upgrade Moss Vale’s Church Road Oval playground and Mittagong’s Cook Street Park playground.*
- *Allocating \$115,000 to fifty-one community projects as part of the annual Wingecarribee Community Assistance Scheme.*
- *Completing construction on the Church Road Playing Fields Amenities block and Eridge Park Netball Courts.*
- *Securing \$542,000 in Australian Government funds to refurbish the Mittagong SES Centre.*
- *Commencing preliminary investigations including designs for the Moss Vale Bypass Project.*
- *Progressing construction on the Moss Vale Civic Centre Refurbishment Project.*
- *Amending the Wingecarribee Local Environment Plan to provide greater flexibility for tourism and hospitality operators.*
- *Organising and promoting bushfire recovery and resilience initiatives including allocating community grant funding, hosting a Recovery Concert and unveiling a memorial in honour of fallen Rural Fire Service volunteers Geoffrey Keaton and Andrew O’Dwyer.*
- *Commencing refurbishment works on the Bowral Memorial Hall.*
- *Hosting in-person or virtual community events including Australia Day Citizen of the Year and Young Citizen of Year, NAIDOC Week festivities and Learn to Skate workshops.*
- *Replacing 6.3 kilometres of water/sewer mains.*
- *Opening the refurbished Seymour Park including off-leash facilities in Moss Vale,*
- *Securing State and Federal grant funding to repair Wombeyan Caves Road,*
- *Launching the Wingecarribee Disaster Dashboard, and*
- *Drafting an Environment and Climate Change Strategy.”*

319. I also note that the Governing Body identified a number of other achievements in the resolution passed at the 9 March 2021 Extraordinary Meeting (extracted above), and that the earlier annual reports in evidence also record other achievements during the 2016 Term⁴¹¹.

320. However, the evidence supports a conclusion that those accomplishments were made more difficult than they ought to have been by the dysfunction within the 2016 Council. Mr Paull’s evidence that “*the operational part of the council was actually delivering despite the*

⁴¹⁰ Ex A, pp 380-381.

⁴¹¹ See, e.g., Ex A, pp 16-17, 92-93, 178-179, 263-266.

*councillors*⁴¹² is especially telling. That evidence makes clear that Council staff were working to drive the business of the Council forward despite the problems that were evident within the Governing Body⁴¹³.

⁴¹² T829.3-18 (Paull). I do not take Mr Paull's evidence to be that the staff acted inconsistently with appropriately made resolutions of the 2016 Council. Rather, the import of that evidence is that staff were in a position where they had to – and, in large measure were successful in – advancing the business of the Council despite the obstacles caused by the dysfunction within the Governing Body.

⁴¹³ T806.7-15, 829.3-18 (Paull). An experience that was not limited to the 2016 Council Term but was also a feature of the 2012 Council Term: T640.15-44 (former Clr Clark); T 806.7-37 (Paull).

CHAPTER 4: TERM OF REFERENCE 1

Issues raised by Term of Reference 1

321. Term of Reference 1 raises two primary, and related, issues. They are:

- a. whether the Councillors “*fully understood their roles and responsibilities*”; and
- b. whether the Councillors “*adequately, reasonably and appropriately carried out their roles and responsibilities*”.

The roles and responsibilities of a councillor

322. Local Government in New South Wales is a creation of statute. Accordingly, it is necessary to pay close regard to the statutory framework found in the LGA and the associated regulations. It is there that the roles and responsibilities of councillors are to be found.

The status of a council

323. A council is a creation of the LGA and is a body politic of the State⁴¹⁴. It is not a body corporate (although the law of the State applies to it as if it were), and nor does it have the same status, privileges, and immunities of the Crown⁴¹⁵. The elected representatives – i.e., councillors – comprise the governing body of a council⁴¹⁶.

The guiding principles for local government

324. The provisions of the LGA relevant to the roles and responsibilities of councillors were the subject of significant amendment immediately prior to the commencement of the 2016 Council Term.

325. As a part of that suite of amendments, sections 8A, 8B and 8C were introduced. They are of particular relevance for present purposes because they outline the “*guiding principles*” for Local Government in New South Wales. They also intersect with the statutory duties of a councillor and the governing body. The stated object of those principles “*is to provide guidance to enable councils to carry out their functions in a way that facilitates local communities that are strong, healthy and prosperous*”⁴¹⁷. Those principles demonstrate the multi-faced role that a council has, and the centrality of the strategic planning function to it.

⁴¹⁴ LGA, ss 219-220.

⁴¹⁵ LGA, s 220(2)-(4).

⁴¹⁶ LGA, s 222.

⁴¹⁷ LGA, s 8.

326. Section 8A provides (bold in original text):

“8A Guiding principles for councils

- (1) **Exercise of functions generally** *The following general principles apply to the exercise of functions by councils—*
- (a) *Councils should provide strong and effective representation, leadership, planning and decision-making.*
 - (b) *Councils should carry out functions in a way that provides the best possible value for residents and ratepayers.*
 - (c) *Councils should plan strategically, using the integrated planning and reporting framework, for the provision of effective and efficient services and regulation to meet the diverse needs of the local community.*
 - (d) *Councils should apply the integrated planning and reporting framework in carrying out their functions so as to achieve desired outcomes and continuous improvements.*
 - (e) *Councils should work co-operatively with other councils and the State government to achieve desired outcomes for the local community.*
 - (f) *Councils should manage lands and other assets so that current and future local community needs can be met in an affordable way.*
 - (g) *Councils should work with others to secure appropriate services for local community needs.*
 - (h) *Councils should act fairly, ethically and without bias in the interests of the local community.*
 - (i) *Councils should be responsible employers and provide a consultative and supportive working environment for staff.*
- (2) **Decision-making** *The following principles apply to decision-making by councils (subject to any other applicable law)—*
- (a) *Councils should recognise diverse local community needs and interests.*
 - (b) *Councils should consider social justice principles.*
 - (c) *Councils should consider the long term and cumulative effects of actions on future generations.*
 - (d) *Councils should consider the principles of ecologically sustainable development.*
 - (e) *Council decision-making should be transparent and decision-makers are to be accountable for decisions and omissions.*
- (3) **Community participation** *Councils should actively engage with their local communities, through the use of the integrated planning and reporting framework and other measures.”*

327. Section 8B provides (bold in original text):

“8B Principles of sound financial management

The following principles of sound financial management apply to councils—

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

- (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.”*

328. Section 8C provides (bold in original text):

“8C Integrated planning and reporting principles that apply to councils

The following principles for strategic planning apply to the development of the integrated planning and reporting framework by councils—

- (a) *Councils should identify and prioritise key local community needs and aspirations and consider regional priorities.*
- (b) *Councils should identify strategic goals to meet those needs and aspirations.*
- (c) *Councils should develop activities, and prioritise actions, to work towards the strategic goals.*
- (d) *Councils should ensure that the strategic goals and activities to work towards them may be achieved within council resources.*
- (e) *Councils should regularly review and evaluate progress towards achieving strategic goals.*
- (f) *Councils should maintain an integrated approach to planning, delivering, monitoring and reporting on strategic goals.*
- (g) *Councils should collaborate with others to maximise achievement of strategic goals.*
- (h) *Councils should manage risks to the local community or area or to the council effectively and proactively.*
- (i) *Councils should make appropriate evidence-based adaptations to meet changing needs and circumstances.”*

329. The Councillor Handbook (referred to in more detail below) states that “[a]ll councillors should read and be familiar with the principles prescribed under the Local Government Act 1993 to guide the exercise by councillors of their functions, decision making, community participation, sound financial management and integrated planning and reporting.”⁴¹⁸ That guidance

⁴¹⁸ Ex A, p 460.

highlights and reinforces the importance of those guiding principles to the performance of the roles and responsibilities of a councillor.

The roles and responsibilities of a councillor, the mayor, and the governing body

330. The roles and responsibilities of a councillor, the governing body as a whole, and the mayor are set out in Part 2 of Chapter 9 of the LGA.

331. The role of a councillor is set out in s 232 of the LGA, which provides:

“232 The role of a councillor

(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.”

332. The role of the governing body (i.e., the collective body of councillors⁴¹⁹) is set out in s 223 of the LGA, which provides:

“223 Role of governing body

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

- (a) to direct and control the affairs of the council in accordance with this Act,*
- (b) to provide effective civic leadership to the local community,*
- (c) to ensure as far as possible the financial sustainability of the council,*
- (d) to ensure as far as possible that the council acts in accordance with the principles set out in Chapter 3 and the plans, programs, strategies and policies of the council,*
- (e) to develop and endorse the community strategic plan, delivery program and other strategic plans, programs, strategies and policies of the council,*

⁴¹⁹ LGA, s 222.

- (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."*

333. The Mayor has additional roles, which are set out in s 226 of the LGA, which provides:

"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.”

334. In addition to those provisions, other provisions of the LGA also identify “responsibilities” of councillors.

335. In this respect:

- i. s 439 of the LGA provides that every councillor “*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.*”
- ii. s 360(5) of the LGA provides that “*A council and a committee of the council of which all the members are councillors must conduct its meetings in accordance with the code of meeting practice adopted by it.*”
- iii. s 440(5) of the LGA relevantly provides (emphasis added):

- “(5) Councillors... must comply with the applicable provisions of—
- (a) the council’s adopted code, except to the extent of any inconsistency with the model code as in force for the time being, and
 - (b) the model code as in force for the time being, to the extent that—
 - (i) the council has not adopted a code of conduct, or
 - (ii) the adopted code is inconsistent with the model code, or
 - (iii) the model code contains provisions or requirements not included in the adopted code.”

336. Section 490A of the LGA provides that a councillor commits an “*act of disorder*” if that councillor “*at a meeting of the council or a committee of the council, does anything that is prescribed by the regulations as an act of disorder*”. Relevantly, cl 182 of the *Local Government (General) Regulation 2005* (NSW) (**2005 LG Regulation**) (in force at the relevant time⁴²⁰) identifies the categories of conduct that constitute an “*act of disorder*” as follows (emphasis added):

“... a councillor commits an act of disorder if the councillor, at a meeting of a council or a committee of a council—

⁴²⁰ The *Local Government (General) Regulation 2021* (NSW) (**2021 LG Regulation**) contains a relevantly identical definition of “*act of disorder*”: cl 182.

- (a) **contravenes the Act, this Regulation or any provision of the code of meeting practice adopted by the council** under section 360(3) of the Act, including any provisions incorporated in the adopted code that are prescribed by this Regulation as mandatory provisions of the model code of meeting practice, or
- (b) *assaults or threatens to assault another councillor or person present at the meeting, or*
- (c) *moves or attempts to move a motion or an amendment that has an unlawful purpose or that deals with a matter that is outside the jurisdiction of the council or committee, or addresses or attempts to address the council or committee on such a motion, amendment or matter, or*
- (d) **insults, makes unfavourable personal remarks about, or imputes improper motives to, any other councillor or a member of staff or delegate of a council, or**
- (e) **says or does anything that is inconsistent with maintaining order at the meeting or is likely to bring the council or committee into contempt.**

The functions of the general manager

337. Having regard to the content of the Terms of Reference and the issues raised by them, it is necessary to also understand the statutory function of the General Manager. Section 335 of the LGA sets out the “*functions*” of the general manager, and provides:

“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."*

338. Consistently with the function of the general manager to be to conduct the "day to day management of the council" and to "direct and dismiss staff", s 352 of the LGA provides:

- "(1) *A member of staff of a council is not subject to direction by the council or by a councillor as to the content of any advice or recommendation made by the member.*
- (2) *This section does not prevent the council or the mayor from directing the general manager of the council to provide advice or a recommendation."*

The "misconduct" provisions of the LGA

339. The circumstances in which disciplinary action may be taken against an individual councillor or councillors, and when the Minister may intervene, were matters that took on some significance during the Public Hearings.

340. Accordingly, it is necessary to consider the "misconduct" provisions in the LGA, which are set out in Chapter 14, Part 1, Division 3 of the LGA. Relevantly, s 440F(1) defines "misconduct of a councillor" as being any of (emphasis added):

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

341. It is significant that Parliament saw fit to determine that a failure to comply with the Code of Conduct and a failure to comply with the Code of Meeting Practice (the latter constituting an "act of disorder" in accordance with the s 490A of the LGA, when read together with cl 182 of the 2005 LG Regulation) as "misconduct". That reinforces the concept that standards of councillor behaviour (both in meetings, and more generally) are not mere aspirational guidelines, but they are mandatory and essential obligations. They reflect the minimum standards of conduct⁴²¹, not conceptual ideals.

⁴²¹ 2019 Code of Conduct, Part 1: Ex A, p 699.

342. Reflecting that position, the Councillor Handbook states that “*Council Meetings **must** be conducted in accordance with the [LGA] and Regulation, and the council’s code of meeting practice...*” and further that “*councillors...are **obliged to comply** with prescribed ethical and behavioural standards in the performance of their role*” (emphasis added)⁴²².

343. Section 440G(1) of the LGA provides that a “*council may by resolution at a meeting formally censure a councillor for misconduct*”. That power may only be exercised if the council is satisfied that “*the councillor has engaged in misconduct on one or more occasions*”⁴²³ and the procedural requirements specified in s 440G(4)-(5) LGA are complied with.

344. The Departmental Chief Executive (i.e., the Chief Executive of the Office of Local Government⁴²⁴) has the power to investigate misconduct by a councillor. Relevantly, s 440H of the LGA provides (emphasis added):

- “(1) **The Departmental Chief Executive may conduct an investigation for the purpose of determining whether a councillor has engaged in misconduct.**
- (2) **The Departmental Chief Executive may conduct such an investigation—**
 - (a) *on his or her own initiative, or*
 - (b) **if the general manager of a council refers an allegation of misconduct by a councillor to the Departmental Chief Executive, or**
 - (c) **if a council, by resolution, refers an allegation of misconduct by a councillor to the Departmental Chief Executive, or**
 - (d) *if the Ombudsman states in a report that the Ombudsman is satisfied that a councillor has or may have engaged in misconduct, or*
 - (e) *if the Independent Commission Against Corruption states in a report that the Commission is satisfied that a councillor has or may have engaged in misconduct.”*

345. The Departmental Chief Executive also has the power to take disciplinary action against a councillor. Relevantly, s 440I of the LGA provides⁴²⁵:

- “(1) *The Departmental Chief Executive may take disciplinary action against a councillor if the Departmental Chief Executive is satisfied that—*
 - (a) *the councillor has engaged in misconduct (whether on the basis of a departmental report or a report by the Ombudsman or Independent Commission Against Corruption), and*
 - (b) *disciplinary action is warranted.*
- (2) *The Departmental Chief Executive may take one or more of the following actions (and any such action is disciplinary action)—*

⁴²² Ex A, pp 484 and 493.

⁴²³ LGA, s 440G(3).

⁴²⁴ LGA, s 3 and Dictionary.

⁴²⁵ The “*departmental report*” referred to in s 440I(1)(a) is a reference to a report in relation to an investigation conducted under s 440H of the LGA: LGA, s 440H(5).

- (a) *counsel the councillor,*
- (b) *reprimand the councillor,*
- (c) *by order, direct the councillor to cease engaging in the misconduct,*
- (d) *by order, direct the councillor to apologise for the misconduct in the manner specified in the order,*
- (e) *by order, direct the councillor to undertake training,*
- (f) *by order, direct the councillor to participate in mediation,*
- (g) *by order, suspend the councillor from civic office for a period not exceeding 3 months,*
- (h) *by order, suspend the councillor’s right to be paid any fee or other remuneration, to which the councillor would otherwise be entitled as the holder of the civic office, in respect of a period not exceeding 3 months (without suspending the councillor from civic office for that period).*

...”

346. Contrary to the position advanced by some of the Councillors, the circumstances in which the Departmental Chief Executive may conduct an investigation for the purposes of determining whether a councillor has engaged in misconduct for the purposes of the LGA, or take disciplinary action against a councillor, does not include a direction or request from the Minister⁴²⁶.

The Minister’s power to intervene

347. The powers of the Departmental Chief Executive set out above sit in contrast with the powers available to the Minister to intervene in relation to a council. The Minister's powers are found in Part 6 of Chapter 13, which is headed “*Performance Management*”⁴²⁷.

348. Section 438A of the LGA relevantly provides:

“438A Performance improvement order

- (1) *The Minister may issue an order in respect of a council if the Minister reasonably considers that action must be taken to improve the performance of the council.*
- (2) *An order issued under this section is a performance improvement order.*
- (3) *A performance improvement order is to specify—*
 - (a) *the reasons why the Minister has decided to issue the order, and*

⁴²⁶ See, e.g., Markwart 23 May 2022 Final Submission, pp 5, 57; Markwart 13 April 2022 Submission, p 3.

⁴²⁷ That heading, being a heading to a Division into which the LGA is divided, is part of the LGA: *Interpretation Act 1987* (NSW), s 35(1).

- (b) *the actions that the Minister requires to be taken to improve the performance of the council.*
 - (4) *Actions to improve the performance of a council include any actions the Minister considers necessary to improve or restore the proper or effective functioning of the council.*
 - (5) *The order may require action to be taken by the council, by individual councillors, or both.*
- ...”

349. The criteria to be considered by the Minister in issuing a performance improvement order are set out in the *Local Government Regulations*⁴²⁸. Relevantly, cl 413D of the 2005 LG Regulation (which was in force at the time the Minister issued the Performance Improvement Order⁴²⁹), provides:

“413D Performance improvement criteria: section 438B

The following are criteria to be considered by the Minister before issuing a performance improvement order—

- (a) *whether the council concerned has failed to comply with its legislative responsibilities, standards or guidelines,*
- (b) *whether there are significant risks facing the council that are not being addressed,*
- (c) *whether previous intervention attempts have failed,*
- (d) *whether council business is being disrupted and the council failing to exercise its functions,*
- (e) *(Repealed)*
- (f) *whether there is a pattern of poor or inappropriate behaviour, either by one or more councillors or members of staff of the council, that has not been rectified,*
- (g) *any other matter that, in the opinion of the Minister, is relevant to the issuing of the order.”*

350. Pursuant to s 438G of the LGA, the Minister may appoint a temporary adviser, or advisers, to provide assistance to a council for the purposes of ensuring that it complies with a performance improvement order and to monitor the council’s compliance with its terms.

351. The 2021 LG Regulation contains a relevantly identical provision⁴³⁰.

⁴²⁸ LGA, s 438B.

⁴²⁹ The 2005 Regulation was repealed and replaced with the *Local Government (General) Regulation 2021 (NSW) (2021 LG Regulation)*.

⁴³⁰ 2021 LG Regulation, cl 413D.

352. The Minister's power to suspend a council is found in s 438I of the LGA, which provides (emphasis added):

"438I Power of Minister to suspend council

- (1) ***The Minister may, by order published in the Gazette, suspend a council for a period specified in the order if the Minister reasonably believes that the appointment of an interim administrator is necessary to restore the proper or effective functioning of the council.***
- (2) *An order under this section is referred to in this Part as a suspension order."*

353. The regulations specify the criteria to be considered by the Minister in determining whether to issue a suspension order⁴³¹. Relevantly, cl 413E of the 2005 LG Regulation (which was in force at the time the Suspension Order was issued) provides:

"413E Suspension criteria: section 438J

The following are criteria to be considered by the Minister before temporarily suspending a council—

- (a) *whether the council has failed to comply with its legislative responsibilities, standards or guidelines,*
- (b) *whether there are significant risks facing the council that are not being addressed,*
- (c) *whether previous intervention attempts have failed,*
- (d) *whether council business is being disrupted and the council failing to exercise its functions,*
- (e) *whether the appointment of an interim administrator is necessary, in the opinion of the Minister, to restore the proper or effective functioning of the council,*
- (f) *whether there is a pattern of poor or inappropriate behaviour by one or more councillors that has not been rectified,*
- (g) *whether an ordinary election of councillors occurs within 3 months after the making of the order,*
- (h) *any other matter that, in the opinion of the Minister, is relevant to the suspension of the council."*

354. The 2021 Regulation contains an identical provision⁴³².

355. It is noteworthy that the regulations identified "*poor or inappropriate behaviour by one or more councillors*" as one of the criteria to be considered by the Minister in considering whether to issue a suspension order. That it is one of the express criteria highlights the importance of

⁴³¹ LGA, s 438J.

⁴³² 2021 LG Regulation, cl 413E.

councillor behaviour – which necessarily includes compliance with the Code of Conduct and the Code of Meeting Practice – to the performance of the roles and responsibilities of a councillor. Further, it expressly contemplates that poor or inappropriate behaviour by even one councillor can have a detrimental effect on the council warranting Ministerial intervention.

356. Pursuant to s 255 of the LGA, the Governor has the power to declare “*all civic offices vacant*” if a public inquiry has been held and the Minister has recommended that the Governor make such a declaration.

357. As noted above, there was a suggestion made by some of the Councillors that the Minister had the power to suspend individual councillors. The relevant provisions of the LGA make plain that the Minister has no such power. The only action that the Minister can take against an individual councillor is the imposition of a compliance order in circumstances where a particular councillor has failed to take the action required by a performance improvement order⁴³³. A “*compliance order*” is very different to a suspension or a dismissal of an individual councillor from civic office.

358. The power to suspend an individual councillor is vested in the Departmental Chief Executive. As observed above, the circumstances in which the Departmental Chief Executive may exercise those powers does not include a request or direction from the Minister. Similarly, the power of the Governor to declare “*all civic offices vacant*” does not contemplate that an individual councillor can be removed from office.

359. Former Clr Markwart suggested that the distinction between the Minister and the Departmental Chief Executive (or the OLG) in that context was a matter of semantics⁴³⁴. I disagree. The repeated suggestion that the Minister could have acted to suspend some Councillors only, and once it was pointed out to them that the Minister did not have that power, the subsequent suggestion that the Minister could direct or request that such action be taken by the Departmental Chief Executive reveals a lack of understanding by those Councillors of the statutory framework that applies to councillor misconduct.

The Councillor Handbook

360. The OLG publishes and maintains a Councillor Handbook as a “*reference guide*” as the “*go-to resource for all councillors during their electoral term*”⁴³⁵.

⁴³³ LGA, s 438HA.

⁴³⁴ Markwart 13 April 2022 Submission, p 3.

⁴³⁵ Ex A, pp 454, 457.

361. The version of the Councillor Handbook issued shortly after the commencement of the 2016 Council Term⁴³⁶ (referred to throughout this Report as the **Councillor Handbook**) set out the following “5 Key things every councillor needs to know”⁴³⁷:

5 key things every councillor needs to know

How to achieve better outcomes for your community

Leadership

Be an effective leader of your local community by:

- » setting the vision and direction for your community without getting involved in the day-to-day operations of your council
- » balancing your advocacy role with the need to work as a team with other councillors to make decisions that benefit the whole community
- » balancing short and long term community needs and interests
- » fostering and maintaining positive internal and external relationships

Conduct

Conduct yourself in a way that enhances and maintains the credibility of your council and local government as a whole by:

- » acting lawfully, honestly, transparently and respectfully in line with your council’s Code of Conduct
- » exercising care and diligence in carrying out your functions
- » ensuring your relationships with the general manager and staff are based on trust and mutual respect, following clear and agreed protocols about staff contact

Open decision-making

Ensure effective participation in council business by:

- » making informed decisions through good preparation and involvement
- » following your council’s Code of Meeting Practice and/or legislation on meetings
- » drawing on the information and assistance that the general manager can provide to councillors in making their decisions

Accountability

Be accountable for understanding and meeting your community’s needs by:

- » engaging and consulting with your community
- » responsibly managing your council’s money and assets to meet current and future needs
- » considering the long term consequences of your decisions
- » ensuring the requirements of the Integrated Planning and Reporting framework are met

Learning

Take responsibility for your ongoing learning and professional development by:

- » regularly assessing your learning needs
- » actively seeking opportunities to acquire further knowledge and skills
- » contributing your knowledge and skills to the development of local government as a whole

362. While not a substitute for the statutory roles and responsibilities of a councillor, the “5 key things” comprise a useful summary of the attributes that a councillor should display to successfully discharge their statutory roles and responsibilities. That is made clear in the Handbook itself, which states “While the ‘5 key things every councillor needs to know’ summary is a helpful start, **it’s important that you have a comprehensive understanding of your role and responsibilities to be an effective councillor**”⁴³⁸ (emphasis added).

⁴³⁶ Ex A, pp 450-551.

⁴³⁷ Ex A, p 456.

⁴³⁸ Ex A, p 457.

363. Section 2.1.1 of the Councillor Handbook describes the “*role of the governing body of a council*” and the “*role of individual councillors*”⁴³⁹.

364. As to the “*role of the governing body*”, after setting out the terms of s 232 of the LGA, the Handbook states⁴⁴⁰:

*“As members of the governing body, and in the interests of ensuring the organisation operates effectively to achieve the best outcomes for the community, **councillors should endeavour to work constructively with council staff that are responsible for implementing council decisions.**”*

This need is reflected in the Act which requires the governing bodies of councils to consult with the general manager in directing and controlling the affairs of the council.”

365. As to the role of “*individual councillors*”, after setting out the relevant provisions of the LGA, the Handbook states (emphasis added)⁴⁴¹:

“The Act makes it clear that councillors are individually accountable to the local community for the performance of the council.

...

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

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

366. It is useful in considering that aspect of the responsibilities of an individual councillor to consider the ordinary meaning of the words “*accept and abide*” as used in the Councillor Handbook. The ordinary meaning of “*accept*” in the context of a decision that has been made includes to “*be prepared to subscribe to*” and “*to tolerate or submit to*”. The ordinary meaning of “*abide*” in the context of a decision made includes to “*act in accordance with*” or to “*remain faithful to*”⁴⁴². While a useful guide, the words of the Councillor Handbook are not a substitute for the text of the LGA. Perhaps unsurprisingly, the description given of that obligation in the Councillor Handbook is, however, consistent with the ordinary meaning of “*uphold*” used in s 232(1)(f) of the LGA, which is to “*confirm or maintain*” or to “*give support or countenance to*”⁴⁴³.

367. Accordingly, while a councillor, remains free to speak about decisions made by Council (subject to compliance with the LGA and the Code of Conduct to the extent relevant), including

⁴³⁹ Ex A, p 466-469.

⁴⁴⁰ Ex A, p 466.

⁴⁴¹ Ex A, pp 466-467.

⁴⁴² *Australian Concise Oxford Dictionary*, 6th Ed, Oxford University Press.

⁴⁴³ *Australian Concise Oxford Dictionary*, 6th Ed, Oxford University Press.

to express disagreement with them – in my view, it would not be consistent with the obligation to “uphold” decisions of the governing body imposed by s 232(1)(f) of the LGA to actively undermine those decisions, whether by words or conduct.

368. As to the performance of the role of a councillor, the Handbook states:

“Councillors must work as a team to make decisions and policies that guide the activities of the council. Policies can be defined as the principles and intent behind the programs that a council implements.

This includes setting the broad, strategic direction for the local community. To do this, councillors have to understand their community’s, characteristics and needs, and the types of services required to meet these needs.”⁴⁴⁴

and:

“Councillors have a responsibility to make decisions in the best interest of the whole community when deciding on the provision of services and the allocation of resources.

Councillors also need to provide leadership and guidance to the community. This is especially important when communities face challenges, such as climate change, drought, high unemployment or skill shortages.”⁴⁴⁵

and:

“Councillors must attempt to find a balance between the obligation to represent the interests of individual constituents and the need to make decisions on behalf of the whole community. This dilemma can cause some interesting debates in council.

Councillors need to display leadership and integrity to help ensure that the decisions they make as a member of the governing body are in the best interest of all the community.”⁴⁴⁶

369. In addition to the Councillor Handbook, there are a variety of other resources available which describe the role and responsibilities of a councillor. One such resource was the Councillor Induction and Professional Development Guidelines, issued by the OLG in 2018⁴⁴⁷. Those guidelines, issued under s 23A of the LGA, were issued to assist general managers and council staff “develop, deliver, evaluate, and report on the induction and professional development programs they are required to provide to mayors and councillors...”⁴⁴⁸

⁴⁴⁴ Ex A, p 467.

⁴⁴⁵ Ex A, p 468.

⁴⁴⁶ Ex A, p 468.

⁴⁴⁷ Ex A, p 552-620.

⁴⁴⁸ Ex A, p 554.

370. Those guidelines identify a number of matters about which councillors are expected to familiarise themselves. They include the statutory role and responsibilities of councillors. For example:

- i. In relation to the guiding principles under the LGA, the guidelines state that “*Mayors and councillors must understand these principles and be able to apply them when exercising their functions*”⁴⁴⁹;
- ii. In relation to the prescribed roles and responsibilities of mayors and councillors, the guidelines state that “*Mayors and councillors must have a strong understanding of their prescribed roles and responsibilities under the Act in order to be able to fulfil them*”⁴⁵⁰.

371. The guidelines also contain a “*Local Government Capability Framework*” developed by Local Government NSW, which “*describes the knowledge, skills and personal attributes needed by mayors and councillors to represent their communities and to deliver community outcomes*”⁴⁵¹. That framework includes the following:

- i. the “*Personal Attributes*” identified included to “*[follow] the code of conduct, legislation and policies applicable to councillors/mayors*”, “*[speak] out against illegal and inappropriate behaviour...*” and to “*observe the highest standard of personal conduct at all times*”⁴⁵²;
- ii. skills related to “*Relationships*” as including being “*respectful of council staff and receptive to their advice*”, and “*[l]istens to contrary points of view and endeavours to find common ground*”⁴⁵³;
- iii. the skills related to “*Civic Leadership*” as including “*Contributes constructively to debate in council*”, “*Works towards consensus as a member of the governing body*”, “*Contributes to a positive and ethical culture within the governing body*”, “*Acts in a way that preserves the health and safety of people in the council workplace*”, and “*Communicates the decisions of council in a respectful way, even if own position was not adopted*”⁴⁵⁴.

The Code of Conduct

372. As observed above, the roles and responsibilities of a councillor must be performed in compliance with the Code of Conduct. A failure to do so can constitute “*misconduct*” for the purposes of the LGA.

⁴⁴⁹ Ex A, p 562.

⁴⁵⁰ Ex A, p 562.

⁴⁵¹ Ex A, p 580.

⁴⁵² Ex A, pp 614-615.

⁴⁵³ Ex A, pp 615-616.

⁴⁵⁴ Ex A, pp 619-620.

373. The evidence reveals that there were five versions of the Code of Conduct that applied from time to time during the 2016 Term⁴⁵⁵. They adopted by the governing body on the following dates:

- c. 30 April 2014 (**2014 Code of Conduct**);
- d. 14 June 2017 (**June 2017 Code of Conduct**);
- e. 23 August 2017 (**August 2017 Code of Conduct**);
- f. 12 June 2019 (**2019 Code of Conduct**); and
- g. 9 September 2020 (**2020 Code of Conduct**).

374. It is not necessary to engage in a detailed comparison of the differences between each version. For present purposes, it is sufficient to focus on the 2019 Code of Conduct⁴⁵⁶, as that is the version of the Code of Conduct that was applicable for the majority of the instances of conduct considered in the evidence. To the extent necessary, reference will be made below to other versions of the Code of Conduct that applied at the relevant time.

375. The 2019 Code of Conduct saw a number of changes to the provisions and structure of the code from that which can be seen in the August 2017 Code of Conduct.

376. The introduction to the 2019 Code of Conduct also the statement that⁴⁵⁷:

*“The Code of Conduct sets the **minimum standards of conduct for council officials**. It is prescribed by regulation to assist council officials to:*

- *understand and comply with the standards of conduct that are expected of them*
- *enable them to fulfil their statutory duty to act honestly and exercise a reasonable degree of care and diligence (section 439)*
- *act in a way that enhances public confidence in local government.*

*Councillors, administrators, members of staff of councils, delegates of councils (including members of council committees that are delegates of a council) and any other person a council’s adopted code of conduct applies to, **must comply with the applicable provisions of their council’s code of conduct**. It is the **personal responsibility of council officials to comply with the standards in the code and***

⁴⁵⁵ Ex A, p 622 (adopted on 30 April 2014), p 647 (adopted on 14 June 2017), p 672 (adopted 23 August 2017), p 607 (adopted 12 June 2019) and p 740 (adopted on 9 September 2020).

⁴⁵⁶ The differences between the 2019 Code of Conduct and the 2020 Code of Conduct are immaterial for present purposes.

⁴⁵⁷ Ex A, p 699.

to regularly review their personal circumstances and conduct with this in mind.

377. Part 3 of the 2019 Code of Conduct set out the “*General Conduct Obligations*”, and provides⁴⁵⁸:

“3.1 You ***must not conduct yourself in a manner that:***

- a) ***is likely to bring the council or other council officials into disrepute***
- b) ***is contrary to statutory requirements or the council’s administrative requirements or policies***
- c) *is improper or unethical*
- d) *is an abuse of power*
- e) ***causes, comprises or involves intimidation or verbal abuse***
- f) *involves the misuse of your position to obtain a private benefit*
- g) ***constitutes harassment or bullying behaviour under this code, or is unlawfully discriminatory.***

3.2 You ***must act lawfully and honestly, and exercise a reasonable degree of care and diligence in carrying out your functions under the LGA or any other Act. (section 439).***

378. Having regard to the ordinary meaning of “*disrepute*”, conduct that is “*likely to bring the council of holders of civic office into disrepute*” is conduct that is likely to bring discredit to the council or holders of civic office, or conduct that is likely to harm the reputation of the council or the holders of civic office⁴⁵⁹. The test is not that the conduct did have that effect, but that it was “*likely*”.

379. Clause 3.6 of the 2019 Code of Conduct contains a general prohibition against harassing others⁴⁶⁰. “*Harassment*” for the purposes of the 2019 Code of Conduct is defined in clause 3.7 as “*any form of behaviour towards a person that: a) is not wanted by the person; b) offends, humiliates or intimidates the person; and c) creates a hostile environment.*”⁴⁶¹

380. Clause 3.8 of the 2019 Code of Conduct contains a general prohibition against engaging in “*bullying behaviour towards others*”. “*Bullying behaviour*” for the purpose of the 2019 Code to Conduct is defined in clause 3.9 as “*any behaviour in which: a) a person or group of people repeatedly behaves unreasonably towards another person or a group of persons and b) the behaviour creates a risk to health and safety*”⁴⁶².

⁴⁵⁸ Ex A, p 702.

⁴⁵⁹ *Australian Concise Oxford Dictionary*, 6th Ed.

⁴⁶⁰ Ex A, p 702.

⁴⁶¹ Ex A, p 702.

⁴⁶² Ex A, p 702.

381. Clause 3.12 of the 2019 Code of Conduct set out “*work health and safety*” obligations, and provides:

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

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

382. The obligations set out in cl 3.12 of the 2019 Code of Conduct are consistent with those contained in s 28(b) of the *Work Health and Safety Act 2011 (NSW) (WHS Act)* to take reasonable care to ensure their acts and omissions do not adversely affect the health and safety of others⁴⁶³. It is sufficient for the purposes of this Report to refer to the obligations as set out in cl 3.12 of the 2019 Code of Conduct.

383. As to obligations on Councillors during meetings, cll 3.19-3.22 relevantly provide (emphasis added)⁴⁶⁴:

*“3.19 You **must comply with rulings by the chair** at council and committee meetings or other proceedings of the council unless a motion dissenting from the ruling is passed.*

*3.20 You **must not engage in bullying behaviour (as defined under this Part) towards the chair, other council officials or any members of the public present** during council or committee meetings or other proceedings of the council (such as, but not limited to, workshops and briefing sessions).*

*3.21 You **must not engage in conduct that disrupts council or committee meetings or other proceedings of the council** (such as, but not limited to,*

⁴⁶³ See the analysis set out in CA Reply Submissions at [37]-[40].

