

**COMMISSION OF INQUIRY INTO  
MOIRA SHIRE COUNCIL**

**COMMISSIONERS**

MS FRANCES O'BRIEN KC (CHAIR)

MR JOHN TANNER AM



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AN INDEPENDENT COMMISSION OF INQUIRY ESTABLISHED BY THE MINISTER FOR LOCAL GOVERNMENT

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OF INQUIRY  
INTO MOIRA SHIRE COUNCIL



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AN INDEPENDENT COMMISSION OF INQUIRY ESTABLISHED BY THE MINISTER FOR LOCAL GOVERNMENT

26 February 2023

The Hon. Melissa Horne MP  
Minister for Local Government  
1 Spring Street MELBOURNE VIC 3000

Dear Minister

## **Commission of Inquiry into Moira Shire Council**

In accordance with its Terms of Reference, please find **attached** the Report prepared by the Commission of Inquiry into Moira Shire Council.

Consistent with its terms of reference, the Report includes an examination of:

- The matters contemplated in the confidential advice provided to you by the municipal monitor dated 7 October 2022 and the confidential letter provided by the Australian Services Union dated 5 October 2022;
- matters affecting the Councillors' performance of their roles;
- matters affecting the Council administration's performance, including human resource practices;
- the efficiency and effectiveness of the Council's governance arrangements in delivering services to its constituents, including financial management and community engagement practices; and
- other matters identified by the Commission of Inquiry that have an impact on the Council's ability to function.

As part of its Inquiry, the Commission has:

- interviewed all current Moira Shire Councillors, and some former Councillors including the former Mayor;
- interviewed Moira Shire Council employees, including the CEO;



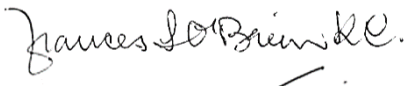
- interviewed former Moira Shire Council employees, including the former CEO;
- heard extensively from members of the Moira Shire community, including through:
  - public meetings held in Cobram, Yarrawonga, Numurkah and Nathalia;
  - written submissions made by members of the Moira Shire community;
  - telephone interviews;
- reviewed substantial documentation produced by the Moira Shire Council in responses to Notices issued by the Commission;
- reviewed and considered written submissions by Moira Shire Councillors, Moira Shire Council employees and others who are subject to adverse findings in this Report;
- referred matters relating to the death of a Moira Shire Council employee to the State Coroner;
- referred matters relating to serious misconduct in procurement by a former Moira Shire Council employee to IBAC; and
- referred matters relating to the dumping of asbestos by Council to IBAC.

The report provides findings and recommendations to restore the good governance of the greater Moira Shire community. The restoration of good governance will provide a stable foundation for building effective leadership, project delivery, community engagement and a positive culture within Council.

The Commission would like to acknowledge the work and thank its Secretariat and specialist support and advice staff for their contribution towards the Commission's Inquiry, and the preparation of this Report.

The Commission would also like to take this opportunity to thank you for being appointed to undertake this vitally important task.

Yours sincerely



**Frances O'Brien KC**

Commission Chair



**John Tanner AM**

Commissioner





New South Wales

Moira Shire

Melbourne

Victoria

Murray River

Cobram

Yarrowonga

Nathalia

Numurkah

Bundalong

Echuca

Goulburn River

Ovens River

Shepparton

Wangaratta

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# DEFINITIONS

Unless otherwise indicated, the following words and phrases are given the following meaning throughout this Report:

**ACTSA** means the Australian Clay Target Shooters Association.

**ASU** means the Australian Services Union.

**CCP** means a Councillor Conduct Panel formed by the Principal Councillor Conduct Registrar under s 156 of the Local Government Act.

**CEO** means Chief Executive Officer of the Moira Shire Council.

**Commission** means the Commission of Inquiry into the Moira Shire Council appointed pursuant to s 200 of the Local Government Act.

**EA** means Executive Assistant.

**EOI** means Expression of Interest.

**EPA** means Environment Protection Authority.

**IBAC** means the Independent Broad-based Anti-Corruption Commission.

**KPIs** means Key Performance Indicators.

**LGV** means Local Government Victoria.

**Monitor** means the Municipal Monitor appointed on 22 April 2022.

**MSC** means Moira Shire Council.

**Local Government Act** means the *Local Government Act 2020 (Vic.)*.

**Occupational Health and Safety Act** means the *Occupational Health and Safety Act 2004 (Vic.)*.



**RFQ** means Request for Quotes.

**VCAT** means the Victorian Civil and Administrative Tribunal.

**VEC** means the Victorian Electoral Commission.





# EXECUTIVE SUMMARY

1. The murder on 5 August 2021 of Mr Rick Devlin, Manager of Operations Moira Shire Council, was a tragic event in every way. Two families have suffered deeply as a consequence. The Commission considers that there is good reason to think that this catastrophic event may have been preventable. The Commission has referred its evidence on these matters to the State Coroner for further examination.
2. Mr Paterson, the employee who murdered Mr Devlin, was set up by his co-workers at the depot and stood down in November 2019 following a false allegation of the theft of a small quantity of kerosene. It had been a long standing practice in the depots that staff working with tar could take a small quantity of kerosene home with them to clean their shoes, clothes and their car.
3. In sentencing Mr Paterson, the Honourable Justice Dixon stated “On the one hand, it seems you were mistreated in the workplace. Your co-workers manufactured allegations against you, hoping to have you relocated or dismissed. On the other hand, you also broke various codes of conduct and at times you were aggressive towards your co-workers.”<sup>1</sup>
4. The allegation of theft was not substantiated but was deeply resented by Mr Paterson who did not return to work after November 2019 and was on WorkCover from January 2020. He subsequently requested a voluntary redundancy package fifteen months prior to the murder of Mr Devlin. Such requests were not uncommon and often approved, but Mr Paterson’s request was rejected out of hand. Had these events not occurred, it is questionable whether the subsequent course of events would have transpired. These are tragic imponderables for which there will never be an answer for both families.

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<sup>1</sup> *Director of Public Prosecutions v Andrew Robert Paterson* [2022] VSC 746 at 15.



5. However what is not in any doubt is that the Nathalia works depot was the epicentre of a bitterly divided workforce riven by victimisation, threats, bullying, harassment, accusation and counter accusation. It was not the only depot or outdoors work site to suffer from these behaviours but it was the setting in which the factors and events leading to Mr Devlin's death played out without any constructive intervention by Council administration.
6. The former CEO of Moira Shire Council told the Commission that Mr Devlin "struggled with managing difficult people" and "had not embraced modern management practices" preferring instead to "get rid of them".<sup>2</sup> He said that Mr Devlin "would have struggled to deal with deep seated cultural issues". The former CEO also said that he was not aware of the redundancy request by Mr Paterson.
7. Mr Devlin was the highest paid manager below executive level at Moira Council. He ran the depots and the outdoors workforce without any effective scrutiny or interference. He maintained good working relationships with the former Chief Executive Officer and the former Director of Infrastructure. He was known to command a tight financial ship.
8. The depot environment was fundamentally unsafe. It broke some men who went on to long term Workcover and drove others to resign. The few women employed in the depots also suffered harassment and abuse with little done to protect them. The Council's human resources management team should have initiated and led a plan of positive action to restore health and safety in the depots. Instead they stood back and pursued flimsy and often unfounded disciplinary actions against accused employees including Mr Paterson.
9. In one case, an unjustly accused employee was stood down for eleven months after the murder without explanation. The allegations were eventually withdrawn but he was refused access to the allegations against him which were contrived and without foundation. The Commission witnessed at first hand the psychological damage caused to the employee and his family.
10. These events and their tragic outcomes represent, at many levels, a catastrophic governance failure. Council's senior executive should have been collectively aware of the risks since at least September 2017 when an external investigator

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<sup>2</sup> File note of interview with Mark Henderson conducted on 2 February 2023, page 27.



reported on "the high level of dysfunction and distrust among the workforce at the Nathalia depot" and the "extremely toxic atmosphere".<sup>3</sup>

11. The former CEO Mr Henderson, who knew Mr Devlin well, should have been alert to the risks, taken action to mitigate them and advised the Council and the Audit and Risk Committee about them. There is no evidence this occurred. He told the Commission that he was unaware of the 2017 Report and its findings. The current CEO, eighteen months after the murder told the Commission that her "take" on the murder of Mr Rick Devlin was that Mr Paterson "was somebody that had personality problems" and "I don't see that Nathalia is a problem depot".<sup>4</sup>
12. The views expressed to the Commission by Ms Keenan about the Nathalia depot and the death of Mr Devlin might have been understandable at the time of Mr Devlin's death so soon after she took up the role of CEO at Moira. Nearly eighteen months later they are much less understandable.
13. Ms Keenan cannot be held in any way responsible for the failure of previous administrations to ensure a safe working environment in the Council's depots. However, the Commission would expect that any Chief Executive Officer, confronted with the murder of one employee by another, would make every effort to be thoroughly briefed by her senior officers and her occupational health and safety manager about the work environment of those employees. The Commission did not need to make extensive enquiries to be quickly aware of the nature of that environment and the damage it had wrought on members of the workforce.
14. The failure of the Council's administration to ensure a safe and healthy environment in the depots and for the outdoors workforce has been compounded by the abject failure since the murder to put in place any plan or process to bring about the fundamental cultural and behavioural changes required. Following Mr Devlin's death, the Manager Operations position was advertised. Mr Henderson and Mr Lambourne, Mr Devlin's deputy, applied. The position was split into two positions. Mr Henderson was moved sideways and given responsibility for the works depots and Mr Lambourne was promoted to a manager position with responsibility for parks, gardens and maintenance. Neither of these new positions was advertised. These operations positions were filled internally rather than by external candidates who might have brought a fresh

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<sup>3</sup> LPGA Investigation Report, 11; See also Chapter 6, The Council Depots and Outdoors Workforce.

<sup>4</sup> Transcript of interview with Clare Keenan on 11 and 12 January 2023, 199.



approach. It was an opportunity lost, Ms Keenan telling the Commission that she opted instead for continuity.

### **The Decline of Governance in Moira Shire Council**

15. Governance failures are rarely isolated. The governance of Moira Shire Council has been steadily eroding over most of the last decade. In 2014, the then Minister for Local Government summoned the Mayor of the time to Melbourne to discuss many of the same issues that remain evident to the present day and assigned the Director Local Government Victoria to work with Council to resolve them.<sup>5</sup>
16. On 22 April 2022, the then Minister for Local Government appointed a Monitor to advise on a raft of issues affecting the governance and functioning of Council, the actions taken to address them and the effectiveness of those actions. Following receipt of the Monitor's confidential report, the current Minister appointed this Commission on 28 October 2022 with terms of reference focussed around Council governance, Councillor and administration performance, and service delivery including financial management and community engagement.
17. It became quickly apparent to the Commission that many of the same governance issues bedevilling the Council and its administration for many years had become more acute over the preceding eighteen months. There is no single answer as to why this happened. However, the appointment of an inexperienced CEO with limited knowledge and understanding of Victorian local government statutory requirements and the local government environment courted additional risk for a Council that was itself increasingly unstable.
18. The Council was dominated for five consecutive terms by the former Mayor Mr Libro Mustica and a supporting group of Councillors who held sway when necessary in the Council. Mr Mustica is a man of considerable substance and standing with a strong support base in the community. Although strongly motivated to improve community infrastructure and the business environment in Moira Shire, he often found himself conflicted in Council decision making and obliged to withdraw from discussion.
19. A minority group of Councillors struggled to get traction in this environment. Three of them were subject to Councillor Conduct Panel applications by the former

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<sup>5</sup> Minister Jeanette Powell ABC media release, 5 March 2014.



Mayor and his supporting Councillors seeking findings of serious misconduct but all of the applications were unsuccessful. Two councillors against whom applications had been made subsequently resigned from Council. A confrontation in a Councillor briefing between the Mayor and a Councillor, who was the subject of the fourth of those applications, was a low point in the Council's already polarised and fractured relationships.

20. By mid-2022, allegiances within the majority group of Councillors were beginning to fray. Working relationships with the minority Councillors were at an increasingly low ebb. Ms Keenan, whose most recent employment was as CEO of Burke Shire in the Gulf of Carpentaria was ill-equipped with her limited experience to support the Mayor and the Councillors as required by the Local Government Act. She had also developed a deep antipathy to one of the minority Councillors which affected her ability to play any conciliatory role.<sup>6</sup>
21. This eventually spilled across into her relationship with the Monitor.<sup>7</sup> Ms Keenan perceived the Monitor as a threat to her role as CEO, as acting beyond her remit and sympathetic to the Councillor. She intemperately wrote to the Monitor in a late night email accusing her of being “petty and biased” and of being a “third tier bureaucrat”.<sup>8</sup>
22. When questioned by the Commission as to why she would write such an ill-judged email she said that she was angry and needed to get it off her mind so that she could get to sleep.<sup>9</sup> The CEO's reactive behaviour, lack of judgement and intemperate language were in evidence on a number of occasions that are examined further in the body of this Report.
23. The Commission found it difficult to comprehend that such an inexperienced CEO was first appointed to the role, and then given an increase in salary and a contract extension within the probationary period. The salary increase and contract extension was done in the absence of any assessment of her performance against key performance indicators contrary to the relevant provisions in the Local Government Act and the Council's CEO Employment and Remuneration Policy. It

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<sup>6</sup> See Chapter 2, Elephant in the Room.

<sup>7</sup> See Chapter 4, The CEO, the Monitor and the Commission of Inquiry.

<sup>8</sup> Email from Clare Keenan to Marg Allan at 11.03pm on 25 October 2022.

<sup>9</sup> Transcript of interview with Clare Keenan on 12 January 2023, 103.



was also contrary to the requirement in both the Act and the Policy for the review to be annual.<sup>10</sup>

24. The former Mayor told the Commission that, in his opinion, councillors had been “blindsided”<sup>11</sup> by the way she had presented at interview for the position. The former CEO told the Commission that, when the former Mayor and two of the Councillors asked him informally for his assessment of Ms Keenan, he told them that he rated her as a very poor candidate in terms of her experience. He also told them that they should go back to market.
25. The former Mayor later sought legal advice with the support of his deputy in September 2022 with a view to terminating the CEO’s employment.<sup>12</sup> She rejected the separation package he offered. The Councillors, four of whom initially supported termination of the CEO’s contract, were in the end divided on the matter and nothing further eventuated. Notwithstanding this divergence of Councillor views about Ms Keenan, all Councillors expressed support for her to continue in the CEO role when assessing her performance three months later in December 2022.
26. Unstable and erratic leadership engenders poor governance. The consequences for Moira Shire have unfolded in short order with a number of very damaging decisions and outcomes some of which had their origins in previous administrations and Councils. In all cases, however, good leadership and good governance of the kind that is now absent at Moira Shire Council may have averted the worst of them or otherwise contained the damage.

### **Serious Misconduct in Procurement**

27. In June 2019, the Internal Audit Committee, as it was then known, identified financial management as the highest risk faced by Council at the corporate level. Council administration treated it as a ‘residual risk’ in the Fraud Register continuing to work within the controls in place.<sup>13</sup> Although the Committee did not know it, weaknesses in those controls were already being exploited.
28. For three years from June 2017, the Council’s Coordinator of Facilities Maintenance, who had been supported into this position by Mr Devlin, directed

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<sup>10</sup> See s 45 of the Local Government Act.

<sup>11</sup> Transcript of interview with Libro Mustica on 11 January 2023, 61.

<sup>12</sup> Transcript of interview with Libro Mustica on 11 January 2023, 101.

<sup>13</sup> Agenda of Ordinary Council Meeting of 26 June 2019, 155.





over \$500,000 of work without tendering or obtaining three quotes to an Albury based company employing his son and later to a company part owned by his son. He also engaged in other breaches of the procurement protocols to benefit the partner of an employee working with him. Council's conflict of interest protocols were not followed although the employee claimed to have made an initial declaration of interest to Mr Devlin and did declare a conflict when seeking urgent approval to allocate his son's company a contract valued at \$10,000. An external investigator commissioned by the Council did not assess any genuine reason for urgency or why his son's company should be used.<sup>14</sup>

29. It was not until 21 October 2021 following an external investigation that the employee was stood down, with normal pay. Whilst on stress related Workcover, he remained an employee of the Council until his employment was terminated in January 2023. Throughout this period he retained his work vehicle, petrol card, corporate card and access keys to the Shire's buildings. Council's Internal Auditor and Councillor Limbrick, who was on the committee, confirmed that neither they nor the Audit and Risk Committee were advised of this serious misconduct and breaches of Council's procurement policy.<sup>15</sup>
30. The present CEO told the Commission that she first became aware of the Coordinator's serious misconduct around September 2021 and that she stood him down after receiving the investigation report.<sup>16</sup> The investigator recommended that the Council commence a disciplinary process in accordance with its policies and procedures and suggested that Council "may wish to seek legal advice from an independent law firm with respect to what that process should be and the nature of the misconduct allegations".<sup>17</sup>
31. There is no evidence that independent legal advice was obtained. The Commission considers that there was substantial evidence of serious misconduct from at least 11 March 2021<sup>18</sup> warranting summary dismissal. No termination occurred until January 2023, when the employee was terminated by reason of his inability to perform the inherent requirements of his job, not because of the serious misconduct.

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<sup>14</sup> See Chapter 6, Serious Misconduct in Procurement.

<sup>15</sup> See Chapter 6, Serious Misconduct in Procurement. Submission by Councillor Limbrick dated 15 February 2023, 3.

<sup>16</sup> Transcript of interview with Clare Keenan on 12 January 2023, 225.

<sup>17</sup> Report of Tracey O'Neill, 'Draft Prelim Assessment Report' dated 4 October 2021, 10.

<sup>18</sup> Email from Lisa Knight to Amanda Chadwick at 3:45pm on 11 March 2021.



32. When questioned by the Commission as to why the employee's employment had not been terminated earlier Ms Keenan erroneously claimed that his Workcover status precluded it. Her letter to the employee dated 22 December 2022 terminating his employment due to a permanent incapacity for pre-injury employment states "this termination does not affect your weekly Workcover payments".
33. Ms Keenan expressed her surprise on learning of the lenient treatment accorded the employee and could offer no explanation for it. The Commission has referred the employee's suspected corrupt conduct to IBAC. Ms Keenan should have notified IBAC when she received the investigator's report in October 2021 pursuant to her mandatory notification requirements under the IBAC Act.

### **Illegal Disposal of Asbestos Contaminated Fill**

34. In 2019, Council undertook preparatory works to excavate and remove a large quantity of soil contaminated with toxic substances including asbestos from a former Country Roads Board tip site in Rowe Street Numurkah. The intent of the project was to extend the site's capacity as a flood retardation basin. It was not the first time that Council had tried to do this.
35. In 2014, the same project was opposed by three Councillors who drew attention in a Council briefing session to the serious risks involved in excavating a site widely known within Council and the community to contain toxic substances and highly likely to contain bonded asbestos (ACM). Asbestos fibro-cement sheeting was widely used in construction during the period the tip site was in operation.
36. Under EPA regulations, fill containing asbestos could only be removed and transported to a site licensed to receive it. There was no such site in Moira Shire. Undaunted, the Council decided to excavate the contaminated soil and transfer it to waste transfer stations at Tungamah and Strathmerton. These sites were not licensed to receive asbestos contaminated fill.
37. Council knew this to be the case, not least because SMEC Australia Pty Ltd provided them in February 2020 with a Report specifically warning of the known presence of ACM at the site and the potential for excavation to release free asbestos fibres. The report specifically stated that the contaminated soil containing asbestos could only be removed and transferred to a site licensed by



the EPA to receive it. The Tungamah and Strathmerton sites were not so licensed and the Council knew it.

38. Mr John Mangan, the Council's highly respected Coordinator - Waste & Recycling warned repeatedly against what Council proposed to do. Notwithstanding Mr Mangan's advice and the SMEC Report, Council went ahead with the project in April 2020 excavating and transporting the asbestos contaminated soil to Tungamah and Strathmerton.
39. The driving factor was cost. The former CEO told the Commission that if funding approval had been sought from Council for an estimated \$1 million to remove the soil and take it to an EPA licensed facility at Shepparton, it "would never have got up".<sup>19</sup> He also said that if they had asked for the EPA's approval to excavate and remove the contaminated soil, the EPA would not have approved it.
40. The safety risks for the Council's workforce, for the contractors engaged and the community were outweighed by Council's determination to implement a solution less costly than transporting the contaminated fill to a licensed facility in Shepparton. The objective was in the words of the former CEO "to limit our exposure to costs while achieving environmental sign off".<sup>20</sup> This was on any measure a Faustian compromise in which the tradeoff was the health of the Council's workforce, the contractors engaged to excavate and transport the contaminated fill and Moira Shire residents.
41. The Council commissioned an Audit Review after the event to find out what had happened and why and how similar future projects might be better conducted in the future. The Audit Review was completed and provided to Council on 23 July 2020. The Commission found the Report troubling and worrying at many levels.
42. The Review records that there was no Asbestos Plan or Occupational Health and Safety Plan. The trucks transporting the contaminated fill were not licensed by the EPA and WorkSafe identified that the contractors employed by the company to transport the material were not provided with protective clothing and equipment. WorkSafe was also not notified prior to commencement of the operation. Council staff were confused about how to deal with asbestos contaminated fill, the

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<sup>19</sup> Transcript of interview with Mark Henderson on 31 January 2023, 35.

<sup>20</sup> Email from Mark Henderson to Marie Martin at 10.30am on 1 September 2020.



regulations governing its excavation and disposal and about the division of responsibilities within the Council.

43. Mr Mangan was suspended by the Council for what the Commission considers to have been wholly spurious reasons following his principled stand against Council's actions which he knew to be risky, wrong and dangerous.
44. The Commission considers that Council's actions in excavating and transferring contaminated fill, which they knew contained potentially friable ACM asbestos, against EPA and WorkSafe regulations, to sites that they knew were not licensed to receive it constituted serious misconduct. Four current Councillors were also Councillors in 2014 when the project and its risks were discussed. The Commission understands that Council now proposes to remove the asbestos contaminated soil to a licensed facility at an estimated cost of \$800,000 per site.

### **Mismanagement of Capital Projects**

45. The Council's mismanagement of its two flagship capital projects – the proposed new Yarrawonga library and the proposed Multisport Stadium for Yarrawonga – are case studies in how not to approach complex capital projects. The Library project was initiated without any fully costed business case or site assessment. A business case was commissioned for the Stadium project but its assumptions are now in serious question.<sup>21</sup>
46. The Stadium project was described to the Commission by a senior executive as a "white elephant".<sup>22</sup> The costs of both projects have increased substantially beyond their original cost estimates. Serious design deficiencies have also been identified in both projects. The Commission understands that both projects have been subject to ongoing review and that the Stadium project is unlikely to proceed as previously proposed.<sup>23</sup>
47. Council's mismanagement of major capital projects has its genesis in its failure to implement the asset life-cycle approach to asset acquisition and management set out in its Asset Management Plan 2021-31. The Council's Asset Plan appears disconnected from the realities of its budgetary and capital allocation processes.

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<sup>21</sup> See Chapter 6, Yarrawonga Multisport Stadium.

<sup>22</sup> Transcript of interview with Josh Lewis on 19 December 2022, 134.

<sup>23</sup> Transcript of interview with Josh Lewis on 19 December 2022, 134.



48. Council in effect makes year to year capital allocation decisions without the benefit of adequate supporting business cases for major capital expenditures, without adequate documentation of asset life cycle costs and without any apparent process to review existing capital commitments. As a result, Council has a capital carryover of \$38 million in the 2022-23 budget when its discretionary capital budget is around \$3.5 million.<sup>24</sup>

### Numurkah Flood Mitigation

49. In March 2012, a major rainfall event caused serious flooding of the town of Numurkah. Numurkah hospital was inundated on 4 March 2012. Many community residents and businesses were also badly affected. A community led Floodplain Management Study and Plan, which recommended a preferred option (Option A) for a new levee bank to protect the town, was adopted by Council in May 2018.<sup>25</sup>
50. Nearly five years later, little has happened to implement the recommended option. Funds have been set aside in Council's 2022-23 budget to implement Stage 1 of the recommended option but with no assurance that the following stages 2 and 3 will be funded. The new levee bank cannot be fully effective against a major flood event until all stages have been implemented.<sup>26</sup>
51. Had the recent flood event extended into Numurkah wreaking devastation similar to 2012, Council would have had much to answer for. The former Mayor Mr Mustica spoke to the Commission of his frustration with the slow progress towards construction of the levee bank and placed much of the responsibility for the delay with the Council administration.<sup>27</sup> The Commonwealth Government in late November 2022 confirmed in writing a funding contribution of \$2.38 million for Stage 1.
52. The Commission's assessment is that responsibility for the protracted delay with this project rests with both the Council and its administration. The community has provided the leadership for the project and has little to show for its efforts. The Commission also agrees with Mr Mustica's assessment that it is not only the community which is bearing the risks of another unmitigated flood event ("I told the

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<sup>24</sup> Moira Shire Council, Proposed 2022/23 Budget, 3.

<sup>25</sup> Numurkah Flood Mitigation Project page available online at the Moira Shire Website: <https://www.moira.vic.gov.au/Community/Works-and-Projects/Flood-Studies-Mitigation-Projects/Numurkah-Flood-Mitigation-Project>; Moira Shire Council Minutes of Ordinary Council Meeting dated 23 May 2018, 9

<sup>26</sup> Transcript of interview with Joshua Lewis on 14 December 2022, 24-26.

<sup>27</sup> Transcript of interview with Libro Mustica on 11 January 2023, 32-37.



CEO that if Numurkah floods again, we're going to be in deep trouble").<sup>28</sup> Council is carrying significant risk and liability not just for potential property damage but also for potential loss of life.

### Occupational Health and Safety Failure

53. Moira Shire Council and its administration have failed repeatedly to meet their obligations under ss 21 and 22 of the Occupational Health and Safety Act to provide and maintain a safe place of work and to monitor that workplace.<sup>29</sup> The consequences for its workforce have been very damaging. The Council has not held its Chief Executive Officer and the administration to account for these failures.
54. The human costs of the Council's failure to ensure the health and safety of its workforce are best known to the affected employees, their medical advisers and their families. However, other costs are readily discernible including a major increase in the cost of Workcover claims and premiums
55. The Council's Workers Compensation claims are predicted to increase from \$130,000 in 2020-21 to \$811,000 in 2021-22 and to \$2.25 million in 2023-24. Council's Workers Compensation premium is predicted to increase from \$265,000 in 2020-21 to \$362,000 in 2022-23 and to \$495,000 in 2023-24. These increases are, in large measure, directly attributable to Council's neglect of its occupational health and safety responsibilities and the wilful misuse of flawed disciplinary processes against its employees.
56. This Report sets out in some detail the ill-treatment of a number of the Council's employees with sad and regrettable consequences for their health and wellbeing and that of their families. Successive CEOs and the Council's department of human resources failed abysmally in their treatment of these employees.
57. The Commission discerned a well-established pattern in which the accused employees were stood down without properly disclosing the allegations against them. External investigations were commissioned, and were often protracted, resulting in employees claiming WorkCover until eventually resigning. It was, on

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<sup>28</sup> Transcript of interview with Libro Mustica on 11 January 2023, 37.

<sup>29</sup> *Occupational Health and Safety Act 2004* (Vic) s 21-22.



any measure a cruel misuse of poorly documented disciplinary policy and processes.<sup>30</sup>

58. It came as no surprise to the Commission that current and former employees spoke at interview of their anxiety in the workplace environment and their perceptions of a lack of equity, consistency and fairness in decisions affecting them. These feelings of anxiety and poor morale were reflected by many staff in their responses to the most recent Staff Survey.<sup>31</sup>
59. One former manager<sup>32</sup> with experience across a number of Victorian Councils told the Commission that he had never seen an organisation implode as quickly as Moira over the last eighteen months. A former Councillor said that anyone checking out Moira's work culture would go anywhere else.<sup>33</sup>

### **Council Representation and Community Engagement**

60. The 2022 Local Government Community Satisfaction Survey for Moira Shire Council showed a significant decline in perceptions of Council performance since the last survey. Consultation and engagement suffered the worst decline with commentary that "Over the last twelve months, community sentiment toward Council performance has deteriorated". "Council needs to demonstrate that it has the interests of residents in mind and that it advocates on their behalf, consulting with residents on relevant priorities". The Survey assessed that "Council performed lower than both the State-wide and large Rural Council averages over most service areas, including overall performance".<sup>34</sup> Some Councillors took the view that the survey results were reflective of misperceptions in the community. One Councillor said that "people who have an axe to grind will comment", whereas "ones who are happy like me don't bother".
61. These results are unsurprising to the Commission and consistent with feedback it received at community consultation sessions it conducted. A number of residents at the Western end of the Shire had the perception that, in consequence of the Shire being an undivided municipality, their interests were no longer adequately

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<sup>30</sup> See Chapter 6: Human Resource Management - Case Studies in Mistreatment.

<sup>31</sup> Staff Survey Results Summary, Positive Intelligence Consulting Moira Shire Employee Survey August 2022.

<sup>32</sup> Transcript of interview with David Young on 12 January 2023, 40.

<sup>33</sup> File note of interview with Kevin Bourke dated 30 November 2023, 15.

<sup>34</sup> 2022 Local Government Satisfaction Survey, Moira Shire Council, 9.



represented in the Council. In Numurkah, for example, some residents expressed the view that only one Councillor acted as their representative.

62. The Commission was provided with numerous examples from across the Shire of what residents saw as Council's failure to respond in a timely way, if at all, to issues raised by individuals and groups within the community. Some of these issues related to community wide matters such as the delays in flood mitigation works in Numurkah. Other issues specific to localities and individual properties and capable of resolution were also seen by residents to have languished for want of any Council response to their request for help.<sup>35</sup>
63. A common theme voiced by residents was the poor quality of customer service in response to enquiries and requests for help. Lack of staffing continuity was seen as a serious problem with residents needing to recount their stories several times to different staff. The high rate of staff turnover in Moira Council (18.3% in 2021-22) is seen by residents to be affecting the quality of service to them.
64. The last Local Representation Review of the Shire in 2019<sup>36</sup> recommended that Moira Shire consist of nine councillors elected from three three-councillor wards. This recommendation was not supported by Council at the time. The former Minister for Local Government, Mr Somyurek rejected the recommendation.
65. At interview with the Commission, Mr Mustica recalled that "in my first year of being elected, we had people from all across the Shire. There was representation and it worked. When there was a discussion about going to a wards system, we thought 'why change what's working'. It worked for the first two rounds of Council, but the most recent Council it didn't work."
66. The Commission has concluded that the present undivided municipality model is not working in the best interests of the Shire. The Commission considers that there would be merit in a further Local Representation Review by the VEC.

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<sup>35</sup> See Chapter 7, Community Engagement.

<sup>36</sup> Moira Shire Council Representation Review Final Report 2019-20, 22.







# FINDINGS

## The **Commission finds that:**

1. Governance of Moira Shire Council has deteriorated such that the Council can no longer effectively carry out its responsibilities in accordance with the Local Government Act.
2. The Council failed to manage the performance of the Chief Executive Officer.
3. The Council and its administration failed to take necessary action to ensure the health and safety of employees in the Council's depots and other outdoor locations.
4. The actions of the Council and its administration in transferring asbestos contaminated waste to the Tungamah and Strathmerton waste stations which were not licensed to receive it constituted serious misconduct putting Council staff, contractors and residents at potential risk of exposure to asbestos.
5. The Council and its administration, by delaying implementation of already approved flood mitigation measures, left the township of Numurkah and its residents at serious risk in the event of another major flooding incident.
6. The Council and its administration through the mismanagement of two major capital projects, failed to act in accordance with the financial management principles contained in s 101 of the Local Government Act and the obligation therein that financial risks must be monitored and managed prudently having regard to economic circumstances.
7. The Council and its administration have failed to provide adequate community representation and to apply the community engagement principles of the Local Government Act on a Shire wide basis, as evidenced by the significant decline in the assessment of Council performance reported in the 2022 Local Government Community Satisfaction Survey.



8. The present undivided municipality model for representation is no longer working in the best interests of the whole Shire.
9. The Chief Executive Officer of Moira Shire Council failed in her duties:
  - 9.1. to comply with the Council's Employee Code of Conduct requiring employees to conduct themselves in a professional and ethical manner at all times and behave in a way that will not bring disrepute to Council or themselves;
  - 9.2. to act appropriately in response to serious misconduct involving a major breach of the Council's procurement policy;
  - 9.3. to comply with the legislative requirement for mandatory notification of suspected corrupt conduct to IBAC;
  - 9.4. to exercise responsible oversight of human resource management practices in breach of the Occupational Health and Safety Act.<sup>37</sup>
10. The Commission also finds the complaint by Ms Keenan to the Executive Director Local Government Victoria about the conduct of the Municipal Monitor Ms Marg Allen to be wholly unfounded. The Monitor acted at all times within the terms of reference provided to her by the Minister for Local Government.<sup>38</sup>

The **Commission has taken the following actions:**

1. Referred to the State Coroner evidence gathered by the Commission concerning certain events, culture and behaviour in the Council's depots and outdoor work sites relevant to the murder of Mr Rick Devlin.
2. Referred to IBAC alleged corrupt conduct by the Council's Coordinator of Facilities Maintenance.
3. Referred to IBAC alleged corrupt conduct by Council in transferring asbestos contaminated soil to waste transfer stations unlicensed to receive it.

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<sup>37</sup> The Commission does not suggest that Ms Keenan's conduct in any way contributed to the death of Mr Devlin.

<sup>38</sup> Local Government Act, s 179.





# RECOMMENDATIONS

1. That Moira Shire Council be dismissed and an interim Administrator or Administrators be appointed immediately for a period of six months.<sup>39</sup>
2. That one or more Administrators then be appointed for a further period of five years beyond two local government election cycles to ensure the restoration of good governance to the Shire in accordance with the Local Government Act.
3. That a full and complete external audit be undertaken of Council's financial management policies and practices including procurement.
4. That the interim Administrator or Administrators overhaul the Key Performance Indicators of the CEO and review her performance having regard to the findings of this Report.
5. That the interim Administrator or Administrators overhaul the Council's Corporate, Governance and Performance Division giving priority attention to the governance and human resources functions including the use of disciplinary processes having regard to the findings of this Report.
6. That consideration be given to a further Local Representation Review of Moira Shire by the Victorian Electoral Commission.
7. That the defence currently being conducted by Moira Shire Council to the proceeding by Mr Mangan in the Federal Court of Australia be discontinued forthwith.
8. That the Moira Shire Council Employee Code of Conduct adopted 2017 and the Recruitment, Selection Policy and Procedures documents adopted 8 August 2022 be rewritten comprehensively.

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<sup>39</sup> Local Government Act, s 232.



9. That Moira Shire Council, whilst under administration, implement a community leadership and civic participation program to:
  - 9.1. develop emerging community leaders in building community capacity;
  - 9.2. encourage and support community participation in civic life; and
  - 9.3. strengthen engagement and relationships between the community and the council.

### **Order - Costs of the Commission of Inquiry**

In completing their terms of reference, the Commission has found it necessary to investigate in depth a number of very serious matters that successive Councils have failed to address promptly and adequately over a number of years. Pursuant to section 214(1) of the Local Government Act, the Commission therefore orders that the Moira Shire Council meet the costs of this Inquiry.



# TERMS OF REFERENCE AND CONTEXT FOR THE INQUIRY



## CHAPTER 1

### Introduction

1. The Commission of Inquiry into Moira Shire Council was appointed by the Minister for Local Government on 17 October 2022 with terms of reference:
  - 1.1. *To conduct an inquiry into matters relating to the affairs of the Moira Shire Council (the Council), including through an examination of:*
    - (a) *The confidential advice provided to the Minister for Local Government by the municipal monitor dated 7 October 2022 and the confidential letter provided by the Australian Services Union dated 5 October 2022;*
    - (b) *Any matters affecting the Councillors' performance of their roles;*
    - (c) *Any matters affecting the Council administration's performance, including human resource practices;*
    - (d) *The efficiency and effectiveness of the Council's governance arrangements in delivering services to its constituents, including financial management and community engagement practices; and*
    - (e) *Any other matters identified by the Commission of Inquiry that have an impact on the Council's ability to function.*
  - 1.2. *To report to the Minister for Local Government in writing on the matters outlined above by 28 February 2023.*
  - 1.3. *If the Commission of Inquiry determines to make an order for the payment of costs of the Commission of Inquiry under section 214 of the Act, to provide the reasons for any determination that the Council should not be responsible for all of the costs.*



2. Appointment of the Commission was preceded by the appointment to Moira Shire Council of a Municipal Monitor on 22 April 2022 to assist the Council in addressing a number of significant governance issues raised by the Mayor and CEO of the Shire and other parties including the Australian Services Union (**ASU**).
3. The Minister requested the Monitor's advice on three matters:
  - 3.1. Any issues affecting the governance and functioning of the Council;
  - 3.2. What actions the Council has taken to address those issues; and
  - 3.3. The effectiveness of those actions.
4. The Monitor Ms Marg Allen provided her confidential report to the Minister on 7 October 2022.

## Context

5. Moira Shire is located in the Hume region of Victoria, located in the northeast of the State. It covers an area of 4,046 square kilometres stretching from Bundalong in the East to Barmah in the west. Its northern boundary is defined by the Murray River whilst its southwest, southern and southeast regions share boundaries with the municipalities of Campaspe, Greater Shepparton, Benalla, Wangaratta and Albury-Wodonga.
6. The Shire has four major towns: Cobram, Nathalia, Numurkah and Yarrawonga and 22 smaller communities. The Shire has a population of some 30,350 with a median age of 48 years which is higher than the State and National medians of 37 and 38 respectively. People aged 65 years and over make up twenty five percent of the population.
7. The Shire's economic base rests on its primary industries. The region is a major fruit, dairying and beef district with growing tourism and manufacturing sectors. It is a popular holiday and retirement area incorporating a large part of the Murray Valley.
8. Moira Shire Council is an undivided Municipality with nine Councillors including the Mayor. Prior to the 2007 representation review by the Victorian Electoral Commission, the nine councillors were elected from three three-councillor wards.



The recommendation of the 2019 representation review by the Commission to revert to a three ward model was not accepted.

9. The Shire's Annual Report 2021-22 has identified the Shire's main challenges as:
  - 9.1. Advocacy to State and Federal Governments for services, policy and funding to address community issues;
  - 9.2. The relatively higher costs, compared with those of other councils, to deliver an equivalent range and standard of Council services across a large geographic area with multiple service locations and a relatively small, dispersed and ageing population;
  - 9.3. The impacts of rate capping on Council's financial resources and limited capacity to supplement rate revenue through other income streams;
  - 9.4. The declining value of Federal Financial Assistance grants;
  - 9.5. Fully funding the renewal of the Shire's assets and the impact on discretionary funding for new capital works.

### **Council Governance**

10. The governance of Moira Shire Council has been steadily eroding over most of the last decade. In 2014, the then Minister for Local Government summoned the Mayor of the time to Melbourne to discuss many of the same issues that remain evident to the present day and assigned the Director Local Government Victoria to work with Council to resolve them.
11. On 22 April 2022, the then Minister for Local Government appointed a Monitor to advise on a raft of issues affecting the governance and functioning of Council, the actions taken to address them and the effectiveness of those actions. Following receipt of the Monitor's confidential report, the current Minister appointed this Commission on 28 October 2022 with terms of reference again focussed around Council governance, Councillor and administration performance, and service delivery including financial management and community engagement.
12. It became quickly apparent to the Commission that many of the same governance issues bedevilling the Council and its administration for many years had become more acute over the preceding eighteen months. There is no single answer as to



why this happened. This Report examines the rapid decline in Council governance from a number of perspectives: the increasing instability and polarisation within the Council, the appointment of an inexperienced CEO unable to provide the full support required for the Mayor and Councillors and an administration incapable of providing good governance and ensuring the health and safety of its workforce.

13. The Council's failures and neglect have adversely affected the Shire community in many ways. These include the delayed provision of important infrastructure and services and the growing costs of financial and other mismanagement. There has also been a sharp drop in the community's confidence in the Council as evidenced by the results of the most recent Local Government Community Satisfaction Survey for Moira Council.
14. The Survey found that "Over the last twelve months, community sentiment toward Council performance has deteriorated". "Council needs to demonstrate that it has the interests of residents in mind and that it advocates on their behalf, consulting with residents on relevant priorities".
15. The Commission's own consultations with communities across the Shire reinforced the perception of a Council no longer providing adequate representation of their interests. The Council was seen by many of the residents who met with the Commission as out of touch and unresponsive to the community it was elected to serve.
16. In this Report, the Commission examines the consequences and costs, human and financial, of the failing governance of Moira Shire Council. These include:
  - 16.1. **The failure of Council and its Administration to deal over several years with the underlying causes of numerous complaints about bullying, harassment and threats of violence in the Council depots.**<sup>40</sup>  
Left unchanged and unchallenged, the depot culture particularly in the Nathalia depot posed serious ongoing health risks to the Council's employees.
  - 16.2. The Commission considers that the tragic death of the Manager Operations may well have been preventable. The Commission has

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<sup>40</sup> Moira Shire LPGA Investigation Report dated 1 September 2017; Email from Rick Devlin to Gary Hodgskiss and Ors dated 26 October 2017; See also Chapter 6: When Governance Fails.





referred its evidence on these matters to the State Coroner for further examination.

