



TOWN OF CAMBRIDGE

RESPONSE TO DRAFT INQUIRY REPORT

15 SEPTEMBER 2020

1 Introduction

- 1.1 Since 18 April 2018, the Town of Cambridge (Town) has been the subject of an inquiry instigated by the Department of Local Government (Department) under Division 1 of Part 8 of the *Local Government Act 1995* (LG Act) (Authorised Inquiry). The Authorised Inquiry has been conducted by Authorised Persons appointed by either the Director-General or the Deputy Director-General of the Department.
- 1.2 From time to time during the course of the Authorised Inquiry ten Authorised Persons were appointed for varying periods. Of the original Authorised Persons, only Mr Ronald Murphy was retained by the Department by July 2020, and his role appears to have been confined to one of oversight and guidance.¹
- 1.3 The scope of the Authorised Inquiry was to:
- “ascertain whether the Council and administration of the Town are functioning in the best interest of the community and into the operations and affairs of the Town, in relation to the adequacy of the Council’s policies and procedures, land acquisition and any other issues that are determined to be of relevance to the above”.*
- 1.4 On 8 July 2020, the Town was issued with a draft copy of the report of the Authorised Persons (Draft Report) and was invited to make written comments in relation to proposed findings 1, 2, 4, 5, 6, 7, 9, 12, 14, 15, 16, 18, 20, 21 and 22, which were described as adverse to the Council and the Town. The Town assumes the invitation to respond to proposed findings 20 and 21 is an error, as those findings are not adverse. On 10 August 2020, the Authorised Persons provided the Town with further particulars of certain parts of the Draft Report (Further Particulars).
- 1.5 This document comprises the Town’s comments on the balance of the proposed findings as supplemented by the Further Particulars.

¹ Affidavit of Ronald Richard Murphy sworn 1 July 2020 and filed in CIV 1763 of 2020 (Murphy) [17], [21].

2 Relevant background

2.1 The Council is comprised of nine members, including the Mayor, who are elected by residents in four-year terms (Elected Members). The Town's Elected Members represent residents across two wards, the Coast Ward and the Wembley Ward. The Town's Chief Executive Officer (CEO) is Mr John Giorgi.

2017 - AICD Report

2.2 In May 2017, the Town underwent a governance review which consisted of a survey sent to Elected Members and certain administrative staff asking them to rate the Town against a large set of governance statements. The review was conducted by the Australian Institute of Company Directors (AICD). It produced a report (AICD Report), which was prepared on the basis that it was confidential, and in which the AICD concluded that the Town's performance was "passable", meaning "adequate but needs to be improved".

2.3 The Town was not provided by the AICD with a copy of its report. It appears, though, that the Department and through it Mr Murphy have received a copy.² Neither the Department nor the Authorised Persons have provided a copy to the Town.

2.4 In May 2017, when the AICD was conducting the governance review and preparing the AICD Report, the Council comprised Mayor Keri Shannon, Deputy Mayor Pauline O'Connor, Cr Corrine MacRae, Cr Tracey King, Cr Louis Carr, Cr Jane Powell, Cr Rod Bradley, Cr Andres Timmermanis, and Cr Sonia Grincerì.

2.5 At the same time, the senior employees of the Town comprised Jason Buckley, CEO; Chris Colyer, Director of Infrastructure; Marlaine Lavery, Director of Planning and Development; Jason Lyons, Director of Corporate and Strategic; Cam Robbins, Director Community Development; and Brett Jackson, Director of Projects.

2.6 Two Council elections, in October 2017 and October 2019, have occurred since the production of the AICD Report. There are only three Elected Members on the current Council who were also on the Council in May 2017: Mayor Shannon, Cr Bradley and Cr Timmermanis. There are only two current senior employees who were also employed in May 2017: Mr Robbins and Ms Lavery.

² Murphy [12].

2.7 By letter dated 1 August 2018,³ the Town informed the Department that it had taken steps to implement key recommendations from the AICD Report, including:

- (a) changing the seating order in the Council chamber to ensure Elected Members were not seated according to their wards;
- (b) organising informal catch ups for Elected Members to provide for improved culture and cohesion;
- (c) reducing the length of Council meetings by amending the manner in which public question time is undertaken; and
- (d) giving the Development Committee of the Council the delegated authority to make certain decisions in limited circumstances.

