Ombudsman
New South Wales

An inherent conflict of interest: councils as developer and regulator

A special report to Parliament under section 31 of the *Ombudsman Act 1974*.

15 December 2020

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Ombudsman
New South Wales

The Hon John Ajaka MLC
President
Legislative Council
Parliament House
SYDNEY NSW 2000

The Hon Jonathan O'Dea MP
Speaker
Legislative Assembly
Parliament House
SYDNEY NSW 2000

15 December 2020

Dear Mr President and Mr Speaker

NSW Ombudsman special report – An inherent conflict of interest: councils as developer and regulator.

Pursuant to section 31 of the *Ombudsman Act 1974*, I now provide you with our report. I draw your attention to the provisions of s 31AA of the Ombudsman Act in relation to the tabling of this special report, and request that the report be made public forthwith.

Yours sincerely

Paul Miller
Acting NSW Ombudsman

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Foreword

Local councils provide an enormous range of services to their communities. They also play an essential role as the third tier of government – particularly as they exercise planning, approval, regulatory and enforcement functions under State environment and planning legislation.

These dual roles mean that there is inherent potential for a conflict of interest for local councils who may be both the owner or proponent of a development, and responsible for regulating and enforcing compliance with applicable laws and regulations.

This conflict is not just a hypothetical possibility.

In late 2019, the NSW Ombudsman finalised an investigation into allegations that Broken Hill City Council had breached the *Environmental Planning and Assessment Act 1979* by allowing its own unfinished Civic Centre to be used for large public functions, despite not having the necessary certification that it was safe to do so.

In that instance, the Ombudsman found that the Council had acted contrary to law by allowing parts of the centre to be occupied and the events to be held. Council also took no compliance or enforcement action against itself for that breach.

The Council's breach and subsequent non-action stand in contrast to its published Compliance and Enforcement Policy and its commitment to a 'zero tolerance approach to unlawful and unauthorised development and non-compliance with development consent conditions'.

Broken Hill City Council had a clear financial and reputational incentive to allow the events to proceed at the Civic Centre, even though it was not complete and parts of it had not been certified as safe for occupation: events had already been scheduled; delays in the completion of the Civic Centre had become the subject of some public criticism; and there may not have been alternative venues in the local area that could have accommodated the planned events.

The concerns of Council that ultimately led it to engage in unlawful conduct may be understandable. However, they do not in any way excuse the conduct, but rather highlight the conflict that can arise when a council plays dual roles in the planning system.

The conflict also means a lack of transparency; the unlawful and potentially unsafe use of the Broken Hill Civic Centre would likely not have come to light at all but for whistleblower reports.

This is an important systemic issue that affects most, if not all NSW councils to some extent.

Following our investigation, we sought to examine how widespread this problem might be across the state, and what different councils do to address it.

We found that, while some councils have adopted arrangements to try to manage these types of conflicts, there is little consistency and the measures taken appear to be of varying effectiveness. There is no clear guidance provided to councils on mandatory or best-practice approaches.

I recognise that there may be no easy and 'one size fits all' solution to the problem. Developments of different natures and size may raise different risks. It may be that a number of approaches could be combined, having regard to the needs of different councils and different developments.

In the enclosed report, I recommend that a local council working group, led by the Department of Planning, Industry and Environment, be convened to identify and implement measures to avoid or, if necessary, manage these kinds of conflicts of interest.

Paul Miller
Acting NSW Ombudsman

Executive Summary

This is a special report presented to Parliament under s 31 of the *Ombudsman Act 1974*.

It concerns the management of conflicts of interest that arise when councils are the owner or proponent of their own developments, are also the consent authority for that development, or otherwise have regulatory responsibilities involving compliance and enforcement.

The report also incorporates (at **Annexure B**) a report by the former Ombudsman, Michael Barnes, of an investigation we completed in December 2019 into Broken Hill City Council's (**BHCC**) improper use of an incompletely refurbished Civic Centre, which led to the examination of the broader systemic issue of conflict in councils' roles that is the subject of this special report.

Key issues

There is an inherent conflict of interest in situations where councils are responsible for policing their own compliance with important laws and regulations. Following our investigation into BHCC, we conducted a survey of councils to better understand the issue – to determine whether existing policies and practices for managing such conflicts dealt with the problem adequately, and to seek out any good practice that could inform potential improvements in the way the problem is dealt with across the state.

While this type of conflict of interest arises relatively frequently, we found that it is not adequately dealt with by the relevant planning laws. While the Department of Planning, Industry and Environment (**DPIE**) has wide-ranging compliance powers under the *Environmental Planning and Assessment Act 1979* (**EP&A Act**), its ability to take action against councils for contravening the Act is limited.

While councils' own codes of conduct do set out a general framework for ethical conduct, and can increase transparency in decision-making, we found they do not prohibit councils from making regulatory decisions on their own developments – nor do they address the resultant conflict of interest.

The Independent Commission Against Corruption (**the ICAC**) examined this issue in 2007, recommending that individual councils take steps to manage such conflicting roles. Our survey suggests adoption of the ICAC's recommendation by councils has been inadequate and inconsistent. While some councils have adopted specific policies to assist with these types of conflicts, there is no common, consistent approach, and policies do not specifically address the risks that can arise where councils act as their own regulator.

Neither other Australian jurisdictions nor other regulators appear to have established processes to deal with similar conflicts of interest that could be emulated in NSW.

We propose a range of options that should be further considered in detail to better deal with situations where some councils determine development applications in which they have an interest. The options include establishing a new state-wide panel or commission; making the Secretary of DPIE, the Minister for Planning, or an independent external body or individual responsible for assessment and determination; or making council staff responsible for assessment (with strict role separation).

We also propose potential options to deal with conflicts where councils have a regulatory or enforcement role for development applications in which they have an interest, including conferring all enforcement powers to DPIE or to a new panel or commission, or requiring clearer role separation within councils, and introduction of mandatory notification (to DPIE and the public) of breaches and enforcement action taken.

I therefore recommend a working group be formed to consider the options and implement changes to better deal with these types of conflict of interest. The recommendation is set out in full below.

Recommendations

I recommend that the Secretary of DPIE convene a working group comprising relevant agencies (including the Office of Local Government and representatives from a cross-section of councils) to:

1. consider options to strengthen and/or develop mechanisms to deal with potential conflicts of interest that arise when councils have concurrent roles as both development proponent and consent authority, and/or as both development proponent and regulator
2. consult relevant stakeholders to further inform the options that will be considered
3. take action to implement any agreed-to options within 12 months of the date of tabling this report.

On 30 November 2020 DPIE responded to these recommendations. It advised that it accepts the recommendations and will form a working group to assess what changes may be necessary to strengthen transparency and accountability regarding assessment and compliance where councils are both proponent and regulator. DPIE's response is attached as **Annexure A**.

1. Background and context

1.1. Introduction

In December 2019 we finalised an investigation into Broken Hill City Council (**BHCC or Council**).

We found Council had acted contrary to law by holding a number of public functions in 2016 and 2017 in the incompletely refurbished Civic Centre (**Centre**) prior to gaining the required occupation certificate. For important reasons of public safety, use of a building without the necessary occupation certificate is strictly prohibited by the *Environmental Planning and Assessment Act 1979* (**EP&A Act or Act**).

As well as finding that Council's actions in using (and allowing others to use) the Centre were wrong, the investigation highlighted a systemic problem: Council was responsible for enforcing its own compliance with the EP&A Act, as well as other regulations.

Council in that case took no enforcement action against itself for its own breach of the EP&A Act. Moreover, Council's unlawful actions would likely never have come to public attention at all if disclosures had not been made to us by whistleblowers under the *Public Interest Disclosures Act 1994*.

After finalising the investigation we conducted a survey of all councils across NSW to learn how other councils dealt with the inherent conflict that arises when a council is both the regulator for a development (regardless of whether it is also the consent authority) and at the same time the owner or proponent of that development.

This report is the result of learnings from that survey and our investigation of BHCC's conduct.

1.2. The Broken Hill City Council investigation

The BHCC investigation arose because BHCC had allowed functions to proceed in its unfinished Civic Centre, despite the fact the private Principal Certifying Authority (**PCA**) had refused to issue an occupation certificate for the entire building. This meant that the use of much of the building was not legally permitted.

Despite this, the Civic Centre (including those parts for which use was prohibited) was opened to the public for at least three large events between 3 October 2016 and 20 May 2017. Between 300 and 400 patrons attended the Centre during some of those events.

The functions proceeded without incident, and the Civic Centre was closed shortly after the May 2017 events until the refurbishment was completed and a final occupation certificate granted.

We found that BHCC's conduct had been contrary to law or otherwise wrong under s 26(1)(a) and (g) of the Ombudsman Act. We referred the matter to the Department of Planning Industry and Environment (**DPIE**), which has overall responsibility for the EP&A Act, to take whatever action it saw fit.

We made two recommendations directly to DPIE, namely that it:

1. decide what, if any, action it should take against Council in relation to the alleged breaches of the EP&A Act by Council
2. jointly with the Office of Local Government (OLG) review relevant policy and legislation to identify whether changes are necessary or desirable to avoid the potential for actual or perceived conflicts of interest that arise from councils' having an interest as a development proponent and a duty as a regulator under the EP&A Act.

We received advice that after reviewing the matter, OLG issued a warning to BHCC in response to the first recommendation. In February 2020 OLG also advised that the relevant governance and policy

sections of the department would meet to discuss any changes that may be necessary or desirable to avoid the potential for the issues identified in the report to occur at councils. However, we received no further advice on any progress in relation to the second recommendation.

BHCC itself has since taken a number of actions in response to our recommendations made to it to ensure a similar situation does not occur in the future. For details of the investigation, including the recommendations made and actions taken in response, see the attached investigation report at **Annexure B**.

1.3. A situation of inherent conflict?

The breach of the EP&A Act by BHCC highlighted the existence of a conflict in that case between:

(a) BHCC's interest as the owner and developer of the Civic Centre, and

(b) its public duty as the regulator and the consent authority to uphold and enforce the law by ensuring the development was carried out in accordance with the development consent and adhered to all the requirements of planning laws.

As the owner and proponent of the Civic Centre development, BHCC had a strong financial and reputational incentive to allow the Centre to be used as soon as possible for conferences and other functions.

Substantial delays in finalising the refurbishment and obtaining the occupation certificate meant that income from the functions was under threat. BHCC's reputation would also have been negatively impacted if any of the scheduled functions had to be cancelled. This was of particular concern to BHCC, because there may not have been any similar premises in the local government area that could have provided a viable alternative venue for those particular events.

On the other hand, BHCC was required to abide by the planning laws like any other development proponent. Moreover, BHCC had a role as a regulator under the EP&A Act. It was not just responsible for complying with the Act but also with enforcing it.

BHCC's Compliance and Enforcement Policy, which applies to all who carry out development within its jurisdiction, states that Council takes:

> a zero tolerance approach to unlawful and unauthorised development and non-compliance with development consent conditions.

1.4. Our survey of Councils

We surveyed NSW councils and sought information about their policies and practices for managing conflicts of interest in relation to developments where councils are both the development applicant and the regulator (whether or not they are also the consent authority). These developments are referred to in this report as council-initiated DAs.

The aims of the survey were:

(a) to examine whether council policies consistently and adequately dealt with potential conflicts that arise in council-initiated DAs

(b) to identify any local good practice that could be shared more broadly and help to inform possible recommendations for state-wide improvements.

Of 128 councils contacted, 59 responded to the survey.

Details of the survey methodology, questions and a summary of responses are set out at **section 4.1**.

2. The problem with the current system

As noted above, through our investigation of BHCC, our survey of councils and a review of the relevant legislation we have identified a broad systemic problem: there is an inherent conflict of interest in situations where councils have a dual role as:

A. the owner and/or proponent of a development (or the land on which it is situated)

B. the regulator in respect of that development – regardless of whether they are also the consent authority for the development.

This type of situation is not an infrequent occurrence – and neither the current legislation nor council codes of conduct and policies adequately address the conflicts that arise.

The problem is also not new. The Independent Commission Against Corruption (**the ICAC**) discussed the issue in 2007 in its Position paper: Corruption risks in NSW development approval process.[1] The ICAC's position on this issue is discussed in **section 3.1**.

In this chapter, we describe the problem in detail.

2.1. Councils can have conflicting roles in developments

When councils have concurrent roles as development owner/proponent and regulator (whether or not they are also the consent authority), an inherent conflict arises between their interest in the development and their duty as the regulator.

If a council is also the consent authority, conflicts can manifest at all stages of the development process – application, assessment, consent determination, and enforcement.

Councils have the role of **consent authority** when they determine development applications (**DA**s) and the role of **regulator** when they ensure the DA complies with the consent and the relevant laws and regulations, including when they consider and take enforcement action in the event of non-compliance. Whenever a council is the consent authority for a DA, it is also the regulator for that DA. However, a council can be a regulator for certain DAs despite the fact it is not the consent authority (see **section 2.3** below). This means that conflicts can arise even when the power to determine a DA has been removed from a council and given to an external body.

In circumstances where the council is itself the owner and/or proponent of a development and is the consent authority for that development, conflicts can manifest in any phase of the development process – assessment, determination and regulation/enforcement.

Of course, conflicts may also arise when development owners or proponents are related parties to the council, such as councillors or council staff. However, this report does not deal with the aspect of conflicts that arise when related parties have an interest in the development.

In the BHCC case, Council was the owner and proponent of the Civic Centre, the consent authority, and consequently the regulator under the EP&A Act. While BHCC outsourced the management of the project to an architectural firm and appointed a private PCA, it failed to do the right thing because it was concerned about the negative repercussions that may have flowed from failing to honour bookings made at the Civic Centre.

When the breach occurred, it was not in BHCC's interest to take action against itself.

1. NSW Independent Commission Against Corruption, *Position Paper: Corruption risks in NSW development approval processes*, (2007).

2.2. These situations of conflict are not uncommon

The volume and frequency of council-initiated DAs inevitably varies from council to council. However, the situation has arisen at least once in the last decade for almost all councils that responded to the survey – and for some councils it arises frequently.

Although the volume and frequency of council-initiated DAs varies across the state, survey results indicate the situation is one that will affect most councils at some point. For some councils, the situation arises frequently.

In our survey (n=59), when asked how many DAs had been initiated by council in the last ten years:

(a) seven councils (11.9%) reported they had more than 50

(b) 15 (25.4%) had between 20 and 50

(c) 27 (45.8%) had between 5 and 20

(d) six (10.2%) had between 1 and 4,

(e) only four (6.8%) said they had none.

This means that, of the councils that responded to our survey, over 93% initiated a DA at least once in the last decade and over 83% did so, on average, at least once every two years.

2.3. Current planning laws do not adequately address these conflicts

Planning panels mitigate the risks that would otherwise be involved in councils approving some council-initiated DAs. They were created, in part, to reduce the risk of corruption and poor management of conflicts of interest in certain high-risk developments, but they do not cover all scenarios where conflicts arise in relation to council-initiated DAs.

Further, even when planning panels perform the role of consent authority, councils retain their role as regulator. This means that councils may still have an enforcement role where there has been wrongdoing in respect of their own developments.

DPIE's role in regulating council-initiated DAs is limited.

Depending on the location and type of development, the role of 'consent authority' with responsibility for determining a DA will be undertaken by one of the following:

- The local council
- A local planning panel (LPP)
- A regional planning panel (RPP)
- The Secretary of DPIE
- The Minister for Planning and Public Spaces
- The Independent Planning Commission.

The responsibility for regulating approved developments (including taking enforcement action in the event of non-compliance) is divided between local councils and DPIE.

DA approval role

When developments exceed a certain monetary threshold or fall within prescribed criteria for contentious developments – including those where there is a conflict of interest for the council, councillors or council staff – council roles may be separated through the creation of local and regional planning panels, which take on the role of consent authority.

There are different criteria determining the types of DAs that can be decided by Greater Sydney Region, Wollongong, Central Coast on one side and regional and rural councils on the other. For Greater Sydney Region, Wollongong and Central Coast councils, applications involving council (or related parties) *must* be referred to the LPP.[2]

The role of consent authority for state significant developments is divided between the Minister for Planning (and by delegated power to senior officers of DPIE) and the Independent Planning Commission. Details of these mechanisms are set out in **section 3.8**.

These alternative consent arrangements have been put in place in part to address a concern that, for developments with broad state-wide or public significance (including local council interests in the case of large metropolitan councils) it may not be in the public interest for particular local interests that are traditionally likely to weigh heavily in a council's deliberations to be given decisive weight. This may be the case whether those are considerations in favour of a development – for example, because it could revive or stimulate an underperforming local economy – or considerations opposed to a development – for example, because although it may be an essential facility that needs to be developed somewhere, no local residents are likely to find it appealing to have it developed in proximity to their neighbourhoods.