- 16.3. Council Administration has been aware of these issues at least since an investigation report was provided to the then Manager Organisational Development in September 2017 which identified the “toxic culture” in the Nathalia depot.<sup>41</sup> The same manager who received that report rejected out of hand a voluntary redundancy request in 2020 by the employee Mr Paterson, who murdered Mr Devlin fifteen months later.<sup>42</sup>
- 16.4. Mr Paterson had earlier been falsely accused in November 2019 of stealing a small quantity of kerosene from the depot. It has been a long standing practice that employees working with tar could take a small quantity home to clean their clothes, shoes and car. The allegation was investigated and not substantiated. However Mr Paterson harboured a deep resentment of this unfounded accusation.<sup>43</sup>
- 16.5. **The excavation and removal of contaminated soil containing asbestos and other toxic materials and its transfer, contrary to EPA regulations, to sites within the Shire that were unlicensed to receive it, being sites at Strathmerton and Tungamah.** This was done against the advice of the Council’s Coordinator Waste and Recycling Mr John Mangan who was later suspended and accused of serious misconduct.<sup>44</sup> The Commission has found that the Council’s actions in excavating and transferring asbestos contaminated waste to the Tungamah and Strathmerton transfer stations which were not licensed to receive it constituted serious misconduct putting Council staff, contractors and residents at potential risk of exposure to asbestos.
- 16.6. **The failure of the Council and its administration for more than three years<sup>45</sup> to deal with alleged corrupt conduct by the Council's Coordinator of Facilities Maintenance.** This involved the Coordinator, who had an obvious conflict of interest, allocating contracts in excess of

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<sup>41</sup> Moira Shire LPGA Investigation Report dated 1 September 2017, 11.

<sup>42</sup> Transcript of interview with staff member on 20 January 2023, 33.

<sup>43</sup> Transcript of interview with staff member on 20 January 2023, 31; File note of interview with Trevor Harbor on 20 December 2022, 5; Transcript of interview with Workplace Health and Safety Coordinator dated 12 January 2023, 90.

<sup>44</sup> Letter from ASU to Minister Horne 5 October 2022, 2; ASU and Mangan v Moira Shire Council (VID642 of 2022), Statement of Claim filed 28 October 2022; Email from John Mangan to Sally Rice dated 20 August 2019.

<sup>45</sup> File note of interview with Cr Mansfield on 15 November 2022, 20-21.



\$500,000 from November 2017 until June 2020 to a company in which the Coordinator's son was an employee, without tender or first obtaining three quotes. After June 2020, work ceased to be allocated to that company but instead to a newly established company part owned and directed by his son. His son's company was not on the Council's tender panel and an exemption was not obtained for the work allocated.<sup>46</sup> The Council's internal auditor and its Audit and Risk Committee were never advised.<sup>47</sup> The Commission has referred this matter to IBAC.

- 16.7. **The mismanagement of two major capital projects for which substantial financial support has been provided by the Commonwealth and State Governments.** The two projects, the Yarrowonga library project, which has been the subject of some ongoing community criticism,<sup>48</sup> and the Yarrowonga Multisport Stadium have been under review as a result of inadequate planning and business case development, design deficiencies and a succession of poor decisions by the Council. Both projects have experienced significant cost increases. The Commission understands that the Stadium project is unlikely to proceed as previously proposed.<sup>49</sup>
- 16.8. **The failure of the Council and its administration since the devastating Numurkah floods of 2012 to undertake any substantive works to erect a levee bank to protect the town and its surrounds from future flooding events.** A preferred option developed through an extensive community led process was finally agreed by Council in May 2018.<sup>50</sup> However it is only in the 2022-23 budget that funding provision has been made for Stage 1 of the project to commence with no assurance of funding for Stages 2 and 3. Council's delays in dealing with this issue have left the township and its residents at serious risk in the event of another major flood event.<sup>51</sup> The Commonwealth Government in

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<sup>46</sup> Email from Lisa Knight to Amanda Chadwick dated 11 March 2021; Draft Preliminary Report authored by Tracey O'Neil dated 4 October 2021.

<sup>47</sup> File note of interview with Bobbie Bright on 13 December 2022, 3.

<sup>48</sup> Transcript of interview with Joshua Lewis dated 14 December 2022, 128.

<sup>49</sup> Transcript of interview with Joshua Lewis on 19 December 2022, 124.

<sup>50</sup> Moira Shire Council Minutes of Ordinary Council Meeting dated 23 May 2018, 9.

<sup>51</sup> Transcript of interview with Joshua Lewis on 14 December 2022, 18; Numurkah Flood Mitigation Project, Moira Shire website; Bridget McKenzie Media Release: \$2.38 Million to Protect Numurkah against Future Floods.



late November 2022 confirmed a funding contribution of \$2.38 million for Stage 1.

- 16.9. **Repeated failures by the Council and its administration to comply with its occupational health and safety obligations have caused considerable human and financial costs for the Council and its employees.**<sup>52</sup> The Council and its administration failed to ensure that employees were treated fairly, equitably and consistently.
- 16.10. Poorly documented disciplinary processes were unjustly used against a number of employees with seeming disregard for basic principles of natural justice resulting in an increasing number of stress related Workcover claims. The Council's Workers Compensation claims are predicted to increase from \$130,000 in 2020-21 to \$2.25 million in 2023-24. Workcover premiums are predicted to rise from \$265,000 in 2021-22 to \$495,000 in 2023-24. These costs do not include substantial legal and other costs incurred.<sup>53</sup>
- 16.11. **Community Representation and Engagement.** Representative government has faltered in Moira Shire. The last Local Representation Review of the Shire in 2019 recommended that Moira Council consist of nine Councillors elected from three three-councillor wards.<sup>54</sup> This recommendation was not accepted by the then Minister for Local Government Mr Somyurek.
- 16.12. Council representation of its undivided municipality is now skewed such that a number of residents, particularly to the West of the Shire feel disfranchised and neglected. The 2022 Community survey is evidence that Council's community engagement has fallen away. Council's performance was assessed as "lower than both the State-wide and large Rural Council averages over most service areas, including overall performance".<sup>55</sup>

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<sup>52</sup> See e.g. Align Occupational Rehabilitation Return to Work Service Initial Report, Paul May dated 2 July 2020; File note of interview with Simone Bath on 24 January 2023; Letter from the Australian Services Union to Clare Keenan dated 16 September 2021; Moira Shire LPGA Investigation Report dated 1 September 2017, 9-11.

<sup>53</sup> Minutes of Audit and Risk Committee Meeting held on 12 May 2022.

<sup>54</sup> Victorian Electoral Commission, Local Council Representation Review, Moira Shire Council dated May 2019, 22.

<sup>55</sup> 2022 Local Government Satisfaction Survey, Moira Shire Council, 9.



17. These governance failures are not isolated events. They need to be seen in context of a continuing decline in the good governance of the Shire, the steady erosion of community confidence in the Council and an increasingly disoriented and demoralised workforce. Council's staff turnover rate stood at 18.3% in 2021-22, well above the average for the State and comparable rural councils. The former Mayor told the Commission that under the current CEO the turnover in staff had become "an evacuation".<sup>56</sup>

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<sup>56</sup> Transcript of interview with Libro Mustica on 11 January 2023, 57.





18. The Commission commenced its inquiry by meeting the Mayor and all councillors together and individually. The Mayor and councillors were, in the main, candid and open in their comments to the Commission about how the Council operated and relationships with their fellow councillors.
19. The present Council has undergone substantial changes in its membership since the last local government elections. Five of the nine Councillors have been elected on countback after the death of one councillor and the resignations of four others including the former Mayor Mr Mustica. Four of the resignations occurred between 10 November 2021 and 3 November 2022.<sup>57</sup>
20. Moira Council has been dominated for most of the last five years by a group of councillors coalesced around the former Mayor and councillor Mr Libro Mustica. The Council has operated for the most part on a five/four split with the majority able to carry the day when necessary in Council meetings.
21. At interview, a number of Councillors showed variable understanding of their governance obligations under the Local Government Act. Some Councillors appeared not to have been well inducted into their roles, or to have received adequate professional development. The former Mayor Mr Mustica, who acknowledged to the Commission that he was not well versed in the Local Government Act, said that the only professional development training he had received in five years was to attend a public speaking course.<sup>58</sup>
22. The Mayor and Councillors were not assisted by the relative inexperience and knowledge of the current Chief Executive Officer about local government and its governance in Victoria. Her appointment to the Director Corporate, Governance and Performance role of an officer who, on his own admission, knew little about council governance compounded the problem. This led to inadequate or no advice

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<sup>57</sup> See <https://www.vec.vic.gov.au/electoral-boundaries/local-councils/moira-shire-council>.

<sup>58</sup> Transcript of interview with Libro Mustica on 11 January 2023, 22.



to the Council on important governance issues. The Director told the Commission that he was initially reluctant to offer contrary advice to the CEO because of her potential reactions.<sup>59</sup>

23. The ordinary meetings of the Council, streamed online for the community, were usually not of long duration and notable for their lack of robust debate. Councillors variously described the meetings as “sterile”, a “rubber stamp” and a “fait accompli”.<sup>60</sup> The forum for substantial discussion of upcoming agenda items was the briefing sessions with Council officers which preceded the Council meetings.<sup>61</sup> The public is not permitted to attend Councillor briefing sessions. The former Mayor expressed the view to the Commission that those sessions should have been public.<sup>62</sup>
24. The Council environment has been challenging for any Councillor in the minority group. Four Councillor Conduct Panel applications have been made against Councillors who were not aligned with the former Mayor and his supporting group of Councillors.<sup>63</sup> One application was returned as defective by the Principal Councillor Conduct Registrar. Two applications did not proceed when the Councillors who were the subject of them resigned. The fourth was returned because the Registrar considered that the Council had not taken sufficient or appropriate steps to resolve the matters in dispute.<sup>64</sup> The Commission assesses that these applications were primarily a product of the fractured working relationships within the Council and that they were, for the most part, personality based.

### **In the Heat of the Moment**

25. In November 2021, a Councillor in the minority group was the subject of an application to the Registrar for an internal arbitration process to make a finding of misconduct against him. The specifics of the allegation were that in the course of debate about the withdrawal of Council advertising from a local newspaper, the Councillor accused the Mayor, Mr Mustica, of running the Council “like a dictator”.

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<sup>59</sup> Transcript of interview with Brant Doyle on 6 December 2022, 25.

<sup>60</sup> File note of interview with Wayne Limbrick on 15 November 2022, 14; File note of interview with Peter Elliot on 15 November 2022, 5.

<sup>61</sup> Transcript of interview with Libro Mustica on 11 January 2023, 18.

<sup>62</sup> Transcript of interview with Libro Mustica on 11 January 2023, 20.

<sup>63</sup> CCP Application made against Kevin Bourke dated 20 October 2021; CCP Application made against Marie Martin dated 3 November 2021; CCP Application made against Marie Martin dated 21 November 2021; CCP Application made against Judith Heather dated 27 April 2022; See also Chapter 2: In the Heat of the Moment, and Chapter 2: Elephant in the Room.

<sup>64</sup> CCP Application made against Judith Heather dated 27 April 2022.



It was further alleged the Councillor then compared Mayor Mustica “to a little European dictator in the 1940's with a small moustache”.<sup>65</sup> The clear implication was that he was comparing Mayor Mustica to Adolf Hitler.

26. The application contended that this conduct could not be characterised as "robust political debate in a democracy". One Councillor told the Commission that the exchanges between the Mayor and the Councillor were better characterised as "screaming" and "yelling", and that the noise in the room was "shocking".<sup>66</sup> Another Councillor described it as a very "fizzy meeting, agitated, banging and shouting" and said that the Councillor stormed out of the meeting.<sup>67</sup>
27. The remarks directed at Mr Mustica were offensive however it was not a one-sided argument. Other internal courses of action other than a CCP application were plainly available to resolve the dispute. One of the Councillors who signed the application told the Commission that she did not know that what she was being asked to sign was an application to the CCP Registrar.<sup>68</sup>
28. She also said that no effort had been made after the meeting to contact the Councillor to conciliate the matter internally or to ask for an apology to the Mayor.<sup>69</sup> The Councillor agreed that, with hindsight, this would have been the preferable course.<sup>70</sup> The Councillor against whom the application was made resigned and so the application lapsed.<sup>71</sup>
29. The Commission has been advised by a number of Councillors and community members that the Councillor who resigned was highly respected in the community and had contributed very positively to the Shire over a long period of time. He was one of the minority group of Councillors most active in bringing scrutiny to and questioning proposals before Council.
30. The legal costs of the CCP application were paid for by the Council without any Council resolution approving payment. The application was also made without any

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<sup>65</sup> CCP Application made against Kevin Bourke dated 20 October 2021, 2.

<sup>66</sup> File Note of interview with Marie Martin on 28 November 2022, 1; CCP Application made against Marie Martin dated 3 November 2021.

<sup>67</sup> File Note of interview with Julie Brooks on 22 November 2022, 2.

<sup>68</sup> File Note of interview with Julie Brooks on 22 November 2022, 4.

<sup>69</sup> File Note of interview with Julie Brooks on 22 November 2022, 4.

<sup>70</sup> File Note of interview with Julie Brooks on 22 November 2022, 4.

<sup>71</sup> File Note of interview with Julie Brooks on 22 November 2022, 4; Email from Principal Councillor Conduct Registrar to Kevin Bourke dated 27 October 2021 enclosing 20 October 2021 application for internal arbitration process regarding allegation of misconduct.



forewarning to the Councillor.<sup>72</sup> The Councillor told the Commission that the first he knew of it was when he received an advice from the Registrar. That no attempt was made to resolve the matter internally points again to the growing dysfunctionality, political infighting and personality driven dynamics of the Council.<sup>73</sup>

### The 'Elephant in the Room'

31. Another application requested a Councillor Conduct Panel to make a finding of serious misconduct alleging bullying by a Councillor who had been elected to Council some months earlier.<sup>74</sup> The Councillor who had previously served on the Council told the Commission of attempts to delay her swearing in and induction processes, of being ignored at Council functions and being repeatedly shut down in Council meetings. The Councillor also told of being overruled on a point of order objecting to another Councillor making pointed reference to “the elephant in the room”.<sup>75</sup>

32. In speaking to her point of order, the Councillor said:

‘My point of order is at the briefing last week the Monitor did mention that it is not about one Councillor and, as everybody knows, they’re referring to me. (...) It’s disgraceful that it was aimed at me in the first place, and now that the Monitor has quite clearly indicated that the elephant in the room isn’t me, that this was asked for by the CEO and the Mayor and it’s about many issues, not just one Councillor’.<sup>76</sup>

33. The Councillor was correct that the appointment of the Monitor by the Mayor was not directed at her. The Monitor’s terms of reference covered a range of matters related to Moira Shire Council. This did not stop the CEO and some Councillors from suggesting otherwise. One long serving Councillor wrote on his Facebook page that:

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<sup>72</sup> File note of interview with Kevin Bourke on 30 November 2022, 13.

<sup>73</sup> File note of interview with Kevin Bourke on 30 November 2022, 13.

<sup>74</sup> File note of interview with Judith Heather on 16 November 2022, 5; Application for Formation of Councillor Conduct Panel made against Judith Heather dated 27 April 2022.

<sup>75</sup> File note of interview with Judith Heather on 16 November 2022, 5; Numurkah Leader, 'Tense exchange at council meeting as monitor makes recommendations' article dated 3 August 2022 available at <https://cog-aap.s3.ap-southeast-2.amazonaws.com/n/471/2022/Aug/02/Aug%203%202022%20.pdf>.

<sup>76</sup> Numurkah Leader, 'Tense exchange at council meeting as monitor makes recommendations' article dated 3 August 2022 available at <https://cog-aap.s3.ap-southeast-2.amazonaws.com/n/471/2022/Aug/02/Aug%203%202022%20.pdf>.





'You may have seen or heard that the Minister for Local Government has instructed that a monitor be put in place to report on the activities of Moira Shire and 2 other Victorian Councils.

This is not to do with the performance of Council generally, simply a response to a number of complaints lodged by most Councillors over the last three months in regard to the behaviour of one Councillor'.<sup>77</sup>

34. The CCP application against the Councillor made a number of allegations about her behaviour including interrupting the Chief Executive Officer when she was speaking, rolling her eyes during a Councillor briefing, wearing dark glasses and complaining about being unable to read the screens in the briefing room (the Councillor said she has eyesight issues), making unnecessary and negative comments and bullying of the Chief Executive Officer. Much of the complaint is essentially about the dysfunctional relationship between the Mayor, the CEO and the Councillor.<sup>78</sup>
35. The application describes the Councillor's conduct at the end of the briefing. It alleges that the Councillor aggressively approached the Mayor, waving a letter sent the day prior from the Mayor concerning complaints he had received from Councillors and the CEO about the Councillor's conduct, outlining her obligations under the Councillor Code of Conduct and encouraging the Councillor to treat people with respect and courtesy. The letter also suggested a protocol restricting the Councillor from direct contact with the CEO and foreshadowed mediation between the Councillor and the CEO if the behaviour continued.<sup>79</sup>
36. There are conflicting accounts about what then transpired. The Councillor alleged assault by the Mayor and went the same day to lodge a complaint at the Cobram Police Station.<sup>80</sup> The Police took a number of statements but did not lay any charge with respect to the complaint. The Commission is not able to form any firm view about what actually occurred.
37. This incident was preceded by unsuccessful attempts to have an "informal chat" between the Mayor, the Councillor and the CEO to discuss the requirements of

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<sup>77</sup> Wayne Limbrick Facebook status on 9 April 2022.

<sup>78</sup> Attachment 1 to CCP Application against Judith Heather on 27 April 2022, 1; CCP Application made against Judith Heather dated 27 April 2022; JG Thompson letter to MSC on 10 May 2022, 1; Email from Clare Keenan to Libro Mustica, Peter Elliot, Peter Lawless, Peter Mansfield, John Beitzel, Julie Brooks, Wayne Limbrick on 10 March 2022, 1; Form 1 Councillor Conduct Panel Application (undated) regarding Councillor Judith Heather, 1.

<sup>79</sup> Letter from Cr Libro Mustica to Cr Judith Heather on 22 March 2022, 2.

<sup>80</sup> File note of interview with Judith Heather on 16 November 2022, 3.



the Local Government Act and the Councillor Code of Conduct.<sup>81</sup> As the Registrar observed in his response to the applicants “the respondent wanted the process to be a formal process, not conducted as an informal chat, and wanted it to be witnessed and recorded”.<sup>82</sup>

38. The Registrar advised the applicants that he was not satisfied that the Council had taken sufficient or appropriate steps to resolve the matter and that the appropriate course was to refer the matter back to Council.<sup>83</sup> A subsequent attempt at mediation between the Mayor and the Councillor was unsuccessful.<sup>84</sup>

### The CEO and the CCP Applications

39. The application to the Registrar to make a finding of serious misconduct against the Councillor was drafted with direct input from the CEO Ms Keenan and her senior corporate and governance staff.<sup>85</sup>
40. The tensions between Ms Keenan and the Councillor predate the Councillor’s election on 15 December 2021. On 16 August 2021, Ms Keenan wrote to the editor of the Yarrowonga Chronicle criticising local residents (“a small, vociferous group”) opposed to the construction of a new library immediately adjacent to the Town Hall, which was published on or about 18 August 2021.<sup>86</sup>
41. On 18 August 2021, the soon to be elected Councillor wrote to Ms Keenan expressing her shock and disappointment at Ms Keenan’s letter. She wrote in her letter that “Your article was threatening, disrespectful and a real put down to community groups who are just having a go”.<sup>87</sup> She then wrote a further letter,

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<sup>81</sup> Decision from John Baring, Principal Councillor Conduct Registrar to Libro Mustica dated 3 June 2022, 2.

<sup>82</sup> Decision from John Baring, Principal Councillor Conduct Registrar to Libro Mustica dated 3 June 2022, 4.

<sup>83</sup> Decision from John Baring, Principal Councillor Conduct Registrar to Libro Mustica dated 3 June 2022.

<sup>84</sup> Transcript of interview with Clare Keenan on 11 January 2023, 53; Transcript of interview with Libro Mustica on 11 January 2023, 121.

<sup>85</sup> Email from Brant Doyle to Russell Kennedy dated 10 April 2022; Email from Brant Doyle to Russell Kennedy dated 18 March 2022; Email from Russell Kennedy to Brant Doyle dated 24 March 2022, 11.01am; Email from Brant Doyle to Russell Kennedy dated 25 March 2022, 5.12am; Email from Brant Doyle to Russell Kennedy dated 25 March 2022, 11.17am; Email from Brant Doyle to Russell Kennedy dated 29 March 2022, 3.56am; Email from Russell Kennedy to Brant Doyle dated 29 March, 4.33am; Email from Russell Kennedy to Brant Doyle dated 29 March 2022, 10.59am; Email from Brant Doyle to Russell Kennedy dated 6 April 2022, 2.00am; Email from Brant Doyle to Russell Kennedy dated 6 April 2022, 3.36am; Email from Brant Doyle to Russell Kennedy dated 6 April 2022, 11.46pm; Email from Brant Doyle to Russell Kennedy dated 6 April 2022, 1.42am; Email from Amanda Chadwick to Russell Kennedy dated 12 April 2022, 5.34am; Email from Amanda Chadwick to Russell Kennedy dated 12 April 2022, 5.30am; Email from Russell Kennedy to Amanda Chadwick dated 12 April 2022, 8.10am; Transcript of interview with Clare Keenan on 12 January 2023, 113-120.

<sup>86</sup> Email from Clare Keenan to Yarrowonga Chronicle dated 16 August 2022; Yarrowonga Chronicle, 'Letter to the editor- In Defence of Democracy' authored by Clare Keenan, published on 18 August 2021.

<sup>87</sup> Email from Judith Heather to Moira Shire Council, attention to Clare Keenan, dated 18 August 2021.



which was published in the Yarrowonga Chronicle on 25 August 2021, criticising Ms Keenan's intervention.<sup>88</sup>

42. Through February 2022, the relationship between the Councillor and Ms Keenan was fraying. By 10 March 2022, Ms Keenan's relationship with and perceptions of the Councillor had deteriorated to the point that she emailed all other Councillors except the Councillor concerned setting out her concerns:

"I attach correspondence she wrote to me prior to her being a Councillor in response to me imploring us to get on with the job of the library after Geoff Campbell took advantage of COVID restrictions to infiltrate a meeting for tenderers and put my staff in a very awkward position.

I chose to start on a clean slate when she became Councillor, doing everything to expedite her taking her oath and working to her impetuous, tight time frame'

She has, in my opinion, conducted herself poorly and in contravention of the Code of Conduct. I believe she will twist anything I say, or indeed invent issues to fit her narrative – which is clearly anti-me and in many instances anti-Council. I further believe that any attempt to discuss her behaviour she will call 'bullying', whereas her sustained poor conduct more aptly fits this category. I would therefore ask that going forward she addresses her correspondence in the first instance solely through ... the Governance Office."<sup>89</sup>

43. Ten days later on 18 March 2022, the Director Corporate Governance and Performance wrote to a legal firm requesting advice regarding the Councillor. His letter notes that "three Councillors witnessed (the Councillor) eye-rolling as the Chief Executive Officer was responding to her concerns regarding a question at last week's council briefing".<sup>90</sup> The Director told the Commission that he was put under pressure by Ms Keenan to make the application and to call the Councillor's behaviour serious misconduct. He said he had told her that he did not agree that it was serious misconduct. He said to the Commission that that her views were informed by her unproductive relationship with the Councillor. He also said that

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<sup>88</sup> Yarrowonga Chronicle, 'Letter to the editor - Shocked at letter' authored by Judith Heather, published 25 August 2021.

<sup>89</sup> Email from Clare Keenan to Councillors (except Councillor Heather) dated 10 March 2022.

<sup>90</sup> Email from Brant Doyle to Russell Kennedy dated 18 March 2022, 1.



some Councillors may not have been keen to resolve the differences between Ms Keenan and the Councillor.<sup>91</sup>

44. On 5 April 2022, the Director was provided by the legal adviser with a fleshed out draft application with content provided by the Mayor, four other Councillors and Ms Keenan.<sup>92</sup>
45. The CEO and her staff were directly involved in its preparation. In one email, the Director, Corporate, Governance and Performance requested that their legal adviser "include some paragraphs stating that the conduct alleged in the application also contravenes the standards of conduct in the Code".<sup>93</sup> A subsequent email dated 10 April 2022 from the same Manager states that:

"Clare has finalised the document and it is attached. I hope it makes sense as it's had a few of us editing the document – Clare was the last one to review and edit".<sup>94</sup>

46. The Commission confirmed with Ms Keenan her involvement in reviewing and editing the document much of which is concerned with allegations about the Councillor's alleged behaviours towards her.<sup>95</sup> The conflict of interest and the need for her to be at arm's length from preparation of the application should have been obvious to her and her staff. There is no evidence that the senior staff involved advised her of the inappropriateness of her involvement. The CCP application was signed on 27 April 2022 and acknowledged by the Registrar on 11 May 2022.
47. Ms Keenan had previously written to the Minister for Local Government on 29 March 2022, following an online meeting on 11 March 2022 between the Minister, the Mayor and Ms Keenan. Her letter describes the allegedly aggressive behaviours of the Councillor stating "I firmly believe this Councillor represents a threat to my staff as well as Councillors" and "How is it that the institutional settings disregard workplace health and safety and allow no protections for my staff against the aggressive behaviour of a Councillor in their workplace".<sup>96</sup>

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<sup>91</sup> Transcript 1 of interview with Brant Doyle on 6 December 2022, 16-17.

<sup>92</sup> Email from Russell Kennedy to Brant Doyle dated on 5 April 2022.

<sup>93</sup> Email from Brant Doyle to Russell Kennedy dated 10 April 2022.

<sup>94</sup> Email from Brant Doyle to Russell Kennedy dated 10 April 2022.

<sup>95</sup> Transcript of interview with Clare Keenan on 11 January 2023, 46.

<sup>96</sup> Letter from Clare Keenan to The Hon Shaun Leane MP, Minister for Local Government, 1.



48. Her letter did not disclose to the Minister that a CCP application seeking a finding of serious misconduct against the Councillor was already in preparation.
49. Ms Keenan's antagonism towards the Councillor ("no one wanted to be in the same room with her")<sup>97</sup> undermined any prospect of a successful mediation between the Mayor and the Councillor. It affected her attitude and behaviours towards the Monitor whom she perceived as sympathetic towards the Councillor. It coloured her public misrepresentation of the Minister's reasons for the appointments of the Monitor and the Commission<sup>98</sup>. It also informed an angry recorded message she left for the Registrar when the CCP application was returned to the Council.<sup>99</sup>
50. Ms Keenan confirmed to the Commission that she had had no direct personal contact with the Councillor other than at Council meetings and other semi-formal settings for the last eleven months.<sup>100</sup> She had also made no attempt to resolve the tensions between the Councillor and herself.<sup>101</sup> The Commission considers these are not the behaviours of a professionally mature CEO working with the Mayor to manage a difficult relationship with a Councillor.
51. The unsuccessful CCP applications against three minority group councillors also cast serious doubt on the commitment and capacity of the Mayor and his supporters within the Council to work together in the best interests of the community as required by their Code of Conduct and the Local Government Act. Their partisan use of CCP processes against fellow Councillors was inimical to the harmonious operation of the Council to which they had been elected.
52. Whilst the spate of Councillor resignations, including that of Mayor Mustica, over the course of twelve months may change some of the dynamics within Council, the divisive behaviours and attitudes of a number of Councillors are well entrenched.

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<sup>97</sup> Transcript of interview with Clare Keenan on 11 January 2023, 51.

<sup>98</sup> <https://www.moira.vic.gov.au/Our-Council/News-and-information/Media-releases/Local-Government-Monitor-welcomed>.

<sup>99</sup> Voicemail recording from Clare Keenan to John Baring dated 3 June 2022.

<sup>100</sup> Transcript of interview with Clare Keenan on 11 January 2023, 53.

<sup>101</sup> Transcript of interview with Clare Keenan on 11 January 2023, 31.





# THE FORMER MAYOR, MR MUSTICA

## CHAPTER 3

53. Mr Mustica was first elected to Council in November 2017 and served five terms as Mayor. He was described by one of his colleagues as a self-made man. On his own telling, he arrived from Italy at the age of 10, worked hard as a builder and eventually started his own business.<sup>102</sup> He has a strong support base in the community. Mr Mustica told the Commission “I understand Cobram like you understand your family”.<sup>103</sup>
54. The Commissioners found Mr Mustica generally open and candid in his comments and responses to their questions. The Commissioners noted however that his dispute with the Councillor referred to in the preceding paragraphs remains personally very sensitive.
55. Mr Mustica has extensive business interests in the Shire and substantial landholdings. One direct effect of this has been the necessity for him to declare conflicts of interest and withdraw from Council discussion on more than 30 occasions during his term of office.<sup>104</sup> These ranged from Council decisions affecting individual properties owned by Mr Mustica to a major planning scheme amendment potentially affecting a number of his properties.

### **34 Ritchie Road, Cobram**

56. Of particular significance for the former Mayor is the property at 34 Ritchie Road Cobram, a very large triangular piece of land of about 31 hectares located some 700 metres from the Cobram town centre. The site in question, which is located within the Farming Zone - Schedule 1, has been earmarked as a potential business park for several years. The site is owned by Mr Mustica through Oasis Homes Pty Ltd.

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<sup>102</sup> Shepparton News article, 'One to One - Moira Shire Mayor Libro Mustica' dated 5 April 2021 available online at <https://www.sheppnews.com.au/news/one-to-one-moira-shire-mayor-libro-mustica/>.

<sup>103</sup> Transcript of interview with Libro Mustica dated 11 January 2023, 15.

<sup>104</sup> See Council Minutes on the Moira Shire Council website.



57. In 2017, prior to Mr Mustica's election to Council, Oasis Homes appealed to VCAT against a Council decision not to grant a permit to develop the site for caravan and cabin accommodation, comprising 24 cabins and a site for 24 caravans.<sup>105</sup> The proposal considered by VCAT was a substantial reduction from the original application submitted to Council that comprised around 297 caravan/cabin sites.
58. VCAT rejected the appeal. The VCAT member in agreeing with Council stated that:
- “.. the site is not identified in strategic planning policy as being appropriate for the proposed caravan park/cabins. Rather the site has been identified in planning policy as the place for new commercial/light industrial businesses to locate, potentially in a business park development, so that Cobram can continue to attract these businesses to the town in the face of competition from other towns in the area”.<sup>106</sup>
59. A Planning Report prepared for Council in 2019 recommended that the site be considered for a business park with a focus on restricted-retail uses.<sup>107</sup> This would provide opportunities for businesses currently under-represented in Cobram to establish and for existing and low intensity businesses to relocate from the town freeing up more central locations for retail and community uses. It also recommended an area of public open space for people living and working in the vicinity.
60. The Planning Report and Development Plan were placed on public exhibition for four weeks. A submission on behalf of Mr Mustica proposed that the land be rezoned for mixed use and commercial purposes including food and drinks premises, medical centre, museum, office and shops together with office and retail. This proposal which would also have had considerable flow on benefits for Mr Mustica's nearby residential villages was not supported in the Planning Report.<sup>108</sup>
61. Some submissions objected on the basis that the Oasis Homes proposal would in effect create a second town centre rather than developing and consolidating the existing town centre.<sup>109</sup> A number of submissions also drew attention to the

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<sup>105</sup> *Oasis Homes Australia Pty Ltd v Moira SC* [2017] VCAT 1227.

<sup>106</sup> *Oasis Homes Australia Pty Ltd v Moira SC* [2017] VCAT 1227, 6.

<sup>107</sup> Planning Report, 34 Ritchie Road, Cobram, Echelon Planning, 24.

<sup>108</sup> Attachment 5, Summary of Submissions in Council Meeting Agenda dated 28 April 2021, 107.

<sup>109</sup> Attachment 5, Summary of Submissions in Council Meeting Agenda dated 28 April 2021, 107.



Mayor's conflict of interest but Council's consultants who prepared the report responded that the Mayor did not attend the part of the Council workshop where the consultant team presented their findings.

62. A report brought to Council on 28 April 2021 by Council officers proposed acceptance of the Planning Panel Report for 34 Ritchie Road to rezone the land from Farming to Commercial 2 and to apply the Development Overlay and Parking Overlay recommended by the Report. It further recommended that authorisation be sought from the Minister for Planning to prepare an amendment to the Planning Scheme. These recommendations were contrary to the amendments sought by Mr Mustica through the Oasis Homes submission to the consultants engaged by the Council.
63. Mr Mustica declared a conflict of interest and left the Council meeting.<sup>110</sup> Without any discussion in the meeting, two Councillors moved that Council defer the decision on Cobram Business park for six to twelve months.<sup>111</sup> The Commission is not privy to any discussions that may have taken place in the briefing session or externally prior to the Council meeting.
64. The Commission does not suggest any impropriety by Mr Mustica in seeking a rezoning of the land in question. He is perfectly entitled to do so. However his pursuit of planning scheme amendments favourable to his personal interests and contrary to the recommendations of the Council's planning department does not sit well with his role as Mayor and Councillor.
65. Declaring an interest and standing aside from discussions in Council is entirely appropriate. However Council's Planning Department was placed in the invidious position of bringing recommendations to Council that were inimical to the Mayor's personal interests with potentially very substantial financial outcomes turning on Council's decision. The Council's publicly unexplained decision to defer the recommendations of the officers' report on 28 April 2021 also draws attention.<sup>112</sup> It is not consistent with the transparency principles of the Local Government Act.

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<sup>110</sup> See Council Minutes dated 28 April 2021, 2. Available on the Moira Shire Council website.

<sup>111</sup> See Council Minutes dated 28 April 2021, 2. Available on the Moira Shire Council website.

<sup>112</sup> See Council Minutes dated 28 April 2021, 2. Available on the Moira Shire Council website.





## Illegal Dumping of Contaminated Waste by the former Mayor

66. In July 2019, Sunbrell Pty Ltd, owned by then Mayor Mr Mustica, was fined by the Environment Planning Authority (EPA) for dumping waste materials including asbestos on land he owns at 85 Ritchie Road in Cobram which was not a licensed premises to receive such waste. The waste materials came from another property owned by Mr Mustica.<sup>113</sup>
67. The waste transferred to the Mayor's property at 85 Ritchie Road was reported by EPA to have been dumped into a pit some 25 metres square and 2 metres deep before being burned. Samples taken by EPA staff at the site from which the contaminated materials were transferred (it was not safe to take them from the pit) confirmed the presence of asbestos. Clean up actions included the engagement of a licensed asbestos removalist. Mr Mustica is reported in the Cobram Chronicle as saying "I have no choice but to pay the fine, I broke the EPA's rules".<sup>114</sup>
68. Whilst the public acknowledgement of having committed an offence is appropriate, the illegal transfer and dumping of this waste contravened not only the State's environmental protection legislation but also the Council's own waste management policies. When questioned by the Commission, Mr Mustica blamed these breaches on the contractor he hired to transfer the waste and who was "meant to engage the asbestos people". He said "it was never an issue" of cost. He explained that he engaged a contractor to do the job and the contractor "didn't do the right things".<sup>115</sup>
69. Disposing of contaminated waste in this way set a poor example for Council's administration which itself engaged in the illegal excavation and transfer of contaminated soil, including asbestos, to unlicensed sites at Tungamah and Strathmerton.<sup>116</sup>
70. In his Submissions, Mr Mustica accepts that a mistake of fact is not a defence at law and accepted all responsibility associated with the incident, including payment of the EPA fines when they fell due and clean up works. Subsequent to the discovery of the asbestos, suitably qualified contractors were engaged. They

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<sup>113</sup> Cobram Courier article, 'Fine for Dumping' dated 12 July 2019 available online at: <https://www.cobramcourier.com.au/news/fine-for-dumping-industrial-waste/>.

<sup>114</sup> Cobram Courier article, 'Fine for Dumping' dated 12 July 2019 available online at: <https://www.cobramcourier.com.au/news/fine-for-dumping-industrial-waste/>.

<sup>115</sup> Transcript of interview with Libro Mustica dated 11 January 2023, 13-14.

<sup>116</sup> Transcript of interview with Libro Mustica dated 11 January 2023, 132-135.



attended the site for three days to sieve through the waste materials, identify and remove the asbestos safely. Mr Mustica understands that it was then transported to a disposal site in Wangaratta.<sup>117</sup>

### **The former Mayor and Yarrawonga Multisport Stadium**

71. In September 2021, the Mayor and councillors met to discuss the proposed Yarrawonga Multisport Stadium for which construction tenders had been received. The Shire Chief Executive officer was also in attendance.<sup>118</sup>
72. There is a number of witness statements by Councillors about what occurred at the briefing. It was reported to the Commission that Mayor Mustica had taken the tender documentation to another builder and/or subcontractors and presented to the assembled Councillors an alternative proposal on how the project could be delivered differently and more cost effectively.<sup>119</sup>
73. A number of Councillors told the Commission that they had pointed out to Mayor Mustica the impropriety of his actions.<sup>120</sup> Another Councillor told the Commission that he thought the Mayor was just trying to act in the best interests of the Shire.<sup>121</sup> It is clear however that Mayor Mustica's actions were an inappropriate intervention in the tender process and regarded as such by a number of councillors present in the briefing.
74. Mr Mustica told the Commission that he was concerned about the approval processes for the tender and the substantially unfunded cost of the project at that time.<sup>122</sup>
75. Councillor Mansfield who was present at the meeting told the Commission that he later emailed the Chief Executive Officer requesting that legal opinion be sought on the Mayor's actions.<sup>123</sup> He said that she replied advising that she would not seek legal opinion without a resolution of the Council. The Commission has been advised that the Multisport Stadium project is now subject to extensive review.

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<sup>117</sup> Submissions of Libro Mustica dated 15 February 2023, 1.

<sup>118</sup> Transcript of interview with Libro Mustica on 11 January 2023, 134; File note of interview with Peter Mansfield on 15 November 2022, 21.

<sup>119</sup> See e.g. File note of interview with Ed Cox on 16 November 2022, 5.

<sup>120</sup> File note of interview with Ed Cox on 16 November 2022, 5; File note of interview with Peter Lawless on 15 November 2022, 10.

<sup>121</sup> File note of interview with Wayne Limbrick on 15 November 2022, 16.

<sup>122</sup> Transcript of interview with Libro Mustica on 11 January 2023, 129-130.

<sup>123</sup> File note of interview with Peter Mansfield dated 15 November 2022, 21.





# THE CHIEF EXECUTIVE OFFICER

## CHAPTER 4

76. Ms Clare Keenan was appointed as Chief Executive Officer (CEO) of the Council on 12 May 2021 with effect on 2 July 2021 and an option to extend for a further period of two years.<sup>124</sup>
77. Ms Keenan came to her role with a varied career and life experience including most recently her position as the CEO of Burke Shire Council on the Gulf of Carpentaria.<sup>125</sup> She had previously carried out various roles for the New Zealand government, including as communications adviser to the Prime Minister. She also worked as an adviser for Napier City Council and in the Middle East establishing a Public Affairs and Communication Network. Her Curriculum Vitae also references being responsible for golfer Greg Norman's media and publicity for the launch of his signature golf course in Aqaba and being his 'eyes on the ground' for the development.
78. Ms Keenan's experience of local government with the Shire of Burke in Carpentaria and in an advisory role with the City of Napier did not equip her well for her new role as CEO of Moira Shire Council. The Shire of Burke has an operating budget of approximately \$20 million of which 67 percent comes from the Commonwealth and State governments.<sup>126</sup> The Burke Shire Council serves a population of approximately 550 people, consisting primarily of people living on and operating large cattle stations and an indigenous population living in remote communities spread across a Council area of some 40,000 square kilometres.<sup>127</sup> The Council has a staff of around sixty including forty outdoors staff.
79. Moira Shire Council has an operating budget of approximately \$60 million, two thirds of which is funded from rates and charges.<sup>128</sup> Moira Council serves a

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<sup>124</sup> Contract of employment for Clare Keenan signed 12 May 2021.

<sup>125</sup> Resume of Clare Keenan.

<sup>126</sup> See Burke Shire Council website.

<sup>127</sup> Burke Shire Council Website, 'About Burke Shire' available online at <https://www.burke.qld.gov.au/our-region/about-burke-shire>.

<sup>128</sup> See MSC 2022-2023 budget.



population of 32,000 across an area of 4,000 square kilometres living mainly in the four major towns, some smaller town centres and the surrounding rural areas.

Moira Council employs some 300 staff including 100 outdoors staff.<sup>129</sup>

80. The Chief Executive Officer is the only position directly appointed by the Council. The functions of the Chief Executive Officer are set out in s 46 of the Local Government Act:

Functions of the Chief Executive Officer

(1) A Chief Executive Officer is responsible for –

- (a) supporting the Mayor and the Councillors in the performance of their roles; and
- (b) ensuring the effective and efficient management of the day to day operations of the Council.

81. The former CEO of Moira Shire Council told the Commission at interview that he was consulted informally by the then Mayor Mr Mustica and two other Councillors prior to Ms Keenan's appointment. He said that he indicated his strong reservations about her experience, and that he advised Mayor Mustica and the other Councillors not to appoint her to the role, and to go back to market. The CEO Employment and Remuneration Committee, chaired by Mr. Mustica decided to appoint Ms Keenan to the position.
82. The former CEO said that he had given Ms Keenan an in-depth oral and written briefing. The Commission has examined the written briefing provided to Ms Keenan and accepts that it could not be described as an in-depth briefing. The Commission can make no judgment about the oral briefing. She also received briefings from second and third level managers and had made arrangements for one-on-one briefings with Councillors. He said also that "she didn't seem to draw much from what he provided to her and the only question she asked out of the blue was who she should sack".
83. The Local Government Act does not prescribe how the CEO should carry out the responsibilities specified in the Act. However, good judgement, tact and diplomacy when required are necessary qualities in any CEO of a large and complex

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<sup>129</sup> See MSC 2022-2023 budget.



organisation. This is especially the case, when the CEO is accountable to an elected body responsible for the delivery to the community of a wide range of regulatory and other essential services.

84. Ms Keenan's lack of senior level experience in local government and the Victorian local government environment showed early in her term of appointment.