2.8 The Town received no response to its letter. Nothing is said in the Draft Report about the AICD Report or the Town's substantial efforts to implement recommendations from the AICD, despite the AICD Report being a motivator for the Authorised Inquiry⁴ and an apparent reason for why the Authorised Inquiry was not withdrawn in late 2019.⁵

2017 – 2019: matters brought to the attention of the Authorised Inquiry but not considered by it

2.9 In December 2017, the Town identified a number of significant failings in its administration, including in relation to:

- (a) the correct application of the Town's Planning Scheme and the setback criteria in the Town's Streetscape Policy, and the effect of the incorrect application of those documents on the validity of development approvals issued by the Town;
- (b) the validity of delegations of authority;
- (c) planning officers exceeding delegated authority;
- (d) decisions requiring an absolute majority decision of Council not being presented to Council;
- (e) the failure of the former CEO to address the above matters; and
- (f) the dysfunctional working relationship between the former CEO and the Council.

³ Annexure 2, Letter from Town of Cambridge to the Department (1 August 2018)

⁴ Murphy RM-2.

⁵ Murphy [45].

- 2.10 A significant amount of information on these matters was provided by the Town in response to directions notices issued by the Authorised Persons in 2018, especially in relation to employment matters regarding the former CEO. The Draft Report does not address any of these matters and does not say why it does not, which is surprising to the Town given that the issues clearly fall within the scope of the Authorised Inquiry and were plainly a motivator for it.⁶
- 2.11 A number of other significant questions and concerns about poor administration and governance by the previous executive and previous Council were also referred to the Department by the Town during the period February 2018 – June 2019, including (but not limited to):
- (a) who was responsible for allowing a culture of complacency to develop at the Town which contributed to non-compliance in planning and governance matters, and how did that culture arise?;
 - (b) who was responsible for failing to keep a register of delegations, for the failure to have valid delegations in place, and for failing to ensure annual reviews of delegations were carried out?;
 - (c) who was responsible for oversight and completion of Compliance Audit Returns on delegations presented to Council that were submitted to the Department annually?;
 - (d) how did officers end up acting *ultra vires* under the *Dog Act 1975* and the *Bush Fires Act 1954*?;
 - (e) who was responsible for the failure to ensure that decisions which required an absolute majority of Council were brought before Council?;
 - (f) who was responsible for the irregularities in the Town’s processes and governance as a consequence of the series of land transactions in the subdivision known as “Omaroo”?;
 - (g) who was responsible for directing a payroll change to the former CEO’s remuneration package without Council authority?;
 - (h) the failure to perform annual performance reviews of staff, as required by s 5.38 of the LG Act;

⁶ Murphy RM-2.

- (i) the failure to observe the provisions of the *Heritage Act 2018* (and its predecessor, the *Heritage of Western Australia Act 1990*) regarding local government heritage inventories by failing to review such inventory in 16 years;
- (j) failures by staff to declare financial or impartiality interests in Council reports where required;
- (k) possible breaches of Standing Orders by certain former Elected Members by adversely reflecting on Council decisions;
- (l) allegations of bullying and harassment of the current CEO and certain Elected Members by former Elected Members;
- (m) anonymous threatening letters sent to the current CEO and Elected Members at their homes and place of work; and
- (n) the unauthorised access by staff to recordings of confidential items of council meetings.

2.12 None of these matters are considered in the Draft Report and no explanation is given as to why.

2019: proposal to withdraw the authorised inquiry

2.13 The employment of the previous CEO concluded in 2018 and a new CEO was appointed in June 2018. In early to mid-2019, the Town implemented an organisational restructure and cultural change process.

2.14 Between 1 January 2019 and 11 November 2019, the Department received only one formal complaint in relation to the Town (in April 2019). On 6 November 2019, the Department indicated its intention to withdraw the Authorised Inquiry, conditional upon the Town agreeing to publish certain information on its website and conducting a governance review at the Town's cost. On 11 November 2019, the Town agreed to publish a consolidated form of the information on its website, but declined to engage in a governance review at its cost on the basis that, in effect, the need for one as at November 2019 had not been demonstrated.

2.15 In December 2019, the Department decided to continue with the Authorised Inquiry until further notice and despite the Town indicating that it would reconsider conducting a governance review. The reasons why the Department continued with the Authorised Inquiry in those circumstances are opaque. On 20 December 2019, the Town wrote to the Department asking what particular concerns the Department had to warrant the continuation of the Authorised Inquiry. No response was ever received to that letter. The only information the Town has is that the Director-General of the Department had “had enough of” the Town’s (alleged yet unidentified) “delaying tactics and disrespect”. The Director-General’s viewpoint is without foundation: the Town has demonstrably neither relevantly delayed nor acted without respect for, it is inferred, the Department or the Director-General. Indeed, the opposite is the case. The Director-General’s expressed viewpoint was not in any event a relevant or proper basis for the Department to continue to inquire into a local government and to continue to exercise coercive statutory powers.