Accordingly, for such developments the decision-making authority is given to a body or person other than council – presumably on the basis that that body or person can still take such concerns into account, but is less likely to give them undue weight.

However, in rural and regional local government areas local councils can – and sometimes do – find themselves simultaneously in the role of development owner/proponent and consent authority.

Regulatory role

Under the EP&A Act, DPIE exercises a regulatory and compliance role in relation to State Significant Developments (**SSD**) and any developments for which the Minister (or the Secretary of DPIE) is the consent authority.

Local councils regulate all other development types, including developments that are determined by LPPs, RPPs and councils themselves. These can include developments in which a council has an interest, or for which council itself is the applicant. Councils may issue orders, 'stop work' notices or penalty infringement notices if work breaches legislative requirements or conditions of consent.

Some of the councils we surveyed told us that they will and do take enforcement action against the council itself, where the council has been found to have breached planning laws. In our survey, nine councils told us they had taken some enforcement action (such as issuing a penalty infringement notice, or reporting a suspected contravention to another regulator such as the Environment Protection Authority) against council itself in the past decade.

2. There are limited exceptions for very small-scale developments. For more information see: Local Planning Panels Direction – Development Applications and Applications to Modify Development Consent, Minister for Planning and Public Spaces, 30 June 2020.

Other potential enforcement mechanisms

As well as its specific role in relation to SSD and major developments where the Minister or Secretary is the consent authority, DPIE has general and wide-ranging compliance powers under the EP&A Act. DPIE has advised us that these powers would enable it to take action if a council were alleged to have contravened the Act, even if the contravention related to a development which is ordinarily regulated by the council and not DPIE.

However, there are a number of limitations to DPIE taking action in this way against a council:

(a) DPIE's Prosecution Guidelines[3] discourage the prosecution of one government agency by another, and do not specifically contemplate a scenario such as the one that occurred in the BHCC case.

(b) No clearly established complaint process exists through which an individual or an entity could report to DPIE a possible council contravention in relation to developments that are not SSD. Although DPIE's Planning Portal website provides an online complaint form, the only guidance given is an instruction to 'complete the form below to make a compliance complaint about a project'. There is no indication that complaints about non-SSD developments are accepted, or what *project* includes.

(c) Most individuals who wish to complain that a local development is not complying with planning laws would likely lodge their complaint with the council itself. In situations where the council is the consent authority and also the DA proponent, it would seem unrealistic to expect councils to refer any such complaints to DPIE – at least in the absence of any mandatory requirement to do so.

The EP&A Act (s 9.45) also enables 'any person' to bring civil proceedings in the Court for an order to remedy or restrain a breach of the Act. Again, however, this enforcement mechanism does not appear to offer a sufficient and practicable solution to a situation where a council is itself unwilling or unable to take enforcement action against its own non-compliance. Even if an individual outside of council became aware of its non-compliance, it seems unlikely they would have a sufficient personal interest to justify the time and costs of taking legal action.

2.4. Codes of conduct do not adequately address these conflicts

Codes of conduct applying to councils, councillors and council staff are important tools to manage the multiple risks involved in planning, development and regulatory processes.

Although council codes of conduct generally require individuals with conflicts of interest to declare them in writing, they do not prohibit councils and council officers from making regulatory decisions on council-initiated DAs or otherwise address the conflicts of interest that arise when they do.

Many councils we surveyed advised that they rely on the codes of conduct to ensure conflicts of interest in the development process are appropriately managed. Some councils expressed the opinion that the codes of conduct are sufficient, and that no other regulation is necessary.

However, codes of conduct only set out a general framework for ethical conduct and behaviour, clarify what is appropriate conduct and what is not, and caution those involved against corrupt conduct and partial or preferential decision-making. They generally also require those with conflicts of interest to declare them in writing. While this facilitates the appropriate management of conflicts, and

3. NSW Department of Planning and Environment, *Prosecution Guidelines (2016)*

increases the transparency and accountability of decision-making, it does not prohibit councils and council officers from making regulatory decisions on council-initiated developments – nor does it address the conflict of interest that arises when they do.

2.5. Council policies and other arrangements do not adequately address these conflicts

Some councils have adopted specific policies or arrangements to assist in the management of actual and potential conflicts of interest in respect of council-initiated DAs. However, there is little consistency among councils as to the approach taken. In some cases, the policies do not adequately deal with all relevant conflict scenarios. In particular, the conflicts that arise when councils regulate DAs in which they have an interest are not specifically addressed.

Our survey shows that councils have adopted a variety of measures to deal with potential conflicts of interest that may arise in council-initiated DAs. There is, however, significant variation among councils in how they approach the issues.

Greater Sydney Region Wollongong and Central Coast councils are required to comply with the Minister's Direction regarding LPPs.[4] Some regional or rural councils (which are not bound by the Minister's Direction) told us they have formal written policies in place, while others told us they rely on undocumented arrangements.

Where written policies exist that deal with conflicts of interest in relation to council-initiated DAs, these are generally risk-based. Most policies appear to focus only on the risk involved at the development approval stage (the role of the council as consent authority) and do not address the risks that can arise during the regulatory or compliance stage (the role of the council as regulator).

Most councils told us that they have some arrangements in place to deal with the risk of conflicts of interest associated with council-initiated DAs. Some common risk mitigation strategies include:

(a) **Escalation to a senior officer to determine required risk management**

In many cases, these involve a senior council staff member assessing the risk of a conflict of interest and determining necessary steps to mitigate the risk. For some councils these risk mitigation steps are formalised in documented policies, but for a large number of councils (23 in our survey of 59) the approaches are not expressly prescribed and are considered and applied on an ad-hoc basis. It is acknowledged that those councils that are required to abide by the Minister's Direction[5] (in relation to referring council-initiated DAs to the LPP for determination) may see no need for a formal policy.

(b) **Use of independent experts as assessors or peer reviewers**

Some councils routinely engage independent experts or planning consultants to either assess or at least peer review assessments of certain DAs before they are submitted to council for determination. In some cases, the criteria for this process are prescribed in policies, and include DAs that:

- have a commercial value over a certain threshold, and/or
- are considered contentious due to their environmental impact and/or because of the number of objections received.

4. Department of Planning, Local Planning Panels Direction – Development applications and applications to modify development consent, www.planning.nsw.gov.au/-/media/Files/DPE/Guidelines/Assess-and-Regulate/Local-Planning-Panels-Direction-Development-Applications-and-Applications-to-Modify-Development-Cons.pdf
5. Greater Sydney Region , Wollongong and Central Coast Councils

These processes cover council-initiated DAs that otherwise meet these thresholds, but generally do not apply to DAs that fall below those thresholds. In some cases, a general discretion may be given to a particular delegated executive to determine whether external consultants should be engaged for the assessment of council-initiated DAs and DAs by parties related to council.

In the case of the City of Sydney, we have been told that council requires all DAs in which the council or a member of the council has an interest to be subject to external assessment prior to determination by the consent authority.

(c) **Assessment by a neighbouring council**

Some councils have put in place arrangements with neighbouring councils whereby a neighbouring council makes an assessment of a council's DA. The assessment is then referred back to the first council for determination. This arrangement seems to be more commonly used by smaller non-metropolitan councils.

(d) **Internal segregation of duties**

A number of councils told us they have procedures that require planning staff who become aware of a potential conflict of interest to refer the DA to the most senior planning officer, or to the council's legal and governance section or the general manager for further direction.

Other councils require certain in-house assessments to be reviewed by senior management, or peer reviewed by other planning staff before final determination.

One council reported that it maintained robust probity in developments involving council DAs by ensuring the planning and regulatory arms of council kept their deliberations separate, and that a council governance officer attended meetings held between the two groups.

Some councils have adopted more than one of the above approaches. For example, one regional council's policy requires developments identified as having a moderate to significant risk of a conflict of interest to be assessed by either a 'suitable independent expert' or by another council, before being determined by the council in question.

It is evident that there is no common approach among all councils on how to manage risks – including conflicts of interest – in the approval and regulation of council-initiated DAs.

3. Options and recommendations

3.1. ICAC's 2007 recommendation

In 2007 the ICAC published a 'Position Paper on Corruption Risks in NSW Development Approval Process'. One of the issues raised in that paper was the conflicting roles of councils at consent authority level:

> Councils are often responsible for the determination of applications affecting their own land, and this is an issue on which the [ICAC's] advice is frequently sought. The dual role is not a corruption risk in itself, but, particularly in the case of entrepreneurial proposals, there can be an exposure to corruption risks.

ICAC's position paper followed the publication of a discussion paper in 2005, which elicited 187 submissions. In relation to the potentially conflicting roles of councils at the consent authority level, the ICAC sought responses to two questions:

- What mechanisms can be used to manage a council's conflicting roles when it is the consent authority for a development it has an interest in?
- In what circumstances should these mechanisms be used?

The ICAC reported that respondents supported the provision of additional guidance in such situations, but that the guidance should take into account the scale and type of the development involved, and of the resources of the council. For larger scale developments there was support for the use of external consultants, or referral to an independent planning commission or body.

The ICAC did not recommend legislative or state-wide policy change, but instead made a recommendation that 'individual councils take steps to manage their conflicting roles in matters where they are the regulator of land and have a financial interest in the outcome of the matter.'

Our analysis of the policies and practices of councils over the last decade (see section 2) shows that councils' adoption of the ICAC's recommendation has been inadequate and inconsistent.

Further, the ICAC's consideration of this issue was primarily and appropriately concerned with preventing corruption and managing corruption risk. Accordingly, its recommendations were focused on significant and/or 'entrepreneurial' developments where corruption risks might be greater.

However, the problem of concurrent roles of councils as consent authorities and regulators of their own developments raises concerns beyond corruption. Our concern in the Broken Hill investigation, for example, was primarily about the willingness of Council to knowingly 'cut corners'. In doing this, the Council potentially compromised public safety in respect of its own development in a way that, as the regulator charged with enforcing those safety laws, it would not (or at least should not) do in respect of any other development.

More recently, in 2019 an independent review of the planning system was undertaken by Nick Kaldas, APM[6]. However, that review did not consider the specific issue of council-initiated DAs.

In **section 3.4** we consider whether a stronger legislative or policy change is needed to ensure all councils adopt consistent measures to manage the conflicts associated with their roles in relation to council-initiated DAs.

6. Review of Governance in the NSW Planning System, Nick Kaldas APM, 21 November 2019.

3.2. Views of councils

Of the 59 councils that responded to our survey, 22 expressed a view on the adequacy of current legislative provisions for managing conflicts of interest in the development process.

Six councils supported a strengthening of the current legislation and/or a clarification of the requirements. Sixteen councils considered that no changes were necessary.

The following comment is typical of the views of a number of councils that were opposed to further regulatory requirements:

> In terms of the enforcement, it is considered that the current provisions are adequate and the introduction of additional regulations or restrictions is unnecessary - for any well-managed, accountable and responsible Councils.

Some councils were concerned that one case of wrongdoing by a council (BHCC) does not necessarily warrant the need for increased regulation:

> Just because one council has been irresponsible in their role of Regulator in overseeing applications that did not follow the correct procedures in relation to EP & A Act requirements, it does not mean that it should be assumed that all Council's [sic] behave in this way.

A number of councils, particularly in non-metropolitan areas, made the point that policies and approaches that may be appropriate for a large metropolitan council may not necessarily be practicable, reasonable or necessary for a smaller or rural council. For example, one council stated that:

> One size does not fit all there is a big difference between a Council that processes multiple applications and deals with planning proposals and regulatory approvals as opposed to a small rural Council that has not received a development application in many years. Don't write the rule book for [a large metropolitan council] and expect [a small rural council] to set up a system that is totally unnecessary.

However, there were some councils that supported legislative and/or policy change to eliminate the potential for conflicts in the case of council-initiated DAs.

One council suggested that councils should not have any role in regulating their own DAs. That council suggested that the planning legislation be amended for those DAs so that it operates as it does for the *Protection of the Environment Operations Act 1997*, where the regulatory authority is the Environment Protection Authority (EPA).

Another suggested that council DAs should be required to be subject to independent assessment, with the Regional Planning Panel to perform that role in the case of rural and regional areas.

Another agreed 'there is a need for clear legislative guidelines on this issue', while another suggested that:

> The Model Code of Conduct could provide specific guidance on many of the matters raised in this survey. In my experience, [planning and regulatory] staff aim to act independently and treat Council as they would any other private developer or property owner, but these staff are often in a "power imbalance" position and branded as "trouble makers".

3.3. Approaches by other regulators and jurisdictions do not offer a useful model

A number of other states in Australia have bodies equivalent to planning panels that assess and determine certain types of developments, including those involving council or council land.[7] However, none of the jurisdictions we reviewed appears to have clearly established processes to manage the conflicts of interest that arise when councils are regulators of a development in which they have an interest.

SafeWork NSW, which is the regulator of work health and safety laws, must also comply with those laws as an employer. SafeWork NSW has a mutual referral arrangement of work health and safety complaints/matters with the NSW Resources Regulator to deal with situations when its role as a regular may be in conflict with its obligations as an employer. Under this arrangement, any work health and safety complaints are first assessed internally in accordance with the usual processes. However, whenever a matter requires an 'inspector response' and it is deemed inappropriate for a SafeWork inspector to undertake an inspection (either because of a conflict of interest or because of the seriousness of the matter), a further assessment is undertaken by a Director, Investigations and Emergency Response to determine whether it is necessary to refer the matter to the Resources Regulator. The Resources Regulator will then make an assessment and respond in accordance with its own compliance and enforcement policy.

3.4. Options that could be considered

The following options could be considered to deal with the conflicts that arise for regional and rural councils when they determine DAs in which they have an interest:

A1. Establish a new state-wide panel or commission

A2. Secretary of DPIE or Minister for Planning be responsible for assessment and determination

A3. Independent external body or individual (e.g. regional panel, consultant, neighbouring council) be responsible for assessment and determination depending on the particular council's needs and resources

A4. Independent external body or individual (as in 3) be responsible for assessment, which is published. Council be responsible for determination in an open council meeting

A5. Council staff be responsible for assessment with strict role separation within Council and determination by Council in an open meeting

A6. Any of the above options, but subject to certain thresholds of 'significance' or 'risk'.

The following options could be considered to deal with the conflicts arising from councils having a regulatory/enforcement role in relation to DAs in which they have an interest:

B1. Confer all enforcement powers on DPIE

B2. Confer all enforcement powers on a new panel or commission

B3. Require clearer role separation within councils

B4. Mandatory notification of breaches and enforcement action taken (to DPIE and the public)

B5. Both B3 and B4.

7. For example, South Australia and Western Australia

3.5. Recommendations

I recommend that the Secretary of DPIE convene a working group comprising relevant agencies (including the Office of Local Government and representatives from a cross-section of councils) to:

1. consider options to strengthen and/or develop mechanisms to deal with potential conflicts of interest that arise when councils have concurrent roles as both development proponent and consent authority, and/or as both development proponent and regulator

2. consult relevant stakeholders to further inform the options that will be considered

3. take action to implement any agreed-to options within 12 months of the date of tabling this report.

On 30 November 2020 DPIE responded to these recommendations. It advised that it accepts the recommendations and will form a working group to assess what changes may be necessary to strengthen transparency and accountability regarding assessment and compliance where councils are both proponent and regulator. DPIE's response is attached as Annexure A.

4. Supporting information

4.1. Our survey of councils

Survey questions

We sent the following survey questions electronically to all NSW councils in mid-February 2020:

1. How many Council developments have been commenced in the last 10 years (a council development is any development where council itself is the development applicant and the consent authority)? Any matter requiring a development approval (DA) should be counted as a separate development.

   ☐ None ☐ 1-4 ☐ 5-20 ☐ 20-50 ☐ More than 50

2. Does Council have any reciprocal arrangement with another council in respect of assessing and regulating Council developments (a Council development is any development where Council itself is the development applicant and the consent authority)?

   ☐ Yes ☐ No

3. If no, does Council have any informal arrangements in respect of assessing and regulating Council developments?

   ☐ Yes ☐ No

4. Does Council have any other specific arrangements in place when it is the consent authority in respect of Council developments, including any policies for the regulation, including enforcement, and monitoring of compliance with the EP&A Act and other planning legislation in respect of Council developments?

   ☐ Yes ☐ No

5. If yes, please provide copies of any documents that describe those arrangements, such as policies, procedures, instructions to staff, etc. If publicly available on a website, please just provide a link below.