⁴⁶⁴ Ex A, p 704.

workshops and briefing sessions), or that **would otherwise be inconsistent with the orderly conduct of meetings.**

3.22 If you are a councillor, you **must not engage in any acts of disorder** or other conduct that is intended to prevent the proper or effective functioning of the council, or of a committee of the council. Without limiting this clause, you must not:

- a) leave a meeting of the council or a committee for the purposes of depriving the meeting of a quorum, or
- b) submit a rescission motion with respect to a decision for the purposes of voting against it to prevent another councillor from submitting a rescission motion with respect to the same decision, or
- c) deliberately seek to impede the consideration of business at a meeting.”

384. As to interactions with staff, cl 7.2 of the 2019 Code of Conduct provides (emphasis added)⁴⁶⁵:

“Councillors or administrators must not:

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

385. Clause 7.6 of the 2019 Code of Conduct provides (emphasis added)⁴⁶⁶:

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

- a) **councillors and administrators approaching staff and staff organisations to discuss individual or operational staff matters (other than matters relating to broader workforce policy), grievances, workplace investigations and disciplinary matters**

⁴⁶⁵ Ex A, p 719.

⁴⁶⁶ Ex A, p 720.

- ...
- f) **councillors and administrators being overbearing or threatening to council staff**
- ...
- h) **councillors and administrators making personal attacks on council staff or engaging in conduct towards staff that would be contrary to the general conduct provisions in Part 3 of this code in public forums including social media**
- i) **councillors and administrators directing or pressuring council staff in the performance of their work, or recommendations they should make**
- ..."

386. As to the administration of the Code of Conduct, cll 9.11-9.13 of the 2019 Code of Conduct provide⁴⁶⁷:

- "9.11 You must not allege breaches of this code other than by way of a complaint made or initiated under the Procedures.
- 9.12 You must not make allegations about, or disclose information about, suspected breaches of this code at council, committee or other meetings, whether open to the public or not, or in any other forum, whether public or not.
- 9.13 You must not disclose information about a complaint you have made alleging a breach of this code or a matter being considered under the Procedures except for the purposes of seeking legal advice, unless the disclosure is otherwise permitted under the Procedures."

387. The "Procedures" are the *Procedures for the Administration of the Model Code of Conduct for Local Councils in New South Wales*, which are prescribed by regulation. A procedure that incorporates the provisions of the model procedure must be adopted by a council, and those procedures must be complied with by councillors, staff, and delegates of a council⁴⁶⁸.

388. Relevantly for present purposes, the Council adopted a version of those Procedures on 12 June 2019 (**2019 Procedures for the Administration of the Code of Conduct**)⁴⁶⁹.

⁴⁶⁷ Ex A, p 726.

⁴⁶⁸ LGA, s 440AA.

⁴⁶⁹ Ex A, p 865. The 2019 Procedures for the Administration of the Code of Conduct appears to have replaced a version adopted in 2014: see, Ex A, p 832.

The Code of Meeting Practice

389. As observed above, a failure by a councillor to comply with the Code of Meeting Practice may amount to an “*act of disorder*”, which in turn may amount to “*misconduct*” for the purposes of the LGA.

390. Relevantly, the following versions of the Code of Meeting Practice were applicable during the 2016 Term⁴⁷⁰:

- i. 8 July 2015 (**2015 Code of Meeting Practice**)⁴⁷¹; and
- ii. 12 June 2019 (**2019 Code of Meeting Practice**)⁴⁷².

391. Given that much of the conduct in meetings considered in the evidence relates to the period from mid- 2019 and following, it is convenient to focus attention on the 2019 Code of Meeting Practice. To the extent necessary reference, will be made to the 2015 Code of Meeting Practice where the relevant conduct occurred prior to 12 June 2019. I note that there was a minor amendment to the 2019 Code of Meeting Practice in about November 2019, which is immaterial for present purposes⁴⁷³.

392. Section 2 of the 2019 Code of Meeting Practice sets out “*meeting principles*”, and provides (emphasis added)⁴⁷⁴:

“Council and committee meetings should be:

Transparent: Decisions are made in a way that is open and accountable.

Informed: Decisions are made based on relevant, quality information.

Inclusive: Decisions respect the diverse needs and interests of the local community.

Principled: Decisions are informed by the principles prescribed under Chapter 3 of the Act.

Trusted: The community has confidence that councillors and staff act ethically and make decisions in the interests of the whole community.

⁴⁷⁰ Further versions of the Code of Meeting Practice were adopted on 24 March 2021, 28 July 2021, and 17 February 2022: see Ex A, p 1191. As those versions post-date the conduct under consideration in this Inquiry, there is no need to refer to them in this Report.

⁴⁷¹ Ex A, p 932.

⁴⁷² Ex A, p 991.

⁴⁷³ Ex A, p 1191.

⁴⁷⁴ Ex A, p 994.

Respectful: *Councillors, staff and meeting attendees treat each other with respect.*

Effective: *Meetings are well organised, effectively run and skilfully chaired.*

Orderly: *Councillors, staff and meeting attendees behave in a way that contributes to the orderly conduct of the meeting.”*

393. Clause 3.36 provides that⁴⁷⁵:

“Councillors must not use pre-meeting briefing sessions to debate or make preliminary decisions on items of business they are being briefed on, and any debate and decision-making must be left to the formal council or committee meeting at which the item of business is to be considered.”

394. It is self-evident that the chair of a meeting has an important role in the maintenance of order, and the efficient conduct of council business. Concomitant with that role is the fact that the chair has “*precedence*”. In this respect, clause 7.9 provides (emphasis added)⁴⁷⁶:

“7.9 When the chairperson rises or speaks during a meeting of the council:

(a) any councillor then speaking or seeking to speak must cease speaking and, if standing, immediately resume their seat, and

(b) every councillor present must be silent to enable the chairperson to be heard without interruption.”

395. Section 16 of the 2019 Code of Meeting Practice is headed “*Keeping Order at Meetings*”⁴⁷⁷. Having regard to the issues raised in the evidence, it contains a number of provisions to which attention must be given.

396. Clause 16.1 enables any councillor to draw to the attention of the chair an alleged breach of the code of meeting practice (but not in respect of adherence to the principles in cl 2)⁴⁷⁸. If that occurs, the chair must suspend business to permit the councillor raising the point of order to state the provision of the code that it is alleged that has been breached and then immediately rule on the point of order⁴⁷⁹.

397. As to the maintenance of order during the meeting, cll 16.4-16.7 provide (emphasis added)⁴⁸⁰:

⁴⁷⁵ Ex A, pp 998-999.

⁴⁷⁶ Ex A, p 1006.

⁴⁷⁷ Ex A, p 1022.

⁴⁷⁸ Ex A, p 1022.

⁴⁷⁹ Clause 16.3: Ex A, p 1022.

⁴⁸⁰ Ex A, p 1022.

- “16.4 **The chairperson, without the intervention of any other councillor, may call any councillor to order** whenever, in the opinion of the chairperson, it is necessary to do so.
- 16.5 **A councillor who claims that another councillor has committed an act of disorder, or is out of order, may call the attention of the chairperson to the matter.**
- 16.6 *The chairperson must rule on a question of order immediately after it is raised but, before doing so, may invite the opinion of the council.*
- 16.7 **The chairperson’s ruling must be obeyed** unless a motion dissenting from the ruling is passed.”

398. The 2019 Code of Meeting Practice also identifies conduct that constitutes an “act of disorder”, and the action that a chair may take in response to an “act of disorder”. Relevantly, cll 16.11 and 16.12 provide:

“16.11 *A councillor commits an act of disorder if the councillor, at a meeting of the council or a committee of the council:*

- (a) *contravenes the Act or any regulation in force under the Act or this code, or*
- (b) *assaults or threatens to assault another councillor or person present at the meeting, or*
- (c) *moves or attempts to move a motion or an amendment that has an unlawful purpose or that deals with a matter that is outside the jurisdiction of the council or the committee, or addresses or attempts to address the council or the committee on such a motion, amendment or matter, or*
- (d) *insults or makes personal reflections on or imputes improper motives to any other council official, or alleges a breach of the council’s code of conduct, or*
- (e) *says or does anything that is inconsistent with maintaining order at the meeting or is likely to bring the council or the committee into disrepute.*

16.12 *The chairperson may require a councillor:*

- (a) *to apologise without reservation for an act of disorder referred to in clauses 16.11(a) or (b), or*
- (b) *to withdraw a motion or an amendment referred to in clause 16.11(c) and, where appropriate, to apologise without reservation, or*
- (c) *to retract and apologise without reservation for an act of disorder referred to in clauses 16.11(d) and (e).”*

399. In accordance with cl 16.16, if a councillor fails to comply with a direction given under cl 16.12, that councillor may be expelled from the meeting.
400. If disorder occurs during a meeting of the council, the chair may also adjourn the meeting for not longer than 15 minutes. If that occurs, on resumption, the council must determine whether the business is to be proceeded with or not⁴⁸¹.

Training received by the Councillors in their roles and responsibilities

401. The evidence reveals that the Councillors had available to them training on their roles and responsibilities, including in relation to the Code of Conduct and the Code of Meeting Practice. That training was delivered both in the induction period (in about October 2016), and at various times throughout the 2016 Term⁴⁸².
402. In addition, the Office of Local Government delivered “*hit the ground running*” sessions, which included sessions on the roles and responsibilities of a councillor and the model Code of Conduct⁴⁸³.
403. As set out above, the Councillors also received detailed training on the roles and responsibilities of councillors as a condition of the Performance Improvement Order.
404. Accordingly, each of the Councillors had the opportunity to receive training in the roles and responsibilities of a councillor, both at the beginning of the 2016 Term and throughout. Only former Clr Halstead raised a concern that the induction and ongoing training they had received was inadequate to assist councillors to understand their statutory roles⁴⁸⁴. None of the other Councillors expressed that view, although some did suggest with the benefit of hindsight that certain matters could have been “*more appropriately delivered to councillors*” or been the subject of greater attention or emphasis⁴⁸⁵.

Did the Councillors fully understand their roles and responsibilities?

The Councillor’s description of their roles and responsibilities

405. When giving evidence, each of the Councillors were asked to describe their understanding of the roles and responsibilities of a councillor. In my view, it is valuable to consider that evidence

⁴⁸¹ Clause 16.13: Ex A, p 1023.

⁴⁸² Ex D, pp 1-7.

⁴⁸³ Ex D, pp 227-342.

⁴⁸⁴ T1207.24-1208.28 (former Clr Halstead)

⁴⁸⁵ See, e.g., T650.44-656.34, 660.30-40 (former Clr Markwart); T837.6-34 (Clr Whipper); T873.25-876.34 (Clr Scandrett); T1026.41-1028.15 (Clr Andrews); T1073.45-1074.10 (Clr McLaughlin); T1117.12-1118.43 (Clr Nelson); T1261.2-43 (former Clr Turland); T1346.10-25 (Clr Gair).

in some detail, as it informs an assessment of whether they fully understood their roles and responsibilities.

406. Clr Gair described his understanding of the role and responsibilities of a councillor as follows⁴⁸⁶:

“Q. Do you have any specific recollections of the training you received in the start of the 2016 term?”

A. Well, the big one is the councillors' responsibilities and roles to represent the community honestly and diligently, to --

...

Q. ...I think you were answering a question perhaps you anticipated from me, which is, what you understood the statutory roles of a councillor were. Can you take us through those if you have any recollection of them?”

A. Well, first one: as I say, the first is to set policy and direction; to represent the community in an honest and open manner; to not delegate yourself or try and enter into the operational situations of council; to set the rate for the shire; to bring to the attention of the mayor or the governing body issues that you feel are important, but to uphold the Code of Conduct in a proper and correct manner.

Q. What about the governing body? Do you have any recollection or can you tell us what your understanding is of what the roles of the governing body are as statutorily prescribed?”

A. The big one is strategy, policy and direction, and that is normally done through a series of workshops to set different plans or different ideas that are being brought forward by staff into a productive form. So, policy direction and strategy is what the governing body was doing.”

407. Clr Gair described his understanding of the additional roles of the Mayor as follows⁴⁸⁷:

“Q. ...Can you tell me what you understand the statutory responsibilities in respect of the mayor are?”

A. The mayor's the mayor.

Q. Could you be more specific?”

A. If the mayor behaves and follows the codes then that's fine. If the mayor breaks the code and is then accountable to the governing body for their actions then that's - that's - that's another level. But I believe that the mayor, and I have been under numerous mayors over the years, and on an annual

⁴⁸⁶ T1346.27-1347.25 (Clr Gair).

⁴⁸⁷ T1351.45-1352.36 (Clr Gair).

basis if the mayoral position became vacant or whatever then you had the right to nominate. But, you know, I never actively undermined a mayor.

Q. *No, let's de-couple those two themes for a moment, I'm not suggesting that you ever did and I wasn't attempting to link [section 232(f)] about undermining with what your understandings of what the mayor's role was. Can I perhaps just ask you again, what do you understand the statutory role of the mayor was?*

A. *Oh, right. Well, the same as councillor, and then above and beyond that, that the mayor works in general with the general manager, chairs the review performance – the performance of the general manager, chairs council meetings, is spokesman for the council on the official position of council, represents the community at various functions or wherever they are invited to attend, and in general hopefully shows leadership.*

Q. *What do you understand showing leadership entails?*

A. *Probably all of the above that I just mentioned. Leadership is perceived by some as - there is a perception within sections of the community and sections of a governing body that they don't agree with the leadership being shown and, as such, there will be a - could be an attempt to undermine that leadership for whatever political purpose or for whatever personal purpose, but to do that I think is wrong and brings the council into dysfunction."*

408. Cllr Andrews (Deputy Mayor at the time the Suspension Order was issued) described his understanding of the role and responsibilities of councillor as follows⁴⁸⁸:

"Q. *...Do you recall what roles and responsibilities you had under the statutory regime, namely, the Local Government Act?*

A. *I can't recall specifically, but one that is quite obvious, and I do recall, is the clear define between operational and the role of the elected body; that was made very clear and it's always been very clear to me."*

and further⁴⁸⁹:

"Q. *Can you explain to us what you understood the strategic operational divide to be?*

A. *The role of council is to present policy, strategic plans. It's the role of senior staff and staff to implement those plans or policies, and there is quite a clear definition of that line between the elected body, in my opinion, the elected body and operational matters.*

Q. *Thank you. Can I just go back a step to what you understood any other statutory roles you had were?*

⁴⁸⁸ T1028.9-15 (Cllr Andrews).

⁴⁸⁹ T1028.24-1029.12 (Cllr Andrews).

A. *Sorry?*

Q. *As a councillor, I should say.*

A. *Those that we could - those members of staff that we could correspond with, senior management of course, the general manager, the two deputy general managers, and also the managers directly under the senior staff level, and that's where it should have sit [sic] - that's where it ceased. It was made quite clear that we weren't to have, without a member of senior staff present, any discussions on operational matters with staff at a lower level.*

...

Q. *Can you give us your understanding of what the statutory roles of the governing body were?*

A. *It's probably - it's just exactly what I just spoke on then is all I can - you know, all I can think of at the moment, there's probably many, but that was the most important one as far as I was concerned and I'll possibly speak later on why I thought it was the most important one; the delineation between operational and the role of the acting - the role of a councillor and the governing body."*

409. Cllr McLaughlin described his understanding of the roles and responsibilities of a councillor as follows⁴⁹⁰:

"Q. *Can you tell me what your understanding of the statutory roles of a councillor are?*

A. *Sure. Well, the statutory roles of the council, the elected body, is basically the strategic consultation with the community and moving that forward. It's a little bit like making the destination: the ship's going to go here, and the staff get it there. So, basically it's a lot about the strategic side of - and the operational side and the strategic side are quite separate. So, we're there to pass the budget, to look at all the works programs going forward, to see the priorities of council where council is financially exposed or the budget...*

...

Q. *Do you understand there to be a statutory distinction in the roles of the councillors and the roles of the governing body?*

A. *I do.*

Q. *Can you give me your understanding of what the statutory roles of the councillor is?*

A. *The statutory responsibility of councillors is to - how do I paraphrase this? We are representing the - we've got a democracy, we're representing the people of this shire from all levels; to be honest, to be open, to be fair to - you're always a councillor; the responsibility to set the direction of council; to*

⁴⁹⁰ T1074-1075 (Cllr McLaughlin).

undertake the review of the general manager's review. That's the only person that we had any influence over with regard to the governing body. The general manager would advise us of, if she - and I've served under four, I think four general managers – three or - three general managers; they all had different opinions on how they would operate, whether they would have deputy general managers or directors, but that was their role, they ran that part of the organisation and that was something that councillors didn't get involved in. The day-to-day running of council was left to the general manager and the senior staff. Our role was listening to the community and to see that the role of the strategic part of the local government, our LEP, our DCPs, were updated. I hope that - is that?"

410. Cllr Nelson described his understanding of the roles and responsibilities of a councillor as follows⁴⁹¹:

“Q. Whether you learnt it at the time or you had a pre-existing knowledge of it, can you tell us what you understood the roles of a councillor were under the statute once you became councillor?”

A. Look, the main thing is we've got a set strategic direction and the policy, ensure the financial viability of the organisation and oversee the general manager's performance, and that's sort of underpinned by the Local Government Act, the legislations, regs, the Code of Conduct, Code of Meeting practice, work health and safety legislation and all the other legislations that go with that.

Q. Do you recall what impression or knowledge you took away about what the statutory roles of the governing body were as distinct from being a councillor in your own right?

A. Yeah. Look, our role was to keep the place running with the strategic direction and not interfere in staff matters at all; you're only dealing with the general manager or the senior staff. But there was a direction given that we were allowed to go to group managers but it stopped at that level, so the distinction between councillor role and the operational role.”

411. Cllr Scandrett described his understanding of the roles and responsibilities of a councillor as follows⁴⁹²:

“Q ...Can I just ask you what you understood - and by all means if it changed over time, let us know - what the core roles and responsibilities were for councillors firstly in the Local Government Act?”

A. Well, we were the strategic arm of the council, we were not the operational; there's quite a clear line between them, Mr Parish.

⁴⁹¹ T1118.45-1119.20 (Cllr Nelson).

⁴⁹² T875.11-976.8 (Cllr Scandrett).

Q. *And that is something which comes through in the Local Government Act; is that your understanding?*

A. *Well, it was - yes, and it was repeated within here too.*

...

Q. *And again, at just a general level, what did you understand the statutory roles were for the governing body in the legislation?*

A. *Well, we had to be quite precise in our role and our responsibilities and our actions. Now, for example, it was very clear bullying was on the table as a discussion point regularly and was coming through and changes in the Code of Conduct internally and externally, so yes, there was an increasing focus I guess on how council operated in the community and how we were to be efficient."*

412. Cllr Whipper described his understanding of the role and responsibilities of a councillor as follows⁴⁹³:

"Q. *What do you understand the statutory obligations are on you as a councillor?*

A. *Well, things like integrity, truth, respect, you know, they're values I think every individual holds and one of the things I noticed, that there was from some councillors a total lack of respect and that I think has been to our detriment because we need to inspire the confidence of the community that we represent. I think the behaviour of some of the councillors deliberately unwound that confidence of the community, and here we are as a result of that, you know, being thrown out in an embarrassing way as well.*

...

Q. *...Can I just ask you, before I got diverted slightly, what you understood the role of the governing body was statutorily? Can you give us your impressions of what --*

A. *Is to set policy for council and to represent the community's view; that's basically what I was about, you know, particularly bringing a minority view to council and doing the best I could as working as part of a team and to uphold those policy decisions.*

...

Q. *Councillor Whipper, can you tell me your understanding of that distinction between the councillor role as being strategic and staff as being operational; how did you see that line?*

A. *... So, ours was a role of governance, setting policy, operational matters rested definitely with the GM, so that's the way I certainly applied myself."*

⁴⁹³ T838.42-839.24, 841.36-44, 843.43-844.7 (Cllr Whipper).

413. Former Clr Halstead described his understanding of the roles and responsibilities as follows⁴⁹⁴:

“Q. What do you understand the role of a councillor as statutorily set out is?”

A. Pretty clearly in section 223, I believe, is the role of the governing body, and I subscribe to that. I am concerned about, and I said so in my submission, the wording of "direct and control"; I don't think that's the sort of wording I'd use. But certainly what's listed on 223, I think, is a fairly good rundown of what's expected of a governing body.

Q. What about the role of a councillor?”

A. Well, there's certainly a tie-in with that. But section 232, the role of a councillor, I agree with what's written there: (a) through to (g); (1)(a) to (g) and (2), and not the least of which is the last one:

A councillor is accountable to the local community for the performance of the council.

...”

414. Former Clr Markwart described his understanding of the role of a councillor as follows⁴⁹⁵:

“Q. What about the roles of individual councillors? What, in your view were their obligations under the Act?”

A. Under the Act? Whoa. I mean, there's things like civic leadership, which again the mayor leads. Behave well, be responsible, listen to people, take into account all information for your decisions. I can't really quote or refer to the Act specifically, but this is the impression I have.

Q. Yes.

A. In my view, a councillor has to behave above and beyond an average ratepayer. Certainly, personal issues on council, development applications on council, as a councillor you must be super careful and not bend any rules whatsoever or not ask for any favours. You've just got to be so professional and so above board, it's not funny, and I believe that's the way to be.

...

Q. ...What about the role of the governing body as you saw it; was that different statutorily from the role that councillors had or did you see that as an extension effectively of the obligations that councillors had?”

A. The governing body, I believe, has a broader responsibility to the community than individual councillors. It's more setting - what shall I say – the vision, if you like, the framework again, the tone; individual councillors add to that or build that or support that, but no one councillor can actually make that happen,

⁴⁹⁴ T1200.35-1201.6 (former Clr Halstead).

⁴⁹⁵ T658.22-659.24 (former Clr Markwart).

it's got to be the whole body, and that requires leadership and support from senior staff in council. You can't have one without the other."

415. Former Cllr Turland described his understanding of the roles and responsibilities of a councillor as follows⁴⁹⁶:

"Q. Can you tell us what you understand your roles as a councillor to be as prescribed in the legislation?"

A. Yeah, I've got the two documents here, these are the current ones, but from the previous it's been changed a few times; pretty well, I understand clearly we're not to involve ourselves in operational matters, and I did, and you can ask me questions on that later. But we're not involved - we're not to direct staff to do anything; we can put notices of motions in and questions with notice, which allows you to ask the questions you want on behalf of the community, or what you think is needed to be answered by the senior staff. I never really ever, and as you can probably see in the records, never sent any emails to anybody below the level that we were allowed to. And, I never spoke to them because I figured, if I didn't get it in writing, it wasn't worth having, and that's how I believed it should be.

Q. Can you tell me what you understood from the induction training the role as statutorily prescribed of the governing body was?"

A. Yeah, to long - the long-term strategies of council, financial strategy, the community [strategic] program to make sure that we were looking for the future in the process, all those standard documents every year would be either up - changed, business would change every couple of years, not every year, but every couple of years. Also the other thing is, every five years we'd have the LEP to be reviewed and then the housing strategies, that's normal process...."

416. Those descriptions reveal a high-level understanding of the roles and responsibilities of a councillor, but they do not suggest that any of the Councillors had a "*comprehensive understanding*" or a "*strong understanding*" of them⁴⁹⁷. While some gave more detail than others, none of the Councillors gave answers that revealed a detailed understanding of the role and responsibilities as reflected in the LGA. Nor did their answers reflect the summary of the roles and responsibilities of a councillor and the governing body set out in the Councillor Handbook (to which none of the Councillors referred), nor did they reflect the training that all of the Councillors received as part of compliance with the Performance Improvement Order. For example, none referred to the requirements to adhere to the Code of Conduct or the Code

⁴⁹⁶ T1261.45-1262.8 (former Cllr Turland).

⁴⁹⁷ See, Councillor Handbook (Ex A, p 457) and the Councillor Induction and Professional Development Guidelines (Ex A, p 562).

of Meeting Practice, and only Clr Nelson referred to them in his answers (albeit in a slightly different context), and only former Clr Halstead referred to the LGA⁴⁹⁸.

417. I do not think that it is necessary for a councillor to be able to recite the content of the relevant provisions of the LGA from memory, or necessarily even to be able to identify them with precision. However, the descriptions given by the Councillors of their roles and responsibilities were high level and incomplete. Although general references to strategy and leadership were apt to capture some of the concepts set out in the relevant provisions of the LGA, the evidence given by the Councillors on this issue left me with impression that they had an incomplete understanding of the content of the roles and responsibilities of a councillor, the governing body and (in the case of Clr Gair) the additional role of mayor as prescribed by the LGA.
418. That impression was reinforced by various aspects of the conduct of the some of the Councillors during the 2016 Term, including in meetings, briefings, and in interactions with staff and the community. Examples of that conduct are considered in more detail in the analysis of the second limb of Term of Reference 1 below. In addition, the justifications given by some of the Councillors for that conduct (also considered below) further demonstrate the absence of a full appreciation and understanding of their roles and responsibilities.
419. An examination of that conduct and the justifications for it makes clear that some of the Councillors either:
- i. did not appreciate that the standards required by the Code of Conduct and the Code of Meeting Practice must be complied with at all times; or
 - ii. were willing to cast those requirements aside if the particular cause was subjectively considered by them to be worthy enough.
420. Both scenarios demonstrate a lack of proper appreciation and understanding of the roles and responsibilities of a councillor. The former is a direct instance of a failure to understand the responsibility of a councillor in performing his or her function. The latter is an attempt to justify inappropriate conduct where those justifications find no support in the relevant provisions of the LGA, the Code of Conduct or the Code of Meeting Practice (no matter the significance of the cause or issue at hand).
421. Counsel Assisting submitted that the understanding some of the Councillors of their roles and responsibilities had been informed by their subjective views about what those roles and responsibilities were, rather than an understanding of those roles and responsibilities as

⁴⁹⁸ T1118.45-1119.20 (former Clr Halstead). Clr Scandrett referred to s 232 of the LGA in the context of a particular council project, however, did not expressly refer to it when describing his understanding of the roles and responsibilities of a councillor or the governing body: T980.32-981.12 (Clr Scandrett).

prescribed by the relevant statutory provisions⁴⁹⁹. In this respect, reference was evidence of Clr Scandrett to compliance with the oath of office (contained in s 233A of the LGA)⁵⁰⁰, and in the evidence of Clr Scandrett and former Clr Halstead to advancing their own election platforms⁵⁰¹.

422. Pausing there – the oath of office expressly requires a councillor to “*faithfully and impartially carry out the functions, powers, authorities and discretions vested in [a councillor] under the Local Government Act 1993...to the best of the [councillor’s] ability and judgment*”⁵⁰². Thus, the oath directs attention to the functions and powers of a councillor as prescribed by the LGA – not a subjective understanding of what those functions are based on an election platform or perceived mandate from the electorate. The content of the oath of office reinforces the need for compliance by councillors with the LGA, rather than excusing conduct which is inconsistent with it. Similarly, a councillor’s own election platform does not inform or affect the content of a councillor’s roles or responsibilities.
423. The application of subjective understanding of the roles and responsibilities of a councillor also extended to the justifications proffered by some of the Councillors for conduct which, on its face, was inconsistent with the Code of Meeting Practice and the Code of Conduct. Justifications for that conduct included a councillor being “*charged*” to “*ask questions*” on behalf of the community⁵⁰³, that the conduct was representing or getting answers for “*the community*”⁵⁰⁴, generally just “*asking questions*” that needed to be asked⁵⁰⁵, or advancing issues that they “*felt weren’t being treated properly*” and which “*they were entitled to have dealt with*”⁵⁰⁶. Those justifications do not excuse conduct by a councillor that fails to adhere to the standards of conduct prescribed by the LGA, Code of Conduct and the Code of Meeting Practice, each which must be complied with by councillors in performing their roles and discharging their responsibilities.
424. In my view, the justifications offered by those councillors (primarily Clr Scandrett and former Clr Turland and Halstead) for that conduct supports the view that they did not appreciate that what they were doing was inconsistent with the roles and responsibilities of a councillor. If (contrary to that conclusion) they did appreciate that at the time, the justifications demonstrate a willingness to cast their content of their prescribed roles and responsibilities aside in pursuit of a cause deemed worthy enough. Self-serving explanations of being “*passionate*”⁵⁰⁷ or

⁴⁹⁹ CA Final Submissions [218]-[237].

⁵⁰⁰ See, e.g., T894.38-895.11, 920.1-8, 929.33-41 (Clr Scandrett).

⁵⁰¹ See e.g., T895.32-42, 962.43-964.21 (Clr Scandrett); T 1198.10-35 (former Clr Halstead).

⁵⁰² LGA, s 233A.

⁵⁰³ T892.22-36, 894.16-896.25 (Clr Scandrett).

⁵⁰⁴ See, e.g., T 898.19-24, 920.1-8, 930.25-30, 964.5-21 (Clr Scandrett).

⁵⁰⁵ See, e.g., T1238.11-1239.12 (former Clr Halstead); T1305.20-1306.20 (former Clr Turland).

⁵⁰⁶ T1210.13-22 (former Clr Halstead).

⁵⁰⁷ T1302.29-47 (former Clr Turland).

“energetic”⁵⁰⁸ do not excuse conduct of that kind. In my view, in either scenario, that conduct, and the justifications advanced for it displays a lack of understanding of their roles and responsibilities as prescribed by the LGA.

Is a high level understanding sufficient to “fully understand” the roles and responsibilities of a councillor?

425. That a councillor should have a thorough and detailed understanding of the roles and responsibilities of the governing body and an individual councillor (including the importance of compliance with the Code of Conduct and the Code of Meeting Practice) ought not be a controversial proposition. As much is made expressly clear in materials published by the OLG and LGNSW, including:

- i. The Councillor Handbook, which states (as a matter of obviousness and among other statements to similar effect) that “*It is important that councillors have an understanding of the legislation under which councils have responsibilities*”, which includes the LGA⁵⁰⁹;
- ii. The Councillor Induction and Professional Development Guidelines (published in 2018 and issued under s 23A of the LGA), which state “*Mayors and councillors must have a strong understanding of their prescribed roles and responsibilities under the Act in order to be able to fulfil them*”⁵¹⁰
- iii. The “*Hit the Ground Running*” 2016 Councillor Workshop presentation⁵¹¹;
- iv. The LGNSW Councillor “*Capability Framework*”, which was appended to the Councillor Handbook⁵¹²;
- v. Circulars issued pursuant to s 23A of the LGA⁵¹³;
- vi. Meetings Practice Note No 16⁵¹⁴.

426. It was also a matter that ought to have been clear to the Councillors through the training that they had received, including their induction training⁵¹⁵ and ongoing training⁵¹⁶. If it had not

⁵⁰⁸ T881.12-22 (Clr Scandrett).

⁵⁰⁹ Ex A, p 534. See also, for e.g., Ex A, pp 456, 464-472, 484-493, 584-589.

⁵¹⁰ Ex D, p 127.

⁵¹¹ Ex D, pp 245-258, 266-286, 315-341.

⁵¹² Ex A, pp 613-620.

⁵¹³ See, e.g., *Circular No 18-45 – Commencement of the new Model Code of Meeting Practice for Local Councils in NSW*: Ex A, p 1316-1322.

⁵¹⁴ Ex A, p 1297. Although dating from August 2009 and although it refers to the provisions of the LGA as they were prior to the suite of amendments in 2016, the Meetings Practice Note was identified in the 2017 Councillor Handbook as being a “*useful resource*” for councillors relevant to the conduct of meetings in the 2016 Term: Ex A, p 543.

⁵¹⁵ Ex D, pp 1-2.

⁵¹⁶ Ex D, pp 3-6.

been clear at that stage, the training mandated by the Performance Improvement Order⁵¹⁷ should have resonated with each of the Councillors given that Minister saw fit to impose it, and (in responding to the Notice of Intention to Issue a Performance Improvement Order) the Councillors unanimously agreed that it should occur.

427. In his Final Submission, former Clr Markwart submitted that “*Councillor’s understanding of roles and responsibilities was high level, as is usual with Councillors with most Councils*”⁵¹⁸. I note that former Clr Markwart had resigned prior to the Performance Improvement Order being issued and therefore did not participate in the training that occurred at that time. His submissions on this topic must be viewed in that light, but as they have potential relevance beyond his own position, it is appropriate that I directly address that proposition in this Report.
428. I accept that there are aspects of the performance of a role of a councillor where a high level understanding of the issue or area of expertise is sufficient. Some may come to their position with extensive relevant experience, some may not. It is not the role of a councillor to be an expert in every area of council operations, nor is it their responsibility to acquire that expertise. That is why the Council engages professional staff who have expertise in each of the necessary areas of its operations. The advice of those professional staff who have the requisite expertise and knowledge informs a councillor’s consideration of those issues. That fact highlights the importance of the working relationship between the governing body on the one hand (as the decision making body) and the professional staff (as the expert advisers) on the other.
429. However, an appreciation of the role and responsibilities of a councillor is in a fundamentally different category. Unlike a consideration of issues that may come to council, it is not unreasonable to expect that an elected councillor has more than a high-level understanding of their own roles and responsibilities in discharging the office to which they have been elected. The concepts contained in the relevant provisions of the LGA are not difficult or onerous to understand, and (as summarised above) a significant amount of information and training was available to the Councillors to enable them to obtain a “*strong understanding of their prescribed roles and responsibilities*”⁵¹⁹.
430. Accordingly, in my view, before a councillor can be said to “*fully understand*” the roles and responsibilities of a councillor, something more than the general, high level, conceptual understanding of those roles and responsibilities is required.

⁵¹⁷ Ex B, pp 30-155.

⁵¹⁸ Markwart 23 May 2022 Final Submission, p 7.

⁵¹⁹ Councillor Induction and Professional Development Guidelines: Ex D, p 127.

Conclusion as to whether the Councillors “fully understood” their roles and responsibilities

431. For the reasons set out above, although there were differences in the level of detail in the evidence of the Councillors, the weight of the evidence supports a conclusion that the Councillors (whether taken as a whole or viewed individually) had a high level understanding of their roles and responsibilities, but they did not “fully understand” them.

432. That conclusion is fortified by the analysis of the conduct of several of the Councillors in the performance of their roles and responsibilities set out below. Some of that conduct, and the justifications or explanations offered for it, demonstrates a lack of understanding of the roles and responsibilities of a councillor, or a willingness to disregard them. As set out above, in my view whether a councillor did not fully understand their role and responsibilities when engaging in that conduct, or they did but disregarded them and engaged in the conduct in any event through a misguided sense of “duty”, “passion”, or “enthusiasm” does not matter. Either scenario reveals a failure to fully understand their roles and responsibilities as prescribed by the LGA.

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

433. In my view, the evidence supports a conclusion that there were collective failures in the Governing Body to always perform their roles and responsibilities adequately, reasonably, and appropriately in a number of respects. For the purpose of this Report, those matters can be conveniently examined within the following categories:

- i. Conduct in council meetings and briefings;
- ii. Interactions and dealings with council staff;
- iii. Other conduct which tended to bring the council, or council officers, into disrepute;
- iv. The effect of councillor behaviour on staff;
- v. Performance of the strategic function of the governing body.

Conduct in council meetings and briefings

434. I have reviewed the vast majority of the Council Meetings, and the Finance Committee meetings, in respect of which a video recording is available on the Council’s YouTube page.

435. A review of that footage reveals numerous instances of breaches of the 2019 Code of Meeting Practice and the 2019 Code of Conduct during those meetings. Many “acts of disorder” can also be seen. It is beyond the scope of this Report to engage in a detailed review of each and

every meeting. To aid the analysis, Counsel Assisting tendered a selection of clips from those meetings (comprising Ex CC) that contain examples of conduct that are representative of the kinds of conduct that can be seen in other meetings. Having reviewed a large number of the recorded Council meetings, in my view the examples seen in Ex CC cannot be described as isolated instances or aberrations⁵²⁰.

The clips in Exhibit CC

436. Exhibit CC contained a series of clips from Council Meetings held on the following days:

- i. 26 June 2019 (Clip 1);
- ii. 10 July 2019 (Clips 2 and 3);
- iii. 14 August 2019 (Clip 4);
- iv. 28 August 2019 (Clip 5);
- v. 29 January 2020 (Clip 12);
- vi. 12 February 2020 (Clip 7);
- vii. 11 March 2020 (Clip 8);
- viii. 24 February 2021 (Clips 9, 10, and 11).