The Authorised Inquiry’s methodology

- 2.16 The Town currently employs 198.3 full time equivalent staff, of which four are senior employees (as described in s 5.37 of the LG Act). These senior employees are the CEO; the Director, Corporate and Community Services; the Director, Planning and Development; and the Director, Infrastructure and Works.
- 2.17 The Draft Report does not specify how many employees were interviewed by the Authorised Persons (saying only, at paragraph 13, that a “number” were). However, it appears that of the Town’s 198 employees only seven (including the CEO) were interviewed, and those interviews occurred between January and March 2020. Excluding the CEO, that accounts for only 3% of the Town’s total workforce.⁷
- 2.18 In addition, six Elected Members (including the Mayor) were interviewed in that period, which the Town understands comprised Mayor Shannon, Deputy Mayor McKerracher, Cr Barlow, Cr Nelson, Cr Mack and Cr Haddon Casey. Despite their requests, Cr Everett, Cr Timmermanis and Cr Bradley were not interviewed.

⁷ There is an indication in the Draft Report that some interviews were conducted “throughout late 2018” , but the Draft Report does not identify whether any of that material is relied upon to support the draft findings. The Town assumes it is not.

- 2.19 It is apparent, then, that the findings of the Authorised Inquiry are premised solely on the interviews of seven employees and six Elected Members, together with the documents referred to in the Draft Report.
- 2.20 As a general comment, the Town observes that many of the very broad and significant findings proposed to be made by the Authorised Inquiry – for example, findings 1 and 2 concerning the health and safety of the Town’s employees and the capacity of the Town’s employees to perform their functions - cannot reasonably be made on the basis of interviews with 13 people from an organisation of over 200 (inclusive of Elected Members).
- 2.21 Further, it is not apparent to the Town how the Authorised Inquiry can purport to arrive at various of its findings – including, again for example, findings 1 and 2 – in circumstances where the allegations appear to have been made by only three employees, and in respect of which no investigation appears to have been undertaken by the Authorised Inquiry to determine whether the allegations have a factual (as opposed to hearsay) basis.

The scope of the Authorised Inquiry and Draft Report

- 2.22 Paragraph 6 of the Draft Report does not set out correctly the scope of the Authorised Inquiry, as to which see paragraph 1.3 above.
- 2.23 It is apparent from the Draft Report that the Authorised Inquiry has not inquired into or reported upon:
- (a) whether the Council and administration are functioning in the best interest of the community;
 - (b) the operations and affairs of the Town in relation to the adequacy of the Council’s policies and procedures; and
 - (c) the operations and affairs of the Town in relation to land acquisition (generally).
- 2.24 No explanation has been provided as to why these matters have not been the subject of inquiry or report.

3 Response to the proposed findings of the Authorised Inquiry

Proposed finding 1 – The Town has not fulfilled its duty to provide a safe and healthy environment for its employees

- 3.1 Paragraphs 44 – 52 of the Draft Report, and paragraphs 1-14 of the Further Particulars, refer.

Occupational health and safety

- 3.2 It is alleged that the Town has failed in its duty to provide a safe and healthy work environment for its employees, contrary to the duty it owes under the *Occupational Health and Safety Act 1984* (OHS Act).⁸ Given the terms of s 19A of the OHS Act, particularly s 19A(3), that proposed finding is tantamount to a finding that the Town has engaged in criminal conduct. Consequently, and applying the reasoning of the High Court in *Balog v ICAC* [1990] HCA 28, which was recently recognised and applied by the Inquiry into the City of Perth,⁹ that is a finding that only a court exercising a criminal jurisdiction can make; it is not a finding that is within the power of the Authorised Persons. It should be removed from the Draft Report.
- 3.3 Further, the finding is not properly open to the Authorised Persons for each of the following reasons:
- (a) Even if the Authorised Persons considered, contrary to *Balog v ICAC* and the approach adopted by the Inquiry into the City of Perth, that it was a finding within their power to make it would need to be supported by evidence capable of proving the finding beyond reasonable doubt. The evidence does not satisfy that standard, or even the civil standard on a *Briginshaw* basis,¹⁰ as is recognised by the Authorised Persons who, at paragraph 14(c) of the Further Particulars observe only that, in their view, the evidence “tends to support” the proposed finding. That is not a proper basis for the finding.
 - (b) The Draft Report proceeds on the presumption that mental health is within the ambit of s 19(1) of the OHS Act, whereas that position is not express in the OHS Act and is as a matter of statutory interpretation not settled in Western Australia.