6. If no, does Council have any informal arrangements in respect of assessing and regulating Council developments?

   ☐ Yes ☐ No

7. Please describe any such informal arrangements

   _____

   _____

   _____

8. Does Council have any particular arrangements for assessing DAs where councillors or council staff are the applicants?

☐ Yes ☐ No

9. If yes, please provide copies of any documents that describe those arrangements, such as policies, procedures, instructions to staff, etc. If publically available on a website, please just provide a link below.

10. Has Council ever taken any form of regulatory action under the EP&A Act in relation to a Council development?

☐ Yes ☐ No

11. If yes, please explain what the circumstances were and what action was taken.

12. Do you have any other comments on the adequacy of the current legislative provisions in respect of Council developments when Council is also the consent authority or is otherwise responsible for enforcement of the EP&A Act and other planning requirements?

List of councils that responded to our survey

Thank you to the following 59 councils that responded to the survey:

Ballina, Bathurst, Berrigan, Bogan, Bourke, Brewarrina, Byron, Campbelltown City, Canada Bay, Central Coast, Central Shire Darling, City of Ryde, City of Sydney, Cobar, Coffs Harbour City, Coolamon, Cootamunda Gundagai, Cowra, Edward River, Federation, Glen Innes Severn, Goulburn-Mulwaree, Hawkesbury, Hay, The Hills, Hunters Hill, Inner West, Junee, Kiama, Kempsey, Lake Macquarie, Lithgow, Maitland City, Moree Plains, Mosman, Muswellbrook, Nambucca, Narromine, Newcastle City, Oberon, Parkes, Port Macquarie-Hastings, Port Stephens, Randwick, Shellharbour, Shoalhaven, Singleton, Snowy Valleys, Sutherland, Tamworth, Tenterfield, Tweed, Upper Lachlan, Wagga Wagga, Walcha, Weddin, Wollongong City, Wentworth and Wollondilly.

The survey was not a comprehensive exploration of the issues and the results do not represent the views of all councils. For this reason, it is important that DPIE consults further in developing its response to this report.

Summary of survey results

The key results from the survey are summarised in the figures below.

Figure 1. Metropolitan councils - number of council-initiated DAs commenced in the past decade

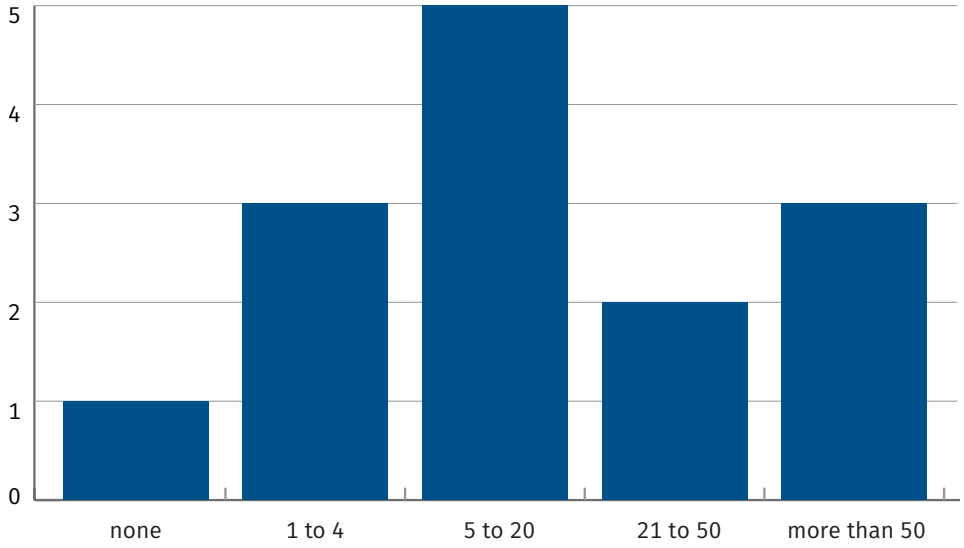


Figure 2. Rural/regional councils – number of council-initiated DAs commenced in the past decade

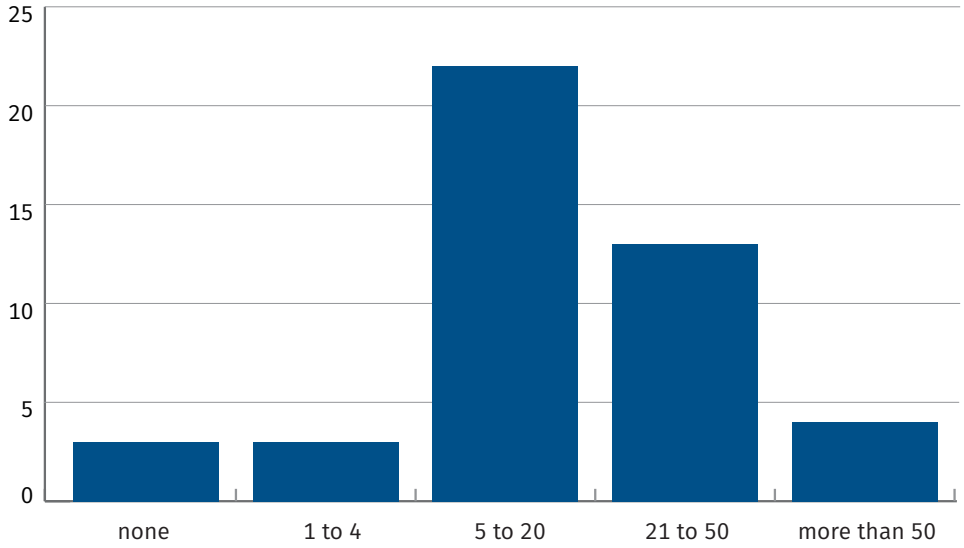
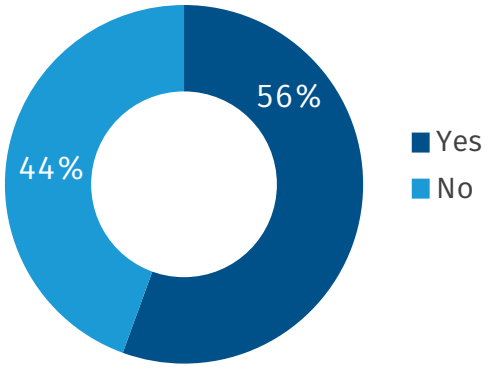


Figure 3. Councils with specific arrangements in place for dealing with council-initiated DAs

Has a policy in place that explicitly deals with council DAs (metropolitan)



Has a policy in place that explicitly deals with council DAs (rural/regional)

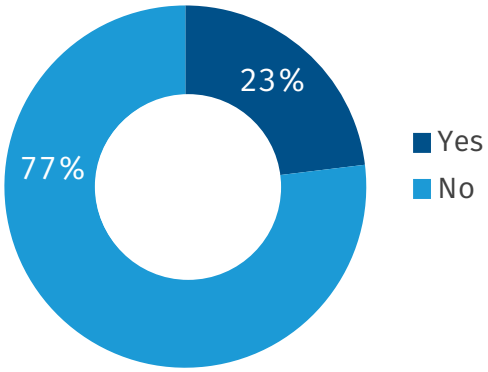
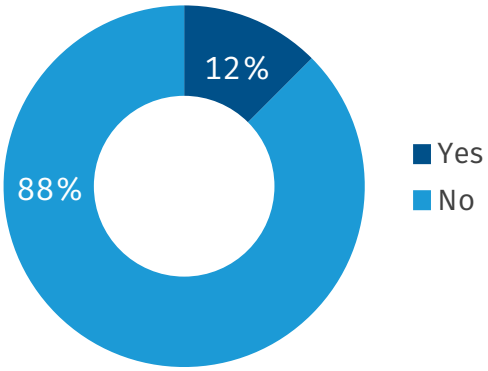
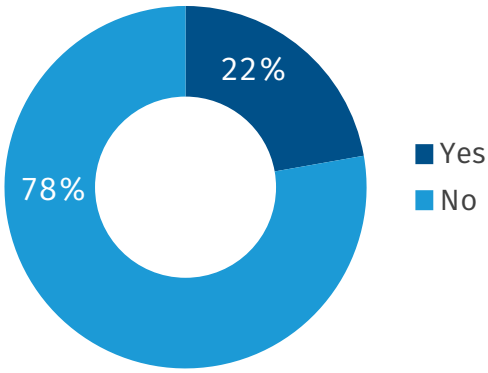


Figure 4. Councils that reported previously having taken enforcement action against themselves in relation to a council-initiated development

Has previously taken enforcement action against itself (metropolitan)



Has previously taken enforcement action against itself (rural/regional)



4.2. The conflicts of interest in the development process

A conflict of interest arises when there is a conflict between the public duty and the private interests of an individual or an entity, where the private interests could influence the impartial performance of official duties and responsibilities.

Conflicts of interest may be actual, potential or reasonably perceived.

The development process itself is a known area of significant corruption risk. Over one third of complaints to ICAC relate to local government (34.92% in 2005-06 and 37% in 2018-19). A significant number of those relate to aspects of the development approval process.

According to ICAC's 2018 publication 'Corruption and Integrity in the NSW Public Sector: an assessment of current trends and events', development applications are one of four main areas often associated with issues of partiality and/or personal interests. For example, where the owner or developer is closely associated with the decision-maker or the decision-maker themselves has an interest, the risk of corruption is high.

The publication highlighted regulatory and accreditation activities as sources of corruption risks. Because regulatory decisions often lead to significant benefits or costs and entail a degree of discretion, they can be susceptible to corruption. It highlighted the following situations where a regulator or accreditation authority may lack independence leading to biased or corrupt decision-making:

- the regulator is financially dependent on the regulated entity
- tension exists between an agency's regulatory and economy-building or customer service activities
- regulators become captured by the entity they are regulating
- staff cycle between working for the agency and the regulated entity.

4.3. Non-council approved development applications

DAs determined by Local Planning Panels

LPPs (formerly known as Independent Hearing and Assessment Panels or IHAPS) are panels of independent experts that determine certain DAs on behalf of a council and provide advice on other planning matters, including planning proposals.

Panels have been created to ensure the assessment and determination of DAs with a high corruption risk, sensitivity or strategic importance are transparent and accountable[8]. Similarly, the IHAPs before them were introduced to 'reduce corruption risk and depoliticise decision-making in local planning'[9]. The key objectives of LPPs are to:

- minimise corruption risks
- ensure independence, accountability and transparency in decision-making[10].

Under the EP&A Act, local planning panels are mandatory for:

- all Sydney councils
- Wollongong City Council
- Central Coast Council.

Councils that are not required to have an LPP have the option to set one up. If a council wishes to set up a panel, it must adopt the panel model established in the EP&A Act. Councils may also establish a shared panel if this suits their operational requirements[11].

LPPs consist of a chair and two independent experts appointed by council from a Minister-endorsed pool of independent, qualified people, plus a community representative.[12]

The following classes of DAs, with some minor exceptions, must be referred to the relevant LPP[13]:

1. the applicant or landowner is:
    - the council
    - a councillor

8. NSW Department of Planning, Industry and Environment, Local Planning Panels, www.planning.nsw.gov.au/Assess-and-Regulate/Development-Assessment/Local-Planning-Panels
9. Minimising and monitoring risk in the IHAP Framework, the former Department of Planning and Environment
10. NSW Department of Planning, Industry and Environment, Local Planning Panels Overview, 2019
11. NSW Department of Planning, Industry and Environment, Local Planning Panels Overview, 2019
12. NSW Department of Planning, Industry and Environment, Local Planning Panels, www.planning.nsw.gov.au/Assess-and-Regulate/Development-Assessment/Local-Planning-Panels
13. See Local Planning Panels Direction – Development Applications and Applications to Modify Development Consents, Minister for Planning and Public Spaces, 30 June 2020

- a member of staff who is principally involved in the exercise of council's functions under the EP&A Act
- a member of Parliament, or
- a relative of one of the above.

2. Contentious development: the referral criteria for contentious development sets out the number of unique submissions received (ranging from 10 to 25 depending on the council) before a DA is required to be referred to the panel for determination. The criteria also provide councils the opportunity to develop a submissions policy to specify a different number of unique objections required before referral is required. Submission policies must be approved by the Secretary of DPIE. For the Secretary to approve a new submissions policy, a council must provide reasonable justification and evidence that the contentious criterion should be amended.
3. Development that departs from standards: DAs that contravene a development standard imposed by a planning instrument by more than 10%; non-numerical development standards and in the City of Sydney more than 25% for dwelling houses, dual occupancies and attached dwellings. (Where the Secretary of DPE has allowed concurrence to be assumed by council staff for contravening development standards, the panel can delegate these applications to council staff to determine).
4. Sensitive development:
   - designated development
   - residential flat buildings exceeding three or four storeys in height depending on the category of council
   - demolition of a heritage item
   - development for the purposes of new premises that will require:
     - a club licence
     - a hotel (general bar) licence; or
     - an on-premises licence for public entertainment venues
   - development for sex services premises and restricted premises
   - development applications for which the developer has offered to enter into a planning agreement.

DAs determined by Regional Planning Panels

Sydney and Regional Planning Panels (previously Joint Regional Planning Panels) were introduced in 2009 to strengthen decision making on regionally significant development applications and other planning matters.

Regionally significant development (**RSD**) includes:

- development with a capital investment value (**CIV**) over $30 million
- development with a CIV over $5 million which is:
  - council related
  - lodged by or on behalf of the Crown (State of NSW)
  - private infrastructure and community facilities
  - eco-tourist facilities
- extractive industries, waste facilities and marinas that are designated development
- certain coastal subdivisions

- development with a CIV between $10 million and $30 million which is referred to the Planning Panel by the applicant after 120 days.[14]

An RSD is notified and assessed by the council and then determined by the relevant Planning Panel – either a Sydney Planning Panel for applications within the Greater Sydney Region or the relevant Regional Planning Panel outside of Sydney, including:

- Hunter and Central Coast Regional Planning Panel
- Northern Regional Planning Panel
- Southern Regional Planning Panel
- Western Regional Planning Panel.

Applications are made to the council, which assesses the proposal for the RPP's determination. The RPP reviews the council's assessment report, along with the development application, and determines whether to approve or refuse the application. To inform its determination, the RPP must undertake its own assessment of the relevant material and may visit the site and seek additional information and views as necessary.

Importantly, planning panels are not subject to the direction or control of the council, except on matters relating to panel procedures or the time taken to deal with a matter. However, councils still play a significant role, as they make the DA assessment and recommendations to the RPP. Where the development is council-related, council assessment staff may have a conflict of interest or duties that need to be managed. The RPP has no role in mitigating any conflicts that may also arise after the DA is approved and the regulation remains the council's responsibility.

State significant developments

Some types of developments are deemed to have State significance due to their size, economic value or potential impacts. State significant development (SSD) includes developments such as:

- new educational establishments, hospitals and correctional centres
- chemical and other manufacturing
- mining and extraction operations
- tourist and recreation facilities
- some port facilities
- waste management facilities
- energy generating facilities.

A proposal for any of the identified development types is SSD if it:

- is over a certain size
- is located in a sensitive environmental area
- will exceed a specific capital investment

In addition, some development on identified sites can also be SSD. Identified sites include Sydney Olympic Park, Darling Harbour, the Bays Precinct and Barangaroo (the full list of SSD development types and identified sites is contained in Schedules 1 and 2 of the State and Regional Development SEPP).[15]

14. Schedule 7, State Environmental Planning Policy (State and Regional Development) 2011
15. NSW Department of Planning, Industry and Environment, State Significant Development, www.planning.nsw.gov.au/Assess-and-Regulate/Development-Assessment/Planning-Approval-Pathways/State-Significant-Development

The Minister for Planning is the consent authority for all SSD other than the ones that must be determined by the Independent Planning Commission (the Commission). The Commission is the consent authority for SSD applications:

- that are not supported by relevant council(s), or
- where the DPIE has received more than 50 unique public objections, or
- that has been made by a person who has disclosed a reportable political donation in connection with the development application.[16]

4.4. Codes of Conduct

Codes of conduct minimise the potential for improper and/or corrupt conduct in the development process by councillors, council staff, planning panels and building regulatory authorities.

The Codes relevant to the planning and development and related regulatory processes for local government are:

1. the Model Code of Conduct (**Model Code**) for councillors and council staff
2. the Code of Conduct for Local Planning Panels
3. the Code of Conduct for Building and Development Certifiers

The Model Code of Conduct

The Model Code of Conduct is prescribed under section 440 of the *Local Government Act 1993* (**LGA**) and the Local Government (General) Regulation 2005 (**the LG Regulation**). Councils were required to adopt the Code by 14 June 2019.