437. Counsel Assisting submitted that there were numerous breaches of the 2019 Code of Conduct and the 2019 Code of Meeting Practice evident in those clips⁵²¹. None of the Councillors that made final submissions sought to persuade me to adopt a different view. Indeed, when shown some of the clips during evidence, Clr Gair described what was seen in them as “*May I say: they’re a disgrace, absolute disgrace.*”⁵²² There is much to be said for Clr Gair’s description of what can be seen in those clips.

438. I have reviewed each of those clips in their entirety several times. The behaviour seen in those clips falls into several categories, including (but not necessarily limited to) the following:

- i. arguing with the chair, refusing, or failing to comply with rulings or directions from the chair; continuing to speak when the chair spoke;

⁵²⁰ CA Final Submission, [245]. See also, T 1296.4-33 (former Clr Turland)

⁵²¹ CA Final Submission, [244].

⁵²² T1381.5-28 (Clr Gair).

- ii. making allegations, or implications, of improper conduct or making personal reflections about other Councillors;
- iii. making allegations, or implications, of improper conduct or performance of duties by council staff, some of which took the form of aggressive or intimidatory conduct or comments directed to Council staff;
- iv. questions, including directed to staff, were not always put respectfully and without argument;
- v. arguing between Councillors.

439. Conduct of that kind is inconsistent with the 2019 Code of Conduct and the 2019 Code of Meeting Practice including, for example (and without attempting to be exhaustive):

- i. various clauses of the 2019 Code of Conduct, including:
 - i) the prohibition against engaging in conduct that is likely to bring the council or other council officials into disrepute contained in cl 3.1(a);
 - ii) the prohibition against engaging in “*bullying*” towards others, in the sense of “*aggressive, threatening or intimating conduct*” towards others in cl 3.8 of the Code of Conduct (read together with the definition of “*bullying behaviour*” in clause 3.10);
 - iii) the obligation to comply with rulings of the chair in cl 3.19;
 - iv) the prohibition against engaging in conduct that disrupts council, meetings, or would otherwise be inconsistent with the orderly conduct of meetings in cl 3.21;
 - v) the prohibition against engaging in “*acts of disorder*” in cl 3.22;
 - vi) the prohibition against being overbearing or threatening to council staff, making personal attacks on council staff, or engaging in conduct towards staff that would be contrary to the general conduct provisions of the 2019 Code of Conduct in cl 7.6;
- ii. various clauses of the 2019 Code of Meeting Practice, including:
 - i) various of the “*meeting principles*” set out in cl 2.1;
 - ii) the obligation to give the chair “*precedence*” contained in cl 7.9;
 - iii) the obligation to put questions “*respectfully and without argument*” in cl 10.18;

- iv) the prohibition against engaging in “*acts of disorder*” contained in cl 16.11, including:
 - (1) making personal reflections or imputes improper motives to any other council official contained in cl 16.11(d); and
 - (2) the prohibition against saying or doing anything that is inconsistent with maintaining order at the meeting, or is likely to bring the council into disrepute in cl 16.11(e);

440. Much of that conduct constituted an “*act of disorder*” within the meaning of cl 182 of the 2005 LG Regulation and s 490A of the LGA. To the extent that the conduct observed in that meeting constituted an “*act of disorder*” at a meeting of the council, it met the definition of “*misconduct*” in s 440F of the LGA.

441. A review of those clips reveals that conduct falling within the categories of conduct summarised above was engaged in primarily by each of Clr Scandrett, former Clr Turland and (albeit to a lesser extent) former Clr Halstead. I do not suggest that each of them engaged in all of that conduct. However, examples of at least some of it from each of those councillors were observed. Limited examples of some of that conduct were also observed from Clr Gair (in the nature of remarks directed to Clr Scandrett⁵²³) and Clr McLaughlin (in the nature of conduct that was disruptive and inconsistent with the maintenance of order at the meeting, such as arguing directly with other councillors and speaking over the chair⁵²⁴).

442. I did not observe any conduct of the kind summarised above from Clr Nelson, Clr Andrews, Clr Whipper, or former Clr Markwart (to the extent that he was present in the meetings).

443. Although it is beyond the reasonable scope of this Report to engage in a detailed assessment of each instance of conduct seen in those clips (or any of the other recordings of meetings that are available), there is some benefit in analysing three of the clips which are demonstrative of its unsatisfactory nature.

444. Clip 12 contains footage from the commencement of the Extraordinary Meeting of Council held on 29 January 2020. The two items of business for that meeting related the 2019/2020 Bushfires that had recently, and tragically, affected the Shire⁵²⁵. The meeting was attended by a number of members of the public, some of whom had been directly impacted by the fires. It was, obviously enough, a very difficult time for the community. If ever there were a time for

⁵²³ See, e.g., Ex CC, clip 2.

⁵²⁴ See, e.g., Ex CC, clip 11.

⁵²⁵ Ex F, pp 3153-3163.

calm reflection and unity by the governing body in the interests of the community, it was that meeting. Unfortunately, that is not what occurred.

445. At the outset of the meeting, Clr Scandrett moved a motion for a “*suspension of standing orders*” to allow the public to address the meeting. Clr Gair refused to accept that motion⁵²⁶. Indicative of the fractured relationship within the Governing Body, Clr Scandrett had not raised his proposed motion with Clr Gair prior to the meeting, although he had discussed it with other councillors in order to canvass support. Clr Scandrett maintained that it was not “*practical*” for him to speak to the Mayor about his intention⁵²⁷. That is a doubtful proposition given that there was time to canvass other councillors. Had that occurred, what happened next might have been avoided. That it did not is indicative of the breakdown in relationship between Clr Scandrett and Clr Gair.

446. The meeting then took, to put it neutrally, an unfortunate course. In response to Clr Gair’s ruling, Clr Scandrett proceeded to argue with the chair. In doing so, Clr Scandrett spoke over the chair and directed comments to him, including “*you have made a big mess of this so far and you continue to do it*” and “*Oh Mr Mayor, you are a shame*”. In the context of the business to be considered at that meeting, the “*this*” referred to by Clr Scandrett can only be reasonably understood as a reference to the response to the bushfires. Unfortunately, none of Clr Scandrett’s colleagues sought to draw those acts of disorder to the chair’s attention, nor did they raise a point of order in relation to them.

447. Clips 7 (26 February 2020) and 8 (11 March 2020) include instances of conduct which are directed towards, or reflected upon, staff during Council meetings. They are noteworthy as they are referred to in Clr Gair’s letter to the Minister dated 16 March 2020⁵²⁸.

448. Clip 7 commences with former Clr Turland seeking to raise an issue about a notice of motion that he and former Clr Halstead submitted, and which had not been included in the business paper by the General Manager⁵²⁹. That notice of motion contained an express allegation of a breach of the Code of Conduct, the LGA, and other legislative provisions, by Council staff and some Councillors⁵³⁰. In that exchange, former Clr Turland argued with and spoke over the

⁵²⁶ The “*public forum*” provisions only apply to ordinary meetings of council, and involve an application process (which is expressed in mandatory language): Ex A, p 1000. See also Ex E, pp 130-131 in which a number of reasons are identified for the refusal of the motion, including those provisions of the Code of Meeting Practice relating to public forums. I observe, however, that despite those matters (and perhaps indicative of the inconsistent application of the code of meeting practice provisions) Ms Haslinger was permitted to speak at the meeting and is recorded in the minutes as being part of a “*public forum*”: Ex F, p 3159. It is not necessary for me to resolve how that occurred.

⁵²⁷ T917.31-918.34 (Clr Scandrett).

⁵²⁸ Ex E, pp 69-70.

⁵²⁹ It is the role of the General Manager to determine what business is to be placed before the council. In doing so, the General Manager must not include business which, in the opinion of the general manager, would be unlawful to implement: 2019 Code of Meeting Practice, cl 3.20: Ex A, p 997.

⁵³⁰ Ex E, p 145.

chair, who was again Clr Gair. Ultimately, the then General Manager, Ms Prendergast, explained that although there was a delay in responding to the submission of the notice of motion by former Clrs Turland and Halstead, it would not have been placed on the business paper in any event for the reasons that had already been given to them⁵³¹. Notwithstanding that explanation, former Clr Turland persisted in arguing with Ms Prendergast, and in doing so stated “*I have a motion that complies...*”. When giving evidence, former Clr Turland accepted that the General Manager’s decision to exclude the Notice of Motion had been correct⁵³².

449. Ms Prendergast then referred the Councillors to the relevant provisions of the 2019 Code of Meeting Practice that were applicable to the situation that had emerged (which by then included the Mayor’s refusal to accept the notice of motion as a matter of urgency such that it could be considered at the meeting). That attracted further argument from former Clr Turland.

450. Former Clr Halstead then rose to speak, stating that he did not “*accept*” the determination of the General Manager, and (in what an objective observer would readily identify as a thinly veiled threat) stated that the issue was “*not going to stop here*” and that some form of unidentified action would be taken about it⁵³³. At the very least, that comment conveyed to the objective observer that the General Manager had failed to perform her role in accordance with applicable processes, and that failure justified some form of action in another place.

451. Former Clr Halstead then alleged that the refusal of the General Manager to include the notice of motion in the business paper was an “*attempt to shut us two down, again...*”⁵³⁴ and that he had “*no confidence*” in the Mayor’s ruling. He further stated that “*I am not going to be hoodwinked, the GM’s heard that one before, by any of you*”. When Clr Gair interjected, former Clr Halstead accused him of wanting to “*shut people down*”, asserting that doing so was Clr Gair’s “*game*”. Again, those comments suggest an improper (or at least inadequate) performance of the roles of the General Manager and the Mayor.

452. Once former Clr Halstead had resumed his seat, former Clr Turland moved a motion of dissent against Clr Gair’s ruling that the issue was not a matter of urgency in accordance with clause 10.3 of the 2019 Code of Meeting Practice. Clr Turland then argued with Ms Prendergast as to the applicable provisions of the 2019 Code of Meeting Practice. Ms Prendergast then, in

⁵³¹ Those reasons included that the proposed notice of motion offended clause 9.20 of the Code of Conduct, and therefore it was excluded in accordance with cl 3.20 of the Code of Meeting Practice: Ex E, pp 143-145. The correctness of the General Manager’s approach was subsequently confirmed by the OLG: Ex E, pp 1-3.

⁵³² T1315.7-1318.11 (former Clr Turland).

⁵³³ In his evidence, former Clr Halstead was unable to recall what he had in mind, although suggested that the OLG might have been one place where action could have been taken: T1239.31-1241.21 (former Clr Halstead).

⁵³⁴ A reference to he and former Clr Turland.

my view correctly, identified that a motion of dissent could not be moved in those circumstances⁵³⁵. Thereafter, former Clr Turland engaged in further argument with the chair.

453. At that point, Clr Scandrett injected himself into the debate, asserting that he had had "*the same thing happen to me*", presumably a reference to having questions with notice or notices of motion disallowed. Clr Gair then announced an adjournment of the meeting for 15 minutes, to which Clr Scandrett replied "*Well, you are a coward Mr Mayor*". On resumption of that meeting, Clr Scandrett sought to apologise to Clr Gair for those comments, however Clr Gair did not accept it⁵³⁶.

454. Similar conduct can be observed in Clip 8, which was taken from the meeting on 11 March 2020. That clip commences with former Clr Turland asking a question about the process followed by Council when accessing information held by it, which was answered by Ms Lidgard at the request of Ms Prendergast. Clr Turland then asked a follow up question, which Ms Prendergast indicated would not be answered by either Ms Lidgard or her⁵³⁷. In response to that determination by the General Manager, former Clr Turland stated "*well, you will*". Former Clr Turland accepted that the remark was a threat directed to the General Manager⁵³⁸. Despite Clr Gair identifying it as such at that time, no action was taken in relation to it by Clr Gair or any other Councillor, whether during the meeting or otherwise (save that the meeting was referred to in Clr Gair's letter to the Minister).

455. Later in that clip, Clr Scandrett sought to agitate the issue of an exclusion of an item of business that had been submitted by him. Clr Scandrett commenced by stating "*Open and transparent society...I know the answer from the GM be that "this is how the meeting rules are", but guess what? We are going to be reviewing those meeting rules*". He then attributed statements to the General Manager, which the General Manger sought to correct. In response Clr Scandrett stated "*thank you GM for jumping in, I didn't know you were a mind reader*"⁵³⁹. The General Manager ultimately objected to Clr Scandrett's conduct on that basis that he was improperly seeking to introduce into the into the meeting items that she had determined should not be placed before the Councillors in accordance with the Code of Meeting Practice. When both Clr Gair and Ms Prendergast stated that what Clr Scandrett was attempting to do was "*impermissible*", Clr Scandrett responded "*big brother again, ok big sister...*". Those exchanges carried a clear and unambiguous implication of improper conduct by the General Manager. Those implications were to continue.

⁵³⁵ See cl 10.5 of the 2019 Code of Meeting Practice: Ex A, p 1009.

⁵³⁶ See, e.g., T1020.46-1021.6 (Clr Scandrett). -

⁵³⁷ With the effect that Ms Lidgard was not obliged to answer it, even if she had been able to do so: see cl 10.16 of the 2019 Code of Meeting Practice: Ex A, p 1010.

⁵³⁸ T129.36-47 (former Clr Turland).

⁵³⁹ Comments which lack the politeness that Clr Scandrett maintained that he always displayed toward staff: see, e.g., T935.40-936.19 (Clr Scandrett).

456. Clr Turland then rose and suggested there were attempts to “*hide it under the table*”.
457. Later in the clip, when called to order, Clr Scandrett continued to argue with the chair and was ultimately asked to leave the chamber by Clr Gair. He refused to do so, remaining in his seat. At this point in the meeting, Ms Prendergast can then be heard to say “...*either Clr Scandrett leaves the chamber or I will ask the staff to leave the chamber because this is enough...*” Clr Scandrett continued to remain in his seat. Somewhat surprisingly, it appeared as though Clr Gair was going to continue with the business of the meeting without resolving the issue of Clr Scandrett’s presence in the Chamber until former Clr Markwart (quite properly, in my view) raised a point of order noting that Clr Scandrett had not left the chamber despite the request of the chair. Clr Gair then repeated his request that Clr Scandrett leave the chamber, this time for “*five minutes*”. Clr Scandrett again refused to comply and can be heard to remark “*it’s election time everyone...go your hardest Mr Mayor...I am elected and representing...*”. It is difficult to conceive of a more abject act of defiance of the chair and conduct that was inconsistent with the maintenance of order at the meeting. That conduct was made all the more significant by the fact that the General Manager had made clear that she considered that staff should not be exposed to the behaviours occurring in the meeting. Rather than heed that warning, Clr Scandrett persisted.
458. At Clr Nelson’s suggestion, Clr Gair suspended the meeting for 15 minutes as opposed to closing it. What is not seen in that clip is that on resumption of that meeting it was necessary for the Council to resolve that the meeting be continued. Former Clr Markwart voted to close the meeting, although the other councillors voted to resume the business of the meeting, and it continued.
459. Following that meeting, former Clr Markwart sent an email to Clrs Gair and Markwart stating⁵⁴⁰:
- “I strongly recommend that if any Councillor steps out of line once – no warning – they be called out for disorder and be required to leave the meeting for the remainder of the meeting, or even subsequent meetings. Get security to enforce it. These Councillors want to grandstand to their public. A 5 minute exclusion or suspending the meeting achieves nothing...”*
460. In my view, some of former Clr Markwart’s recommendations represented an appropriate response in the context of the behaviours shown at meetings during the 2016 Term (i.e., calling out acts of disorder, and, if appropriate, expelling councillors from meetings). They were not taken up⁵⁴¹.

⁵⁴⁰ Ex E, pp 52-53.

⁵⁴¹ Although the behaviour at that meeting was referred to in Clr Gair’s correspondence to the Minister, there is no evidence that action of the kind suggested by former Clr Markwart was taken in response to future instances of disorderly conduct.

461. Although that summary of the conduct observed in those clips cannot fully convey its nature, in my view it cannot seriously be contended that it was anything other than inappropriate and inconsistent with a number of provisions of the 2019 Code of Conduct or the 2019 Code of Meeting Practice.
462. I have not sought to assess the underlying merits of the particular issues that were to being pursued by those Councillors in those clips. Even if I were to assume (without deciding) that they were significant and important matters and were matters that were appropriate to have been raised by a councillor, in my view the manner in which they were raised and persisted with was inconsistent with an appropriate or adequate discharge of the roles and responsibilities of a councillor. That the conduct was engaged in at all is also apt to demonstrate that there was either a lack of understanding of, or willingness to completely adhere to, the proper roles and responsibilities of a councillor by those Councillors.
463. Each of the Clr Scandrett, and the former Clrs Turland and Halstead were challenged about their conduct in some of the clips contained in Ex CC during their evidence. Their responses warrant some attention in this Report.
464. Although Clr Scandrett expressed “*regret*” and “*embarrassment*” at some of his conduct seen in those clips⁵⁴², there was a level of reluctance on his part to accept that his conduct was inappropriate⁵⁴³. In this respect, Clr Scandrett also offered a number of explanations or justifications for it, including that: he was “*there for the people*” or “*there for the community*”⁵⁴⁴; that he “*had a conscience*”⁵⁴⁵; the “*emotion of the day probably intervened*”⁵⁴⁶; or that meetings were “*heated*”⁵⁴⁷. Other explanations advanced by Clr Scandrett for his conduct included that he was: “*like a dog with a bone*”; “*energetic*” in the pursuit of a cause⁵⁴⁸; and that his conduct was driven by a sense of “*duty as a councillor to get information and...ask questions on behalf of the community*”⁵⁴⁹. A further justification proffered by Clr Scandrett for his conduct appeared to be the existence of an 8:1 voting pattern, in which he was in the minority⁵⁵⁰.
465. In some instances, when questioned about his own conduct, Clr Scandrett sought to identify criticisms of Clr Gair rather than respond directly to the issues being raised with him. For

⁵⁴² See, e.g., T916.44-917.4, 1018.30-40, 1020.24-1021.17 (Clr Scandrett).

⁵⁴³ See, e.g., T916-921, 1017-1021 (Clr Scandrett).

⁵⁴⁴ T916.44-917.4, 1021.11-17 (Clr Scandrett).

⁵⁴⁵ T1021.11-17 (Clr Scandrett).

⁵⁴⁶ T919.35-46 (Clr Scandrett).

⁵⁴⁷ T1020.19-1021.17 (Clr Scandrett).

⁵⁴⁸ T880.42-881.21 (Clr Scandrett)

⁵⁴⁹ T930.25-30 (Clr Scandrett).

⁵⁵⁰ T927.29-928.22 (Clr Scandrett).

example, when questioned about his own conduct in clip 12 of Ex CC, Clr Scandrett gave the following evidence (emphasis added)⁵⁵¹:

“Q. *Do you agree with the proposition that staying on your feet and not giving precedence to the chair served only to enhance your own reputation at the expense of the mayor's?*

A. *Not in the least, it was not about me, it's never been about me, **I am there for the community, I have a conscience, I have pledges to the community to represent them and act in their best interests** as per our oath and others, and no, I don't agree with that.*

Q. *You have an obligation, don't you, to the governing body?*

A. *We've talked about that, yes, we do.*

Q. ***You have an obligation, for instance, not to bring the council into disrepute?***

A. ***I think the council going into disrepute: I think the mayor was doing a fine job with that.***

THE COMMISSIONER: Q. *That wasn't the question. Ask the question again, please.*

MR PARISH: Q. *Do you accept that you have an obligation not to bring the council into disrepute?*

A. *I have already said yes to that, Mr Parish.*

Q. *Do y-- --*

A. *As I say, I think the meeting was difficult and there were very worried people in there and they wanted to be heard. **So, yes, in looking back it might have been better to have not responded to the mayor as I did, but that was the emotion at the time in the hall.***

Q. *And, is that an excuse, do you say, for the failure to observe the Code of Meeting Practice and giving precedence to the chair?*

A. *We're all human, Mr Parish, and whilst I don't resile from my raising that motion, I did feel I was entitled to read into the minutes the name of the seconder.*

Q. *Well, I guess the same question applies as I asked before: is that an exception, as you understand it, to clause 7.9 of the Code of Meeting Practice?*

A. *I understand that the Code of Meeting Practice requires a seconder before a motion is dealt with by the mayor.”*

⁵⁵¹ T920.1-45 (Clr Scandrett).

466. Leaving to one side the procedural matters raised by Clr Scandrett⁵⁵², that passage of evidence demonstrates a reluctance on his part to accept that his conduct was inappropriate and an inclination to direct criticism to others rather than confront the issue at hand⁵⁵³.

467. It is convenient to observe at this point that Clr Scandrett's reluctance to accept the obvious proposition that examples of his conduct were inappropriate included his response to questions about the rhetoric he used during a Council meeting in which he described Clr McLaughlin (who was not present at the meeting) as "*the Minister for Holidays*". Clr Scandrett gave the following evidence about that comment⁵⁵⁴:

"Q. *Did you refer to one councillor who missed the meeting "s "the Minister for Holidays" at one point?*

A. *Yes, that would be correct.*

Q. *On reflection, was that an appropriate comment to make?*

A. *I think it was in the spirit of debate in the chamber, um, you know, probably the cut and thrust of debate. Having said that, I think there'd been some media on that matter, that that councillor was constantly away sailing.*

Q. *I'm giving you an opportunity to respond to a suggestion --*

A. *Yes.*

Q. *On reflection, and answer it how you see fit, but on reflection was that an appropriate comment to be made at a council meeting?*

A. *No, it wasn't.*

Q. *Thank you.*

A. *Having said that, a lot of comments were made by a lot of councillors and particularly in that way, where attack took place and was not restrained."*

468. Although ultimately agreeing that it was not an appropriate comment to have made, Clr Scandrett also sought to justify it. I have reviewed the meeting in which that exchange took place. In my view, there is no objective support in that recording for the justification that the comment was "*in the spirit of the debate in the chamber*". Similarly, that there had "*been some media on the matter*" does not excuse instances of inappropriate behaviour during Council meetings. Even if there had been comment of that kind, a councillor remains bound by the

⁵⁵² The correctness of which is debatable.

⁵⁵³ Similar evidence was given in relation to clip 7 of Ex CC: T1020.37-1021.17 (Clr Scandrett).

⁵⁵⁴ T1004.45-1005.22 (Clr Scandrett).

prohibition against making personal reflections about other councillors during Council meetings⁵⁵⁵.

469. Similarly, although former Clr Turland did on occasions accept the inappropriateness of aspects of his conduct⁵⁵⁶, his evidence was also characterised by attempts to justify it⁵⁵⁷. One such example occurred during the following exchange relating to clip 8 of Ex CC (emphasis added)⁵⁵⁸:

“Q. When you said at the end there in that tape "you will", how do you think the staff, I think it was in that case Ms Lidgard, would have taken that? Do you think it was fair if she took that as a threat?

A. Oh, look, I think you'd have to talk to them but I think that --

Q. I'm asking what your impression of how she might have taken it would be?

A. I think they would all be feared because they were part of listening to the tape, and they knew it was wrong, I would suggest to you.

Q. Do I take from that answer that you do accept that it could be taken as a threat by her?

A. Well, when the process is broken and the administration allowed it to happen to protect the mayor from a stupid statement that he'd made, they should be concerned.

Q. That doesn't answer my question. The question I asked was, do I take it from your previous answer that you do accept what you said there could be taken as a threat?

A. Yep, probably right.

Q. Do you think it's appropriate to be threatening staff at all, let alone in an open council meeting?

A. I wasn't threatening the - Ms Lidgard, I was threatening the general manager for allowing that process to happen.

Q. Right, okay then. Do you think it's appropriate --

A. The general manager spoke to Ms Lidgard.

Q. Do you think it's appropriate to be threatening the general manager at all --

A. That's right.

Q. -- let alone at a council meeting?

A. They had broken the law. Broken the law.

Q. Does that justify you threatening the general manager at a council meeting?

⁵⁵⁵ 2019 Code of Meeting Practice, cl 16.11(d): Ex A, pp 1068-1069.

⁵⁵⁶ See, e.g., T1290.2-25, 1292.4-6, 1293.27-33 (former Clr Turland).

⁵⁵⁷ See, e.g., T1290-1306, 1313-1314 (former Clr Turland).

⁵⁵⁸ T1299.11-1300.13 (former Clr Turland).

- A. *I don't think it's threatening, it's bringing to a point - the mayor had made a statement on the radio --*
- Q. *Well, you just said it was --*
- A. *-- the day before he had listened to the tape that he had no right to listen to without going through the GIPA process. I can't, you can't."*

470. Threatening conduct directed towards staff is inconsistent with a number of provisions of the 2019 Code of Conduct. For example, Clause 7.6 of the 2019 Code of Conduct expressly prohibits councillors engaging in threatening conduct towards staff. It is also inconsistent with the obligations in 3.12, and it is likely to fall within the definition of “*bullying*” in cl 3.9.

471. Former Clr Turland also offered various explanations or justifications for his conduct, including being in the “*heat of the moment*”⁵⁵⁹, and as being in pursuit of his “*duty*”. Other explanations or justifications for his conduct included: “*trying to do the right thing*”⁵⁶⁰; being “*passionate about what I think is right or wrong*”⁵⁶¹.

472. Finally, former Clr Halstead resisted the proposition that his behaviour in clip 7 was inappropriate. Rather, he explained it as an expression of “*opinion*” that he was entitled to express during a council meeting⁵⁶².

473. Aspects of the explanations advanced by each of Clr Scandrett, former Clr Turland and former Clr Halstead for their conduct suggest that the behaviour is excused, or even justifiable, by the significance of the cause, or a perception that Council staff or other Councillors were not performing their function appropriately. In my view, none of those explanations justify or excuse conduct which fails to adhere to any of the relevant provisions of the LGA, the 2019 Code of Meeting Practice and the 2019 Code of Conduct. That such conduct was sought to be explained or justified in that way is indicative a lack of proper understanding by those councillors of their role, and the responsibilities that are attached to it. I am fortified in that view by the fact that conduct of the kind seen in the clips which form Ex CC was not an isolated incident, nor could it be described as an aberration.

474. In this respect, a single instance of inappropriate conduct “*in the heat of the moment*”, whilst unacceptable, might not warrant close attention or criticism if not repeated. Where, such as here, inappropriate conduct of a similar kind was repeated, it cannot be excused by the “*heat of the moment*” or “*passion*”. Rather, it demonstrates a continued failure to adequately,

⁵⁵⁹ T1291.34-1292.6 (former Clr Turland).

⁵⁶⁰ T1289.43-47 (former Clr Turland).

⁵⁶¹ T1289.43-47 (former Clr Turland).

⁵⁶² T1239.27-1242.36 (former Clr Halstead).

reasonably, and appropriately, discharge the roles and responsibilities of a councillor (including adherence to the behavioural norms prescribed by the Code of Conduct) at all times.

475. Regrettably, little was done about conduct of the kind seen in those clips (or any other similar examples) by any of the other Councillors during meetings, or others. As set out above, only former Clr Markwart appears to have agitated for firmer action in response to such conduct⁵⁶³. No code of conduct complaints were lodged in relation to it, nor was a motion to refer matters for investigation to the Departmental Chief Executive pursuant to s 440H(2)(c) of the LGA apparently considered. For the most part, much of the conduct passed without comment. That was indicative of a culture that tacitly accepted (even if it did not condone) as “*part of the rough and tumble of Shire Council meetings*”⁵⁶⁴. To an objective observer of those meetings the other Councillors appeared unphased by what was occurring.

476. The instances of conduct of Councillors during meetings that had an adverse effect on staff was not limited to those meetings⁵⁶⁵. As set out above, some staff had to be shielded from the Councillors, whilst others attended meetings and briefings with a sense of anxiety. That behaviours of that kind were having an adverse effect on Council staff was clear to Clr Gair by no later than 16 March 2020 when he described it in correspondence as a “*significant work health and safety issue*”. Notwithstanding those matters, no steps were taken during meetings, nor were any of the other procedures available to Councillors activated in accordance with the advice given to Clr Gair by the OLG to “*follow*” the available process.

Meetings identified in the Notice of Intention to Issue a Suspension Order

477. The Notice of Intention to Issue a Suspension Order refers to meetings of Council’s Finance Committee held on 22 February 2021 (actually held on 17 February 2021⁵⁶⁶) and the Ordinary Meeting held on 24 February 2021⁵⁶⁷. During those meetings, conduct falling into the following relevantly similar categories to those identified above can be observed. For the most part, that conduct was engaged in by Clr Scandrett and former Clr Turland. To a lesser extent, conduct falling into some of those categories was also engaged in by former Clr Halstead.

478. Tellingly, during the 17 February 2021 Finance Committee meeting, Clr Gair said “*If you were watching this you would think no wonder the Council is classified as an Improvement Order*”⁵⁶⁸. During the 24 February 2021 Ordinary Meeting, Clr Gair described the conduct of some

⁵⁶³ Ex E, pp 52-53.

⁵⁶⁴ CA Final Submissions [245].

⁵⁶⁵ See, e.g., Ex E, pp 59, 61, 62-63.

⁵⁶⁶ https://www.youtube.com/watch?v=y7ZvBBVvzp4&list=PL7UUICap7_qOxBZWfBhIxORyV6etySox-&index=9 See also minutes of the Ordinary Meeting held on 24 February 2021: Ex F, p 4115.

⁵⁶⁷ https://www.youtube.com/watch?v=SQDDaN8PdV8&list=PL7UUICap7_qN_n46QsWsMug2uTuCf1IFI&index=7 Ex B, p 223

⁵⁶⁸ At approximately 38:40 of the recording.

councillors as “school kids having a go at each other”⁵⁶⁹. Both comments were apt to capture the conduct seen during the meetings.

479. Unsurprisingly, the conduct seen in those meetings had a direct effect on staff. In this respect, Mr Mooney gave the following evidence of his experience of the Finance Committee meeting on 17 February 2021 (emphasis added)⁵⁷⁰:

“And I recall the very last finance committee meeting we had before council was placed under administration, an’ I’m pretty sure it wasn’t picked up on the audio, and it’s probably unprofessional for me to share this, but I did turn around to the mayor of the day, Duncan Gair, and I said to him, I basically pleaded with him and saying, “Mate, this isn’t the Gestapo”, because that’s effectively what it felt like, if you have the opportunity to witness that, it was just question after question after question, which is fine, that’s my job and I was able to answer those, but it presents a level of distrust if someone else - if a lay person is watching that and going, “Well, why is the councillors going so hard? Is there issues we need to be aware of?”

The procedures adopted at meetings

480. The procedures in many meetings were unclear and did not always adhere to the Code of Meeting practice. Regularly, there was confusion or debate about which Councillor had moved a motion, the procedures applicable to amendments and foreshadowed motions, the order of proceedings, and it was often unclear when the debate had commenced.

481. On occasion that resulted in staff being dragged into the debate between about the content of their reports or the issue at hand when they ought not to have been⁵⁷¹. The use by Clr Gair of a mute function on councillor microphones during meetings within the Chamber was also a matter of controversy, which contributed to the deterioration of relationships between some of the Councillors⁵⁷².

482. Having viewed many recordings of Council meetings, including those in Ex CC, in my view a common feature of the meetings chaired by Clr Gair was an unclear and at times inconsistent

⁵⁶⁹ At approximately 1:19:45 of the recording.

⁵⁷⁰ T298.11-24 (Mooney).

⁵⁷¹ T614.10-615.30 (Reynolds). A process that Mr Reynolds described as “strange”.

⁵⁷² See, e.g., T1010.25-42 (Clr Scandrett); T1211.37-1212.41 (former Clr Halstead); T1262.35-1263.29 (former Clr Halstead); T1366.32-44 (Clr Gair). That practice does not appear to find support in the Code of Meeting Practice: see Ex F, p 3418. However, in the absence of policy guidance from the OLG or other relevant agency to the contrary, I would be prepared to accept that if councillors refused to come to order that a chair of an online meeting would be left with little option but to use that feature in order to restore order to the meeting: see, e.g., T617.8-23 (Reynolds).

application of meeting procedure. The importance of a clear and consistent adherence to the Code of Meeting Practice was described by Mr Reynolds as follows:

“Q. One thing that can be seen in some of those meetings, and it I think relates to the issue of loose procedure about motions, there being debates about who would move and who would second a motion; did you observe things like that?

A. I did.

Q. Is that something that happens in councils in your experience?

A. No, not generally.

Q. Does it tell one something about the processes and the efficiencies of meetings?

A. I suppose the answer is, yes, it does.

Q. What’s your view about that?

A. My view is, the lack of process - processes are there to help an outcome be achieved efficiently, fairly and transparently. The fact that there was that lack of process around the procedure enabled the debate to concentrate on non-issues, like who had the right of moving and who was a seconder, those sorts of things, rather than the nub of the issue that they might have been talking about’

I’m a person who likes process by my nature, by my training, by my background because it serves a good outcome and, if it’s not observed in practice, then the outcomes can be either messy, delayed, protracted, et cetera.”

483. As Mr Reynolds observed, that lack of adherence to procedure created an environment where Councillors could engage in behaviour of the kind identified above, and which was disruptive to the orderly conduct of Council meetings⁵⁷³. Although the issues were more apparent in some meetings than others, and some meetings were able to proceed without any significant issue, overall, I would not describe Clr Gair’s chairmanship of Council meetings as being “*skilful*” as contemplated by the 2019 Code of Meeting Practice principles⁵⁷⁴. Unfortunately, little long-term improvement in adherence to clear and applicable meeting procedure can be seen in the period following the Performance Improvement Order.

484. The lack of adherence to meeting procedure was not limited to Council meetings. It also extended to meetings of the Finance Committee (which was comprised of all of the Councillors). In this respect, Mr Mooney gave the following evidence (emphasis added)⁵⁷⁵:

*“...finance committee is a great example where often we would have questions peppered at us, you know, **Code of Meeting Practice went out the window when it came to finance committee**, but we would be peppered with questions as to, “You*

⁵⁷³ Ex B, p 220; T599.17-601.6 (Reynolds).

⁵⁷⁴ Ex B, p 994.

⁵⁷⁵ T297.38-298.9 (Mooney).

*know, this report here, page 8 doesn't balance. Doesn't balance, there's no figure on here", and it would be as simple as turning the page and say, "Well, councillor, if you look at page 9' it's just a print roll, the total's on the next page". **So it's hard to differentiate whether that was intentional, but it happened frequently.**"*

485. It is clear from a review of the meetings that are recorded, including the clips in Ex CC, that Clr Gair was regularly unable to maintain order during meetings. Clr Gair described the challenges of chairing meetings during which some Councillors engaged in disruptive behaviour, and the difficulties of conducting meetings in an online environment during the COVID-19 pandemic⁵⁷⁶. I readily accept that both situations would provide challenges for any chair, and in particular Councillors refusing to comply with directions from the chair may present real difficulty to the maintenance of order.
486. However, even allowing for those difficulties, I agree with Mr Reynold's assessment that that Clr Gair did not have a sufficient understanding of the Code of Meeting Practice to enable him to respond to those challenges effectively⁵⁷⁷. Even if he did⁵⁷⁸, those recordings make clear that he did not apply the processes available to him in any meaningful way in response to what were clear acts of disorder, or at least conduct that affected the orderly conduct of Council business. In this respect, Clr Gair accepted during his evidence that he was "too soft" in response to acts of disorder by other Councillors⁵⁷⁹. That concession was well made.
487. Having regard to the circumstances that developed during the 2016 Term, it is regrettable that none of the other Councillors – in particular, those with considerable experience on previous councils – took any real steps during those meetings to support Clr Gair. As observed above, only Clr Markwart (a first term councillor) appears to have pressed the Clr Gair to take firmer action during meetings. In this respect, former Clr Markwart accepts that "*poor behaviour in Council meetings should have resulted in stronger action by the Chair and Councillors...*", although he expressed doubt that it would have resolved the behaviours⁵⁸⁰. Similarly, Clr Nelson accepted that more could have been done by the other Councillors to assist in the maintenance of order during meetings⁵⁸¹.
488. In my view, however, the inconsistent application of meeting procedures coupled with a lack of response by the chair and other Councillors to repeated acts of disorder contributed to the environment where they could occur. That environment had reached such a stage by March 2020 that a Councillor was emboldened enough to taunt the chair to "do your worst". On any

⁵⁷⁶ See, e.g., T1366.9-1367.17 (Clr Gair).