### Yarrowonga Chronicle - Entering the Fray

85. On 18 August 2021, six weeks into her term of appointment, the Yarrowonga Chronicle published a letter to the editor from Ms Keenan concerning the new library proposed to be built in Yarrowonga on the site of the demolished community hall. The hall had been demolished by Council against the objections of a number of residents. The Council's action in demolishing the hall whilst a local community group was challenging the Council's intentions in the Victorian Civil and Administrative Tribunal had already inflamed local feeling.<sup>130</sup>
86. In her letter she referred to "a small vociferous group" who have actively protested the demolition of the Community Hall in Yarrowonga, which is needed to progress the restoration of the beautiful Town hall and a new library'.<sup>131</sup>
87. She also accused a member of that group of 'improperly and dishonestly' attending a meeting between council staff and Class A asbestos removers tendering for the demolition of the Community hall.
88. Her letter went on to characterise her role thus:

'As CEO my job is to carry out the decisions of our democratically elected members. It works like this – once a decision of Council is made by the majority, all Councillors support that decision.

Members of community groups are able to run for office, as I believe a member of this group did. Another part of my job is to deliver value for

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<sup>130</sup> Submission from Yarrowonga Community Action Group Inc to Victorian Civil and Administrative Tribunal dated 18 June 2021; Yarrowonga Chronicle letter to the editor 'In Defence of Democracy' from Clare Keenan dated 18 August 2021; Yarrowonga Chronicle letters to the editor 'Don't sell the Yarrowonga people short' and 'Shocked at letter' dated 25 August 2021.

<sup>131</sup> Email from Clare Keenan to Emma Prior, Editor at Yarrowonga Chronicle dated 16 August 2021, contained within email from Russell Kennedy to Brant Doyle dated 5 April 2022.



money. The ongoing opposition to a decision of Council has cost ratepayers a huge amount.<sup>132</sup>

89. The letter concludes:

'I now respectfully request that democracy wins the day and I do what the majority of residents, my Mayor and Councillors want me to do – Get on with the Job'.<sup>133</sup>

90. Ms Keenan's letter to the Chronicle showed little sensitivity or good judgement in the aftermath of Council's demolition of the community hall and little understanding of the local government environment in Victoria. Ms Keenan expressed her view to the Commission that this was "something that impacted on my staff and was in that sense operational".<sup>134</sup> She also said that it was usual for the CEO to comment in the media on these issues in remote and regional places in Queensland.

91. Quite apart from any other issues raised by the letter, some basic due diligence by her might have identified that the library project had been initiated without any sound business case, that the costings and design were already in question and that realisation of the project faced many challenges. The project is now over budget and under review. Eighteen months later the site of the community hall adjacent to the town hall still lies vacant.

92. The former Mayor Mr Mustica told the Commission that in his opinion she should not have written the letter.<sup>135</sup>

### **The Withdrawal of Council advertising from the Numurkah Leader Newspaper**

93. The following month in September Ms Keenan again ventured into the arena of public controversy by withdrawing Council event advertising from the Numurkah Leader newspaper. The immediate precipitant of this decision appears to have been an interview in the newspaper with a local COVID sceptic. Ms Keenan told the Commission that the advertising had been withdrawn because the published

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<sup>132</sup> Yarrowonga Chronicle letter to the editor 'In Defence of Democracy' from Clare Keenan dated 18 August 2021; Yarrowonga Chronicle letters to the editor 'Don't sell the Yarrowonga people short' and 'Shocked at letter' dated 25 August 2021.

<sup>133</sup> Yarrowonga Chronicle letter to the editor 'In Defence of Democracy' from Clare Keenan dated 18 August 2021; Yarrowonga Chronicle letters to the editor 'Don't sell the Yarrowonga people short' and 'Shocked at letter' dated 25 August 2021.

<sup>134</sup> Transcript of interview with Clare Keenan dated 11 - 12 January 2023, 23.

<sup>135</sup> Transcript of interview with Libro Mustica dated 12 January 2023, 66-69.



interview content was contrary to Commonwealth, State government and Council policy to increase community vaccination levels.

94. The newspaper editor reported Ms Keenan's withdrawal of advertising to her readers who reacted badly and launched a campaign in support of the Newspaper. Councillors and Ms Keenan received numbers of protesting emails. Some 700 residents of Numurkah out of a total population of 5,000 signed a petition to Council objecting to the withdrawal of advertising from their local newspaper and demanding its reinstatement. Ms Keenan told the Commission she had not read the petition.<sup>136</sup>
95. Specially printed Council brochures that had been distributed to all Numurkah letter boxes, but not to other towns in the Shire were bundled up and returned to Council by the residents, who saw this as an attempt to subvert their newspaper. A number of residents, including those who met with the Commission during its public hearings, characterised the withdrawal of advertising as an attack on freedom of expression and the press.
96. Councillors came under considerable direct pressure from the Numurkah and surrounding communities. The former Mayor Mr Mustica told the Commission that he spoke with Ms Keenan about the Numurkah Leader issue and "She said she was allowed to do it because it was operational – but it wasn't operational – and we got smashed".<sup>137</sup> Following a Councillors only meeting on 9 October 2021, Ms Keenan was told by the Deputy Mayor to reinstate Council event advertising with the newspaper.<sup>138</sup> The editor, Ms Cosgriff, said that the Mayor telephoned her and said that he wished it had never happened.
97. The Commission considers that the withdrawal of advertising from the Numurkah Leader was a significant error of judgement impinging on freedom of expression and the freedom of the press. A former senior employee described Ms Keenan's decision as "a sledgehammer response to a nutshell issue which could have been dealt with in a different way".<sup>139</sup> The Commission agrees with that assessment.

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<sup>136</sup> Transcript of interview with Clare Keenan dated 11 - 12 January 2023, 158.

<sup>137</sup> Transcript of interview with Libro Mustica dated 11 January 2023, 68.

<sup>138</sup> File note of interview with Julie Brooks dated 22 November 2022, 5.

<sup>139</sup> File note of interview with former Senior Manager dated 24 November 2022, 2.



## The Withdrawal of a VCAT Enforcement Application

98. On or about 9 November 2021, Ms Keenan intervened on the eve of a VCAT hearing concerning enforcement orders issued by the Council to owners of a property to revegetate land illegally cleared of both living and dead trees. Ms Keenan did not consult with the officers who had worked on the case for two years. Two senior officers told her that her proposed action would set a precedent undermining future enforcement actions by the Council<sup>140</sup> on a wide range of legislative requirements including many local laws and regulations.
99. A number of Councillors, including one who was a near neighbour, were of the view that the owners were elderly and nothing was to be gained by pursuing the matter.<sup>141</sup> When questioned by the Commission most Councillors were under the misapprehension that the VCAT action was about the illegal removal of the trees rather than an order requiring revegetation of the cleared land consistent with guidelines issued by the Department of Environment, Land, Water and Planning.<sup>142</sup>
100. Evidence has been provided to the Commission that Ms Keenan's action to withdraw the application was in response to pressure from Councillors. Ms Keenan acknowledged to the Commission that she had been approached on the matter by the Mayor Mr Mustica and Councillor Cox. She said that "Councillor Cox was worried about how elderly they (the property owners) were" and "I think they were telling me what the community was saying, I didn't comment".<sup>143</sup>
101. Ms Keenan also told the Commission that she was concerned about the costs to Council. "It was definitely the costs that were a problem and it was going to become more costly".<sup>144</sup> The Commission understands that there were no legal costs until after 5 October 2021, when the Council engaged a private law firm. The Commission understands that Council incurred approximately \$12,000 in costs. The Council could, in the ordinary course, have obtained an order for the payment of costs for the enforcement proceeding.<sup>145</sup> It would also have been open for

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<sup>140</sup> File note of interview with Sally Rice dated 17 November 2022, 1-2; File note of interview with Simon Rennie dated 17 November 2022, 4.

<sup>141</sup> File note of interview with Ed Cox dated 16 November 2022, 5-6.

<sup>142</sup> See e.g. File note of interview with Ed Cox dated 16 November 2022, 6; File note of interview with Wayne Limbrick dated 15 November 2022, 18.

<sup>143</sup> Transcript of interview with Clare Keenan dated 11 - 12 January 2023, 248.

<sup>144</sup> Transcript of interview with Clare Keenan dated 11 - 12 January 2023, 249.

<sup>145</sup> *Victorian Civil and Administrative Tribunal Act 1998*, s 115C.





Council not to pursue those costs in the event that it was successful in the application for revegetation.

102. Legally authorised enforcement decisions are the operational responsibility of the CEO and staff acting under the CEO's delegation. They are not a matter for any intervention or pressure from Councillors. Ms Keenan's actions in not supporting her staff and yielding to Councillor pressure that had been resisted by the previous CEO on this same matter put in question her resolve to perform her statutory duties without fear or favour.<sup>146</sup>

### **The Extension of the CEO's Contract**

103. Within a month of these events, the Council's CEO Employment and Remuneration Committee, consisting of all Council members plus an independent member, met on 8 December 2021 and recommended to Council the varying of the CEO's Employment Contract from a period of three years, with an option to extend for a further period of two years, to a full five year term. The Committee also recommended that Council increase the CEO's total remuneration package from \$260,000 to \$290,000 effective from the date of the Council's resolution which was approved on 15 December 2021.<sup>147</sup>
104. The impetus for this review came from Ms Keenan who was discontented with her level of remuneration at the time of her appointment.<sup>148</sup>
105. Mr Mustica indicated to the Commission that a commitment had been given to review Ms Keenan's salary level after six months. However Council's decision to increase her salary and extend her contract was made before the expiry of Ms Keenan's probationary period and without any assessment of her performance against an agreed set of Key Performance Indicators (KPIs). When this decision was taken by Council, no KPIs had been developed to assess her performance.<sup>149</sup>
106. The decision was contrary to the Council's CEO Employment and Remuneration Policy which formed part of her initial contract and with the relevant provisions of the Local Government Act. It was also contrary to the requirement in both the Act

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<sup>146</sup> See e.g. File note of interview with Simon Rennie dated 17 November 2022, 4.

<sup>147</sup> Chief Executive Officer - Contract of Employment - Report to the Committee of Council dated 8 December 2021, 1-2; Council Meeting Minutes dated 15 December 2021, 1-2.

<sup>148</sup> Transcript of interview with Clare Keenan dated 11 - 12 January 2023, 253; See also Transcript of interview with Libro Mustica dated 11 January 2023, 64-65; Transcript of interview with Brant Doyle (2) on 6 December 2022, 78-81.

<sup>149</sup> Transcript of interview with Libro Mustica dated 11 January 2023, 74-80.



and the Policy for the review to be annual. One of the Councillors who opposed the decision said to the Commission that no one should get a pay rise untested at five months.<sup>150</sup>

107. The Report proposing these recommendations to the Committee was prepared by Mr Brant Doyle on the instructions of the Mayor. His report stated that:

"During the last five months, Clare has demonstrated her strong strategic capacity, impressive communication, strong drive to achieve and deliver strategic outcomes and exceptional leadership, in particular what she provided during the crisis which occurred in August".<sup>151</sup>

108. This assessment sits uncomfortably beside the assessment of other current and former senior managers interviewed by the Commission who were not asked for their opinion on Ms Keenan's performance.

### The CEO and the Organisation

109. The appointment of Ms Keenan brought rapid change to an organisation that had grown accustomed to a quite different operating environment under the previous CEO. Some staff welcomed the change others found it disorienting. The Staff Survey conducted in August 2022 presented a mixed picture in response to the question "What would you do if you were CEO for a day?" By far the largest number of respondents indicated "Listen and seek feedback personally from staff". "Lift morale , accountability and fairness, stability and consistency 'also rated highly in the minds of staff".<sup>152</sup>
110. In comments by staff to the survey some staff members were supportive of the CEO "She does a fantastic job in a very tough situation"; "Doing a great job, keep it up". Others made comments such as "I don't know, I never see her"; "No vision, no real consultation, makes poor decisions"; "Overly reactionary"; "Never here. Never seen. Making crazy decisions"; and "Every time I hear the CEO speak at a

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<sup>150</sup> *Local Government Act 2020* (Vic) ss 44-45; Moira Shire Council's CEO Employment and Remuneration Policy; File note of interview with Julie Brooks dated 22 November 2022, 6.

<sup>151</sup> Chief Executive Officer - Contract of Employment - Report to the Committee of Council dated 8 December 2021, 1-2.

<sup>152</sup> Results of the Moira Shire Council Staff Survey conducted August 2022; and Positive Intelligence Consulting Moira Shire Employee Survey August 2022.



meeting or event I think WOW she's amazing but what you say means nothing if your actions don't support your words".<sup>153</sup>

111. The theme of Ms Keenan's visibility recurs in the responses to the survey: "We hardly ever see her, her only form of communication seems to be by email or via the directors and managers. I do not feel I can go to her and voice my concerns about anything" and "We have seen little of the CEO in the past few months and doesn't appear to spend much time in the office. I am concerned that the CEO is picking up information third hand and making decisions with haste without taking the time to talk to affected people or teams in a calm and measured manner to understand the full facts before making a decision'.
112. Staff anxiety was a recurrent theme in the Survey: "Coming back to the passing of Rick. The CEO came on the day to the office staff and since has never come back to check on these staff members and neither have the "people" team (Human Resources). Kindness and humanity cost nothing. Now we are in a situation where everyone is scared for their jobs"; "She has made some huge decisions in the short time she has been here and I've never felt more insecure in my job"; "Don't trust anyone anymore" "Staff morale is at an all time low"; "Unfortunately I have to say that general morale across the organisation is at its lowest for several years".<sup>154</sup>
113. These types of responses by some staff are consistent with comments made to the Commission by a number of staff members past and present. The lack of equity, consistency and fairness in decisions affecting staff have also been regularly commented upon as they have in the Staff Survey. Perceived favouritism in the appointment of staff to senior positions with limited advertisement have served to undermine trust and confidence as has the misuse of disciplinary processes against staff members.<sup>155</sup>
114. The Council's current Recruitment and Selection Policy does not expressly require that Council positions be advertised as provided for in the Local Government Act. Failure to advertise positions is reflected in a number of senior appointments

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<sup>153</sup> Results of the Moira Shire Council Staff Survey conducted August 2022; and Positive Intelligence Consulting Moira Shire Employee Survey August 2022.

<sup>154</sup> Results of the Moira Shire Council Staff Survey conducted August 2022; and Positive Intelligence Consulting Moira Shire Employee Survey August 2022.

<sup>155</sup> File note of interview with Trevor Harbor dated 20 December 2022; File note of interview with John Shaw dated 16 December 2022; Results of the Moira Shire Council Staff Survey conducted August 2022; and Positive Intelligence Consulting Moira Shire Employee Survey August 2022.



made in the last eighteen months. The Commission considers that Council's recruitment policies should be overhauled accordingly.

115. The executive position of Director Corporate, Governance and Performance, in early 2022, the position of Manager of People and Safety in April 2022 and the Operations positions in late 2022 were not appointed on merit as required by the Act. All these positions command very substantial salaries. In the case of the Executive Director Corporate, Governance and Performance, the salary package is in excess of \$200,000.
116. In each of these cases, it was asserted that either advertising did not elicit any external applicants or if it did the external applicants were so weak that they were not interviewed and the internal applicant was the successful candidate. In two other cases the obligation to appoint on merit was avoided by splitting the position and appointing two applicants. In one case this involved advertising and appointing two worthy applicants to the split positions. In the other case, two internal only applicants were appointed to the split positions.
117. The employment of family members is addressed in the Employee Code of Conduct but it is inadequate in dealing with the issue of family member recruitment and the real conflicts that arise from family members reporting up and down the line of responsibility. The David Roberts case dealt elsewhere in this Report is a case in point.
118. Perceived favouritism in appointments has been reported on unfavourably to the Commission as unsettling for a number of employees. There will always be circumstances in which strict adherence to the requirements of the Act is not possible. However they must be highly persuasive and set out unambiguously in the Recruitment and Selection Policy and in the Recruitment and Selection Procedure. The Commission is of the view that there is good reason for concerns in the community about “unequal access to jobs” at MSC.
119. Rapid change in any organisation often brings with it a level of uncertainty, anxiety and sometimes fear for affected staff. As the staff survey indicates, some staff are also energised by change and welcome it. Compounding the negative reactions of some staff at Moira Council is their perception of inadequate consultation and communication as identified in Ms Keenan’s 360 degree assessment.<sup>156</sup> A number

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<sup>156</sup> Hogan 360 Assessment of Clare Keenan, dated 5 August 2022.



of staff found Ms Keenan's management style and manner of communicating to be very disconcerting.

120. A number of current and former managers and staff interviewed by the Commission characterised Ms Keenan's behaviours as reactive and emotionally driven.<sup>157</sup> It was also reported that she was prone to "losing her cool" and swearing loudly.<sup>158</sup> "She uses language not befitting a professional let alone a CEO".<sup>159</sup> "Screams like a mad person, foul language. Wins fights at all costs regardless of whether worth winning. Throws fuel on the fire, just escalates, screams in front of others".<sup>160</sup>
121. One of her senior directors told the Commission that "...the current CEO is quite reactive... Makes decisions very quickly without consideration... the style of reaction is that decision is made, and it's made ... it's quite a strong reaction in terms of this is what we're doing".<sup>161</sup> Another manager said " Disagrees with everything that contradicts somewhere that she wants to go... I got the feeling that she was someone who needed to be angry, to hold a contrary opinion, rather than just talking it out".<sup>162</sup>
122. One staff member said "If you got on the wrong side of Clare, you wouldn't be there long". Another told the Commission "She's extremely reactive ... she explodes over the small stuff – which distracts her from the larger stuff. She picks fights. Her treatment of staff is like nothing I've seen before – she has favourites or you're in the gun. It spins on a dime."<sup>163</sup>
123. These reactive propensities as detailed elsewhere in this Report have also been evident in her communications with the Victorian government and its agencies, with the Australian Services Union, with the Monitor appointed by the Minister for Local Government and with others. Ms Keenan's 360 degree assessment identified "be[ing] less aggressive", "staying calm and even tempered" and "managing emotions" and "sharing information and knowledge" and "building

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<sup>157</sup> Transcript of interview with Brant Doyle dated 6 December 2022, 24-25. File note of interview with Sally Rice dated 17 November 2022, 1-2; File note of interview with Simon Rennie dated 17 November 2022, 4..

<sup>158</sup> Transcript of interview with Brant Doyle, 6 December 2022, 26.

<sup>159</sup> File note of interview with former Senior Manager dated 24 November 2022, 6.

<sup>160</sup> File note of interview with Robyn Bonaddio dated 21 November 2022, 9.

<sup>161</sup> Transcript of interview with Brant Doyle (2) dated 6 December 2022, 24-25.

<sup>162</sup> File note of interview with former Senior Manager dated 24 November 2023, 2.

<sup>163</sup> File note of interview with Sally Rice, dated 17 November 2022, 9.



relationships with others" as areas in which she needed to improve her performance.<sup>164</sup>

124. Ms Keenan restructured the organisation in early 2022 consistent with the Council's expectations for change. The Commission has been provided with evidence that Ms Keenan emailed staff with information about the proposed changes and sought their feedback. This was then taken into account in a further iteration of the new organisation structure which was also emailed to staff.
125. It is the prerogative of any Victorian local government CEO with the support of their Council to restructure their organisation to improve its efficiency and effectiveness in delivering the Council Plan. However s 46(4) of the Local Government Act provides that a CEO must develop and maintain a Workforce Plan, inform the Council before implementing an organisational structure that will affect the capacity of the Council to deliver the Council Plan, and consult members of Council staff affected by a proposed organisational restructure before implementing the organisational structure.
126. There is no evidence that any written report was provided to Councillors about the impact of the restructure on delivery of the Council Plan. Ms Keenan told the Commission that Councillors were advised confidentially and orally at a Council briefing.
127. The organisational restructure unsettled a number of staff as evidenced by their comments in response to the staff survey later in the year. The Commission understands that organisational restructuring has been commonplace at Moira Council over a number of years giving rise to ongoing anxiety about job security. Staff turnover at Moira Council in 2020-21 accelerated to about 18%, well above the average rate in Victorian Councils.<sup>165</sup> Some of that may be attributed to factors associated with Covid and staff leaving for other employment opportunities. However evidence has also been provided to the Commission of staff leaving because of what has been described to the Commission as a "toxic" work environment.<sup>166</sup>
128. One former manager told the Commission that in his experience across a number of Victorian local Councils, he had never seen an organisation implode as quickly

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<sup>164</sup> Hogan 360 Assessment of Clare Keenan, dated 5 August 2022.

<sup>165</sup> Transcript of interview with Kristina Skipper dated 6 December 2022, 17.

<sup>166</sup> File note of interview with Paul May, dated 13 December 202, 5.



as Moira over the last eighteen months.<sup>167</sup> Another expressed amazement that such havoc could be caused in such a short time.<sup>168</sup> A former Councillor said that anyone checking out Moira's work culture would go anywhere else.<sup>169</sup>

129. Some Councillors in their interviews with the Commission said that there would always be disgruntled staff dissatisfied with change.<sup>170</sup> Moira Shire Council has significant organisational health issues within its workforce. The Commission's view is that Moira Council administration needs to commit to a revised Workforce Plan that addresses those issues squarely with its staff. Some capable senior executives and managers have been recruited externally who have the capability of leading that process. The Commission has noted that the current Workforce Plan is now in the process of being revised.<sup>171</sup>

### **The CEO, the Monitor and the Commission of Inquiry**

130. Following an online meeting on 11 March 2022 between the Minister and the Mayor which Ms Keenan also attended, the Minister requested a plan by 30 June 2022 to address concerns raised with his office including unequal access to jobs, councillor conflict, lack of transparency and community engagement.<sup>172</sup> No plan was provided to the Minister.
131. The Minister's letter to the Mayor requesting the plan had been passed to Ms Keenan who told the Commission initially that she could not recall seeing it but after reflection said she must have seen it because she had discussed with others whether the Minister had the power to direct her. The Commission pointed out to Ms Keenan that the letter was from the Minister to the Mayor and that the power of the Minister to direct her was irrelevant.<sup>173</sup>
132. In any event, Ms Keenan told the Commission that she considered the Minister's request to have been overtaken by the appointment of the Monitor. The Monitor was appointed by the Minister on 22 April 2022 with broad terms of reference to advise on any issues affecting the governance and functioning of the Council,

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<sup>167</sup> Transcript of interview with David Young dated 21 December 2022.

<sup>168</sup> File note of interview with former Senior Manager dated 24 November 2022, 7.

<sup>169</sup> File note of interview with Kevin Bourke dated 30 November 2022, 15.

<sup>170</sup> File note of interview with Wayne Limbrick on 15 November 2022, 14.

<sup>171</sup> Transcript of interview with Clare Keenan, dated 11 and 12 January 2023, 174.

<sup>172</sup> Letter from Minister Leane to Libro Mustica dated 29 March 2022, 3.

<sup>173</sup> Transcript of interview with Clare Keenan, dated 11 and 12 January 2023, 81.

<sup>174</sup> Moira Shire Council, Media Release: 'Local Government Monitor welcomed;', dated 8 April 2022.

<https://www.moira.vic.gov.au/Our-Council/News-and-information/Media-releases/Local-Government-Monitor-welcomed>.



what actions the Council has taken to address those issues, and the effectiveness of those actions.

133. Ms Keenan's evidence to the Commission is inconsistent with a joint statement issued on 8 April 2022 by her and the former Mayor welcoming the news from the Minister that a Monitor was to be appointed.<sup>174</sup> The statement incorrectly attributed the Minister's action solely to the concerns she had raised about "the behaviour of one Councillor".
134. Although Ms Keenan initially welcomed the appointment of the Monitor her attitude changed as the Monitor's work with the Council progressed. By 12 September 2022, Ms Keenan's anxiety and resentment of the Monitor was evident in an email to the Monitor in which Ms Keenan wrote "I have spoken to Councillors who appear to be under the impression that your view is that 'unless they sack their CEO, they will be sacked. I assume as a Monitor you would not act to undermine my leadership nor influence the independent performance review process. I would like your urgent confirmation in this regard'.<sup>175</sup>
135. At 1:05pm on 25 October 2022, Ms Keenan sent an email to the Monitor with a copy to the Chief Finance Officer stating that "it is not appropriate or fair that the ratepayers of Moira Shire should be expected to pay for work that is outside your remit. I therefore request in the interests of transparency, that your invoice be itemised to ensure compliance with your terms of reference".<sup>176</sup>
136. Half an hour later, at 1:39pm, Ms Keenan made explicit in an email to the Executive Director Local Government Victoria that "Ms Allen is seeking to broaden and extend her appointment as she has a vested interest through the very significant remuneration she has received". In the same email, Ms Keenan accused the Monitor of conducting herself "in a manner that is more consistent with an attempt to act as de facto Chief Executive".<sup>177</sup>
137. Ms Keenan asked the Executive Director LGV to request the Minister to end the Monitor's appointment "prior to the caretaker period to remove interference as we handle this emergency [i.e. flooding in the Shire] and move into the recovery

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<sup>174</sup> Moira Shire Council, Media Release: 'Local Government Monitor welcomed;', dated 8 April 2022. <https://www.moira.vic.gov.au/Our-Council/News-and-information/Media-releases/Local-Government-Monitor-welcomed>.

<sup>175</sup> Email from Clare Keenan to Margaret Allan at 3:10pm on 12 September 2022.

<sup>176</sup> Email from Clare Keenan to Margaret Allan at 1:05pm on 25 October 2022.

<sup>177</sup> Email from Clare Keenan to Mike Gooley at 1:39pm on 25 October 2022.





phase”.<sup>178</sup> The Executive Director LGV referred Ms Keenan’s concerns to the Commission of Inquiry.<sup>179</sup>

138. Late that night, Ms Keenan sent a text message to the Executive Director LGV continuing her allegations against the monitor stating "this is vexatious and income generating".<sup>180</sup>
139. When questioned further by the Commission about her assertion that Ms Allen had sought to extend her appointment for monetary gain, Ms Keenan offered as an alternative explanation the view of “my councillors” that Ms Allen's appointment and its extension had been for “political reasons”.<sup>181</sup>
140. On the same day, at 11:03pm 25 October 2022, Ms Keenan sent a late night email to the Monitor complaining about her interference, accusing the Monitor of “aggressively defending her position” and describing her as “a third tier bureaucrat”.<sup>182</sup> When questioned by the Commission as to why she would send such an ill-judged and intemperate email, Ms Keenan said that: “I wanted to get it out of my head so I could get to sleep.” When asked why she felt it necessary to put her thoughts into an email rather than just writing them on a piece of paper, Ms Keenan said “I didn’t have my glasses on.” The Commission noted that Ms Keenan sent the email on her iPhone.
141. The final paragraph of Ms Keenan’s email stated as follows:

“Your ego has led you to miss the substantial fact of reporting a dysfunctional Councillor and recommending suspension, in favour of trying to undermine my leadership with staff and certain Councillors. This has led to a miserable failure of your remit. You have failed in your task, shown yourself to be petty and biased. We shall now be making these issues public, given you (sic) lack of capability to act in the best interests of our shire by addressing the issue of the single problematic and destructive Councillor”<sup>183</sup>

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<sup>178</sup> Email from Clare Keenan to Mike Gooley at 1:39pm on 25 October 2022, 1.

<sup>179</sup> Email from Mike Gooley to Clare Keenan at 1:21am on 15 November 2022, 1.

<sup>180</sup> Text message from Clare Keenan to Mike Gooley at 10.03pm on 25 October 2022.

<sup>181</sup> Transcript of interview with Clare Keenan on 11 and 12 January 2023.

<sup>182</sup> Email from Clare Keenan to Marg Allan dated 25 October 2022, 1.

<sup>183</sup> Email from Clare Keenan to Marg Allan dated 25 October 2022, 1.



142. The Commission notes that the Council accepted all of the recommendations made by the Monitor Ms Allan to the Council to improve Council organisational governance. Her recommendations covered a wide range of improvements including changed meeting arrangements to enable Councillors to be better informed on matters coming before Council, introduction of a governance calendar, a General Business item on the agenda, better governance support and professional development for Councillors, improved asset management and capital planning processes and better community engagement.<sup>184</sup>
143. The Monitor was also instrumental in ensuring that Council was provided with an independent assessment of a proposed change of Council insurer. Ms Keenan had verbally proposed to Council that Council change its insurer for the entire insurance portfolio with a premium of approximately \$1 million per year and that she would implement this as an operational matter without Council resolution. The Monitor advised strongly that Council should receive a comprehensive report including the risk management undertaken and make a formal decision on the matter. Her advice was accepted and an independent assessment provided to Council.<sup>185</sup>
144. Another allegation made by the CEO against the Monitor concerned the Monitor's role at the mediation between Councillor Heather and the Mayor. The CEO maintained that the Monitor had offered to act as a support person for Councillor Heather.<sup>186</sup> The Monitor specifically denied this allegation in an email dated 10 September 2022. The Monitor then advised Councillor Heather in an email at 6:05pm that day that she would not be there as a support person for either party. Councillor Heather responded to the Monitor on 10 September at 7:16pm, "I understand completely and would never expected anything else".<sup>187</sup>
145. On 24 October 2022 at 9:38am, the Monitor requested that the CEO advise when she was proposing to inform the Moira community that the Mayoral election had been delayed. On 25 October at 10:05pm, the CEO sent a text message to the

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<sup>184</sup> See Council Minutes on the Moira Shire Council website.

<sup>185</sup> See Council Minutes on the Moira Shire Council website.

<sup>186</sup> Transcript of interview with Clare Keenan on 12 January 2023, 114-116. See also Email from Clare Keenan to Margaret Allan at 3:10pm on 12 September 2022; Email from Clare Keenan to Mike Gooley at 1:39pm on 25 October 2022.

<sup>187</sup> Email from Clare Keenan to Margaret Allan at 12:54pm on 9 September 2022; Email from Margaret Allan to Clare Keenan at 5:11pm on 10 September 2022.



Executive Director LGV including the Monitor's 24 October 2022 correspondence, stating "this is what I am dealing with at a time of crisis...".<sup>188</sup>

146. In an email on 25 October 2022 at 1:39pm to Executive Director LGV, the CEO asserted that the Monitor "attempt[ed] to influence my performance review and employment...".
147. Ms Keenan's defensive and sometimes hostile attitude towards the Monitor reflected her unwillingness to acknowledge the Monitor's proper role and terms of reference given to her by the Minister. She did not take the opportunity to work cooperatively with the Monitor, who had long experience in local government, to improve Council governance and organisational performance.
148. Ms Keenan's pattern of sending ill-considered emails was not restricted to her emails to the Monitor. In an email to all staff on the morning of 27 October 2022, Ms Keenan wrote:

'A few days ago, I requested of the Director of Local Government the removal of the Local Monitor as she had failed to address the issue of workplace health and safety due to the behaviour of a councillor and instead had acted outside her terms of reference and in a manner I believed to be unethical. I was today informed that she will be removed as of now rather than the end of January. We will instead have a Commissioned (sic), who is a Kings Council (sic) and has I am told, the power to suspend Councillors and will investigate the behaviour of a Councillor. We are very happy to finally have someone with the qualifications and experience to help us.'<sup>189</sup>

149. Her email to staff was consistent with her persistent mischaracterisation of the Monitor's role and the reasons for which the Monitor had been appointed by the Minister. Her explanation to staff of the reasons for the appointment of the Commission were similarly misguided.
150. On 28 October 2022, Ms Keenan then wrote to the Australian Services Union (ASU) as follows:

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<sup>188</sup> Text message from Clare Keenan to Executive Director LGV (Mike Gooney) sent 10.05pm on 25 October 2022.

<sup>189</sup> Email from Clare Keenan to all staff of Moira Shire Council dated 27 October 2022, 1.



“Your members today asked that the Commission investigate the ASU behaviour with respect to our workforce. They have asked me to consider a class action against the ASU. It is your organisation that has the culture problem.... You are the bullies and your behaviour is disgraceful ... you are completely out of touch with my hard-working excellent staff who are your members and complain that when you come to talk to them you bamboozle them. They have asked that I accompany them to your meetings – what does that say about you?”<sup>190</sup>

151. The Commission has been provided with evidence of a number of other intemperate and poorly judged messages from Ms Keenan including a recorded message left for the Registrar Councillor Conduct Panels:

‘I am infuriated by the letter I received from you, which I didn’t actually receive from you. We are in a desperate situation. The Minister has gone so far as to put in a Monitor and we can’t get a Panel sorted... I am furious and the Minister is going to hear about this... Now this is absolutely outrageous and I’m going to make this a huge issue. So please get back to me immediately’.<sup>191</sup>

152. The Registrar described the tone of the message as angry and threatening, the apparent loss of composure leading him to conclude it would not be prudent to engage in a one-on-one telephone conversation with Ms Keenan. He said to the Commission that it was the most unprofessional message he had ever received.<sup>192</sup>
153. The tenor of these emails and messages is consistent with comments by staff to the Commission that Ms Keenan is highly reactive, intemperate in what she says, how she says it (including swearing) and having a predilection for conflict. ‘If you challenge Clare, she’ll bite back twice as hard, she loves a fight’.<sup>193</sup>
154. The Commission considers that these are not the behaviours of a competent and professionally mature CEO heading a substantial organisation with 300 staff, an annual operating budget of some \$60 million and important responsibilities to the Moira Shire community.

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<sup>190</sup> Email from Clare Keenan to Australian Services Union dated 28 October 2022, 1.

<sup>191</sup> Recorded voicemail transcribed into email from John Baring to Sara Harbidge dated 7 June 2022, 1.

<sup>192</sup> File note of interview with John Baring dated 8 November 2022, 2.

<sup>193</sup> File note of Interview with Simon Rennie dated 17 November 2022, 6.



155. Ms Keenan's email dated 25 October 2022 to the Executive Director LGV making a number of allegations about the conduct of the Monitor and seeking her removal was referred to the Commission for consideration. Having considered this matter, the Commission finds that none of conduct alleged by the CEO about the Monitor was unethical or beyond the remit of the Monitor. The conduct of the Monitor with the staff of MSC was wholly within her remit. The Commission rejects that the Monitor had any motive other than the interests of the Shire of Moira.
156. The Commission accepts the Monitor's and Cr Heather's view of how the mediation between the former Mayor and Councillor Heather was to be undertaken should the Monitor have been present. It was entirely appropriate that the Monitor play an active role in attempting to resolve the differences between Ms Keenan, the Mayor and Cr Heather. She did not overstep her role in this regard.
157. The Monitor's role in pressing for assurance to Council concerning the proposed change of insurer was what Ms Keenan should have undertaken and would not have occurred without the Monitor's advice and input.<sup>194</sup>
158. The Monitor's inquiry of the CEO as to when and how the residents of Moira Shire were to be informed of the delays to Council's democratic processes was a fundamental obligation of her role.
159. The role of the performance review of the CEO is the most important governance task of the Council. It was imperative that the Monitor observe this process, provide any necessary advice to the Council and report to the Minister on the conduct of the process.

### **The SurePact Procurement**

160. The Council's procurement policy regarding Procurement Methods, Thresholds and Requirements is quite explicit about contract thresholds, quotes and tendering. Any goods services and works with a value of \$50,000 to \$150,000 require that a minimum of three written quotes be obtained. From \$150,000 to \$350,000 a Request for Quotes (RFQ) process must be followed with moderation by Procurement and Contracts Department and awarded contracts reported to

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<sup>194</sup> See e.g. email from Marg Allan to Clare Keenan at 3:35pm on 15 July 2022 contained within email chain from Clare Keenan to Marg Allan at 7.40am on 16 July 2022.



Council. Above \$350,000, a report must be drafted and sent to Council for approval.<sup>195</sup>

161. In early 2022, Ms Keenan discussed with the Director Infrastructure Services the procurement of SurePact, an integrated software system to support the management and tracking of projects, project spend and budget, program and portfolio information and funding streams, demand versus resource availability and prioritisation of projects within and across programs and portfolios. Ms Keenan had used the SurePact system at Burke Shire Council when she was its CEO.
162. On 6 March 2022, he emailed to Ms Keenan the business case for the SurePact procurement. The business case states that Council staff examined alternative systems including Cascade and Symphony 3 “neither of which can deliver the benefits and outputs that SurePact can deliver”.<sup>196</sup> However the Council already had the Cascade system and Symphony 3 is described as a high level executive reporting system rather than an integrated project management and tracking system. The Commission has confirmed through interview that there wasn't a real consideration of alternatives.<sup>197</sup>
163. The Business Case estimated Total Net Project Cost at \$100,000 with estimated ongoing costs of \$50,000 which, fortuitously, sat one dollar below the threshold at which a full RFQ process would have been required. The Business case makes it clear that the Procurement and Contracts staff disagreed with not obtaining three written quotes.<sup>198</sup>
164. On 21 March 2022 the Director Infrastructure Services completed a retrospective Procurement Exemption Form but included in it a statement that “This form is being completed after I had further discussions with Council’s CEO Clare Keenan in affirming that Council’s procurement guidelines and processes were covered in the procurement of SurePact”.<sup>199</sup> The Commission has examined the Procurement Policy Exemptions which do not encompass the SurePact acquisition. For the avoidance of doubt, the Commission does not consider that the circumstances

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<sup>195</sup> Procurement Policy - Moira Shire Council dated 27 October 2021, p.10 ([https://www.moira.vic.gov.au/Our-Council/Our-policies?dlv\\_OC%20CL%20Public%20DocLib%20Relative=\(pageindex=4\)](https://www.moira.vic.gov.au/Our-Council/Our-policies?dlv_OC%20CL%20Public%20DocLib%20Relative=(pageindex=4)))

<sup>196</sup> Item 10 - D22 20708 Business Case - SurePact 2022, 5.

<sup>197</sup> Transcript of interview with Joshua Lewis on 19 December 2022, 208.

<sup>198</sup> Moira Shire Council Business Case - SurePact 2022.

<sup>199</sup> D22 27975 - Procurement Exemption Form - SurePact - March 2022 dated 21 March 2022.



under which the services of SurePact were procured constitute "abnormal circumstances such as emergencies".<sup>200</sup>

165. On 30 March 2022 SurePact invoiced the Council in the amount of \$71,500 for the first year of the Licence Agreement including an implementation fee of \$8,500.<sup>201</sup> Three months later, Accounts was emailed with "a revised invoice for a full twelve months commencing July 2022 following negotiation of a full SLA with unlimited users". Accounts was advised that "we will need to budget \$120,000 each year moving forward". The Commission has confirmed that the revised SurePact licence agreement is a binding three year contract with the only termination rights being a material breach of the Agreement not remedied within forty five days or an Insolvency event.<sup>202</sup>
166. The SurePact procurement breached Council's procurement policy in all respects firstly by not obtaining three quotes based on the questionable estimates in the business case, secondly by retrospectively utilizing an inapplicable exemption and finally by not seeking Council's approval for a contract exceeding \$350,000 approval which was above the threshold for Council approval. The Commission has seen no evidence that Council has even been informed of the full costs of this contract or of the costs incurred prior to its signing.
167. The Commission has concluded that the business case for the SurePact contract was developed specifically to meet the CEO's requirement for its acquisition. Ms Keenan maintained to the Commission that she remained at arm's length from the procurement. However, Ms Keenan is quoted on SurePact's website as stating "(h)aving worked with the SurePact solution in my previous position at Burke Shire Council, I have seen first-hand its value to an organisation and chose to introduce SurePact within Moira Shire Council".<sup>203</sup>
168. Council's procurement guidelines were not complied with and the full costs of the lease agreement not disclosed to Council. This sent the wrong message to the organisation about the importance of complying with Council's procurement policy.

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<sup>200</sup> Moira Shire Council Procurement Policy adopted 27 November 2019 cl 5.1 available online at <https://www.moira.vic.gov.au/files/sharedassets/public/your-council/policies/procurement-policy-adopted-27-november-2019.pdf>

<sup>201</sup> Tax Invoice from SurePact dated 30 March 2022.

<sup>202</sup> SurePact Services and Subscription Agreement dated 28 February 2021.

<sup>203</sup> Article entitled 'SurePact launches into Victoria with Moira Shire Council dated 12 May 2022' available online at <https://surepact.com/news/surepact-launches-into-victoria-with-moira-shire-council/>.



It undermined the Contracts and Procurement staff in the performance of their duties.

### The Performance Review

169. Council commenced a performance review for Ms Keenan in August 2021 following a 360 degree performance assessment. The 360 degree performance assessment of Ms Keenan involving Councillors, Ms Keenan's direct reports, other staff and peers provided important feedback to Ms Keenan, Councillors and others participating in the Survey. However, it could not substitute for a KPI based performance assessment. The assessment of Ms Keenan was in many respects unfavourable with low scores against a number of key measures.
170. Of note was that her direct reports and other staff rated her below average on integrity, resilience and people skills. On leadership themes, Councillors rated her below the average overall score in 10 of the 14 themes, direct reports below average in 8 of the themes and other internal reports in 13 of the 14 themes. Development opportunities identified for Ms Keenan included resilience, staying calm and even tempered and building relationships with others.
171. The Commission understands that the Council subsequently met to discuss Ms Keenan's performance on 11 August, 22 November and 7 December 2022. On 7 December 2022, Council approved a performance agreement with Ms Keenan containing a Statement of Strategic Objectives and Council Priorities and agreed outcome measures.
172. The Statement of Strategic Objectives and Council Priorities and the agreed outcome measures in Part A of the Agreement are nearly all process oriented (e.g. report to Council on technology (planning software)) and remote staffing opportunities; Key Financial indicators established; Report to Council to set budget and priorities; Workshop programmed; Move to Windows 365, Multifactor authentication and staff cyber security training.
173. None of the Council's Strategic Objectives and Council Priorities or the outcome measures explicitly recognise or respond to such pressing priorities as Numurkah flood mitigation, delivery of key capital projects already under stress and importantly, ensuring the health and safety of the Council's depots and outdoor staff.





# COUNCIL PLANNING, FINANCIAL MANAGEMENT AND ACCOUNTABILITY



## CHAPTER 5

174. The Local Government Act requires Councils to have a Council Plan, Financial and Management Plans and an Audit and Risk Committee with a Charter to advise councils on risks and mitigation. They are an important measure of the effectiveness of Council's governance. The Commission accordingly examined these key elements of Moira Council's governance as set out below.