Under s 440 of the LGA, each council is required to adopt a code of conduct based on the Model Code of Conduct prescribed under the Regulation. Councils may enhance or strengthen the standards prescribed under the Model Code of Conduct in their adopted codes of conduct to make them more onerous. Councils may also supplement the provisions contained in the Model Code of Conduct with additional provisions in their adopted codes of conduct.

However, councils cannot dilute or weaken the standards prescribed in the Model Code of Conduct in their adopted codes of conduct. Provisions contained in a council's adopted code of conduct that are less onerous than those prescribed under the Model Code of Conduct will be invalid and the equivalent provisions of the Model Code of Conduct will override them through the operation of section 440 of the LGA.

The Model Code sets the minimum standards of conduct for council officials. For the Model Code, a 'council official' includes councillors, members of staff of a council, administrators, council committee members, delegates of council and for the purposes of clause 4.16, council advisers. The Model Code assists council officials to:

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

16. NSW Department of Planning, Industry and Environment, State Significant Development, www.planning.nsw.gov.au/Assess-and-Regulate/Development-Assessment/Planning-Approval-Pathways/State-Significant-Development

Relevantly, the Model Code includes specific guidelines relating to land use planning, development assessment and other regulatory functions. These require council officials to:

- ensure that land use planning, development assessment and other regulatory decisions are properly made, and that all parties are dealt with fairly (3.13)
- avoid any occasion for suspicion of improper conduct in the exercise of land use planning, development assessment and other regulatory functions (3.13)
- ensure that no action, statement or communication between council officials and others conveys any suggestion of willingness to improperly provide concessions or preferential or unduly unfavourable treatment (3.14).

Councillors are prohibited from directing, influencing or attempting to direct or influence council staff (including assessments officers) in the exercise of staff members' functions.

Council staff are prohibited from meeting with applicants or objectors alone and outside office hours to discuss planning applications or proposals.

A councillor's failure to comply with the prescribed standards of conduct constitutes misconduct. A staff member's failure to comply with the council's code of conduct may give rise to disciplinary action.

The Model Code provides a general framework for ethical conduct and behaviour, and specifically cautions against council officials 'improperly providing concessions or preferential or unduly favourable treatment' in respect of land use planning, development assessment and other regulatory functions. However, it does not sufficiently and specifically address the inherent conflicts of interest/duties that can arise when a council regulates its own developments.

Code of Conduct for Planning Panels

Planning Panel members are bound by a comprehensive Code of Conduct (**the Code**), which came into operation on 1 January 2019. The Code was approved by the Minister for Planning for members of LPPs and the relevant Ministerial Direction makes no reference to members of RPPs. However, the operational guidelines for panels suggest that the Code applies to members of both LPPs and RPPs. The Code includes a section on land use planning, development assessment and other regulatory functions[17] and sections on pecuniary and non-pecuniary conflicts of interest.[18] The Code also includes specific requirements relating to lobbying panel members, and the interaction between panel members and other parties.

Government's development of the Code indicates that it recognises that planning assessments and determinations are likely to give rise to genuine or perceived conflicts of interest among decision-makers, and sees a need for proper management of these conflicts.

Code of Conduct for Building and Development Certifiers

The *Building and Development Certifiers Act 2018* (**B&DC Act**) and the Building and Development Certifiers Regulation 2020 commenced on 1 July 2020. The B&DC Act regulates building and development certifiers (including building surveyors, certain engineers, swimming pool inspectors, and strata and subdivision certifiers). They are classified as public officials and are subject to the provisions of the ICAC Act, the *Public Interest Disclosures Act 1994* and the Ombudsman Act. As public officials, building and development certifiers are required to:

- act in the public interest, to the benefit of society and the community as a whole
- avoid any conflicts of interest between their professional duties and personal and private interests
- act honestly and impartially

17. At paras 3.14-3.20
18. Parts 4 and 5

- report any corrupt behaviour to the relevant authorities
- adhere to the Code of Conduct for certifiers.

The Code of Conduct for certifiers is set out in Schedule 5 of the Building and Development Certifiers Regulation 2020. Part 4 of the regulations prescribes conflicts of interests for the purposes of s 29(1)(b) of the B&DC Act,[19] and also the circumstances in which a conflict of interest does not arise.[20]

On 1 September 2020 the Commissioner for Fair Trading published a Certifier Practice Standard under section 14 of the B&DC Act. Chapters 1 and 2 of the Standard cover the role of certifiers as public officials and conflicts of interest.

The B&DC Act and regulations also contain offence provisions that require certifier impartiality, including:

- making it an offence to carry out certification work if the certifier has a conflict of interest
- making it an offence for a certifier to behave other than impartially and an offence for anyone to provide a benefit to a certifier in order to influence them
- making it an offence to fail to comply with the Code of Conduct.

4.5. Approaches taken in other jurisdictions

In its position paper, the ICAC referred to the South Australian model which had established a Development Assessment Commission (DAC) which determined applications in which local government had an interest.

However, the 'Guide to Development Assessment' issued by Planning SA dated 2002 indicated that a council could act as a development authority even where it was involved in the development. The Guide stated:

> The only exception to the ability for a Council to deal with its own development relates to where the Council is undertaking specified 'commercial' type development. Schedule 10 sets out the forms of development undertaken by a Council that must be determined by DAC.
>
> It should be noted that Section 34(1)(b)(iii) of the Act enables the Council to request the Minister to declare DAC as authority instead of the Council. This section enables a Council to refer applications where it sees good reason. It is not expected this provision will be used often, as the Act clearly envisages Councils can deal with applications in which it has an interest.
>
> Where a Council is proposing a development itself, a good practice for the Council will be to ensure the allegation of bias is minimised by methods such as:
>
> - Council not committing to a development prior to planning consent
> - Council separating its assessment from its development functions at officer level
> - where this is not feasible, seeking outside planning advice.[21]

The role of the DAC has now been subsumed by the State Commission Assessment Panel or SCAP. The SCAP independently assesses and determines specified kinds of development applications in South Australia. These are prescribed in the *Development Act 1993* (SA) and the Development Regulations 2008 (SA) and include certain types of development by councils themselves or involving council land, and applications where the council requests (and the Minister for Planning agrees) that the SCAP be the assessing authority.

19. Regulation 24
20. Regulation 25
21. Planning SA, Guide to Development Assessment – An Integrated Planning and Development System for South Australia Planning SA, 2002

South Australia's Planning and Development system is currently undergoing further significant reform.[22]

Western Australia also has planning panels or Development Assessment Panels (**DAPs**) in place. The DAPs, rather than local councils or the Western Australian Planning Commission (**WAPC**), determine all major infrastructure and development proposals.

The matters which the DAPs may determine are set out in the *Planning and Development Act 2005* (WA) and the Planning and Development (Development Assessment Panels) Regulations 2011 (WA). There are three types of DAP applications:

- mandatory
- optional 'opt-in'
- delegated applications (by the local government or WAPC).

The mandatory threshold for DAP applications is $10 million or more (City of Perth – $20 million or more) and the optional threshold where the applicant or councils can refer an application to be determined by the DAP is between $2-10 million (City of Perth – $2-20 million). The DAP is precluded from determining development in an 'improvement scheme area' or development by a local council or the WAPC.

The relevant responsible authority can only delegate the following applications to the DAP for determination:

- an optional DAP application
- a development application for the construction of less than 10 grouped or multiple dwellings.

However, DAPs are not responsible for administering any conditions of approval in relation to the conditional approvals they provide.

In Victoria, Development Assessment Committees (**DACs**) were introduced in 2009. Consisting of both state and local government nominees, they were established to encourage better partnerships between state and local government, and improve local government resources and expertise in assessing land use and development proposals of regional significance or high complexity.

In July 2013, the *Planning and Environment Act 1987* (Vic) was amended to abolish the Development Assessment Committees and introduce a new opt-in Planning Application Committee (**PAC**). The PAC system is optional for councils. The PAC is intended to be an independent panel appointed by the Minister that will be available to provide advice to councils on specific kinds of permit applications. There is no obligation for a council to obtain the advice of the PAC. However, if a council wants their advice, the Minister can make the PAC available. In addition, councils can also choose to delegate responsibility for determining applications to the PAC.

However, according to a report published by the Victorian Auditor-General in March 2017, only one DAC was set up and no PACs have been established.[23]

22. The new *Planning, Development and Infrastructure Act 2016* (SA) was assented to on 17 April 2017, but will be implemented across 5 years. The new system is being implemented over three stages – Phase 1 – Outback – 1 July 2019, Phase Two (Rural) – 31 July 2020 and Phase 3 (Urban) – 2021. Significant developments, including those specified in Schedule 10 of the Regulations, are required to be determined by the SCAP.
23. Victorian Auditor-General's Office, Managing Victoria's Planning System for Land Use and Development, 2017, www.audit.vic.gov.au/report/managing-victorias-planning-system-land-use-and-development?section=

Annexure A

Response from Department of Planning Industry and Environment to the Recommendation

Planning, Industry & Environment

IRF20/5489

Mr Paul Miller
Acting NSW Ombudsman
Level 24, 580 George Street
SYDNEY NSW 2000

Via email: ombo@ombo.nsw.gov.au

Dear Mr Miller

Thank you for your correspondence to the Secretary of the Department of Planning, Industry and Environment (the Department) about your intention to table a special report about 'Managing conflicts of interests when councils undertake their own development'. The Secretary has asked that I respond to you on his behalf.

In circumstances where there is a failing of proper process by councils, the *Environmental Planning and Assessment Act 1979* allows the Department, under the *Local Government Act 1993*, to investigate breaches and council regulatory powers may be suspended if the seriousness warrants it.

As you are aware, the Office of Local Government has been working with Broken Hill City Council and the Department's compliance officers in relation to the use of the Broken Hill Civic Centre without the required occupation certificate being in place. I understand that the Council has developed probity measures to ensure that there will be no future conflict of roles for that Council when it is regulating its own development.

The Department continues to take proactive steps to ensure the planning system meets the community's expectations. For example, in 2018 the former NSW Deputy Police Commissioner Nick Kaldas was commissioned to assess the integrity of decision-making and governance across the planning system. Mr Kaldas' recommendations were accepted by the NSW Government and subsequent steps have been taken to strengthen governance arrangements.

I note that there are a range of risk-based measures currently operating within the planning system to manage councils' conflicts of interest in your report, including the well established independent regional panels and independent local planning panels introduced in 2018, particularly where a council is both proponent and decision maker.

The Department will form a working group to assess what changes may be necessary to strengthen transparency and accountability in the planning system taking an appropriate risk based approach to assessment and compliance where councils are both proponent and regulator.

4 Parramatta Square, 12 Darcy Street, Parramatta NSW 2150 | Locked Bag 5022 Parramatta NSW 2124 | planning.nsw.gov.au

If you have any more questions, please contact Mr Luke Walton, Executive Director, Local Government and Economic Policy, at the Department of Planning, Industry and Environment on 02 9274 6228.

Yours sincerely

30/11/2020

Marcus Ray
Group Deputy Secretary
Planning and Assessment

4 Parramatta Square, 12 Darcy Street, Parramatta NSW 2150 | Locked Bag 5022 Parramatta NSW 2124 | planning.nsw.gov.au

Annexure B

Copy of a report of an investigation into Broken Hill City Council under s 26 of the *Ombudsman Act 1974* December 2019.

The original of this report was given to the Minister for Local Government and to Broken Hill City Council by the NSW Ombudsman (Michael Barnes) in December 2019. This copy has been modified from the original by omitting the first and last names of individuals, who are instead referred to in this copy only by their title or position.

Contents

Executive summary

In 2015, Broken Hill City Council (**Council**) received a five million dollar grant from Infrastructure NSW to upgrade its ageing, two-storey Civic Centre (**Civic Centre or Centre**) into a modern hub for meetings, conferences and events. Building works started in the first half of 2016, following the engagement of contractors.

Council had planned to hold events at the Centre from October 2016, which was soon after building works were expected to reach practical completion. The works were not completed within the anticipated timeframe, and Council did not receive an occupation certificate to enable the use of the building. Despite this, a conference was held at the Centre from 3 to 7 October 2016.

After the conference, on 21 October 2016 Council received an interim occupation certificate which only permitted occupation of the auditorium located on the ground floor. Building works at the Centre continued.

Further events were scheduled for May and June 2017. Despite ongoing efforts, Council still had not obtained a full occupation certificate before the end of May 2017. Two events – the Civic Ball (**Ball**) on 12 May 2017, and the Nationals Conference on 18-20 May 2017 – proceeded as planned regardless.

After the two May events, Council issued a media release advising the public that all events scheduled to be held at the Centre would be relocated until the end of June 2017, at which time the builders aimed to complete works to 'address various issues within the facility'.

Shortly after the May 2017 events we received a public interest disclosure alleging that Council had breached the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) by allowing the Centre to be used for public functions without an occupation certificate as required by that Act. We conducted several preliminary inquiries with Council to obtain more information, and later commenced a formal investigation under s 13 of the *Ombudsman Act 1974*.

Council was the consent authority for the Centre development, which meant it was also the regulatory authority under the EP&A Act. The Department of Planning, Industry and Environment (**DPIE**) has overall responsibility for the administration of the EP&A Act. In June 2018 we provided DPIE with information about Council's actions in relation to the use of the Centre and requested advice on whether there was any action Council, as the regulatory authority, should take in relation to the alleged breach, if proven – for example, requiring a formal public acknowledgement and apology. In its response, DPIE noted our doubts about the utility of Council taking other enforcement action against itself. DPIE noted that, under its Compliance Policy, DPIE also had the ability to issue a caution under the *Fines Act 1996* to Council, or to seek enforceable undertakings under s 9.5 of the EP&A Act. DPIE later clarified it was not possible to issue a caution, as the alleged breach had already occurred.

As the allegations were serious and it was not reasonable to expect that Council would take impartial action against itself, and the action available to DPIE appeared to be limited, we decided to continue the formal investigation.

We have concluded there is clear evidence the Centre was used on multiple occasions without either an interim or a full occupation certificate in place for all the areas used on those occasions.

The Centre is classed "high risk" by the Building Code of Australia because it is a public assembly building and an entertainment venue. We understand the May 2017 events were attended by approximately 390 and 280 people respectively. Those events took place at a time when the Principal Certifying Authority had serious concerns about fire safety requirements. The Council did not give sufficient consideration to these concerns when they made the decision to proceed with the events.

In their submissions to our provisional conclusions, the General Manager and Council sought to minimise the seriousness of the issues and have been dismissive of the risks associated with opening an uncertified or partially certified building to the public. In his statements to the community and

to our office, the General Manager has said, in effect, that allowing the Centre to be used without certification was justifiable in the circumstances and involved low risk to the safety of patrons. This minimises the very real physical risks to which people may have been exposed. It also displays a lack of regard for the legislation Council is responsible for both complying with and enforcing in its regulatory role under the EP&A Act.

We have consulted with the Office of Local Government (**OLG**) and DPIE, and have received recent advice from DPIE clarifying that its powers under the EP&A Act are broad and that enforcement action may be taken in relation to the allegations if they are substantiated.

Our investigation highlighted a potential issue within the current regulatory regime under the EP&A Act: an inherent conflict of interest exists when a local council is responsible for regulating a development for which it is also the proponent and the consent authority. Although many councils have reciprocal agreements with neighbouring councils to consider local development decisions at arm's length, such arrangements are not compulsory and currently lack transparency. No clear pathway appears to exist for complaints about potential breaches of the EP&A Act by local councils to be raised by members of the public with DPIE.

Allowing a building to be used in the absence of a valid occupation certificate is a serious offence that attracts significant penalties under the EP&A Act. Councils cannot be expected to take impartial action against themselves should a breach occur – particularly in circumstances where the council itself made a deliberate decision to commit that breach. A breach committed by a council, if not addressed properly and transparently, has the potential to compromise the integrity of the regulatory regime. Public authorities must be held accountable for their actions. A high standard of integrity and honesty is critical to ensure public confidence in councils' ability to carry out their functions properly.

During the investigation we became aware of further concerns involving a contract with Telstra for the provision of audio-visual services at the Civic Centre, which were not part of the original complaint. Consequently, we expanded the investigation using our 'own motion' jurisdiction to include the execution of the Telstra contract.

We found that the General Manager executed the Telstra contract without proper delegation or authorisation from Council, and without following the required tendering process.

The Telstra contract exceeded $600,000, which was well over the tendering exemption threshold of $150,000 set by the *Local Government Act 1993* and the Local Government (**General**) Regulation 2005 (**Regulation**).

There are important public interest principles underpinning tendering processes. These are directed toward ensuring that councils are open, transparent and accountable, promote fairness and competition, and secure best value for councils' ratepayers and residents. Because the Telstra contract did not comply with tendering requirements, there can be no assurance that these principles were observed.