⁵⁷⁷ T623.1-11 (Reynolds).

⁵⁷⁸ And I note that there was evidence by some witnesses of their views that Clr Gair had a good understanding of the code of meeting practice: see, e.g., T306.18-23 (Mooney); T270.35-42 (Byrne).

⁵⁷⁹ T1367.19-35 (Clr Gair).

⁵⁸⁰ Markwart 23 May 2022 Final Submission, p 6.

⁵⁸¹ In this respect, Clr Nelson gave evidence that the councillors should have been more proactive to assist to maintain order during meetings: T1127.1-12 (Clr Nelson).

reasonable view, that is not an environment that met the standards of being “*Respectful*”, “*Effective*” and “*Orderly*” as set out in the 2019 Code of Conduct “*Meeting Principles*”⁵⁸².

Councillor conduct during briefings and information sessions

489. Councillor briefings and information sessions were not recorded. However, there was ample evidence that Councillor conduct in meetings was also inappropriate⁵⁸³. That conduct included:

- i. heated exchanges between Councillors, which on some issues became “*caustic*”⁵⁸⁴;
- ii. inappropriate interactions with staff⁵⁸⁵;
- iii. disruptive conduct by Councillors⁵⁸⁶.

490. Mr Paull have the following relevant evidence about the environment that existed in briefings, including when external consultants presented to the Councillors⁵⁸⁷:

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

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

A. *I respect the fact that councillors are entitled to ask questions, searching questions, and get profession, well-informed answers: have no problem with that at all. And, a large majority of the councillors did, but there were a small number of councillors that for various reasons, in my opinion, were always after the “gotcha moment” in terms of trying to ‘I’ve got the staff now’ I’ve got something to hold over them’ I’ve got something to belt them with.*

Q. *In your experience, is that the purpose of these briefing sessions, – --*

⁵⁸² Ex B, p 994.

⁵⁸³ See also Markwart 23 May 2022 Final Submission, p 76.

⁵⁸⁴ T163.3-25 (Wilton); T296.1-24 (Mooney); T422.2-10 (Burgess); T1037.26-1039.28 (Clr Andrews); T1269.21-1270.3 (former Clr Turland); Ex E, pp 57-58, 60.

⁵⁸⁵ T282.12-21 (Mooney); T296.1-24 (Mooney); T799.10-22 (Paull); T1037.43-1038.1 (Clr Andrews); T1071.1-12 (Clr McLaughlin); T1265.26-1267.1 (former Clr Turland); Ex E, pp 55-58.

⁵⁸⁶ T294.40-295.46 (Mooney); T843.12-35 (Clr Whipper).

⁵⁸⁷ T803.34-805.5 (Paull).

- A. *Absolutely not, the briefing sessions are there to provide councillors with information, to allow them to ask questions in a more informal manner so that they're informed...*
- Q. *... did you form a view whether the councillors who were asking those sorts "gotcha questions" really understood their roles and responsibilities at least in that briefing session context?*
- A. *My personal opinion is that they were making it personal about the attacks on staff rather than staying professional, and that's inappropriate. There were personal attacks on other councillors as well: that's inappropriate. The briefing sessions were there to conduct the business of council, not to try and score points against, you know, the other councillors, or not to try and catch the staff out, or not to try and beat the staff up, that was not the purpose, so in my mind, they weren't conducting themselves in a way that was appropriate for a councillor."*

491. It is little wonder that the briefings were challenging for staff, a challenge exacerbated by the fact that they featured "*a lot of very aggressive behaviour to staff*", such that on occasion the General Manager told the Councillors "*enough was enough or she was going to remove the staff*"⁵⁸⁸.

492. Consistently, there was also evidence that staff were told not to attend those sessions and that staff were removed from them, due to inappropriate Councillor behaviour⁵⁸⁹, and that some staff were shielded from briefings as a result of the behaviours of Councillors⁵⁹⁰. Some staff approached presenting items to Councillors at those sessions with apprehension or, in some cases, a sense of dread because they were "*were probably going to get whacked*"⁵⁹¹. It is clear that the behaviour during briefings (like that seen in Council meetings) had an adverse effect on some staff, which included them lodging incident reports recording "*threats/abusive behaviour*" and "*psychological injury – harassment/bullying/abuse*"⁵⁹². Clr Whipper described conduct of that kind as being "*psychological abuse of council staff*" which impacted on their ability to perform their roles⁵⁹³.

493. Clr Gair gave evidence that an environment in which staff had a sense of dread or anxiety in attending briefing sessions was indicative of a dysfunctional governing body⁵⁹⁴. I agree.

494. Against that evidence, former Clrs Turland and Halstead were of the view that behaviours were better during briefing sessions⁵⁹⁵. That view does not sit comfortably with the overwhelming weight of the evidence, and I accept the submission of Counsel Assisting that their own

⁵⁸⁸ T799.16-22, 805.7-21 (Paull). See also, T296.1-6 (Mooney).

⁵⁸⁹ T296.1-24 (Mooney).

⁵⁹⁰ T806.17-37 (Paull).

⁵⁹¹ T805.7-21 (Paull).

⁵⁹² T297.38-298.24 (Mooney); Ex E, pp 55-58, 60.

⁵⁹³ T842.5-12 (Clr Whipper).

⁵⁹⁴ T1374.38-41 (Clr Gair).

⁵⁹⁵ T1213.24-45 (former Clr Halstead); T1264.43-1265.34 (former Clr Turland).

subjective views about them were likely informed by what they considered to be appropriate standards of behaviour by councillors when interacting with staff⁵⁹⁶.

495. I note that there was some evidence that the Governing Body made decisions during briefings that were acted upon by staff⁵⁹⁷. In this respect, Clr Scandrett provided a list of briefings at which he said that binding decisions had been made⁵⁹⁸. That list identifies four occasions on which Clr Scandrett suggests that binding decisions were made in briefings. Other witnesses denied that binding decisions were made, although it appears that there were (in the very least) occasions where the councillors slipped into debate during those sessions⁵⁹⁹.

496. Having regard to the evidence before me, I am not in a position to identify to an adequate level of satisfaction particular examples of where decisions were made in briefings and acted upon by staff. In particular, I do not have sufficient evidence before me to examine and identify particular examples where such decisions were acted upon without first having also been considered in a Council meeting. In those circumstances, I prefer to express no view about that issue beyond noting that the allegation has been raised. Ultimately, it is not a question that I need to resolve to fully dispose of Term of Reference 1 in any event.

Other interactions with Council staff

497. As set out above, there was evidence of Councillor interactions with staff during meetings and briefings that were inappropriate, and which were inconsistent with the 2019 Code of Conduct and the 2019 Code of Meeting Practice. There was also evidence of other inappropriate interactions between staff and some Councillors in other settings. In addition, there were interactions between some Councillors and staff in which those Councillors sought to pressure or influence the performance by staff of their roles, or inappropriately involve themselves in operational issues. Interactions of that kind are dealt with in the context of Term of Reference 2 below.

498. There was evidence that former Clr Halstead made known to some senior staff that he did not trust them⁶⁰⁰, described staff as “*pen pushing bureaucrats*” or “*administrative bureaucrats*”, and publicly called into question the competence of some staff (sometimes in their

⁵⁹⁶ CA Final Submissions, [250].

⁵⁹⁷ See, e.g., 10 August 2021 IA Report: Ex B, p 249; T982.16-984.38 (Clr Scandrett); T1270.28-1271.42 (former Clr Turland).

⁵⁹⁸ Ex BB.

⁵⁹⁹ See, e.g., Ex BB; T1269.32-43 (former Clr Turland); T1373.15-32 (Clr Gair). Clr Gair accepted that it occurred: Gair 23 May 2022 Final Submission, sub-paras (c) and (i).

⁶⁰⁰ T799.24-801.46 (Paull); Ex AAA.

presence)⁶⁰¹. There is also evidence that former Clr Halstead made comments that publicly called into question the competence of staff, sometimes in their presence⁶⁰².

499. In my view, there is no doubt that a councillor (let alone the Mayor of the day) addressing staff in that was highly inappropriate. It is one thing for a councillor to ask appropriate (at times probing) questions, and to apply their own judgment to issues which will occasionally result in them taking a different course to that advised by staff. That is entirely appropriate. It is quite another to tell staff that they were not trusted in the performance of their role, publicly question their competence in their presence (and that of others) and belittle them as merely “*pen pushers*” or “*administrative bureaucrats*”. I am unable to conceive of any valid justification for conduct of that kind. Not only does it have a detrimental effect on staff, but it also actively undermines the solid and trusting relationship between the governing body and the senior staff, which is vital to a council fulfilling its statutory functions. In my view, conduct of that kind is inconsistent with a councillor adequately, reasonably, and appropriately, performing their role and adhering to their responsibilities.

500. There was also evidence about comments directed to staff by other Councillors which attacked their competence, and others that suggested that staff they were improperly hiding things from councillors or inappropriately performing their role⁶⁰³. Some examples of conduct of that kind can also be observed in the recordings of council meetings (including those in Ex CC), and in the questions and notices of motion submitted by former Clrs Turland and Halstead⁶⁰⁴.

501. In part, those notices of motion and questions prompted the then Deputy Secretary of Local Government, Planning and Policy to write to the General Manager⁶⁰⁵:

- i. Observing that the conduct of some Councillors in the 11 March 2020 meeting was “*not consistent with the Council’s obligation to be a responsible employer*”;
- ii. reminding Councillors:
 - i) of their duties they owed “*under the Work Health and Safety Act 2011 (WHS Act) to take reasonable care that their acts or omissions do not adversely affect the health and safety of others*”; and
 - ii) That they “*must not misuse meetings as a forum to publicly attack staff or make allegations of wrongdoing against them*”.

⁶⁰¹ Ex E, pp 56, 146-147; Ex AAA; T684.34-47 (former Clr Markwart)

⁶⁰² Ex AAA.

⁶⁰³ See, e.g., T799.24-800.8, 802.8-46 (Paull); T1268.40-46 (former Clr Turland); Ex E, pp 62-63, 67-68, 89, 108, 111-112.

⁶⁰⁴ See, e.g., Ex E, pp 146, 149-150.

⁶⁰⁵ Ex E, pp 2-3.

502. There was also evidence of correspondence from some Councillors to staff which used derogatory or belittling language about staff. For example:

- i. on 20 March 2020, former Clr Turland sent an email to other councillors, which was copied to various staff (including the General Manager), which stated “*Like always you don’t tell the full story It would be good if the General Manager and you would do the right thing but that is expected for your mob Protecting the staff and the community take second place with this leadership*”⁶⁰⁶.
- ii. two days later, on 22 March 2020, former Clr Turland sent an email to the councillors and a collection of staff members, including the General Manager, which included the statement that “*Clr Halstead and I have been requesting you and the so called General Manager take action now for over a week....We have Councillors [sic] have been excluded from the political games you and the General Manager have been playing...*”⁶⁰⁷

503. Former Clr Markwart described correspondence of that kind as “*bile*” from which he had protected himself by blocking Clr Turland’s communications⁶⁰⁸.

504. There was also evidence of interactions between former Clr Turland and staff which involved behaviour by him that was described as aggressive and intimidating. For example, there were exchanges during meetings, and in the Civic Centre between Mr Turland and senior staff which prompted incident reports to be lodged by staff who were involved or present when they occurred⁶⁰⁹. They were also witnessed by other councillors⁶¹⁰. When questioned about one of those incidents, former Clr Turland was reluctant to accept that his conduct was inappropriate and described his conduct as “*forthright*”⁶¹¹.

505. Interactions of the kind identified above were plainly inappropriate. As observed by the former Deputy Secretary, they were inconsistent with their obligation to ensure that the Council was a responsible employer contained in s 8A of the LGA. They were also inconsistent with the obligations of a councillor to ensure that they take care to ensure that their acts or omissions do not adversely affect the health and safety of other persons. They were, at times, aggressive, threatening, intimidating, belittling, or humiliating, and thus fell within the definition of “*bullying behaviour*” for the purposes of cl 3.10 of the 2019 Code of Conduct.

⁶⁰⁶ Ex E, p 111.

⁶⁰⁷ Ex E, p 108.

⁶⁰⁸ Ex E, pp 52-53.

⁶⁰⁹ See, e.g., Ex E pp 54-55, 64-68; T301.22-304.13 (Mooney).

⁶¹⁰ T683.19-38 (former Clr Markwart).

⁶¹¹ T1304.45-1306.20 (former Clr Turland).

506. Conduct of that kind is not consistent with a councillor adequately, reasonably, and appropriately discharging his or her roles and responsibilities.

Public statements that bring the Council and Council officers into disrepute

507. There was also evidence that some Councillors made public comments about the organisation, staff, and other Councillors, which were likely bringing them into disrepute.

508. For example, on 6 April 2020 (in the early stages of the pandemic in Australia) former Clrs Turland and Halstead wrote a letter to the editor of the *Southern Highlands News*, which included the following statements⁶¹²:

“We the undersigned call upon the Council of Wingecarribee Shire to bring down 'temporary' wage reform to assist the ratepayers of the Shire during the CoronaVirus Pandemic.

...

We find it most disturbing however that the General Manager has not seen fit to take the necessary steps to implement a reduction in wages of the 'administrative' staff of the Council; indeed it is even more disturbing that the General Manager has not seen fit to take a substantial 'cut' in her salary for at least the next 6 months. An annual salary of \$330,000 is substantial and should be the subject of a 'temporary' reduction.

The Mayor Councillor Duncan Gair should demonstrate leadership and take action to ensure that the salary of the General Manager is reduced in the short term, namely 6 months. The General Manager should take similar action with the wages of the two Deputy General Managers, however that is her call, as it falls within the 'Operational' area of council...

The normal level of administration of Council's operations would not be in 'full swing' at present, with administrative staff in the most part, working from home; the likelihood of 'normal' output is unlikely.

...

In our opinion it is obscene that the residents and ratepayers of the Shire are to 'carry the load', whilst suffering financial losses and associated social disruption, whereas the 'administrative' staff of Council collect their full wages.

...”

509. Those comments were reported in the *Southern Highlands News* that day⁶¹³. Although former Clr Halstead complained about aspects of that article⁶¹⁴, much of the extract from the Letter to the Editor set out above was quoted accurately in it.

⁶¹² Ex S.

⁶¹³ Ex E, pp 49-51.

⁶¹⁴ T1232.34-1234.8 (former Clr Halstead).

510. The effect of that letter and the article that followed it, was to apply pressure to the General Manager to take the steps for which they advocated. Whether its authors turned their minds to that issue or not, that was its obvious effect. The comments made in it were unambiguously critical of the General Manager for not taking the steps they identified. The epithet “*disturbing*” removes any doubt that the criticism was levelled what they saw to be the General Manager’s lack of action on those issues. It also contains comments which are critical of staff, in that it suggests improper or immoral conduct by those staff who “*collect their full wages*” whilst members of the community were adversely affected by the emerging pandemic – a circumstance described as “*obscene*”.

511. Former Clr Halstead stated that the letter was just an expression of “*opinion*” by him. The concept that councillors were merely expressing an opinion, and therefore they were entitled to express it (no matter its content) was advanced by other Councillors, particularly in the context of the 30 March 2022 Media Release (considered further below). Nothing in the 2019 Code of Conduct supports the notion that in circumstances where a councillor expresses an opinion, they can be excused from a breach of its terms. To the contrary, the Councillor Handbook makes expressly clear that whilst councillors are free to express their own personal opinions, they remain subject to the Code of Conduct when doing so⁶¹⁵. Put another way, that a councillor has a right to hold an opinion and express it is not in question. However, that right remains at all times subject to the law, such that there is no general right to express of opinion free from any consequence⁶¹⁶. The law of defamation is but one example. The behavioural norms set out in the Code of Conduct that apply to all councillors is another.

512. The comments in that letter, and which were then published in the press, were in the very least a breach of the Council’s Media Policy⁶¹⁷. In this respect, they were plainly comments made in their capacity as councillors – and not as private capacity as a resident of the shire. The letter was signed by them in their capacities as Deputy Mayor and Councillor. The comments were clearly about “*staff matters*” (i.e., the receipt of staff of their contracted remuneration), and they were also comments which, in my view had:

- i. the potential to have a negative impact on those Councillors’ working relationships within the Council; and
- ii. had the “*capacity to damage the Council’s reputation*”⁶¹⁸.

⁶¹⁵ Ex A, p 484.

⁶¹⁶ Leaving to one side privileges, such as parliamentary privilege and the protections afforded witnesses in court proceedings etc.

⁶¹⁷ Ex D, p 427.

⁶¹⁸ Ex D, p 430.

513. Conduct which is contrary to the Council's policies constitutes a breach of clause 3.1(b) of the 2019 Code of Conduct⁶¹⁹.
514. In my view, the comments made in that letter, and published in the article, also met the definition of comments which are "*likely*" to bring the staff to which they are directed into disrepute contrary to clause 3.1(a) of the 2019 Code of Conduct⁶²⁰. In particular, those comments suggest:
- i. improper and "*disturbing*" failures in the performance of the General Manager for not having taken the steps that they identify; and
 - ii. improper and obscene conduct by "*administrative staff*" for "*collecting their full wage*" at the expense of the ratepayers of the Shire.
515. There was other evidence of Councillors making comments in the press denigrating the organisation publicly, which drove Mr Burgess to tell staff to stop listening to local radio in the workplace. Clr Scandrett was identified as one who made comments of that kind on a regular basis, while other Councillors made some "*minor comments*" of that nature⁶²¹.
516. An example of that conduct was Clr Scandrett's interview on 2GB on 30 January 2020, the day after the contentious 29 January Extraordinary 2020 Meeting⁶²² at which the Council had resolved to defer consideration of "*relief options for development application and associated fees*" to 12 February 2020 (i.e., two weeks later) to enable consultation with other councils and the Department of Planning, Industry and Environment, and for a report to be prepared to Council⁶²³. In that interview, Clr Scandrett called for the sacking of the Council over its failure to approve the waiver of development application fees at that meeting⁶²⁴. That was despite the fact that the issue had been deferred for two weeks and had not yet been finalised.
517. In that interview, Clr Scandrett said that appointing an administrator would be "*the best way to get rid of the gene pool, start over*"⁶²⁵. The issue of refreshing the "*gene pool*" within the Council is one to which I refer below. It was an extreme response to a decision of the Governing Body defer an issue for two weeks. Even accepting that the issue was one of concern to the community, and the approach taken at the 29 January Extraordinary Meeting was not the preferred approach of Clr Scandrett, there is nothing in that decision alone that

⁶¹⁹ See also, Ex D, p 431.

⁶²⁰ I note that a code of conduct reviewer considered that issue and came to a different conclusion: Ex C. I would respectfully disagree with the conduct reviewer on that point.

⁶²¹ T422.24-423.6 (Burgess).

⁶²² Ex PP.

⁶²³ Ex F, p 3162.

⁶²⁴ Ex PP, p 3.1-20

⁶²⁵ Ex PP, p 3.11-20.

warrants the extraordinary step of “sacking” the Councillors. Each of those remarks called into question the proper performance by those Councillors of their roles.

518. Also in that interview, Clr Scandrett made a number of observations about his fellow Councillors that were likely to bring them into disrepute. For example, he suggested that Clr Gair improperly “*shut me down*” when he had moved a motion for the suspension of standing orders⁶²⁶; that Clr McLaughlin was the “[l]ocal ALP councillor, yes, not very impressive”; that Clr Nelson was “*beholden*” to Clr Gair; that Clr Whipper was “*half a green*”⁶²⁷.

519. As Counsel Assisting submitted in relation to that interview, “*it is difficult to think of a more obvious act designed to bring the Council into disrepute*”⁶²⁸.

520. For completeness, I note that that former Clr Turland also gave an interview later that day⁶²⁹. Whilst expressing disappointment with how the meeting progressed, and with the approach taken by the majority, he was far more measured in his approach than Clr Scandrett. He made the obvious point that “*It will be sorted because the motion that the Mayor put up was we have got to wait another two weeks for the information report to come to council.*” Clr Scandrett, in contrast, made no reference to the reason for the deferral of the issue – i.e., to enable the Council to engage in consultation with other councils and the relevant state government agency on the issue.

521. Ultimately, what occurred was the matter was brought forward at an Extraordinary Meeting of Council on 6 February 2021 at which the Council unanimously agreed to waive various fees associated with applications for the rebuilding of lost and damaged buildings as a result of the bushfires⁶³⁰. That fact clearly demonstrates that there was no rational basis to “sack” the Council for its decision to defer the issue for two weeks. That is particular so when issue was, and remained, under active consideration at that time.

Performance of the strategic function of the Governing Body

522. The evidence reveals that there were a number of shortcomings in the Council’s strategic plans, which were not resolved during the 2016 Term. As set out in more detail in Chapter 3 above:

- i. The Review of the Planning Function Report identified⁶³¹:

⁶²⁶ Ex PP, p 3.38-4.1.

⁶²⁷ Ex PP, p 4.3-36.

⁶²⁸ CA Final Submissions, [278].

⁶²⁹ Ex QQ.

⁶³⁰ Ex F, p 3169.

⁶³¹ Ex B, pp 434-438

- i) an approach of adopting a policy and repeatedly amending it so that it never took final form;
 - ii) outdated Development Control Plans; and
 - iii) inconsistencies between strategic policies, and a lack of co-ordination between them;
 - iv) a lack of serious commitment to basic strategic planning functions.
- ii. The Review of Council Finances Report revealed that the⁶³²:
- i) the Workforce Plan and the Strategic Asset Management Plan had not been updated since inception (although it acknowledged that there was only a statutory requirement to renew the Resourcing Strategy every four years);
 - ii) there was no evidence of a review of outcomes or evidence of ongoing monitoring at Council level of the strategies to satisfy the workforce gap analysis.
 - iii) there was no evidence of the review and confirmation of assumptions in the Strategic Asset Management Plan, which recorded that many of the “*current performance indicators*” were “*yet to be measured or assessed*” or “*policy to be developed*”;
 - iv) the Long Term Financial Plan included future years that were not necessarily aligned with other strategic planning documents.
- iii. The Bushfire Review Report identified that⁶³³:
- i) Emergency Management Plans either lacked content, or were non-existent in a number of areas;
 - ii) Local and District Ignition Plans did not exist prior to the fires; and
 - iii) there was no Local Recovery Plan;
 - iv) there was no policy or plan on how to close parks and reserves during period of extreme fire danger.

⁶³² Ex B, pp 609-610.

⁶³³ Ex B, pp 277-278.

- iv. The Small Business Commissioner’s Report recorded that the stakeholders consulted were of the view that⁶³⁴:
 - i) Council’s strategic plans did not deliver clear thinking about the future, outline how outcomes will be achieved, or give appropriate focus to small businesses; and
 - ii) there were no planning documents that outline a specific vision for small business in the region.
- v. Corporate Relations Service Review Report identified that the Communications and Community Engagement Strategy was not fit for purpose, and that the strategies had been *“rolled over year-on-year with minimal reflection on the current operating conditions, renewed service aspirations or dynamic stakeholder needs”*⁶³⁵.
- vi. There was evidence that the Council had not resolved the listing of various heritage items within the Shire, despite a report having been first reported to Council in 2012⁶³⁶.
- vii. There was evidence that the Council’s housing strategy had not been adopted prior to the Suspension Order⁶³⁷.

523. Ms Miscamble gave evidence that as part of the investigations she undertook into the strategic planning within the organisation, there had been a number of *“gaps”* which had been identified, and in respect of which she had not been able to ascertain a reason as to why those matters had not been attended to prior to her appointment⁶³⁸.

524. Some Councillors sought to defend the performance of the 2016 Council in relation to strategic planning. For example, while former Clr Markwart did not accept the proposition that, because of the dysfunction within the Governing Body it failed to properly carry out some of its strategic planning obligations. In that respect, he submitted (emphasis added)⁶³⁹:

*“Council did carry out their strategic planning obligations. However, **due to disruption from a small number of Councillors the quality of that work could have been better.** A small number of Councillors were **too focused on the immediate issues** facing Council, forcing Council as a whole to spend too much time*

⁶³⁴ Ex B, p 474.

⁶³⁵ Ex LL, p 7.

⁶³⁶ T449.07-26 (McManus).

⁶³⁷ Ex B, p 474; T536.20-38, 542.19-546.5 (May); T1274.8-39 (former Clr Turland); T1463.10-24 (Miscamble). See also, Nelson 30 May 2022 Final Submission, p 33.

⁶³⁸ T1463.10-36 (Miscamble).

⁶³⁹ Markwart 23 May 2022 Final Submission, pp 8-9.

*addressing non-strategic issues and **neglecting important longer term strategic perspectives.***”

525. In my view, former Clr Markwart’s submission accords with the weight of the evidence. That is, although the Councillors cannot be said to have abrogated their strategic planning functions entirely, the evidence supports a conclusion that the ongoing and escalating dysfunction within the Governing Body negatively impacted on the ability of the governing body to fully discharge that function.

The effect of Councillor behaviour on Council staff

526. The effect of councillor behaviour on staff can be aptly demonstrated by the following passage of Mr Paull’s (emphasis added)⁶⁴⁰:

A. *...I could have made records of many incidences, but I didn't, because I suppose, you know, being here as long as I've been and being through what I've been through, **you just accept that, you know, getting belted up by councillors is part of the job.***

Q. *Do you think you ought to just accept that it's part of the job?*

A. *Well, frankly, what's the options? The Code of Conduct, in my opinion, is ineffective.*

*THE COMMISSIONER: Sorry, just to bring you back to Counsel Assisting's question, whether or not there are other options, **do you think it's acceptable for someone to come to their workplace --***

A. ***No, absolutely not.***

Q. ***-- having to accept the fact they're going to be, I think you said, "belted up by councillors"?***

A. ***Absolutely not.***”

527. It goes without saying that Council staff ought not have to accept that they will be “*belted up by councillors*” as part of their job. It is incumbent on the Councillors themselves to ensure that their conduct is appropriate and consistent with their obligations, including achieving compliance with guiding principle that the Council must provide a “*supportive workplace*” for its staff⁶⁴¹, and the obligations set out in cl 10.13 of the 2019 Code of Conduct. That Mr Paull – an experienced local government professional - was driven to that view indicates that something had gone very wrong at WSC.

528. The Staff Wellbeing Surveys and the comments and observations recorded in the Road Map Report (considered above) also reflect the impact of Councillor behaviour on staff and morale within the organisation. As noted above, that a former General Manager described working at

⁶⁴⁰ T801.27-46 (Paull).

⁶⁴¹ LGA, s 8A(1)(i).

WSC a challenge which ranked second only to serving in the Middle East during the first Iraq War says much about the climate that has persisted at WSC.

529. Mr Paull also gave evidence that staff within the Council were “*bewildered*” by the behaviour that was occurring within the Governing Body⁶⁴², and described the effect of that conduct as follows (emphasis added)⁶⁴³:

“I think the staff were - I used the word previously - “bewildered” by their behaviour; that certainly had an effect because it damaged the reputation of the whole organisation, including the people that worked in it, and the fact that the staff were, again, in my opinion, were stepping up and were delivering, the community saw the whole organisation as a rabble, I guess, and that’s not the case.”

530. Mr Paul also gave the following evidence that the perception in the community of the Council had a direct effect on staff in the organisation⁶⁴⁴:

“I mean, you can be in the pub on the weekend and someone will challenge you about what council’s doing. Now, that’s part of being a senior manager in local government, but other staff at various levels in the organisation, as I understand, were being challenged as well about, “What the hell is council doing?” That’s tough because they can’t influence that and, as I’ve said, senior staff have a limited ability to influence the behaviour of councillors as well.”

531. That evidence is consistent with the evidence of other witnesses that some staff had become embarrassed to work for the Council given its perception within the community⁶⁴⁵. It is perhaps unsurprising in that context that the Council saw a significant increase in its workers compensation premiums, and the value of claims attributable to “*mental stress*”⁶⁴⁶.

532. That environment presents wider challenges to the organisation in terms of recruitment and retention of staff. Despite some suggestions from the Councillors to the contrary, high rates of staff turnover is not a new phenomenon⁶⁴⁷. The staff turnover rate was 15.4% in 2016/2017⁶⁴⁸. Whilst true that it rose to 21.6% (from a high of 17.9% in 2017/2018) high turnover rates have been a feature of WSC for some time and has long exceeded the industry average of approximately 7%⁶⁴⁹. The Council’s reputation in the sector adds an additional hurdle in attracting staff (in addition to various other matters)⁶⁵⁰. In this respect, albeit in a

⁶⁴² T805.23-34 (Paull).

⁶⁴³ T829.45-830.5 (Paull).

⁶⁴⁴ T830.22-30 (Paull).

⁶⁴⁵ T309.23-36 (Mooney); T533.15-23 (May).

⁶⁴⁶ Ex M, p 51.

⁶⁴⁷ See, e.g., 30 March 2022 Media Release (Ex O); Markwart 23 May 2022 Final Submission, p 13.

⁶⁴⁸ Ex X.

⁶⁴⁹ Ex M, p 61. However, contrary to the assertions of Clr Gair, the number of vacancies in the organisation has never reached 180, nor approached that level: T1418.22-1419.4 (Clr Gair); T1497.13-16 (Miscamble); Ex X.

⁶⁵⁰ T1462.30-1463.8 (Miscamble).

slightly different context, Mr Bourne gave evidence that it was becoming difficult to attract new business to the Shire “because basically the region was seen as a basket case”⁶⁵¹.

533. Many of the Councillors accepted that there were instances of inappropriate conduct towards staff, or which otherwise had an adverse effect on them, including conduct that would meet the description of “bullying”⁶⁵². That such conduct occurred with relative frequency in meetings and other interactions (such as those identified above) is, in my view, a symptom of the dysfunctional environment that existed within the Governing Body. That environment is plainly not a “consultative and supportive workplace” for staff⁶⁵³. It is also indicative of an environment in which those Councillors who engaged in that conduct failed to take reasonable care that their acts or omissions did not adversely affect the health and safety of other person as set out in cl 3.12 of the 2019 Code of Conduct.

The “two or three troublemakers” argument

534. A number of the Councillors argued that the dysfunction within the 2016 Council was caused by two or three Councillors only – those being, Clr Scandrett and former Clrs Halstead and Turland. To an extent, there is some merit in that argument in that those Councillors were the focus of much of the criticism of Councillor behaviours in council meetings and briefings, and in their interactions with staff. It is true that the evidence reveals that behaviours of that kind were, for the most part, engaged in by those three, with more limited examples by some other Councillors. But that is only part of the picture.

535. Regrettably, there was, in almost all cases, no action taken by any of the other Councillors to seek to address dysfunctional behaviour when it occurred. To the extent that the behaviour occurred in meetings, it was almost invariably met with silence by the remaining Councillors. For example, no steps were taken when attacks were made against staff – even when the General Manager made clear that the staff would be removed from the meeting. That was a clear sign that the General Manager had concerns for the safety of the workplace due to Councillor behaviour, yet none of the councillors appears to have taken any step to seek to ensure that the Council was a safe workplace for those staff.

536. It is true that Clr Gair approached the Minister and the OLG raising his concerns. The evidence supports an inference that the approach to the Minister resulted in the Performance Improvement Order. Other approaches to the OLG by Clr Gair resulted in advice to “follow the available processes” available to the Councillors under the LGA, which included the Code of Conduct complaint mechanism. However, that advice was not taken up. That appears to be

⁶⁵¹ T254.5-13 (Bourne).

⁶⁵² See, e.g., T842.41-843.10 (Clr Whipper); T1044.32-1045.11 (Clr Andrews); T1071.1-12 (Clr McLaughlin); T1374.19-1375.19 (Clr Gair).

⁶⁵³ LGA, s 8A.

because there was a view within the Governing Body and some of the staff that the Code of Conduct process was ineffectual⁶⁵⁴. In addition, the other Councillors did not consider a motion of censure in accordance with s 440G of the LGA, or a motion seeking to refer the conduct of the Chief Executive of the OLG for investigation in accordance with s 440H(2) of the LGA.

537. To his credit, Clr Nelson has, since giving evidence, reflected on what could have been done in response to behaviours that breached the Code of Conduct and the Code of Meeting Practice. In doing so he reviewed the training that had been given to the Councillors (including during the Performance Improvement Order) and concluded that: *"I am therefore remiss for not following the advice from the OLG training. It should have been a lightbulb moment for me to take action. And I didn't."*⁶⁵⁵ However, he (and other Councillors) directed significant criticisms at the OLG which is reminiscent of former Clr Clark's evidence that there was a view within the 2012 Council that the OLG *"would somehow resolve the issues, you know, come up with a magic solution..."*⁶⁵⁶.

538. Accordingly, while there is some merit to the *"two or three troublemakers"* argument, it does not provide a complete picture of the escalating dysfunctionality that affected the Governing Body. As observed above, the lack of response to those behaviours by the other Councillors contributed to the permissive environment in which that conduct occurred. No apparent steps were taken, whether during meetings, or using the code of conduct process, to address that situation prior to the Suspension Order being issued.

539. Further, the evidence reveals that the dysfunction within the Governing Body:

- i. was affecting the wider organisation and was not merely confined to instances of poor behaviour amongst the councillors themselves;
- ii. contributed to an adversarial relationship with some aspects of the community;
- iii. had negative effects on staff; and
- iv. affected the ability of the Governing Body to fully perform its strategic planning role.

Findings in relation to Term of Reference 1

540. Having regard to the evidence as a whole, and the matters set out above, I have reached the following conclusions in relation to Term of Reference 1:

⁶⁵⁴ Described by Clr Gair as being hit by a *"wet lettuce leaf"*: T1376.5-1377.27 (Clr Gair). See also, e.g., Nelson 30 May 2022 Final Submission, pp 14-15; Markwart 13 April 2022 Submission, p 4.

⁶⁵⁵ Nelson 30 May 2022 Final Submission, p 15.

⁶⁵⁶ T641.29-32 (former Clr Clark).

- i. The Councillors (whether taken as a whole or viewed individually) had a high level understanding of their roles and responsibilities but did not display a full understanding of them.
- ii. There were repeated instances of inappropriate behaviours by some Councillors during meetings, briefings, and in other interactions with staff, which were not adequately or effectively addressed by the other Councillors.
- iii. The failure of the other Councillors to effectively respond to those instances of behaviour contributed to the creation of a permissive environment in which they could occur, which in turn contributed to the dysfunction within the Governing Body.
- iv. An adversarial relationship had developed during the 2016 Term between the Governing Body and some aspects of the community.
- v. The dysfunction within the Governing Body had a negative impact on the organisation, including its staff.
- vi. The dysfunction within the Governing Body affected its ability to fully perform its strategic planning function, which at least contributed to a number of identified shortfalls in the Council's strategic planning framework.
- vii. Although the nature and extent of the failures by each of the Councillors differ, and the more egregious examples of inappropriate conduct were limited to three Councillors, in my view the evidence supports a conclusion that the Councillors as a whole did not adequately, reasonably and appropriately discharge their roles and responsibilities at all times during the 2016 Term.

CHAPTER 5: TERM OF REFERENCE 2

541. As noted above, Term of Reference 2 requires examination of whether, in the 2016 Term, there was “*improper interference*” by the elected body of council, or individual councillors, in operational matters. Although Term of Reference 2 makes “*particular reference to staffing and planning functions*” it is not limited to those functions alone.

The operational vs strategic divide

542. It is a well-accepted feature of Local Government in New South Wales that there is a divide between the functions of the governing body – described as the strategic or governance function – and the functions of the General Manager and council staff to conduct the day to day operations of a council – described as “operational” function. That distinction was described during the public hearings as the “*strategic versus operational divide*”.