⁸ Note, while the Draft Report uses the language of “work environment”, the language of the statute is “workplace”, an arguably narrower concept.

⁹ Annexure 4, Report of the Inquiry into the City of Perth, Volume 1, 53.

¹⁰ *Briginshaw v Briginshaw* (1938) 60 CLR 336.

- (c) The finding is said at paragraph 14 of the Further Particulars to be based on paragraphs 48, 49 and 52 (presumably intended to be a reference to paragraph 51) of the Draft Report. Those paragraphs, even when read with the Further Particulars, summarise only limited and generalised statements made by three employees, plus the CEO. For the reasons explained at paragraphs 2.20 and 2.21 above, that is not a proper basis for finding that the Town failed in its duties under the OHS Act in respect of all (or even most) of its employees.
- (d) None of the three people interviewed by the Authorised Persons appear to have given evidence that they have suffered or may suffer any harm to their health, be it physical or mental, nor is there any evidence of that type from the other 195 employees of the Town. While that appears to be an inference proposed to be drawn by the Authorised Persons (see paragraph 14 of the Further Particulars) it is not supported by the evidence. Put another way, there is no evidentiary or causative connection drawn in the Draft Report between the “hazards” that the Town is alleged to have failed to guard against and any risk to, or actual effect on, staff health.
- (e) As to paragraph 51 of the Draft Report, the evidence set out at paragraph 11 of the Further Particulars reflects the CEO advising staff to prioritise work, to take time off if stressed, and to be politic with Elected Members; all of which is consistent with the Town managing risk (recognising, as the OHS Act itself does, that risk cannot be entirely removed from any workplace) and providing its staff with a safe and healthy workplace.

3.4 The proposed finding is also inconsistent with the Town’s own (broader, organisation-wide) experience. For instance:

- (a) The Town is not aware of any internal or formal complaints made to the Town’s Complaints Officer and understands that there has been no access to the Employee Assistance Program (EAP) by employees. The EAP is an anonymous expert counselling assistance program available to all employees and Elected Members. The Council has not been provided with any report indicating that there were any matters of concern relating to the safety of Town employees between January and March 2020.

- (b) The CEO employs a Manager of Human Resources, and the Town's management practices include policies for grievances, bullying and harassment. The Council is not aware that any complaints have been made pursuant to the policies.
- 3.5 Finally, while the Draft Report expresses the view that the Town has not, *as far as practicable*, provided its employees with a safe and healthy workplace, the Draft Report does not set out what things the Town practicably could have done but did not do to address the issues raised by the employees interviewed. This omission is noteworthy when considered against the matters in paragraph 3.4 above. In effect, the Draft Report seeks to condemn the Town for failing to take certain unidentified measures in respect of broadly expressed complaints about which the Town was not aware, as the complaints have only been made to the Authorised Inquiry, not the Town.

Town culture

- 3.6 It is apparent from paragraphs 44-52 of the Draft Report the Authorised Inquiry is concerned with what it describes as the Town's "poor culture", which characterisation is premised on the interview of three of the Town's employees (paragraphs 6-8 of the Further Particulars refer).
- 3.7 The Town is undergoing an organisational change process, largely as a consequence of the failures of the previous Council and administration before 2017. This process is the first comprehensive review implemented by the Council since the Town was created on 1 July 1994.
- 3.8 It is to be expected as part of that change process that long-standing employees who may have come to expect a level of complacency in performance will now feel concerned that they are the subject of higher expectations and efficiency measures. It is also to be expected, though of course not desired, that some employees may harbour doubts about their job security during any organisational change. That is a not uncommon experience in any industry.
- 3.9 The Town is aware that some senior employees, who have been at the Town for a long time, have been unhappy with the improvements undertaken by the Town, as the changes seek to challenge inertia, complacency, poor practice and substandard performance.