On the basis of the available evidence and the conclusions, I have made findings under s 26(1)(1) and (g) of the *Ombudsman Act 1974* that certain conduct of Council and the General Manager has been contrary to law or otherwise wrong. See **chapter 5** for detailed findings.

Michael Barnes
NSW Ombudsman

Recommendations

In order to remedy the failings (in part) and ensure Council's processes are strengthened to avoid a similar situation from arising in the future, under s26 (2)(a) and (e) of the Ombudsman Act, I recommend:

1. the Department of Planning, Industry and Environment (DPIE) decide what, if any, action it should take against Council in relation to the alleged breaches of the EP&A Act by Council
2. the Office of Local Government (**OLG**) decide what, if any, action it should take against Council in relation to the alleged breaches of the EP&A Act by Council and the failure to comply with tendering requirements in respect of the Telstra contract, and work with Council to ensure its processes are strengthened to prevent similar situations from arising in the future
3. DPIE and OLG jointly review relevant policy and legislation to identify whether changes are necessary or desirable to avoid the potential for actual or perceived conflicts of interest that arise from councils' having an interest as a development proponent and a duty as a regulator under the EP&A Act
4. Council provide a copy of this report to Council's Audit, Risk and Improvement Committee
5. Council's Audit, Risk and Improvement Committee provide further advice to Council on what actions Council should take to ensure that it complies with the tendering provisions of the Local Government Act, the Regulation and the Office of Local Government's Tendering Guidelines. The advice should also address the system deficiencies in Council's project management processes identified in this investigation report and O'Connor Marsden's report
6. Council enter into or review any current reciprocal agreements with an appropriate council for regulating projects where Council is the proponent or DA applicant, in order to avoid any actual or perceived conflicts of interest
7. Council make any such reciprocal agreements publicly available
8. Council continue the regular delivery of public interest disclosure refresher training for all staff and managers

Council consider whether it should take any action against the General Manager under the Code of Conduct in light of the findings in this investigation report.

I will also be considering whether it is appropriate to make a special report to Parliament under s 31 of the *Ombudsman Act 1974* in relation to this investigation.

1. The investigation

We investigated the conduct of Broken Hill City Council (**Council**) and Council's General Manager under s 13 of the *Ombudsman Act 1974* (**Ombudsman Act**). Some of the conduct investigated was the subject of a complaint made to us under the *Public Interest Disclosures Act 1994* (PID Act), but the final scope of the investigation was broadened using our 'own motion' jurisdiction.

The complaint, received on 22 May 2017, alleged that Council breached the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) by allowing the Broken Hill Civic Centre (**Centre**) to be used for public functions in May 2017 without the necessary occupation certificate required by the EP&A Act. The Centre was undergoing major refurbishment at the time of the functions.

We conducted several preliminary inquiries with Council. We issued a notice of investigation under s 16 of the Ombudsman Act to Council on 16 October 2017, addressed to the Mayor of the Council. On the same day, we issued a notice of investigation under s 16 to the General Manager in relation to his conduct. We also issued a notice under s 18 of the Ombudsman Act requiring Council to produce a range of documents.

In response to the s 18 notice, Council provided two lever arch folders of documents on 14 November 2017. A report by O'Connor Marsden & Associates (**OCM**), also produced at this time, raised serious concerns about the execution of a contract between Council and Telstra for audio-visual (**AV**) services as part of the Civic Centre refurbishment project. OCM found that the contract should have been put to a Council meeting for authorisation, as it was a single contract over the value of $150,000. Further, OCM noted it did not appear that reporting to Council on the progress of the project (in accordance with the minimum requirements of the Office of Local Government's Capital Expenditure Guidelines) had occurred.

Given the concerns outlined by OCM, we decided to broaden the investigation and examine the General Manager's conduct in relation to:

- execution of the contract between Council and the Telstra Corporation on 30 June 2016 for audio visual services, which was part of the Centre refurbishment project (**Telstra contract**)
- failure to report to Council on the progress of the Centre refurbishment project as required by the Office of Local Government's Capital Expenditure Guidelines 2010.

An additional s 16 notice of investigation was therefore issued to the General Manager on 14 September 2018.

On 20 December 2018, we provided a document (**first provisional statement**) containing a statement of facts and provisional conclusions and findings to the General Manager, to afford him procedural fairness and to obtain his submissions.

1.1. The General Manager's and Council's submissions

In response to the first provisional statement, on 15 February 2019, Redenbach Lee Lawyers, who were acting on behalf of the Council and the General Manager, provided a 132-page submission, including 13 lever arch folders of additional documents (**Redenbach Lee submission**)[1] and five witness statements by the:

- General Manager
- Coordinator of Tourism and Events

1. Owing to the difficulty of distinguishing between the submissions made on behalf of the General Manager from the submissions made on behalf of Council, we have adopted the term 'Redenbach Lee submission' to refer to all submissions received from both public authorities.

- Mayor
- Events and Partnerships Support Officer
- former Mayor.

On 12 and 19 July and 1 August 2019, Redenbach Lee sent us a number of affidavits from current and former Council staff, and other materials prepared for litigation in the Supreme Court between Council and parties involved in the refurbishment.

We considered the Redenbach Lee submission and other material provided by Redenbach Lee, and where relevant incorporated them into a second provisional statement. Redenbach Lee Lawyers have also made a number of procedural and other general objections to the investigation, which have been otherwise dealt with in correspondence.

Although the Redenbach Lee submission was presented as a 'combined response of the Council and the General Manager', we decided to provide the **second provisional statement** to the Mayor on behalf of Council to afford Council procedural fairness, and to obtain any further submissions from Council and/or the Mayor – as opposed to additional submissions from the General Manager.

On 13 September 2019 we received further submissions from Council in a letter from the Mayor, with individual submissions from six councillors attached. On 16 September 2019, two councillors provided their own separate submission stating that their position on the issues in the second provisional statement was 'at odds' with the other councillors.

The further submissions by Council largely replicated the key submissions already made by the Redenbach Lee submission.

It is of concern that some Councillors have failed to acknowledge the seriousness of the breaches of the EP&A Act, under which Council itself has a regulatory and enforcement role. One Councillor remained convinced that it may be found that Council has no case to answer and was therefore concerned about the potential impact of our report on Council's reputation and confidentiality.

It is of further concern that both Council's submission and the submissions of individual Councillors make unfounded assumptions about the identity of the complainant(s) in this matter, as well as derogatory statements about those individuals. Council's submission advised that public interest disclosure (**PID**) training is routinely delivered to council staff, and yet the submission itself shows a lack of basic understanding of PID principles – such as the need to provide confidentiality and protections to staff who make reports of wrongdoing, including preventing reprisals against them.

Some Councillors have questioned the source of the evidence we have relied on. The evidence, which is set out in some detail in this report and the provisional statements provided to Council, comes from documents provided by Council and statements made by the General Manager and other Council employees.

Where relevant, we have noted Council's submissions in this report – but our conclusions and findings have remained unchanged.

1.2. Consultation with the Minister for Local Government

As required by s 25 of the Ombudsman Act, on 10 December 2019 we informed the Minister for Local Government, of his intention to make a report under s 26 of the Ombudsman Act. We provided a draft copy of the report to the Minister to enable her to decide whether to consult with us. On 18 December 2019, the Minister advised that she did not require a consultation.

1.3. List of abbreviations

Abbreviation	Name
BCA	Building Code Australia
BMG	Blackett, Maguire and Goldsmith PCA
COO	Chief Operating Officer
EP&A Act	Environmental Planning and Assessment Act
IOC	Interim Occupation Certificate
LGA	*Local Government Act 1993*
LGNSW	Local Government NSW
MBE	MBE Security and Fire Services
MICE	Meetings, Incentives, Conferences and Events
OCM	O'Connor Marsden
OLG	Office of Local Government
PCA	Principal Certifying Authority
PCG	Project Control Group
Pro AV	Pro AV Solutions audio visual technology supplier
PID Act	Public Interest Disclosures Act

1.4. List of appendices

Abbreviation	Name
Appendix A	Ground floor plan
Appendix B	Photo of debutantes, partners and the Mayor in Civic Centre
Appendix C	Photo of Deputy Premier and the Mayor cutting ribbon in Civic Centre
Appendix D	Photo of debutante and partner upstairs in Civic Centre

2. Background

2.1. The Civic Centre refurbishment project

The Civic Centre was built in 1970 and is owned and operated by Council. It is a two-story venue for conferences, trade shows, theatrical productions, weddings, meetings and events.

In 2015 Council was given a grant of $5,063,100 by Infrastructure NSW to upgrade the Centre into a hub for meetings, incentives, conferences and events (**MICE**). The grant was provided through the NSW Government Restart NSW Resources for Regions Grant Program, and was to cover 100% of project costs.

The project included works on lift installation, air-conditioning, seating, kitchen facilities, staging, conference facilities, partitioning, foyer/entrance, amenities, disabled access, energy efficiency, and audio-visual (**AV**) works.

On 20 May 2012 Council resolved to accept the tender for project management submitted by a Sydney-based company (referred to as 'the architects'). The company had provided the architectural design for the upgrade and later also took on the duties of superintendent, which involved administering the construction contract and ensuring that the contractual obligations were performed. This meant the architects acted as the interface between the Council and the builders.

On 16 March 2016 Council accepted the tender for construction works (including AV works) submitted by a company based in Adelaide (hereafter referred to as the builder). The Principal Certifying Authority (**PCA**) was Blackett, Maguire and Goldsmith (**BMG**), a company based in Sydney.

The General Manager was appointed to his role on 4 April 2016, three weeks after Council accepted the builder's tender.

A Project Control Group (**PCG**) was established to steer the refurbishment project. It was comprised of senior Council staff, including the General Manager and Acting Deputy General Manager, representatives of the architects and the builder, the Mayor and one Councillor. Following the Council elections in September 2016, the composition of the PCG was changed so that it no longer included elected members of the Council.

The contractual arrangements between Council and the builder required the project to reach practical completion by September 2016 – that is, within 6 months of commencement. Following a variation to the contract this date was extended to 13 December 2016, and subsequently further extended on multiple occasions.

The Nationals Conference of Growing Families Australia was held at the Centre over four days between 3-7 October 2016.

On 21 October 2016, the PCA issued an interim occupation certificate (**IOC**), which only permitted occupation of the auditorium on the ground floor of the Centre. The rest of the Centre (the lower ground floor, first floor, and areas of the ground floor other than the auditorium) was not certified for occupation at this time.

After October 2016, Council worked towards obtaining a final occupation certificate for the whole Centre in time for events planned for May 2017 onwards.

Due to increasing difficulties in managing the project, in April 2017 Council's newly recruited Chief Operating Officer (**COO**) was given responsibility for the overall project management. Towards the end of April 2017, the COO recruited a Consultant Project Manager, initially for four weeks, with a mandate to finish the refurbishment as soon as possible. The Consultant Project Manager resigned in mid-July 2017.

The PCA carried out inspections on the Centre in early May 2017 and refused to issue either a final occupation certificate or a further interim occupation certificate for the rest of the ground floor as a number of works were outstanding, and the necessary certification had not been provided to the PCA.

Despite the fact that occupation certificates had not been given for parts of the Centre other than the auditorium, two events (**May events**) were held in the Centre: the Civic Ball on 12 May 2017 and the Nationals Conference on 18, 19 and 20 May 2017.

After the May events, on 23 May 2017, Council issued a media release stating all events scheduled to be held at the Centre would be relocated until the end of June 2017, when the builders were aiming to complete works 'to address various issues within the facility'.

The Barrier Daily Truth newspaper reported on 24 May 2017 that the General Manager had said in the media release that:

- the May events were 'a tough stress-test' and had revealed a few issues that needed to be rectified before Council would be comfortable hiring it out again
- attendees had concerns around the bathrooms, 'namely the lighting, plumbing and sinks'
- while Council could still hold events at the Centre, it could not 'take money in good conscience from hirers and customers' when patrons had told Council what needed to improve.

On 17 July 2017, the builder claimed practical completion, however Council refused to accept the claim on the basis of numerous outstanding defects and incomplete works.

The relationship between Council, the architects and the builder deteriorated and eventually culminated in proceedings before the Supreme Court, which are ongoing.

On 29 November 2017 Council resolved that as there had been substantial breaches of contract by the builder, the General Manager was authorised to 'take over the works'. As a result, a new builder was engaged to finish the project.

According to a Council media release, a final occupation certificate for the whole Centre was obtained on 10 July 2018, nearly two years after the original contractual date for practical completion and over a year after the May events were held at the Centre.

2.2. The Telstra Contract

According to a report prepared in August 2017 by O'Connor Marsden (**OCM**) following a probity audit of the Telstra contract:

> A key component of the Civic Centre Upgrade Project grant funding agreement with Infrastructure NSW required Council to ensure state-of-the-art and easily upgradable integrated technology, this being a key aspect of a Meetings, Incentives Conference and Event (MICE) venue. The cost of these upgraded works was estimated at $689,000 in the funding agreement.

In January 2016, the architects obtained a fee proposal of $142,559.87 from Pro AV Solutions for the provision of the AV component of the Civic Centre refurbishment project.

According to the General Manager's witness statement and information in other documents, he formed the view after commencing his role at Council on 4 April 2016 that the amount set aside by the architects for AV technology was insufficient to achieve Council's goals for this component of the upgrade project.

In June 2016, the General Manager asked Telstra to provide another fee proposal for the AV solution. He subsequently executed a contract with Telstra for AV services on 30 June 2016 totalling $611,541.15. This contract with Telstra is said to have replaced the proposal submitted by Pro AV Solutions to the architects in January 2016 (see **chapter 4** for a detailed discussion).

3. Alleged breaches of the EP&A Act

3.1. Occupation certificate requirements

An occupation certificate, issued under the EP&A Act, allows a person to occupy and use a new building or change the use of an existing building. It verifies that the PCA (the principal certifying authority) is satisfied that the building is suitable to occupy or use having regard to the requirements of the Building Code of Australia (**BCA**) and the relevant Development Consent.

Most relevantly, the EP&A Act prohibits the use of the whole or any part of a building before an occupation certificate is issued by the PCA.

Section 109M(1) of the EP&A Act, which was in force at the time of the relevant events,[2] stated:

> A person must not commence occupation or use of the whole or any part of a new building (within the meaning of section 109H) unless an occupation certificate has been issued in relation to the building or part.

There are two types of occupation certificates: interim and final.

An interim occupation certificate authorises a person to occupy or use a partially completed building or start a new use of a part of an existing building. A final occupation certificate authorises a person to occupy or use a new building or start a new use of an existing building. With respect to the same building, it is not necessary for an interim occupation certificate to be issued before a final occupation certificate is issued.

The occupation certificate requirements imposed by the EP&A Act clear and unambiguous. Either there is an occupation certificate for the part (or whole) of the building being used, or there is not. In the absence of an occupation certificate, occupation or use of the building (or relevant part of the building) is in breach of (what is now) s 6.9.

The EP&A Act imposes significant penalties for breaches, reflecting the importance of obtaining an occupation certificate. Occupying or changing the use of a building without an occupation certificate is a 'Tier 2' offence under the EP&A Act. If the party responsible for the breach is prosecuted, a court can impose penalties of up to $2 million (for a corporation) or $500,000 (for an individual). Additional amounts are prescribed for each day an offence continues.[3]

Under the EP&A Act, the relevant PCA must assess whether the building is suitable for occupation or use in accordance with its classification under the BCA before issuing an occupation certificate.

The BCA sets the standards to be met for the design and construction of various classes of building. This ensures that minimum levels of health, safety and amenity are provided for people who use the building. The PCA can check design and construction details by relying upon certificates or other documentary evidence issued by building and trade professionals, e.g. fire safety certificates.

The BCA classifies buildings into one (or more) of 16 classes based on their proposed use. Relevant factors include whether or not a building is considered high or low risk, and special considerations relevant to particular uses. The risk profile is reflected in the more onerous requirements (especially in regard to fire safety) placed on high risk buildings.

The Centre is classified as an assembly building (class 9b in the BCA) and is therefore considered 'high risk'.

2. October 2016 and May 2017. The current provision is s.6.9.
3. These penalty amounts, which are current, were also in place at the time of the relevant events.

A PCA must not issue an occupation certificate unless satisfied that, among other things, any required fire safety certificates have been provided and the building is suitable for occupation in accordance with its BCA classification.