### **The Council Plan 2025**

175. The Moira Shire Council Plan 2021-25 has five strategic objective pillars:

1. Welcoming and Inclusive Place
2. A Diverse and Dynamic Economy
3. A Clean Green Environment
4. Customer Focussed and Responsive
5. Transparent and Accountable Governance.

176. The strategic priorities under each pillar are essentially statements of activities or values, for example

“We support new and existing businesses to grow and prosper”.

“We develop and promote year round tourism”

“We will be an environmentally friendly organisation”.

“Our systems, processes and use of technology will support efficient and secure business operations”.



“We will responsibly manage our business health and safety risks”.<sup>204</sup>

177. Supporting Strategies, Plans and Policies are referenced for each Pillar. The performance indicators cited in the document are the Local Government Community Satisfaction Survey, the Local Government Performance Reporting Framework and the Governance and Management Checklist and various tourism management tools.
178. There is no attempt within the Plan to set strategic priorities to be achieved by 2025 nor any specific measures against which to assess whether they have been achieved. The actions “What We Deliver” (not “What we will deliver”) are essentially business as usual.

### **Moira Shire Asset Plan**

179. Moira manages a portfolio of assets that have a combined value and replacement cost of \$800 million.<sup>205</sup> The Plan notes that over the next ten years “we expect to budget a total of \$176 million for renewing, improving and growing our assets” and “around \$339 million over the same period to operate and maintain our assets”.<sup>206</sup>
180. The Plan espouses the adoption of a life cycle approach and cost effective management strategies for the long term. The Commission did not observe these key elements in the Council’s approach to two major capital projects, the Yarrawonga Library/Community Hub and the Yarrawonga Multisport Stadium, which have been discussed elsewhere in this Report. Both projects have encountered difficulties in the absence of viable business plans and inadequate consideration of the lifecycle costs of operating and maintaining such facilities.<sup>207</sup>
181. The Commission also notes that ten years after the devastating Numurkah floods of 2012 which required construction of a new hospital, no substantive action has been taken to meet the well documented need for a new levee bank and associated stormwater drainage works.
182. Flood mitigation is not referenced in the Long Term Financial Plan.<sup>208</sup> Council finally adopted a preferred option for the levee bank in May 2018 but it would

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<sup>204</sup> Moira Shire Council Plan 2021-2025 available online at <https://www.moira.vic.gov.au/Our-Council/Our-plans-and-strategies/Council-Plan>.

<sup>205</sup> Moira Shire Asset Plan 2021-2031, 3.

<sup>206</sup> Moira Shire Asset Plan 2021-2031, 3.

<sup>207</sup> Moira Shire Asset Plan 2021-2031, 14.

<sup>208</sup> Moira Shire Asset Plan 2021-2031, 22.



appear from discussions with Council officers that funding provision has only been made at this point, for Phase one. There is no funding provision for Stages two and three.

183. It has been confirmed to the Commission<sup>209</sup> that, in practice, capital planning and budgeting by the Council is done annually. Discretionary funds are limited having regard to the pressures of asset renewal and replacement. Councillors nevertheless advance new capital projects in the budget process each year notwithstanding the many uncompleted projects already in the capital program. Few if any existing projects are reprioritised or removed from the program. It is only in this financial year that Council has moved to one hundred percent renewal funding.<sup>210</sup> This will add to pressure on discretionary capital allocations.
184. The result of this ad hoc approach to capital planning and budgeting is that the Shire will carry forward \$38 million of capital works in 2022-23. Cash and cash equivalent assets in 2022-23 will be \$54,539,000 supporting a very conservative approach to the Shire's liquidity ratios.<sup>211</sup> The Budget document states that "This year, we will catch up on projects that have not been able to proceed for reasons outside of Council's control such as contractor shortages and the timing of grants". Councillor Limbrick has observed that the capital works program at Moira Shire "is seriously a mess".<sup>212</sup>
185. These longstanding capital program issues will not be rectified until Council implements a life cycle approach to asset acquisition and management including the preparation of well-developed business cases to justify the inclusion of affordable new projects in the forward capital program. The recently appointed Director of Infrastructure will require strong support from the Council and the CEO to implement the necessary reforms

## Risk Management

186. Council's Risk Management Policy which appears not to have been reviewed since September 2019, states that:

'A degree of risk exists in everything Moira Shire Council does and it is the responsibility of all Council officers to effectively manage risk. The risk

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<sup>209</sup> Transcript of interview with Josh Lewis on 19 December 2022, 21.

<sup>210</sup> Transcript of interview with Josh Lewis on 19 December 2022, 101.

<sup>211</sup> Moira Shire Proposed Budget 2022-2023, 2. (Change quote to \$38 from \$35)

<sup>212</sup> Submission of Cr Wayne Limbrick dated 17 February 2023, p 4.



appetite of Moira Shire Council is dynamic in nature and will be reviewed on a regular basis. Council is willing to accept a higher level of risk to achieve strategic goals but a lower level of acceptance for strategic, operational risks and community risks”.<sup>213</sup>

187. Unfortunately, there was ample evidence before the Commission that very significant risks have not been identified particularly in the Council’s procurement and capital programming and workforce management processes. The major risks within the capital program have already been adverted to. Procurement has proven to be a seriously flawed process.
188. Information about the major procurement breach discussed in detail elsewhere in this Report was never made available to the Audit and Risk Committee or to the internal auditor. As the matter involved a very substantial amount of money and was independently investigated it might have been expected that the administration would have drawn it promptly to the attention of the internal auditor, but it did not.
189. An alternative explanation, which has been suggested to the Commission, is that information about the breach may have been withheld from both the internal auditor and the Committee.<sup>214</sup> There does not appear to have been a programmed internal audit of procurement for several years and none is currently programmed.
190. Neither has the Committee been kept well informed about the true extent and nature of Occupational Health and Safety risks across the organisation. The failure to address and mitigate these risks has resulted in heavy human cost and substantial financial cost to the ratepayers of the Shire. Information provided to the Committee about WorkCover claims, the extent of psychological injury and substantial projected increases in premiums has been inadequate since a change of management reporting responsibility.<sup>215</sup>
191. Contrary to the precept in the Policy that Council has a lower level of acceptance for community risks, Council appears to have been willing to accept for an extended period the unmitigated risks of another major flood event for the Numurkah community. This stands in stark contrast to the initiative of the local

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<sup>213</sup> Risk Management Policy, Moira Shire Council dated 23 October 2019, 2.

<sup>214</sup> Transcript of interview with Libro Mustica dated 11 January 2023, 79.

<sup>215</sup> File note of interview with Bruce Von Lindhe dated 17 November 2022, 8.



community in establishing within seven months of the 2012 flood a Committee to develop a flood mitigation strategy and plan.

192. Interviews with current and former independent members of the Council's Audit and Risk Committee conveyed a picture of a Committee poorly supported by the Administration to perform its charter. The Risk Register which is a critical tool for assessing and managing risks was in the words of the new independent Chair of the Committee "horrendous"<sup>216</sup> and needing major review. The Committee was not provided with written reports on a number of high risk issues about which it knew little.
193. A senior executive director told the Commission that risks were not correctly identified on the Risk Register.<sup>217</sup> Managers sent through their risks which were then put on the table of risks. Oral reports by the Chief Executive Officer are not a substitute for written reports setting out for the Committee the nature of and reason for the risk and the action being taken to mitigate it. As one independent member put it to the Commission: "Our greatest risk is what we don't know".<sup>218</sup>
194. The limitations on the Audit and Risk Committee, many of them not of its own making, have meant that it has not been able to carry out effectively its charter responsibilities to the Council. The Committee's reports have in the main been dealt with procedurally by the Council which appears to have had no active role in risk identification, assessment and mitigation.
195. The need for additional independent members on the Audit and Risk Committee has been recognised for some time. The appointment of a new, experienced and well qualified Chairperson is a step forward. The Commission understands that two additional independent members are likely to be appointed in the near future. Council needs to rethink its approach to risk management which is a shared responsibility with the organisation. The present risk management processes are unsustainable and expose the Shire to very significant adverse events and outcomes.

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<sup>216</sup> File note of interview with Anthea Sloan dated 28 November 2022, 3.

<sup>217</sup> File note of interview with Bruce Berg Von Linde dated 17 November 2022, 8..

<sup>218</sup> File note of interview with Lisa Ford dated 29 November 2022, 19.





196. This section of the Report examines a number of major governance failures by the Council and its administration. However they are not isolated events as this Report shows. They sit within a spectrum from incompetence to wilful misuse of position. They punctuate in graphic ways an accelerating decline in the good governance of the Shire.

### **The Illegal Transfer By The Council of Prescribed Waste Including Asbestos**

197. In 2019, Council proposed to excavate and remove a large quantity of contaminated soil from an old landfill site on Rowe Street Numurkah. Excavation of the site was to extend a retardation basin as part of flood mitigation works. The Rowe Street site was known by Council officers to be a high risk site containing toxic material including potentially friable asbestos. A former Councillor Cr. Brian Keenan was reported to have described it as Pandora's Box and not to go near it.

198. Asbestos contaminated material is classified as Category C priority material under Schedule 6 to the *Environment Protection Regulations 2021* and can only be received at certain prescribed sites.

199. The Council's Program Coordinator – Waste and Recycling, Mr John Mangan attended the Rowe Street site in February/March 2019 and identified building, demolition and industrial waste. He again visited the Rowe Street site in August 2019 and discovered what appeared to be asbestos on the surface of the ground.

200. On 19 August 2019, the General Manager Community Ms Rice emailed Mr Mangan stating:

200.1. Mr Mangan should think about the disposal options for material taken from the Rowe Street site.

200.2. If Moira Shire had to pay to dispose of the material at Cosgrove landfill the Rowe Street Project would have to be abandoned.



- 200.3. The abandonment of the Rowe Street Project would not be a good outcome for Moira Shire.
- 200.4. Mr Wall (the Rowe Street Project Manager) said to Ms Rice that the material was dirt with some glass and concrete in it.<sup>219</sup>
201. On 21 August 2019, it is alleged that Mr Mangan attended a meeting with the then CEO Mr Henderson, the General Manager Infrastructure Mr Close and others involved with the Rowe Street project. Mr Mangan alleges that he was advised that the Shire intended to deposit soil from the Rowe Street Project at the Cobram landfill. Mr Mangan is alleged to have advised that, because the Rowe Street site was a high risk site, any excavated soil would need to be tested and approved before it could be deposited at the Cobram site. Mr Mangan is alleged to have said that he would not accept any soil into the Cobram Waste Station that did not meet the requisite standard.<sup>220</sup> The Council denies these allegations.<sup>221</sup>
202. It is alleged by Mr Mangan that in a conversation with Ms Rice in late August 2019 he was told that he needed to change his tune and accept soil from the Rowe Street site, that there would be consequences if the Rowe Street project did not go ahead and that he seriously needed to reconsider his stance.<sup>222</sup> While the Council admits that Mr Mangan met with Ms Rice in August 2019, it denies Mr Mangan's version of events.<sup>223</sup>
203. In September 2019, Council engaged SMEC Australia Pty Ltd to undertake an assessment of material at the Rowe Street site to enable a preliminary waste soil disposal categorisation. In an email dated 16 October 2019 from SMEC to Mr Somerville the Council's Coordinator Design and Construction, who was responsible for the project, SMEC advised that two test pits had encountered ACM sheeting and that their field scientist had been advised that "where potential ACM

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<sup>219</sup> ASU and Mangan v Moira Shire Council (VID642 of 2022), Statement of Claim filed 28 October 2022, paragraph 19; Defence filed 23 December 2022, paragraph 19.

<sup>220</sup> ASU and Mangan v Moira Shire Council (VID642 of 2022), Statement of Claim filed 28 October 2022, paragraphs 21-22.

<sup>221</sup> ASU and Mangan v Moira Shire Council (VID642 of 2022), Defence filed 23 December 2022, paragraphs 21-22.

<sup>222</sup> ASU and Mangan v Moira Shire Council (VID642 of 2022), Statement of Claim filed 28 October 2022, paragraphs 23-24.

<sup>223</sup> ASU and Mangan v Moira Shire Council (VID642 of 2022), Defence filed 23 December 2022, paragraphs 23-24.



has been encountered, I have instructed not to continue excavating due to the potential to break up ACM and potentially cause fibre release”.<sup>224</sup>

204. SMEC’s report dated 5 February 2020 concluded, inter alia, that suspected presence of asbestos containing materials (**ACM**) was widespread at the site.<sup>225</sup> The report further states that, in two of the eleven test pits dug at the site, the ACM located was suspected to be friable.<sup>226</sup> It recommended that:

“Soils that are excavated for drainage basin improvement works should not be re-used within another site due to the known presence of bonded ACM fragments across much of the site and potential for free fibres. This material (Category C contaminated soil) must also be disposed of to a landfill facility licensed by the EPA to receive asbestos. Any material transported must be conducted using EPA licensed waste transporter and vehicles. Any works at the site must be conducted under an OHS Management Plan and /or Asbestos Management Plan specifically designed to manage and mitigate any risks to workers and surrounding residents”.<sup>227</sup>

205. Notwithstanding the SMEC report, the Council began in April 2020 to deposit soil from the Rowe Street site at the Strathmerton and Tungamah sites, which were not licensed to accept asbestos.<sup>228</sup> The material was not transported using an EPA licensed waste transporter and vehicles. Works at the Rowe Street site were not conducted under an OHS Management Plan or Asbestos Management Plan specifically designed to manage and mitigate any risks to workers and surrounding residents.<sup>229</sup>

206. A local Numurkah resident wrote to all Councillors on 28 April 2020 registering concern that the Rowe (sic) Street Basin which was being excavated was known to be a contaminated site. She said that she had notified the EPA which could not

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<sup>224</sup> Safet Now Consulting Report dated 23 July 2020, 16-17.

<sup>225</sup> SMEC Report dated 5 February 2020, 5, 6, 19, 28,.

<sup>226</sup> SMEC Report dated 5 February 2020, 5, 19, 20.

<sup>227</sup> SMEC Report dated 5 February 2020, 30.

<sup>228</sup> ASU and Mangan v Moira Shire Council (VID642 of 2022), Statement of Claim filed 28 October 2022, paragraphs 27-28; Defence filed 23 December 2022, paragraph 27-28.

<sup>229</sup> Safet Now Consulting Report dated 23 July 2020, 7-8.





confirm that the carrier removing multiple B-double loads of landfill from the site was licensed to carry or dispose of potentially asbestos infected material.<sup>230</sup>

207. The then CEO Mr Henderson replied on 28 April 2020, copying his email to all Councillors, rejecting her claim that the Shire was undertaking works in breach of EPA guidelines He asked if she had any evidence to support her allegation beyond “a casual call to the EPA” and stated that “in the interim works will continue as planned”.<sup>231</sup>
208. On 4 May 2020, WorkSafe issued an entry report with respect to the Rowe Street site. The Report noted the potential presence of friable Asbestos Containing Materials at the Rowe Street site and that further excavation at the site had ceased until further notice.<sup>232</sup> MSC’s Workplace Health and Safety Coordinator, subsequently emailed MSC project staff stating:
- “While the matter as to the identification of the asbestos material (possible friable material) is under investigation, the sites at Rowe Street, Strathmerton and Tungamah must not be disturbed.”<sup>233</sup>
209. On 13 May 2020, the EPA attended the Strathmerton site<sup>234</sup> and issued a Minor Works Pollution Abatement Notice (PAN) on 20 May 2020. The PAN:
- 209.1. Noted that the EPA had identified the presence of friable asbestos within the soil taken from the Rowe Street site and that there was a risk the soil could blow into adjacent residential properties;
- 209.2. Requiring the Council to install controls to prevent potential asbestos fibres from migrating and to prevent public access; and
- 209.3. Required that by 29 May 2020 the Council provide a report to the EPA demonstrating compliance with the requirements in the PAN”.
210. In June 2020, Identifibre, Environmental and Asbestos Testing consultants, issued reports for the Rowe Street, Strathmerton and Tungamah transfer sites which

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<sup>230</sup> Email from Janene Champion to all MSC Councillors at 12.36pm on 28 April 2020, contained within email from Mark Henderson to Janene Champion at 3.41pm on 28 April 2020.

<sup>231</sup> Email from Mark Henderson to Janene Champion at 3.41pm on 28 April 2020.

<sup>232</sup> Worksafe Entry Report - Cobram Office Meeting - 4 May 2020, page 2.

<sup>233</sup> Safet Now Consulting Report dated 23 July 2020, page 20.

<sup>234</sup> EPA Inspection Report dated 14 May 2020.



identified the presence of asbestos and recommended remediation works.

Mr Mangan has stated that he was excluded from this process.<sup>235</sup>

211. The EPA PAN was withdrawn on 9 June 2020 following remedial works carried out by Council at the Strathmerton and Tungamah sites as recommended by Identifibre. The clean-up works dealt essentially with removal of surface contamination by asbestos debris with 100 millimetres of clean fill spread over the remediated areas.
212. However on 30 July 2020, Mr Mangan emailed the Council's Workplace Health and Safety Coordinator advising that he had attended the Tungamah site that day, that there were still large amounts of exposed waste and what appeared to be asbestos protruding through the surface and that the site was very dry and windblown. He questioned the suitability of reopening the site and believed that the site should be assessed as safe and suitable for reopening prior to any works being done.
213. At a Council briefing in mid-August 2020, Mr Henderson was questioned by Councillors about the Rowe Street excavation. One of the Councillors emailed Mr Henderson stating that waste from the Rowe Street site, which is a former landfill, is categorised as prescribed industrial waste category C and as such can only be disposed of at sites licensed to accept it.<sup>236</sup>
214. The Councillor also stated that "It was mentioned during discussions that Cosgrove would have been so much more expensive. Cosgrove or Bowser were the legal way to go. What will the current exercise cost the Shire".<sup>237</sup>  
On 24 August 2020, Mr Henderson emailed all Councillors advising that EPA had issued clean up notices for all three sites and the requirements that Council must comply with.<sup>238</sup>
215. On 31 August 2020, the same Councillor again wrote to Mr Henderson expressing dissatisfaction that he had not explained "why the contaminated soil was not taken to Cosgrove in the first instance, especially since it has been stated that drilling

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<sup>235</sup>ASU and Mangan v Moira Shire Council (VID642 of 2022), Statement of Claim filed 28 October 2022, paragraph 7.

<sup>236</sup> Email from Marie Martin to Mark Henderson and ors at 12.21pm on 17 August 2020.

<sup>237</sup> Email from Marie Martin to Mark Henderson and ors at 12.21pm on 17 August 2020.

<sup>238</sup> Email from Mark Henderson to all Councillors at 2.56pm on 24 August 2020 contained within email from John Beitzel to Mark Henderson at 6.35pm on 24 August 2020; see also email update from Mark Henderson to all Councillors at 8.25am on 18 August 2020 contained within email from Mark Henderson to Robyn Bonaddio at 8.34pm on 18 August 2020.



and soil samples had been carried out and indicated contamination”.<sup>239</sup> The Councillor also questioned the true costs of the project. In reply, Mr Henderson said that:

“based on the amount of material excavated and the Cosgrove gate price the budget approved by Council would have been insufficient. On a simple cost benefit analysis, the project would have been abandoned at that stage. In hindsight I would have much preferred that but we are now working through the consequences and endeavouring to limit our exposure to costs whilst achieving environmental sign off”.<sup>240</sup>

216. Mr Henderson’s reply to the Councillor makes no reference to an Audit Review which had already commissioned in July 2020 from SafeTNow Consulting:

216.1. "To understand the nature of the project undertaken at the Rowe Street drainage basin.

216.2. To understand the steps taken by key personnel to manage the operational hazards associated with the Rowe Street drainage basin.

216.3. To review documentation associated with the project undertaken at the Rowe Street drainage basin.

216.4. To identify and propose recommendations for future projects of this nature”.<sup>241</sup>

217. The report confirms that pressure was applied to take the contaminated fill at the Cobram site and that a Class B Asbestos removalist was engaged to remove asbestos at the Rowe Street drainage basin. The report states that the Asbestos removalist did not establish an Asbestos Control Plan, notify WorkSafe Victoria or ensure that asbestos waste was disposed of to a premises licensed by the EPA to dispose of asbestos waste.<sup>242</sup>

218. The report also indicated that a number of key personnel at the Council had not read the SMEC report (“the day WorkSafe came was the first I saw of the SMEC

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<sup>239</sup> Email from Marie Martin to Mark Henderson and ors at 12.01pm on 31 August 2020.

<sup>240</sup> Email from Mark Henderson to Marie Martin at 10.30am on 1 September 2020 contained within email from Mark Henderson to Robyn Bonaddio at 12.43pm on 1 September 2020.

<sup>241</sup> Safet Now Consulting Report dated 23 July 2020.

<sup>242</sup> Safet Now Consulting Report dated 23 July 2020, 7-8.



report”),<sup>243</sup> that although there was knowledge of the presence of asbestos at Rowe Street, there was confusion about the specific requirements of the Occupational Health and Safety Act and no Health and Safety Coordination Plan had been established.

219. The report also drew attention to the internal pressures on staff because of the number of projects in progress and the potential for poor or rushed decisions. (“The capital team is very busy – no-one is being helpful – people are blowing (sic) between departments – arguing about who get the job and having to justify who are using and why – mind is off on procurement issues and not on the job – creates additional pressure”).<sup>244</sup>
220. The documentation examined by the Commission paints a vivid picture of a project that was inadequately scoped and funded, that did not adequately consider or manage the risks to the workforce and the community of excavating a site known to be contaminated with waste likely to contain asbestos and which proceeded even when the presence of bonded asbestos fibre (ACM) had been identified.
221. Staff directly involved in the project were confused about their responsibilities under the Occupational Health and Safety Act, some worrying more about the costs than the risks and arguing about who was responsible for what.<sup>245</sup> Transferring the excavated, contaminated soil to the Tungamah and Strathmerton sites compounded a problem of the Council’s own making with potential further asbestos exposures to the workforce and the community.
222. When interviewed by the Commission the former CEO said he knew that the site would have residual asbestos content, that there was widespread knowledge within the organisation that the site was contaminated.<sup>246</sup> The Commission drew to his attention that three Councillors had opposed excavation of the site when it had previously been proposed in 2014.<sup>247</sup>
223. In this regard, the Commission has received a letter that was sent from former Councillor Kevin Bourke to the then acting CEO of Moira Shire Council on 14 April 2014. In that email, former Councillor Bourke raises concerns about the Rowe

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<sup>243</sup> Safet Now Consulting Report dated 23 July 2020, 4 and 26.

<sup>244</sup> Safet Now Consulting Report dated 23 July 2020, 9 and 29.

<sup>245</sup> Safet Now Consulting Report dated 23 July 2020, 24-29.

<sup>246</sup> File Note of interview with Mark Henderson conducted on 2 February 2023, 17.

<sup>247</sup> File Note of interview with Mark Henderson conducted on 2 February 2023, 10.



Street site, the excavation of which he described as being "an expensive and troublesome project, considering the fact that the current Basin is believed to be on a former Tip site, and any expansion of this Basin could trigger unwanted and unforeseen and very expensive issues".<sup>248</sup> When interviewed, former Councillor Bourke said that this issue was raised at a briefing in 2014, noting the possibilities of asbestos and chemical contamination at the site. Wendy Buck, now on Council, stated that she also gave advance warning to Council that the site was contaminated.<sup>249</sup> Five of the Councillors on the 2014 Council were on Council in 2019, when the budget for the Rowe Street project was approved.

224. The former CEO confirmed that the estimated cost of \$1 million to transfer the contaminated soil to the licensed facility at Cosgrove was the main reason this option was not taken up.<sup>250</sup> He told the Commission that he did not know who had made the decision to transfer the excavated soil to the unlicensed sites at Tungamah and Strathmerton.<sup>251</sup> However he acknowledged that the project was of strong public interest warranting CEO oversight.<sup>252</sup>
225. The former CEO conceded that he knew that the soil needing to be removed from Rowe Street was likely to have some asbestos residue. He said there was widespread knowledge within the organisation that the material was contaminated and that the Council administration needed to come up with a management solution for it. In the former CEO's words, the solution was to "work with the EPA and get a result that its prepared to sign off on".<sup>253</sup>
226. When questioned by the Commission as to whether EPA approval had been sought prior to the excavation and removal of the contaminated soil from the Rowe Street Basin, the former CEO said "I don't think the EPA would ever have allowed us to do that".<sup>254</sup> When the Commission asked whose decision it was to transfer the soil containing asbestos to unlicensed facilities, the former CEO said it would have been someone between the Project Manager, Construction Manager and the General Manager and that, as to the specifics of which individual, he said he was not privy to that.<sup>255</sup>

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<sup>248</sup> Letter from Kevin Bourke to Peter Bertolus dated 14 April 2014.

<sup>249</sup> File note of Wendy Buck dated 8 December 2022, 2 - 3.

<sup>250</sup> File Note of interview with Mark Henderson conducted on 2 February 2023, 23.

<sup>251</sup> File Note of interview with Mark Henderson conducted on 2 February 2023, 19.

<sup>252</sup> File Note of interview with Mark Henderson conducted on 2 February 2023, 20.

<sup>253</sup> File Note of interview with Mark Henderson conducted on 2 February 2023, 22.

<sup>254</sup> File Note of interview with Mark Henderson conducted on 2 February 2023, 18.

<sup>255</sup> File Note of interview with Mark Henderson conducted on 2 February 2023, 19.



227. The Commission finds it hard to accept, having regard to the public interest and the estimated cost of \$1.0 million for transfer of the contaminated soil to Cosgrove, that the former CEO would not be fully aware about details of the decision to transfer the contaminated soil to the Strathmerton and Tungamah transfer sites. When asked by the Commission whether the transfer of asbestos contaminated waste to unlicensed sites was a failure of governance, he said that “the CEO’s role is not governance, that is the role of the Council”.<sup>256</sup>
228. The former CEO also told the Commission that he had briefed the incoming CEO about the project<sup>257</sup> and that her only question was the size of the penalty that might be incurred from the EPA.<sup>258</sup> He also said she had later advised him that the EPA had given the project a clean bill of health.<sup>259</sup>
229. In September 2021, Moira Shire accused Mr Mangan of serious misconduct, suspended him from work and initiated an investigation.<sup>260</sup> On 7 April 2022, the ASU filed an application on his behalf in the Federal Court of Australia to deal with a dispute in accordance with the Dispute Settlement Procedure.<sup>261</sup> Mr Mangan has been unable to attend the Court for health reasons.
230. The Commission is of the view that the disciplinary action taken against Mr Mangan is directly related to the stance he took in opposing the illegal dumping of contaminated soil at the Cobram landfill, its transfer to other unlicensed sites for which he was responsible. The Commission notes that Mr Mangan is widely respected (“a waste guru”) within the waste management sector.
231. The Commission has also established from its interviews with Mr Mangan, other key managers and staff that a number of the allegations made against the Coordinator, including those related to the unlawful use of Council documents, are unsound. The Council’s treatment of Mr Mangan is further examined later in this Report.
232. The Commission understands that in the aftermath of these events, the Shire is now taking action to clean up all three sites and that the asbestos contaminated soil will be taken to a facility licensed to receive and treat it. The Commission has

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<sup>256</sup> Recording of interview with Mark Henderson conducted on 2 February 2023.

<sup>257</sup> File Note of interview with Mark Henderson conducted on 2 February 2023, 4.

<sup>258</sup> Recording of interview with Mark Henderson conducted on 2 February 2023.

<sup>259</sup> File Note of interview with Mark Henderson conducted on 2 February 2023, 14.

<sup>260</sup> Letter to J.Mangan 2 September 2021.

<sup>261</sup> ASU and Mangan v Moira Shire Council (VID642 of 2022), Statement of Claim filed 28 October 2022.



been further advised that the cost of clean-up and removal could be of the order of \$800,000 per site, a potential cost to the Shire's ratepayers of around \$2.4 million well in excess of the estimated cost of \$1 million had it been transferred in the first instance to the nearest licensed facility at Cosgrove.

233. Had appropriate budget provision been sought and approved to deal properly with the known risks of excavating and transporting the contaminated material and processing it at the nearest licensed site at Cosgrove, the Shire's workforce, contractors and the Moira residents would not have been potentially exposed to asbestos.
234. The former CEO told the Commission that a "a project of that cost would never have got up".<sup>262</sup> In an email dated 1 September 2020 to Cr. Martin, he wrote:

"based on the amount of material excavated and the Cosgrove gate price the budget approved by Council would have been insufficient. On a simple cost benefit analysis the project would have been abandoned at that stage. In hindsight I would have much preferred that but we are now working through the consequences and endeavouring to limit our exposure to costs whilst achieving environmental sign off."<sup>263</sup>

235. The former CEO's comments, made with the benefit of hindsight, serve to confirm that cost was the driving factor in the decisions that were made, outweighing the public interest in the safe and compliant removal of the contaminated soil to an appropriately licensed facility.
236. The Commission considers that the Council's actions in excavating and transferring asbestos contaminated waste to the Tungamah and Strathmerton waste transfer stations which were not licensed to receive it constituted serious misconduct putting Council staff and residents at potential risk of exposure to asbestos.

### **The Council Depots and Outdoors Workforce**

237. The culture of the Council's depots and the outdoors workforce is not uniform. Issues at one depot are not necessarily replicated at another depot. Staff turnover

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<sup>262</sup> File note of interview with Mark Henderson conducted on 2 February 2023, 11.

<sup>263</sup> Email from Mark Henderson to Marie Martin at 10.30am on 1 September 2020 contained within email from Mark Henderson to Robyn Bonaddio at 12.43pm on 1 September 2020.



is high. What they have had in common was the organisational power of Rick Devlin, Manager Operations, who was murdered at his home on 5 August 2021 by a Council depot employee. Mr Devlin managed some 100 staff carrying out duties including maintenance, arboriculture, road re-sheeting, trees, parks, gardens and bins.

238. Mr Devlin was the highest paid manager in the Council earning some \$40,000 more than any other second level manager. He was also the only Manager or General Manager who was not on a fixed-term, performance-based contract. The Commission was left in no doubt by witnesses from the depots and current and former senior managers that Mr Devlin, who had a reputation with Council management for operating a tight financial ship, ran the depots essentially unchallenged by anyone in central administration.
239. The interviews that the Commission has conducted including with a number of depot and other outdoors staff have painted a fraught picture of a deeply divided workforce. It was an environment in which staff were bullied and sworn at, harassed and threatened and sometimes ostracised by being given work to deliberately isolate them from their colleagues.<sup>264</sup>
240. Claims of misconduct were regularly made against staff not in favour to a human resources department that generally deferred to the Manager Operations, Mr Devlin, when depot and outdoors staff were involved. Staff who were the subject of false accusations and disciplinary action have in some case been on WorkCover for extended periods. Other staff have been driven to resign. Violent threats were not uncommon. This was a high risk environment in which employees could be broken by pressure, exclusion and aggression. It had every potential for a major incident to occur, and tragically it did, albeit off site.
241. In May 2020, the Australian Services Union lodged a complaint with IBAC alleging misuse by Mr Devlin and others of Council property and resources for private purposes. The names of the employees whose information formed the basis of the complaint remain confidential. The Commission understands that IBAC determined that the complaints were not of an order that warranted further investigation.

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<sup>264</sup> Investigation Report into Moira Shire prepared by Loss Prevention Group of Australia dated 1 September 2017, 10.





242. On 2 August 2021, three days before the murder of Mr Devlin, a package of anonymous complaints against Mr Devlin and other employees including members of the Council's management group was left on the doorstep of a Councillor. She handed in to Ms Keenan who then discussed with her Executive Leadership Team (ELT) who might have been responsible for the document.<sup>265</sup> However, knowledge of the folder's existence did not long remain within the leadership team. One employee told the Commission that rumours about the names and details in the folder were circulating not only in the Nathalia depot, but also in the other depots.<sup>266</sup>
243. Stopleveline was engaged on 8 September 2021 to undertake an investigation. "The scope of the investigation was not to investigate the allegations contained in the document, but to try and identify the authors of the document". The investigation was provided by Ms Keenan with an unsigned, undated and unaddressed document which she claimed to have found on Mr Devlin's desk on 9 September 2021, a month after his murder.<sup>267</sup>
244. The document, which was patently unreliable, was used in the investigation. Mr John Mangan and Mr David Lee were singled out for investigation. The Report, which the Commission considers largely unfounded in many respects and to have proceeded on an assumption of guilt, was not completed until March 2022. The allegations contained in the document including those against Mr Devlin and current senior members of staff have never been investigated.<sup>268</sup> The unfounded claims against Mr Mangan and Mr Lee and their consequences are examined later in this Report.
245. The long and convoluted history of complaints and investigations into workforce behaviours in the depots and in other outdoor work locations should have prompted successive CEOs and senior managers to take action to address the increasingly obvious health and safety risks. An investigation report was undertaken in 2017 into "alleged workplace misconduct such as bullying, criticism and ridicule and other Occupational Health and Safety breaches".<sup>269</sup> All of the parties involved worked at the Nathalia depot. The Report was provided to

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<sup>265</sup> Stopleveline Report Allegations against Mr John Mangan and Mr David Lee; 'Official complaint', undated and unsigned.

<sup>266</sup> File note of interview with Troy Metzner dated 22 December 2022, 9-10.

<sup>267</sup> Transcript of interview with Clare Keenan on 12 January 2023, 214.

<sup>268</sup> Transcript of interview with Clare Keenan on 12 January 2023, 208.

<sup>269</sup> Investigation Report into Moira Shire prepared by Loss Prevention Group of Australia dated 1 September 2017.



Mr Brant Doyle then Manager Organisational Development and now the immediate former Director Corporate, Governance and Performance.

246. The Report found a “high level of dysfunction and distrust among the workforce at the Nathalia depot. It is apparent that there are significant behavioural issues by certain people at the depot and that this filters through to others who believe they can behave similarly. We note that people have expressed they would 'punch someone' in the head if things said to them were similar to the allegations made during this investigation. We draw this to your attention as being a possibility should behaviour patterns not improve”.<sup>270</sup>
247. In response to the Report, Mr Devlin sent an email to his managers and human resources stating that they had a major cultural issue that they needed to deal with. Mr Devlin stated, "It is my believe (sic) that as leaders we have let this go on for too long and it has probably been festering for a couple of years". Mr Devlin requested that his managers and human resources "have a think" and that he would be meeting individually with them and as a team to create a plan to "initiate cultural change at the Nathalia depot".<sup>271</sup>
248. However, the Commission has not seen any evidence of action being taken by Council administration then or in the intervening five years prior to the death of Mr Rick Devlin to address these deep seated antagonisms and aggressive behaviours at the Nathalia depot or elsewhere.
249. Ms Keenan told the Commission that her “take” in the context of the murder of Mr Rick Devlin, was that Mr Paterson was "someone who had some personality problems” and that she did not see Nathalia as a "problem depot”.<sup>272</sup> The Commission’s assessment is that the murder was not just about someone with personality problems. It came as the tragic end point of a history of conflict between Mr Paterson and Mr Devlin and other depot employees. It was the worst possible outcome of extended workplace conflicts, involving bullying and threats, leading to Mr Paterson being falsely accused of the theft of a small quantity of kerosene.

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<sup>270</sup> Investigation Report into Moira Shire prepared by Loss Prevention Group of Australia dated 1 September 2017, 11.

<sup>271</sup> Email from Rick Devlin to Gary Hodgkiss and ors dated 26 October 2017.

<sup>272</sup> Transcript of interview with Clare Keenan on 12 January 2023, 121.



250. It has been the practice for decades that depot employees working with tar are able to take a small quantity of kerosene home to get the tar off their clothes, shoes and car. The allegation was not substantiated but Mr Paterson, as happened with several other falsely accused employees, was stood down and eventually went onto WorkCover until finally required to return to work the day after Mr Devlin's murder.
251. It is open to question whether this final pressure point would have been reached had the Council administration not rejected out of hand a request by Mr Paterson fifteen months earlier for a voluntary redundancy involving a \$25,000 payout.<sup>273</sup> Such requests were not uncommon and other employees had received similar redundancy payments.
252. The murder of Mr Devlin was in the view of the Commission, a tragic and potentially preventable catastrophe. It occurred in the context of a toxic work environment in which bullying, abuse, ostracism and threats of violence were commonplace. The distance from threats of violence to actual violence is not always obvious until it happens.
253. The views expressed to the Commission by Ms Keenan about the Nathalia depot and the death of Mr Devlin might have been understandable at the time of Mr Devlin's death so soon after taking up the role as CEO of Moira.
254. Nearly eighteen months later they are much less understandable. Several key senior executives at the time of the murder and other senior staff including the Team Leader Workplace Health and Safety were well aware of the serious health and safety issues in the depots, especially but not only at, Nathalia.
255. Ms Keenan cannot be held in any way responsible for the failure of past administrations to ensure a safe working environment in the Council's depots. However, having regard to Ms Keenan's statement, the Commission would expect that an incoming Chief Executive Officer, confronted with the murder of an employee by another employee, would make every effort to be thoroughly briefed by her senior officers and other employees about that work environment. The Commission did not need to make any extensive enquiries to be quickly aware of the nature of that environment and the damage it had wrought on the workforce.

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<sup>273</sup> Transcript of interview with staff member on 20 January 2023, 33-34.



256. Ms Keenan told the Commission that she had retained Mr Devlin's diaries that had been removed from his office after his death. She gave no explanation as to why they had not been handed to the Police or returned to his family. She said that there "was almost nothing... in them".<sup>274</sup> The diaries were provided to the Commission after issuance of a notice. The Commission is most concerned to have discovered that they do contain significant entries and other documents that are relevant to the Commission's Inquiry. They may also be relevant to other authorities and the Commission will deal with them appropriately.

### **Human Resource Management - Case Studies in Mistreatment**

257. The present CEO and former administrations have not been well served by their organisation development and human resources managers who failed to ensure a safe environment in the depots and to act professionally and without fear or favour in the best interests of the organisation and its employees. One long serving employee told the Commission that the Council's human resources department was "in the pocket" of Mr Devlin.<sup>275</sup>

258. One consequence of these failures is that the costs of Council's Workers Compensation claims are predicted to increase from \$130,000 in 2020-21, to \$811,000 in 2020-22 and to \$2.25 million in 2023-24. It is also predicted that Council's Workers Compensation Premium will increase from \$265,000 in 2020-21, to \$362,000 in 2022-23 and to \$495,000 in 2023-24.

259. The Commission's examination of human resource management practices at Moira Council has found them to be often demeaning of employees, inequitable, unlawful and lacking professional judgement and expertise. This has made for a highly disputatious workplace, very high turnover rates (currently in excess of 23%) excessive work cover claims, serious personal trauma in some cases and a deep sense of anxiety and unease among employees.

### **Abuse of the Stand Down Power**

260. The employer's stand down power has been used almost automatically and immediately upon notification of a discipline matter. It has been used for both serious and non-serious conduct. The condition precedent for the legitimate exercise of such a power is to prevent any further infraction or serious misconduct.

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<sup>274</sup> Transcript of interview with Clare Keenan on 12 January 2023, 217-218.

<sup>275</sup> Transcript of interview with staff member on 20 January 2023, 37.



This has been almost invariably absent from the matters in which the power has been used by Moira Shire Council.

261. In contrast, where the exercise of the power was unequivocally justified in an egregious and serious breach of the procurement system, the stand down power was not exercised until months later. This left the procurement system at continuing risk, during which time the misconduct was repeated.<sup>276</sup>

### ***The requirement to be satisfied of a Prima Facie Case***

262. Human resource management has not, as a matter of course, taken steps to satisfy itself of a "prima facie" case in complaints about a serious breach of discipline before proceeding with stand-down notices.
263. A complaint was made by an employee four months after his departure from the workplace against three of his former fellow workers.<sup>277</sup> These allegations were not conveyed to those employees until nine months after his departure. All the allegations were uniformly minor except for one. No effort was made by human resources to confirm a prima facie case from the complainant before any investigation was commenced. This important verification process was never done.
264. The periods of stand downs were often protracted. In one case the stand down and Workcover period were still in place after some 60 weeks.<sup>278</sup> Periods in excess of 12 months are not unusual and months often elapse with employees at home on full pay.

### ***Denial of Natural Justice: Failure to supply particulars***

265. The stand down letters to employees often lacked any detailed information about the alleged discipline breach. To the extent they did they were often so generalised that it was impossible for the employee to know even the nature of the complaint.
266. This is a fundamental denial of natural justice. In one case after nearly 12 months of stand down and exoneration by an independent investigator the worker was still

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<sup>276</sup> See Chapter 6: Serious Misconduct in Procurement.

<sup>277</sup> Statement of David Roberts dated 3 August 2022.

<sup>278</sup> See e.g. Stand-down letter from MSC to Coordinator of Facilities Maintenance dated 21 October 2021; Termination letter from MSC to Coordinator of Facilities Maintenance dated 12 December 2022.



refused detailed information as to the nature of the misconduct.<sup>279</sup> While the Commission understands that the worker was provided with correspondence from the Council in July 2022, the details of allegations in that correspondence were generalised and lacked content.

267. The Shire of Moira's approach to the conduct of disciplinary proceedings is misconceived. The HR Manager admitted that she initiated proceedings on the basis that the Shire is under an obligation to advise an employee of an investigation, irrespective of any prima facie analysis. This a misconception of the rules of natural justice. The confusion this view has engendered is exemplified in correspondence from Council dated 11 February 2021. Following an occasion of just such a process by an external investigator, where complainants were interviewed, it was asserted that the employee "was not cleared of the allegations as there was no investigation or findings made".<sup>280</sup>
268. The failure to supply particulars of allegations during protracted periods of stand down is the reason for the numerous successful WorkCover claims by employees. WorkCover has regularly refused to apply the discipline exemption provision to claims under the *Workplace Injury Rehabilitation and Compensation Act 2013*. It has found that the anxiety depression and heartache caused to employees by such processes (including one employee in a near suicidal state) justified the grant of many claims in these circumstances. The increase in the number and cost of annual WorkCover claims since 2020 and the recent substantial increase in WorkCover premiums is directly related to these disciplinary processes.