- 3.10 The absence of staff reviews and accountability was a feature of the previous administration, as was reported by the Town to the Authorised Inquiry (see paragraph 2.11(h) above). By way of example, the current Director of Corporate and Finance, who was appointed to his role in August 2000, had no annual reviews of his performance between 2001 and 2015.
- 3.11 In June 2018, the Town received a report of an independent investigation conducted by Hall & Wilcox into historical matters of legal non-compliance at the Town. In the course of reporting the conclusions reached in that investigation, the investigators observed:
- (i) *“We do find however, that a culture of complacency developed at the Town and there appears to have been a tendency among employees to assume things were being done validly rather than making independent enquiry, to do what they had always done without question; and to not properly review changes made to relevant statutes which impacted on their day to day duties”.*¹¹
- 3.12 The report of the investigation was provided to the Authorised Inquiry in 2018. The outcomes of the investigation formed part of Council’s consideration when Council resolved to undertake the organisational change process in 2019, which process challenges that culture of complacency.
- 3.13 The 30-month period of the Authorised Inquiry has also created suspicion and stress for Town employees and the Council. Again, that is to be expected. However, at no stage has the Department sought to meet the Council or the Town’s employees to explain the process of the Authorised Inquiry or to alleviate concern. The Town has written to the Department on 19 separate occasions, providing detailed advice and updates on the Town’s activities and governance reform and has invited the Department to engage or meet with the Town, but has never received a response. The continual silence of the Department, its apparent inability to communicate with a local government, and the high turnover of Authorised Persons throughout the course of the Authorised Inquiry, has created a culture of fear and concern in the Town.

¹¹ Annexure 5, Hall & Wilcox Report, June 2018, 11.

3.14 On 23 June 2020, on the CEO's recommendation, the Town's Council resolved to undertake a workplace culture investigation by an independent expert. The Council expects that this workplace culture investigation will provide recommendations to the CEO and Council to implement

Proposed finding 2 – The Town's Administration is unable to properly perform their functions because of undue pressure and fear of consequences

3.15 Paragraphs 53-73 of the Draft Report, and paragraphs 15-19 of the Further Particulars, refer.

General comments on proposed finding

3.16 A series of general, unattributed allegations have been made in the Draft Report. It is asserted that, based on these allegations, the Authorised Inquiry can make a finding that the Town's employees – *as a whole* – cannot and *are not presently* properly performing their functions. In addition to the specific responses set out below, the Town repeats and emphasises the point made above: this finding cannot reasonably be made when then Authorised Inquiry has interviewed only 3% of the Town's workforce.

3.17 Further, the evidence as disclosed in the Draft Report and Further Particulars does not support the proposed finding. Nowhere in paragraphs 53-73 of the Draft Report, or in paragraphs 15-19 of the Further Particulars, is it recorded that any of the staff interviewed by the Authorised Persons told the Authorised Inquiry that they were unable to perform, or were prevented from performing, their functions. In the absence of that evidence, a finding that as a matter of fact the Administration is unable to perform its functions cannot be made.

Specific comment on proposed finding

3.18 As to paragraph 55 of the Draft Report, the use of the word "scaremongering", and the suggestion that the CEO was, as a matter of fact, scaremongering, does not appear to be sourced in the evidence. If it is not evidence, it cannot be used to support the proposed finding. If it is evidence, its substance must be provided to the Town for comment as a matter of procedural fairness. That has not happened.

- 3.19 Paragraph 57 is hearsay and cannot be relied upon by the Authorised Inquiry. Taken at its highest it is simply a bare allegation. There is no direct evidence to support the allegation and it is denied by Mr Giorgi at paragraph 56. In those circumstances the only finding properly open is that no employee has had their employment terminated because the Mayor or an Elected Member did not want them employed.
- 3.20 Most of paragraph 58 is hearsay devoid of particulars that would provide contextual relevance to the proposed finding it is used to support. The observation at paragraph 3.19 above applies equally to this paragraph. The inference the Authorised Inquiry seeks to draw can only arise if the Authorised Inquiry first finds that the CEO acts at the dictation of the Mayor (because only the CEO, not the Mayor, can terminate staff), and that there were no reasonable grounds for the employees in question to be terminated or their contracts not renewed. Those findings are not made and do not appear to be supported by any evidence.
- 3.21 Paragraph 60 of the Draft Report is symptomatic of the vague nature of the allegations put against the Town. There it is alleged that employees provided information to the Authorised Persons “regarding their lack of confidence and capacity to undertake their functions because of undue pressure and fear of consequences”. However, in neither the paragraphs which follow (61-73) nor the relevant paragraphs of the Further Particulars (15-19), is anything at all said of any impairment of any employee to perform any function. It is an inference the Authorised Inquiry proposes to draw (Further Particulars, paragraph 18) but it is without an evidentiary basis.
- 3.22 None of the allegations in paragraph 61 of the Draft Report rise above that characterisation.
- 3.23 As to the allegation at [61](a) of the Draft Report, the Mayor does not require staff to keep a log of contact between planning staff and developers. This was a policy adopted by the Council. The policy applies to development proposals in excess of \$3.5m and was based on a policy also adopted by the Town of Vincent. A similar policy applies to elected members.
- 3.24 In the absence of particulars the Town cannot meaningfully respond to [61](b) of the Draft Report. None are provided in the Further Particulars.