3.2. Use of the Centre before any occupation certificate was issued

The National Conference of Growing Families Australia (**Conference**) was held at the Centre over four days between 3-7 October 2016. We gathered the following information from Council's records, the Growing Families' website, and correspondence from the builder:

- An email with the subject line 'Conference 1 Access Times 3/10 to 7/10/2016' dated 22 September 2016 from Council's Events and Partnerships Support Officer to the builder, and copied to other Council events staff, refers to the Conference as follows: 'Please find attached a copy of the times that the Civic Centre Auditorium will be in use for the first conference as discussed this morning. I will try and get the other timeline to you shortly.'
- The builder forwarded this email on 22 September 2016 to various recipients (such as tradespeople) with the same subject line and an attachment titled 'Growing Families Australia Conference – Access Times for Builders'. In the email, the builder requested the recipients take note of the timetable for the upcoming function and advised that any trades that would be onsite during this period would need to alter their schedule or location in order to continue works.
- The witness statements of the Mayor, the Coordinator of Tourism and Events, and the General Manager all concede that the Conference was held on these dates in the Centre.
- The Redenbach Lee submission accepted that evidence existed to support a conclusion that the Conference was held in the auditorium between 3 and 7 October 2016.

Although the Redenbach Lee submission accepted that an interim occupation certificate was only issued on 21 October and that the conference occurred some two weeks before, it asserted that 'the Civic Centre is and always has been used in accordance with the **current IOC**' (emphasis added). As there was no IOC in place covering the dates of the Conference, whether or not the space was used in accordance with any future IOC is irrelevant. Using the Centre in the absence of any occupation certificate was in breach of s 109M(1) of the EP&A Act.

The submission also contended that, although the IOC was only issued after the Conference, as the application for it was made to the PCA one business day after the Conference, the space was the same during the Conference as it was when the IOC was granted.

To the extent that this argument is put forward to counter the allegation of a breach or minimise its significance, it is not accepted – for two reasons.

First, making an application for occupancy one day after an unlawful occupancy occurred does not mean there was no breach, or that the effect of the breach was minimised.

Second, contrary to the submission's claim, the evidence shows that the space must have changed in order for the IOC to be granted.

For example, an email of 18 October 2016 to the architects from the PCA about its inspection on 17 October 2016 listed seven requirements or issues that needed to be addressed before an IOC could be granted for the auditorium. One of the issues was that the fire indicator panel was not working, which meant the smoke detection and alarm systems were not operational. The PCA emphasised that this had to be operational before any use of the building. An email dated 21 October 2016 from electrical contractors, BRW ELEC, to the builder, confirmed that the fire indicator panel 'was [now] fully operational and functioned as intended', suggesting some work was done after 17 October to fix it.

The emails from the PCA and BRW ELEC show that a crucial fire safety requirement was not functional as at 17 October 2016 and that this was remedied on 21 October 2016, the day the IOC was granted.

This is contrary to the claim in the Redenbach Lee submission that there were no changes to the building between the holding of the Conference and the granting of the IOC. There is no evidence that the fire indicator panel was functional during the Conference in early October 2016.

The minutes of the PCG meeting dated 6 October 2016 record that the floor finish in the auditorium was to be investigated, and Council was to meet with a the builder supervisor on that day.

The PCA's email of 17 October 2016 also stated that there was a newly applied finish to the timber floor, which required certification for slip resistance. The evidence suggests that changes were made to the auditorium floor between the date of the Conference and the issuing of the IOC.

3.3. The terms of the Interim Occupation Certificate (IOC) of 21 October 2016

As noted, the IOC was issued on 21 October 2016 and stated:

- This **Interim Occupation Certificate** relates to the Auditorium only (emphasis in the original).

Schedule 1 attached to the IOC listed the documentation the PCA relied upon, including:

- the ground floor plan
- a letter from the builder confirming that works to the auditorium were cosmetic
- a letter from Council dated 20 October 2016 describing interim arrangements for the disabled access and egress to the auditorium (**access strategy**) and the toilet facilities strategy, both of which were required by the PCA.
- a Fire Safety Certificate for the auditorium accompanied by an email from BRW ELEC, confirming that the fire indicator panel was fully operational and functioned as intended.

The auditorium is marked in yellow on the Ground Floor Plan (**Appendix A**). The legend on the plan states that the yellow marking indicates the area covered by the IOC. The auditorium, which is located on the ground floor of the Centre, is bordered by the foyer on the east side and by offices, the bar and the kitchen on the south. These areas of the ground floor, marked in grey on the plan, were not covered by the IOC.

The main entrance to the Centre is accessed by steps on Chloride Street up to the foyer. Public access to the auditorium is through doors from the foyer, opposite the entrance doors. However, at the time the IOC was issued, construction works were still occurring in the foyer. Temporary access to the auditorium was through the northern exit doors, which open directly onto a plaza on Beryl Street. Because the northern exit doors did not provide access for people with disabilities, disabled access was to be provided via a ramp from Blende Street on the south side of the Centre.

The access strategy for patrons with disability set out in the letter from Council attached to the IOC required them to traverse the foyer (otherwise not certified for occupation) – accompanied or assisted by staff – to gain access to and from the auditorium. No other occupation of the foyer (e.g. by patrons without disability) was permitted by the IOC or the documentation it relied upon.

The toilet facilities strategy set out in the letter from Council noted that, with a maximum attendance of 300 people expected for forthcoming events, portaloos with 8 toilets and 1 urinal would be provided. The adjacent Aged Persons Rest Centre toilets would be used by those requiring ambulant facilities, and Council staff would assist patrons to and from that building.

The IOC was issued by the PCA on 21 October 2016 on the basis that the facilities required for the class of building such as the Centre were provided by way of temporary structures within a short distance of the auditorium.

3.4. Attempts to obtain a final occupation certificate

On 8 May 2017, the PCA inspected the Centre accompanied by the Consultant Project Manager. The PCA identified a number of issues which needed to be addressed. At this stage, Council's aim was to achieve a final occupation certificate for the whole building in time for the events booked from May onwards.

On 11 May 2017, the PCA emailed Council two reports - Inspection Report R2 and Occupation Certificate Requirements R2.

The items highlighted by the PCA in yellow in the inspection report had to be addressed or rectified before an IOC for **the ground floor only** could be issued. Items highlighted in blue had to be addressed or rectified before an IOC for the **first floor** could be issued. The items highlighted in yellow (the required certificates) in the Occupation Certificate Requirements document had to be submitted before an IOC for **both the ground and the first floor** could be issued.

Despite attempts to satisfy the requirements, Council was not successful in obtaining any further occupation certificates – either interim or final – in May 2017.

3.5. Use of the Centre in May 2017

Two significant events were held in the Centre in May 2017:

- the Civic Ball (**Ball**) on 12 May 2017
- the Nationals Conference on 18, 19 and 20 May 2017.

The evidence indicates that in addition to the public events, the Centre was occupied by staff almost continuously for a 13-14 day period from at least 7 May 2017 (when they started preparing for the May events) until at least 20 May 2017 when the Nationals Conference concluded. It seems likely that at least a day would have been needed to 'bump out' the event (i.e. by 21 May 2017). In this regard:

- Council's media release of 13 June 2017 stated that 'staff had spent days setting up in preparation for the Ball'
- it is reasonable to assume that staff would have been present for pack-up, clean-up and other bump out activities on 13 May 2017 (the day after the Ball)
- the General Manager has stated that set-up for the Nationals Conference started on Sunday 14 May 2017

Lawful use of the Centre in May 2017 was limited to the auditorium on the ground floor, as specified by the October 2016 IOC (and attached documentation). Contrary to what is asserted in the Redenbach Lee submission, the evidence demonstrates that areas other than the auditorium were used during the May events in breach of the EP&A Act.

3.5.1. The planned use

Less than two weeks before rehearsals for the Ball were scheduled, on 27 April 2017, the Consultant Project Manager emailed the Deputy General Manager, Council's Project Director and other relevant staff with a list of outstanding items which he said '**MUST** be completed by Sunday 7th May 2017 as debutante rehearsals will commence on Monday the 8th May 2017'.

His email said the areas of the building Council planned to use were:

- for the Nationals Conference: the whole of the Centre
- for the Ball and rehearsal: the stairs, mezzanine area, the upstairs lounge (including an area to be used as change facilities for the debutantes) and the Chips Rafferty Function Room, toilets, and cool room on the ground floor.

The list attached to the Consultant Project Manager's email showed the items that required urgent attention and had to be completed by 7 May 2017:

1. All 3 tiered seating units in the auditorium are to be stacked and moved to the left hand side of the room.
2. The Auditorium and the stage must be clean and tidy.
3. Stairs and mezzanine area are to be cleared/cleaned and handrails secured-required for photo taking.
4. A section of the upstairs lounge will be required as change area for the debutantes.
5. Male and female toilets are to be cleaned and operational with lights working.
6. Two 15 amp dedicated power points are to be fitted to the wall of the loading dock-required for caterer's vehicles.
7. Three data entry points are to be fitted in the bar area of the Chips Rafferty Room-required for POS cash draws.
8. Cool rooms are to be cleaned out and locks fitted.
9. The venue will have to be recertified with particular attention being given to the Security System, Fire Alarm and Sprinkler systems, Emergency and Exit Lighting.

3.5.2. Evidence of actual use

The foyer – disability access

The General Manager attached photos of the Centre to his 18 July 2017 letter to us. One photo showed the auditorium set up for the ball, and another photo showed the auditorium in use for a conference, both under the heading 'Civic Centre Broken Hill Auditorium 2017'. The only conference held in the Centre in 2017 was the Nationals Conference. A third photo under the heading 'Civic Centre Broken Hill Foyer 2017' shows a group of at least 12 people milling in the foyer, with one person walking into the auditorium from the foyer. These people are not Council staff, Councillors or builders, so it appears they are conference attendees. The people pictured do not appear to have needed access the auditorium by way of the ramp, nor do they appear to be accompanied or assisted by Council staff.

The toilet facilities

The IOC of October 2016 did not certify the toilet facilities. As discussed above, Council's letter to the PCA – which was one of the documents relied on to determine the IOC – confirmed that all bathroom facilities made available to occupants would be outside of the Centre. These facilities consisted of portaloos for able-bodied patrons, and another nearby location for people with disability.

Although there was no subsequent IOC issued allowing the use of toilets, evidence shows not only that the bathrooms inside the Centre were used, but that patrons had concerns about the standard of those facilities. As noted above, the Barrier Daily Truth quoted the General Manager saying that the Nationals Conference and the Civic Ball had been 'a tough stress test' for the Centre. He said attendees had 'concerns around the bathrooms, namely the lighting, plumbing, and sinks' and because of this, the Centre would be closed until these issues had been resolved.

Other areas

At the northern end of the foyer a flight of stairs leads up to the mezzanine, and then a second flight of stairs leads from that landing to the first floor. The evidence shows that the area in front of the stairs, areas on the stairs, and beyond the stairs (the upstairs rooms) were used for the Ball and the Nationals Conference as follows:

- A photograph of the debutantes and their partners with the Mayor shows them standing on a flight of stairs covered with the distinctive carpet used only on the first floor (dark grey with light flecks or streaks). This appears to be the second flight of stairs leading from the landing up to the first floor (**Appendix B**).
- A photo of Deputy Premier John Barilaro and the Mayor performing the ribbon-cutting ceremony shows them cutting a ribbon tied to the handrails of the stairs leading from the foyer up to the landing (**Appendix C**). At the right of the photo there is a rope bollard. It seems likely that rope bollards were placed at the foot of the main staircase to restrict access before the ribbon-cutting ceremony. It appears unlikely that once the ribbon had been cut, declaring the Centre open, the bollards would have remained across the stairs. It also seems unlikely that the opening ceremony conducted by the Deputy Premier would have gone ahead if all areas of the Centre other than the auditorium were closed off to the public.
- A photograph of a debutante and her partner (**Appendix D**) shows them in a room which has the distinctive carpet used only on the first floor (dark grey with light flecks).

The General Manager made a number of general statements admitting that areas of the Centre not covered by the IOC were used in May 2017. For example, in his letter to us dated 18 July 2017, the General Manager confirmed that the Centre:

> was used on these two [May] occasions without interim occupancy'

and:

> 'the areas of the building **used that were not the subject of an occupation certificate were the entry foyer area and toilet facilities, along with bar area and some break out rooms on the second floor**. (emphasis added).

In addition, the letter stated that the Nationals Conference 'required a multi-facility venue with break-out rooms/meeting spaces and auditorium'.

The General Manager's admission that areas such as the bar area and some break-out rooms on the second floor were used appears to be inconsistent with statements made in subsequent representations on behalf of the Council. For example, the General Manager informed the Independent Commission Against Corruption (**ICAC**) on 24 August 2017 that 90% of 'the event' was held in the auditorium. The Redenbach Lee submission stated that 'the remaining 10% was made up of the foyer area and necessary access and egress as authorised'.

3.5.3. Submissions in relation to areas used

Staff use

The Redenbach Lee submission argued that the preparatory works for the events did not constitute an occupation for the purposes of the EP&A Act, for two reasons.

First, the submission argued that at all times while preparation for the events was undertaken, 'the requisite authority and supervision by the PCA was in place'. In support of this, it referred to a certain paragraph in one of the witness statements. However, this paragraph refers to attempts and efforts to obtain interim occupancy, and does not provide a basis for the claim that the 'requisite authority was in place'. No authority in terms of a valid occupation certificate (other than for the

auditorium) was in place at the time preparation for the events occurred, and it is not the role of the PCA (which was located in Sydney and only attended the Centre for inspections) to supervise occupation.

Second, the submission stated that under the contract, Council staff were entitled to attend the site for any purpose 'with the requisite company of the builder and the architects'. It quoted clause 24.2 of the contract (AS4000) between Council and the builder in support of this argument:

> The *Principal* and the *Principal's* employees, consultants and agents may at any time after reasonable written notice to the Contractor, have access to any part of the site for any purpose...

Regardless of what the contract provided, it could not permit what the EP&A Act prohibited, which was occupation or use of the Centre without the relevant occupation certificate. Parties to a contract are not at liberty to agree to conduct that legislation prohibits. It is not accepted that occupation of the building in areas other than the auditorium was allowed by contractual arrangements between Council and the builder in disregard of the legislative requirement that an occupation certificate be issued, or that the preparatory works by staff were not an occupation for the purposes of the EP&A Act.

The extent of the 21 October 2016 IOC

Regardless of whether preparatory activities constituted occupation for the purposes of the EP&A Act, the position taken by the Redenbach Lee submission is that all preparatory acts and public events only occurred within the areas of the Centre permitted by the October 2016 IOC, i.e. the auditorium. The submission asserted that 'the relevant access and egress measures' were 'part and parcel' of the IOC for the auditorium and that the use of the Centre was limited to the space provided for in the IOC and associated access and egress.

This position is clearly contradicted by the General Manager's admissions and the evidence (including photographic evidence) as discussed above. Accordingly, the position put forward by the Redenbach Lee submission cannot be accepted.

3.6. The extent and seriousness of the issues

The General Manager claimed that the issues under consideration were not serious, and that the overall risk in using parts of the Centre without obtaining the relevant occupation certificate was low.

An article in the Barrier Daily Truth on 20 July 2017 quoted the General Manager as saying that the failure to achieve certification related to the relevant paperwork not being forwarded to the certifiers, rather than to any specific issues with the building work itself. The General Manager's letter of 18 July 2017 to us also claimed that the PCA's outstanding requirements in relation to obtaining the final certificate were not significant because:

- by Friday 12 May 2017, the PCA's predominant concern was a lack of documentation showing that installation/construction had been carried out in accordance with the relevant code or Australian Standard. This was not to say that the documentation did not exist at that time, just that the builder had not provided it to the PCA by close of business on Friday 12 May
- the documentation that had not been provided by 12 May 2017 was later provided to the PCA and, the General Manager claimed, the issue of the occupation certificate was imminent as at 18 July 2017. This seemed to imply that the issuing of the occupation certification was a mere formality.

These claims are not supported by the evidence. The PCA requirements that needed to be met before any further occupation certificates could be issued were significant in nature and were not limited to a mere catch-up in paperwork. Further, a significant number of certificates required for the approval of the occupation certificate were missing. Most importantly, certificates for five statutory fire safety measures, including a 'Building Occupant Warning System', had not been provided.

3.6.1. The PCA's outstanding requirements were significant

Rectification works required as at 8 May 2017

The PCA's Inspection Report R2 dated 8 May 2017 required 29 items of rectification works to be completed prior to the grant of a final occupation certificate. On 9 May 2017, the PCA sent the report of its inspection of 8 May 2017 to the architects and the Consultant Project Manager saying that if Council wished to go for an interim OC 'for essentially just the ground floor foyer and toilets, all items relating to these areas would need to be addressed'.