543. The division of functions arises from the interaction between sections 223, 332 and 335 of the LGA. Those provisions relevantly provide:

“223 *Role of governing body*

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

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

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

...

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.

...

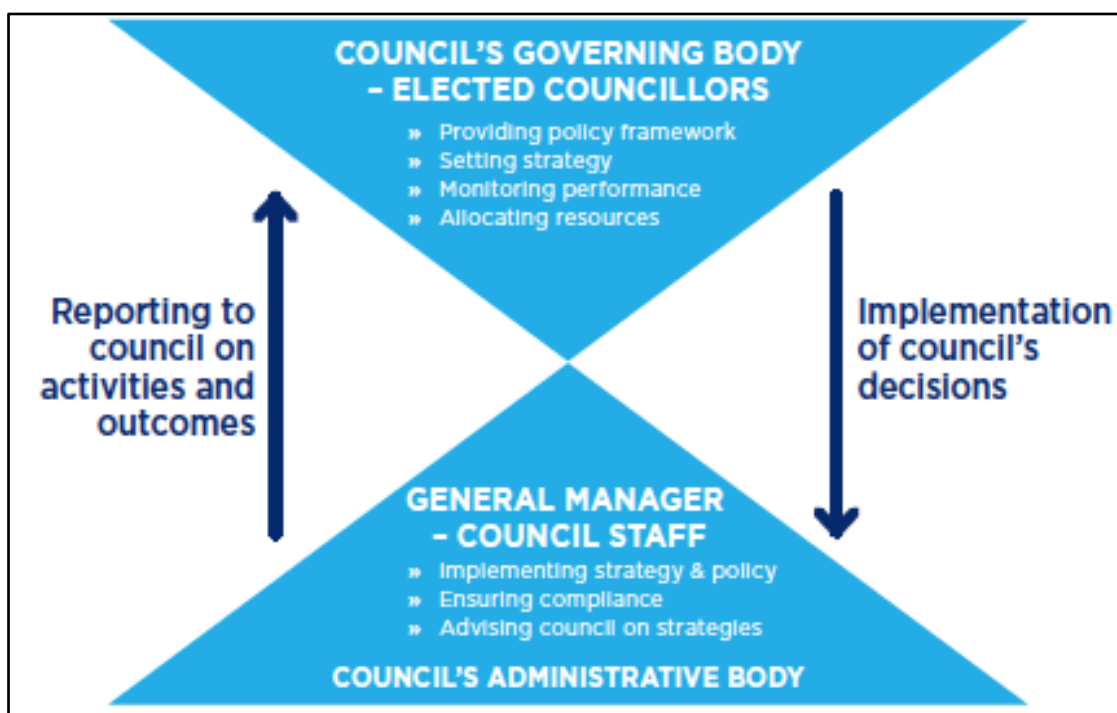
352 Independence of staff for certain purposes

(1) A member of staff of a council is not subject to direction by the council or by a councillor as to the content of any advice or recommendation made by the member.

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

544. Although the LGA does not identify the division of roles and responsibilities as being between operational and strategic, taken together, those provisions make clear that the responsibility the day-to-day functions of the council (i.e., the operational matters) rest with the council staff, directed by the General Manager.

545. The Councillor Handbook depicts the division in the roles and responsibilities diagrammatically as follows⁶⁵⁷:



546. That division is described in the Councillor Handbook as follows (emphasis added)⁶⁵⁸:

*“The elected council’s role may be compared to that of the board of a public company or a more complex version of a board that oversees a local club; **the elected council oversees the activities of the council but is not involved in the day-to-day***

⁶⁵⁷ Ex A, p 461.

⁶⁵⁸ Ex A, p 461.

running of the council. The ‘shareholders’ of a public company can be likened to a local community.”

547. As Counsel Assisting correctly points out⁶⁵⁹, the analogy drawn between a councillor and a board member of a public company is useful to an extent (in particular in relation to lack of any involvement in the day to day running of operations), but care should be taken in applying analogies lest they distract from the text of the LGA. While the analogy is useful in identifying the roles and responsibilities of a councillor at a conceptual level (which is its obvious purpose), it remains necessary to pay close attention to the terms of the statute which prescribes the roles and responsibilities of members of the governing body.

548. The Code of Conduct also reinforces the division of roles and responsibilities. In this respect, clause 7.2 of the 2019 Code of Conduct provides (emphasis added)⁶⁶⁰:

"7.2 Councillors or administrators must not:

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

549. Similarly, cl 7.6 of the 2019 Code of Conduct provides (emphasis added)⁶⁶¹:

"Inappropriate interactions

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

- a) *councillors and administrators approaching staff and staff organisations to discuss individual or operational staff matters (other than matters relating to broader workforce policy), grievances, workplace investigations and disciplinary matters*
- ...
- f) *councillors and administrators being overbearing or threatening to council staff*

⁶⁵⁹ CA Final Submissions, [289].

⁶⁶⁰ Ex A, p 719.

⁶⁶¹ Ex A, p 720.

...

- h) *councillors and administrators making personal attacks on council staff or engaging in conduct towards staff that would be contrary to the general conduct provisions in Part 3 of this code in public forums including social media*
- i) ***councillors and administrators directing or pressuring council staff in the performance of their work***, or recommendations they should make

...”

550. Lest there be any doubt about the fact that the members of the governing body have no part to play in the day-to-day operations of council operations, the Councillor Handbook contains the following highlighted statement (emphasis added)⁶⁶²:

*“The general manager provides the link between the elected council and its employees. **While all council staff have a duty to carry out council decisions, they are responsible to the general manager, not the councillors. Individual councillors cannot direct staff in their day-to-day activities.** However, this is counterbalanced by the responsibility of general managers to provide information, guidance and support to councillors to make good decisions.”*

551. The WSC “*Councillors’ Access to Information and Interaction with Staff Policy*” reflected that division of roles and responsibilities. Relevantly, the policy stated⁶⁶³:

“Procedures for Interaction with Staff

- *Councillors may contact a General Manager, Deputy General Manager, Group Manager to discuss, or to make arrangements to meet to discuss, Council services or projects.*
- *Councillors must not make direct contact with other staff without the approval of the General Manager, Deputy General Manager or Group Manager and where such approval has been granted must not direct or pressure staff in the performance of their work.*
- *Councillors must not give direction to or request staff to undertake work for the Councillor or for any other person with the exception of Councillor support staff and work must be directly related to the performance of their civic office functions.*
- *Committee Chairs may contact committee staff representatives to clarify a matter currently before the committee.*
- *Inappropriate interactions between Councillors and Council staff are set out in Council’s Code of Conduct for Councillors and Staff.”*

⁶⁶² Ex A, p 461.

⁶⁶³ Ex D, p 453.

552. The importance of an interaction policy of that kind, and the effect on the organisation if not respected, was described by Mr Burgess as follows (emphasis added)⁶⁶⁴:

“THE COMMISSIONER: Q. Is a policy of that kind important in the ordinary function of local government in your view?”

A. **Absolutely**, Commissioner.

Q. Can you tell me why?

A. *Back in my days in Glen Innes, which was a small country town, different dynamics obviously, and to Wyong which was growing, an organisation that prided itself in having great governance systems; **it was to stop councillors knowingly or unwittingly approaching staff to try and influence.** That was to lock out that influence long before at Wyong and Glen Innes before the local government department brought in their Code of Conduct.*

Q. **Do you have a view about the effects it may have on an organisation when that policy is not adhered to?**

A. **Absolutely destructive.** *I saw that when I went to Auburn, it was absolutely chaotic and destructive, and it pitted staff against each other, it pitted councillors against councillors, and I think that's what we were seeing played out here.*

Q. *Who do you think has the **primary responsibility for ensuring that policy is upheld?***

A. **General manager.**

Q. *Do you think the councillors bear responsibility to adhere to it as well?*

A. *I think very progressive councils understood their role very clearly; whether it was written or unwritten, they didn't transgress. But in most cases, certainly in the case of Glen Innes, Wyong and Auburn when those sort of policies went to the councils the fair-minded councillors adopted those very, very quickly.*

Q. **And in a council where there is such a policy is it fair to say that the councillors bear a significant part of the responsibility not to overstep their proper role?**

A. **Correct.”**

553. Each of the Councillors accepted the existence of that division in roles and responsibilities⁶⁶⁵. However, there was view held by some of the Councillors that if the particular issue was important enough, transgression into operational matters could be excused. For example, Clr Scandrett gave evidence that part of his approach to asking questions of staff as “*trying to get answers for the community*” and “*trying to do a job that the council executive were not doing*”⁶⁶⁶.

⁶⁶⁴ T425.21-426.12 (Burgess).

⁶⁶⁵ See, e.g., T659.26-661.8 (former Clr Markwart); T843.37-844.7 (Clr Whipper); T875.11-23, 990.45-991.2 (Clr Scandrett); T1028.9-1029.12 (Clr Andrews); T1074.12-1076.18 (Clr McLaughlin); T1119.11-20 9 (Clr Nelson); T1203.16-1205.26 (former Clr Halstead); T1261.27-43, 1262.16-33 (former Clr Turland); T1347.4-14, 1386.14-16 (Clr Gair).

⁶⁶⁶ T897.29-898.24 (Clr Scandrett).

In answer to clarifying questions about that evidence, Clr Scandrett gave the following evidence (emphasis added)⁶⁶⁷:

“THE COMMISSIONER: Q. What part of that - I'm just at the moment not sure I understand, when you said earlier you were trying to do a job that the executive wasn't doing; if what you were doing was asking for information, what was being done? I must say, I have some difficulty with this passage of evidence, I'm not sure I'm understanding what you're driving at.

A. Our customer service charter - I actually think they're shareholders, but anyway - our customer service charter required certain response times and the like, and on quite a number of matters they weren't being met, therefore I say I was having to chase up things often on behalf of the ratepayers.

I remember on a couple of instances, Commissioner, Ann Prendergast in front of councillors said, "You've won" – or words to the effect, "You've won the number of council requests competition again, councillor", and she was talking about the fact that I was, you know, submitting a volume of requests, and I think Councillor Whipper was named regularly as the No.2 but somewhat behind. But these - if you want to read those, that's the sort of document that was provided (holds up document), everything from grass cutting, to weekly bulletins, to shop signage and so on. Just, quite frankly --

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

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

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

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

554. Former Clr Turland and former Clr Halstead also appeared to be of the view that if the particular issue warranted it, councillors could become involved in operational issues⁶⁶⁸. Clr McLaughlin expressed similar sentiments in relation to planning issues⁶⁶⁹.

555. The view that involvement by a councillor in operational matters is justified if the particular councillor perceives that something has not been dealt with appropriately misunderstands the significance of the division in roles and responsibilities identified in the LGA and the Code of

⁶⁶⁷ T899.13-900.12 (Clr Scandrett).

⁶⁶⁸ See, e.g., T1222.37-43 (former Clr Halstead); T1331.15-47 (former Clr Turland).

⁶⁶⁹ T1088.33-1089.35 (Clr McLaughlin).

Conduct. In my view, councillors have a responsibility to ensure that their conduct does not transgress that divide⁶⁷⁰ no matter the perceived importance of the particular issue.

Was there improper interference in the operational matters by the 2016 Council, or Councillors?

556. The reference to “*improper interference*” in Term of Reference 2 must be understood as a reference to involvement in operational matters that is inconsistent with the relevant provisions of the LGA, and applicable policies and procedures such as the Code of Conduct and the Council’s Councillor Interaction Policy.

557. There was evidence of a general nature that indicates that “*improper interference*” by individual Councillors in operational matters (including contact with staff outside of the established councillor request system and the interaction policy) occurred during the 2016 Term. However (subject to some examples dealt with below) much that that evidence, whilst confirming that it occurred, does not enable me to make specific findings in relation to individual incidents (including who was involved and the particular issue at hand)⁶⁷¹.

558. That general evidence also includes instances of pressure being applied to staff in the performance of their roles, including outside of the councillor request system. Mr Paull’s evidence about those matters was illuminating (emphasis added)⁶⁷²:

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

A. ***I was pressured on many things: emails from councillors about many things: do this, fix that road, fix these potholes, trim Mrs Jones’s trees, mow the footpath out the front of Mr Smith’s house, hundreds of requests from councillors. Now, they were councillor requests, they should have went through councillors’ formal action request system, but councillors chose to send those things directly to deputy general managers. Now, was that then directing me? No, but it was then pressuring me, on many things.***

...

THE WITNESS: Fairly common in local government.

THE COMMISSIONER: Q. Well, that may be. What I’m exploring with you is whether requests in form are, in substance, directions?

⁶⁷⁰ See, e.g., T425.1-10 (Burgess); T533.6-11 (May).

⁶⁷¹ See, e.g., T423.15-425.10 (Burgess); T529.15-36 (May); T659.26-660.28, 682.23-683.17 (former Cllr Markwart); T807.25-809.3, 825.28-827.14 (Paull); T844.13-23 (Cllr Whipper); T1457.31-1458.15 (Miscamble); Ex L; Ex NN pp 34, 46-47; Ex OO, pp 9, 47-48. See also Markwart 23 May 2022 Final Submission, p 10.

⁶⁷² T825.28-827.14 (Paull). As to pressure applied by Councillors in relation to planning matters, see T732.45-733.11 (Ryan).

- A. *Well, my view is that requests from the community should go through a process. They should be recorded through councillors' Customer Information Centre, they should be triaged, they should be risk assessed and they should be prioritised, and they should be dealt with on a priority basis so that everybody gets a fair go. Some councillors encouraged the community to go direct to them, and **the inference was that you'd go around that process and that they would get into the earhole of whoever they needed to, to get things happening for that particular resident.** That is pretty common in local government.*
- Q. ***It might be common, but is it appropriate?***
- A. ***No, it's not,** and as an officer of council you have to resist that, and we tried to...*
- ...
- Q. *And by taking these matters direct to staff, let's just assume for the moment in accordance with the interaction policy, **does that hinder the efficient operation of council business?***
- A. ***Absolutely.** I mean, I used to get text messages from particular councillors 24/7. The group manager below me that manages the infrastructure says it's part of the business, or used to, used to get peppered with them.*
- Q. *And **you've described them as being on occasion "pressuring"; have I understood you correctly?***
- A. ***Pressuring, robust, on occasions abhorrent.***
- ...
- Q. *Yes, I appreciate you would apply a proper process to it, but **things of this type were received by your colleagues, I take it?***
- A. ***Yes.***
- Q. *And, **did any of them ever express to you a view that they were not merely requests but directions?***
- A. ***On occasions, yes."***

559. In my view, the kind of “*pressure*” that was directed to Council staff as described by Mr Paull in that passage of evidence was in substance, an attempt to influence staff members in the performance of their role. Given the clear prohibition on conduct of that kind in the Code of Conduct, and the demarcation in roles between the Councillors and the Council staff, in my view that conduct meets the description of “*improper interference*” for the purposes of Term of Reference 2.

560. As to whether there had been “*inappropriate interference*” by Councillors in planning matters, again, there was some evidence that suggests it occurred, however, save for one particular example (dealt with below) it was too general to permit me to make specific findings about

particular examples⁶⁷³. In this respect, the introduction of the Local Planning Panel was a significant development that removed the potential for such interference, and the widely held perception that such interference occurred.

Particular examples of inappropriate interference in operational or planning matters

Former Clr Halstead and pothole repair

561. In about 2018, former Clr Halstead, whilst Mayor, arranged to deliver a presentation to staff on what he considered to be the appropriate method of pothole repair⁶⁷⁴. Former Clr Halstead gave evidence that he did so because he was “*very concerned about the state of pothole repairs*”, and that he had “*no regrets about doing that....and I would do it again tomorrow*”⁶⁷⁵.
562. It is difficult to conceive of a clearer example of “*improper interference*” in an operational issue than the Mayor of the day (or any other councillor) lecturing or demonstrating to staff how they should perform their role. If former Clr Halstead had a concern with pothole repair within the Shire, the appropriate course would be to raise it with the General Manager or (in accordance with the WSC interaction policy), the relevant Deputy General Manager for them to consider and take action if appropriate. It was not for him to take it upon himself to deliver a training session of that kind. Unsurprisingly, was not well received by the staff involved⁶⁷⁶.
563. Former Clr Halstead was unable to see the obvious problem with what occurred. The following passage of evidence is illustrative of his reluctance to accept that he had inappropriately transgressed into operational matters (emphasis added)⁶⁷⁷:

“Q ...Did you accept that in that case you may have transgressed over your role and responsibility into the operation --

A. I might have what?

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

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

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

A. **No, I don't.**

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

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

⁶⁷³ T530.43-531.5 (May); T735.20-736.3 (Ryan); T1045.15-1046.4 (Clr Andrews); Ex A, pp 262-270, 426-446, 809. As to pressure applied by councillors on staff in relation to planning matters, see T732.45-733.11 (Ryan).

⁶⁷⁴ Ex R; T424.2-18 (Burgess); T807.42-808.22 (Paull); T1222.7-1223.6 (former Clr Halstead).

⁶⁷⁵ T1222.37-1223.6 (former Clr Halstead).

⁶⁷⁶ T423.2-18 (Burgess); T808.4-9 (Paull).

⁶⁷⁷ T1223.8-1224.31 (former Clr Halstead).

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

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

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

A. Correct.

...

THE COMMISSIONER: Q. Part of the process, as you'll appreciate, is to give everybody the opportunity to respond to things that are suggested to us, and this is one of them, but **it might be suggested to me that the distinction you draw is one without substance. What would you say to that?**

A. I disagree.

Q. **And, it might also be suggested to me that, as you were the mayor at the time, the only way that could be perceived by staff was a direction by you as to how to do their job: what would you say to that?**

A. Interesting, interesting question. **I can see that some people might think that.**

Q. **And, if that was the way it was received, would you then accept that it would be wrong for the mayor of the day to direct staff as to how to do their job?**

A. **Yes, I'd agree that that would be not correct. However, this was offering advice, not telling them how to do it; offering advice on how they might repair a pothole."**

564. It was not an issue of "semantics". In my view, the distinction that former Cllr Halstead sought to draw between what he did (i.e., general methods of pothole repair) and what would transgress the boundaries for improper interference in operational matters (i.e., direction on the method of repair of a particular pothole) lacks substance. That former Cllr Halstead sought to explain his conduct in that way suggests that he did not fully appreciate the division of roles and responsibilities between a councillor and council staff⁶⁷⁸. It also shows a lack of appreciation for the impact of his conduct on the relevant staff, who, according to the evidence,

⁶⁷⁸ Which is also relevant to the assessment of former Cllr Halstead's understanding of the roles and responsibilities of a councillor within Term of Reference 1 above.

were “*upset that they’d basically been treated like school children*”⁶⁷⁹ during an interaction that should never have happened.

565. In my view, that conduct constituted “*improper interference*” in an operational matter within the meaning of Term of Reference 2⁶⁸⁰.

Clr Gair and the Pin Oaks

566. Clr Gair, whilst Mayor, gave a written direction to Mr Paull to remove eight Pin Oak trees in Station Street “*forthwith*”⁶⁸¹. The effect of that direction was to apply pressure on Mr Paull to remove those trees⁶⁸². The removal of those trees was contentious aspect of an already contentious project⁶⁸³. It is apparent that none of the other councillors were aware of Clr Gair’s direction to Mr Paull at the time it was made⁶⁸⁴.

567. A copy of that written direction has not been able to be located, and a precise date on which it was given has not been able to be identified. However, as it was accepted by Clr Gair that he gave that direction⁶⁸⁵, that a copy of it has not been able to be located does not affect my consideration of this issue.

568. The evidence makes clear that the direction was given before:

- i. the final form of the Station Street Project had been approved by the Governing Body; and
- ii. all necessary steps had been taken to enable the commencement of work on the Station Street project, including the Review of Environmental Factors.

569. There was a resolution of the Governing Body on about 25 March 2020 that those trees be removed⁶⁸⁶. However, it was described by Clr Whipper as being part of the approach of the design of the project⁶⁸⁷, a description with which Clr Gair agreed⁶⁸⁸. In those circumstances, and given that all necessary requirements to permit work to commence had not be completed at the time of that resolution, it cannot have sensibly been understood to have required staff to take that action immediately. It certainly was not actioned in that way by Mr Paull, or any other Council staff. In that respect, it was Mr Paull’s evidence that the former General Manager’s

⁶⁷⁹ T808.4-9 (Paull).

⁶⁸⁰ See also cl 6.7 of the 2017 Code of Conduct: Ex A, p 686.

⁶⁸¹ T817.12-24 (Paull); T1385.33-42 (Clr Gair).

⁶⁸² T816.39-817.34 (Paull).

⁶⁸³ T822.9-15 (Paull).

⁶⁸⁴ T861.14-28 (Clr Whipper); T1218.36-1219.37 (former Clr Halstead).

⁶⁸⁵ T1385.33-42 (Clr Gair).

⁶⁸⁶ Ex F, p 3342.

⁶⁸⁷ T861.36-863.33 (Clr Whipper).

⁶⁸⁸ T1394.37-42 (Clr Gair).

position was the same as that he adopted – the trees would not be removed until the Review of Environmental Factors had been completed⁶⁸⁹.

570. Accordingly, although the Councillors had resolved to remove those trees as part of the Station Street Project, work on that project was not able to commence at the time the direction was given. It was for that reason that Mr Paull refused to comply with it⁶⁹⁰.

571. Clr Gair gave the following evidence as to why the direction was made in writing⁶⁹¹:

“...the Local Government Act says, you shall not direct council staff in operational matters unless - as a mayor, that is – unless there has been a resolution passed by council. And the resolution had been passed and it was not challenged by council until our suspension. And there is a second part of that, that of the - and that says that, in relation to directing that be done:

Councils or administrators must not in any public forum or private forum direct or influence or attempt to direct or influence any other member of the staff of council or delegate.

So, if I had have just had a conversation with Mr Paull and said, "I want you to cut those trees down", then there is an opportunity for members of the public or certain councillors to say, you just had a quiet word with him in the office. If I was going to have these trees removed, which was a condition that the council had resolved to be done, then I wanted direct - a direct result - correspondence from the general manager that reasons why he could or he could not.”

572. That answer suggests that Clr Gair appreciated that what the direction involved an inappropriate attempt to influence a member of staff in the performance of their role, but one which could be ameliorated if the direction was put in writing. In my view that understanding, if held, was plainly wrong.

573. That passage of evidence also highlights the difficulty Clr Gair had when giving evidence in explaining why he gave that direction. If Clr Gair wanted “*correspondence from the general manager*” setting out whether or not those trees could be removed, it makes little objective sense for him to direct that they be removed to elicit such a response. Clr Gair gave the following further evidence about that issue⁶⁹²:

“Q. So, by the beginning of 2021 there was a still a significant state of flux about the ultimate form this project would take; is that right?”

A. Yeah, it was getting to the very – yes, correct.

Q. Given that, why did you direct Mr Paull to remove the eight Pin Oak trees immediately?”

⁶⁸⁹ See, e.g., T823.25-43 (Paull).

⁶⁹⁰ See, e.g., T816.40-817.46, 818.23-819.38, 821.10-28, 822.17-29 (Paull).

⁶⁹¹ T1386.14-37 (Clr Gair).

⁶⁹² T1393.18-1394.44 (Clr Gair).

- A. *No, he couldn't.*
- Q. *Why did you give this direction if the project was in a state –*
- A. *Because I didn't.*
- Q. *Just let me finish. **Why did you give him that direction if the project was in such a state of flux in early 2021?***
- A. ***I wanted a definitive answer** because I was getting pressure and I didn't know the REF hadn't been complete and, as I say, Mr Paull said, "No, I can't do it", and I said, "Well, that's fine".*
- Q. ***What would be the purpose of removing the eight Pin Oak trees prior to the final project being approved?***
- A. ***It would have definitely given a direction that commencement had – the project had commenced.***
- Q. ***Even though it hadn't – the final form of it hadn't been approved?***
- A. ***No, I would not have given that direction unless all processes had been complete; I don't operate that way.***
- Q. *I'm sorry, perhaps I'm misunderstanding you. I thought you had agreed with the proposition that by – let's say March 2021 the project was still – the final form the project would take was still in a state of flux; do you agree with that?*
- A. *Yes.*
- Q. *The final project had not been approved for commencement; do you agree with that?*
- A. *Yes.*
- Q. ***Then, what was the purpose of giving Mr Paull the direction to remove the eight Pin Oak trees immediately?***
- A. ***Because I wanted a definitive – and I – at that stage, Mr Commissioner, I wanted reasons why it could not have commenced and –***
- Q. *You were aware that the project hadn't been finally approved, were you not?*
- A. *Um, well, I – that was up to the general manager to – or acting general manager to advise, that's his position, to advise councillors and myself on projects and where they were up to and whether what was being requested was legal. He said, "It's not legal, it can't be done".*
- Q. *Wasn't it ultimately a matter for the governing body to give the project the final tick before it would commence?*
- A. *No, the resolution was already there.*
- Q. *The resolution to commence the Station Street project in a form that had not been finalised?*
- A. *The resolution – sorry. **The resolution to remove the Pin Oaks was a resolution of council.***
- Q. ***I've had some evidence from other councillors who were of the view that resolution was merely about the design and would not have been***

implemented until the overall Station Street project had been finalised and approved. What do you say to that?

A. ***That that's a fair comment and I couldn't – I couldn't get a – I couldn't argue with the general manager when he said, "I can't do that", so ..."***

574. It is not entirely clear to me from that passage of Clr Gair's evidence why the direction was given if what Clr Gair wanted to know was why the project could not have commenced. Presumably, there would have been little difficulty in Clr Gair merely asking that question, rather than issuing Mr Paull with the direction to remove the trees "*forthwith*". Ultimately, however, I have determined that I do not need to reconcile those issues with the evidence on that topic for the purposes of answering Term of Reference 2. That is because, it is uncontroversial that Clr Gair gave a written direction to Mr Paull to remove the Pin Oak Trees in Station Street at a time when that work could not be completed, and prior to the final approval by Council of works commencing on the Station Street Project. Even assuming that Clr Gair had not intended to do something inappropriate, he nevertheless injected himself into operational matters, and sought to "*direct or influence, or attempt to direct or influence, any other member of the staff of the council in the exercise of the functions of the staff member*"⁶⁹³. That is sufficient for the purposes of Term of Reference 2.

Councillor Scandrett addressing a union meeting

575. In about late 2018-early 2019⁶⁹⁴, Clr Scandrett attended the Resource Recovery Centre where staff were attending a Union meeting. The purpose of that meeting was to discuss the reduction in opening hours of that centre. Clr Scandrett's evidence was that he had become aware that the meeting was being held via media reports⁶⁹⁵.

576. Two video clips of Clr Scandrett addressing members of staff at that meeting were tendered⁶⁹⁶. In Ex CC, clip 13, Clr Scandrett can be seen addressing staff and stated:

- i. that the "*money being saved by cutting hours here, right, which is core stuff, is going to the art gallery to prop up it*";
- ii. "*there's no business plan for it*" in reference to the Art Gallery "...so we don't know what they are going to do out there...";

⁶⁹³ Contrary to cll 7.2(b) and 7.6(i) of the 2019 Code of Conduct.

⁶⁹⁴ T903.11-15 (Clr Scandrett).

⁶⁹⁵ T904.44-47 (Clr Scandrett).

⁶⁹⁶ Ex CC, clips 13 and 14.

- iii. *"...it shouldn't be at the cost of services...I am probably going to cop a shitload out of being here today, but that's how it is...I was elected by thousands of people and I'm sure a number of you probably saw me on the hustings over the last two terms"*⁶⁹⁷.

577. At that point, Clr Scandrett is asked a question by a member of the media who was in attendance and who referred to him as "Councillor Scandrett", to which Clr Scandrett responded *"...I am not here as Councillor Scandrett, I am here as Ian Scandrett a resident...the comments I am making are my own"*.

578. It ought to be uncontroversial that a Councillor should not be addressing staff at a union meeting (or in any other forum) about matters that affect their employment, or their conditions of work. Those were plainly operational and staffing matters. It is a breach of the interaction policy, and the Code of Conduct, for a councillor to do so⁶⁹⁸. When giving evidence, Clr Scandrett sought to justify his attendance in various ways. That justification included:

- i. that the meeting took place *"on a public road outside our Resource Recovery Centre"*⁶⁹⁹;
- ii. that there were two meetings, one convened by the Union (which Clr Scandrett was not involved in) and a *"postscript"* to that meeting which was what can be seen in the video clips⁷⁰⁰;
- iii. at the end of the meeting convened by the Union, Clr Scandrett was invited by the organiser *"whether I would like to speak to the crowd and answer questions, which I did in my own right"*⁷⁰¹, and that that he spoke and answered questions *"as a private citizen"*⁷⁰².

579. In my view, none of those justifications excuse a councillor interacting with staff about matters directly affecting their employment, contrary to the interaction policy and the Code of Conduct. In this respect:

- i. Firstly, there is no meaningful distinction between a gathering of staff during a Union meeting, and one that exists immediately after the close of that meeting. It remains a gathering of Council staff.

⁶⁹⁷ Ex CC, clip 14, which is of much shorter duration, shows Clr Scandrett addressing that *"gathering"* stating *"it is like saying we will not fix potholes for a year to fund an art gallery – No"*.

⁶⁹⁸ As this event pre-dates the 2019 Code of Conduct, see the 2017 Code of Conduct, cl 6.7(a): Ex A, p 686.

⁶⁹⁹ T902.44-47 (Clr Scandrett).

⁷⁰⁰ T902.2-9, 905.2-21 (Clr Scandrett).

⁷⁰¹ T904.5-42 (Clr Scandrett).

⁷⁰² T907.10-39 (Clr Scandrett).

- ii. Secondly, the location of the meeting is immaterial. That it was held in a public place does not alter the fact that it was a gathering of Council staff.
- iii. Thirdly, and significantly, Clr Scandrett's comments on the recording are inconsistent with having been made by a "*private citizen*". In my view, the objective observer would be left with little doubt that Clr Scandrett was addressing that meeting as a Councillor. If that were not the case, his remarks about "*going to cop a shitload*" for being in attendance, having been elected by "*thousands of people*", and having been seen "*on the hustings*" make little sense. Each of those comments can only pertain to a Councillor and have nothing to do with the position of a "*private citizen*".
- iv. Fourthly, Clr Scandrett's candid comment that he would "*cop a shitload*" for his attendance indicates that he was aware that he should not have been present and should not have addressed staff in that way. That reveals a recognition on his part that he was involving himself in matters that were outside the purview of councillors.
- v. Fifthly, it is not credible to think that had Clr Scandrett not been a Councillor that he would have been invited to speak to, and answer questions from, staff. As Clr Scandrett accepted, the role of a councillor was "*a 24/7 job in the public's eye*"⁷⁰³ (as is also made clear in the Councillor Handbook⁷⁰⁴).

580. Having reviewed the clips of that meeting in Ex CC, and considered Clr Scandrett's evidence in relation to it, in my view the distinction that Clr Scandrett sought to draw – i.e., that he acted as a private citizen and not as a Councillor – was, in my view, not one that was reasonably available. Rather, in my view that conduct was inconsistent with the prohibition against councillors approaching staff and staff organisations to discuss operational staff matters contained in the 2017 Code of Conduct⁷⁰⁵. It constituted an "*improper interference*" in an operational matter for the purpose of Term of Reference 2.

The use of the Councillor Request System

581. There was evidence of a system whereby councillors could raise issues for the attention of staff. Those issues would then be triaged and prioritised (including on the basis of risk), so that they could be managed in an efficient manner⁷⁰⁶. A system of that kind recognises that as elected representatives, it is a common experience that Councillors will be approached or contracted by residents with issues or concerns. The system allows Councillors to raise those

⁷⁰³ T908.20-21 (Clr Scandrett).

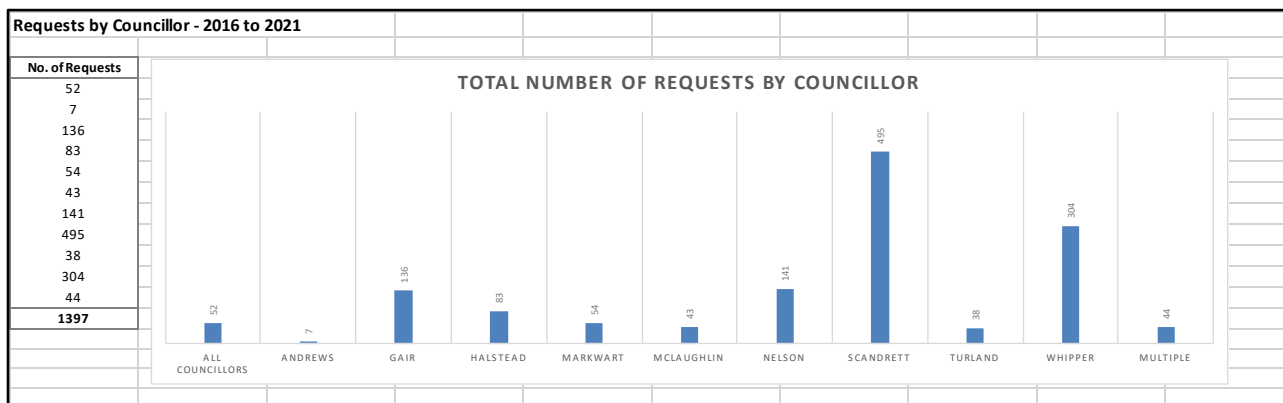
⁷⁰⁴ Ex A, p 484.

⁷⁰⁵ The relevant code of conduct given the date on which this conduct occurred: Ex A, p 686.

⁷⁰⁶ T826.16-24 (Paull).

issues on behalf of residents in an appropriate way, which are then handled by the operational staff.

582. The evidence reveals that approximately 1397 total requests were made during the 2016 Term, prior to the Suspension Order being issued⁷⁰⁷. The following graph sets out a breakdown of the requests lodged in that period per councillor⁷⁰⁸:



583. There was evidence that requests made through that system had an effect on staff and caused them to be diverted from their day to day work as they were on occasion treated as urgent issues warranting attention when they otherwise would not have been. The evidence before this Inquiry does not support a finding that requests made through that system were used as a way to improperly interfere in operational matters. I make no finding to that effect.

584. However, as observed above, the evidence also reveals that many issues were raised by Councillors outside of that system, when they ought to have been lodged through that it. Whilst the evidence does not permit particular examples to be identified, the weight of the evidence clearly indicates that contact of that kind occurred and were taken by some staff to be an attempt by those Councillors to avoid established systems⁷⁰⁹. Councillors bypassing the applicable system and policy when raising issues, and in so doing applying inappropriate pressure to staff in the performance of their roles, is in my view a further example of councillors engaging in “*improper interreference*” in operational matters. To the extent that they felt justified in doing so, it demonstrates a failure to fully understand the limit of their role and responsibilities.

⁷⁰⁷ Ex BB.

⁷⁰⁸ Ex BB.

⁷⁰⁹ See, e.g., T825.28-827.14 (Paull); Ex NN pp 34, 46-47; Ex OO, pp 9, 47-48 and the other references collected above.

Councillor interference in planning matters

585. The evidence reveals that there was a widely held view within the community and by some Councillors, that some of the Councillors were inappropriately involved in planning matters, including by (but not limited to) becoming too closely aligned with applicants or objectors⁷¹⁰.