- 3.25 The Council does not involve itself in matters concerning the administration and awarding of tenders, except as is provided by the LG Act, pursuant to Council resolution. As to the allegation at [61](c) of the Draft Report, the Town denies that the Council has hindered “staff from following appropriate processes” and notes that no particulars of that allegation are provided. It should be deleted from the Draft Report. The Town is aware of only one tender in respect of which Council has requested staff contact particular contractors. That tender was for the Lake Monger Community Shed. As the attached resolution from November 2019 explains, Council was requested to authorise the publication of the tender. It did so, subject to certain conditions designed to reduce the scope and cost of the project, and to ensure the tender was widely advertised to promote competitive bidding. That action was required to respond to a funding deficit that arose following a decision by Lotterywest to make only a partial grant of funding for the project. There is nothing in the LG Act or its regulations that prohibits a (unanimous Council) resolution of this type. To the contrary, it is within Council’s role to be responsible for overseeing the allocation of the Town’s finances.
- 3.26 As to the allegation at [61](d), the Town is not aware of the Mayor not providing legal advice obtained by her to Elected Members. No particulars are provided. The Town notes that, to the contrary, the Draft Report narrates at paragraphs 177-180 an instance of the Mayor providing legal advice to Elected Members. Legal advice is made available to Elected Members in a hard copy before meetings for reading by Elected Members, and then retained in safe custody at the Town. The Council regards this as best practice when dealing with highly confidential matters so that legal advice retains its legal professional privilege and is not easily disseminated by accident or otherwise. In any event, this allegation is not relevant to proposed finding 2 which concerns the proper functioning of the Administration, not the Council.
- 3.27 As to the allegation at [61](e), the Town refutes any suggestion that it cannot attract candidates for its advertised positions. The allegation is hearsay and without statistical backing. No particulars and no evidentiary basis is provided. It also does not appear related to the proposed finding.

- 3.28 The Town refutes the suggestion that there has been a decline in the Town's functions over the period of the Authorised Inquiry. The Town is of the view that there has been an improvement in the Town's performance over the last 3 years, including in the quality of reports to Council, information provided to ratepayers, community communications, and ratepayer representation. This is reflected in the continuing positive community feedback to Elected Members and to the Town itself, and in the 13 letters from the Town to the Department sent across the period of the Authorised Inquiry.
- 3.29 The Town is unaware of the basis for the allegations set out in paragraphs 66-73 of the Draft Report, or their relevance to the proposed finding that the administration is unable to perform its functions. The Town does not accept the assertion at paragraph 72 that the exchanges set out at paragraphs 67-71 demonstrate "a lack of respect for the Town's employees". It is not clear how that inference could be drawn from those matters.

Proposed finding 4: By authorising elected members to undertake administrative tasks, Council has created a situation where employees are not able to properly perform their functions.

- 3.30 The asserted factual bases for proposed finding 4 are those matters set out at paragraphs 83 to 87 of the Draft Report. Paragraphs 20-29 of the Further Particulars refer. The Town notes the proposal to delete paragraph 88 from the Draft Report.
- 3.31 The proposed finding asserts that "employees are not able to properly perform their functions". The only employee identified in this respect is the CEO. He has not given any evidence to the Authorised Persons that his functions have been impaired or, if he has, the substance of that evidence has not been provided to the Town for comment. The Draft Report simply assumes the CEO could not perform his functions. In the absence of evidence from him that his functions were actually impaired the finding cannot be made. It should be deleted from the Draft Report.