### **External Investigations**

269. Except in the case of serious misconduct where a prima facie case has been established to warrant stand down, Human Resource Management is under an obligation of natural justice to advise the nature and content of any allegations before any person is stood down. This involves establishing the what, where and when of the allegations obtained from the relevant complainants and witnesses. Investigations at MSC are almost invariably conducted by outside investigators. Consequently, employees are faced with months of uncertainty arising from allegations about which they have little or no proper knowledge or understanding.

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<sup>279</sup> File note of interview with Trevor Harbor on 20 December 2022, 1.

<sup>280</sup> See Chapter 6, Case Study 5 - David Lee.



270. Why such expensive and protracted processes are used is inexplicable. If the natural justice obligations of impartiality are a consideration, it needs to be understood that the courts recognize the limits of the employer's obligation in this regard. This does not relieve human resources personnel from acting with integrity and fairness in the interests of the wider organisational stakeholders and responding professionally and appropriately to management pressure.
271. Investigations of this kind should, in the ordinary course, be carried out by competent, experienced human resources staff under the direction of the Manager Human Resources. Reliance on external investigators diminishes the capacity and expertise of Council's own human resource managers and staff. It also diminishes their ownership and accountability for disciplinary outcomes.

### ***Compromised Professional Impartiality***

272. Fair dealing with employees subject to disciplinary processes has been subverted when human resource management has been unwilling to support investigation outcomes or when line managers have sought to undermine the outcomes when disciplinary actions against an employee have not been substantiated. The case of Mr Harbor provides an example of this.
273. Eleven months after he had been stood down and allegations of serious misconduct had been withdrawn, the employee was required in correspondence from the Shire of Moira dated 19 July 2022 to transfer out of his workplace. The justification advanced in the letter was Moira's obligation to ensure safety in the workplace. This was tantamount to victimisation of the employee because of Council's own failure to ensure safety in the workplace where he had worked for seventeen years.<sup>281</sup>
274. In another case, the Manager Human Resources told the Commission she was directed to initiate disciplinary action against accused employees by the Manager Operations.<sup>282</sup> The Commission accepts that she was directed. However, the Manager Operations was clearly conflicted because the allegations were made by his son. Neither Manager appears to have taken any action in respect of these conflict of interest. This was in breach of their professional and ethical obligation to act fairly, impartially and in good conscience.

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<sup>281</sup> Letter from Kristina Skipper to Trevor Harbor dated 19 July 2022.

<sup>282</sup> Transcript of interview with Kristina Skipper on 6 December 2022, 10.



### *Designation of Code of Conduct Infractions as Serious Misconduct*

275. There is also an unwarranted readiness to designate any misconduct at Moira Council as serious misconduct. It appears virtually no judgement is exercised as to whether any allegation falls properly to be considered as serious misconduct. The Moira Shire Employee Code of Conduct fails to differentiate misconduct from serious misconduct in any way that is apposite or useful for this purpose. The Code of Conduct needs to be re-written comprehensively.
276. Inappropriate, crude language and bad behaviour have been regular occurrences but rarely of sufficient seriousness as to warrant termination of the contract of employment. In almost all instances they would not constitute conduct that the Fair Work Commission would consider serious misconduct warranting dismissal.
277. However, alleged serious misconduct has not been treated as such. In one instance, the employee was not informed of the allegation until months later when human resources purported to advise the employee “informally” of the allegation. It was suggested to the employee he should be grateful for this approach.
278. Upon the occurrence of an alleged retaliation incident, the Shire sought to again raise the earlier matter claiming serious misconduct and a “pattern of behaviour”. The employee was stood down. Neither allegation was serious misconduct. It is difficult to understand this approach unless it is intended to intimidate. If serious misconduct occurs it should be treated as such immediately.
279. Where there was a case of *actual* serious misconduct in the subverting of the procurement systems, in failing to comply with the policies and procedures, little or nothing was done. There was no summary termination of employment as is required by serious misconduct, and the employee was free to repeatedly breach the procurement policies.<sup>283</sup>
280. The Commission has described at some length the failings and inconsistencies of the disciplinary processes employed by human resources management at Moira Council because they have eroded confidence in Council leadership, destabilised the workforce and, perversely, heightened the health and safety risks for staff in the Council’s depots and outdoor workforce. They constitute a persistent disregard for fairness and equity and a willingness when required to suborn due process to

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<sup>283</sup> See e.g. Email from Lisa Knight to Amanda Chadwick at 3:45pm on 11 March 2021; Transcript of interview with Lisa Knight on 13 December 2022, 13-30; see also Chapter 6: Serious Misconduct in Procurement.





the dictates of line managers pursuing their own agendas. Over a period of eight years, Moira Shire Council spent \$2.5 million on legal fees. To the extent that fees for legal advice could be readily identified, around 68% of that amount was spent on matters arising in human resource management.

281. The following examples highlight the incestuous, ugly culture that has put employees at risk in the depots. They also show how the flawed discipline processes applied by human resources management worsened an already volatile and potentially dangerous environment in the Council depots and other outdoors locations.

### **Case Study 1: Mr David Roberts**

282. Two of Mr Devlin's sons were employed in the Numurkah depot. The Council has no separate policy on the employment of family members. However, the Employee Code of Conduct provides that employees must not in any way attempt to influence a recruitment process if an applicant is known to them. If recruitment would result in the applicant reporting to a family member or friend, this relationship must be disclosed to the hiring manager and the Organisational Unit to determine whether this is appropriate.<sup>284</sup> This policy is wholly inadequate to address real conflicts that arise from family members reporting up and down the line of responsibility.
283. One of the sons, Stephen Devlin, wrote to Human Resources four months after leaving the organisation alleging theft and inappropriate conduct by Mr David Roberts the Team Leader Parks and Gardens Maintenance West, based in Numurkah.<sup>285</sup> However, these allegations were not conveyed to Mr Roberts and to other employees until nine months after Stephen Devlin's departure. Rick Devlin directed the HR Coordinator, Ms Skipper to investigate the allegations made by his son, Stephen Devlin. Ms Skipper said that she raised a potential issue about Rick Devlin directing her to investigate allegations made by his son but was told to act quickly at the time.<sup>286</sup> Accusations of misconduct were also made against two other employees in the team.

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<sup>284</sup> Moira Shire Employee Code of Conduct adopted November 2017, 11 [3.8]; Statement of David Roberts dated 3 August 2022; Memo from Rick Devlin to Andrew Close (General Manager Infrastructure) regarding new letters of offer for temporary staff.

<sup>285</sup> See Letter from MSC to David Roberts dated 16 July 2019 contained in attachments to Statement of David Roberts dated 3 August 2022.

<sup>286</sup> Transcript of interview with Kristina Skipper dated 6 December 2022, 9.



284. The allegations against all three employees were eventually not substantiated but the processes followed by Ms Skipper were Kafkaesque. In July 2019, David Roberts was on long service leave when he received a phone call from her asking to meet with him and the then Workplace Health and Safety Coordinator in a public park in Numurkah.<sup>287</sup> Mr Roberts was with his son. Ms Skipper handed him a letter alleging unspecified breaches of Moira Shire Council's Employee Code of Conduct and other workplace policies.
285. He was advised that an independent investigator would conduct a workplace review and provide a report into the allegations against him. The letter advised him that the review process was strictly confidential and required him to attend a meeting on 17 July 2019.<sup>288</sup> He was visibly distressed and was joined by his wife who was nearby with her mother. The OHS manager who accompanied Ms Skipper said that he made his disapproval of this process clear to her.<sup>289</sup>
286. When questioned why she had delivered the letter in the park to Mr Roberts, Ms Skipper said that it was against her advice to either Mr Close, who was then General Manager of Infrastructure, or Mr Devlin. She said she needed to follow a lawful direction.<sup>290</sup>
287. Mr Roberts was then asked to attend a meeting with the investigator before he had received any details of the allegations. He declined to do so. One week later he received a letter setting out the allegations.<sup>291</sup> On 29 July 2019 he attended a meeting with the investigator, despite that he was on long-service leave at the time.<sup>292</sup> On 14 August 2019 he received a letter from Council advising that the allegations were unsubstantiated.<sup>293</sup>
288. The Commission has examined the allegations and the investigators report. Had Ms Skipper or her delegate waited to speak first with the person who had made the allegations and carried out the most basic of checks before engaging an external investigator, the distress caused to the employee and his family could have been avoided.

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<sup>287</sup> Transcript of interview with Workplace Health and Safety Coordinator dated 12 January 2023, 95.

<sup>288</sup> Letter from Andrew Close to David Roberts dated 10 July 2019

<sup>289</sup> Transcript of interview with Workplace Health and Safety Coordinator dated 12 January 2023, 95.

<sup>290</sup> Transcript of interview with Kristina Skipper dated 6 December 2022, 14.

<sup>291</sup> Letter from Andrew Close to David Roberts dated 16 July 2019

<sup>292</sup> Statement of David Roberts, dated 3 August 2022, 2.

<sup>293</sup> Letter from Andrew Close to David Roberts dated 14 August 2019.



289. One of the allegations was that Mr Roberts and his colleague Mr McPherson had driven into the depot with their wives and taken away trailer loads of soil.<sup>294</sup> Quite apart from the unlikelihood of such an event occurring in broad daylight in front of other employees, their cars did not have a towbar.<sup>295</sup> Other allegations were minor (e.g. Mr Roberts did not adequately mentor the complainant) and were most unlikely to be substantiated. The allegations against the other two staff members were also found to be unsubstantiated.<sup>296</sup>
290. Mr Roberts had not previously been the subject of any complaint during his twenty-year working career and was badly affected by his experience. One of the employees was still receiving counselling support three years later. The actions taken against all three employees were an abuse of process and contrary to any notion of natural justice.

### **Case Study 2: Mr Trevor Harbor**

291. On 9 August 2021, Mr Trevor Harbor, another employee at the Nathalia depot received a letter from the Council suspending his employment pending a workplace investigation.<sup>297</sup> The letter alleged that he may have engaged in serious misconduct and stated that the workplace investigation would investigate comments he had allegedly made to his colleagues, regarding firearms in his possession and alleged serious breaches of confidentiality.<sup>298</sup>
292. As in the previous case above, the same pattern was followed without any details of the allegations and a requirement of strict confidentiality. It was not until 23 November 2021, three months later that the Council again wrote to him advising that an independent investigator had been engaged.<sup>299</sup> The letter advised that the investigator was currently interviewing witnesses, that he would be provided with specific allegations shortly and that he would have the opportunity to provide a response in writing and/or by interview.
293. Nothing further was heard from People and Safety, until representations were made on Mr Harbor's behalf by the ASU. On 19 July 2022, the ASU wrote to

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<sup>294</sup> Letter from Andrew Close to David Roberts dated 16 July 2019.

<sup>295</sup> File note of witness interview with Trevor Harbor dated 20 December 2022, p 6.

<sup>296</sup> Transcript of interview with Kristina Skipper dated 6 December 2022, 15.

<sup>297</sup> File note of interview with Trevor Harbor dated 20 December 2022, 3; Letter from Moira Shire to Trevor Harbor dated 19 July 2022,

<sup>298</sup> Letter to Trevor Harbor from the Moira Shire Council dated 9 August 2021, 3.

<sup>299</sup> Letter to Trevor Harbor from the Moira Shire Council dated 9 August 2021, 7.



Ms Skipper having been advised by the employee that he had been requested to attend a meeting to discuss his return to work.<sup>300</sup>

294. The ASU letter noted that he had been stood down for eleven months with little if any contact from People and Safety or updates on the progress of the investigation and that no explanation had been offered or outcomes advised. The ASU required, on his behalf, an agenda for the meeting, written confirmation that the allegations had been fully withdrawn and the basis for the decision, and an outline of the return to work processes to ensure his health and safety.<sup>301</sup>
295. In response the same day 19 July 2022, Ms Skipper wrote to the employee advising that 'The investigator met with staff and determined there was insufficient information and evidence to proceed with the investigation. Accordingly, the allegations as outlined in our letter dated 19 August 2021 have been withdrawn'. The letter then stated that "we have an obligation to provide you with a safe workplace. As such, to meet our obligation it was suggested to you last week that your position should be transferred from Nathalia depot to Numurkah depot".<sup>302</sup>
296. At a meeting in the Cobram Office on or about 4 August 2022, attended by Graham Henderson, Manager Operations, Jeff Dingli, Trevor Harbor and Ms Skipper, Mr Harbor asked twice what it was that he was alleged to have done and was allegedly told by Ms Skipper that "just because management could not prove what you said does not mean management doesn't believe you didn't say it".<sup>303</sup> Ms Skipper states that she does not remember saying this,<sup>304</sup> however, this evidence derives from a file note prepared by Mr Harbor prior to the commencement of this Inquiry. The Commission considers Mr Harbor's evidence to be credible.
297. Evidence was provided to the Commission that Mr Harbor, who was an ASU delegate, had been ill-treated and abused by several other employees at the Nathalia depot over an extended period of time.<sup>305</sup> It was said of him by another employee that when he got into the union he changed. "He was good for ten years

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<sup>300</sup> Letter from Australian Services union to Kristina Skipper dated 19 July 2022.

<sup>301</sup> Letter from Australian Services Union to Kristina Skipper dated 19 July 2022.

<sup>302</sup> Letter from Kristina Skipper to Trevor Harbor dated 19 July 2022.

<sup>303</sup> File note of interview with Trevor Harbor dated 20 December 2022, 1; File note written by Trevor Harbor dated 10 October 2022, 6.

<sup>304</sup> Submission of Kristina Skipper dated 17 February 2023, par 2(e).

<sup>305</sup> File note written by Trevor Harbor dated 10 October 2022, 4; see also File note of interview with Trevor Harbor dated 20 December 2022, 1.



at least" but now "does everything by the book".<sup>306</sup> It is the Commission's assessment that doing things "by the book" was not depot rules and employees who challenged or complained were unwelcome and victimised.

298. The Commission considers that the treatment of Mr Harbor was a travesty of natural justice. For him to endure eleven months of suspension without any specific allegations being brought and then to be told the allegations were being withdrawn because the investigation could not adduce sufficient evidence is beyond any pretence of fair and equitable treatment. To require that he relocate to another workplace for the safety of himself and his colleagues serves only to confirm the failure to investigate and deal with the underlying health and safety issues in the depot.
299. After the death of Mr Devlin on Thursday 5 August 2021, Mr Harbor became the target of recriminations at the Nathalia depot. Evidence has been given to the Commission that the "whole Nathalia depot were talking about the employee and his guns". "He wouldn't shoot he's not that type of bloke. Didn't think Pado (Mr Paterson) would either. Because we know he's got guns. Someone had just been murdered. Weird shit going through your head".<sup>307</sup>
300. Ms Keenan met with depot staff the following day and was told by the staff present about Mr Harbor's possession of firearms.<sup>308</sup> The Commission established in its interview with Ms Keenan that those present did not tell her the four firearms were those he used in clay target shooting as a twenty six year member of the Hay Club of the Australian Clay Target Shooters Association (ACTA). Neither was she made aware of the long standing ill-feeling of several of those present towards Mr Harbor. Nor was she made aware that a number of those present had engaged in disputes with him as a result of which he had for years been given tasks to isolate him in the workplace. Nor was she told that he was an ASU delegate.
301. On Sunday 8 August at 4:00 pm Mr Harbor received a phone call saying that he needed to attend the Council offices at 7:00 am on Monday 9 August when he was questioned in relation to any knowledge he had of the murder with specific reference to the four firearms that he owned.<sup>309</sup> He and his wife were then required to attend for Police interview in connection with the shooting even though

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<sup>306</sup> File note of interview with Scott Evans dated 20 December 2022, 2.

<sup>307</sup> File note of interview with Scott Evans dated 20 December 2022, 4.

<sup>308</sup> File note of interview with Scott Evans dated 20 December 2022.

<sup>309</sup> File note of interview with Trevor Harbor dated 20 December 2022, 3-4.



Mr Andrew Paterson was arrested and charged with the murder on the Thursday before these events.

302. When asked by the Commission why she had stood the employee down, Ms Keenan said that five to six people at the meeting with depot staff told her that the employee “had been talking about 80 high powered rifles” and she had stood him down because she “was concerned that he was a problem at the depot”<sup>310</sup>. She could not remember what reason she gave the employee for standing him down. Neither could she explain why he remained stood down for eleven months without any reason ever being given to him. She also stated that she expected he would only be stood down for a few weeks.
303. The Commission concluded on the basis of her evidence that Ms Keenan had stood an employee down for eleven months on the basis of malicious depot gossip, without any allegations ever being put to him, and was unaware that he had remained stood down for all of that time. Her behaviour and that of Ms Skipper towards the employee were a gross dereliction of their responsibilities.

### **Case Study 3: Mr Paul May**

304. Mr May was working in the roads crew at the Tungamah depot when in October 2019 he sustained an injury to his shoulder.<sup>311</sup> Physiotherapy arranged through Align Work achieved some improvement, but he was moved to lighter duties at Yarrawonga Parks and gardens for some eighteen months.<sup>312</sup>
305. On 8 July 2021, he was given notice of termination and his employment was terminated on 30 July 2021.<sup>313</sup> The letter claimed that the role in which he had been working was a created rather than ongoing role. However, one month later, a Municipal Maintenance Gardener position was advertised on 30 August 2021. Under the *Equal Opportunity Act 2010* (Vic), Council is required to accommodate injured employees. Mr May made a claim alleging discrimination by reason of its failure of MSC to comply with its obligations under the *Equal Opportunity Act 2010* (Vic) to comply with its obligations to accommodate injured employees.

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<sup>310</sup> Transcript of interview with Clare Keenan dated 12 January 2022, 199.

<sup>311</sup> Letter from Workplace Health and Safety Coordinator to Paul May dated 26 November 2019.

<sup>312</sup> File note of interview with Paul May dated 13 December 2022, 2-3; Initial Report, Occupational Rehabilitation Return to Work Service, Align Worth Health dated 2 July 2020

<sup>313</sup> File note of interview with Paul May dated 13 December 2022.



306. In his anti-discrimination complaint, Mr May claimed a job that he was capable of doing was advertised soon after his termination. He also claimed that MSC had failed to comply with its obligations to formulate return to work plans for him as an injured employee. Mr Doyle who represented the MSC at the mediation of the matter asserted vigorously that return to work plans had been created on three occasions.
307. At the Commission's request, the MSC searched extensively for these plans but none could be produced. There was much talk in emails about the need for these plans but it appears, as is asserted by Mr May, that none was ever actually produced. In her Submissions, Ms Skipper states that Worksafe conducted an investigation into the management of Mr May's Workcover claim and advised that no further action would be taken.<sup>314</sup> However, this is of no utility in circumstances where the Council has been unable to demonstrate that return to work plans were prepared and provided to Worksafe as part of its investigation.
308. The employee signed a deed of settlement for an amount less than three months' pay. He had been a Council employee for thirteen years.
309. The Commission is concerned that Council did not meet its obligations to support the employee with regularly updated Return to Work plans. It is also concerned that he was pressured, without legal representation, to sign the deed of release when it was obvious to MSC that it could not make out a defence to the action.
310. Evidence has been provided to the Commission that some members of the Yarrowonga work depot did not take kindly to a partially injured worker being employed there. Mr May was subjected to incidents of bullying and intimidation by depot staff, including outside his home. Evidence has also been provided to the Commission that the environment in the Yarrowonga depot was toxic with bullying, sexual harassment and drug use.<sup>315</sup> Ms Skipper submits that there were no incident reports or emails received by Council from Mr May relating to incidents of bullying or intimidation.<sup>316</sup> However, the evidence provided by Ms Skipper in support of this submission clearly demonstrates that Mr May had been threatened as follows:

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<sup>314</sup> Submission of Kristina Skipper dated 17 February 2023, par 2(g).

<sup>315</sup> File note of interview with Paul May dated 13 December 2022, 5, Transcript of interview with Workplace Health and Safety Coordinator, 8/9 December 2022, 53, 54.

<sup>316</sup> Submission of Kristina Skipper dated 17 February 2023, par 1(i).



"Hi chops it's doc we have a problem with Paul may an if he comes to my house which he has just told me he will not leaving the same way."<sup>317</sup>

311. The Commission has seen evidence in mobile messages that on 8 December 2020, Ms Skipper's husband requested Mr May to spy and report back on an ASU barbeque the following day. He declined to do so.<sup>318</sup> Ms Skipper has submitted that she was unaware of these messages until after they were sent, that she treated them as a joke and would not compromise her integrity or ask Mr May to compromise his by spying.<sup>319</sup> The Commission understands that Mr May did not treat these messages as a joke, and that Ms Skipper did nothing to disabuse him. At the very least, this created a perception of improper conduct that went uncontradicted.
312. The lack of care shown for Mr May's welfare including the absence of any consistent return to work planning and implementation is consistent with the poor treatment of other physically and psychologically injured employees.
313. The MSC seems unaware of its obligations under the Victorian Equal Opportunity Act and consistently issues letters advising workers that unless they return to work, they will be treated as not being able to perform the inherent requirements of the job and therefore that their employment will be terminated.
314. While such an approach may well meet the obligations of the *Discrimination Act 1992* (Cth), it does not meet the obligations of the *Equal Opportunity Act 2010* (Vic). MSC seems to be under the misapprehension that compliance with the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) is enough to fulfil the wider and more extensive obligations under the *Equal Opportunity Act 2010* (Vic).
315. The Commission notes that Mr May's son was made redundant after suffering workplace injury and has had continuing difficulty in recouping travel expenses.

#### **Case Study 4: Mr John Mangan**

316. On 2 September 2021, John Mangan, the Coordinator - Waste & Recycling at MSC was stood down. The stand down was said to be by reason of serious misconduct. It was not until six weeks later, that Mr Mangan was advised in writing

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<sup>317</sup> Submission of Kristina Skipper dated 17 February 2023, Attachment 14 at p 33.

<sup>318</sup> File note of interview with Paul May dated 13 December 2022, 3.

<sup>319</sup> Submission of Kristina Skipper dated 17 February 2023, par 2(j).





of the detail of a series of allegations none of which singularly or together constituted serious misconduct.<sup>320</sup> The allegations were minor at best. The multiplicity of claimed breaches was duplicitous. The first and most important obligation of natural justice, to ensure that the employee can precisely understand the allegations against him or her, was not adhered to.

317. To the extent that it is possible to understand the allegations, they, inter alia, appear to be that Mr Mangan made claims in non-identifying documents and photos about Mr Devlin. The allegations pertained to Mr Devlin obtaining recycled 44 gallon drums and old street seats belonging to the Council and about the provision of mowing services by Mr Devlin to particular residents of the Shire. As these were said to be accepted practices at the depot, Mr Mangan's claimed written record of them breached the Employee Code of Conduct in numerous ways towards Mr Devlin and other managers.
318. The material which initiated the investigation was a set of non-identifying documents and photos delivered to the CEO on or about the 1 August 2021 by a Councillor who had received them anonymously. An outside investigator "Stopline" was appointed on 8 September 2021 after the CEO had discussed with her Executive Leadership Team who could have produced them.
319. The protracted investigation reported six months later on 2 March 2022.<sup>321</sup> It made no reference to the preservation of the materials during the course of the handling of the material from the Councillor, the CEO, to the Executives, to the Stopline investigator and then to the investigator who actually did the investigation. The Commission assumes if a sound preservation of evidence process had been followed the report would have said so.
320. Additionally on the 8 September 2021, a month after Mr Devlin's death, the CEO forwarded to the investigator a copy of a document Ms Keenan said she had found on Mr Rick Devlin's desk that day. It was headed "Official Complaint" and typed and undated with "regards Rick Devlin" at the end of the document. It detailed a series of complaints about another employee said to be a friend and colleague of Mr Mangan.<sup>322</sup>

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<sup>320</sup> Letter to John Mangan from Clare Keenan dated 2 September 2021 ; Letter from Moira Shire to John Mangan dated 15 September 2021. Letter from Clare Keenan to John Mangan dated 20 December 2021.

<sup>321</sup> Moira Shire Allegations against Mr John Mangan and Mr David Lee, Stopline Report dated 2 March 2022.

<sup>322</sup> Transcript of interview with Clare Keenan dated 11 and 12 January 2023. 'Official complaint', undated and unsigned.



321. The date of finding, place of finding and the content of the undated “Official Complaint” found a month after Mr Devlin’s murder left a serious question mark over its veracity. Its prejudicial quality over its probative value as regards to Mr Mangan should have been obvious to any experienced investigator.
322. That any of this material could constitute a prima facie case against Mr Mangan or anybody else is to be seriously doubted. However it was also used against another employee, Mr David Lee. Mr Lee’s wellbeing remains seriously compromised as a result of these dubious materials and the consequential processes that followed.<sup>323</sup> The treatment of Mr Lee is dealt with below.
323. Undeterred, the investigator then proceeded to interview eight fellow employees of Mr Devlin about the relationship between Mr Mangan and Mr Devlin and the motive Mr Mangan would have had for the production of the non-identifying documents and photos. The probative value of the non-identifying documents and photos was slight at best to found any investigation.”<sup>324</sup>
324. The assumption of guilt riddled through these interviews is obvious. The gossip, speculation, innuendo and, on occasions, disingenuous finger-pointing adduces nothing to the already flimsy non-identifying documentation. None of the interviews provides any sound basis for proceeding to require Mr Mangan to answer any allegation. The investigation should have ceased at that point.
325. Mr Mangan made, to the extent possible, comprehensive and convincing written answers to the allegations on two separate occasions.<sup>325</sup> That these were not accepted as completely exculpatory is inexplicable.
326. The Commission is inclined to the view that after the murder of Mr Devlin some Council employees were overwhelmed by a desire for retribution against those somehow seen as associated with Mr Paterson and other persons, including Mr Mangan and Mr David Lee, who were perceived to have fallen out with Mr Devlin. Mr David Lee, who was also falsely accused along with Mr Mangan, has experienced significant health issues as a result of the investigation and his subsequent treatment by Council administration.<sup>326</sup>

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<sup>323</sup> Moira S Allegations against Mr John Mangan and Mr David Lee, Stopline Report dated 2 March 2022; File note of interview with David Lee dated 20 December 2022, 4.

<sup>324</sup> Moira S Allegations against Mr John Mangan and Mr David Lee, Stopline Report dated 2 March 2022.

<sup>325</sup> Letter from John Mangan to Kristina Skipper dated 16 December 2021.

<sup>326</sup> File note of interview with David Lee dated 20 December 2022, 4.



327. As detailed earlier in this Report, Ms Keenan should have been alert to the possibility of prejudicial statements and questionable evidence in the aftermath of the death of Mr Devlin.
328. The Commission is of the view that the defence currently being conducted by Moira Shire Council to the proceeding by Mr Mangan in the Federal Court of Australia about these matters should be discontinued by the Council forthwith.
329. The Commission feels it appropriate to record in this report Mr Mangan's performance appraisal for 2020/21 signed and dated 5 months before he was stood down:

“John has managed to juggle an extremely heavy workload over the last 12 months and complete a very large number of projects. John is at all times professional and courteous to internal and external stakeholders and has an amazing knowledge of the waste and recovery industry and is well respected in industry circles.”<sup>327</sup>

#### **Case Study 5: Mr David Lee**

330. In 2013, Mr David Lee was transferred as a Leading Hand Projects in the waste department under the supervision of Mr John Mangan, Coordinator Waste and Recycling. He was supplied with a set of equipment specifically for this purpose. Whilst he operated out of the various works depots covering the various land fill sites he was not under the supervision of Mr Devlin.
331. Mr Lee's control of his own equipment specifically for waste purposes was a source of tension with Mr Devlin as was the regular capital expenditures by the Waste Department on the equipment.
332. In April 2020, David Lee actively supported Mr Mangan in his opposition to the proposed dumping of the Rowe Street contaminated soil at the Cobram clean fill site and later at the Tungamah and Strathmerton waste transfer stations.
333. In May 2020, an investigation was conducted into Mr Lee.<sup>328</sup> He was neither informed of the investigation or the nature of the allegations. On 10 August 2020

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<sup>327</sup> 2021 Annual Performance Appraisal for Mr John Mangan, 2.

<sup>328</sup> See letter from Maddocks to Andrew McLeish at Stoplevel on 5 November 2020 referring to an investigation undertaken in May 2020 by O'Neill workplace lawyers.



he was “informally “reminded of his respectful conduct obligations under the Council Code of conduct.<sup>329</sup>

334. Five months later on 30 October 2020 he was stood down for alleged serious misconduct. Three weeks later allegations were made in writing stating Mr Lee’s conduct was said to constitute a “pattern of behaviour” being the conduct of May 2020 and the further October allegations.<sup>330</sup>
335. When challenged about the unsustainability of the allegations of May 2020 the then CEO disingenuously asserted Council had “chosen not to commence a disciplinary process.” This was said despite admitting “an external consultant had been engaged and met with employees by whom complaints were made”. It was further asserted Mr Lee was “not cleared of any allegations because none were ever investigated nor findings made”. It was also asserted Mr Lee had been treated “particularly generously”.<sup>331</sup>
336. The Commission has commented elsewhere in this report about the failure of the MSC to satisfy itself of a prima facie case before proceeding to disciplinary action. The treatment of Mr David Lee indicates that MSC personnel appear not to appreciate the implications of such a process even when it is done. The external consultant in May 2020 did conduct an investigation. That it was foreshortened is no doubt because of advice that the allegation could not be sustained for whatever reason.
337. Professional impartiality demanded that these May 2020 allegations be set aside by human resources staff and that senior managers be advised accordingly. Unfortunately, that did not happen. The May 2020 allegations were revived retrospectively in the October allegations. In the process, this cast light on why the investigator in May made well have had doubts about them. The October allegations state that the original complainant in May stated that he had been “directed” to make the May complaint though he refused to say by whom.<sup>332</sup>
338. When challenged by Mr Lee’s representatives about the revival of the May complaint in October it was asserted that the investigation and findings of the October investigation were made only about the conduct of the October

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<sup>329</sup> Letter from MSC to Jeff Dingli at the ASU dated 11 February 2021, 1.

<sup>330</sup> See undated document on MSC letterhead entitled 'Allegations', relating to allegations against Mr David Lee.

<sup>331</sup> Letter from MSC to Jeff Dingli at the ASU dated 11 February 2021, 1.

<sup>332</sup> Undated document on MSC letterhead entitled 'Allegation', relating to allegations against Mr David Lee, paragraph 10.



allegations.<sup>333</sup> This was patently incorrect. It was also asserted that the MSC would not rely on the May investigation in respect of making any decision. MSC also refused to supply a copy of it to Mr Lee's representatives.

339. The minor nature of all of the allegations was another example at MSC of the use of "serious misconduct" which on any objective examination could never have found the asserted "serious misconduct". The final warning issued to Mr Lee was excessive for an employee of 20 years standing and there is a real sense of unwarranted punishment in this outcome.
340. On 1 September 2021, Mr David Lee was stood down again pending the same investigation by Stopline, as pursued against Mr Mangan.<sup>334</sup> This was the last straw for Mr Lee, who told the Commission his wellbeing was so compromised that he was unable to respond to the allegations against him.
341. It was alleged (inter alia) that Mr Lee had an issue with Mr Devlin because Mr Lee believed that his sons, who were contractors, were not being fairly treated by MSC in the allocation of contracts. It was also alleged that he had provided photographs of old MSC seats on Mr Devlin's property that were appended to the anonymous document left at the former Councillor's doorstep. The third allegation was that he had contributed to the document which implied a range of inappropriate conduct by Mr Devlin and two other employees.
342. The allegations which relied almost entirely on innuendo and gossip were found substantiated by the investigation. Mr Lee was accused of sending emails outside MSC. A cursory enquiry of the recipients of these emails would have determined that a local police woman and a witness were the recipients of the emails. Both recipients were involved in the apprehension of a burglar at the Tungamah depot that Mr Lee had been called on to investigate on the night of its occurrence. Mr Lee was also accused of sending emails outside MSC to himself. The Commission understands this practice was commonplace amongst MSC employees so that they could continue working at home.
343. However, as with the allegations against Mr Mangan, the Commission finds the allegations against Mr Lee to be unfounded and heavily influenced by the highly

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<sup>333</sup> Letter from MSC to Jeff Dingli at the ASU dated 11 February 2021. See also undated document on MSC letterhead entitled 'Allegation', relating to allegations against Mr David Lee.

<sup>334</sup> Letter from MSC to David Lee dated 1 November 2021.



dubious document allegedly discovered on Mr Devlin's desk a month after his death.

344. The Commission has taken the step of naming the employees and former employees in these case studies because their identities would be immediately obvious to many members of the Shire Workforce and the Moira community. None of the named individuals engaged in a level of misconduct that warranted the disciplinary actions taken against them.
345. The Commission has also named these individuals because their treatment has been so egregious that it should be fully exposed to public scrutiny. The suffering imposed on them and their families through flawed disciplinary processes at managerial behest is inexcusable.
346. Under ss 21(1) and 21(2) of the Occupational Health and Safety Act, it is the responsibility of the Chief Executive Officer to provide and maintain for employees a safe and healthy work environment that is without risk to health. The work environment for Moira Shire employees has been anything but safe. The safety issues within the organisation are longstanding and widely known. The previous administration must carry the first burden of responsibility for allowing a poisonous and incestuous culture to develop in the depots without any obvious effort to change it.
347. During the first eighteen months of Ms Keenan's tenure as CEO, there is also no evidence that she, in her turn, has taken any action or developed any plan with her senior management team to deal specifically with the cultural and safety risks in the depots. It is unsurprising to the Commission therefore that meeting this obligation does not figure prominently in her performance improvement goals and priorities recently approved by Council.

### **Major Projects - Yarrowonga Library and Multisport Stadium**

348. These are flagship capital projects for the Council in which the Council has invested considerable time, money and effort. The Commission has been advised that as at 2 December 2021 \$1 million has been spent on the Library Project and \$689,000 on the Stadium project.<sup>335</sup>

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<sup>335</sup> File note of interview with Matthew Jarvis on 6 December 2022, 1, 2.



349. The estimated project cost for the Library in February 2022 was \$6.7 million but construction cost is now understood to be in excess of that figure. The State Government is contributing \$1 million from the State Living Libraries Program and \$3.75 million in a low interest loan from the Community Infrastructure Loans Scheme.<sup>336</sup>
350. Total project cost for the Multisport Stadium was estimated by consultants to be \$16.9 million including \$10 million for Stage 1. Council has secured \$2 million for the project from the Victorian Local Sports Infrastructure Fund and \$7 million in low interest funding. A further \$3.3 million in funding has been confirmed from the Commonwealth Government's Community Development Grants Program.<sup>337</sup>
351. Both projects have been essentially Councillor driven. Both projects have generated significant financial and other risks and liabilities that have not been adequately addressed in Council's planning and decision making. The Commission understands that the library project will proceed. However, the stadium project is subject to internal review and reappraisal.<sup>338</sup>

### *The Yarrawonga Library*

352. On 27 May 2020, Council considered a report by the Planning Department which recommended that Council request the Minister for Planning to decide the planning permit application for the demolition of the Yarrawonga Community hall and construction of a new replacement Library building. In making this recommendation, officers commented as follows:

"Given Council's past decisions on this project its objectivity as a planning authority can best be achieved by referral of the application to an independent umpire thereby ensuring procedural fairness.

If Council were to retain the planning authority for this project there is a risk that the decision could be challenged based on the principles of procedural

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<sup>336</sup> Moira Shire Council Media Release: Library tender awarded, dated 21 February 2022. <https://www.moiravic.gov.au/Our-Council/News-and-information/Media-releases/Library-tender-awarded>; Moira Shire Council Media Release: Moira secures loan for Yarrawonga Library development, dated 3 April 2020. <https://www.moiravic.gov.au/Our-Council/News-and-information/Media-releases/Moira-secures-loan-for-Yarrawonga-Library-development>; Moira Shire Council Media Release: Yarrawonga Library project forges ahead, dated 3 May 2021. <https://www.moiravic.gov.au/Our-Council/News-and-information/Media-releases/Yarrawonga-Library-project-forges-ahead>

<sup>337</sup> Yarrawonga Chronicle Article by Emma Prior, 'Funding for stadium secured', dated 26 October 2022. <https://www.yarrawongachronicle.com.au/news/funding-for-stadium-secured/>

<sup>338</sup> Transcript of interview with Josh Lewis on 19 December 2022, 112, 113, 117.



fairness and predetermined position resulting in a denial of natural justice. Referring the application to the Minister for decision effectively mitigates that risk.”<sup>339</sup>

353. As subsequent events confirmed, the Council did have a pre-determined position. Whilst a VCAT appeal was in train by residents opposed to the Council’s plans, the Council took advantage of new planning provisions limiting the appeal rights of community members to issue itself in effect with a demolition permit for the community hall.<sup>340</sup>
354. The permit was issued on 16 June 2021 to Shepparton based consultants acting on behalf of the Council.<sup>341</sup> The permit application was exempt under the new planning provisions from notification and third party appeal rights. The proposal was advertised only to adjoining owners and no sign was erected on the site. The former community hall was demolished and the site fenced off from the public. No works have commenced eighteen months later. Demolition of the community hall is cited as an achievement in the Council’s 2020-21 Annual Report.<sup>342</sup>
355. It is not the role of the Commission to express any view about the most appropriate location for the new Yarrawonga library. It is clear however that, at least since 2016, Council has been resolved on the town hall site for its construction and discounted the option of constructing it on the nearby Yarrawonga Primary School site.<sup>343</sup>
356. The Department of Education and Training announced that the site was no longer required for education purposes and the Department of Treasury and Finance offered it for sale through a First Right of refusal offer to public authorities. Council expressed interest to the Department of Treasury and Finance about acquiring the site but did not proceed because of concerns about the costs of restoring the historic court house on the site and other costs of demolition, maintenance and renewal.<sup>344</sup>

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<sup>339</sup> Agenda of Ordinary Council Meeting - 27 May 2020, 4, 5.

<sup>340</sup> Letter from Andrew Close of Moira Shire Council to Chris Smith & Associates Pty Ltd, dated 16 June 2021 attaching Planning Permit Approval for 100 Belmore Street, Yarrawonga, 24 Orr Street Yarrawonga, ref 5/2021/126; Yarrawonga Community Action Group Inc v Moira SC (Red Dot) [2021] VCAT 665.

<sup>341</sup> Letter from Andrew Close of Moira Shire Council to Chris Smith & Associates Pty Ltd, dated 16 June 2021 attaching Planning Permit Approval for 100 Belmore Street, Yarrawonga, 24 Orr Street Yarrawonga, ref 5/2021/126.

<sup>342</sup> Moira Shire Council Annual Report 2021/22, 35.

<sup>343</sup> Moira Shire Council, Agenda of Ordinary Council Meeting on 22 November 2016, 24-118.

<sup>344</sup> Moira Shire Council Agenda for Ordinary Meeting of Council dated 24 June 2020, 126.





357. Constructing a new library on the site of the demolished community hall adjacent to the heritage listed Town Hall also poses design and other challenges including parking, which is already a major problem in the town centre. A report dated 16 August 2016 included a catchment-based needs analysis and identified a number of site options for the new library. However there is no evidence of a fully costed business case ever being developed and considered by Council prior to its decision to proceed with construction of a new library on the town hall site.
358. The Commission understands that the library project is to proceed. The Commission understands also that a consortium of local philanthropists in Yarrawonga has now offered to fund the Council's acquisition of the former primary school site.<sup>345</sup>

### ***Yarrawonga Multisport Stadium***

359. Planning for the Yarrawonga Multisport Stadium began in earnest in September 2018 with the appointment of a Steering Committee for the project. The objective of the project was to provide indoor and outdoor sports facilities for a number of school, community and sporting groups in Yarrawonga. The local stadiums were constructed primarily for education purposes and were assessed to be ageing and not compliant with sporting competition requirements. The new stadium was proposed to include safe, full size and compliant sports courts, administration facilities, kiosk, kitchenette and café.<sup>346</sup>
360. From the outset there were different views within Council about the project. One Councillor thought the project was a costly "Taj Mahal", that Council was "just going through the motions", and that "it would never be built".<sup>347</sup> The costs of the project have been a focus of the Council's attention and discussions throughout the project.
361. A feasibility study for the Multisport Sport Stadium, conducted in 2019 for the Council by a planning group specialising in sports and leisure recreation, estimated total project cost for stages 1 and 2 at \$16.9 million including \$10 million to deliver Stage 1. The study which included a demand analysis and operating

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<sup>345</sup> Transcript of interview with Josh Lewis, dated 19 December 2022, 107.

<sup>346</sup> Moira Shire Council website, Yarrawonga Multisport Stadium - Stage One. <https://www.moira.vic.gov.au/Community/Works-and-Projects/Recreation-Leisure-and-Community-Facilities/Yarrawonga-Multisport-Stadium-Stage-One>

<sup>347</sup> File note of interview with Wayne Limbrick on 5 November 2022, 14.



cost projections, forecast an operating deficit averaging around \$50,000 per annum. However the assumptions used in the study are now in question.<sup>348</sup>

362. The Commission understands that the review now underway will re-examine the demand, usage and cost projections for the stadium together with a raft of issues affecting its design and construction.
363. Major construction projects such as the Yarrawonga library and the Multisport stadium require thorough business case development that assesses planning, design and delivery risk from all sides. This has not happened in the case of these projects with the result being uncertainty about the cost, appropriateness and adequacy of what may eventually be delivered for community use.
364. In relation to these projects, the Council has not met its prudential obligations under the financial management principles of the Local Government Act. Issuing itself a permit via an agent to demolish the Yarrawonga community hall whilst an appeal was underway at VCAT showed its determination to pursue its preferred option and its contempt for the democratic and lawful rights of those community members who opposed it. In relation to both projects, the Council has not been fully transparent and accountable to the community it serves.