586. Clr Andrews gave considered and measured evidence on this issue, which is worthy of setting out in this report as it identifies at least one reason why that perception arose (emphasis added)⁷¹¹:

“A. ...on occasion and possibly on many occasions over the three years **it was quite obvious that some councillors were arguing the case and gave the feeling - once again, the feeling or the impression to me, that they had or would have had some involvement with the applicant over and above the normal debate on an application before us on any given council meeting.**

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

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

A. **Exactly the same, absolutely.**

Q. *And was this from a variety of councillors or was it from a particular person in particular or?*

A. *Contrary to my view, I think most councillors would have spoken against any given DA on any given occasion even though that the staff had deemed it for approval, but there's a difference and you can tell the difference in the discussion where it's just not general debate, it appears to be that a councillor or councillors at any given time have had, I believe, conversations with the applicant.*

Q. **Was this an observation you make about a variety of members of the governing body or do you limit it to one, for example, or was it more than one individual at different times depending on the application that was being considered?**

A. Yes, **more than one, more than one.**”

⁷¹⁰ See, e.g., T674.30-675.35, 676.15-19 (former Clr Markwart); T734.17-27, 746.45-748.46 (Ryan); T771.11-772.7, 775.6-776.10 (Samulski); T1032.45-1035.21 (Clr Andrews); T1283.22-27 (former Clr Turland); Ex B, p 248, 427-428, 435-436, 438, 443. Ex B, p 472

⁷¹¹ T1033.42-1034.37 (Clr Andrews).

587. Similarly, former Clr Markwart gave evidence that he was aware of instances where Councillors would speak towards something very strongly on issues in circumstances where there was a known relationship⁷¹², and that⁷¹³:

“Q. Do you have a view as to whether, even if it did not strictly fit within the notion of non-pecuniary interest in the code of conduct, whether it was appropriate for a councillor to sit and vote on a DA that they have taken up the cause for from a ratepayer?

A. I personally believe it's inappropriate. I'm not quite sure what the Code of Conduct states on that, but I personally believe a councillor has to be squeaky clean and should manage that perception very carefully.

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

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

588. Additionally, there was some evidence that indicates that there were Councillor interactions with planning staff (including below the level of senior staff) which that transgressed into operational matters⁷¹⁴. For example, Mr Burgess gave evidence that⁷¹⁵:

“I saw some councillors from their point of view seeking information, but I think the role of seeking information on occasions transgressed into trying to influence staff in potentially recommendations and reports to council, and that seemed to be common in the planning area.”

589. Again, however, the evidence before the Inquiry does leave me in a position to make conclusive findings in relation to specific examples of conduct that amounted to “*inappropriate interreference*”.

590. During his evidence, Clr Andrews referred to Clr McLaughlin having been involved in a particular development application and had “*prejudiced*” it, which was the subject of a code of conduct complaint⁷¹⁶. By way of brief summary, the evidence reveals that Clr McLaughlin was the subject of a code of conduct complaint in which he was alleged to have inappropriately provided assistance and information to an objector to a development and having done so, voted on the relevant application when it came before council. Those matters were the subject of two code of conduct review reports which were delivered during the 2016 Council Term⁷¹⁷.

⁷¹² T675.4-6 (former Clr Markwart).

⁷¹³ T676.5-19 (former Clr Markwart). See also, Markwart 23 May 2022 Final Submission, p 10.

⁷¹⁴ T747.19-30 (Ryan); T1045.41-1046.4 (Clr Andrews).

⁷¹⁵ T425.5-10 (Burgess).

⁷¹⁶ T1045.15-39 (Andrews).

⁷¹⁷ Ex C, pp 37-233.

591. Much of the conduct that was considered in those reports pre-dated the commencement of the 2016 Term. That which occurred during the early stages of the 2016 Term is inextricably linked to, and cannot be divorced from, the conduct that pre-dates the commencement of the 2016 Term. The issues raised by that conduct are not matters of background, and nor do they provide context for the events but relate to particular examples of conduct by a councillor. In those circumstances, I have concluded that (on balance) it would not be appropriate for me to engage in a consideration of them, or to take them into account, in an assessment of Term of Reference 2. Doing so would require me to engage in a consideration and analysis of particular instances of conduct (as opposed to matters of background) which pre-date the period identified by Term of Reference 2. Accordingly, I have placed no reliance on those matters.
592. A particular benefit of the Local Planning Panel is that the occasion for conduct of that kind cannot. As Mr Ryan explained, it permits councillors to become advocates for or against a development, without being constrained by the fact that they will ultimately be the decision makers⁷¹⁸.

Findings in relation to Term of Reference 2

593. Having regard to the whole of the evidence, and for the reasons set out above, I make the following findings in relation to Term of Reference 2:
- i. The evidence establishes that there were instances of “*improper interference*” by individual councillors in operational matters during the 2016 Council Term.
 - ii. The evidence does not permit me to make findings as to the extent and frequency of that “*improper interference*”, however a limited number of individual examples have been identified.
 - iii. The evidence does not support a conclusion that the Governing Body as a collective group engaged in “*improper interference*” in operational matters during the 2016 Council Term.
594. Counsel Assisting urged me to make the following findings in relation to Term of Reference 2⁷¹⁹:

“There was a culture within the Governing Body that led to Councillors micromanaging aspects of the Council that amounted to improper interference, probably caused by a lack of trust between Councillors and Staff”

⁷¹⁸ T739.46-740.8 (Ryan).

⁷¹⁹ CA Final Submission, [399(f) and (g)].

and

“When presented with grey areas, Councillors lacked the capacity and judgment to ascertain what conduct was within the purview of the obligation to direct and control and what conduct constituted improper interference.”

595. Although there is some force in that submission, I do not consider it necessary to make those findings. I am satisfied that issues of that kind are adequately dealt with in the broader context of Term of Reference 1. Secondly, the examples of *“improper interference”* in operational matters identified above do not, in my view, fall into the category of *“grey areas”*. They were clear transgressions into operational matters. The purported justification for them offered by those Councillors fortifies my view that they did not fully understand their roles and responsibilities as Councillors, nor perform them adequately, reasonably, or appropriately at all times for the purposes of Term of Reference 1.

CHAPTER 6: TERM OF REFERENCE 3

596. As set out above, Term of Reference 3 requires a consideration of whether the Governing Body has been, and will be, in a position to direct and control the affairs of Council in accordance with the LGA and to otherwise fulfil its statutory obligations.

597. It therefore requires an assessment that relates to the period prior to the Suspension Order having been issued, and a forward looking assessment of what is likely to occur in the future.

Was the 2016 Council in a position to direct and control the affairs of the Council?

598. In some respects, this issue can be answered briefly. The evidence was that the Council continued to function, made achievements, and provided essential services. Aspects of strategic planning framework were undertaken (although there were shortfalls as set out above) and the Council's financial position was assessed as being sound immediately after the Suspension Order was issue (albeit that there some issues to be addressed for future years).

599. Accordingly, on one view, the evidence indicates that the Councillors were able to direct and control the affairs of the Council despite the obvious dysfunction within its ranks. Further, it could not be said that the Councillors abrogated all of their responsibilities.

600. However, that conclusion must be qualified by the matters which have been considered in the context of Terms of Reference 1 and 2. Namely, that whilst directing and controlling the affairs of the Council, there were instances within the governing body of:

- i. conduct which was inconsistent with the roles and responsibilities of a councillor as prescribed by the LGA; and
- ii. conduct which amounted to "*improper interference*" in the operational affairs of the Council.

601. Further, as set out above, the dysfunction within the Governing Body had a clear effect on the functioning of the wider organisation and its staff. It is telling that those issues were expressly raised by Clr Gair in his correspondence to the Minister and the OLG in March 2020⁷²⁰.

602. Accordingly, once the whole of the evidence is considered, the most compelling conclusion available is that whilst the Councillors were in a position to direct and control the affairs of the Council, the dysfunction within the Governing Body, together with the various instances of

⁷²⁰ Ex E, pp 69 and 83.

behaviours and conduct that were inconsistent with the roles and responsibilities of a Councillor, had an adverse effect on the functioning of the organisation and its staff.

Will the Suspended Councillors be in a position to direct and control the affairs of the Council?

603. This aspect of Term of Reference 3 involves an element of prediction as to what may occur in the future. It necessarily involves an assessment of what might take place, having regard to a consideration of the evidence that has been gathered. That assessment involves weighing the evidence as to what transpired together with the observations and submissions of the Councillors as to what they consider will happen if the suspension were lifted.

604. Counsel Assisting identified the key issue in the assessment of this aspect of Term of Reference 3 as being "*what would change?*"⁷²¹. That is a useful framework within which to consider this limb of Term of Reference 3.

What would change?

605. A key theme advanced by some of the Suspended Councillors was that with the resignations of former Clrs Turland and Halstead, much of the cause of the dysfunction had resolved itself and matters would greatly improve. In my view, although a relevant consideration, it is not a complete answer to this limb of Term of Reference 3.

606. In this respect, the resignations of former Clrs Halstead and Turland does not affect an assessment of a number of the matters identified in the context of Terms of Reference 1 and 2 above. For example, none of the Councillors in their submissions indicated that they had a greater level of understanding of their prescribed roles and responsibilities than the high level understanding revealed by their evidence. Further, it does not deal with the complete breakdown of the relationship between Clr Scandrett and the remaining councillors. Despite the expressed hope of a changed dynamic, there is little evidence that supports a conclusion that it is likely to change.

607. There is little acceptance by the Councillors in their submissions of the contribution they made to the creation or maintenance of an environment where clear acts of disorder became the norm, and inappropriate conduct directed towards staff passed without comment or action. There is some acknowledgement that more could have been done, however significant blame is apportioned to the OLG for the state in which the Council found itself, coupled with ongoing criticism of the Interim Administrator's conduct.

⁷²¹ CA Final Submission, [330]-[339].

608. Further, aspects of the post-suspension behaviour and statements made by some of the Councillors indicates a continued ongoing lack of understanding of the roles and responsibilities of a councillor, the division between the operational and strategic functions, and the effect that public statements made by councillors (even when suspended) can have on the organisation. I have dealt with those matters in the context of Term of Reference 4 below, but in my view, they are also relevant to an assessment of this limb of Term of Reference 3.

609. However, there were some encouraging matters advanced in some of the submissions. In this respect:

- i. Clr Andrews made appropriate concessions in his submissions, and I accept that he is genuinely regrets what occurred. Although I have found that his understanding of the roles and responsibilities of a councillor was high level, and there is little evidence to indicate that it has improved, I would be confident that he would be better placed to discharge the roles and responsibilities of a councillor in the future. That is particularly so given that evidence does not support a conclusion that he engaged in acts of disorder, or other disruptive or dysfunctional behaviour.
- ii. Clr Nelson also made appropriate concessions as to his conduct (albeit he proffered some justification for it by needing to be “*robust as an elected official*”⁷²²) and I am of the view that that conduct of that kind would be unlikely to be repeated by him again. Clr Nelson also meaningfully engaged with a number of the issues that arose from the evidence in his final submission. Although I have not found it necessary to resolve them, it is indicative of careful reflection by Clr Nelson. Like Clr Andrews, although in my view Clr Nelson’s understanding of the roles and responsibilities of a councillor were relatively high level, and there is little evidence to indicate that it has improved, I would be confident that he would be better placed to discharge the roles and responsibilities of a councillor in the future.
- iii. Clr Gair’s Final Submission states that “*salutary lessons*” have been learned from the Inquiry, and that “*with the knowledge gained through this inquiry councillors will represent the community in a more positive and productive manner*”. Unfortunately, the “*lessons*” and “*knowledge*” are not identified in his submission and other aspects of his submission and post-suspension conduct suggest a continued lack of understanding of the roles and responsibilities of a councillor, the wider framework that applies to Local Government in New South Wales, the impact of councillor conduct on the community’s confidence in the Council and the organisation itself. Further, there is nothing in Clr

⁷²² Nelson Undated Final Submission (No 2), [7].

Gair's submission that suggests that an improved understanding of or adherence to appropriate meeting procedure is likely should he be the Mayor, nor that future instances of disruptive conduct would be dealt with in accordance with applicable processes.

610. I did not receive final submissions from Clr McLaughlin or Clr Whipper, so I am unable to undertake similar assessments about them going forward. However, I observe that Clr McLaughlin's letter to the editor of the *Southern Highlands Express* indicates a continued failure to understand the steps available to a council to respond to instances of councillor misconduct⁷²³. In particular, Clr McLaughlin asserts that if returned the Governing Body could resolve the dysfunction by suspending Clr Scandrett. There is no such power available to a governing body in the LGA.

611. Clr Scandrett's final submission did not engage with any of the criticisms of his conduct set out in Counsel Assisting's Final Submission. Rather, Clr Scandrett supported the recommendations made by Counsel Assisting. His submission concluded with the following:

"In summary I say that the council was dysfunctional; there was a variety of bullying; there was impact on staff and Council Officers [and Officials] and that the community were not listened to.

I am comfortable that I did my best in difficult circumstances to get things on a proper footing"

612. Despite having accepted when giving evidence that aspects of his conduct were unacceptable and he contributed to the dysfunction within the 2016 Council⁷²⁴, Clr Scandrett's final submission justifies his conduct as doing his best "to get things on a proper footing". I found that submission concerning. In my view, it should go without saying that engaging in acts of disorder, and other instances of misconduct (as defined in the Code of Conduct), are not indicators of a councillor doing his best to get things onto a "proper footing". The proper footing involves adherence to the roles and responsibilities of a councillor, including the behavioural standards set out in the Code of Conduct and the Code of Meeting Practice. Compliance with those behavioural norms does not prevent or restrict strident and robust representation of the community. Rather, they are designed to enhance it. Regrettably, those mandatory standards are matters which Clr Scandrett (and others) were willing to cast aside when they saw fit to do so.

613. That submission draws into focus other aspects of Clr Scandrett's evidence concerning his platform to "reset the council". In that respect, Clr Scandrett gave the following evidence (emphasis added):

⁷²³ Ex SS.

⁷²⁴ See, e.g., T962.35-964.21 (Clr Scandrett).

“Q. Do you accept that you had at least some part to play in the dysfunction of the council between 2016-2020?”

A. *Yes, and I think all councillors --*

Q. ***I'm asking about you.***

A. ***Okay. Yes.***

Q. *Do you think, therefore, as someone who contributed to the suspension reasons, that it is appropriate to be congratulating the Minister on the suspension of the governing body?*

A. *Seeing I stood on a platform of reform and accountability, Mr Parish, the "Just Fix It" team [holds up document] and --*

Q. *Can you answer the question?*

A. *I am answering the question, sir, if you'll bear with in. There's no argument as to my views, they are detailed here. If you've not looked at my election material, maybe you should and I invite you to.*

THE COMMISSIONER: Q. *Councillor, comments like that are not helpful --*

A. *Sorry, I didn't mean to --*

Q. *-- you've been given an opportunity --*

A. *Sorry, you're welcome to --*

THE COMMISSIONER: *No, just stop. You are responding to matters which have been suggested to us, it's part of the process. So, please don't argue or direct comments to Counsel Assisting who is giving you that opportunity in this forum.*

THE WITNESS: ***My answer, Mr Parish, is I am well recognised as having had a position for resetting this council for the terms I've been elected and prior; it's not a new bit of information.***

MR PARISH: Q. ***And you've achieved that by contributing to the dysfunction which led to the suspension of the council; what do you say to that?***

A. ***One could say that. One could say that we all contributed towards that.***

THE COMMISSIONER: Q. *But accepting that one could say that, I'm interested in your response to the suggestion that you achieved the - I think "reset" was your word - by, as Counsel put it, contributing to the dysfunction in council; what do you say to that express proposition? I'm very interested to have your response.*

A. ***I don't see it as a badge of honour particularly, Commissioner, but I do see it as an outcome that came from me continuing to look at how to be a better council for the community and the push-back that I got from other councillors on that improvement.***

614. When the Notice of Intention to Issue a Suspension Order was issued, Clr Scandrett made a public statement stating that he was “delighted” and that a “public inquiry is the only way to ensure a refreshed gene pool throughout the organisation”⁷²⁵. As noted above, Clr Scandrett had publicly called for the sacking of the Council prior to the Minister’s intervention in which he

⁷²⁵ Ex E, pp 1350-1351.

also referred to a refreshing of the “*gene pool*”. Leaving aside that conduct of that kind clearly brings the Council into disrepute⁷²⁶, it is not the role of a councillor to unilaterally bring about a “reset” of the organisation or bring about a refreshing of the “*gene pool*” within the governing body.

615. Councillor Scandrett’s submissions and evidence on this issue suggest that he considers his conduct was appropriate because the other Councillors would not agree with his desire to “reset” the organisation, and in those circumstances, he was justified in seeking to “refresh the *gene pool*” within the Governing Body. In my view, conduct of that kind is not consistent with the statutory roles and responsibilities of a councillor. Change in the strategic direction of the organisation is made by consensus of the governing body. Change within the governing body is brought about through elections. In my view, it is not the role of an individual councillor to unilaterally achieve either.

616. Counsel Assisting submits that “*there is little reason for the Commissioner to find that if the Councillors were returned, that Councillor Scandrett would not hold the same beliefs and continue the same course of conduct as before...*”⁷²⁷. Clr Scandrett did not engage with that submission (or any other matter directed to his conduct) in his final submission. Similarly, when giving evidence, it was clear that Clr Scandrett did not hold high hopes for improvement if the Suspended Councillors were returned to office, and gave evidence that “*the question really goes to the heart of, if this council were to be returned or re-elected would the behaviour change? And the answer is, I’m not sure it would, and I’m not talking about me, I’m talking about all*”⁷²⁸.

617. On that issue, Counsel Assisting has also submitted that there is “*no reason to think the Council meetings will be significantly less disruptive given the subsisting majority:minority split that at least Councillor Scandrett says contributed to the dysfunction*”⁷²⁹. The “*majority:minority split*” was the previous 8:1 split (then 7:1 following the retirement of former Clr Markwart) split referred to by Clr Scandrett. On this issue Clr Gair submits that the remaining councillors could “*work as a cohesive and productive council*”, but in doing so states that he acknowledges that “*Clr Scandrett was a reason for the disfunction [sic] of council and his conduct unless changed, could create problems, other than to say that he in my opinion would be the odd man out*” and that “*Clr Scandrett is a destabilizing councillor*”⁷³⁰. Having regard to the totality of the evidence, I have come to the view that Counsel Assisting’s submissions on this issue should be accepted.

⁷²⁶ In my view, the distinction Clr Scandrett sought to draw about his Facebook posts being made in the capacity as a “*resident taxpayer*” lacked substance.

⁷²⁷ CA Final Submission, [355].

⁷²⁸ T933.26-935.9 (Clr Scandrett).

⁷²⁹ CA Final Submission, [8(i)], [336]-[337].

⁷³⁰ Gair 23 May Final Submission, sub-paras (h), (u)(3).

Significantly, beyond hope⁷³¹, there was nothing in the evidence which suggests that the same dynamic would be unlikely to return.

618. In this respect, even if the dysfunction within the Governing Body during the 2016 Term was solely attributable to a minority, as Clr Gair accepted the actions of a minority had a significant effect on the whole of the Governing Body⁷³².

619. It is also significant that the Governing Body had been subject to the Performance Improvement Order which required additional and focussed training, which did not result in lasting change. To that end, Clr Gair's evidence that previous interventions by the OLG "*worked for a short space of time and then councillors just reverted to previous behaviour*"⁷³³ rings loud. That lived experience, coupled with a long history of dysfunctionality within the Governing Body (including in earlier terms), are also matters of particular significance in assessing the likely future course of the 2016 Council.

620. Having regard to each of those matters and accepting that there is a degree of impression in attempting to predict what might occur in the future, in my view there is very real doubt that the dysfunction of the past would not return.

Findings in relation to Term of Reference 3

621. Having regard to the whole of the evidence, and for the reasons set out above, I have reached the following conclusions in relation to Term of Reference 3:

- i. Whilst the Councillors were in a position to direct and control the affairs of the Council, the dysfunction within the Governing Body, together with the various instances of behaviours and conduct that were inconsistent with the roles and responsibilities of a Councillor, had an adverse effect on the functioning of the organisation and its staff.
- ii. Whilst there are indications that some of the Suspended Councillors have demonstrated a better capacity to direct and control the affairs of the Council in compliance with their roles and responsibilities as specified by the LGA:
 - i) Those Councillors have not displayed a greater level of understanding of their roles and responsibilities;

⁷³¹ T1446.23-1447.19 (Clr Gair).

⁷³² T1447.9-25 (Clr Gair).

⁷³³ T1344.31-38 (Clr Gair).

- ii) Some of the submissions made and post-suspension conduct are indicative a failure to understand the roles and responsibilities of a councillor, and some of the central foundational principles that apply to local government in new South Wales;
 - iii) There is nothing to indicate that Council meetings would not be affected by the kinds of dysfunction that had previously occurred or would be conducted with a greater adherence to applicable meeting procedures.
- iii. On balance, in my view it is doubtful that the 2016 Council would remain free from dysfunction of the kind seen during the 2016 Term.

CHAPTER 7: TERM OF REFERENCE 4

622. As set out above, Term of Reference 4 permits inquiry into any other matter warranting inquiry, particularly those that may impact on the effective administration of Council's functions and responsibilities or the community's confidence in Council being able to do so.
623. In my view, a number of the matters that I have considered in the contexts of other Terms of Reference could equally fall within the scope of Term of Reference 4. There is no need for me to consider them again in this section of the Report. It is sufficient to say that even if there are matters that I have dealt with in the contexts of Terms of Reference 1, 2 or 3 which could be said to fall outside of their terms (which I do not accept), they properly arise in the context of Term of Reference 4 in any event.
624. In addition to each of those matters, the following issues are most conveniently dealt with within the context of Term of Reference 4:
- i. the 30 March 2022 Release;
 - ii. the "Road Map" for the future of the Council;
 - iii. former Clr Markwart's comments concerning use of the gavel;
 - iv. Clr Gair's interaction with Ms Haslinger after the 29 January 2021 Extraordinary Meeting;
and
 - v. the question of whether the Council needs "more time".

The 30 March 2022 Media Release

625. As noted above, in the lead up to the commencement of the Public Hearings, Clrs Gair, Andrews, McLaughlin, Nelson and former Clr Markwart issued the 30 March 2022 Media Release, which was headed "Sacking was *political*, say councillors".⁷³⁴ The 30 March 2022 Media Release then became the subject of an article published by the *Southern Highlands Express* which carried the following headline⁷³⁵:



⁷³⁴ Ex O.

⁷³⁵ Obviously enough, none of the Suspended Councillors who subscribed to the 30 March 2022 Media Release bear any responsibility for the headline that accompanied that article.

626. Former Clr Markwart submitted that the 30 March 2022 Release was not relevant to the Terms of Reference⁷³⁶. In my view, it plainly was. Its relevance lies in the fact that it contains statements made by four of the Suspended Councillors which bear upon an assessment of those Councillors' understanding of their roles and responsibilities, the functioning of local government, and the impact of their conduct on the wider organisation.
627. Matters of that kind are relevant to the effective administration of the Council's functions and responsibilities and given that they were made to and published in the local press, the community's confidence in the Council being able to perform them going forward. Those matters fall squarely within Term of Reference 4. They are also capable of bearing upon an assessment of Terms of Reference 1 and 3. In this respect, to the extent that they inform an assessment of those Councillors' understanding of the roles and responsibilities of a councillor, they also bear upon the issues identified in Term of Reference 1. To the extent that they inform an assessment of the attitudes and approaches that those Councillors would bring to the role in the future, they are capable of bearing upon an assessment of the second limb of Term of Reference 3.
628. Although former Clr Markwart joined the 30 March 2022 Release, as he is not a Suspended Councillor, the comments and findings about it in the paragraphs that follow do not extend to him. However, as former Clr Markwart made submissions about this issue which are capable of applying generally to the position of the Suspended Councillors who subscribed to the 30 March 2022 Media Release, they have been considered below.

The 30 March 2022 Media Release was not an attempt to undermine the Inquiry

629. The impetus for the 30 March 2022 Media Release appears to have been discussions between Clr McLaughlin and Clr Gair to the effect that a public response to the criticisms made of the Governing Body by the Interim Administrator should be made. That then prompted Clr Gair to contact Clrs Andrews and Nelson and former Clr Markwart to invite them to a meeting a couple of weeks prior to the release being issued (i.e., in approximately mid-March 2022) at his premises to discuss that concept. Each of them attended that meeting⁷³⁷. Also in attendance at that meeting was Mr Paull (the former Acting General Manager of the Council)⁷³⁸. Clr Gair was unable to explain who had invited Mr Paull to the meeting (although he had a "*suspicion*" as to who had done so) despite the fact that it was held at his property⁷³⁹.

⁷³⁶ Former Clr Markwart's Final Submission dated 23 May 2022, in which he submitted that the 30 March 2022 Media Release "*should have also been excluded from the inquiry as a topic of discussion*". No other Councillor who made a final submission advanced a similar point.

⁷³⁷ T690.2-691.33 (former Clr Markwart); T1051.2-38 (Clr Andrews); T097.32-1098.21 (Clr McLaughlin); T1168.3-1169.35 (Clr Nelson); T1405.1407.22 (Clr Gair).

⁷³⁸ T1169.12-39 (Clr Nelson); T1407.19-22 (Clr Gair).

⁷³⁹ T1407.19-47 (Clr Gair).

630. There were also no clear answers in the evidence as to why the 30 March 2022 Media Release was released on that date. Each of the Suspended Councillors present (with the exception of Clr Andrews, who was not asked questions on that issue) denied that the timing of the 30 March 2022 Media Release had anything to do with the commencement of the Public Hearings of the Inquiry⁷⁴⁰.
631. That evidence is difficult to reconcile with the opening words of the 30 March 2022 Media Release which were “*Five former councillors have jointly welcomed the opportunity to set the record straight at the public inquiry starting this week...*”⁷⁴¹ The release itself plainly contemplated the commencement of the Public Hearings. There was also an apparent “*deadline*” to issue it on the Sunday prior to the commencement of the Public Hearings⁷⁴².
632. It is also not entirely clear how the document was prepared, or where the information contained in it was sourced from. Clr Gair described it being prepared by a “*wordsmith*”, whose identity he did not wish to reveal. There was little benefit to the Inquiry in seeking to compel Clr Gair to reveal the identity of the “*wordsmith*”, and I did not do so. However, it is unclear whether the “*wordsmith*” drafted the document from things he was told by Clr Gair (or others), or by some other process⁷⁴³. There was a draft (or perhaps drafts) circulated for review by each of the named participants before it was issued⁷⁴⁴, although surprisingly given that he was extensively quoted in it, Clr Gair did not review the final version of it before it was issued⁷⁴⁵. It also does not appear that any of those who put their names to it checked the various statements in it for accuracy, as opposed to relying on what they had been told by others or by reference to an “*understanding*” that they had formed⁷⁴⁶.
633. Despite those issues with the evidence on this topic, I have come to the view that they are ultimately of little significance. That is because:
- i. First, I am satisfied that the 30 March 2022 Media Release was not designed nor intended to undermine the process of this Inquiry, nor did it have that effect.

⁷⁴⁰ See, e.g., T692.18-38 (former Clr Markwart). Similar points were in the Markwart 23 May 2022 Final Submission, p 100.

⁷⁴¹ Ex O.

⁷⁴² T1412.20-30 (Clr Gair)

⁷⁴³ Some of the language in the 30 March 2022 Media Release bears a striking similarity to that used in a Facebook post by former Clr Markwart (provided by him to the Inquiry as part of a submission), which included statements such as “*From the information in those reports made available to date, only relatively unsubstantial issues have come to light*” and “*no smoking gun irregularities were found to justify the suspension of Councillors*”. Reference is also made to “*political pressure*” having been applied to “*by-pass the due process and sack Councillors and appoint an administrator*” and to the \$700,000 deficit: Markwart 3 February 2022 Submission, p 2. In that event, it would be reasonable to infer that the “*wordsmith*” had access to that post.

⁷⁴⁴ See, e.g., T1168.43-1169.10 (Clr Nelson).

⁷⁴⁵ T1412.20-23 (Clr Gair).

⁷⁴⁶ See, e.g., T1411.30-38 (Clr Gair); T1169.5-10 (Clr Nelson).

- ii. Secondly, as a general proposition there is nothing wrong in the Clr Gair, Clr Nelson, Clr Andrews, Clr McLaughlin and former Clr Markwart making public comment to respond to criticisms made of them or to highlight their own achievements, including by way of media release, and about them meeting for that purpose.
- iii. Thirdly, having concluded that the 30 March 2022 Media Release was not designed nor intended to undermine the process of this Inquiry, it must follow that the timing of the release is of no moment.
- iv. Fourthly, each of Clr Gair, Clr Nelson, Clr Andrews, Clr McLaughlin and Mr Markwart put their name to the release. It therefore does not matter that the evidence does not paint a clear picture as to how it was prepared, or why it was released during the first week of the Public Hearings. Ultimately, by putting their name to the release, they willingly supported its dissemination and the subsequent publication of the information contained in it.

Inaccuracies in the 30 March 2022 Media Release

634. However, the 30 March 2022 Media Release remains significant, in particular because of the various inaccuracies contained in it, and the effect it has on the various issues identified above. Those inaccuracies include the following matters.

“Councillors and senior staff were guilty of resisting political pressure to approve a major land development without the necessary infrastructure like sewerage in place. So we were suspended.”

635. That statement suggests that the reason why the Councillors were suspended was the resistance of the political pressure to approve the particular development. It became apparent that the alleged *“political pressure”* referred to was said to have come from Mr Smith MP and Ms Tuckerman MP⁷⁴⁷. At the time asserted *“political pressure”* was said to have been applied, and the suspension of the councillors, Ms Tuckerman MP was not the Minister.

636. It is beyond the scope of this Inquiry to examine whether the alleged *“political pressure”* was applied as suggested in the 30 March 2022 Media Release and repeated in the evidence. Even assuming (without deciding or expressing any view one way or the other) that it had been, there is no support in the evidence for the conclusion that resisting that pressure was the reason why the Suspension Order was issued.

637. To this end, some of the final submissions made by the Councillors misunderstand the significance of the point⁷⁴⁸. The vice in that statement is not the allegation of the application

⁷⁴⁷ T1178.20-1180.8 (Clr Nelson); T1441.41-1443.28 (Clr Gair).

⁷⁴⁸ See, e.g., Markwart 23 May 2022 Final Submission, pp 5, 12-13.

of political pressure. Rather, the vice is that it constitutes an unequivocal statement by the suspended Mayor and other Suspended Councillors that they had been suspended because of their resistance of that pressure. It is that aspect of the statement that warrants attention because it suggests to the reader (relevantly, the community within the Shire) that the imposition of the Suspension Order was an improper political response by the then Minister, lacking a proper foundation.

638. Relevantly, Clr Nelson described that statement as follows (emphasis added)⁷⁴⁹:

Q. *I'm just having difficulty understanding what any conversations Ms Tuckerman had about a development in the electorate has to do with the actions of the then Minister for Local Government. Can you enlighten me?*

A. *I'm just saying that **we're drawing the line between the fact that she was pressuring the council; now, that may or may not have had an influence back in Parliament House.***

639. Pausing there – the 30 March 2022 Media Release does not say that the actions of Ms Tuckerman MP in relation to development in the electorate “*may or may not have had an influence on Parliament House*”. It contained no words of qualification of that kind. Ultimately, Clr Nelson properly conceded that no direct line could be drawn to what was said to have been the interactions between Ms Tuckerman MP and the Council and the decision of then Minister Hancock to issue the Suspension Order⁷⁵⁰.

640. The theory appears to be little more than speculation. Clr Nelson’s evidence that the resistance to the alleged political pressure “*may or may not have had an influence*” reveals its speculative nature. Clr Gair was also unable to identify a link between that resistance and the Suspension Order when giving evidence⁷⁵¹:

“Q. *...You refer to the political pressure in respect of this land development, and it followed therefore that you were suspended; that's correct?*

A. *That's correct.*

Q. *And the pressure was from Wendy Tuckerman; that's correct?*

A. *Wendy Tuckerman came and saw me and Barry Paull in relation to --*

Q. *I'm not asking that, I'm asking if you are referring to Wendy Tuckerman in this press release as the person --*

A. *Yes, yes, yes.*

Q. *-- who was placing that pressure?*

A. *Yes.*

⁷⁴⁹ T1179.29-35 (Clr Nelson).

⁷⁵⁰ T1180.13-18 (Clr Nelson).

⁷⁵¹ T1442.34-1443.31 (Clr Gair).

- Q. *And is it fair to read that as meaning that you are attributing Wendy Tuckerman as the person who got you suspended?*
- A. *Ah, one of, and many more.*
- Q. *Are you suggesting there that Wendy Tuckerman was one of the people who took steps to get you suspended?*
- A. *To keep us suspended I can't answer. To get us suspended, definitely, she did two press statements with Nathaniel Smith, and both of those said that they wanted us suspended, and I am so disappointed Wendy Tuckerman did that. I spent the previous week, we were together at an opening and I took her on a photo shoot, and she rang me and said what was my feeling, and then, she does this. I mean, just --*
- Q. *What precisely did she do, sorry?*
- A. *She then stood on the front steps out here or wherever and got her photo taken saying she supports us - wants us suspended and I --*
- Q. *She wasn't the person that made the decision about the suspension, though, was she?*
- A. *No, sir.*
- Q. *She wasn't the Minister at the time, was she?*
- A. *She wasn't."*

641. The only reason identified by Clr Gair as supporting the statement that Ms Tuckerman MP was involved in the suspension of the Council was her having done press statements and participated in a photo shoot. There was evidence of Ms Tuckerman MP (together with Mr Smith MP) having written to then Minister urging her intervention⁷⁵². That correspondence included the following passage:

⁷⁵² Ex B, pp 227-228.

We write to urge you to use your powers under the *Local Government Act* and suspend Wingecarribee Shire Council.

On 8 September 2020 you issued a Performance Improvement Order (PIO) to the Council to “strengthen relationships between elected representatives and prevent dysfunction”. We supported the PIO as we believed it was desirable for Council to resolve its internal difficulties and return to focusing on delivering positive outcomes for the community.

Regrettably, we are of the view that the PIO has not achieved its desired outcome.

Council meetings, which are held online, continue to fail to meet the *Model Code of Meeting Practice for Local Councils in NSW*. Councillors are regularly muted or even banished to virtual waiting rooms. This behaviour is contributing to poor decision-making and poor outcomes for the community.

We also express concern at allegations that we have received that council is not acting in an open and transparent manner regarding major projects it intends to undertake.

In addition to the community’s loss of confidence in the elected officials, we believe there may be significant management issues contributing to the Council’s inability to deal with the matters at hand. Moreover, we, along with the community, are particularly concerned that Council has commenced a process to appoint a new General Manager at a time when it is heavily divided and dysfunctional.

Both our electorate offices have been inundated with complaints regarding this recruitment decision. It has also led to a Petition to the NSW Parliament, organised rallies in the Shire, and enormous disquiet within the community. Given the current dysfunction and poor decision-making, we do not think the current Council is fit to make such a significant appointment at this time.

As State Members of Parliament we have patiently waited for the Mayor and Councillors to abide by the PIO, however, they have failed to heed our advice and continue to fail the communities they represent.

We, therefore, request your urgent intervention.

642. The reference to the photo shoot appears to be a reference to an article published in the *Southern Highlands Express* in which Mr Smith MP and Ms Tuckerman MP were photographed outside of the Civic Centre⁷⁵³. That article largely repeated the content of that letter.
643. Nothing in those statements links their calls for intervention to the so-called resistance to political pressure in relation to development within the Shire. It identifies the performance of the Councillors and the concerns within their electorates in relation to that performance as matters warranting the Minister’s intervention.
644. The statement is also inconsistent with the objective facts. As identified above, a number of reasons were identified for the imposition of the Performance Improvement Order and the Suspension Order. Tellingly, the Governing Body had unanimously passed a resolution accepting the reasons for the imposition of the Performance Improvement Order and had not offered any response to the reasons for imposition of the Suspension Order⁷⁵⁴. In this respect, Clr McLaughlin gave evidence that at the time the Suspension Order was issued, much of the conduct that was subject to the Performance Improvement Order had continued, justifying the

⁷⁵³ Ex YY.