For the **ground floor**, the rectification works included:

- doors of the cupboard adjacent to box office were to be provided with non-combustible backing and smoke seals
- function Room 1 - double doors leading to foyer - left hand side door was jammed and not opening properly
- function Room 1 - Exit sign was required above single door leading to auditorium
- kitchen and bar - portable fire extinguisher and fire blanket were to be provided to bar area
- exit passageway between kitchen and auditorium - door handle on exit door was to be replaced with single handed downward action door hardware
- construction materials and rubbish were to be removed from exit passageway
- external Fire Hydrant - signage was to be provided for in accordance with the requirements of the FRNSW 188 exemption.

For the **first floor**, the rectification works included:

- stairs - exit sign was to be installed over stair
- ceiling to lounge area adjacent to external windows on eastern side – smoke detectors were not provided in this area. Detectors were to be provided or written confirmation from fire services contractor was to be provided if they were not required and reasons they were not required to be provided
- smoke detector was to be provided in cleaners' cupboard
- pantry/plate up - portable fire extinguisher and fire blanket were to be provided
- double doors from function rooms to lounge - doors must swing in both directions as currently installed on site. If doors were to be on hold open devices, they were required to be linked to the Fire Indicator Panel and smoke detectors required within 1.5m each side of the door. Exit signs were required on either side of the double doors.
- ceiling to lounge area adjacent to southern external windows in function rooms - smoke detectors were not provided in this area. Detectors were to be provided or written confirmation from fire services contractor was to be provided if they were not required and reasons they were not required.
- function rooms - exit signs when operable walls were in place. Exit signs were required either side of the door when the walls were extended out. The lock was to be removed from this door, as free egress was required from both sides when the wall was extended.
- existing exit door leading to fire stair on western side - door handle was to be replaced with single handed downward action door hardware. Dead bolts were to be removed from top and bottom of the door. Statutory signage – 'fire safety door do not obstruct do not keep open' was required to be contrasting to the doors.

The evidence does not support the claim that the predominant concern of the PCA was a lack of documentation. Rather, as can be seen from the above information, there were numerous physical rectification works needed, and safety concerns that needed to be resolved before either an IOC or an OC could be issued.

Although the General Manager claimed that the outstanding requirements generally related to paperwork, he also conceded that the PCA identified 'a number of issues relating to the bathroom facilities, stairs, and electrical work among others' as recorded in a report by the Consultant Project Manager, who inspected the Centre with the PCA on 8 May 2017.

The Consultant Project Manager's report of 8 May 2017 in fact listed 24 defects or non-compliances, of which eighteen related to 'the bathroom facilities, stairs, and electrical work'. This further implies that the Redenbach Lee submission that the predominant concern was a lack of documentation is not correct.

The General Manager failed to mention in his letter to us that six of the defects/non-compliance identified on 8 May related to fire safety non-compliances, which included that:

- another fire extinguisher was required
- there were no smoke detectors in the ceiling of the upstairs foyer, where the ceiling was at a different height
- there was no smoke detector in the cleaners' cupboard
- the upstairs kitchen did not have a fire extinguisher
- exit signs were required in the function rooms and above the stairs
- the fire escape door in the function room should have had a downward press handle.

The Redenbach Lee submission stated that the non-compliances related only to the first floor, and as the May events only used space on the ground floor, the non-compliances were not relevant and should not be used as evidence that a breach occurred. However, it is noted that the PCA's Inspection Report R2 listed defects on the ground floor as well. In any case, as discussed above, it is not accepted that the only space used was the ground floor.

The Redenbach Lee submission also stated that there was time to achieve the rectification works required by the Inspection Report R2 between the date of its issue (8 May 2017) and the date of the Ball (12 May 2017). Whether or not there was time to do so does not change the fact that the PCA did not issue a further occupation certificate, which indicates that these requirements had not been met by the time of the May events.

In relation to access issues identified by the PCA, the General Manager said in his letter of 18 July 2017 that Council's access consultant had advised on 11 May that 'he was prepared to provide an interim certificate conditional on the issues being rectified in the future'. However, the access consultant did not have the power to issue an IOC; only the PCA could do so. Any access management plan by itself did not authorise the use of the building in the absence of an occupation certificate.

3.6.2. The number of missing certificates was significant

A report by the PCA of 11 May 2017 (Occupation Certificate Requirements R2) listed 41 individual certificates that were required, with nine crossed off (apparently indicating that they had already been supplied) in order to obtain a (final) occupation certificate.

The PCA sent an email the same day to the Consultant Project Manager and others stating that, if a second interim occupation certificate was required in time for the May events, 13 categories of certificates (highlighted on the Occupation Certificate Requirements R2) would need to be provided. These included certificates for:

- all piling, footings, reinforced concrete, structural steel, structural timber framework, awnings, window openings (structural engineer)
- all new mechanical ventilation works
- installation of all mechanical systems
- all plumbing and drainage works

- hot water system
- floor coverings-fire hazard properties test
- glazing (external, internal, and all glazed assemblies)
- installation of any insulated sandwich panels (cool room panels)
- fire safety (five particular statutory certificates were specified as required for interim occupation).

3.6.3. Certificates provided to the PCA before and after the May events

In light of the General Manager's advice of 18 July 2017 that the missing documentation had been provided to the PCA since the May events and that the issue of the occupation certificate was imminent, we asked Council to provide copies of the certificates. In response, on 26 July 2017, the General Manager provided 206 pages of documents and some certificates stating: 'This is the information provided by the architects today as the Civic Centre project managers working towards attaining occupancy certification, and this represents progress since 12 May 2017'.

The Redenbach Lee submission stated that the provision of documents by the General Manager on 26 July 2017 'was intended to provide a complete record of the certification as at that date'.

Based on the certificates provided by the General Manager (and an updated version of the 11 May 2017 Occupation Certificate Requirements R2 report), it appears that by 11 May 2017, some certificates had been provided to the PCA as follows:

- Three certificates for electrical work and one for emergency lighting.
- One certificate for glass and glazing installed in April 2017 for 'windows, auto doors (front entry) balustrade as per AS2047 and mirrors' which appeared to address the certification requirement for all glazed assemblies (including doors, windows, louvres and shopfronts) in external walls to comply with AS2047.
- One certificate for plumbing and drainage work dated 10 May 2017 related to the hydraulic item, which required certification that all plumbing and drainage works had been carried out in accordance with Volume 3 of the BCA and the relevant AS3500 series.

Documentation provided by the General Manager on 26 July 2017 included an undated letter on letterhead from the plumber who had provided the certificate, confirming that the hydraulic services had been installed in accordance with Volume 3 of the BCA and Relevant AS3500 Standards. However, it is unclear whether the letter had been obtained before close of business on 12 May 2017.

Assuming that the hydraulic services certificate was completed and provided by 11 May 2017, it appears only six of the 13 certificates needed to satisfy the requirements for a further IOC had been obtained by 11 May 2017.

No certification had been provided to the PCA in relation to the air conditioning plant, the hot water system, the external glazing, and most importantly – the statutory fire safety measures.

Although several additional certificates were obtained in July 2017, some six weeks or so after the May events, this does not advance the claim that the outstanding issues preventing the issuing of an IOC were merely a matter of delayed paperwork.

3.6.4. The fire safety concerns

It is critical that a building such as the Centre (a public assembly building and entertainment venue classed as high risk by the BCA) complies with legislative requirements, due to the high density of people using the building and its risk profile. It is understood that the ball was attended by 390 people, and the Nationals Conference by 280 people.

These requirements exist to ensure people within the building (most of whom are usually unfamiliar with the premises) are safe – especially in the event of an emergency. It is all the more important for councils, who enjoy a position of trust in the community and are themselves regulators under the EP&A, to act strictly in compliance with their legislative obligations and to ensure that the safety of the public, and confidence in their local government, is maintained.

As noted above, there were five statutory measures relating to fire safety required to be certified according to the PCA's 11 May 2017 Occupation Certificate Requirements R2 report, namely:

- automatic fire detection and alarm system
- building occupant warning system
- fire blankets
- mechanical air handling systems
- portable fire extinguishers.

The PCA had placed notes in red print next to the automatic fire detection and alarm systems and the portable fire extinguishers indicating significant concerns. The PCA stated that the annual inspection certificate by MBE Security and Fire Services indicated that extinguishers and fire blankets had failed.

In view of the apparent seriousness of the fire safety concerns, we asked Council to provide information about what action had been taken to address the deficiencies identified by the PCA in the 11 May 2017 report.

The portable fire extinguishers

The General Manager said in his response of 28 August 2017 that on 12 May 2017 MBE replaced the fire extinguishers and fire blankets noted as failed in the PCA's report. He also provided records to show this.

Automatic fire detection and alarm systems

In his response of 26 July 2017, the General Manager provided a Fire Safety Certificate for inspection and testing of the automatic fire detection and alarm systems issued by Wormald dated 23 March 2017.

However, the PCA identified on 11 May 2017 that the Wormald certificate did not satisfy the requirements for an installation certificate because it was a test certificate only.

Building Occupant Warning System

The General Manager stated that Council's former Project Director advised him that the Final Fire Safety Certificate of 21 October 2016, which formed part of the certification the 21 October 2016 IOC relied on, continued to be valid.

Schedule 1 to that IOC listed at No 5 the Final Fire Safety Certificate, which showed that all of the statutory fire measures were checked off, including the Building Occupant Warning System.

However, in April 2017, the PCA found there was no Building Occupant Warning System in the Centre. If no Building Occupant Warning System was present in April 2017, either the 21 October 2016 Final Fire Safety Certificate certified a system that was non-existent (or perhaps not installed) or the system Wormald tested in March 2017 was removed or substantially altered after the test. In either case – and contrary to the General Manager's advice to us – as the PCA found that the Building Occupant Warning System was missing, the October 2016 Final Fire Safety Certificate could not have remained valid. Even if the certificate had continued to be valid for the auditorium, it was not valid for the uncertified parts of the Centre used in the May events.

Although no Building Occupant Warning System was in place during the May events, it appears a temporary one had been installed. In the response of 28 August 2017, the General Manager confirmed that during a site inspection conducted by him and Council's communications and community

engagement coordinator on 12 May 2017 they 'witnessed a building warning system in operation… with audible sirens'. According to the General Manager, this was a temporary warning system that Council's COO, had arranged to be installed. An email from the COO of 12 May 2017 to the architects confirms that a temporary audible evacuation system was installed.

While a temporary audible warning system was in place on the day of the ball, and the defective fire blankets and extinguishers noted as failed in the PCA's report of 11 May 2017 had been replaced, a fire damper and additional smoke detectors were not installed until 24 July 2017. As at that date, the fire panel for the Building Occupant Warning System had not been installed.

In response to further questions from us, the General Manager advised on 28 August 2017 that MBE Security and Fire Services had been engaged to install an Emergency Warning and Intercommunications System (this is superior to a Building Occupant Warning System).[4]

A certificate of compliance for the new emergency sound system was issued by MBE on 7 September 2017, some four months after the May events.

Submissions in relation to the fire safety concerns

In relation to the outstanding fire safety requirements and the Wormald certificate of 23 March 2017, the Redenbach Lee submission asserted those issues were discovered only when the PCA issued the Occupation Certificate Report on 11 May 2017. It also stated that Council and the General Manager could not be held responsible in any way for the conduct of Wormald in certifying the existence of the Building Occupant Warning System.

While we acknowledge that the Occupation Certificate Report was received one day before the ball, and Council could not be held responsible for Wormald's conduct, ultimately that is not relevant to the matter under investigation. That issue is the use of the Centre in the absence of the necessary occupation certificate, and in circumstances where five statutory fire safety certificates were outstanding and the matters highlighted in red were particularly serious.

3.7. Risks involved in using the Centre

In Council's media release of 13 June 2017, the General Manager stated that Council's 'advice was that the safety risk was extremely minor as both events primarily utilised the auditorium area, and given the community had already invested so much in the Ball, I made the decision to go ahead'.

The General Manager went on to say, 'It was a very difficult situation and I recognise not everyone will agree with the path I chose, but I believe I put the needs of the community first. If I was faced with the same set of circumstances again, I'd like to think I'd make the same decision.'

In his 18 July 2017 letter to us, the General Manager also stated that he was satisfied that proceeding with the two events did not represent any risk to anyone involved in or attending either event and that he had made a 'one-off' decision in difficult circumstances.

We cannot accept the suggestion that there was a low risk. Considerable risk would have been involved in holding functions in a building where significant non-compliances had been identified by the PCA in relation to fire safety, and where areas were used which had not been covered by the IOC of 21 October 2016.

4. A Building Occupant Warning System is use for fire alarm and evacuation control in larger or more complex buildings. The system generates the standard 'rising whoop' evacuation signal and plays a voice message with evacuation instructions. It also provides for a public address (PA) message throughout the building. An Emergency Warning and Intercommunication System has the added ability to divide the building into zones, a feature that is not available with a Building Occupant Warning System.

In addition to the fire safety issues, there were other concerns about the building. In his letter dated 28 August 2017, the General Manager advised us that the works undertaken by the builder had been 'found to be incomplete, substandard, defective, and in certain circumstances, unsafe'.

According to a letter from Redenbach Lee Solicitors to the architects dated 9 November 2017, Council was still addressing concerns about the building, namely:

- stair balustrades/handrails were in danger of collapsing under load
- tall concertina doors appeared not to have sufficient structural support and had no lateral restraint to the floor, and so were hanging loose
- water penetration in the roof was causing ongoing damage which could cause collapse of the water damaged ceiling
- auditorium seating could not be used due to inadequate structural support under the existing floor to take the loading of seats plus occupants
- glass balustrades on the first floor were not structurally adequate, and could bend when body weight was applied.

The Redenbach Lee submission stated that the extent of the alleged defects was only made apparent to Council after the May events, and could therefore not be relied upon to draw any conclusions as to what evidence was available in May.

Although the full extent of the defects may not have been apparent, there is evidence that Council was aware of many of the defects prior to the May events. For example:

- the Consultant Project Manager's email of 27 April 2017 stated that the handrails were to 'be secured'
- Inspection Report R2 dated 8 May 2017 recorded at Item 13 'Ground floor – Stair 2 leading from foyer to male toilets...The middle handrail to be installed'. The photo in the report showed a centre handrail in place, which may not have been fully installed
- Item 16 of that report stated: 'The middle handrail to be installed.' The photo shows no centre handrail at all
- an inspection of the roof undertaken on 5 January 2017 identified serious leaks in plant and change rooms (PCG meeting minutes 23 February 2017).

Council had also been well aware of problems with the auditorium seating for months, as indicated by a document entitled 'Civic Centre Key Issues and Timeline' prepared by the Consultant Project Manager. The entry for 2 November 2016 recorded that Council's Executive Manager, Strategic City Development had emailed the architects requesting an engineer's report to advise if the floor was suitable for the seating.

The Consultant Project Manager's timeline indicates that the executive manager also noted the seating was not what they wanted and 'was no good at all'. The Consultant Project Manager commented that 'the architects failed to do anything about the floor or the seating, and a final engineers report from Partridge concluding that the floor was unsuitable was not received until 11/01/2017'.

The Redenbach Lee submission stated that because the new seating was not used for the events and would not have required certification prior to the events, it was not relevant.

However, the main concern about the seating was its weight. It was twice as heavy as the old seating, and was too heavy for the floor. The General Manager said in an affidavit dated 1 August 2019 that he was present at a PCG meeting on 3 November 2016 when issues were raised about the seating, including the weight loading on the floor. The Consultant Project Manager's email of 27 April 2017 to staff directed that the seating units 'be stacked and moved to the left hand side of the room'.

While the seating may not have been used for the May events, it was not removed from the auditorium, and it remained as an unsafe load on the floor. Further, Item 12 of the Inspection Report 2 dated 8 May 2017 required the provision of a structural loading certificate for the existing auditorium floor in regards to the seating.

The relevance of the seating to the occupancy certification is further highlighted in an email of 27 June 2017 from the Consultant Project Manager to the supplier of the seating, advising that Council had decided the seating had to go because the weight required the floor to be strengthened at a cost that had been estimated at $80,000 to $100,000. He said that without strengthening the floor, Council could not receive an occupation certificate and was not prepared to spend any more money on the building. On 18 July 2017, the General Manager wrote to the PCA advising that Council confirmed the seating would be removed.

Affidavits provided by Redenbach Lee on 12 July 2019 prepared for the court proceedings between Council and the architects and the builder confirm serious known concerns about the seating. The affidavit of Council's corporate risk officer, of 3 July 2019 states:

> During the period from March 2017 to May 2017 I attended the Civic Centre on a number of occasions. On one of these occasions I observed Council staff trying to move the new tiered seating and saw that when they tried to move it the floor appeared to bend and flex excessively. I cannot recall the exact date of this visit.