### **Serious Misconduct in Procurement**

365. In June 2018, a Councillor emailed the then Mayor with concerns about the engagement of an Albury based company rather a local business to carry out electrical works at the Yarrawonga Town Hall.<sup>349</sup> In February 2020 and March 2021, the same Councillor raised similar concerns.<sup>350</sup>
366. In March 2021, the procurement coordinator responsible for procurement panels noticed, in examining cumulative contractor spends, that one business was getting a lot more than others. She raised it with the Director of Operations, with her manager, with other senior managers and spoke about it with the Acting CEO at his request.<sup>351</sup>

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<sup>348</sup> Transcript of interview with Joshua Lewis on 19 December 2022, 235-241.

<sup>349</sup> File note of interview with Peter Mansfield on 5 November 2022, 21.

<sup>350</sup> File note of interview with Peter Mansfield on 5 November 2022. Draft Preliminary Assessment Report prepared for Moira Shire Council by O'Neill Workplace Lawyers, dated 4 October 2021.

<sup>351</sup> Transcript of interview with Lisa Knight on 13 December 2022, 2-28.



367. An investigator was engaged in May 2021.<sup>352</sup> The investigator's report showed that between 15 November 2017 and 24 June 2020, an Albury firm was awarded contracts worth in excess of \$500,000.<sup>353</sup> The works were authorised by the Coordinator Facilities Maintenance whose son was employed by the company. The company was on the panel of contractors during the relevant period and eligible to be allocated work in accordance with the terms of their contract and the Procurement Policy and Guidelines.<sup>354</sup>
368. Between 16 January 2018 and 24 August 2018, the company was engaged to carry out works amounting in total to \$188,350. The work was split into several stages including \$50,000 for one project. There is no evidence that three quotes were obtained, an exemption sought or a public tender carried out. The Coordinator Facilities Maintenance authorised the procurement of all of these services.<sup>355</sup>
369. In May 2021, a new company commenced trading in which the son of the Coordinator was a shareholder and director. The Albury company which had previously been allocated work received no further work from that time. The Coordinator shortly after recommended further work be allocated to the new company in which his son had a direct interest. The company was not on the panel of contractors. An explanation of urgency was given but the Investigator did not consider the evidence supported that assertion.<sup>356</sup>
370. There is some evidence that the Coordinator initially declared his conflict of interest to the Manager of Operations but no exemption was sought as required by the Council's Procurement Policy and a Declaration of Interest form was not completed.<sup>357</sup> The Coordinator also wrote to the Manager of Operations that "We are trying to get these guys (his son's company) onto the Panel Contract when

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<sup>352</sup> Letter from Mark Henderson to Coordinator of Facilities Maintenance dated 26 May 2021.

<sup>353</sup> Draft Preliminary Assessment Report prepared for Moira Shire Council by O'Neill Workplace Lawyers, dated 4 October 2021.

<sup>354</sup> Draft Preliminary Assessment Report prepared for Moira Shire Council by O'Neill Workplace Lawyers, dated 4 October 2021.

<sup>355</sup> Draft Preliminary Assessment Report prepared for Moira Shire Council by O'Neill Workplace Lawyers, dated 4 October 2021.

<sup>356</sup> Draft Preliminary Assessment Report prepared for Moira Shire Council by O'Neill Workplace Lawyers, dated 4 October 2021.

<sup>357</sup> Draft Preliminary Assessment Report prepared for Moira Shire Council by O'Neill Workplace Lawyers, dated 4 October 2021.



that opportunity opens up".<sup>358</sup> This suggested to the investigator positive action rather than the objective public tender process.<sup>359</sup>

371. In the period between 30 October 2018 and 27 November 2018, the Coordinator instructed a member of his staff to issue an Expression of Interest (EOI) with respect to test and tag contracts in circumstances where he knew the staff member's partner would become a tenderer.<sup>360</sup> After receiving quotes from panel contractors which did not include the partner's company, he instructed his staff member to issue a second EOI to the partner's company along with three other companies. The contract was then awarded to the partner's company which was not a panel contractor.<sup>361</sup>
372. In June 2021, he was directed by the Manager of Operations to cease using the partner's company for contract test and tag. He then directed work instead to another company which carried out work using his son without making any declaration of interest.<sup>362</sup>
373. The Coordinator was stood down in October 2021 and he went on to WorkCover following a stress claim.<sup>363</sup> No further disciplinary action was taken and he retained the use of his Council vehicle, Council petrol card, corporate card and access keys to all Council buildings until termination of his employment in January 2023.<sup>364</sup>
374. The former Mayor Mr Mustica said that had he known "I'd be pretty pissed about that".<sup>365</sup> His CEO Ms Keenan expressed her surprise on learning of the employee's lenient treatment notwithstanding that she had stood him down in the first instance.<sup>366</sup> The former CEO told the Commission that he was not aware of the full extent of the Coordinator's alleged fraud but that if he had been aware of it

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<sup>358</sup>Draft Preliminary Assessment Report prepared for Moira Shire Council by O'Neill Workplace Lawyers, dated 4 October 2021.

<sup>359</sup> Draft Preliminary Assessment Report prepared for Moira Shire Council by O'Neill Workplace Lawyers, dated 4 October 2021.

<sup>360</sup> Draft Preliminary Assessment Report prepared for Moira Shire Council by O'Neill Workplace Lawyers, dated 4 October 2021.

<sup>361</sup>Draft Preliminary Assessment Report prepared for Moira Shire Council by O'Neill Workplace Lawyers, dated 4 October 2021.

<sup>362</sup> Notice of Allegations against Coordinator of Facilities Maintenance, dated 22 December 2021.

<sup>363</sup> Letter from Moira Shire Council to Coordinator of Facilities Maintenance, dated 21 October 2021; Transcript of interview with Workplace Health and Safety Coordinator on 8 December 2022, 1-13.

<sup>364</sup> Transcript of interview with Workplace Health and Safety Coordinator on 8 December 2022, 1-13.

<sup>365</sup> Transcript of interview with Libro Mustica on 11 January 2023, 83.

<sup>366</sup> Transcript of interview with Clare Keenan on 11 and 12 January 2023, 218.



“he wouldn’t be working there any more”. He also said that he would have disclosed the alleged fraud to IBAC.

375. The Commission has confirmed that the Internal Auditor and the Audit and Risk Committee were never advised of the alleged fraud nor was there any notification to IBAC.
376. There is no explanation as to why, when the serious misconduct was brought to attention of Council in 2018 and again in 2020, no action was taken. The Facilities Maintenance Coordinator was instead allowed to remain in his role. During that time, he repeatedly breached the probity requirements of Council's procurement policies. His misconduct eroded the confidence of Council staff in the institutional integrity of Council. It also eroded the confidence of local suppliers in Council's procurement system.

### Delayed Numurkah Flood Mitigation

377. The Numurkah Floodplain Management Study and Plan records that in late February and early March 2012, a major rainfall event caused severe flooding of the town of Numurkah.<sup>367</sup> Heavy rain fell across a catchment area of some 2,500 square kilometres. The catchment naturally flows to the West such that all of the estimated 200,000 to 250,000 mega litres of flood water runoff all had to pass through and around Numurkah. When floodwater from the east combined with floodwater entering the town from the South, it resulted in unprecedented flood levels and extensive damage. This included residential areas previous regarded as unlikely to be affected by flooding.<sup>368</sup>
378. In the absence of prior safeguards, Numurkah hospital was inundated on 4 March 2012. Many community residents and business houses were also severely impacted and "paid a heavy price both emotionally and financially, many of them still struggling to recover".<sup>369</sup>

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<sup>367</sup> Numurkah Floodplain Management Study and Plan Summary Report, prepared by the Numurkah Floodplain Management Study Community Reference Group, 6: <https://www.moira.vic.gov.au/Community/Works-and-Projects/Flood-Studies-Mitigation-Projects/Numurkah-Flood-Mitigation-Project>

<sup>368</sup> Numurkah Floodplain Management Study and Plan Summary Report, prepared by the Numurkah Floodplain Management Study Community Reference Group: <https://www.moira.vic.gov.au/Community/Works-and-Projects/Flood-Studies-Mitigation-Projects/Numurkah-Flood-Mitigation-Project>

<sup>369</sup> Numurkah Floodplain Management Study and Plan dated November 2017, Water Technology, iii.



379. The Community Reference Group which prepared the Study and Plan commented that:

"A lingering consequence of this is that any reports of a major rainfall event in any of the upper catchments immediately raises the stress and anxiety levels of the Numurkah community to a state of high alert for the days following as they grapple with the possibility of another major flood heading towards the town".

"As a result of extensive community feedback, the Community reference Group resolved that anything short of permanent protection for both north and south Numurkah would not be acceptable".<sup>370</sup>

380. The Reference Group, which was chaired by Cr. Kevin Bourke examined in detail a number of flood mitigation options. The preferred option – Option A – was adopted by Council in May 2018.<sup>371</sup>

381. The Commission during its community consultations spoke with a number of residents who confirmed that the recent flood event, which did not in the end affect Numurkah, had indeed raised the level of anxiety for many in the town. It was recognised that arriving at an agreed option had required extensive modelling and consultation including with the local community, Moira Shire staff and a number of government agencies. However, there was also a high level of frustration that nothing much had happened since Option A had been adopted by the Council.

382. There was also concern that a proposed development at Tunnock Road in Numurkah would adversely affect the implementation and effectiveness of Option A. A number of residents had opposed a previous two lot subdivision of the site at VCAT.<sup>372</sup> The current proposal is for the construction of a number of residences on the larger lot within the already approved subdivision. A number of residents complained of a lack of access to the CEO and councillors to explain their concerns.<sup>373</sup>

383. The Commission understands from the briefing it received and its discussions with community members that the processes of hydrological modelling and

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<sup>370</sup> Numurkah Floodplain Management Study and Plan dated November 2017, Water Technology, iii.

<sup>371</sup> See Council Minutes on the Moira Shire Council website.

<sup>372</sup> See e.g. Letter from Janene and Brian Champion dated 28 May 2018.

<sup>373</sup> Submission of Kerry Cursons in December 2022, 2; File note of community hearings sessions with Janene Champion on 9 December 2022, 6-7.



consultation to reach agreement on a preferred flood mitigation option are complex and necessarily lengthy and time consuming. However Option A was adopted by Council nearly five years ago. There appears to have been continuing internal debate about the design, height and costs of the proposed levee bank<sup>374</sup> and little apparent urgency by Council to commence implementation of the three-stage, already approved, option.

384. Had the recent flood event extended into Numurkah wreaking devastation similar to 2012, Council would have had much to answer for. The former Mayor Mr Mustica spoke to the Commission of his frustration with the slow progress towards construction of the levee bank and placed much of the responsibility for the delay with the Council administration.<sup>375</sup>
385. The Commission's assessment is that responsibility rests with both the Council and its administration. The community has provided the leadership for the project and has little to show for its efforts. The Commission also agrees with Mr Mustica's assessment that it is not only the community which is bearing the risks of another unmitigated flood event ("I told the CEO that if Numurkah floods again, we're going to be in deep trouble").<sup>376</sup> Council is carrying significant risk and liability not just for potential property damage but also for potential loss of life.
386. The Commission has been advised that funding has been allocated for Stage 1 in the Council's 2022-23 budget. However no funding provision has as yet been made for Stages 2 and 3. The levee bank proposed under Option A cannot be fully effective against a major flood event until all stages have been implemented.<sup>377</sup> The Commission considers that the priority for staged funding and works to implement Option A needs to be reflected in Council's strategic capital planning and budgeting with an urgency that has not been evident for the last five years. The Council should advocate strongly on behalf of the community for any additional funding assistance that may be required.
387. The Commission understands that there is now no reason why Stage 1 of the project cannot now proceed.

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<sup>374</sup> Transcript of interview with Libro Mustica dated 11 January 2023, 32-38.

<sup>375</sup> Transcript of interview with Libro Mustica dated 11 January 2023, 32-34.

<sup>376</sup> Transcript of interview with Libro Mustica dated 11 January 2023, 37.

<sup>377</sup> Transcript of interview with Joshua Lewis dated 14 December 2022, 14-16.



# COMMUNITY REPRESENTATION AND ENGAGEMENT



## CHAPTER 7

### Community Engagement

388. The Council's Community Engagement Policy has as its purpose that:

"This policy will reinforce council's commitment to provide opportunities for the community to influence the decisions, policies and plans of Council by actively participating in engagement programs and processes, lending us their experiences and expertise".<sup>378</sup>

389. The policy states that the Council will use "different community engagement techniques and communication mechanisms depending upon the issue or project, its particular circumstances and the audience it needs to target".<sup>379</sup> Council will use Deliberative Engagement such as advisory panels or representative groups or Participatory Engagement involving one way information exchange either from Council to community or community to Council.

390. Whilst there are some good examples of the effective use of these techniques particularly in community services, the practice has generally not matched the theory.

391. Council's attitude and behaviour towards consultation with Yarrawonga residents opposed to the demolition of the community hall and construction of a new library on the town hall site was dismissive and contemptuous on any measure. Its consultations with Numurkah residents on the long delayed levee bank proposal to mitigate flooding have been at times desultory and lacking any urgency.

392. Council's discussions with Apex members in Cobram on the future of APEX Park, which was transferred by Apex to Council management for community use, have

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<sup>378</sup> Moira Shire Council Community Engagement Policy, adopted 24 February 2021, 1. <https://www.moira.vic.gov.au/Our-Council/Our-policies>

<sup>379</sup> Moira Shire Council Community Engagement Policy, adopted 24 February 2021, 5. <https://www.moira.vic.gov.au/Our-Council/Our-policies>





been less than transparent. After transfer of the site, Council subdivided it with a view to sale for residential development. The site had previously been used as a long term camping and caravan site by vulnerable members of the community. Following strong representations by Apex and intervention by the then Mayor, Mr Mustica,<sup>380</sup> the Council has now reconfirmed that the site will be retained for community use.

393. The Commission's drop in sessions and confidential meetings with community members in Cobram, Yarrawonga, Nathalia and Numurkah invariably drew criticism of Council's failure to consult and connect with local communities, as did written submissions from residents, including those from surrounding smaller communities.
394. There was a consistent theme, particularly in the Western areas of the Shire, that their needs and interests were not a priority for the council, that they were not listened to and if they were listened to they were not heard.
395. The Commission was provided by residents with numerous examples of what they saw as Council's failure to respond in a timely way, if at all, to issues raised by individuals and groups within the community.<sup>381</sup> Some of these issues related to community wide issues such as delays in flood mitigation in Numurkah including the construction of a new levee bank. Long standing problems with Numurkah's stormwater system were also raised.<sup>382</sup>
396. Other issues specific to localities and individual properties and capable of resolution were also seen by residents to have languished for lack of any Council response to their requests for help. A number of Numurkah residents raised with the Commission their anger at the temporary withdrawal of Council advertising from the local Numurkah Leader newspaper over an interview with a local COVID sceptic, describing it as censorship of the press.
397. The Commission was concerned about allegations by a Numurkah resident that her emails to Councillors and the CEO about this issue had been blocked.<sup>383</sup>

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<sup>380</sup> Transcript of interview Libro Mustica dated 11 January 2023, 50.

<sup>381</sup> File note of community hearings session with Kerry Cursons on 9 December 2022, 4.

<sup>382</sup> File note of community hearings sessions with Jane Champion on 9 December 2022, 6-7.

<sup>383</sup> File note of community hearings session with Kerry Cursons on 9 December 2022, 4.

File note of community hearings sessions with Janene Champion on 9 December 2022, 6-7.



398. Also in Numurkah, considerable criticism was directed at Council's response to development proposals seen as detrimental to flood mitigation and at its failure to take action against a property owner dumping smelly green waste compost at a site close to a local childcare centre. Residents told the Commission that the owner was the same person responsible for dumping tyres at the same site which ultimately required EPA to step in and remove them.
399. Numurkah Lake, once a centrepiece for tourism and recreational pursuits is now an unattractive weed choked expanse. Ownership of the lake and its immediate environs is shared between the Council and a private resort operator. Efforts by Council to date to achieve a sustainable outcome to all parties including the local community have been unsuccessful. Some solutions proposed by consultants engaged by Council have been unhelpful. One such solution involved turning most of the lake into a retention basin that would in practice become a swamp.<sup>384</sup>
400. Local residents compare the beauty of Lake Mulwala and Victoria Park Lake in Shepparton with their unsightly local lake. Inclusion of Lake Numurkah in Councils strategic planning in 2020-21 has not yet yielded any positive outcome. The Commission has been briefed however by the Director of Infrastructure on efforts to achieve an agreed approach with the resort operator and the local community.<sup>385</sup>
401. Nathalia residents including a number of persons who were employed at the depot were understandably very conscious of the tragic events there in 2021. One resident told the Commission that the workforce was still a bit 'jangly' because of the horrendous experiences they have had.
402. Floodplain issues were again raised but also concerns about Council removal without consultation of mature native trees and their replacement with exotics; local toilets replaced but lacking disability access; and onerous parking requirements on a local business requiring it to relocate. Another resident related the torturous experience with Council planning and building requirements to establish a new restaurant in the town. All of these issues local in their nature but in each case engendering the perception of a Council not sufficiently supportive of the local community.

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<sup>384</sup> Transcript of interview Josh Lewis dated 14 December 2022, 72-88.

<sup>385</sup> Transcript of interview Josh Lewis dated 14 December 2022, 72-88.



403. In Cobram, residents lamented the loss of the tourist information centre, inadequate support for small businesses, unreliable bin collection services, licence renewals, disrespect for community operated facilities on Council or Crown Land in smaller communities, no-shows and no apologies by invited Council representatives to community events ('we sent them the bill for the dinner') and perceived excessive reliance on consultants.
404. In Yarrawonga, there was anger at the Council's 'atrocious behaviour' in demolishing the Community hall, Council unwillingness to purchase the former primary school site for community uses, inadequate town centre car parking, lack of community consultation about the Tourism Information Centre and unannounced Council works damaging urban Landcare restoration. Concerns were also raised in Yarrawonga about lack of Council enforcement action against unpermitted uses and delays with Council drainage works.
405. In all of its community consultations, a common theme voiced by residents was the poor quality of Council customer service in response to enquiries and requests for help by members of the community. Lack of staffing continuity was seen to be a serious problem such that residents, sometimes left waiting on line for lengthy periods, would then have to recount their stories and issues afresh to someone who knew nothing about their particular matter. Staff turnover is to be expected in any organisation. However the high rate of staff turnover in Moira Shire Council is seen by residents to be affecting the quality of customer service to them.
406. One of the Monitor's recommendations to Council was that the Council's Community Engagement Policy needed to be reviewed and updated. A draft, revised Community Engagement Policy has been prepared for Council consideration.

### **Electoral Representation in Moira Shire**

407. A more fundamental and important issue raised by a number of residents at the Western end of the Shire was their perception that, in consequence of the Shire being an undivided municipality, their interests were no longer being adequately represented in the Council. In Numurkah, for example, some residents expressed the view that only one Councillor acted as their representative.
408. The Commission considers that their views are not without justification. Arguments were mounted during the last Local Representation Review of the Shire in 2019 by



the VEC that an unsubdivided electoral structure would support the need for all elected Councillors to govern in the interests of the whole Shire. Considerable evidence has been provided to the Commission through its community consultations and submissions received that this has not proven to be the case.

409. The undivided nature of the municipality did not initially change the balance of representatives from each of the three main areas of the Shire. With the resignations of a number of Councillors however the balance of representation has shifted decisively.<sup>386</sup> The present undivided electoral structure has progressively resulted in the dominance of Council membership by a majority grouping centred on Cobram and Yarrawonga with severe under representation by Councillors from the Western end of the Shire.
410. The 2019 Local Representation Review recommended, following analysis of both options of an unsubdivided and subdivided municipality, that Moira Shire Council consist of nine councillors elected from three three-councillor wards.<sup>387</sup> This recommendation was not accepted by the then Minister for Local Government, Mr Adam Somyurek.
411. The Commission considers in the light of its investigations and findings that the present undivided electoral structure is not providing balanced representation of the aspirations and needs of the whole municipality and that it has enabled an unhealthy and divisive concentration of power in the Council favouring the central and eastern areas of the Shire.
412. The Commission therefore considers that a further Local Representation Review of Moira Shire is warranted in the near term to strengthen representation and accountability across the Shire.

### **Community Leadership and Civic Participation**

413. The Commission has been advised during the course of its Inquiry that the Committee for Gippsland manages and facilitates the Gippsland Community Leadership Program for the development and growth of existing and emerging leaders within the Gippsland region. This is a highly regarded program but

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<sup>386</sup> Transcript of interview with Libro Mustica on 11 January 2023, 46; Local Council Representation Review: Final Report prepared by Victorian Electoral Commission into the Moira Shire Council, dated May 2019. <https://www.vec.vic.gov.au/-/media/3eacd7fb37ce42c8a98b00f4f8b0b686.ashx>

<sup>387</sup> Final Report prepared by Victorian Electoral Commission into the Moira Shire Council, dated May 2019, 5. <https://www.vec.vic.gov.au/-/media/3eacd7fb37ce42c8a98b00f4f8b0b686.ashx>



requires a significant payment per participant, meaning it is generally not accessible to the broader community. The Commission understands this program was introduced while the South Gippsland Shire Council was under administration.

414. The Commission notes that, at the Brimbank City Council, a successful Community Leadership training program was introduced while the Council was under administration and has been successful. It is free for participants at a small cost to the Council and is open to anyone in the community. It is designed to raise leadership and governance skills in people participating in community organisations.
415. It is the Commission's view that there would be great merit in the Moira Shire Council investing in such a program for the benefit of the community including increased understanding of the role of Council and the roles and responsibilities of Councillors.





# SUBMISSIONS

## CHAPTER 8

416. Section 217 of the Local Government Act provides:
- (1) If a Commission of Inquiry proposes to make a finding that is adverse to a person, the Commission of Inquiry must be satisfied that the person -
    - (a) is aware of the matters on which the proposed finding is based; and
    - (b) has had an opportunity, at any time during the course of the inquiry, to respond on those matters.
  - (2) A Commission of Inquiry must consider a person's response under subsection (1)(b) (if any) before making a finding that is adverse to the person.
  - (3) If a Commission of Inquiry includes a finding that is adverse to a person in its report, the Commission of Inquiry must fairly set out the person's response under subsection (1)(b) (if any) in the report.
417. On 6 February 2023, the Commission provided each of the parties who may be adversely affected by the Commission's proposed findings with a draft copy of its Report (or relevant sections) and the documents footnoted throughout. The parties were then given an opportunity to respond on those matters through written submissions due by 17 February 2023.
418. Having conducted this process, and having interviewed witnesses throughout the course of its Inquiry, the Commission is satisfied that the requirements prescribed by s 217(1) have been met.
419. The Commission has considered all written submissions received, and addressed them in this Report.



## The Council

420. In response to its Draft Report, the Commission has received submissions from Mayor Councillor Lawless, Councillors Limbrick, Mansfield, Buck and Heather, and former Councillor Martin.
421. The Commission did not receive a joint submission from Council in response to its Draft Report.
422. While it was open to Council not to provide a joint submission, in the Commission's view, this provides further evidence of the present Council's disunity.

## Mayor Councillor Lawless

423. In his Submissions, Mayor Councillor Lawless takes issue with the Commission's comments about a group of Councillors voting in support of Mr Mustica and holding sway when necessary in the Council. Mayor Councillor Lawless submits that this is inaccurate and does not reflect the dynamics of Council during his period of service.<sup>388</sup> The Commission does not accept this submission, having regard to the evidence provided by other Councillors and the Commission's observation of several streamed Council meetings.
424. With respect to the Commission's comments about the CCP applications, Mayor Councillor Lawless states that he had no knowledge of the applications and was not involved.<sup>389</sup> The Commission accepts this.
425. Mayor Councillor Lawless makes several submissions with respect to the events that occurred on 23 March 2022 between Councillor Heather and former Mayor Mustica. However, in his Submissions, Mayor Councillor Lawless states that he was not present at the time of the incident.<sup>390</sup>
426. Mayor Councillor Lawless submits with respect to the decision to initially employ Ms Keenan that former Mayor Mustica was initially a "very strong advocate for the appointment of Ms Keenan".<sup>391</sup> The Commission accepts this, and notes that the comments by former Mayor Mustica referred to in paragraph 24 of the Executive

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<sup>388</sup> Submission of Mayor Councillor Peter Lawless dated 17 February 2023, p 2.

<sup>389</sup> Submission of Mayor Councillor Peter Lawless dated 17 February 2023, p 2.

<sup>390</sup> Submission of Mayor Councillor Peter Lawless dated 17 February 2023, p 2.

<sup>391</sup> Submission of Mayor Councillor Peter Lawless dated 17 February 2023, p 2.



Summary to this report are understood to have been made with the benefit of hindsight. Mayor Councillor Lawless states with respect to paragraph 25 that he was not aware that a separation package had been offered to Ms Keenan.<sup>392</sup> The Commission is prepared to accept this. Mayor Councillor Lawless states with respect to the appointment of Ms Keenan more generally that Council was acting on advice from an experienced and professional recruiter.<sup>393</sup> This does not obviate the decision making responsibilities of Council.

427. Mayor Councillor Lawless submits with respect to paragraph 26 of the Executive Summary that the current leadership model now in place at Moira Shire Council is stronger and better particularly with the strong united executive management team under the CEO.<sup>394</sup> The Commission does not consider that the evidence supports this proposition.
428. Mayor Councillor Lawless submits with respect to paragraph 36 of the Executive Summary that Councillors should not share any blame for the decision to transfer asbestos contaminated to waste transfer stations unlicensed to receive it.<sup>395</sup> The Commission does not accept this abrogation of responsibility.
429. Mayor Councillor Lawless submits with respect to the Yarrowonga Library, Yarrowonga Multisport Stadium and Numurkah Flood Mitigation Projects that there are mitigating circumstances in the case of each.<sup>396</sup> The Commission accepts that there may be mitigating circumstances in respect of these projects, but maintains its view that each project has been mismanaged by Council.
430. Mayor Councillor Lawless submits with respect to finding 5 that this characterisation of the Numurkah Flood Mitigation Project is completely inaccurate because there is still considerable work to take place before necessary approval from all the agencies involved is received for the works to begin and to appropriately limit the likelihood of future objections holding up the project.<sup>397</sup> The Commission does not accept this submission noting it has now been over ten years since the 2012 floods in Numurkah and nearly five years since Council approved the preferred option for the construction of the levy. Mayor Councillor

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<sup>392</sup> Submission of Mayor Councillor Peter Lawless dated 17 February 2023, p 3.

<sup>393</sup> Submission of Mayor Councillor Peter Lawless dated 17 February 2023, p 6.

<sup>394</sup> Submission of Mayor Councillor Peter Lawless dated 17 February 2023, p 3.

<sup>395</sup> Submission of Mayor Councillor Peter Lawless dated 17 February 2023, p 3.

<sup>396</sup> Submission of Mayor Councillor Peter Lawless dated 17 February 2023, p 3-4.

<sup>397</sup> Submission of Mayor Councillor Peter Lawless dated 17 February 2023, p 5-6.





Lawless' comments also do not address the ongoing risk to Numurkah residents in the event of another major flooding incident.

431. With respect to finding 10, Mayor Councillor Lawless expresses reservations about the Monitor's communications skills.<sup>398</sup> The Commission does not accept this submission.
432. With respect to recommendation 1, Mayor Councillor Lawless submits that he does not believe dismissing the present Councillors "will help address some of the present concerns or allegations, and that [the Moira community] would be best served by the present Councillor group and the excellent senior staff now in place".<sup>399</sup> Having regard to the matters discussed throughout this Report, the Commission does not accept this submission.
433. Mayor Councillor Lawless submits with respect to recommendation 2 that the appointment of administrators beyond two election cycles would be extreme and send the wrong message to the community about the perceived quality of local potential candidates for Councillor roles. Mayor Councillor Lawless submits with respect recommendations 3, 4, 5 and 8 that matters could be addressed by Councillors rather than an administrator.<sup>400</sup> Having regard to the seriousness of issues identified in this report, the Commission does not accept this submission.
434. Mayor Councillor Lawless states with respect to the circumstances surrounding the Municipal Monitor's appointment that "in truth the CEO asked the Minister and her department and agencies for assistance to deal with a particular issue but received no support from LGV or other agencies".<sup>401</sup> The Commission does not accept this submission, noting that the Monitor was appointed to assist with broad terms of reference.

### Councillor Limbrick

435. Councillor Limbrick questions how Councillors can know or be responsible for many of the matters raised in the Report if not brought to Council by the CEO or executives.<sup>402</sup> The Commission notes that it is the non-delegable responsibility of

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<sup>398</sup> Submission of Mayor Councillor Peter Lawless dated 17 February 2023, p 5.

<sup>399</sup> Submission of Mayor Councillor Peter Lawless dated 17 February 2023, p 5.

<sup>400</sup> Submission of Mayor Councillor Peter Lawless dated 17 February 2023, p 5-6.

<sup>401</sup> Submission of Mayor Councillor Peter Lawless dated 17 February 2023, p 6.

<sup>402</sup> Submission of Cr Wayne Limbrick dated 17 February 2023, p 1.



Council to hold the CEO accountable for the performance of Council administration.

436. Councillor Limbrick states that he ran for Council because he believed there were serious issues with the Council administration including "a lack of consultation, inherent belief that staff do everything and the public had nothing to offer, a toxic work culture and generally an inefficient and non-responsive organisation".<sup>403</sup> The Commission accepts this submission.
437. Councillor Limbrick states with respect to the death of Mr Devlin that much of the comment made in regard to the toxic culture at the Nathalia Depot is a mystery to him. He states that the CEO's response following Mr Devlin's death was extraordinary under very difficult circumstances and that she has done everything she possibly could to respond to the aftermath of what was an horrific event.<sup>404</sup> The Commission has considered this submission in its assessment.
438. With respect to the appointment of Ms Keenan more generally, Councillor Limbrick states that he stands by the decision to appoint Ms Keenan and believes she can take the organisation forward.<sup>405</sup> He also submits that Mr Henderson's opinion at the time should have little or no weight.<sup>406</sup> The Commission does not accept this submission.
439. Councillor Limbrick takes issue with the Commission's assessment of there being a majority group of councillors who held sway when necessary. He states that "there was a group of councillors who were progressive, not always agreeing, but focussed on trying to get things done. There were others who were anti-progress only focussed on their own patch, lacked vision, focussed on pot holes and drainage".<sup>407</sup> The Commission has noted this submission which, in the Commission's view, confirms divisions within Council.
440. Councillor Limbrick submits with respect to the CCP applications that the behaviour of three Councillors against whom complaints were made were all in his opinion "not up to the standard expected of civic leaders. All different, but all just as unacceptable".<sup>408</sup> He further submits that he firmly believes that the Countback

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<sup>403</sup> Submission of Cr Wayne Limbrick dated 17 February 2023, p 1.

<sup>404</sup> Submission of Cr Wayne Limbrick dated 17 February 2023, p 1-2.

<sup>405</sup> Submission of Cr Wayne Limbrick dated 17 February 2023, p 2.

<sup>406</sup> Submission of Cr Wayne Limbrick dated 17 February 2023, p 3.

<sup>407</sup> Submission of Cr Wayne Limbrick dated 17 February 2023, p 2.

<sup>408</sup> Submission of Cr Wayne Limbrick dated 17 February 2023, p 3-4.



system has failed Moira Shire due to the number of resignations and the subsequent admission to Council of individuals who are unelectable by popular vote.<sup>409</sup> The Commission does not accept Councillor Limbrick's pejorative comments about his fellow Councillors. The Commission also rejects his characterisation of Councillors elected through the countback system as provided for in the Local Government Act.

441. Councillor Limbrick states with respect to the Monitor that he found her to be quite decisive at times and felt that she had no faith in the CEO.<sup>410</sup> He states that the advice regarding the termination of the CEO's employment was characterised by former Mayor Mustica as having only been obtained just in case it got to that when the final report from the Monitor came out.<sup>411</sup> The Commission has noted this submission.
442. Councillor Limbrick states with respect to the serious misconduct in procurement referred to in Chapter 6 of this Report that these issues "were never reported to Council or the Audit and Risk Committee. They clearly should have been by the previous CEO and required stronger, more immediate action by the current CEO".<sup>412</sup> The Commission accepts this submission.
443. Councillor Limbrick makes various submissions with respect to the transfer of asbestos contaminated soil by the Moira Shire Council to waste transfer stations unlicensed to receive it.<sup>413</sup> These submission have been provided to IBAC along with the Commission's referral.
444. Councillor Limbrick submits that the capital works program at Moira Shire "is seriously a mess".<sup>414</sup> He cites the Numurkah Flood Mitigation project as a "classic example".<sup>415</sup> The Commission accepts this submission. Councillor Limbrick submits that the delays for this project are partly attributable to conflict within community committees and the previous Director of Infrastructure.<sup>416</sup> These issues do not absolve the Council of its responsibility to have implemented the agreed Option A for construction of the levy.

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<sup>409</sup> Submission of Cr Wayne Limbrick dated 17 February 2023, p 4.

<sup>410</sup> Submission of Cr Wayne Limbrick dated 17 February 2023, p 4.

<sup>411</sup> Submission of Cr Wayne Limbrick dated 17 February 2023, p 3.

<sup>412</sup> Submission of Cr Wayne Limbrick dated 17 February 2023, p 3.

<sup>413</sup> Submission of Cr Wayne Limbrick dated 17 February 2023, p 3-4.

<sup>414</sup> Submission of Cr Wayne Limbrick dated 17 February 2023, p 4.

<sup>415</sup> Submission of Cr Wayne Limbrick dated 17 February 2023, p 4.

<sup>416</sup> Submission of Cr Wayne Limbrick dated 17 February 2023, p 4.



445. Councillor Limbrick states that the cultural issues at Moira Shire are long-standing and deep-seated. He states that he fully supports the CEO's actions in the decisions she has taken.<sup>417</sup> The Commission has considered this submission in its assessment.
446. Councillor Limbrick supports the notion that community engagement needs to improve, and states that there is considerable frustration within the community that messaging and timing of information has been poor with not enough notice of consultation periods, surveys that are loaded, plans already made and then forced on the community with no consultation.<sup>418</sup> The Commission notes this assessment which is consistent with the evidence received in its Inquiry.
447. Councillor Limbrick submits that "the current council should be dismissed, due to the failure of the electoral system which has delivered a dysfunctional and unworkable group that is unlikely to be able to offer any positive results over the remaining terms".<sup>419</sup> The Commission notes this submission, which supports the Commission's finding that Council be dismissed.
448. Councillor Limbrick doubts that a ward system will deliver better representation and says that Council may again end up with Councillors who are not up to the standard that the Shire needs.<sup>420</sup> The Commission has noted this submission.
449. Councillor Limbrick notes in closing that his sole purpose for nominating for Council was to try and force change to fix much of what this Commission has found in its reviews. He believes that "we have been let down by the system to a large degree" and finds it "concerning that Councillors duly elected by their community will take the fall for the sins of the administration prior to [his] term".<sup>421</sup> The Commission has noted this submission.

### **Councillor Buck**

450. Councillor Buck submits with respect to recommendation 1 that it is unfair for the Commission to attribute blame and recommend the same consequences for all current Councillors when clearly some current Councillors were not in office when critical decisions were made or failures occurred. Councillor Buck further submits

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<sup>417</sup> Submission of Cr Wayne Limbrick dated 17 February 2023, p 4.

<sup>418</sup> Submission of Cr Wayne Limbrick dated 17 February 2023, p 4-5.

<sup>419</sup> Submission of Cr Wayne Limbrick dated 17 February 2023, p 5.

<sup>420</sup> Submission of Cr Wayne Limbrick dated 17 February 2023, p 5.

<sup>421</sup> Submission of Cr Wayne Limbrick dated 17 February 2023, p 6.



that s 228 of the Local Government Act is broad enough to contemplate the dismissal of some but not all Councillors.<sup>422</sup>

451. The Commission notes that Councillor Buck was elected Council in 2012, 2016 and most recently on 12 December 2022. The Commission further notes that s 228 of the Local Government Act provides that, on recommendation of the Minister, the Governor in Council may stand down a Councillor for a specified period not exceeding six months or until certain outcomes in subsection 5 have occurred. For the reasons discussed throughout this Report, the Commission does not think that a period of six months would be sufficient. The Commission also notes that the outcomes in subsection 5 are not applicable.

### **Councillor Heather**

452. Councillor Heather makes Submissions with respect to the incident that occurred on 23 March 2022, including that the joint statement by the Mayor and CEO on 29 March 2022 incorrectly attributed the appointment of the Municipal Monitor to the “the behaviour of one Councillor”.<sup>423</sup> The Commission accepts this submission.

### **Former Councillor Marie Martin**

453. Former Councillor Martin submits that, whilst she appreciates the gravity of the matters canvassed in the draft report, she does not believe it is in the interests of the Shire to be without representative government for such an extended period of time.<sup>424</sup> For the reasons detailed throughout this Report, the Commission does not accept this submission.

### **Libro Mustica**

#### *Yarrowonga Multisport Stadium*

454. In his Submissions, Mr Mustica addresses the Commission's comments, outlined above in paragraphs 71-75, regarding his intervention into the tender process for the Yarrowonga Multisport Stadium.

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<sup>422</sup> Submission of Cr Wendy Buck dated 17 February 2023, p 1.

<sup>423</sup> Moira Shire Council, Media Release: 'Local Government Monitor welcomed;', dated 8 April 2022. Accessible here: <https://www.moira.vic.gov.au/Our-Council/News-and-information/Media-releases/Local-Government-Monitor-welcomed>; Further submission of Cr Judith Heather dated 16 February 2023, p 1.

<sup>424</sup> Submission of former Councillor Marie Martin dated 17 February 2023.



455. Mr Mustica submits that two tenders were considered by Council on 24 August 2022, and that he did not agree with the recommendations of Council administration to proceed with one of those tenders.<sup>425</sup>
456. It was under these circumstances that Mr Mustica then made his presentation to Council on 28 September 2022. In his Submissions, Mr Mustica notes that, by this time, the deadline for submitting tenders had closed, and the tender process was "well and truly complete and closed".<sup>426</sup>
457. While the deadline for submitting tenders may have closed, the Commission does not accept that the tender process itself was complete and closed.
458. No evidence has been provided to the Commission establishing that the tender process put to Council for decision on 24 August 2022 was complete, or that the tenderers whose proposals were considered on that date had been advised that their tenders were unsuccessful.
459. In these circumstances, the Commission does not consider that the presentation by Mr Mustica on 28 September 2022 was appropriate. This aligns with the position of several councillors present on the day, including Councillor Limbrick and Councillor Mansfield.

### *34 Ritchie Road*

460. In his Submissions, Mr Mustica attaches comments by Mr Des Menz, a Civil/Environmental Engineer.<sup>427</sup>
461. Mr Menz expresses a number of views about the "weaknesses and failures in previous planning undertakings sponsored by Moira Shire Council".<sup>428</sup> He takes issue with the Echelon Report regarding 34 Ritchie Road, which "perpetuates the unsatisfactory long-term residential planning framework that began 16 years and more previous".<sup>429</sup> Mr Menz states that, "because Mr Mustica pursued changes in Cobram's planning framework in the period 2014-2016, this does not mean that on becoming an elected representative, he should have ceased all such overtures. He knew what conflict of interest was".<sup>430</sup>

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<sup>425</sup> Submission of Libro Mustica dated 17 February 2023, p 3-4.

<sup>426</sup> Submission of Libro Mustica dated 17 February 2023, p 4.

<sup>427</sup> Submission of Libro Mustica dated 17 February 2023, p 16-19.

<sup>428</sup> Submission of Libro Mustica dated 17 February 2023, p 18.

<sup>429</sup> Submission of Libro Mustica dated 17 February 2023, p 18.

<sup>430</sup> Submission of Libro Mustica dated 17 February 2023, p 18.



462. The Commission has made it clear in its Report that it does not suggest any impropriety by Mr Mustica in seeking a re-zoning of the land in question. He is perfectly entitled to do so. However, his pursuit of planning scheme amendments favourable to his personal interests and contrary to the recommendations of the Council's planning department does not sit well with his role as Mayor and Councillor.

### Clare Keenan

463. Ms Keenan submits that while she had CEO and council experience and considered herself qualified from mid-2021 to assume and grow into the role of a CEO of a Victorian regional Council, she was initially inexperienced in Victorian regional government, and was unfamiliar with extant underlying cultural issues at Moira Shire Council.<sup>431</sup>

464. With respect to Ms Keenan's prior experience, the Commission notes that Ms Keenan's prior CEO experience was limited to a two year and four month term as CEO of a remote Queensland shire.

465. Ms Keenan's council experience, prior to her time at Burke Shire, consisted of policy and advisory roles in New Zealand approximately 20 years ago.

466. The Commission acknowledges that Ms Keenan was faced with difficult circumstances shortly after commencing her role at Moira Shire Council.<sup>432</sup>

467. However, the Commission does not accept that Ms Keenan's inexperience in Victorian regional government, unfamiliarity with extant underlying cultural issues at Moira Shire Council, or the difficult circumstances she faced upon commencing the role provide an acceptable explanation to the issues considered throughout this Report.

468. In the Commission's view, an experienced Executive would have approached matters such as stakeholder management, Councillor conflict, and human resources practices with diplomacy and restraint.

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<sup>431</sup> Submission of Clare Keenan dated 17 February 2023, 2.

<sup>432</sup> Submission of Clare Keenan dated 17 February 2023, 3.



469. The Commission also notes that the extant cultural issues at Moira Shire Council were publicly known since at least 2014.<sup>433</sup>
470. Ms Keenan submits that she has resolved to undertake the following steps in order to better serve Council in future:
- 470.1. Repairing/restoring diplomatic relations with aggrieved stakeholders;
  - 470.2. Adjusting her tone and management style;
  - 470.3. Seeking further training on relevant legislation and Victorian government processes.<sup>434</sup>
471. Having regard to the evidence of Ms Keenan's established patterns of behaviour, the Commission has little confidence that these resolutions will be realised.