⁷⁵⁴ See Chapter 3 above.

imposition of the Suspension Order⁷⁵⁵. Clr Gair also agreed that the identified reputational risks, dysfunction, and safe workplace issues were subsisting at the time the Notice of Intention to Issue a Suspension Order was issued⁷⁵⁶. When that notice was considered by the Governing Body, and in its response to the Minister, there was no suggestion that the grounds set out in that notice as justifying the imposition of Suspension Order were wrong, inaccurate, or that they did not justify the imposition of a Suspension Order⁷⁵⁷. That evidence cannot be reconciled with the statement that the suspension was “*political*” or that the Councillors had been suspended for resisting political pressure.

645. Ultimately, the statement conveyed that the only reason for the Suspension Order was that there had been resistance to political pressure in relation to development within the Shire. That was clearly not the case. Even if taken as an expression of opinion (despite being expressed as an assertion of fact), it was an opinion lacking in support in the objective evidence.

“...the plethora of reports commissioned by the Interim Administrator revealed relatively insubstantial issues...”

646. The 30 March 2022 Media Release contained the statement that “*the plethora of reports commissioned by the Interim Administrator revealed relatively insubstantial issues*”. That statement is presented as a statement of fact, and there is nothing about it that qualifies it as mere opinion.

647. As noted above, Clr Gair had not read any of the reports when making that statement⁷⁵⁸. Rather, he read the “*administrator’s community address*” which summarised those reports⁷⁵⁹. He took particular exception to the Bushfire Review Report, again which he had not read, and stating (emphasis added)⁷⁶⁰:

“Look, I - I object to this bushfire report that was done, totally, and I haven’t even read it. I read the summary; I wouldn’t bother, I wouldn’t put it in the bottom of a cocky’s cage, it’d die of constipation. Honestly and truly, to write a report without consultation of the mayor, without consultation of the general manager acting, without consultation of the former general manager or the deputy general manager in relation to handle all this, and write a report and then present it to council and saying, “This is a fair and honest documentation of what happened”, without a councillor having an input?”

⁷⁵⁵ T1099.38-1102.9 (Clr McLaughlin).

⁷⁵⁶ T1422.28-1423.8 (Clr Gair).

⁷⁵⁷ See, e.g., Ex B, pp 236-237.

⁷⁵⁸ T1413.23-1414.14 (Clr Gair).

⁷⁵⁹ T1414.7-11 (Clr Gair).

⁷⁶⁰ T1369.6-16 (Clr Gair).

648. Clr Gair also gave evidence that “*I didn’t think the reports, having seen the Commission - the administrator’s comments to the community, were worth reading anyway.*”⁷⁶¹
649. Clr McLaughlin and Clr Nelson agreed with the statement that those reports “*revealed relatively insubstantial issues*”⁷⁶². None had read each of the reports, and only former Clr Markwart had read some of them⁷⁶³. Clr McLaughlin expressed “*unqualified agreement*” with that statement despite not having read any of the reports⁷⁶⁴. Clr Andrews, to his credit, gave evidence that as he had not read the reports, he could not agree that they “*revealed relatively insubstantial issues*”⁷⁶⁵.
650. For the reasons outlined above, an objective reader of those reports would not conclude that, taken as a whole, the reports commissioned by the Interim Administrator revealed “*relatively insubstantial issues*”. In this respect, it is telling that Clr Nelson (also to his credit) has since read the Bushfire Review Report. Although he disagrees with some matters recorded in the report and joins in Clr Gair’s criticism of the approach taken in the preparation of the Bushfire Report⁷⁶⁶, he nevertheless agrees with its recommendations. Indeed, he would add to them⁷⁶⁷. He also accepts that “*Wingecarribee could have done better*”⁷⁶⁸. That view does not sit comfortably with the report identifying “*relatively insubstantial issues*”.
651. Further, a review of the Interim Administrator’s Community Updates which reference those reports could not leave the objective reader with the understanding that they “*revealed relatively insubstantial issues*”⁷⁶⁹. In one such update, the Interim Administrator stated that the reviews undertaken “*have shown that Wingecarribee Shire Council was not a good example of local government*”⁷⁷⁰, and in relation to the Bushfire Review Report (to which Clr Gair took particular exception), that it contained a “*constant theme of the Report is a lack of leadership, failure of communication, respect of roles and emergency readiness*”⁷⁷¹. Whether or not Clr Gair agreed with the matters identified in those community updates, they were not appropriately described by the suspended Mayor as being “*relatively insubstantial*” in the context of what the Shire had experienced during the 2016 Term. Even more so when the reports had not been read, a fact also not revealed in the 30 March 2022 Media Release.

⁷⁶¹ T1415.9-15 (Clr Gair); Clr Gair’s Final Submission dated 23 May 2022, sub-para (r).

⁷⁶² T694.42-695.7 (former Clr Markwart); T1102.11-39 (Clr McLaughlin); T1172.41-1174.40 (Clr Nelson).

⁷⁶³ T694.42-695.14 (former Clr Markwart).

⁷⁶⁴ T1102.34-39 (Clr McLaughlin).

⁷⁶⁵ T1053.38-1054.14 (Clr Andrews).

⁷⁶⁶ Which includes that the councillors (and some staff) were not directly contacted by the author of the bushfire review report. However, I note that Clr Nelson was aware of the public call for submissions and did not respond to it: T1174.42-1176.28 (Clr Nelson).

⁷⁶⁷ Clr Nelson’s Final Submission dated 30 May 2022, p 14.

⁷⁶⁸ Clr Nelson’s Final Submission dated 30 May 2022, p 16.

⁷⁶⁹ See, e.g., Ex B, pp 793-797.

⁷⁷⁰ Ex B, p 794.

⁷⁷¹ Ex B, p 795.

652. The summary of those reports by the Interim Administrator indicates that there were matters identified in them that required action and response by the Council. They have formed part of the rebuild of the organisation undertaken by its new General Manager (considered below). It is difficult to see any rational basis for why they would not be “*worth reading*” by the suspended Mayor, or any other Suspended Councillor, particularly those who seek to return to their roles. Whether or not they agree with the matters recorded in those reports, the conclusions reached, or the approach adopted in their preparation, one would expect that they would be relevant to any Councillor who seeks to be fully informed of the issues facing the Council, and the matters that have been the subject of attention during the period of suspension. That is particularly the case when making public statements which are intended to respond to criticisms made of them. In my view, given the significance of those reviews, and their findings, to the organisation as a whole, comments of that kind also serve to undermine confidence in the Council and its staff that are responsible for responding to them.

653. As a statement of fact, the statement that the “*plethora of reports commissioned by the Interim Administrator revealed relatively insubstantial issues*” lacks support in an objective review of the reports themselves. It also does not find support from the Interim Administrator’s summaries of them in his various “*Community Updates*”. The suggestion is also at odds with the direction now taken by the Council, which is undergoing a transformation which includes actioning a number of the recommendations that were made in those reviews.

654. Clr Gair maintained during his evidence, and in his final submission, that the statements in the 30 March 2022 Media Release were statements of opinion⁷⁷². Even if it was an expression of opinion that does not alter the position. As an expression of opinion, it conveyed an impression that the suspended Mayor (and the other Suspended Councillors who agreed with that statement) had read those reports (not merely a summary of them⁷⁷³) and having considered them, had concluded that they revealed “*relatively insubstantial issues*”. That plainly had not occurred.

“The then Minister could have removed the problem councillors without sacking the whole council but there were other, political forces at play. The Minister rejected her own department’s advice to maintain the elected council after it had met her performance improvement conditions and she ordered a costly public inquiry as the only legal way of keeping us out of office.”

655. There are two problems with this statement.

656. The first is the statement that the “*Minister could have removed the problem councillors without sacking the whole council...*” is wrong. Leaving aside the fact that the Council had not been

⁷⁷² T1411.47-1415.40 (Clr Gair).

⁷⁷³ Which did not support the statement in any event.

“sacked”, as set out above the notion that the Minister had power to take action against an individual councillor is wrong. I have addressed the issue of Ministerial power in this respect above. That such a view was advanced demonstrates a lack of understanding of the relevant statutory context in which councillors hold office, and the application of provisions which regulate their conduct by Clr Gair and the other Suspended Councillors who subscribed to the 30 March 2022 Media Release. It was the same misconception evident in the response to the Notice of Intention to Suspend, and which was advanced in Clr Nelson’s submission to the Minister.

657. The second is the reference to the Minister rejecting her own department’s advice. As it turned out, the “advice” referred to was contained in a document headed “*Postponement of the 2021 local government elections - Frequently asked questions*” (**2021 Elections FAQ Document**)⁷⁷⁴, which was issued shortly after the postponement of the elections that had been scheduled to occur in September 2021. That postponement occurred on 24 July 2021, so it is likely that the 2021 Elections FAQ Document was issued at about that time⁷⁷⁵.

658. That 2021 Elections FAQ Document included the following reference to WSC⁷⁷⁶:

Wingecarribee Shire Council’s suspension expires on 10 September 2021 and councillors who continue to hold their civic offices in that council will resume their offices from that date to 4 December 2021 when their civic offices expire.

659. Two primary observations can be made about 2021 Elections FAQ Document:

- i. First, it was clearly issued before the order appointing this Inquiry. It also predates the 10 August 2021 IA Report, which recommended the appointment of this Inquiry. In that context, the reference to the expiry of the suspension is an unremarkable reference to the state of the affairs as it then was;
- ii. Secondly, it makes no reference whatsoever to advice given to the Minister by the OLG, or wider DPIE, that the Suspended Councillors should be returned at the expiry of the suspension. On a reasonable reading, it does not suggest that such advice had been received by the Minister, or that it had been accepted or rejected. Nor could it – the Interim Administrator’s second report had not yet been issued and the occasion for advice to be given to the Minister about what to do going forward had not arisen.

⁷⁷⁴ Ex V; T1424.02-38, T1431.25-1432.39 (Clr Gair).

⁷⁷⁵ T1426.1-19, 1429.23-26 (Clr Gair).

⁷⁷⁶ Ex V.

660. The statement appears to have been informed by commentary in the media following the release of that document to the effect that the Suspended Councillors would be returned⁷⁷⁷. Even so – that does not provide a basis for a statement that the “*Minister rejected her own department’s advice to maintain the elected council after it had met her performance improvement conditions*”.

661. When giving evidence, Clr Gair suggested that there had been political pressure placed on the Minister to overturn her decision (apparently recorded in the Frequently Asked Questions document) to return the Suspended Councillors to their positions. He gave the following evidence as to that issue⁷⁷⁸:

“MR PARISH: Q. I was seeking to understand, if the logic you are drawing from these two documents and the reason that you tabled this frequently asked questions flyer, was because you were of the belief that the Minister ought to have accepted the advice of the frequently asked questions flyer over the recommendations of the interim administrator?”

A. *Yes, I believe that the Office of Local Government had reviewed all the information that the council had forwarded to the office, and that the office as a professional body, as advisors to the Minister, made that recommendation and the Minister didn't take that recommendation and, as such, I believe there is political pressure placed on her to overturn her decision”*

662. Pausing there, none of that flows from a reasonable reading of the 2021 Elections FAQ Document.

663. Later however, Clr Gair gave the following evidence (emphasis added)⁷⁷⁹:

“Q. So, the actions that came from the political pressure that you're referring to or insinuating from the flyer must be the continued suspension and the public inquiry; is that correct?”

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

...

THE COMMISSIONER: Q. But isn't that what you say in this press release:

"The Minister rejected her own department's advice to maintain the elected council after it had met her performance improvement conditions and she ordered a costly public inquiry as the only legal way of keeping us out of office".

⁷⁷⁷ T1426.21-1427.13 (Clr Gair).

⁷⁷⁸ T1430.42-1431.8 (Clr Gair).

⁷⁷⁹ T1434.8-1435.26 (Clr Gair).

- A. *That's my belief, yes.*
- Q. *And **what's the belief based on?***
- A. ***We're going around here.***
- Q. *Try it this way: **it might be suggested to me that a belief held without any evidence is not a reasonable belief: would you agree with that?***
- A. ***To a degree, yeah.** As I say, it's - it is all subjective, Commissioner, as far as I am aware. I cannot - **I cannot make statements and stick by them, and that's why I have put - done what has been put here, and that's my opinion, and until it is investigated I don't deviate from it.***
- Q. ***So, is it the case that in your view the matters of opinion you hold should be investigated even though you don't have any evidence to support the opinion?***
- A. ***I - I think I do, yes.***
- Q. *It might be suggested to me that an opinion held without any evidence to support it is not a reasonable opinion; what would you say to that?*
- A. *That is my opinion."*

664. In my view, it is deeply troubling that a suspended Mayor would make a public statement that the Minister of the day had been the subject of political interference in exercising her function in circumstances where he accepts that he had no evidence for doing so. It is also troubling that each of the other Councillors who subscribed to the 30 March 2022 Media Release apparently saw no issue with that assertion having been made.

"Council has suffered its first loss in at least 26 years of over \$700,000, entirely due to the costs of sacking or forcing the resignation of virtually all the senior staff"

665. This statement was made to draw attention to what was said to be the poor performance of the "*current administration*". Presumably, that was intended to be directed to the Interim Administrator, however it necessarily carries with it a criticism of the performance of the wider organisation. That fact appears to have been lost on the Suspended Councillors who subscribed to it.

666. There are a number of problems with that statement.

667. First, when the Council's Financial Statements are reviewed⁷⁸⁰, it can be seen that the loss referred to in the 30 March 2022 Media Release is the "*net operating result for the year before grants and contributions provided for capital purposes*". That result was (\$707,000) – i.e., a loss of just over \$700,000⁷⁸¹. However, after grants and contributions are taken into account, there was an operating result from continuing operations of \$33,640,000. The 30 March 2022

⁷⁸⁰ Ex E, p 1242.

⁷⁸¹ That figure was identified by former Cllr Markwart as being the basis for the statement in the 30 March 2022 Media Release: Markwart 23 May 2022 Final Submission.

Media Release does not include that important piece of information, which would no doubt be of interest to the community who might otherwise be concerned about the financial performance of the Council. It is apt to mislead.

668. Secondly, when that result is compared with earlier periods, it is not the first loss of that kind “*in at least 26 years*”. The following table sets out the relevant results recorded over the 10 years prior to FY2021⁷⁸².

FY	Net operating result for the year before grants and contributions provided for capital purposes (\$'000)	Operating result from continuing operations (\$'000)
2011 ⁷⁸³	(2,916)	8,589
2012 ⁷⁸⁴	(8,793)	6,156
2013 ⁷⁸⁵	(4,092)	5,482
2014 ⁷⁸⁶	(6,645)	(25)
2015 ⁷⁸⁷	(4,332)	7,081
2016 ⁷⁸⁸	2,735	23,549
2017 ⁷⁸⁹	7,056	40,909
2018 ⁷⁹⁰	3,671	51,856
2019 ⁷⁹¹	4,442	46,186
2020 ⁷⁹²	5,041	34,893

⁷⁸² See also, Ex O.

⁷⁸³ Ex E, p 168.

⁷⁸⁴ Ex E, p 168.

⁷⁸⁵ Ex E, p 270.

⁷⁸⁶ Ex E, p 373.

⁷⁸⁷ Ex E, p 509.

⁷⁸⁸ Ex E, p 642.

⁷⁸⁹ Ex E, p 737.

⁷⁹⁰ Ex E, p 871.

⁷⁹¹ Ex E, p 1006.

⁷⁹² Ex E, p 1118.

669. I note that Clrs Gair and McLaughlin were councillors in each of the years when a loss of that kind was recorded. Indeed, in FY2014 the Council recorded a modest overall operating loss from continuing operations. Those financial statements were signed by Clr Gair as Mayor⁷⁹³. Yet both maintained that the \$707,000 loss was the first of its kind in “*at least 26 years*”.
670. Former Clr Markwart cavilled with the submission by Counsel Assisting that the 30 March 2022 Media Release was inaccurate in this respect and drew attention to the income statements for the year ended 30 June 2021⁷⁹⁴. In doing so, he posed the question “...*on what basis does Counsel Assisting call the media release grossly inaccurate given the evidence*” referred to in his submission⁷⁹⁵. In fairness to former Clr Markwart, he may have understood Counsel Assisting to be suggesting that there was some controversy about the fact that there was an operating loss for the year before grants and contributions provided for capital purposes was recorded in 2021. That is not the issue. Rather, the issue is with the statement that the loss was the first such loss “*in at least 26 years*”. As the comparison set out above demonstrates, that statement was palpably wrong.
671. Thirdly, there is no factual basis for the statement that the loss was “*entirely due to the costs of sacking or forcing the resignation of virtually all senior staff*”. Whilst staff costs contributed to the overall result, it is wrong to say that it was “*entirely caused by*” those matters. The evidence reveals that a variety of other matters went into the result, including a decline in interest on investments of \$1.7 million due to a downturn in economic conditions, a reduction in water usage income of \$2.2 million, an increase in worker’s compensation premiums of approximately \$500,000; an increased depreciation expense⁷⁹⁶. When asked about the basis of that statement, Clr Gair gave the following evidence (emphasis added)⁷⁹⁷:

“Q. **What is the factual basis for your opinion that the \$700,000 loss is entirely due to the costs of sacking or forcing the resignation of virtually all the senior staff?**

A. *That is what I have said and that is what I - is my opinion --*

Q. *That's not [my] question.*

THE COMMISSIONER: Q. **But what's the opinion based on? Opinions don't just form from nothing. What's the opinion based on?**

A. *The \$700,000, I believe, was in Mr May's address --*

⁷⁹³ Ex E, p 372.

⁷⁹⁴ Which are considered above.

⁷⁹⁵ Former Clr Markwart’s Final Submission dated 23 March 2022. To the extent that Clr Markwart drew attention to the income statement by fund (drawn from the notes to the financial statements, and contained results which were not referred to in the 30 March 2022 Media Release) the negative net operating result for the year before grants and contributions provided for capital purposes recorded in FY2021 (which also had a positive net operating result for the year: Ex E, p 1291), was also not the first loss of that kind in “*at least 26 years*”: See, e.g., Ex E, pp 1198 (FY2020), 1000 (FY2019), 438 (FY2014), 328 (FY2013), 224 (FY2012).

⁷⁹⁶ Ex O.

⁷⁹⁷ T1419.10-35 (Clr Gair).

- Q. *Let's assume that Mr May has said \$700,000. What Mr Parish is drawing your attention to are the next words attributed to you, that is, "entirely due to the costs of sacking or forcing the resignation of virtually all the senior staff". Is that something you have knowledge of?*
- A. *Um, I don't know entirely due, but I would imagine there are costs to the sacking and forcing the resignation.*
- Q. *So, sitting here now, do you think the words "entirely due" shouldn't be there?*
- A. *Well, I don't know, it is my opinion, Mr Commissioner. If I am wrong, I am wrong, it is my opinion. If you want me to base it on fact, it is my opinion: I'm sorry."*

672. Further, the statement was not an expression of opinion. It was an unequivocal statement concerning a financial matter, about which definitive conclusions can be reached. The statement was wrong.

673. The effect of the statements concerning the financial performance of the Council was to suggest it had materially worsened in the period since the Suspension Order. Those statements were materially wrong, and the errors in them can be discovered from a simple review of the financial records of the Council. This is not a matter about which minds might reasonably differ.

674. The impact of the suspended Mayor and other Suspended Councillors (who seek a return to office) making incorrect statements concerning the financial performance of the Council is no mere triviality. The 30 March 2022 Media Release was directed to local press and was shared in local public forums. It was designed to engage with the local community. Its content had the potential to affect the community's confidence in the organisation. It also had the potential to affect the staff with it, and who are involved in the day-to-day operations of Council, some of whom perform functions that intersect with those performance metrics. Although made in an attempt to respond to criticisms made by the Interim Administrator, and direct others towards him, the matters contained in it inevitably called into question the wider performance of the Council organisation and thus its staff. That Clr Gair and the other Suspended Councillors who subscribed to the 30 March 2022 Media Release apparently did not appreciate as much is telling. The errors in it are not matters of mere semantics⁷⁹⁸.

675. A further example of statements within the 30 March 2022 Media Release falling into that category was the criticism directed to the Interim Administrator as being "*the first council boss ever to give grant money (\$4.1 million) back to the state government*". That was a reference to the decision taken by the Interim Administrator, following the recommendation of Council staff, to cancel the Station Street Project. That decision was taken following a detailed report

⁷⁹⁸ Cf Markwart 23 May 2022 Final Submission, p 14.

prepared by staff that recommended that the project not proceed⁷⁹⁹. That report identifies a funding shortfall of \$17.7 million as one of the reasons why it ought not proceed⁸⁰⁰. Although the statement was directed to the Interim Administrator, it necessarily involves criticism of the staff who recommended the course taken. That is because it clearly conveys the impression that the Interim Administrator was wrong in making that decision, to the detriment of the community, in circumstances where that action was taken in accordance with the recommendation contained in a detailed report prepared by relevant staff.

676. In my view, assertions of that kind by current, albeit suspended, Councillors have the very real capacity to undermine confidence in the Council organisation. It is one thing to seek to correct a criticism or make known information about one's achievements. There is nothing inherently wrong about doing so. However, in seeking to criticise the Interim Administrator, the factually incorrect comments by Suspended Councillors have the capacity to affect the community confidence in the organisation. They are also apt to have a negative effect on the current staff who are – according to the evidence – committed to driving the organisation forward.
677. In responding to Counsel Assisting's submissions highlighting the factual inaccuracies in the 30 March 2022 Media Release, Clr Gair did not engage with the substance of the issue raised but submitted that the "*comments of Counsel Assisting cannot be just directed to me but a wider community as well and will not make comment [sic] Counsel Assisting has the right to his opinion, as do I*"⁸⁰¹. To be clear - the issue is not the right to hold opinions or express them. Nor is it about making a public response to the criticisms that have been made of them. At a general level, there is nothing wrong about any of those concepts. Rather, the that the suspended Mayor and some Suspended Councillors made statements about the performance of the Council that were materially wrong, and which have the capacity to undermine confidence in the Council and its staff.
678. The assertion of a right to express an opinion does not operate as a panacea to the fact that the statements made assertions concerning the performance of the organisation, and other matters affecting its operations, they seek to lead which were not only wrong, but in respect of which that they seemingly took no real steps to verify⁸⁰². Even if they could be appropriately described as an expression of opinion, despite having been expressed as unequivocal statements of fact, they were opinions that had no foundation in fact.

⁷⁹⁹ Ex K, pp 5-6.

⁸⁰⁰ Ex K, p 5.

⁸⁰¹ Gair 23 May 2022 Final Submission, sub-para (r).

⁸⁰² As opposed to some rudimentary calculations, which did not account for the wide range of other relevant considerations. See, e.g., T1177.12-1178.18 (Clr Nelson); T1104.24-1106.31 (Clr McLaughlin).

Clr McLaughlin's letter to the editor of the Southern Highlands Express

679. A further example of the concerns of that kind are found in Clr McLaughlin's letter to the Editor of the *Southern Highlands Express*⁸⁰³. There, Clr McLaughlin suggests that the Suspended Councillors could be returned and that they could then take action to suspend Clr Scandrett, who he described as the "troublemaker". That is plainly wrong.

680. I have been unable to find any suggestion made during the Public Hearings that such a process was open to the Councillors. Certainly, a governing body can pass a motion of censure, or pass a motion referring a councillor to the departmental chief executive for investigation. But nowhere in the LGA does a governing body have the power to, itself, suspend one of its number. Once again, conduct of that kind demonstrates a lack of understanding of the roles and responsibilities of the governing body and the statutory framework in which it sits. Here, as was the case in the 30 March 2022 Media Release, Clr McLaughlin publicly asserts that a course is available when it is not.

The "Road Map" for the future

681. On 16 March 2022, the General Manager of the Council, Ms Miscamble, presented a report headed "*Our Road Map: Moving Forward to Reset our Organisation*"⁸⁰⁴ (**Road Map Report**). The Road Map Report was prepared following consultation with staff, State and Federal Members of Parliament, community members and organisations, regional stakeholders, and having considered the results of staff wellbeing surveys and the independent reviews⁸⁰⁵.

682. The General Manager's report which accompanied the presentation of the Road Map Report stated⁸⁰⁶:

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

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

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

⁸⁰³ Ex SS. Signed, "Cr Graham McLaughlin".

⁸⁰⁴ Ex M.

⁸⁰⁵ Ex M, p 2.

⁸⁰⁶ Ex M, p 1.

683. Counsel Assisting submits that I can be “*comfortably satisfied from the weight of the evidence available that the premise for [the Road Map Report]*” set out in that passage is established⁸⁰⁷. I agree.

684. Within the Road Map Report, the following is stated (emphasis added)⁸⁰⁸:

“In recent years Wingecarribee has faced many challenges with floods, severe storms, the Black Summer Bushfires in 2019/2020, COVID-19 Pandemic, COVID-Delta 2021 and COVID-Omicron 21/22.

Further there has been dysfunction and instability within the Council.

This resulted in the Minister for Local Government, initially suspending and subsequently announcing on 1 September 2021 a Public Inquiry into Wingecarribee Shire Council.

This has been a turbulent and testing time for the community and challenging for the Council, testing the resilience and resolve of the Team.

It is important to recognise the resilience of individual team members, 60% of whom also live in the area, who experienced what the community have experienced as residents whilst at the same time as a staff member working in challenging circumstances, often without recognition of the contributions they have made.

The Reviews undertaken over the past 9 months highlighted the need for improvement in the way in which Council fulfils its functions as a local government – in terms of governance practices, communication and working with the community and overall management and leadership within the organisation.

There is a need to restore transparency and openness both between the Council and the community and within the organisation.

This may be difficult at times – acknowledging that there may be times when we have got it wrong and need to improve, or perhaps having difficult conversations that may be uncomfortable but necessary to restore trust and confidence in the future.”

685. The “*reviews*” referred to in that passage include those which Clr Gair determined were “*not worth reading*”, and which he and other Suspended Councillors who subscribed to the 30 March 2022 Media Release it asserted to the community (despite not having read them) “*relatively insubstantial issues*”. Plainly, they are not seen in that way by the organisation.

686. The Road Map Report sets out a detailed and phased plan to rebuild the organisation, which includes three horizons “*for WSC to become a leading local government that is respected, community and customer focussed and is a recognised leader in the community and broader local government industry*”⁸⁰⁹.

⁸⁰⁷ CA Final Submissions, [385].

⁸⁰⁸ Ex M, p 17.

⁸⁰⁹ Ex M, p 18.

687. Counsel Assisting submitted that I can find that the Council needs a period of reform and rebuilding⁸¹⁰. In my view, the overwhelming weight of the evidence supports that view. In any event, the General Manager as the head of the organisation is best placed to make that determination. The Road Map Report sets out a detailed basis for the need to rebuild and reform, which is consistent with the evidence before this Inquiry.

688. Counsel Assisting went on to submit that *“it is more difficult for the Commissioner to find that the Councillors accept this and will be a constructive part of the process”*⁸¹¹. Regrettably, I agree. Perhaps most the most telling aspect of evidence in this respect is the following evidence given by Clr Gair:

THE COMMISSIONER: Q. Given the development of what might be described as a dysfunctional culture over three terms of council, I appreciate you have strong views on the administrator and what he said and perhaps what he's done, but it's been suggested to me that we've come to a point where the relationship between the community and the council, and between the governing body and the community, so both between at the organisational elected body levels needed a circuit breaker, something to stop the culture, strengthen the organisation and then move forward together?

A. Well, that's got to start right at the very top here, and I don't believe it is. I think the --

Q. Well, just, I won't cut you off from saying what you want to say, but what about the concept?

A. I believe that the councillors who are here have remained and not resigned, and all save one, I believe we work together and have shown that we work together. It's not block voting, you know --

Q. Sorry, I thought you'd agreed on a number of occasions that there was a dysfunctional culture developing over three terms of council; do you agree?

A. I said that with minorities and I tried to get that message across.

Q. Sure, but minorities are part of the whole, are they not?

A. Sorry?

Q. Minorities are part of the whole?

A. Yes, well, that's what I believe.

Q. And your view is that the minorities in each of those terms have had a pretty significant effect on the whole, isn't it?

A. Yes, sir.

Q. So, do you see some logic in the idea that the continuation of that sort of culture and that sort of effect on the governing body and the organisation couldn't continue?

⁸¹⁰ CA Final Submissions, [388].

⁸¹¹ CA Final Submissions, [388].

- A. *Oh, that's why we're in this situation, I believe. I still have faith in the human race --*
- Q. *I'm not suggesting you shouldn't, but **do you think that, you know - would you agree with the proposition that it just couldn't continue the way it was?***
- A. ***It - you're correct, Commissioner, it needed the circuit breaker. I didn't want to see a suspension, I --***
- Q. *I fully accept that. But now that we are where we are --*
- A. ***I don't support where we are, I don't support the organisation to where it is, and I believe it was handled very, very poorly.***

689. That a suspended Mayor, who seeks a return to the role, states that he does not “*support the organisation to where it is*” is troubling. In my view, the reluctance of those Suspended Councillors who subscribed to the 30 March 2022 Media Release to engage with the substance of the issues raised in those reports by refusing or failing to read them while publicly declaring to their community that they raised “*relatively insubstantial issues*” is inconsistent with the notion of “*civic leadership*” and a willingness to objectively review the issues facing the organisation⁸¹².

690. Further, by that conduct they have also demonstrated a reluctance to acknowledge “*that there may be times when we have got it wrong and need to improve, or perhaps having difficult conversations that may be uncomfortable but necessary to restore trust and confidence in the future*” (matters identified in the Road Map Report as being necessary to moving the organisation forward). That circumstance supports the substance of the submission made by Counsel Assisting that “*it is more difficult for the Commissioner to find that the Councillors accept this and will be a constructive part of the process*”.

691. That lack of support is also evident in the email sent by Clr Gair to the Inquiry after the completion of this evidence⁸¹³. That email was sent on 27 April 2022, the day prior to the General Manager giving evidence, and concluded by Clr Gair signing off as “*Duncan Gair (Mayor, suspended WSC)*”. Attached to the email was a message, apparently received to an iPhone, which Clr Gair described as having been “*sent to me. [sic] from an anonymous source*”. However, Clr Gair then went on to say, “*I do however, have a belief it came from an ex-employee of WSC*”. By advancing that view, it appears that Clr Gair sought to give veracity to the content of the “*anonymous message*” by suggesting that it came from a source likely to have knowledge of the matters asserted in it.

692. The message itself makes a number of allegations against the Interim Administrator and suggests that the recruitment of certain staff was not undertaken in accordance with applicable

⁸¹² I note that Clr Nelson has, however, expressed his support for the Road Map, p 13.

⁸¹³ Ex MM.

processes. It also makes the assertions as to the recruitment of the General Manager, including that she was “*handpicked*” by Mr Smith MP. The assertions in that message directly undermine the legitimacy of the appointment of various staff, most relevantly the General Manager.

693. The evidence reveals that the assertions in the message have no basis in fact⁸¹⁴. It is not necessary for me to deal with each of the matters raised in that message, however it is appropriate that I say something about the allegations concerning the General Manager’s appointment. Put shortly, the evidence reveals that the recruitment process for the General Manager was thorough and appropriate⁸¹⁵. Mr Smith MP was not involved in that process, and the evidence was that Ms Miscamble did not know Mr Smith MP as the Member for Wollondilly at the time of her application⁸¹⁶.

694. Clr Gair resisted Counsel Assisting’s submission that the message was “*an attempt to undermine the legitimacy of the appointment of Lisa Miscamble and therefore the Shire Council Organisation*”, and submitted as follows:⁸¹⁷

“Counsel Assisting makes the comment, that as I forwarded an anonymous message to the Inquiry I was attempting to undermine the GM. There is absolutely no credence to that statement. There are three issues here.

1 – The message not [sic] written by me nor do I know the author not have any knowledge of the veracity of the assertions made within it.

2 – As per the CoC, If I am, as a councillor or if a staff member made aware of a potential breach of the CoC I am obliged to report it, usually to ICAC but I felt this inquiry was an appropriate forum to raise the allegations.

3 – There was no need for Counsel Assisting to submit the message as evidence and like other information I have presented to the Inquiry could have been kept confidential. I have no issue with it being made public.”

695. A few things can be said about that submission:

- i. Firstly, when forwarding the message on, Clr Gair did not qualify it by stating that he had no knowledge of the veracity of the assertions contained in it. It is true that he did not expressly adopt them as his own, however he did not set out any of the matters now raised in his submission when forwarding it. Rather, he did so adding his belief that they

⁸¹⁴ Ex RR.

⁸¹⁵ T1487.44-1488.33 (Miscamble); Ex RR.

⁸¹⁶ T1490.39-43 (Miscamble).

⁸¹⁷ CA Final Submission, [347]. Clr Gair’s Final Submission dated 23 May 2022, sub-para (I). I observe that Counsel Assisting did not suggest that he had that intention, only that to the extent that he did, it lacked evidentiary basis.

came from a former staff member, a statement which conveys the impression that the message came from someone likely to have knowledge of the matters asserted in it.

- ii. Secondly, Clr Gair's references to the Code of Conduct reveal his lack of understanding of that process. There is no obligation to report "*potential*" Code of Conduct breaches to ICAC. There is a clear process for the making and handling of such complaints set out in the Procedures for the Administration of the Model Code of Conduct for local councils in NSW⁸¹⁸.
- iii. Thirdly, Clr Gair submits that he was obliged to report what he thought were Code of Conduct breaches that had come to his attention. That sits in stark contrast to the fact that he did not take any action under the Code of Conduct in response to many breaches of it that he observed during the 2016 Council Term. Indeed, his evidence was that he had not made any Code of Conduct complaint in the 26 year period he had been a councillor⁸¹⁹, despite being a member of successive councils that were beset (on his own evidence) by dysfunctional conduct.

696. Ultimately, in my view, the message had the tendency to undermine the appointments of various staff members, including the General Manager. Clr Gair's submission indicates that he failed to appreciate that obvious fact. That Clr Gair would forward it on without the qualification that he now seeks to apply to it, adds to his evidence that he does "*not support the organisation to where it is*".

697. That is not the only criticism of the organisation made by a Suspended Councillor to this Inquiry. As observed above, various comments made during the evidence and in submissions are directed to the performance of the organisation in an attempt to criticise the Interim Administrator. Despite directing various criticisms to the Interim Administrator, none of the suspended councillors directly engage with the results of the independent reviews, nor the merits of changes made during the suspension period. Rather, they focus on the comments that the Interim Administrator has made about them and the departure of some former staff. That evidence, and those submissions, suggest that the suspended councillors have difficulty seeing beyond their grievances with the Interim Administrator's comments and engaging in reflective contemplation about the issues that had been facing the Council more broadly.

698. One example of this is the comments directed to the financial performance of the organisation dealt with above. Another is the references made by some of the Suspended Councillors to staffing changes within the organisation. No doubt many of the Suspended Councillors are

⁸¹⁸ See, e.g., Ex A, pp 872-873. The only obligation to report matters to ICAC arises if there is a suspicion, on reasonable grounds, that the conduct may concern corrupt conduct: Procedures, cl 5.36. No such suggestion was made by Clr Gair when forwarding the message, or in his final submission.

⁸¹⁹ T1342.34-37 (Clr Gair).

genuinely disappointed to see people that they worked with leave the organisation. Of course, none of them would be privy to whole of the circumstances as to why certain staff left the organisation (even if they had spoken with them). One such criticism advanced by Clr Gair was that the Interim Administrator “*never had the courage to even meet Mr Paull nor gave him any reason for his decision that he ‘had to go’*”⁸²⁰. That criticism, and others like it, fails to recognise that the Interim Administrator (performing the function of the Governing Body) is not responsible for staffing decisions beyond the General Manager, which was occupied by Mr Burgess at the time the Suspension Order was issued. All other staffing decisions were the responsibility of the General Manager of the day. That suggests a lack of understanding by those Suspended Councillors of the distinction between the role of the general manager and the governing body (whose function the Interim Administrator performs).

Former Clr Markwart and the gavel

699. An allegation was raised during the evidence that former Clr Markwart, when chairing the meeting, said words to the effect of “*I have the gavel and I know how to use it*” and that those words were said in an aggressive and bullying manner⁸²¹. Former Clr Markwart denied that he said those words in a manner that was aggressive or intended to intimidate⁸²². Given the nature of the allegation, it is appropriate that I say something about it in this Report.