- 3.32 The proposed finding proceeds on the basis that the ordinary course is for the CEO to obtain legal advice for the Town and that the taking of advice by the Council directly subverted that ordinary course. However, there is nothing in the Draft Report or the Further Particulars to suggest that ordinary course is not ordinarily taken, and the CEO has not given that evidence. By its very nature, the taking of legal advice by the Council in the circumstances identified in the Draft Report was out of the ordinary, involving circumstances of response to an unprecedented global pandemic or circumstances in which the CEO was conflicted from involvement.
- 3.33 As to paragraphs 93-100 of the Draft Report, the Town does not accept the Authorised Persons' construction of the LG Act and the *Local Government (Rules of Conduct) Regulations 2007* (as in force at the time of the impugned resolutions). As the Authorised Persons are aware, Council took advice on the application of regulation 9 of the *Local Government (Rules of Conduct) Regulations 2007* on a number of occasions, including from the Department and from Senior Counsel. Two Elected Members also sought, and at their own expense, their own independent advice on the matter. All of that advice confirmed that Council could obtain advice directly in respect of certain matters. In any event, given the recent amendments to regulation 9 of the *Local Government (Rules of Conduct) Regulations 2007*, the concerns set out in the Draft Report will not reoccur, meaning the issue is of historical significance only.

Proposed finding 5: By authorising the Mayor to undertake administrative tasks without appropriate safeguards or controls, Council have failed to ensure good governance processes with respect to procuring law firms and the appropriate allocation of the Towns finances.

- 3.34 Paragraphs 3.30, 3.32 and 3.33 above are repeated.
- 3.35 While the Council does not accept that it failed to ensure good governance of the Town particularly given the terms of s 6.8 of the LG Act in respect of unbudgeted expenditure, the Town and its Council accept that, on reflection, the motions passed on 15 May 2018 and 28 August 2018 could have been more constrained, insofar as particular budgets could have been set for the advice sought, quotes could have been obtained, and particular reporting requirements could have been attached to the Mayor's authorisations.

- 3.36 The Town had a policy in place to comply with this provision, but it did not extend to the council and elected members.
- 3.37 It is noted that Mills Oakley law firm are a member of the WALGA panel of preferred suppliers, with the attendant pre-qualifications provided as a consequence of that WALGA supply process.
- 3.38 The Town and its Council notes that the Authorised Inquiry has been aware for some time (since at least the receipt of letters from the Town’s lawyers in late 2018) of the direct procurement by the Council of legal services. At no point before the giving by the Minister of the Notice to Show Cause on 26 May 2020 was that procurement raised as an issue with the Town. Indeed, in November 2019 and December 2019, the Department was considering withdrawing the Authorised Inquiry without any adverse comment.
- 3.39 Were the Council to embark upon resolutions of this type in the future such constraints would be imposed. However, given the recent amendments to regulation 9 of the *Local Government (Rules of Conduct) Regulations 2007*, the concerns identified by the Authorised Inquiry will not reoccur.

Proposed finding 6: By authorising Councillor Timmermanis to undertake administrative tasks related to employment of staff, Council is interfering with the CEO’s role to manage the day to day operations of the local government and the employment or dismissal of staff under section 5.41(g).

- 3.40 Paragraphs 3.30-3.33 above are repeated.
- 3.41 Further, Cr Timmermanis’ role was regulated by the Town’s Code of Conduct and regulation 10 of the *Local Government (Rules of Conduct) Regulations 2007*.

Proposed finding 7: Council failed to obtain quotes prior to engaging the law firm to undertake work and has not applied appropriate procurement processes to ensure impartiality and value for money.

- 3.42 Paragraphs 3.35 – 3.38 above are repeated.

Proposed finding 9: Council has interfered in administrative matters by engaging law firms without following appropriate procurement processes.

- 3.43 Paragraphs 111-121 of the Draft Report refer, but do not appear to support or otherwise be relevant to the finding. For the reasons given in respect to findings 4 and 5, and on the basis that paragraphs 113-119 of the Draft Report refer only to the Mayor and not the Council *en bloc*, and on the basis that the resolution dated 9 April 2020 (referred to at paragraph 120 of the Draft Report) does not require the administration to appoint a particular lawyer, Council rejects the suggestion it has “interfered in administrative matters”.
- 3.44 In addition to those matters finding 9 appears to be a recast of finding 5. The Town’s comments in respect of that finding are repeated here.

Proposed finding 12: Council’s interference in employment matters of senior employees infringed upon the CEO’s functions and responsibilities under section 5.41(g) of the Act.