### *Evidence*

472. With respect to the evidence more generally, Ms Keenan submits that evidence provided by certain people who were personally affected by her conduct towards them ought to be viewed with caution.<sup>435</sup>
473. The Commission has approached all evidence it has received with the necessary degree of caution.
474. The Commission has found the evidence provided by the persons named in Ms Keenan's submissions to be credible and unembroidered.
475. The evidence provided by the persons named in Ms Keenan's submission is supported by consistent evidence from others who Ms Keenan does not allege to have an incentive to mis-state affairs or embellish their complaints.<sup>436</sup>
476. It is also supported by the documentary evidence, including Ms Keenan's own emails, text messages and voice messages.<sup>437</sup>

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<sup>433</sup> Minister Jeanette Powell ABC media release, 5 March 2014.

<sup>434</sup> Submission of Clare Keenan dated 17 February 2023, 8(a-c)

<sup>435</sup> Submission of Clare Keenan dated 17 February 2023, 14.

<sup>436</sup> Refer to Chapter 4, The CEO and the Organisation.

<sup>437</sup> Refer to Chapter 4, The CEO, the Monitor and the Commission of Inquiry.





477. Taken together, this evidence forms a consistent picture which, in the Commission's view, adequately addresses any questions that may be said to arise with respect to the reliability of evidence given to the Commission.

### *Process*

478. Ms Keenan submits that, in making its findings, the Commission ought to take into account the volume of material provided to Ms Keenan with the Commission's draft report for response between 6 and 17 February 2023. Much of this material was available to Ms Keenan prior to 6 February 2023 through her role as CEO of the Moira Shire Council and during her interview with the Commission. In these circumstances, the Commission is satisfied that the requirements of procedural fairness have been met.

### *Response to Findings*

479. Ms Keenan submits that it is not always apparent whether, and to what extent, the Commission is proposing to make a finding about her when findings and adverse statements refer to Council and/or its administration.<sup>438</sup>

480. Ms Keenan states that, given time, she has taken the approach of responding to adverse statements about the conduct of Council's administration only when she is expressly referred to as a participant in that conduct.<sup>439</sup>

481. Findings about a body politic or body corporate consisting of natural persons are common place in public inquiries.

482. Of course, it was open to Ms Keenan not to respond to findings except where they directly refer to her. However, in the Commission's view, it bears noting that it was both open and available for Ms Keenan to do so.

### *Finding 7*

483. With respect to finding 7, Ms Keenan submits that the evidence of two Numurkah residents who allege that Ms Keenan blocked their emails should be afforded no weight. Ms Keenan submits that these residents felt aggrieved by their experiences in dealing with Council, and says that she denied blocking their emails in her interview with the Commission.<sup>440</sup>

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<sup>438</sup> Submission of Clare Keenan dated 17 February 2023, 22.

<sup>439</sup> Submission of Clare Keenan dated 17 February 2023, 24.

<sup>440</sup> Submission of Clare Keenan dated 17 February 2023, 29-32.



484. The Commission notes that finding 7 is not reliant upon the evidence about emails being blocked, and reflects the assessment of Council performance reported in the 2022 Local Government Community Satisfaction Survey.
485. The Commission also notes that, in her interview with the Commission, Ms Keenan denied that emails from one Numurkah resident were currently blocked from her account, but acknowledged that "a while ago [she] asked for [the Numurkah resident's] emails to not come to [her] inbox" and that she asked her EA for these emails "to go to other people's inboxes".
486. The Commission does not accept that Ms Keenan denied blocking emails from the Numurkah residents in her interview.
487. The Commission also found the evidence of the Numurkah residents to be credible.

### *Finding 9.2*

#### *Professional manner*

488. Ms Keenan denies having "reactive propensities", displaying "reactive behaviour, lack of judgment and intemperate language" and demonstrating "a pattern of ill-considered emails and other communication", which are not behaviours of "a competent and professionally mature CEO".<sup>441</sup> She states that she has never sworn at, or raised her voice to, a staff member.<sup>442</sup> The Commission does not say that Ms Keenan swore at, or raised her voice to, a staff member.
489. Ms Keenan submits that the conclusions drawn by the Commission about her professional manner are based on a total of five current and former managers and staff.<sup>443</sup> This is not correct. The conclusions drawn by the Commission in this regard are based on a range of evidence, including evidence from the five people named in Ms Keenan's submissions, the feedback provided by staff (including her direct reports) and Councillors as part of Ms Keenan's 360 assessment, the feedback provided by staff through the staff survey and Ms Keenan's own emails, text messages and voice messages.<sup>444</sup>

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<sup>441</sup> Submission of Clare Keenan dated 17 February 2023, 42.

<sup>442</sup> Submission of Clare Keenan dated 17 February 2023, 46.

<sup>443</sup> Submission of Clare Keenan dated 17 February 2023, 43.

<sup>444</sup> See Chapter 4 (e),(f) and (h)



490. With respect to the five current and former staff members, Ms Keenan submits that the evidence of 'most of these witnesses' should not be readily accepted, or should be accorded little weight' because Ms Keenan submits that these people are aggrieved by her conduct.<sup>445</sup>
491. Ms Keenan does not allege that two of the five current and former staff members are aggrieved by her conduct. There is therefore no reason, in Ms Keenan's submissions, why their evidence should not be accepted as reliable.
492. With respect to the remaining three people, the Commission found their evidence to be credible, persuasive and consistent with the weight of other evidence as discussed in paragraphs 472-477 above.
493. The Commission accepts Ms Keenan's submission that another senior employee may have provided evidence in support of Ms Keenan's performance.<sup>446</sup>
494. However, that does not alter the Commission's overall assessment of the evidence on Ms Keenan's performance.
495. With respect to the Commission's reliance upon her 360 assessment, Ms Keenan states that 'it is common in the corporate world for assertive and strong female managers to be improperly characterised as aggressive, and has nevertheless accepted that feedback as helpful and constructive".<sup>447</sup>
496. Ms Keenan further states that she has "scored highly in emotional intelligence tests and has a well-above average ability to manage her emotions". In support of this statement, Ms Keenan has provided the Commission with a report based on what appears to have been an online assessment lasting approximately 40 minutes.<sup>448</sup>
497. The Commission does not accept these explanations for Ms Keenan's conduct.
498. With respect to her dealings with the Municipal Monitor, the ASU, the Victorian Government and agencies, Ms Keenan states that she was unfamiliar with the process of the appointment of a monitor and a Commission of Inquiry under the

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<sup>445</sup> Submission of Clare Keenan dated 17 February 2023, 43.

<sup>446</sup> Submission of Clare Keenan dated 17 February 2023, 44.

<sup>447</sup> Submission of Clare Keenan dated 17 February 2023, 47.

<sup>448</sup> Submission of Clare Keenan dated 17 February 2023, 46.



Act, and submits that there is no basis for a finding that it was a "persistent mischaracterisation".<sup>449</sup>

499. She submits that her recorded phone message to the Registrar of Councillor Conduct Panels was "equally uninformed of the technical procedural issue at play, and the irrelevant reference to the Monitor and chaotic nature of the call simply reflects the unfortunate desperation to which she referred".<sup>450</sup>
500. Ms Keenan seeks to explain her conduct by reference to moments of frustration, and unfamiliarity with Victorian procedural matters some of which were only recently enacted.<sup>451</sup>
501. The Commission notes that the procedure in Victoria relating to the role of a Municipal Monitor and appointment of a Councillor Conduct Panel has remained substantially unchanged for at least five years, having existed prior to the commencement of the new legislation.
502. The Commission does not accept Ms Keenan's submission that her conduct can be explained by an unfamiliarity with these procedures.
503. If Ms Keenan was unfamiliar with Victorian procedural matters, it was incumbent upon her to seek advice and familiarise herself with the relevant provisions, rather than make unfounded and offensive statements about the Municipal Monitor which, by Ms Keenan's own admission, breached the Employee Code of Conduct on numerous occasions.<sup>452</sup>
504. Ms Keenan submits with respect to the staff survey that it was a "pulse check" and that it had a low response rate of around 93 people.<sup>453</sup>
505. The Commission does not accept that the staff comments should be dismissed on this basis, and notes that Council's own summary of the staff survey expresses no reservations about the reliability or utility of the survey.<sup>454</sup>
506. Ms Keenan submits that staff feedback can be attributed to various other external factors including the death of Mr Devlin. In this regard, the Commission notes that

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<sup>449</sup> Submission of Clare Keenan dated 17 February 2023, 48-59.

<sup>450</sup> Submission of Clare Keenan dated 17 February 2023, 50.

<sup>451</sup> Submission of Clare Keenan dated 17 February 2023, 51.

<sup>452</sup> Transcript of interview with Clare Keenan on 11 and 12 January 2023, 122 and 123.

<sup>453</sup> Submission of Clare Keenan dated 17 February 2023, 53.

<sup>454</sup> Staff Survey Results Summary, Positive Intelligence Consulting Moira Shire Employee Survey August 2022.



the death of Mr Devlin does not figure prominently in staff responses to the survey.

507. Ms Keenan further states that she has made changes to address other matters such as concerns around the internal appointment of staff.<sup>455</sup>
508. Ms Keenan submits that the Commission has placed excessive focus on the negative reviews and evidence of staff, and that the Commission must weigh that evidence against favourable evidence provided in respect of Ms Keenan's performance.<sup>456</sup>
509. Ms Keenan notes that, in their evidence to this Commission, five councillors and one external member of the audit and risk committee provided positive comments about her performance.<sup>457</sup>
510. The five councillors who provided this evidence did so before Council had established KPIs against which Ms Keenan's performance could be properly assessed.
511. In any event, the Commission has taken this evidence into account, but does not consider that it outweighs the evidence referred to above.

#### *Relationship with the Monitor*

512. With respect to her dealings with the Municipal Monitor, Ms Keenan submits that she was new to the role and was "understandably not yet fully acquainted with all relevant Victorian government legislation and processes".<sup>458</sup>
513. Furthermore, Ms Keenan states that she "did not at any stage see the Monitor's terms of reference".<sup>459</sup>
514. This is directly contradicted by the email Ms Keenan sent to the Executive Director of LGV at 1:39pm on 25 October 2022<sup>460</sup>, which states:

... I am deeply concerned that the Municipal Monitor ... is acting far outside her Terms of Reference (Attachment 1)...

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<sup>455</sup> Submission of Clare Keenan dated 17 February 2023, 55.

<sup>456</sup> Submission of Clare Keenan dated 17 February 2023, 56.

<sup>457</sup> Submission of Clare Keenan dated 17 February 2023, 56.

<sup>458</sup> Submission of Clare Keenan dated 17 February 2023, 58.

<sup>459</sup> Submission of Clare Keenan dated 17 February 2023, 57.

<sup>460</sup> Email from Clare Keenan to Mike Gooley at 1:39pm on 25 October 2022.



515. In any event, even if Ms Keenan did not have a copy of the Monitor's Terms of Reference, it was incumbent upon her to obtain a copy, or at least understand what they contained, before alleging to the Monitor, the Chief Financial Officer, the Executive Director of LGV and all Moira Shire Council staff that the Monitor was acting outside her Terms of Reference.
516. Ms Keenan further submits that she misunderstood the reason for the appointment of the Minister to be about the conduct of Councillor Heather.<sup>461</sup> Again, this is at odds with the evidence.
517. In a letter dated 29 March 2022, the Minister for Local Government referred to a meeting held with then Mayor Mustica on 11 March 2022 to discuss Moira Shire Council's priorities and community concerns.<sup>462</sup> The concerns were stated as including unequal access to community information and council jobs, councillor conflict and a lack of transparency and community engagement. The Minister requested that the Council seek advice from LGV to inform a plan to address these concerns and provide the Minister with an update on actions taken and any further support required by 30 June 2022.
518. When asked by this Commission for a copy of any such plan, Ms Keenan advised the Commission that no workplace plan was produced because the Minister's request was superseded by the appointment of the Municipal Monitor.<sup>463</sup>
519. During her interview with the Commission, Ms Keenan was asked how she could have formed the impression that the Monitor's Terms of Reference were limited to the conduct of Councillor Heather, while also believing that the broader request for a report on the matters listed in Minister's letter dated 29 March 2022 had been superseded by the Monitor's appointment.<sup>464</sup>
520. Ms Keenan said that her understanding of the Monitor's Terms of Reference was informed by a conversation she had with a member of LGV.<sup>465</sup> With respect to the Minister's letter, Ms Keenan said that she had at the time sought advice on the Minister's power to direct her.<sup>466</sup> The Commission reminded Ms Keenan that the letter was addressed to former Mayor Mustica, and that any question about the

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<sup>461</sup> Submission of Clare Keenan dated 17 February 2023, 57

<sup>462</sup> Letter from Minister Leane to Libro Mustica dated 29 March 2022.

<sup>463</sup> Letter from Ms Keenan to the Commission dated 30 November 2022.

<sup>464</sup> Transcript of interview with Clare Keenan on 11 January 2023, 71.

<sup>465</sup> Transcript of interview with Clare Keenan on 11 January 2023, 72.

<sup>466</sup> Transcript of interview with Clare Keenan on 12 January 2023, 80.



Minister's power to direct her was irrelevant.<sup>467</sup> In any event, the Commission does not accept Mr Keenan's explanation as to the matters in paragraph 519.

521. Ms Keenan submits that the Commission's reference to her anxiety evident in an email to the Monitor is unfounded and unfair because her email "concerns a perceived threat by the Monitor to Ms Keenan's employment".<sup>468</sup> The Commission does not accept that a perception can excuse her subsequent treatment of the Monitor.
522. Ms Keenan submits that the Commission's criticism of the text message she sent to the Executive Director of LGV at 10:05pm on 25 October 2022 is unsubstantiated and unfair. Ms Keenan submits that she was prioritising the response to an immediate flood crisis and assisting the community in a time of crisis over the admittedly important issue of informing residents of delays to the Mayoral election.<sup>469</sup> The Commission accepts that emergencies need to be prioritised. However, a CEO in her position must be capable of meeting other important obligations as they arise, in this case her obligations with respect to the democratic process of informing the community about the date of the mayoral election.

#### *Relationship with Councillor Heather*

523. In her submissions, Ms Keenan concedes that her relationship with Councillor Heather was strained.
524. She states that the Commission has conceded that it is "not able to form any firm view as to the subject or legitimacy of issues giving rise to that relationship strain".<sup>470</sup>
525. This is not an accurate characterisation of the Commission's position. The Commission states at paragraph 36 of this Report that it is not able to form any firm view as to what actually occurred in the confrontation between Councillor Heather and then Mayor Mustica on 23 March 2022.

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<sup>467</sup> Transcript of interview with Clare Keenan on 12 January 2023, 81.

<sup>468</sup> Submission of Clare Keenan dated 17 February 2023, 59.

<sup>469</sup> Submission of Clare Keenan dated 17 February 2023, 59.

<sup>470</sup> Submission of Clare Keenan dated 17 February 2023, 60.



526. This does not mean that the Commission is unable to form any firm view as to the subject or legitimacy of issues giving rise to the relationship strain between Ms Keenan and Councillor Heather.
527. As the Commission has noted, the relationship between Ms Keenan and Councillor Heather became strained on 18 August 2021, when Ms Keenan's letter to the editor describing opponents of the Yarrowonga Library project as a "vociferous group" was published. Ms Heather, as she then was, emailed Ms Keenan on 18 August 2021 stating amongst other things that she considered Ms Keenan's letter to be "threatening, disrespectful and a real put down to community groups who are just having a go".<sup>471</sup>
528. In her submissions, Ms Keenan states that, when Councillor Heather was elected on 15 December 2021, she did not perceive there to be any unresolved issues between them, and that she had a desire to begin their relationship with a "clean slate".<sup>472</sup>
529. This is despite Ms Keenan stating in her interview with the Commission that she never provided a substantive response to Councillor Heather's email of 18 August 2021.<sup>473</sup>
530. It is at odds with evidence surrounding Ms Keenan's delay in swearing Ms Heather into Council.<sup>474</sup>
531. It is also at odds with Ms Keenan's email to all Councillors except Councillor Heather on 10 March 2022. In her email, Ms Keenan attaches Councillor Heather's 18 August 2021 email and refers to it in support of a request that Councillor Heather cease direct contact with her.<sup>475</sup>
532. Ms Keenan submits that the Commission cannot reasonably suggest that the behaviours of a professionally mature CEO fail to be demonstrated if only one-on-one private contact was avoided.<sup>476</sup>

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<sup>471</sup> Refer to Chapter 4, The CEO and the CCP Applications

<sup>472</sup> Submission of Clare Keenan dated 17 February 2023, 64.

<sup>473</sup> Transcript of interview with Clare Keenan on 11 January 2023, 29.

<sup>474</sup> File note of Judith Heather on 16 November 2022,

<sup>475</sup> Email from Clare Keenan to Councillors dated 10 March 2022.

<sup>476</sup> Submission of Clare Keenan dated 17 February 2023, 65.





533. The Commission does not suggest this. As outlined at paragraph 50 of this Report, this conclusion is reached on the basis that:
- 533.1. Ms Keenan made no attempt to resolve the tensions between the Councillor and herself; and
- 533.2. Ms Keenan has had no direct personal contact with Councillor Heather other than at Council meetings and other semi-formal settings for the last 11 months.
534. Ms Keenan submits, with respect to the CCP application against Councillor Heather, that the Commission "temporally conflates" events by linking Ms Keenan's role in the application with the previous issues she had had with Councillor Heather.<sup>477</sup> The Commission does not accept this for the reasons above.
535. Ms Keenan further submits that it is unclear how her assistance in the CCP application against Councillor Heather was inappropriate, particularly in circumstances where she was assisted by lawyers, and the document was ultimately finalised by the signatories to the application.<sup>478</sup> The evidence received by the Commission states that Ms Keenan finalised the application and that she was the last one to review and edit it before it was provided to Councillors for signature.<sup>479</sup>
536. A large proportion of the application also concerns issues between Ms Keenan and Councillor Heather, including allegations that Ms Heather was "unreasonably questioning Ms Keenan when Ms Keenan is speaking", "talking over Ms Keenan", and "scoffing when Ms Keenan is speaking".<sup>480</sup>
537. Under the Local Government Act, applications to the CCP can only be made by Councillors and the Chief Municipal Inspector.<sup>481</sup>
538. While Ms Keenan would ordinarily be entitled to support Council in administrative matters, in this situation, there was clearly a conflict between Ms Keenan's

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<sup>477</sup> Submission of Clare Keenan dated 17 February 2023, 63.

<sup>478</sup> Submission of Clare Keenan dated 17 February 2023, 61.

<sup>479</sup> Email from Brant Doyle to Russell Kennedy dated 10 April 2022.

<sup>480</sup> Attachment 1 to CCP Application against Judith Heather on 27 April 2022.

<sup>481</sup> Local Government Act, s 154(2).



professional and personal interests, which should have been resolved by Ms Keenan abstaining from the process of preparing the CCP application.

539. Ms Keenan denies that her relationship with Councillor Heather ultimately undermined mediation prospects or affected her relationship with and concerns about the Monitor or her voice message left with the CCP registrar.<sup>482</sup> This denial is not supported on the evidence before the Commission.

#### *Entry into public controversies*

540. Ms Keenan submits that it was not inappropriate for her to enter public controversies through her letter to the editor dated 18 August 2021, withdrawal of advertising from the Numurkah Leader or intervention in the VCAT enforcement action in November 2021.<sup>483</sup>
541. With respect to the letter to the editor, Ms Keenan disagrees with the Commission's assessment that the library project had been initiated without any sound business case, that the costings and design were already in question and that realisation of the project faced many challenges. She says further costings were in question due to delays caused by the very group she had criticised in her letter.<sup>484</sup> Ms Keenan has not produced any evidence in support of either assertion. The Commission remains of the view that her decision to write the letter to editor published on 18 August 2021 showed little sensitivity or good judgment.
542. With respect to the withdrawal of advertising, Ms Keenan states the Commission has not provided her with the alleged petition circulated by Numurkah residents regarding the withdrawal. Ms Keenan further states that, "even if the withdrawal of advertising was an error in judgment, it must be viewed fairly in the time when governments and the media were balancing freedom of speech and official health advice and objectives in the face of so called 'vaccine hesitancy'".<sup>485</sup>
543. In her interview with the Commission, Ms Keenan did not deny the existence of a petition and stated that the extent of community opposition to her decision would

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<sup>482</sup> Submission of Clare Keenan dated 17 February 2023, 66.

<sup>483</sup> Submission of Clare Keenan dated 17 February 2023, 68.

<sup>484</sup> Submission of Clare Keenan dated 17 February 2023, 68.

<sup>485</sup> Submission of Clare Keenan dated 17 February 2023, 69.



have been evident from the number of pamphlets that were being returned to Council at the time.<sup>486</sup>

544. In any event, the Commission's view as to the appropriateness of Ms Keenan's decision to withdraw the advertising is not dependent on the petition. In the Commission's view, Ms Keenan's decision was inappropriate because it involved the use of a public institution and its economic power to stifle an open and free media.
545. With respect to her intervention in the VCAT proceeding, Ms Keenan states that she acted on legal advice, and achieved a commercial and private agreement, including costly and novel jurisdictional issues.<sup>487</sup> This ignores the fact that the proceeding was an enforcement action involving issues of public interest, and that withdrawing the proceeding could be seen to have undermined Council's future capacity.
546. Ms Keenan challenges the Commission's conclusion that she acted on the pressure of others in making this decision, stating that such evidence is untested.<sup>488</sup> However, in her interview, Ms Keenan acknowledged that she had been approached on the matter by the then Mayor Mustica and Councillor Cox.<sup>489</sup>
547. Ms Keenan submits that it is not reasonable for the Commission to rely upon the evidence of two former staff members who state that they cautioned Ms Keenan against withdrawing the proceeding.<sup>490</sup> The Commission does not accept this submission for the reasons discussed above in paragraphs 472 - 477, noting also that the two staff members gave consistent evidence when separately interviewed by the Commission.

### *Remuneration Review*

548. Ms Keenan denies that she provided the impetus for the decision in December 2021 to increase her salary and extend her contract. In so doing, Ms Keenan refers to evidence provided Mr Mustica, Councillor Limbrick, Councillor Lawless and Council papers.<sup>491</sup>

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<sup>486</sup> Transcript of interview with Clare Keenan on 12 January 2023, 163.

<sup>487</sup> Submission of Clare Keenan dated 17 February 2023, 70.

<sup>488</sup> Submission of Clare Keenan dated 17 February 2023, 71.

<sup>489</sup> Transcript of interview with Clare Keenan on 12 January 2023, 252.

<sup>490</sup> Submission of Clare Keenan dated 17 February 2023, 71.

<sup>491</sup> Submission of Clare Keenan dated 17 February 2023, 73.



549. While the Commission accepts that Council took the decision to increase her salary and extend her contract, the evidence establishes that Ms Keenan was the main progenitor of the review process leading to Council's decision. In her interview with the Commission, Ms Keenan stated that when she was offered the job she was offered a salary which was far lower than she had been told was applicable to the job, and that she accepted that salary but said she wanted it reviewed.<sup>492</sup>

### *Restructure*

550. Ms Keenan has made submissions on Moira's organisational restructure, and provided evidence to the Commission demonstrating that certain consultations occurred.<sup>493</sup> The Commission has accepted this evidence, and taken it into account in its Report.

### *Proposed finding 9.2*

551. Ms Keenan makes various submissions in respect of finding 9.2 about her dealings with Surepact.<sup>494</sup>

552. For the avoidance of doubt, finding 9.2 does not relate to Surepact, but rather the misconduct of the Coordinator of Facilities Maintenance discussed above in Chapter 6 under the heading "Serious Misconduct in Procurement".

553. With respect to Surepact more generally, Ms Keenan denies that she procured the system for Burke Shire Council.<sup>495</sup> The Commission accepts this evidence but notes that Ms Keenan was familiar with their services from her time there.

554. Ms Keenan further denies that the business case for Surepact at Moira Shire Council was developed to meet her requirements or with any input from her other than asking staff to look into it.

555. This is at odds with the Surepact website which quotes Ms Keenan as stating "(h)aving worked with the SurePact solution in my previous position at Burke Shire

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<sup>492</sup> Transcript of interview with Clare Keenan on 12 January 2023, 253.

<sup>493</sup> Submission of Clare Keenan dated 17 February 2023, 76.

<sup>494</sup> Submission of Clare Keenan dated 17 February 2023, 80-84.

<sup>495</sup> Submission from Clare Keenan dated 17 February 2023, 82



Council, I have seen first-hand its value to an organisation and chose to introduce SurePact within Moira Shire Council".<sup>496</sup>

556. Ms Keenan refers to her interview with the Commission where she stated that she "specifically wanted it to be ... arm's length and rigorous" in the procurement of Surepact services.<sup>497</sup>
557. Ms Keenan also refers to the evidence of the Director of Infrastructure who denied that the staff member who had prepared the business case was eager to satisfy the CEO, and said that staff member was pretty thorough through the process and quite eager to open up some transparency. Ms Keenan does not mention that the same witness stated that "certainly Clare was a big advocate for Surepact. She had implemented it at a past workplace, I think Burke Shire".<sup>498</sup>
558. Ms Keenan further states that she did not approve a Surepact contract exceeding \$350,000, and that the Commission is therefore unable to make a finding of serious misconduct against her.<sup>499</sup> As discussed above, Ms Keenan's dealings with respect to Surepact are not relevant to finding 9.2. The Commission also notes that, in her Submissions, Ms Keenan now acknowledges that the Council staff may have approved a contract which exceeded the \$350,000 threshold requiring Council approval.<sup>500</sup>

### *Proposed finding 9.3*

559. Ms Keenan states with respect to her obligation to notify IBAC of suspected corrupt conduct that "she acted on advice from HR and understood that Mr Henderson or Mr Sharpe would have informed both IBAC and Audit at the start of the investigation".<sup>501</sup>
560. Ms Keenan has produced no evidence to support her assertion that she received advice from human resources about notifications to IBAC at the time.
561. The Commission acknowledges that the misconduct and investigation into that misconduct commenced before Ms Keenan's arrival at Moira. However, when Ms Keenan received the results of the investigation in October 2021, it was incumbent

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<sup>496</sup> Article entitled 'SurePact launches into Victoria with Moira Shire Council dated 12 May 2022' available online at <https://surepact.com/news/surepact-launches-into-victoria-with-moira-shire-council/>.

<sup>497</sup> Submission from Clare Keenan dated 17 February 2023, 82.

<sup>498</sup> Transcript of interview with Josh Lewis dated 19 December 2022, page 210.

<sup>499</sup> Submission from Clare Keenan dated 17 February 2023, 84.

<sup>500</sup> Supplementary submission of Clare Keenan dated 22 February 2023, 24.

<sup>501</sup> Submission from Clare Keenan dated 17 February 2023, 86.



upon her, as a principal officer under the IBAC Act, to ensure that a mandatory notification had been made to IBAC.

562. Ms Keenan maintains that she notified the Audit and Risk Committee about the suspected corrupt conduct.<sup>502</sup> Ms Keenan has not produced any documents to evidence this. It is also at odds with the Submissions of Councillor Limbrick who, as a Council representative on the committee, says that the committee was never advised about this matter.<sup>503</sup>

#### *Proposed findings 3 and 9.4*

563. In her submissions, Ms Keenan links findings 9.4 and finding 3, and submits that it is not open to find that she contributed to Mr Devlin's death.<sup>504</sup>

564. The Commission does not say that Ms Keenan in any way contributed to Mr Devlin's death. This is made clear at paragraphs 13 and 225 of this Report. For the complete avoidance of doubt, the Commission has also made this clear in its findings.

565. With respect to finding 3 more generally, Ms Keenan submits that this finding should not be made including because:

565.1. this finding is a serious finding requiring a high level of satisfaction on the evidence;

565.2. in Mr Paterson's murder trial, the Supreme Court of Victoria heard more fulsome evidence and did not attribute any culpability to the Council or its workplace environment;

565.3. the basic notions of justice and personal responsibility mean that Mr Paterson alone is to be held responsible for the murder of Mr Devlin;

565.4. the Commission is not required under its Terms of Reference or any related material to make findings or report on the factors which may have contributed to the murder of Mr Devlin.<sup>505</sup>

566. Having considered these matters, the Commission:

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<sup>502</sup> Submission of Clare Keenan dated 17 February 2023, 88.

<sup>503</sup> Submission of Wayne Limbrick dated 17 February 2023, 3.

<sup>504</sup> Submission of Clare Keenan dated 17 February 2023, 91.

<sup>505</sup> Submission of Clare Keenan dated 17 February 2023, 91(a-d).



- 566.1. notes that finding 3 has been made on evidence which the Commission understands was not before the Court in Mr Paterson's murder trial;<sup>506</sup>
- 566.2. considers that it is reasonable and open, based on this evidence, for the Commission to question whether the death of Mr Devlin may have been preventable;
- 566.3. notes that the Commission's Terms of Reference include a requirement to inquire into, and report on (inter alia):
- 566.3.1. any matters affecting the Councillors' performance of their roles; and
- 566.3.2. any matters affecting Council administration's performance, including human resource practices;
- 566.4. considers that the performance of Council and its administration in ensuring the health and safety of employees in the Council's depots and other outdoor locations falls squarely within these Terms of Reference;<sup>507</sup>
- 566.5. has referred the ultimate question as to whether Mr Devlin's death was preventable to the State Coroner; and
- 566.6. agrees that the act of murder was an unfathomable act for which Mr Paterson was criminally responsible.
567. Ms Keenan challenges the conclusions drawn by the Commission in paragraphs 12-13 and 253- 256 of this Report about the state of the culture at Nathalia Depot.
568. Ms Keenan says in respect of these matters that she has not had access to any evidence in support of them, and that the Commission cannot therefore draw such conclusions. Ms Keenan also submits that the Commission's conclusions are contrary to the initiatives that have been implemented by her to improve work health and safety issues on the alleged workplace issues identified.<sup>508</sup>
569. The Commission notes the following in response to this submission:

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<sup>506</sup> Moira Shire LPGA Investigation Report dated 1 September 2017; Transcript of interview with staff member on 20 January 2023; Diaries belonging to Rick Devlin.

<sup>507</sup> See further *Ross v Costigan* (1982) 41 ALR 219, 334.

<sup>508</sup> Submission of Clare Keenan dated 17 February 2023, 94.



- 569.1. it was readily ascertainable from the murder of one employee by another that there were potential cultural issues at the Nathalia Depot;
- 569.2. Ms Keenan was by her own admission in possession of Mr Devlin's diaries, which evidence substantial cultural issues at the Nathalia Depot;<sup>509</sup>
- 569.3. Ms Keenan had access to evidence supporting the Commission's position that several key senior executives at the time of the murder and other senior staff including the Manager Occupational Health and Safety were well aware of the serious health and safety issues in the depots, especially but not only at, Nathalia;<sup>510</sup>
- 569.4. in the first 18 months of Ms Keenan's tenure, there were several human resources incidents involving the Nathalia Depot (see paragraphs 291-303 and 330-347 above);
- 569.5. the Supreme Court of Victoria, when sentencing Mr Paterson, noted cultural issues in the Nathalia depot;<sup>511</sup>
- 569.6. the Commission did not need to make extensive enquiries to be quickly aware of the nature of that environment and the damage it had wrought on members of the workforce;
- 569.7. under the circumstances, the Commission is satisfied that Ms Keenan has had access to the above evidence, and the substance of other evidence referred to in this Report, demonstrating that there were cultural problems in the Nathalia Depot;
- 569.8. the Commission has not been provided with any evidence establishing that any transformative initiative has been taken over the past 18 months to change the toxic culture that has prevailed in the Nathalia Depot since at least September 2017; and
- 569.9. the Commission does not therefore accept Ms Keenan's submissions on these matters.

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<sup>509</sup> Transcript of interview with Clare Keenan on 12 January 2023, 217.

<sup>510</sup> Moira Shire LPGA Investigation Report dated 1 September 2017.

<sup>511</sup> *Director of Public Prosecutions v Andrew Robert Paterson* [2022] VSC 746 at 12-16.





## Mark Henderson

570. The former CEO of Moira Shire Council, Mark Henderson has made submissions to the Commission on several matters.

### *Procedure*

571. Mr Henderson raises issues with respect to the Inquiry processes, including access to documents and the conduct of his interview.<sup>512</sup>

572. Mr Henderson was interviewed by the Commission on 30 January 2023 in respect of issues relating to his time at Moira Shire Council and provided with an opportunity to respond.

573. On 6 February 2023, Mr Henderson was provided with a complete copy of the Commission's Draft Report and access to the documents footnoted throughout.

574. He was given an opportunity to respond by way of written submissions due by 17 February 2023 and has availed himself of that opportunity.

575. Under these circumstances, the Commission is satisfied that the requirements of procedural fairness have been met.

### *Depot environment*

576. With respect to the Commission's finding that the depot environment was fundamentally unsafe, Mr Henderson submits that he visited every depot at least annually over breakfast to discuss matters of interest to the crews and provide a first-hand opportunity to raise any issue directly with him.<sup>513</sup> He states that never during those many visits and his open office door approach did any member of staff raise workplace safety or culture with him.<sup>514</sup> He states that workplace health and safety featured prominently in staff inductions for staff who commenced during his tenure.<sup>515</sup> He states that senior management received detailed monthly OH&S reports on incidents, lost time and workplace health programs, and submits that Workcover claims were at an all time low in his final year.<sup>516</sup> Mr Henderson further states that "no doubt there were some hard nosed characters that didn't get

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<sup>512</sup> Submission of Mark Henderson dated 17 February 2023, p 1.

<sup>513</sup> Submission of Mark Henderson dated 17 February 2023, p 1.

<sup>514</sup> Submission of Mark Henderson dated 17 February 2023, p 1.

<sup>515</sup> Submission of Mark Henderson dated 17 February 2023, p 1.

<sup>516</sup> Submission of Mark Henderson dated 17 February 2023, p 1.



on, but the Commission's attempt to conclude that this manifested in the tragic murder of Rick Devlin is bizarre."<sup>517</sup>

577. The Commission notes Mr Henderson's submissions, however, the evidence provided to the Commission supports the Commission's assessment that the depot environment was fundamentally unsafe. The Commission also notes that, during his interview, Mr Henderson stated that he was unaware of the 2017 Investigation Report which highlighted the toxic environment in the Nathalia Depot.<sup>518</sup> The Commission does not conclude that the depot environment manifested in the death of Rick Devlin, but rather, that is open to question whether it did. The Commission has referred this matter to the Coroners Court of Victoria.

### *Governance*

578. Mr Henderson takes issue with the Commission's conclusion that the governance of Moira Shire Council has been steadily eroding over the last decade.<sup>519</sup> He states that when he retired in 2021, the Council's financial position was strong, a multitude of worthwhile projects had been completed and there was a competent senior team in place.<sup>520</sup> He further states that the governance of the Shire was sound with excellent internal and external results.<sup>521</sup> The Commission notes Mr Henderson's submission which, in the Commission's view, is not supported by the evidence.

### *Rowe Street*

579. Mr Henderson disputes the Commission's conclusions and findings regarding the asbestos issue at Rowe Street. He states that, "if you read the report you'd think we dug up an old tip, dumped it in a truck and tried to hide it out of view at Tungamah and Strathmerton because the cost of taking it to Shepparton was too high".<sup>522</sup> He states that there is "no mention in the report of the hand screening that occurred at Rowe street by asbestos experts to remove bonded asbestos from the excavated material so that asbestos fragments could be legally disposed of to a licensed site".<sup>523</sup>

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<sup>517</sup> Submission of Mark Henderson dated 17 February 2023, p 1-2.

<sup>518</sup> Transcript of interview with Mark Henderson on 30 January 2023, p 63.

<sup>519</sup> Submission of Mark Henderson dated 17 February 2023, p 2.

<sup>520</sup> Submission of Mark Henderson dated 17 February 2023, p 2.

<sup>521</sup> Submission of Mark Henderson dated 17 February 2023, p 2.

<sup>522</sup> Submission of Mark Henderson dated 17 February 2023, p 2.

<sup>523</sup> Submission of Mark Henderson dated 17 February 2023, p 2.



580. The Commission notes Mr Henderson's submissions, however, the Council has admitted in its Defence to the claim brought in the Federal Court of Australia by the Council's Program Coordinator - Waste & Recycling that soil at Rowe Street contained asbestos and was taken to waste transfer stations that were not licensed to receive. <sup>524</sup> Mr Henderson told the Commission that it was fair to assume that, to some extent at least, the decision to transfer the asbestos contaminated soil to unlicensed sites was primarily to do with not wanting to pay the cost of taking it to a licensed facility.<sup>525</sup> Mr Henderson also told the Commission that if funding approval had been sought from Council for an estimated \$1 million to remove the soil and take it to an EPA licensed facility at Shepparton, it "would never have got up".<sup>526</sup>
581. Mr Henderson's submissions about the steps taken to remove the asbestos from the soil before it was transferred do not answer the evidence before the Commission demonstrating that asbestos contaminated soil was unlawfully transferred from Rowe Street to unlicensed sites. Neither does it explain why Council is now taking steps to remediate the sites at the relevant waste transfer stations and transfer the contaminated soil to a facility licensed to receive it.

#### *Numurkah Flood Levy*

582. Mr Henderson submits with respect to the Numurkah Flood Levy Project that the Commission's conclusion that "Council is carrying significant risk and liability not just for potential property damage but also potential loss of life" is absurd.<sup>527</sup> He further submits "nobody needs to die from a flood event in Numurkah as there are days of forewarning and in fact the risk of liability to a Council lies more in not maintaining an approved levy and increased flooding impacts on properties outside the levy".<sup>528</sup> The Commission does not accept this submission on the evidence.

#### *Representation review*

583. Mr Henderson submits with respect to the proposed representation review of Moira Shire that "it would be plainly obvious that wards, given the shifting

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<sup>524</sup> Australian Services Union & Anor v Moira Shire City Council, file VID642/2022: Statement of Claim of 28 October 2022 par 26. Defence of 23 December 2022, par 26.

<sup>525</sup> Transcript of interview with Mark Henderson on 30 January 2023, p 61.

<sup>526</sup> Transcript of interview with Mark Henderson on 31 January 2023, 35.

<sup>527</sup> Submission of Mark Henderson dated 17 February 2023, p 3.

<sup>528</sup> Submission of Mark Henderson dated 17 February 2023, p 3.



demographics of the Shire, would increasingly disadvantage the West and rural interests in terms of future electoral representation".<sup>529</sup> He further states "it is not the unsubdivided electoral structure that has led to the geographic imbalance of the current Council but rather a decided lack of candidates from the West that might fill extraordinary vacancies".<sup>530</sup> The Commission does not accept this submission on the evidence.

### **Coordinator of Facilities Maintenance**

584. The Coordinator submits that he did not engage in procurement misconduct or exploitation because he was working under the supervision of his manager, and in discussion with the procurement team before purchase orders were written.<sup>531</sup>
585. He states that several of the orders were completed under panel contract rather than under quote because he did not know how much work would be required.<sup>532</sup> He also states, in relation to contract allocation benefiting the partner of an employee working with him, that the company was awarded the contract because it was the cheapest quote and that his managers were aware of this conflict of interest.<sup>533</sup>
586. He also claims that the awarding of a contract to his son's company was on the basis that it was an emergency and undertaken with the authority of his manager.<sup>534</sup>
587. The Commission does not accept these submissions, and has referred this serious misconduct to IBAC for further consideration.

### **Stopline Pty Ltd**

588. Stopline has provided submissions with respect to the workplace investigations undertaken into the conduct of Mr Lee and Mr Mangan.
589. Stopline state with respect to the undated and unsigned letter purported to be written by Mr Devlin that:

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<sup>529</sup> Submission of Mark Henderson dated 17 February 2023, p 3.

<sup>530</sup> Submission of Mark Henderson dated 17 February 2023, p 3.

<sup>531</sup> Submission of Coordinator of Facilities Maintenance dated 17 February 2023, p 1.

<sup>532</sup> Submission of Coordinator of Facilities Maintenance dated 17 February 2023, p 1.

<sup>533</sup> Submission of Coordinator of Facilities Maintenance dated 17 February 2023, p 2.

<sup>534</sup> Submission of Coordinator of Facilities Maintenance dated 17 February 2023, p 3.



Stopleveline only ever received a photo of this letter, (which purported to be written by Mr Devlin), and informed Council that there was no way of proving who the author was or how it came to be found on Mr Devlin's desk weeks after his death.

Nonetheless, Council drew its allegations from this second letter and relied upon it to enable a workplace investigation. All Stopleveline could do was ask everyone interviewed what they knew about the second letter and the allegations contained therein.

Stopleveline was of the view that Council believed the letters themselves and their contents constituted breaches of council policies. Stopleveline understood that Council had already stood down council staff (Messrs. Mangan and Lee) prior to the commencement of the Stopleveline investigation, for unrelated workplace matters.<sup>535</sup>

590. Stopleveline states that they explained to Council the limitations of the investigation being requested by Council at the outset, namely that:

... it would be almost impossible to ascertain the author of the documents left on Councillor Martins' doorstep. Further, Stopleveline understood that by the time it was contacted, the documents were handled and seen by multiple persons, which would make the task difficult even for a forensic expert.<sup>536</sup>

591. This is totally inconsistent with the findings ultimately made by Stopleveline in its report, which states that they had "no reason to believe that the evidence relied on during this investigation is not true and accurate".<sup>537</sup>

### **Kristina Skipper**

592. Ms Skipper makes a number of submissions about the human resources practices at Moira Shire Council.

593. She submits, with respect to the Commission's conclusion that Mr Paterson's request for a voluntary redundancy was rejected, that it was instead withdrawn by

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<sup>535</sup> Submission of Stopleveline dated 14 February 2023, p 2-3.

<sup>536</sup> Submission of Stopleveline dated 14 February 2023, p 1-2.