700. An extract of the audio recording of that meeting was played during the evidence⁸²³. The relevant words spoken by former Clr Markwart were as follows⁸²⁴:

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

To date I have never had to use the gavel, I certainly hope I never will, but I do know where it sits.

So, at this stage I'd like to basically introduce this item and hand over the councillors 12.1, Station Street Upgrade, the project update. So, please ...”

701. Having listened to that audio, and having the benefit of former Clr Markwart’s evidence, in my view there was nothing inappropriate about his remarks, or the tone in which they were spoken. In particular, I do not consider his words conveyed an impression that former Clr Markwart was going to “*use the gavel*” in any way other than that for which it is designed – to call a meeting

⁸²⁰ Gair 23 May 2022 Final Submission, sub-para (e) and (f).

⁸²¹ T127.42-128.4 (Barrett); T198.12-199.8 (Wilson); T225.26-226.1 (Olsen).

⁸²² T663.26-664.7 (former Clr Markwart).

⁸²³ Ex ZZ.

⁸²⁴ T663.26-46.

to order. In my view, former Clr Markwart did not threaten anyone in attendance at that meeting with the gavel.

702. Rather, the audio reveals that former Clr Markwart made an appeal for decorum and respect and expressed a desire as the chair, not to have to intervene. They are adages which could be applied to any meeting. Indeed, had they been headed on a regular basis during Council meetings, much of the dysfunction that was evident in the Governing Body might have been avoided.

703. In making that finding, I accept that the evidence given by those witnesses who were at the meeting described feelings that were genuinely held by them. As set out above, I reject former Clr Markwart's submission that they were untruthful when giving their evidence, or otherwise conspired to give false evidence about him. That those witnesses perceived those otherwise appropriate comments in that way is most likely explained by the adversarial relationship that had developed between the some of the Councillors and some parts of the community, particularly in relation to the contentious issues that were being considered during that meeting. In my view, that environment likely contributed to how former Clr Markwart's words and actions (which were otherwise appropriate) were perceived.

Clr Gair's interaction with Ms Haslinger on 29 January 2020

704. When giving evidence, Ms Haslinger stated that following the 29 January 2020 Extraordinary Meeting, Clr Gair approached her and offered to shake her hand, which she refused, at which point Clr Gair said words to the effect of "*Just remember, I have lots of friends in this town*"⁸²⁵. Ms Haslinger found that comment to be threatening and intimidating⁸²⁶.

705. Clr Gair denied making any threatening statement to Ms Haslinger. He denied saying the words attributed to him and gave evidence that if he said words to that effect, it was a reference to the fact that he had many friends in the Shire who had been affected by the tragedy of the Bushfires, like Ms Haslinger⁸²⁷.

706. I consider it is more probable than not that Clr Gair did make reference to his friends or acquaintances in that interaction. However, I accept that that Clr Gair did not intend to convey any threatening message to Ms Haslinger. Rather, I accept Clr Gair's evidence that he intended to convey that he knew others in the community who had been affected by the bushfires. I also accept that the meeting was difficult for all in attendance, which may have contributed to some infelicitous words being spoken, and the manner in which they were received. That is not a criticism of either Clr Gair or Ms Haslinger as opposed to an

⁸²⁵ T96.12-36 (Haslinger).

⁸²⁶ T96.31-45 (Haslinger).

⁸²⁷ T1361.39-1363.24 (Clr Gair).

acknowledgement that the meeting would have been a difficult and confronting experience for both of them (and others in attendance) which has the potential to affect how interactions are perceived.

Does the Council need time?

707. The Interim Administrator gave the following evidence (emphasis added)⁸²⁸:

"A. ...Since the general manager has been here and she's had the support of very competent local government professionals, and I'm not saying that the people who filled in aren't but they weren't at that level, so much has been uncovered.

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

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

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

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

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

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

*The **other thing I come to is fairness to candidates who are presenting for election. A two-year term, the councillors won't have worked out what they want as a community strategic plan, there will still be a lot of issues outstanding, and for those reasons I think more time is required to get the place - well, to get it into a situation where the general manager has no excuses, and that's not being detrimental to the general manager, it could be any general manager**.*

⁸²⁸ T582.22-594.8 (May).

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

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

708. There is force to the Interim Administrator's observations. The Road Map Report sets out the work required to bring about what the organisation and its new Executive see as necessary change, and that there is a considerable way to go⁸²⁹.

709. Even more significant in my view is the observation that to give an incoming governing body the best prospect of success, a strong organisation is required. By strong organisation, I understand the Interim Administrator to refer to an organisation with established structures, policies, and procedures, as opposed to an organisation which is in the initial phases of rebuilding itself.

710. Those observations also sit comfortably with Clr Gair's evidence concerning the length of the time that is necessary to rebuild community confidence in the Council given its long history of dysfunction. In this respect, Clr Gair gave evidence that (emphasis added)⁸³⁰:

*"The culture was introduced in 2012-2016. To a degree in the later stages of the 2008-2012 council, but was introduced in 2012-2016. It then expanded, bloomed and flowered in the 2016-2020 session and, as I say, **it's going to take years to community to restore the confidence in regards to sections of the council operations, if councillors who run and get elected come on with the correct intent...**"*

⁸²⁹ Contrary to the apparent suggestion by former Clr Markwart, the Interim Administrator's evidence about the organisation needing more time was not directed to the General Manager's ability to carry out the role. Rather, as was obvious, it was a view directed to the early stage of the organisational rebuild: see Markwart 23 May 2022 Final Submission, pp 16-17.

⁸³⁰ T1445.8-17 (Clr Gair).

711. As the Road Map Report identifies, the way in which that confidence is to be restored includes the rebuild of the organisation and re-establishing its relationship with the community. In my view, that presents the best chance to avoid a return to the dysfunction of the past.

Findings in relation to Term of Reference 4

712. Having regard to the evidence as a whole, and for the reasons set out above, I have reached the following conclusions in relation to Term of Reference 4:

- i. The 30 March 2022 Media Release contained various statements that had no basis in fact. It included comments that were apt to bring the council organisation into disrepute and raise alarm within the community, and which could negatively affect those staff within the organisation, who are responsible for its day to day operations. In my view, that such statements were made demonstrates a lack of awareness by those Suspended Councillors of the effect of their own actions and statements on the organisation and was that was inconsistent with the roles and responsibilities of a councillor.
- ii. The rebuild of the Council organisation which has commenced, will take a considerable time to complete, and is not yet a mature stage.
- iii. Former Clr Markwart's comments during the 14 February 2018 concerning use of the gavel were not inappropriate, threatening or intimidatory. That they were received in that way is further evidence of the breakdown in the relationship between the councillors and at least some elements within the community.
- iv. Clr Gair did not intend anything that he said in his interaction with Ms Haslinger after the 29 January 2021 Extraordinary Meeting to be a threat or to otherwise intimidate her.
- v. There is considerable force in the view that the Council requires more time to reform itself in order to give an incoming governing body the best chance of success, including to avoid a return to the dysfunction that was present over the past decade.

CHAPTER 8: RECOMMENDATIONS

713. Having regard to the findings set out above, and (where relevant) the additional observations below, I make the following recommendations.

Recommendation 1

The Minister recommend to the Governor that the Civic Offices of the Wingecarribee Shire Council be declared vacant forthwith.

714. I have come to the conclusion that the most appropriate course is to recommend to the Minister that the Civic Offices be declared vacant.

715. As set out above, the 2016 Council was beset by dysfunction, and the Councillors did not fully understand their roles and responsibilities, nor were they adequately or appropriately performed at all times. Although, as set out above, there were some positive matters to be taken from the evidence and submissions (in particular in relation to Clrs Nelson and Andrews) overall there was little in the evidence of the Suspended Councillors, or their final submissions (if made), that demonstrates that they now have a better understanding of their roles and responsibilities or that they would better perform them if returned to office. In particular, the conduct of four of the six Suspended Councillors in advancing a number of matters in the 30 March 2022 Media Release that lacked foundation in fact, and the circumstances in which those statements were made, leaves me with significant doubt that they truly appreciate the effect that their conduct (even as Suspended Councillors) has on the organisation and its staff.

716. Although many of the more egregious examples of inappropriate conduct in meetings and interactions with staff referred to in the evidence involved Clr Scandrett, former Clr Turland and (to a lesser extent) former Clr Halstead, that conduct had a wide-ranging effect on the effectiveness of the Governing Body, the organisation, and its staff. For the reasons outlined above, I do not consider that the resignation of former Clrs Turland and Halstead provides a strong counterpoint to the recommendation I have made⁸³¹.

717. That is because even if I were to assume (as Clr Gair and others urge me to find) that it was only those former councillors together with Clr Scandrett who were responsible for the dysfunction within the Governing Body the evidence demonstrates that the dysfunction had a significant effect on the community, the Council organisation, and its staff. Further, instances of inappropriate conduct were not addressed or responded to by the other Councillors in any meaningful way, in part because they lacked an understanding of the processes available to them, notwithstanding the additional training they had undertaken as a result of the

⁸³¹ Cf, e.g., Gair 23 May 2022 Final Submission, sub-para (u)(1)

Performance Improvement Order. There was also a reluctance on their part to use the processes available to them because they had formed the view that they were ineffectual. That contributed to the creation of an environment in which inappropriate conduct repeatedly occurred, often without comment or action by any of the other Councillors.

718. There evidence identifies that there is a clear need to restore the Council's reputation and the community's confidence and trust in it. That process is underway, but it is far from complete. In my view, having regard to the circumstances as a whole, the organisation needs time free from the dysfunctionality of the past to achieve that outcome. Accordingly, I have come to the view that the most appropriate course is to recommend to the Minister that she recommend to the Governor that the civic offices be declared vacant.
719. Counsel Assisting made submissions to me about the likelihood that, if returned, the Suspended Councillors would restore to the governing body planning functions which currently reside with the Local Planning Panel established by the Interim Administrator⁸³². I do not consider that to be an issue which is appropriate for me to take into account in determining what recommendations to make to the Minister. Even assuming that the governing body had the power to return those functions to itself (or undo any of the other changes implemented during the period of suspension) I do not consider that it is appropriate for me to pre-empt such a decision. Issues of that kind are properly matters for the governing body of the day, not me.
720. Accordingly, although there was much evidence as to the benefit of the Local Planning Panel in the context of WSC and more generally, I have not placed any weight on those submissions in making this recommendation. That having been said, given that it was a matter addressed in Counsel Assisting's submissions, it is appropriate that I record that each of Clr Gair⁸³³, Clr Nelson (albeit, with reservation)⁸³⁴, and Clr Andrews⁸³⁵ expressed support for the Local Planning Panel either during their evidence or in their Final Submissions. Clr McLaughlin, on the other hand, was "*very much against*" it⁸³⁶.
721. Clr Gair submitted that the Suspended Councillors should be returned, and elections deferred until 2024⁸³⁷. As I read the relevant provisions of the LGA, such a course is not available. Even if it were, I would not make that recommendation to the Minister for the reasons set out above.

⁸³² CA Final Submissions, [391]-[398], [399(n)].

⁸³³ Gair 23 May 2022 Final Submission, sub-para (s).

⁸³⁴ Nelson 30 May 2022 Final Submission, p 9.

⁸³⁵ T1056.30-33 (Clr Andrews).

⁸³⁶ T1079.38-41 (Clr McLaughlin).

⁸³⁷ Gair 23 May 2022 Final Submission, sub-para (9).

Recommendation 2

That the elections for the Wingecarribee Shire Council should be deferred to coincide with the state-wide local government elections in 2024.

722. Having made Recommendation 1, I have come to the conclusion that it is appropriate to recommend to the Minister that the next election for the Shire be deferred to coincide with the next cycle of council elections in 2024. In making that recommendation, I have not merely accepted the evidence of the Interim Administrator on this issue (as appears to have been suggested in some of the final submissions made). I have carefully weighed the evidence as a whole and considered all of the submissions. The Interim Administrator's evidence is but one of many factors that I have taken into account.

723. Former Clr Markwart advanced strong submissions in support of an election to be held as scheduled, and in doing so submitted⁸³⁸:

"Everyone, including the State Government, Interim Administrator, General Manager, Counsel Assisting need to give the community their democratic right to have their say, and they need to listen to the community.

Not holding an election would be totally hypocritical of all involved, especially those who criticised the previous Councillors of not listening to the very same community."

724. Pausing there, it is my role to make a recommendation to the Minister for her consideration. Ultimately, it is for the Minister to take the course she considers appropriate. The Interim Administrator, General Manager, Counsel Assisting, and other arms of the State Government are not the relevant decision makers, and only Counsel Assisting has made submissions recommending that course. Given those matters, the apparent "hypocrisy" is not evident to me.

725. However, I understand the substance of former Clr Markwart's point to be directed to the importance of local democracy in the Shire (and more generally). In this respect, former Clr Markwart also submitted⁸³⁹:

"It is my supported opinion that the outcome that best meets our community's (I live in this community) needs is to hold an election asap. This year. This solution would provide the community with their say, it would provide Council staff including the new General Manager with "clear space" for a new starting point for all. A rest if you wish.

...

⁸³⁸ Markwart 22 May 2022 Final Submission, p 17.

⁸³⁹ Markwart 23 May 2022 Final Submission, p 3.

I ask the inquiry to listen and take into account the views of the whole community, and not those who have an axe to grind with past Councils. Let the community vote. That's democracy and that's what we, the community want."

And further that:

"My preferred outcome of this inquiry is for an election as soon as possible, in 2022, not later. In my opinion this would resolve all issues and meet the resolve the growing concern within the community of the loss of democracy within local government here in Wingecarribee Shire.

...

There are many members of the local community who have never supported the appointment of an Administrator, and who reject much of his criticisms. More community members are becoming more concerned and more vocal about what has happened and what continues to happen within local Government in this shire. I note the Interim Administrator is receiving more criticism as time goes by due to some of his decisions and actions on Council.

The best way that can be resolved and the shire move forward is by an election this year."

726. Clr Gair made similar points, submitting that⁸⁴⁰:

"7 I believe democracy needs to be returned as soon as possible and not a dictatorship as is happening now. There is growing concern within the community that as stated above there is little reason for councillors not to be returned for the following reasons:

- (a) there was no corruption by councillors or staff, and no suggestion of corruption uncovered by Counsel Assisting during the inquiry⁸⁴¹.*
- (b) Council did not have deficit Operational Budgets and was financially sound o to councils [sic] suspension.*
- (c) The community expects to be able speak with elected community representatives about concerns they may have in relation to council affairs.*
- (e) There appears to be a bias by the Administrator against former councillors and staff members. The Administrators Community Address on the 18/5/2022 is of concern. The Administrator also publically [sic] derided council at the Southern Highlands Business Networking Group on thursday 19/5 22 [sic], blaming the previous council for problems that he is responsible for and created. He was stood up by members of the public and explain why DAs were taking so long, so he blamed the previous council.⁸⁴²*
- (f) The minority of councillors who have caused the suspension of council have resigned.*

⁸⁴⁰ Gair 23 May Final Submission, sub-para (7).

⁸⁴¹ Of course, that was not the function of this Inquiry.

⁸⁴² There was no sub-paragraph (d) in the original.

- (g) *Australia was founded on democracy and freedom of choice and that principal should be continued whenever and soon as possible [sic]*
- (h) *I believe that no councillor, other than Clr Scandrett, has been found guilty of any major breaches of the CoC and many of the assertions by Counsel Assisting are opinions of Council Assisting and many alternative views can be made.*
- (i) *Councils across NSW and Australia at some stage will have personality clashes and areas where the CoC are broken. This is across all forms of politics, private enterprise, sporting clubs and various and numerous associations and volunteer groups .This is not an excuse for WSC and the behaviour shown by a few councillors. One does have to ask, is this going to be the set standard that if a few councillors across councils in NSW misbehave than those councils will be suspended for a term of council. That would be a untenable situation.*
- (j) *Council Assisting noted that councils should be made aware of all options available when dealing with continual misbehavior. The Minister for Local Government and the OLG in my opinion need to expedite this suggestion.*
- (k) *There is also the opportunity to hold fresh elections. There will be a financial cost to the candidates and the community. The term would be two years instead of four, Democracy would be returned to Wingecarribee, and the community will decide on who should be a councillor.”*

727. Clr Andrews also advanced the proposition that “[t]he community has a lost a voice with the governing body” as one of the reasons supporting its return⁸⁴³.

728. The propositions advanced by Clr Gair, Clr Andrews and former Clr Markwart as to the desirability of elected representation⁸⁴⁴ are reasonable, and I accept that they are shared by others within the community. I also accept that there is a desire within the community to have the opportunity to elect their local representatives sooner rather than later. In this respect, there is much to be said for giving the community an opportunity to express its opinion as to the performance of its elected representatives at the ballot box. In advancing those points, former Clr Markwart and Clr Gair also refer to those within the community who disagree with the actions taken by the Interim Administrator. Although such matters are (at best) tangential to the issues that I have to consider, I am also prepared to accept for the purposes of the analysis that such views are held within the community.

⁸⁴³ Andrews 27 May 2022 Submission, p 2.

⁸⁴⁴ As set out above, there are a number of aspects of Clr Gair’s submission that I do not accept, or which are matters that fall well outside the Terms of Reference. By quoting the whole of the submission in this paragraph, I should not be taken to have accepted those matters.

729. However, I am also conscious of the caution that some of the Councillors urged upon me that individuals, or groups, do not speak for the whole of the community⁸⁴⁵. It is a matter of common experience that a range of views in relation to the performance of the relevant council (or any other level of government) are held within the community, from strong support or opposition at the margins to complete disinterest in-between. Although it is apparent to me that the Shire is home to a community that has individuals and groups who are highly engaged in local issues, there is nothing to suggest that overall, the Shire lacks those same features. Although I do not doubt the unwavering commitment and support for the concept of local democracy expressed by former Clr Markwart and Clr Gair, references to what the “*community wants*” must be understood in that way⁸⁴⁶.

730. Ultimately, the following matters (each of which is considered above) have persuaded me that a deferral of the election is the appropriate recommendation to make for the Minister’s consideration:

- i. there was acknowledged dysfunction within the Governing Body during the 2016 Term, which had carried over from previous terms;
- ii. that dysfunction affected the performance of the Council, and had an adverse effect on its staff;
- iii. there were instances of some Councillors inappropriately interfering in operational matters, including by seeking to pressure staff in the performance of their roles;
- iv. there had been an irreparable breakdown in the relationship and trust between some of the Councillors, and between some of the Councillors and the senior staff;
- v. as a consequence, there were accepted reputational, and work, health and safety risks facing the organisation during the 2016 Term;
- vi. the community satisfaction surveys indicate a significant loss of confidence in the Council during the 2016 Term;
- vii. the Council’s reputation in the sector has affected (and continues to affect) the ability of the Council to attract and retain staff to the organisation;

⁸⁴⁵ See, e.g., Markwart 23 May 2022 Final Submission, p 3 (“*take into account the views of the whole community, and those who have an axe to grind with past Councils*”) and 11 (“*Councillors under our system of Local Government are assessed at election time by voters, not by a vocal community group who oppose a Council decision on a significant project*”).

⁸⁴⁶ In this respect, there was also evidence of community members who were strongly supportive of the approach taken by the Interim Administrator, and changes within the organisation, which demonstrates the range of views as to that (and other) issues within the community: T369.16-19 (White); T389.27-41 (Rowell-Miller); T4896.5-487.30 (Marks).

- viii. the new General Manager has commenced a program of reform in order to rebuild the organisation, to rehabilitate its reputation and to repair its relationship with the community;
- ix. that program is in its early stages, and has a considerable way to go;
- x. the incoming governing body needs to be supported by a strong organisation with mature structures and processes to give it the best prospect of success, and (significantly in my view) to minimise the risk that the dysfunction of the past will return.

731. As set out above, I accept that the view that elections should be held when scheduled is one that is held within the community and represents a reasonable and open view. It is for that reason that I have extracted large portions of the submissions made by former Clr Markwart and Clr Gair so that they may be readily brought to the attention of the Minister for her consideration.

732. However, in my view having regard to the circumstances in which the 2016 Council found itself, and the current stage of the organisation's rebuild, of both itself, but also of its reputation and its relationship with the community, the preferable course is to recommend to the Minister that the elections be deferred until the next local government election cycle in 2024.

Recommendation 3

That a standardised mandatory induction program be developed for all Councillors to in New South Wales covering (at least):

- a. The statutory roles and responsibilities of a councillor (including detailed guidance on the distinction between the strategic roles of a councillor and the operational function of the council staff);***
- b. The Model Code of Conduct, including training on how breaches of it are dealt with;***
- c. The Model Code of Meeting Practice and meeting procedure, including clear guidance for moving motions, amendments, foreshadowed motions, rules of debate, and acts of disorder and how they may be dealt with;***
- d. Councillor misconduct, and the responses to it;***
- e. other "core" councillor skills necessary to fulfil the statutory obligations of a councillor.***

733. The evidence reveals that the understanding by the Councillors of their roles and responsibilities, including the division of roles between the Governing Body and the Council staff was high level. Further, that multiple instances of councillor behaviour which was

inconsistent with the Code of Conduct and the Code of Meeting Practice, and of Councillors inappropriately becoming involved in operational matters, whether directly or through attempts to influence staff in the performance of their roles, occurred.

734. There is currently a requirement on General Managers to ensure that a training course that provides councillors within “*information about the functions and obligations of councillors and councillors and the administrative procedures and operations of the council*”⁸⁴⁷.

735. However, the circumstances that arose in WSC highlight the merit in there being a standardised induction package that deals with the core roles and responsibilities of councillors, including behavioural standards, applicable to all councillors in New South Wales. The delivery of standardised training of that kind, developed by experts in the relevant fields, should ensure that all councillors receive the same thorough training on the basic and core aspects of their roles. It would also remove the burden from General Managers and council staff to develop that aspect of the training.

736. As to the benefit of standardised training of that kind for councillors, the Interim Administrator gave evidence that⁸⁴⁸:

“...training on the complexities of the Local Government Act and what you can and you can't do, I totally support the idea of OLG not LG NSW, who are the advocates for councillors, but the local government department having fixed modules which are compulsory, but you can't have a pass and fail because this is a democracy, but at least people would - candidates and elected persons would have no excuse.”

737. I am conscious that each Local Government Area has unique features, and accordingly more tailored training will also be required. However, those unique features do not alter the essential roles and responsibilities of councillors, and the basal behavioural standards that apply to them. To the extent necessary, the standardised training package can be readily supplemented to deal with the individual circumstances of the relevant council. But the need to do so in some cases does not detract from the desirability of all councillors in New South Wales having thorough and clear training in their roles and responsibilities, and other core skills, that apply equally to all of them.

738. In the Central Coast Council Public Inquiry, Commissioner McCulloch recommended that⁸⁴⁹:

⁸⁴⁷ *Local Government (General) Regulation 2021 (NSW)*, cl 183.

⁸⁴⁸ T581.32-39 (May).

⁸⁴⁹ Central Coast Public Inquiry Report, Recommendation 6:

<https://www.parliament.nsw.gov.au/tp/files/81719/Report%20of%20Public%20Inquiry%20into%20Central%20Coast%20Council.pdf>

“Consideration be given to introducing as a mandatory requirement for all councillors, the completion of an accredited course for company directors, or a course of equivalent rigour developed specifically for local government councillors, within the first twelve months of their election, with refresher courses for councillors who have previously completed such courses.”

739. This recommendation (along with Recommendation 5 below) is intended to complement (not detract from) that recommendation. In this respect, Recommendations 4 and 5 are intended to build upon the concept identified by Commissioner McCulloch that it is desirable that all councillors should receive a standardised training package that is directed to the performance of their core roles and responsibilities.

Recommendation 4

That a standardised mandatory training for Mayors and Deputy Mayors be developed in relation to the Code of Meeting Practice (which can be supplemented to include any variances in the particular Code adopted by the particular council) and skills and techniques for chairing meetings, including particular focus on meeting procedure, maintaining order, and techniques and powers for dealing with acts of disorder, with such training to be undertaken within a reasonable time of being elected to that position.

740. It is evident that there was a lack of understanding of the Code of Meeting Practice, and appropriate meeting procedures, and how to apply them at WSC by the Councillors, including Cllr Gair. In addition to regular acts of disorder, there was often confusion around meeting procedures, which enabled and facilitated some of the disruptive behaviour seen in meetings.

741. The conduct of council business during council meetings is an important function. It is the forum in which the public most readily observe the elected councillors at work. As can be seen in the case of WSC, meetings which are subjected to disruptive conduct and lack of clear procedure can affect the community’s confidence in their elected representatives. Indeed, it is striking that one of the explanations given by some of the Councillors for the decline in community satisfaction in their performance was the introduction of live streaming of meetings, which for the first time allowed the community to observe the conduct of the councillors more readily during meetings⁸⁵⁰.

742. That is reinforced by the “*meeting principles*” at the outset of the Model Code of Meeting Practice include that council and committee meetings should be⁸⁵¹:

“ ...

⁸⁵⁰ See, e.g., Markwart 23 May 2022 Final Submission, pp 7-8. Nelson undated submission (Submission No 2), [4].

⁸⁵¹ Ex A, p 994.

- Trusted:* The community has confidence that councillors and staff act ethically and make decisions in the interests of the whole community.
- Respectful:* Councillors, staff and meeting attendees treat each other with respect.
- Effective:* Meetings are well organised, effectively run and skilfully chaired.
- Orderly:* Councillors, staff and meeting attendees behave in a way that contributes to the orderly conduct of the meeting.”

743. As set out above, the recordings of meetings held during the 2016 Term reveal that many of them did not adhere to those “*meeting principles*”, and they could not be described as having been “*well organised, effectively run and skilfully chaired*”.
744. There is currently an obligation on General Managers to ensure that supplementary induction training is delivered to Mayors to “*provide the mayor with information about the functions and obligations of councils and mayors and train the mayor in the skills necessary to perform the role of mayor*”⁸⁵². That does not extend to Deputy Mayors, even though the Deputy Mayor (if elected in the relevant Local Government Area) is the person most likely to assume the responsibilities of chairing meetings in the absence of the mayor.
745. Given the significance of meetings to the functioning of local government, in my view, Mayors and Deputy Mayors should be given standardised, and focussed, training in the Code of Meeting practice, meeting procedures, and the role of chairing a meeting. Chairs with that knowledge, and skill base, are likely to be in a better position to deal with disorderly conduct, and to preside over meetings that are well organised and effectively run.
746. In the very least, in my view the training referred to in cl 184 should be extended to Deputy Mayors (where elected), and cl 184 amended accordingly.

Recommendation 5

Consideration be given to amending clauses 183 and 184 of the *Local Government (General) Regulation 2021* to make attendance at compulsory induction training (including of the kind referred to in recommendations 3 and 4 above, if adopted) mandatory.

747. Currently, the obligation on councillors (and mayors) to attend induction training is to use “*reasonable efforts to participate*”. In my view, the obligation to attend that training (given its importance to ensuring councillors have a proper understanding of their roles and responsibilities) should be expressed in mandatory language to signify the importance of the training to the performance of their role.
748. That could be achieved by amending the requirement of “*reasonable efforts to participate*” to a mandatory requirement to participate the relevant training course within six months (or some

⁸⁵² *Local Government (General) Regulation 2021 (NSW)*, cl 184.

other reasonable period) of their election. By casting the obligation in that way, it signifies the importance of that training to their role. However, the wide window in which the training is to be completed (six months) minimises the risk that capricious results may occur if, say, a councillor took ill on the appointed day as the training package could be delivered to them at a later date. The regulation could also incorporate a discretion in the Departmental Chief Executive (or delegate) to extend the period to accommodate the prospect that unforeseen circumstances might prevent the mandatory training being delivered in the prescribed period.

749. An amendment of that kind would demonstrate to elected councillors the importance of that induction training, and their participation in it. Given that a failure to comply with an obligation imposed under the regulations amounts to “*misconduct*”, a mandatory obligation of the kind referred to above would be more likely to result in a meaningful consequence for a failure to comply with it. That is because, the recommended amendment would produce a measurable standard – either the training was or was not completed within 6 months (subject to an extension of time). As the obligation is presently framed, it is very difficult to establish that a councillor has failed to make “*all reasonable efforts*” to participate in training, such that failure to participate would rarely be the subject of adverse consequence.

Recommendation 6

That consideration be given to amending the Procedures for the Administration of the Modal Code of Conduct for Local Councils in NSW to require that, in circumstances where a councillor has been found following an independent review to have been in breach of the Code of Conduct that:

- a. The Conduct Reviewer include in their report a short summary of the breach(es) of the Code of Conduct that have been found, which identifies the factual circumstances and a list of each provision contravened;***
- b. The resolution of Council reported to the public meeting and recorded in the Minutes must include:***
 - i. an identification of the Councillor who was in breach of the Code of Conduct;***
 - ii. a short summary of the conduct that constituted the breach of the Code of Conduct found by the independent reviewer from the report as identified in subparagraph (a) above, including an identification of the provision(s) of the Code of Conduct that had been contravened; and***

iii. a summary of the action taken by the governing body in response to that report, including the reasons for any departure from the recommendation of the independent conduct reviewer (if that be the case).

750. The evidence reveals that the Code of Conduct was seen as ineffectual within WSC, and as a result, various breaches of it were not the subject of formal Code of Conduct complaints. That meant that many instances of inappropriate behaviour occurred, and continued, unabated. It is also clear that the Code of Conduct did not provide any real deterrence to the Councillors who engaged in that conduct.

751. There was also inconsistency in how the Council dealt with Code of Conduct matters when they came before it. For example, the minutes of the meeting at which the Code of Conduct breach by Clr McLaughlin was considered by the governing body did not identify him, or the relevant conduct engaged in⁸⁵³. Yet, the minutes of the meeting at which the Code of Conduct breach by Clr Scandrett was considered identified him and included a short statement of the conduct that constituted the breach⁸⁵⁴.

752. I am aware that there is currently a review of the Model Code of Conduct underway. As part of that review, in my view consideration should be given to strengthening Code of Conduct process in order to provide increased general deterrence against behaviour that is inconsistent with its terms.

753. One way in which that could be achieved is to require that details of any breach of the Code of Conduct that have been found by an independent Code of Conduct reviewer, and placed before council for its consideration, be recorded in the report of the matters considered in private session to the public meeting⁸⁵⁵. That would enable interested members of the community to see which of their elected representatives engaged in conduct that was inconsistent with their roles and responsibilities as a councillor.

754. In my view the minutes should also include, as part of the resolution of Council reported to the public meeting:

- i. an identification of the councillor who was in breach of the Code of Conduct;
- ii. a short summary of the conduct that constituted the breach of the Code of Conduct found by the independent reviewer from the report as identified in sub-paragraph (a) above,

⁸⁵³ Ex F, pp 1214-1215.

⁸⁵⁴ [https://www.wsc.nsw.gov.au/Council/Council-Meeting-Minutes-Agendas?dlv_Council%20Meeting%20-%20OC%20CL%20Public%20Meetings=\(pageindex=8\)](https://www.wsc.nsw.gov.au/Council/Council-Meeting-Minutes-Agendas?dlv_Council%20Meeting%20-%20OC%20CL%20Public%20Meetings=(pageindex=8))

⁸⁵⁵ To be clear, I do not suggest that consideration of code of conduct matters should take place in open council. My comments are directed to the resolution passed in relation to those matters, which is then reported to open council and recorded in the minutes accordingly.

including an identification of the provision(s) of the Code of Conduct that had been contravened; and

- iii. a summary of the action taken by the governing body in response to that report, including the reasons for any departure from the recommendation of the independent conduct reviewer (if that be the case).

755. A requirement of that kind could be introduced in the *Procedures for the Administration of the Model Code of Conduct for Local Councils in NSW* with the result that it would form part of the procedures that must be adopted and complied with in accordance with s 440AA of the LGA.

Recommendation 7

That consideration be given to requiring Councils to maintain a public register of each established breach of the Code of Conduct by councillors.

756. In addition to recommendation 6 (or perhaps as an alternative) consideration should be given to requiring councils to maintain a public register of established breaches of the Code of Conduct by councillors, which includes:

- i. an identification of the councillor who was in breach of the Code of Conduct;
- ii. a short summary of the conduct that constituted the breach of the Code of Conduct found by the independent reviewer including an identification of the provision(s) of the Code of Conduct that had been contravened; and
- iii. a summary of the action taken by the governing body in response to that report, including the reasons for any departure from the recommendation of the independent conduct reviewer (if that be the case).

757. A requirement of that kind could be implemented via the *Procedures for the Administration of the Model Code of Conduct for Local Councils in NSW*.

758. As set out above, a public record of code of conduct breaches by councillors will go some way to adding to the deterrence value of the Code of Conduct provisions. The benefit of a public register is that it provides those members of the public who are interested to readily locate that information, as opposed to having to search for it through minutes of meetings.

Recommendation 8

That the Model Code of Conduct be amended to capture other circumstances where conflicts of interest may arise and which do not fall within the current definition of “personal interest”,

including where a councillor has aided an applicant or objector to a development application or for any other service to Council.

759. As set out above, the evidence reveals that there was some concern within the community (and within the Governing Body itself) that some councillors had become involved with applicants or developers, including by providing them with assistance in the preparation of their application or objection. To the extent that those applications then came before council, there is currently nothing in the conflict of interest provisions in the Code of Conduct that clearly requires that councillor to declare that matter.

760. In my view, an applicant would be rightly aggrieved if a councillor had aided an objector and then voted on that application without having declared that contact. In the very least, it gives rise to a perception that the applicant has not been treated fairly in the consideration of its application. It also has the potential to undermine confidence in the council's approach to development applications and gives rise to an apprehension of unfairness in the system. That apprehension arises even if the councillor had been acting appropriately. The integrity of the council's processes concerning development and land use is of great significance, as reflected by various provisions in the Code of Conduct and the Code of Meeting Practice.

761. In my view, if a councillor has provided material assistance to an applicant or objector in the preparation of a development application or objection to a development, that is a matter that should be declared if the application comes before council. By material assistance, I do not refer to providing a point of contact or passing on information available to the general public (such as forms, web-links to generic information etc). Rather, the vice in conduct of that kind arises when it involves assistance, advice, or guidance as to the merits of the application or objection, including how it is presented, which is not available to the general public, including the counterparty to the application. It is involvement of that kind which, if not declared when the matter is considered by Council, has the risk to undermine confidence in the decision making process and gives rise to perceptions of unfairness.

762. Requiring declarations of that kind will also go some way to removing the perception that (perhaps unfairly) attaches to councillor speaking strongly in favour of, or against, a particular application, as occurred during the 2016 Term at WSC.

Recommendation 9

That consideration be given to amending the Local Government Act, to make the division between "operational" and "strategic" responsibilities clearer by making it clear in the statute that a Councillor is not permitted to direct or seek to influence (whether directly or indirectly) council staff in the performance of their duties.

763. The division between the operational and strategic functions are well defined in materials such as the Councillor Handbook and the Code of Conduct. However, they are less clearly prescribed in the LGA. In this respect, the LGA does not use the language of “operational” and “strategic” and it is only revealed by an analysis of its various provisions.
764. As can be seen from the evidence before the Inquiry, the most likely occasion where that divide is breached is in councillors seeking to direct or influence (directly or indirectly) staff in the performance of their roles. The evidence reveals that the attempt to influence staff, through the application of “*pressure*” and questioning directed to a particular outcome or conclusion, was a relatively common experience of staff. In my view, staff need to be empowered to resist those attempts, rather than having to merely accept that they occur and to manage them in the performance of their roles (as was the case within WSC).
765. To provide a clear and unambiguous statement that councillors must not seek to direct or influence (directly or indirectly) staff in the performance of their functions, consideration should be given to amending the LGA (for e.g., s 352) to include that express prohibition. A provision of that kind leaves no room for doubt about the division in roles and responsibilities, or the limits of a councillor’s function in “*directing and controlling*” the affairs of the council.