- 3.45 Paragraphs 145 to 147 of the Draft Report, and paragraphs 33-34 of the Further Particulars, refer.
- 3.46 The conclusion stated at paragraph 147 of the Draft Report is a conclusion of law. The Authorised Inquiry, not being a Court, is not qualified to form that conclusion and it together with finding 12 should be removed from the Draft Report.
- 3.47 In any event, it is arguably open to the Council pursuant to s 2.7(2)(a) or s 2.7(2)(b) of the LG Act, either in the course of setting a policy or allocating the Town’s finances and resources, for Council to resolve to set maximum notice period for senior employees. That is not prohibited by the terms of s 5.41(g). The proposition gains further support from s 5.37(2)(b) of the LG Act, by which Council may reject any “*proposal* to employ” a senior employee. Plainly, Council could reject a “*proposal* to employ” a particular employee on the basis that the *proposal* includes an unacceptably long maximum notice period. Nothing in the text or context of the LG Act prevents the Council from adopting that as a policy position in respect of senior employees and formalising it by resolution. Indeed, doing so improves transparency, accountability and certainty.

Proposed finding 14: The Town failed to comply with Section 5.22(2) of the Act by not presenting the minutes of the 7 February 2018 meeting at the next ordinary council meeting held 27 March 2018.

Proposed finding 15: The Town failed to comply with Section 5.22(2) of the Act by not presenting the minutes to the 20 February 2018 meeting at the next ordinary council meeting, held 27 March 2018

Proposed finding 16: The Town failed to comply with Section 5.22(2) of the Act by not presenting the minutes to the 23 February 2018 meeting at the next ordinary council meeting held 27 March 2018.

3.48 Each of findings 14, 15 and 16 are allegations that the Town failed to present the minutes of meetings on 7 February 2018, 20 February 2018 and 23 February 2018 at the ordinary council meeting on 27 March 2018.

3.49 First, as a matter of law and contrary to the proposed findings, s 5.22 of the LG Act does not impose the responsibility for presenting minutes on “the Town”. The proposed findings should be deleted for this reason.

3.50 Second, as a matter of fact and contrary to the proposed findings, the minutes of each of the meetings of 7 February 2018, 20 February 2018 and 23 February 2018 were presented for confirmation at the ordinary council meeting on 27 March 2018. This is reflected under heading 7 “Confirmation of Minutes” in the agenda papers for the 27 March 2018 meeting. That they were not confirmed on that date is not to the point, and is not what s 5.22 requires. The proposed findings should be deleted.

Proposed finding 18: Council failed to adhere to the principles as set out with regulation 3 of the *Local Government (Rules of Conduct) Regulations 2007* - General principles to guide the behaviour of council members, stating (c) elected members are to be open and accountable to the public.

3.51 Paragraphs 169 to 176 of the Draft Report, and paragraph 35 of the Further Particulars, refer.

- 3.52 The motion put by Cr McAllister was to stop the Hall & Wilcox Investigation until the opinion of Marcus Solomon SC was obtained, and to censure the Mayor. A motion to have the meeting heard behind closed doors was put and lost, as the motion itself did was determined not to qualify for confidentiality under the provisions of the LG Act.
- 3.53 Cr McAllister expressed her reservations in the meeting that she had disclosed confidential information in the background briefing papers and consequently did not speak to that material in an open forum. In that way its confidence was maintained. Further, Cr McAllister had assumed it would be a confidential meeting and accordingly, the agenda papers had not been circulated to the public.
- 3.54 On further reflection, the information provided by Cr McAllister was considered inappropriate in content and nature, and the view was formed by Council that it should not be disseminated publicly. It contained possibly defamatory material and commentary on employment matters relating to the former CEO.
- 3.55 In view of those matters, the Acting CEO Mr Lyons redacted the minutes and presented them to the Council. Council expected that if there was an issue with the formatting or content of the minutes, then it was the role of Mr Lyons to so advise the Council. He did not. The publication of the minutes in a redacted form is consistent with the manner in which the material was dealt with at the meeting.
- 3.56 In any event, it is one thing to speak generally about a matter in an open session of a meeting of the Council. It is entirely another thing to distribute, in an open form, a detailed background paper that provides particulars and specifics of the matter, in circumstances where those particulars and specifics are adverse to a person. That the discussion can be had openly (but carefully) while the background detail is kept confidential does not mean, and cannot without more mean, that Elected Members were failing to comply with the principle in reg 3(c) of the *Local Government (Rules of Conduct) Regulations 2007*.
- 3.57 Proposed finding 18 should be deleted.

Proposed finding 22: The Town’s current information technology system may not be suitable for complying with contemporary recordkeeping requirements.

- 3.58 Paragraphs 205 to 220 of the Draft Report, and paragraphs 36-37 of the Further Particulars, refer.

3.59 The Town's data storage and electronic records management is a matter for the CEO. The Town notes the comments of the Authorised Persons in the Draft Report. The Council will consider any report and recommendation provided by the CEO on the matter.