<sup>537</sup> Stopleveline Report into allegations against Mr John Mangan and Mr David Lee dated 2 March 2022, page 11.



the ASU.<sup>538</sup> The Commission has been informed that the redundancy request was taken by hand to the General Manager Infrastructure and then by hand to the Manager Organisational Development who rejected it out of hand. The Commission has been advised that the following day the matter was discussed directly with the Manager Operations who also rejected it out of hand.<sup>539</sup> The Commission has been advised by the ASU that the redundancy request was only then withdrawn because it was believed that Mr Paterson's employment rights could be compromised. Accordingly, the Commission rejects Ms Skipper's submission.

594. Ms Skipper states with respect to paragraph 9 of the Executive Summary of this Report that the employee was provided with details of the allegations against him, and encloses a letter purporting to demonstrate this.<sup>540</sup> The letter provided by Ms Skipper does not contain the content of the allegations. What is apparent from Ms Skipper's letter is that, having engaged Stopline Pty Ltd to conduct an independent investigation into allegations of serious misconduct by the employee, the investigator determined there was insufficient information and evidence to proceed with the investigation. It was not until 11 months after the employee was first notified of unspecified allegations that he was informed that the allegations had been withdrawn.
595. Mr Skipper submits with respect to paragraph 273 that the employee was not required to transfer out of his workplace, as it was only a suggestion to support return to work.<sup>541</sup> The Commission does not accept this. The employee treated it as a direction as it had no foundation as an occupational health and safety issue conditional upon his return to work
596. Ms Skipper denies with respect to paragraph 274 that she was directed to initiate disciplinary action on the basis that she was instead directed to initiate an investigation.<sup>542</sup> The Commission does not accept this distinction.
597. Ms Skipper submits with respect to paragraph 309 that Mr May was not pressured to sign the deed, and that he had the opportunity to have legal representation at the mediation and was provided with a cooling off period.<sup>543</sup> This does not

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<sup>538</sup> Submission of Kristina Skipper dated 17 February 2023, par 1(b).

<sup>539</sup> Transcript of interview with staff member on 20 January 2023, 33-34.

<sup>540</sup> Submission of Kristina Skipper dated 17 February 2023, par 1(c).

<sup>541</sup> Submission of Kristina Skipper dated 17 February 2023, par 1(t).

<sup>542</sup> Submission of Kristina Skipper dated 17 February 2023, par 1(u).

<sup>543</sup> Submission of Kristina Skipper dated 17 February 2023, par 1(h).



address the fact that Council, during the course of a mediation with an unrepresented party, relied on an assertion that they had return to work plans which have been unable to be produced to this Inquiry. While the evidence indicates that the deed contained a cooling off period, the Commission considers this was not an equal negotiation.





# APPENDIX A

Advice from Municipal  
Monitor to Minister Horne  
dated 7 October 2022

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The Hon. Melissa Horne MP  
Minister for Local Government  
Parliament House  
Victoria  
BY EMAIL [Melissa.Horne@parliament.vic.gov.au](mailto:Melissa.Horne@parliament.vic.gov.au)

Dear Minister,

Thank you for your letter dated 21 September 2022 requesting advice regarding:

- Any issues affecting the governance and functioning of the Council
- What actions the Council has taken to address those issues, and
- The effectiveness of those actions.

## Background

I was appointed to the role of Municipal Monitor for Moira Shire on 22 April 2022 until 31 January, 2023. The Terms of Reference relate to monitoring the governance processes and practice of the Council, including specific regard to matters raised in the letter from the Council CEO dated 29 March 2022.

To date, I have attended 6 council meetings and 12 briefings/informal meetings of all councillors, one meeting of the Risk and Audit Committee, one meeting of the Executive Leadership Team, met on a regular basis with the Mayor and CEO, met with councillors collectively and on an individual basis, senior staff, the Australian Services Union, a community action group, key community leaders both in Moira Shire and surrounding areas, both at their and my request.

I sent an email to all staff informing them of the opportunity for them to provide information relevant to my Terms of Reference. Several staff contacted me and provided information.

Prior to my appointment, two councillors resigned within the current term. Due to these two resignations and the passing of another councillor, there are three councillors who have been elected since the 2020 General Election.

## Advice regarding the three matters you raised in your letter dated 21 September 2022

There are a number of issues I have observed, or have been advised of, relating to the governance and functioning of the Council. These are outlined below along with actions Council has taken and the effectiveness of those actions.

### 1. The unresolved issues affecting the relationship between the Mayor, CEO and Cr Heather

The Mayor sent a letter to Cr Heather regarding her behaviour which also indicated a preference that the councillor no longer communicate with the CEO outside of regular council events. After receiving this letter, I have been advised that Cr Heather approached the Mayor on 23 March 2022, during which an incident occurred. It is this incident that is referred to in the CEO's letter to the Minister dated 29 March 2022.

In respect to the letter from the CEO to the Minister dated 29 March 2022, the CEO stated that she was unable to provide a safe workplace due to the behaviour of one councillor. In the letter, the CEO

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refers to legal advice received stating that the CEO could not prevent the councillor from carrying out their statutory duties. I was unable to obtain a copy of that advice as it was verbal only. No investigation was commissioned by the CEO into the incident.

The then Minister for Local Government announced that a monitor would be appointed to Moira Shire on 8 April 2022, and I was announced as the monitor on 22 April and commenced duties on 27 April 2022. An application for a Conduct Panel was lodged by 6 councillors, facilitated by the Executive, dated 27 April 2022 against Cr Heather regarding the incident between Cr Heather and the Mayor that is alleged to have occurred on 23 March 2022. I was unaware of this application until sometime later. The application was prepared by Council's lawyers on instruction of the council officers without a Council resolution. This application did not proceed as the Principal Council Conduct Registrar (PCCR) advised that Council needs to undertake further attempts to resolve the matter with Cr Heather, before any application could meet the legislative requirements of Section 155 (1) for a Councillor Conduct Panel.

In response to the PCCR determination, the CEO called me and was adamant that the Council would go to court to challenge the decision. By later that week she advised that as Cr Heather's behaviour was improved, no action would be taken in response to the PCCR's decision. The CEO's responses seemed reactive in my view.

I provided verbal and follow up written advice to the CEO, as to how Council should proceed if it was of a mind to pursue the application. I noted that Cr Heather had undertaken induction since the application was lodged. I referred to using the processes outlined under the Council's Code of Conduct to attempt to resolve the matter. I also advised that all councillors would benefit from a professional development session focussed on working together effectively.

I noted that no councillors or staff have reported Work Health and Safety incidents or near misses as a result of Cr Heather's behaviour. I have observed the CEO and other councillors making comments that the cost of the monitor to Moira Shire is the result of the behaviour of one councillor, meaning Cr Heather.

I asked the Mayor and CEO a number of times about progress towards arranging the facilitated conversation with Cr Heather. There did not appear to be any sense of urgency about this.

A conversation was facilitated by an expert consultant between the Mayor, CEO and Cr Heather, on September 29, 2022, some 6 months after the incident. The facilitator has advised me that the CEO's view is that it was a failed process. The facilitator noted to me that the three individuals have strong personalities with the CEO and Cr Heather having diametrically opposed views. The facilitator has advised the Mayor and CEO that they should discuss any next steps with the broader councillor group, who also need to take responsibility for resolving issues.

During my appointment, I have not observed any behaviour from Cr Heather that I consider inappropriate, although she recently left a briefing session before it finished saying she had not been afforded procedural fairness. Next day she emailed all councillors to apologise for leaving. It has been put to me that Cr Heather's behaviour has greatly improved since my appointment. Concerns have been expressed that this may not continue once the monitor's term expires. This is quite likely as an improvement in the relationship between the Mayor, CEO and Cr Heather does not appear to have been achieved following on from the facilitated conversation.

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## 2. Councillors lack an understanding of their governance role

There does not appear to be a thorough understanding by Councillors of their roles as outlined in the Local Government Act 2020. The principles-based Act requires a strategic focus, governing for the whole municipality, and management of strategic risk. Two councillors are newly elected this term. Seven of nine councillors have had previous experience as councillors, one going back prior to amalgamation in 1995.

I observed:

- Councillors are not well inducted into their roles receiving a 2-hour induction session upon election nor do council reports provide sufficient background information to help provide context for decisions.
- There has not been any professional development sessions offered for Councillors during my appointment other than induction training for the two new Councillors. Limited matters come before Council. The majority of council meeting agendas have not included more than 4 to 6 items for decision, many of which are a statutory requirement (for example, review of delegations, approval of financial statements). The agendas do not include broad strategic matters, advocacy or new initiatives that would be expected of a council of this size. The Councillors only spend between 5 to 7 hours together per month. The council meetings are generally completed within 1 hour.
- I am concerned that Councillors do not turn their minds to all issues before them and do not always seek to be properly informed. What has led me to this view is:
  - o There has never been a motion moved that wasn't the officer recommendation, and no amendments. Councillors rarely have robust discussion or debate, in council meetings or briefings.
  - o The level of information provided to Councillors in reports is not always comprehensive. This may make it difficult for all Councillors to make informed decisions. Reports for councillor briefing sessions are usually verbal only. Councillors usually engage in discussion and questions at the briefing sessions.
  - o It is clear from discussions that some Councillors have not read or not understood the agenda papers for Council meetings.
  - o There has been a number of projects/issues which have been discussed at briefing sessions multiple number of times. The reports provided on these matters could have been more comprehensive, or greater clarity on the proposed actions may have resulted in issues being resolved sooner.
- Governance Rules are in place however, I observed the Mayor permitting councillors to use Urgent General Business in council meetings to raise matters that were not urgent in nature and no notice had been given as required by the Rules. My sense is that this is indicative of broader issues where the Council has been casual about the application of the Rules.
- There appears to be a concerted effort to keep the Council's consideration to a narrow set of issues. Several councillors told me that the administration controls the meeting agendas, and there is little, if any, influence councillors have over the matters considered by Council. Some feel frustrated and that they are wasting their time.
- I have not seen any matters come before a Council meeting regarding advocacy for the community. There are needs which Council is not taking up. I was advised by the Hospital CEO that Cobram is in dire need of a new hospital. The Council has not given consideration to advocacy for on this matter. Council's lack of advocacy for the hospital has also come to the attention of the local member of parliament.

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- The municipality is unsubdivided and while Councillors are elected by the entire shire, many Councillors seem to be focussed on matters related to the localities near their residences, rather than considering the whole municipality.

Having observed these things it has led me to the conclusion that the Council is not fulfilling its governance role.

I put to the Councillors at a briefing session attended by the Executive, that they needed to ensure they were fulfilling their role under that Local Government Act, specifically the role of Council and the role of Councillors, to emphasise the importance of governing for the whole municipality, considering the long term and strategic opportunities, advocating for the community, along with broader risks and opportunities, and not directing staff. I encouraged Councillors to broaden the scope of the matters under consideration, and to ask for reports and discussions about matters related to their role that were of concern to them. Councillors agreed that the agendas did not cover the expanse of issues they thought should be before the Council, and the content should be reviewed. I advised them that in order to consider the full breadth of issues they would need to dedicate more time to considering and discussing matters together. Council has agreed to expand its meeting times to meet on three Wednesdays per month, up from two, in order to provide opportunity for workshops, professional development, site visits and deputations. This is due to commence in October 2022.

I provided advice that the Mayor required access to a staff member who can immediately advise him of meeting procedures contained in the Governance Rules during Council meetings. This is now in place and the meetings are now complying with the Council's Governance Rules.

Upon my advice, Council has now introduced a General Business item into Briefing sessions as an opportunity for Councillors to raise matters of concern and have discussions about matters not on the agendas. While this change is only recent, I have noticed councillors taking the opportunity to raise matters of concern and interest. Councillors will need to be more assertive to elicit the necessary support from the administration to progress the issues raised. The matters could be progressed if the administration become proactive in responding to the matters raised by councillors. The CEO has told me she prefers Councillors to raise matters directly with her, rather than have time allocated to General Business during briefing sessions.

I also recommended a program of professional development be undertaken with the topics of 'Governance' and 'Working Together Effectively' to be the first priorities. Council officers have arranged Governance training for October 12, 2022.

As many of these changes have recently been initiated, I have not had the opportunity to observe their effectiveness in improving governance.

All of the advice I have given to Council as discussed above, are standard practice for local government and are well within the remit of the CEO.

### 3. Poor financial management in regard to capital works.

Councillors have a strong interest in undertaking capital works. The Council has a capital works budget of approximately \$20M in 22/23. This is on top of capital works to the value of \$34M that have not been delivered in prior years. It would be reasonable to expect a carried forward amount of around \$4M to 6M. A carried forward amount of \$34M indicates that there are projects that have been budgeted but not delivered for several consecutive years. This means that the community has paid for projects, and has a right to expect them to be constructed, that have not been delivered.

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Prior year projects include the Shire's largest ever project which was budgeted for \$9.9M, now expected to cost in the order of \$14M for the Yarrawonga multi sports stadium. The Yarrawonga library project expected to cost \$8 M is also on the list of projects budgeted in prior year but not yet delivered. These projects have been budgeted for several years during which time cost escalations have occurred. Tenders were sought for the Yarrawonga multi sports stadium in February 2022 without confirmation of available funding. The tender and funding remain unresolved.

A construction contract was awarded for the Yarrawonga library project without necessary risks being managed. This has resulted in the site being cleared but no works have been able to progress for many months. The site remains a vacant worksite. I have been advised that works are due to commence in October 2022.

The library project has not been without controversy. A community group formed to save the community hall which has since been demolished to make way for the new library. This group is now lobbying to save the former primary school site and is frustrated at the lack of definitive response from Council.

Council is introducing a project management system called Sure Pact to assist in project management oversight.

I have advised the Council that it should gain a full understanding of the projects that will be delivered in 22/23 by September 2022 and develop financial policy to manage carry forward funds in future years by November 2022. Council recently received a verbal presentation from the Director on the current delivery program. It is yet to receive a detailed report on the capital works delivery program for 22/23 to understand which projects are planned to be delivered within the funding and project management capacity of the Council in the current year. Financial policy is planned to be developed in November 2022. I also met with the Chief Financial Officer and Director of Infrastructure Services to discuss the process for rectifying the large carry forward. As these initiatives are yet to take full effect, I am unable to comment of their effectiveness.

#### 4. Failure to manage the CEO's performance

The Council has a CEO Employment and Remuneration Policy. The CEO Employment and Remuneration Committee consists of all Councillors plus an Independent Member who is a Human Resources professional. The policy provides for the annual review of the CEO's performance following which Council can consider a remuneration review. The HR professional was appointed after the policy was finalised and was able to assist in the appointment process for the current CEO.

The CEO commenced duties in July 2021. In December 2021, the Councillors resolved to confirm her appointment following a 6 month probation period, extend her contract from 3 years to 5 years and increase her salary package by \$30,000. It wasn't clear on what basis Council agreed to increase the contract and the remuneration noting that the policy specifies Council can consider a remuneration review after 12 months.

The CEO's contract includes a detailed outline of the responsibilities of the CEO, and lists "initial performance criteria until .....a more comprehensive CEO performance plan is developed and agreed following commencement". No comprehensive CEO performance plan has been developed for the CEO to date.

Recently the Council resolved to appoint a further external advisor (the consultant) to facilitate the CEO's annual performance review being conducted by the Committee. It is unclear to me what the

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role of the independent member will be in the performance review, given Council has now appointed a further external advisor for this purpose.

I am aware that the Mayor has been seeking external advice from various parties regarding the CEO's contract, including from the Council's lawyers. The Mayor sought this advice without the knowledge of his fellow councillors, nor authorisation through a Council resolution.

I recently met with Councillors and they variously mentioned concerns regarding the CEO performance. I reminded them of the policy and process related to the CEO's employment including that the role of the Independent Member, as well as the consultant appointed to undertake the performance review, is to provide advice to Council.

The CEO's annual performance review commenced in August 2022 however the CEO was unavailable and a further meeting is being scheduled for late October 2022.

**5. Poor staff culture, increased staff turnover and a history of concerning Human Resource Management practices.**

I observed a culture of fear in the organisation.

The staff described to me that they felt they 'had a target on their back', that they had been treated disrespectfully and unfairly, that they had witnessed and feared the CEO's unpredictable and unprofessional behaviour. (I too have witnessed the CEO's reactive behaviour regarding the Cr Heather conduct panel request matter.)

It is clear to me that staff were very concerned about approaching me due to confidentiality. Some were willing to speak to me, but not provide anything in writing. Others asked to meet me outside work hours or outside the shire, which I did. Staff said to me that they feared 'they would be next'. Staff from all four directorates, and the Office of the CEO contacted me to discuss the organisation's culture.

I received several written submissions expressing concern regarding the CEO's leadership. One wrote "I don't think I've ever experienced a more demoralised and tormented workforce as the one existing in MSC at the moment and I will struggle to live with myself if I don't say something." "We are at desperation stage as we wonder what is going to come next in this dictatorial style of management." and "I'm terrified to send this and potentially lose my job."

It has been put to me by several sources that the Council has poor Human Resources practices which includes staff not being afforded procedural fairness and natural justice. Examples were given to me of staff being appointed to roles without proper advertising, and staff under investigation waiting weeks before being advised of the details of allegations. Some of these practices go back a number of years.

In August 2021, a homicide occurred where a staff member on Workcover, shot and killed the Works Manager. This did not occur on a work site nor in work hours however, understandably, it does appear to have on going impacts across parts of the organisation.

I was advised of at least two recent manager roles where appointment was not on merit. The information provided to me was that a manager's role was advertised, and following interviews for the role, the administration decided to create two manager roles with different titles enabling two candidates to be appointed. The new roles were not separately advertised..

Concerns were raised with me regarding Occupational Health and Safety practices at the Shire.

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An executive member of Worksafe advised me that Moira Shire is one of a small number of Councils across the state that Worksafe has a comparatively high number of matters to address. Their inspectors have attended on a number of occasions in a proactive and reactive role. Worksafe is currently investigating a number of matters related to Moira Shire.

There have been a number of psycho-social Workcover claims lodged by staff in recent months.

The ASU is actively supporting its members at Moira Shire. The Union has forwarded to me a number of statements including signed statements which allege very poor treatment of staff. I have received several allegations of contraventions of the Local Government Act and the Fair Work Act in the treatment of staff while undertaking their duties. The ASU states that "There is a culture of fear and intimidation at Moira Shire Council. The ASU is seeing members who have voiced their concerns, or simply done their job ..... face disciplinary action, including termination of employment."

The ASU advises that it is currently dealing with one matter before Fair Work Commission (FWC) and that there has been "more than average FWC matters over last few years for a workplace of that size". "There are several WorkCover cases and WorkSafe complaints underway."

Workforce turnover figures for 21/22 were at 18.35%, following 20/21 at 4.44%, 19/20 at 12.95%, and 18/19 at 15.62%. The current rate of 18.35% is considered very high, particularly for a rural municipality where the opportunities for alternative employment are limited. A normal turnover rate would be around 10%.

A staff survey was recently commissioned by the CEO. The survey results have been shared with the staff. Councillors have asked to review the survey results. The CEO response was that the matter had been completed, and she did not want to compromise the confidentiality of the survey results which I took to mean that she was not intending to share the information with Councillors.

I met with Council's Human Resources Manager who told me that the culture was not different to most workplaces and that correct processes were being followed. I gave advice that the recruitment policy/procedure allowed the CEO to appoint staff without any reason other than in the best interest of the shire, I asked whether she thought this was in line with the Local Government Act which requires appointment on merit. She agreed to have the policy reviewed and rectified. She said they had never not complied with the Act.

There has been substantial information provided by credible sources regarding poor culture and poor practices. On the basis of the amount of advice I have received, it is reasonable to think there are significant issues that require attention. I have not raised these matters with the CEO as I am concerned that her reactive nature may result in more difficult outcomes for staff. I did however advise Council that it had a responsibility to assure itself that the organisation was running well and I advised that it should increase its oversight of the organisation. My advice included enhanced management reports to include additional metrics, including the financial impact of Workcover insurance premiums, staff survey results, non-compliance with recruitment policy, recruitment turnover rates, and Workcover claims by type. This information has only partially been provided by the administration. Officers are progressively including the information. There has not been enough information provided to date for me to ascertain whether Councillors will use this tool constructively to ensure proper oversight of the organisation.

#### 6. Community engagement practice

Concerns raised with me suggest an unwillingness of Council and/or the CEO to meet with community members and receive their input. The Council's community engagement policy lacks

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clarity regarding how Council will engage with the community. Council does not have an active program or mechanism to encourage or support community members to meet with them. I have received a number of complaints from community members saying that letters and emails to the CEO, go unanswered including requests for meetings. This is a cause of frustration for the community.

For example, the full budget was on display for the community for only one week between newspaper advertisement and close of written submissions by community members. There were social media posts and community sessions held before the newspaper advertisements. The spirit of the Act is to enable meaningful and informed engagement. I raised with the CEO that Council needed to provide more time for community members to respond to the opportunity for input.

A community member said to me:

‘either the council doesn’t think the community knows what it wants, or they are being persuaded by the administration’,

‘(We) find the lack of engagement hard to understand. We don’t think it’s the councillors but the administration.’

I have provided advice to Council, to make provision for deputations from community members, and for site visits at its briefings. Recently one community group presented to a briefing, after several requests to staff from Councillors.

I have also provided advice that Council should revise its Community Engagement Policy. The policy should clarify to the community how Council is meeting the Community Engagement Principles under the Act and make it clear the opportunities that community members have to engage with Council. Council has agreed to undertake the review. This is yet to occur.

#### **7. Community dissatisfaction with Council**

The results of the recent Community Satisfaction survey showed a marked drop in community satisfaction. Seven of the nine categories are now rated as under 50 out of 100. In particular, the rating in 2022, for Overall Performance of Council has dropped from 58 to 48, Value for Money from 50 to 45, Overall Direction of Council from 50 to 45 and Consultation from 55 to 45. These results were released to the CEO in June 2022.

A number of community satisfaction survey measures are used as the Performance indicators of success in the Shire’s Council Plan 2021-2025.

The administration advised Council at a briefing that there would be a workshop with Councillors to review the survey and develop actions to address the declining results. This has not occurred.

In response to my enquiry, the CEO advised me that the results will be released to the public. This has not yet occurred.

#### **8. Leadership and the Mayor and CEO’s relationship**

It has been alleged that the relationship between the Mayor and CEO goes beyond that expected of a usual professional relationship in that the CEO may be acting to support the Mayor’s requests, beyond those authorised by the Council.

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For example:

- A local paper printed a report making allegations about the Mayor's activities. Soon after the CEO withdrew all council advertising from that newspaper (usually \$45,000 annually and had been up to \$65,000 during Covid) which caused both the editor and the local community to become very agitated to the extent that they called for the resignations of the Mayor and CEO. It was put to me that the Mayor directed the CEO to take this action. The advertising has now all been reinstated. I did not uncover any information that would confirm this, however it begs the question why someone would have formed this view.
- I was also told by several people that the Council staff had been working on a prosecution case to VCAT, for 12 -24 months regarding the illegal removal of native vegetation. The day before the hearing in October 2021, the CEO withdrew the Shire from the case without explanation.. It was put to me that individual Councillors put pressure on the CEO to take this action as they didn't want the landowners prosecuted, and that the increase in the CEO's remuneration and employment term, resolved by Council in December 2021 was a reward for the CEO's action to withdraw the matter. Again, I have not seen any evidence as to the reason for withdrawing, although there do seem to be allegations that paint a picture that the councillors and CEO are misusing their positions for personal gain.

The Mayor is in his fifth term as Mayor. He is very passionate about the Shire and has a high degree of influence. It has been put to me that the Mayor's influence over the organisation goes beyond that expected of a Mayor through undue involvement in the organisation by directing staff, and benefiting his personal interests. I was told that the "mayor has so much influence and no one will oppose him."

The CEO has responsibilities under the Local Government Act. I have listed some the functions and made observations where the function has not been performed as expected which raises concerns about a lack of capability.

*Supporting the Mayor and Councillors in the performance of their roles:*

I observed that the CEO sought advice from me on matters well within the remit of the CEO, for example asking me what a Notice of Motion is. This is clearly set out in the Council's Governance Rules.

I noted the CEO acting and intending to act without the authority of the Council. For example, she verbally proposed to Council that Council change its insurer for its entire insurance portfolio of approximately \$1M per year, and that she would implement this as an operational matter without Council resolution. I advised that Council should receive a comprehensive report including the risk management undertaken and make a formal decision on the matter. I considered this to be a matter that the community would have an interest in. The CEO had a report prepared for the Council as a result. Another example is that the CEO or her staff acted without Council resolution to have the application for a conduct panel by 6 councillors prepared and lodged using council resources. I mentioned to the Director Corporate Services who the CEO delegated to speak with me about this, that the staff needed to have a council resolution to undertake this action on behalf of 6 councillors.

-The CEO has repeatedly said that the monitor is at Moira Shire because of one councillor and fails to acknowledge the broader governance remit within the monitor's Terms of Reference. She has constantly made comments that the monitor can be revoked at any time. The CEO fails to see the significance of the monitor or take ownership of the matters I have raised. Up until recently she had not been treating the implementation of my advice with any urgency. When I asked her about this,

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she responded that the amount of work required, was putting her staff's health at risk. She emailed me "My staff have been placed under considerable stress by your timelines for implementation of your advice, which in some cases are not achievable (or only at great cost to staff wellbeing) while undertaking our work to achieve the Council Plan". I have been assisting the Governance Manager who is very keen to implement the improvements. In response to my enquiry to her about whether the timelines were causing undue pressure, she was quite relaxed and expressed her appreciation for the focus on improvement of governance processes. I also observed the CEO misrepresenting my comments and advice to councillors on more than one occasion.

- The Council agendas set by the CEO have very limited content, causing frustration to many councillors that the councillors don't have the opportunity to consider broader matters. The CEO has not been proactive in expanding the matters before Council. I have spoken to the CEO about the need for the council agenda to include items that cover the full remit of their role. She told me she introduced verbal reports from Directors to Council meetings to make them longer, and provide the Directors with professional development opportunity of public speaking. While the information shared is useful for the community it is not a resolution to the lack of strategic matters on the formal council meeting agendas.

- I have not seen the CEO play an active role in providing advice to councillors during meetings to clarify matters and help items be drawn to a conclusion. I have also advised the Mayor and CEO that in briefing sessions between them they need to draw items to a close and give clarity to next steps before moving onto next items. This has not occurred.

*Ensuring the effective and efficient management of the day-to-day operations of the Council.*

- the organisation's culture is very poor leading to resignations, and Workcover claims as outlined in item 5 above.

- several Staff have told me that the CEO's behaviour is becoming increasingly problematic. In their words, "There is a sense across the management team that no one can speak up anymore. There's a very toxic poison from the CEO" and "she jumps to conclusions that staff are doing the wrong thing".

- Staff have said the CEO is unresponsive to email requests. This results in delays in administrative processes, for example, in relation to recruitment, firearms registration and agenda finalisation. I noted on one occasion the agendas were distributed to councillors at 11pm for a council briefing commencing at 2pm the following day. I was advised the delays was caused by the CEO approval process.

- Community members have told me that the CEO is unresponsive to email requests including requests to meet.

- The Mayor has raised with me that she is often not in the office, and he can't contact her, despite his request for her increased presence.

- the Shire's reputation is impacted along with access to information, due to the CEO's lack of attendance and contribution at regional meetings. Regional leaders told me that Moira Shire has a very low profile in the region, and the CEO often does not participate in meetings where she was expected to represent the Shire. I am aware the CEO is regularly unavailable to attend the CEO meetings of the Murray River Group of Councils for which Moira Shire is the host Council for 2022. I was also advised that she was regularly absent from the Regional Partnership meetings.

*Responsibility for councillors and staff under Work Health and Safety legislation*

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- The CEO wrote to the former Minister for Local Government stating she was unable to fulfil her obligation to provide a safe workplace in respect to the incident between the Mayor and Cr Heather, based on verbal legal advice. She has not had an investigation undertaken of the matter.
- In a Council meeting report of 27 July 2022 the CEO reiterated her inability to carry out her role and wrote in the report "We note that the key issue of concern raised by the CEO to the Minister for Local Government; namely, of the CEO being unable to carry out her responsibility under the Occupational Health and Safety Act 2004, remains unresolved and is conceivably not within the Monitor's scope or authority to resolve. This remains a concern to Council. The issue brought to the attention of the Minister by the CEO is a systemic one experienced by other Councils, as evidenced by the resignation of La Trobe City Council's General Manager, Suzanne Miller because she believed she could "no longer ensure the safety of relevant council staff in performing their roles", and will likely only be resolved by revised legislation.
- I understand Occupational Health and Safety training has recently been undertaken within the organisation

#### 9. Town Planning

The Shire has several vacancies in its Town Planning team. It was put to me that planning staff turnover including three managers in recent years, is related to the organisation putting pressure on staff to approve applications.

The Shire has had trouble recruiting new staff to support the statutory planning team. This will result in delays in applications being processed and the statutory timeframe of 60 days increasingly not being met.

#### Referrals to the Local Government Inspectorate

It has been put to me by multiple sources, that there has been improper and possibly illegal practices undertaken by councillors and the administration. These are very concerning allegations including promoting personal interests, misuse of position, covering up of illegal activity, and non-disclosure of information. I have made several referrals to the Chief Municipal Inspector as a result.

If these things are verified, the impact on good governance would be significant.

#### Provision of Monitor advice

I have provided a range of advice in the form of formal written advice to the Council, discussions with the Council and individual Councillors, meetings with the administration including weekly meetings with the Mayor and CEO.

At a recent briefing session on 14 September 2022, I observed the first changes to the briefing meetings being considered because of my advice. Councillors have committed to a forward agenda that includes professional development, deputations, meetings with strategic partners and community, and strategic discussions. Councillors also received presentations on capital works, and advocacy. A date has been set for governance training for councillors. A Council report prepared by the CEO that was considered on 28 September 2022, which lists the formal written advice I have provided to the Council, and the Council's response. Outside of this, I have provided numerous advice to officers and individual councillors. This advice has been focussed on governance policy, processes, and practices.

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While there has not been enough time to see the full effect of the changes, as a result of my advice, these changes will not be adequate to ensure good governance at Moira Shire, without a major shift in understanding and adherence by Councillors and the administration of their roles and responsibilities.

#### Conclusion

This is a group of Councillors that are not performing their roles as expected or required of them. An important part of the Mayor's and CEO's roles as the leaders of the two parts of the Council (i.e. the elected councillors and the administration) is to support Councillors to perform their roles, however neither is performing their role as expected or required. This is being exacerbated by the fact that the Councillors are unable to properly manage the CEO. Both parts of the Council are struggling to support the other, to improve and hold each other to account for their performance.

There are numerous governance issues at the Shire, predominately stemming from the lack of leadership by the Mayor and CEO and the lack of councillors understanding of their roles. This has resulted in many issues including the poor organisation culture, lack of Council's management of the CEO's performance, and the poor financial management of capital works. While the Council has agreed to implement my written advice, I am concerned that any improvements that have been made, may be lost once the monitor's term expires, as the Mayor and CEO have not taken ownership of the issues.

In addition to the issues that I have explained in detail in this letter, there are a number of matters that I have referred to the Local Government Inspectorate. These matters are very concerning and relate to the governance of the Shire. I understand it may take some time before the results of these investigations are able to be finalised.

There appears to be long standing and deeply entrenched cultural issues at the Shire. To address these issues, the Councillors and administration need to significantly improve their understanding and performance of their roles. Due to the significance and extent of the issues at Moira Shire, I have formed the view that a further intervention beyond the appointment of a monitor is warranted, to establish a culture of good governance.

Yours sincerely



Margaret Allan

Municipal Monitor – Moira Shire Council

7/10/22

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# APPENDIX B

Letter from ASU to Minister  
Horne dated 5 October 2022

## ASU Brief to the Minister for Local Government, the Hon Melissa Horne MP



**Re:** Moira Shire Council

**Submitted by:** Tash Wark

**Date:** 5 October 2022

**cc:** Marg Allan, Municipal Monitor

### Summary

The Australian Municipal, Utilities and Services Union (ASU) represents members employed by Moira Shire Council (MSC).

Over the last couple of years, ASU members have reported significant workplace issues at MSC. The ASU has sought to raise these concerns with MSC directly, to no avail. We have also made complaints to and met with WorkSafe, run several matters at the Fair Work Commission (FWC), made a complaint to IBAC, and raised concerns with the Municipal Monitor, Marg Allan.

This brief outlines examples of the issues that members have raised with the ASU such as:

1. Unreasonable disciplinary action that was taken by senior leadership and human resources.
2. Adverse action that was taken against members for making complaints, inquiring about their workplace rights and/or fulfilling the obligations of their job roles requiring them to report issues of concern related to the conduct of senior officers and/or Councillors, including the mayor.
3. Bullying and harassment of members.
4. Sexual harassment.
5. Failures of MSC to respond to incident reports, and to respond to bullying and harassment in the workplace.
6. Conduct of senior officers and Councillors, including the mayor, that appears to be colluding to protect one another regarding potential corruption, misuse of office and material gain.

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This includes intimidation, bullying and harassment of staff and adverse action against them, as per point 2 above.

We note that the examples provided in this brief are provided confidentially and deidentified to protect our members. Additionally, this brief captures only a snapshot of the issues at MSC and cannot do justice to how gravely concerned the ASU is about the ongoing safety of our members and other workers in this workplace.

To continue to ignore the circumstances at MSC is to perpetuate the toxic culture and will only cause further psychological damage to workers and jeopardise their job security. ASU officials are regularly in contact with workers who are so damaged by MSC that they may not be able to return to work at all and many who are seeking ongoing psychological treatment.

#### Adverse action

ASU members have been subjected to adverse action because they have made complaints or inquiries about their entitlements and have performed their duties in line with their position description and associated statutory obligations.

The ASU has a matter before the FWC on behalf of a member who is facing a disciplinary process and termination of his employment. This member raised various concerns with members of the leadership of MSC regarding the illegal deposit of waste at transfer stations and identified the deposit of asbestos near residences that had been authorised or permitted by members of Council leadership. MSC took no action to address the member's concerns and instead subjected the member to adverse action in the form of disciplinary action. The member now faces termination of his employment. In at least one instance, a councillor appears to have colluded to attempt to discredit the worker and ensure his termination.

As a result of MSC's unlawful conduct, the member has experienced significant psychological harm and is in receipt of worker's compensation.

The ASU understands the origins of one incident involving asbestos disposal appears to have origins from the mayor's property.

The ASU will continue to advocate on behalf of members about these issues, including at FWC and other relevant jurisdictions.

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### Increase in WorkCover claims at Council

The impact of the issues at MSC on the workforce and workplace culture is significant. Before April 2020, the ASU is aware that only two WorkCover claims were made on average per annum. Since April 2020 alone, the ASU understands that over 15 claims have been made and approved. Many of these claims have been for injuries sustained due to ongoing bullying and harassment.

These figures do not track other terminations by MSC, nor staff who have opted to leave for their own wellbeing without making a complaint to WorkSafe or lodging a worker's compensation application.

Despite the significant injuries sustained by its employees, MSC has failed to address these concerns or prevent further injuries from occurring. In fact, the risks being unaddressed appears to be causing further workplace harm at an increasing rate.

We have formally approached WorkSafe about these concerns and brought them to the Municipal Monitor's attention.

### Unreasonable disciplinary action

The ASU has assisted an unprecedented number of members employed by MSC who have been subjected to disciplinary action based on faulty or inadequate premises and processes that were not conducted reasonably. Disciplinary action has also been taken against members, and other MSC employees, who have raised concerns about bullying, occupational health, and safety or simply did not conform to leadership's desires.

The ASU has evidence that MSC uses disciplinary processes to bully and intimidate employees who are considered "dead wood" or, alternatively, have raised concerns about leadership conduct and/or practices within MSC. We have been directly involved with members who, immediately following them raising concerns about environmental or occupational health and safety issues, have been subjected to disciplinary processes where they faced allegations of serious misconduct, including being directly threatened with termination of employment.

MSC's human resources team, led by Brant Doyle and Kristina Skipper, facilitate the culture of targeting employees, weaponising disciplinary action and have caused immeasurable harm to employees. This has been carried out with the awareness and active participation of current CEO, Claire Keenan, and former CEO, Mark Henderson.

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The ASU has seen countless disciplinary processes undertaken by MSC where they have failed to provide any evidence of wrongdoing, yet subject workers to investigations that often go on for months at a time. In all circumstances, those workers subjected to these processes have ongoing psychological injuries, many of them have not returned to work and those who have returned are very fearful of speaking out for fear of retaliation by MSC. Living in small regional communities, these members face irreversible reputational damage that exacerbates psychological injuries and impacts their ongoing capacity to work and earn a livelihood, both at MSC or in another workplace.

The ASU has recently been advised that a return-to-work provider is now refusing to deal with MSC due to MSC's poor treatment of its employees. This leaves workers with few options for formal occupational rehabilitation assistance, particularly in a regional location, and a gap in the system where there is no current information about what alternatives workers have. It is astounding to the ASU, and our local members, that this appears to be allowable and MSC appears to face no penalty or corrective action as a consequence.

The ASU will continue to advocate on behalf of members about these issues, at FWC and other relevant jurisdictions.

#### Bullying, harassment, and broader cultural concerns

While MSC does have policies regarding bullying and harassment these policies are not up to standard and, in any event, are not actually followed by MSC. No action has been taken by MSC to respond to the concerns raised about bullying and harassment in the workplace, despite a work-related homicide occurring in 2021. It is the ASU's view that this homicide could have been prevented if MSC had taken appropriate action when its employees made bullying complaints.

The workplace culture at MSC is high risk. The ASU is aware of at least one instance of a worker being suicidal, and numerous others who are experiencing anxiety, stress, sleep disturbances, depression, adjustment disorders, and other symptoms. The sheer volume of workers' compensation claims illustrates how dangerous the culture at MSC is. Bullying and harassment are perpetuated by the highest levels of management, including by Councillors and the CEO, and the toxic culture has caused significant psychological injuries.

There is a culture at MSC where employees are scared to speak out for fear of adverse action or because they have previously been adversely impacted for raising concerns. The ASU is concerned that these injuries could lead to further catastrophic outcomes for our members and the workforce

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if decisive action is not taken to hold councillors, MSC's senior leadership and the human resources team to account.

We have met with WorkSafe to discuss how they are responding to these issues at MSC. We understand any investigations are still ongoing and no timeline for outcomes has been provided to the union or complainants. The ASU is of the view that any outcome or further action by WorkSafe, while welcomed, may be too late to prevent further injuries occurring because of the entrenched cultural issues and driving factors listed above at MSC.

#### Sexual harassment

Members who have raised specific instances of sexual harassment have had their experiences diminished by MSC. In one instance, MSC never investigated a complaint of sexual harassment by a general manager. The perpetrator was simply told to apologise, and no formal action was taken.

The ASU will seek to continue to advocate about these issues, including at FWC, via WorkSafe, and in other relevant jurisdictions, on behalf of members.

#### Failures of MSC to respond to OHS incident reports

Members have reported to the ASU that while they may have completed OHS incident reports, these are not actioned by MSC. Further, many members report that they are fearful to complete incident reports, particularly regarding bullying and harassment, for fear of adverse action by MSC. This is not an unfounded fear, in the ASU's opinion, based on the experiences of our members.

ASU members are regularly reporting to the union that they do not feel confident that any concerns they raise regarding occupational health and safety will be taken seriously by MSC. While there is an OHS Committee, members report that they have no confidence that Health and Safety Representatives (HSRs) are empowered to raise health and safety concerns or have those concerns addressed by MSC. This fear is borne out by the adverse action experienced by members when they have made complaints about health and safety, including complaints about exposure to asbestos and bullying.

The OHS system and legislation hinges upon the role of workplace health and safety representatives being empowered to carry out their roles. In this environment it is impossible to be certain HSRs can do this safely and without fear of adverse action, reprisals, threats to their employment. The whole workplace, therefore, is intrinsically unsafe.

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ASU members have been exposed to asbestos in the workplace due to the active neglect of senior leadership. On one occasion, members were led to believe, by senior leadership, that a site was not contaminated and so these members entered this location. Upon entering, they realised that it was not in fact a clean site and that they had been directly exposed to asbestos.

Following a meeting on 30 September 2022, WorkSafe has advised ASU that they can make their HSR Support Team available to support the renewal of the HSR network at MSC.

#### Illegal dumping by Mayor and coverup by senior leadership

Members have raised concerns about illegal dumping of waste, including asbestos, by Mayor Libro Mustica. Members have witnessed Cr Mustica trucking waste from his property and dumping materials in illegal landfills. This was subsequently investigated by the Environmental Protection Authority.

Members have witnessed Cr Mustica seeking to have waste that contains unclean fill (asbestos) deposited at MSC's landfill sites, via a third party. Members who have identified concerns or made complaints or performed their role by preventing unclean fill from being dumped at Council landfill sites have had their employment threatened.

WorkSafe advised the ASU that 6 compliance notices were issued in relation to this breach by MSC.

#### ASU demands

The ASU has made the Municipal Monitor aware of our concerns set out above, in detail with supporting evidence. We appreciate that the Monitor in turn briefs the Minister. Whilst we continue to represent our members' interests to MSC and in the relevant jurisdictions, the need for further intervention continues to grow. This situation has crossed a threshold where harm cannot be totally arrested. Accordingly, the state government has an imperative responsibility to act and intervene.

ASU members, other employees, and the local community, at MSC are at risk because of the dangerous workplace culture that perpetuates and condones bullying and harassment. Senior leadership, including councillors, the CEO, and the executive, are directly implicated in this conduct. Decisions undertaken by numerous members of this group continue to jeopardise the safety of the community at large as well as the workplace.

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Members have been somewhat heartened by the placement of a Municipal Monitor however the ASU is of the view that this is not going to provide the relief needed by members and the community in a reasonable timeframe.

It is unacceptable for this to be allowed to continue and, to prevent further injury, the State Government must intervene. It is the view of the ASU that the council must be dissolved, and senior leadership removed from their positions to ensure that MSC can become a safe workplace.

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