The affidavit of Council's Coordinator of Tourism and Events, dated 11 July 2019 states:

> Over the course of in or about early October 2016, the Events Team and I became concerned with the new tiered seating that Council had purchased as it appeared to be heavier than the previous unit. I observed that the floor would also creak when we attempted to move or adjust the tiered seating. In this case, the scale of the new seating appeared too large for the space. I also thought that the creaking was a creaking of the floorboards because of the weight of the new seating.
>
> Over the course of in or about early October 2016, I became more aware that the new tiered seating, when pulled into a new position in the auditorium (depending on where it was required for the events) would make the floorboards bow with its weight. I sighted this myself and was also told the same by other members of the Events Team at the time.
>
> . . . In or about October 2016 I also observed that the size of the new tiered seating meant that it blocked both the entrance to the auditorium, and also the fire exits.

3.8. Failure to seek an alternative venue or cancel the May events

Given that holding the May events was in breach of the legislative requirements, Council should have either cancelled the events or arranged alternative venues. It was not open to the General Manager to substitute his assessment of risk for that mandated by legislation.

The General Manager advised us in his letter of 18 July 2017 that arranging alternative venues for both May events would have required 'at least a month of pre-planning and booking, including hiring of marquees, lighting, toilets, and road closures as well as advice to conference organisers'. According to the General Manager, the relocation of the events to other venues required consideration of the following issues:

- As the ball was going to be attended by 390 people, it required pre-allocated table seating, kitchen plating facilities, toilets suitable for debutantes, a stage, sound, lighting and dance floor.
- The Nationals Conference required a multi-facility venue with break-out rooms or meeting spaces and an auditorium. It also required technical equipment and capacity to handle up to 280 people.

The General Manager advised that approximately one month prior to the Ball, he had discussed with Council's Executive Manager, Strategic City Development what alternative options might be available if the Centre was not ready for occupation in time. Consequently, on 26 April 2017 a quote was obtained from Patti's Hire for the supply of a 15m x 40m marquee.

However, despite contemplating the possibility, being on notice that the occupation certificate might not be issued in time, and making inquiries about alternative arrangements, the General Manager and Council made no firm decision about booking an alternative venue until it was too late.

The quote was obtained a little over two weeks before the ball – two weeks short of the month that the General Manager said was necessary (at a minimum) to arrange an alternative venue. Responsible project management and planning would have involved setting a date at least a month before the events by which certification had to be obtained, or an alternative venue arranged.

Council had received the PCA's report on the outstanding works and documentation needed in October 2016. It is not unreasonable to expect that, in deciding whether or not to book alternative venues for the Ball and the Nationals Conference, Council would have checked the October 2016 report (which listed all the outstanding works and documentation) and then met with the builder and the architects to discuss a time frame for completion.

3.8.1. Submissions about the failure to cancel or relocate the May events

The Redenbach Lee submission asserted that we had incorrectly assumed the works outstanding as at October 2016 would have remained outstanding in the period leading into the May events. The submission stated that 'Council and the General Manager reasonably expected that in that period of six months, extensive works had been ongoing and the items as stated in the October 2016 requirements would reasonably have been addressed'. The evidence establishes that the outstanding works were not addressed in full by the time of the May events.

The PCA's email of 11 May 2017 at 5.49pm, attaching the Occupation Certificate Requirements R2, confirmed the October list was still outstanding:

> All certification must be submitted by no later than lunchtime tomorrow (Friday) to allow us to review the documents - noting this OC requirements list was originally issued in October 2016.

Whilst it may be reasonable for Council and the General Manager to expect the outstanding works to have been resolved within six months, it is not reasonable for them to have assumed that they were resolved given that both the General Manager and Council were responsible for checking on the actual progress of the works and the completion of the tasks identified by the PCA to achieve occupancy.

In any event, the General Manager's responses suggest that he did know that at least some of the outstanding works had not been resolved. Despite this knowledge, he did not pursue an alternative venue as he did not consider the risk of breaching the EP&A Act to warrant making contingency arrangements.

In his letter of 18 July 2017, The General Manager described his state of mind at the time the first debutantes had started arriving at the Centre:

> By the time the final advice came through to me at 5.50pm AEST on Friday 12 May (from the Project Manager at the architects) that an Occupation Certificate had not been issued, the first debutantes were arriving at the Civic Centre which left me with only two options-proceed with the event (following discussions with Council's project managers on the risks), or put staff/security on the doors to turn debutantes and their families away from the venue/event...

We accept that turning debutantes and their families away from the Centre as they arrived for the Ball would be a thankless and difficult task to carry out. However, the General Manager's suggestion that he first contemplated allowing the Centre to be used without certification at 5.50pm on the evening of the Ball is not borne out by the following circumstances:

- It appears the debutantes had used the Centre (in the absence of an IOC) for rehearsals from 8 May 2017, and staff had been using the Centre to set up for the Ball.
- While the General Manager's statement that he received the 'final advice' from the Project Manager at the architects at 5.50pm on 12 May 2017 may be true, the COO had emailed him earlier that afternoon advising him of the PCA's advice that it was unlikely occupancy would be granted that day.
- The PCA advice that was forwarded to the General Manager attached a copy of the PCA report which noted 'updated requirements from the information submitted'. The cover email from the COO to the General Manager also indicated that he discussed the matter with the General Manager before sending the email to him. The General Manager has acknowledged that the PCA report was attached to the email he received and available for him to read.
- Further, the General Manager also decided on 12 May 2017 to go ahead with the Nationals Conference, which was not due to take place until almost a week later.

Regardless of when advice was received on the day, according to the General Manager's own account one month was needed to organise an alternative venue. This suggests that he had formed a view, a month out from the event, that regardless of whether the OC was granted, the event would go ahead. This makes his submissions about how late in the day advice was received largely immaterial. Further, even if the advice was received too late to relocate the events, they could have still been cancelled.

There is some evidence that the General Manager was advised to cancel the Nationals Conference after the Ball. In an email to the Mayor on 14 August 2017, the Consultant Project Manager stated that he and the COO 'strongly advised' the General Manager, four days after the Ball, against holding the Nationals Conference at the Centre.

Council's media release of 13 June 2017 noted that 'The Civic Ball and the Nationals Conference had immense value to Broken Hill, both for the fabric of the community and for national exposure and boosting the local economy'.

Council's Annual Report 2016/2017 said in relation to the Nationals Conference:

> Over 320 delegates and guests visited Broken Hill to attend the National Party's Annual General Conference, back in Broken Hill for the first time since 2002. In conjunction with the Conference, several projects were announced for the Broken Hill area by NSW Nationals & Liberal MPs, including a $500M dollar pipeline to be built exclusively from Australian steel to ensure Broken Hill's water supply and $700,000 in funding for a new truck wash for Broken Hill, a vital piece of infrastructure as part of the broader stock movement sector. Also announced was the roll out of a Country Universities Centre in Broken Hill, a model which has been trialled with great success in Cooma following an $8M boost to the program by Deputy Premier John Barilaro MP.

It seems that the decision to proceed with the events was at least in part based on the expectation that the events would provide a boost to the local economy, and that this consideration outweighed any concerns about risks and non-compliance with the EP&A Act.

3.9. Submissions about the General Manager's reliance on advice

As previously noted the General Manager submitted, in justification of his actions, that in making decisions about the events, he relied on advice provided to him by staff and the parties involved in the Centre refurbishment project.

The General Manager's actual involvement with the Centre project, his awareness of the difficulties encountered during the project, and his role as chief executive do not allow a conclusion that he simply received and relied upon poor or incomplete advice. Although the COO was recruited in April 2017 and given responsibility for overall project management and there is evidence the General Manager was not copied into emails between the COO, the architects and the builder from 28 April 2017, the General Manager still carried ultimate responsibility for the project. This included the responsibility of proactively informing himself about the status and progress of the works.

Advice about whether occupation certificates would be obtained in time

The General Manager has maintained that, based on advice, he formed a belief that Council would be granted a further IOC for the whole of the ground floor in time for the ball. In his letter of 18 July 2017 he submitted that until a few days before the Ball on 12 May:

- he anticipated Council would have certification imminently, and those advising him were 'hopeful and positive' that an IOC would be granted
- by the time it became apparent that this was unlikely, it was too late to relocate the events and Council was faced with the choice of either cancelling the events altogether or going ahead in the absence of an occupation certificate.

In his letter of 30 August 2017 to us, the General Manager similarly stated:

> The regular advice I was receiving in the days leading up to the events from [staff members] of the architects was that, in order to obtain the further interim occupation certificate, the Builder needed to provide the Certifier with the relevant engineering and structural sign offs for completed works. I was advised that once the Builder had satisfied those minimum requirements, that all other matters could be dealt with via a defects list; the magnitude of the BMG list was not known to me until I had cause to respond to your initial correspondence dated 5 June 2017...

Contrary to the General Manager's submission that he was unaware of the magnitude of outstanding matters until June 2017, it was evident that Council was aware of the difficulties in meeting certification requirements from early May 2017:

- on 2 May 2017 the Consultant Project Manager inspected the Centre with two certifiers from Council's staff and emailed the architects a list of items that needed to be addressed
- by 4 May 2017 the Consultant Project Manager described the situation, in an email to the architects, as 'grim', and clearly believed time was running out
- on 8 May 2017 the Consultant Project Manager walked through the Centre with the PCA and BMG, and compiled a list of 24 defects/non-compliances, including eight relating to fire safety
- on 9 May 2017 the PCA sent the report of his inspection of 8 May 2017 to the architects and the Consultant Project Manager saying '...if the client wishes to go for an interim OC for essentially just the ground floor foyer and toilets, all items relating to these areas would need to be addressed' and 'we have yet to receive any certification and OC docs apart from the testing of the automatic fire detection and alarm system'.

The General Manager said in his affidavit of 1 August 2019 that:

- on or about 18 April 2017 he was 'growing concerned regarding significant delays to the Project'
- he received a copy of the Consultant Project Manager report of his inspection of 2 May 2017 by email, and he emailed the COO asking questions about the report.

On or about 21 April 2017 he received an email from the builder which again raised concerns about the architect's administration of the project, and slow response times. He telephoned the builder to ask about the status of the works schedule which he said Council staff had been 'chasing' the builder to obtain for some weeks. For reasons that are not clear, the COO emailed the architects and the builder on 28 April 2017 requesting that emails only be sent to him and the Consultant Project Manager and not copied to the General Manager, the former Project Director or the Deputy General Manager. The COO forwarded this email to the General Manager on the same day with a covering email that said 'FYI'.

Although there is no evidence the request to limit communication came from the General Manager himself, it is noted that he was sent a copy of the email later that day and could have intervened to reverse that request. This would have been reasonable to expect had he wanted to be kept informed, given the fast approaching May events, the known difficulties with certification and the recent recruitment of both and the Consultant Project Manager.

Even though the General Manager was no longer being copied into emails about the project, according to his letter of 28 August 2017 he was receiving regular advice in the days leading up to the May events from the COO and the Consultant Project Manager. He had also been a member of the PCG since April 2016 and was the most senior member of Council staff on the PCG. The minutes show the PCG met weekly.

The General Manager was actively involved in the project. As early as 19 September 2016 he sent an email to the Deputy General Manager stating that he wanted to 'rein this project in and ensure we have full control of it'. He set out a list of requirements for his deputy, including weekly meetings to keep himself 'in the loop' and the creation of a 'register of works to be done/completed works' that can be easily referenced'.

The General Manager was aware of the problems that had delayed the completion of the project and the disputes with the builder and with the architects as project managers. The email records show the General Manager was personally involved in dealing with the builder and the architects on 11, 18 and 19 April 2017, while he was on leave, and even after the COO had commenced work.

The General Manager said in his affidavit of 1 August 2019 that on or about 5 April 2017, he was informed of delays with the project in an email from the architect's Practice Manager. The General Manager said he understood the architects had scheduled the builder to finish by 13 April 2017, but he also knew 'there was a multitude of incomplete work that was defective'.

Given the General Manager's stated intention of reining in the project and his actual involvement in the work, it is difficult to accept that he was comfortable to relinquish all oversight of the project two weeks before the May events.

The Redenbach Lee submission stated that it was 'in no way unreasonable' for the General Manager to rely upon the COO and the Consultant Project Manager. However, it appears that the Consultant Project Manager was not fully apprised of the situation from the outset, and so was not immediately in a position to provide advice. Emails suggest that when he was recruited, the Consultant Project Manager was not given a copy of the PCA's requirements for a full occupation certificate, issued in October 2016, and was not advised what works and certifications were outstanding. For example:

- On 2 May 2017 the Consultant Project Manager sent an email to the architect's Practice Manager asking what he was doing to ensure certification was obtained by 8 May 2017:

  > Have you given any thought to ensuring that we get certification next Monday. Can you please let me know if there are any outstanding items, and what instructions you have given the builder. It is very important that we get certification and occupancy because planning for the civic ball is well advanced.

- Later on the same day, the Consultant Project Manager emailed the architect's Practice Manager advising that he had done a walkthrough of the Centre with 'our planning guys' (two staff certifiers) and they had come up with works (which he listed) that needed addressing. He asked for the architect's Practice Manager's thoughts.

- On 4 May 2017 (after receiving no reply) the Consultant Project Manager emailed the architect's Practice Manager again, asking if he had had a look at the items he had listed, whether he thought any of the items would affect certification and the occupation certificate, and whether he had instructed the builder to carry out any works for certification.
- On 4 May 2017, the architect's Practice Manager replied simply that his list of items were unfinished works which needed to be completed by the builder.

If the Consultant Project Manager had been given the list from the PCA, he would not have had to compile his own or ask the architects for one.

In his witness statement, the General Manager claimed an email from the COO on 11 May 2017 led him to believe that interim occupancy remained achievable, provided the relevant certification was provided imminently. However, that email raised serious doubts about whether the IOC could be achieved, referring to:

- 'significant work' to be undertaken before an interim OC could be granted (before the Ball the following day)
- a potential serious flaw around the audible warning system which could hinder the grant of an IOC
- the fact that Council would 'be required to address the outstanding items by late morning' of the next day, which would be difficult.

The General Manager responded at 7.34pm on 11 May 2017 asking the COO whether he thought the architects appreciated the gravity of the situation. It is difficult to reconcile the General Manager's later claims that he believed interim occupancy was achievable with his characterisation of the situation as 'grave'.

The General Manager further stated in his witness statement that 'on or around 12 May 2017, at or around 4.19pm' he received an email from the COO 'indicating that interim occupancy for the entire building was unlikely'. He said the email included an email chain with the PCA back to 11 May 2017 which, he said, 'referred to numerous occupation certification requirements, to which he was not privy to until on or around 4:19pm on 12 May 2017'.

Even if staff and contractors indicated to the General Manager that they were hopeful that an IOC would be issued, it was his responsibility to ensure that their beliefs were based on solid evidence (e.g. the required certification had been submitted to the PCA and all required works had been completed) – especially given his prior knowledge of the difficulties with the project.

Advice about the risks

As already noted, the General Manager has maintained that the risk inherent in using the Centre without the necessary occupation certificate was low, and that he relied on advice by the architects in forming that opinion. For example, in his letter of 28 August 2017, the General Manager stated that the architects had advised him verbally that while they could not formally approve the use of the Centre, they considered the use to be low risk. He went on to explain that after the May events he became aware of the architects having strongly recommended to the COO and the Consultant Project Manager that the events ought not to have proceeded – but that this advice had not been conveyed to him at the time it was received. An email from the architects to the Consultant Project Manager and the COO dated 17 May 2017 stated that the architects had 'strongly recommended that functions were not to be held in the building until it was complete contractually'. The architects also pointed out that by taking possession of an unfinished project, Council may give the builder an impression it was happy to use the building as it was.

It is relevant to note that the builder's claim for extension of time dated 26 June 2017 referred to the fact that the Centre was used by Council in a state of non-certification 'with **high level risk** that the builder did not condone nor signoff in using a construction site for the functions' (emphasis added).

3.10. Conclusions – EP&A Act breaches

The available evidence establishes that:

- Council breached the EPA&A Act by allowing a four-day National Conference of Growing Families Australia to be held in the Civic Centre between 3 to 7 October 2016 without an occupation certificate as required by the EP&A Act
- the General Manager and Council breached the EP&A Act by allowing the May events to be held in the Civic Centre on 12, 18, 19 and 20 May 2017 without either an interim or a full occupation certificate having been granted for all areas of the Civic Centre (apart from the auditorium) that were used on those dates
- Council breached the EP&A Act from at least 7 May 2017 up to and including 12 May 2017 by allowing Council staff to use the building to prepare for the May events, and by allowing the public to use the building to rehearse for the Civic Ball from 8 May 2017.

Councils are regulators under the EP&A Act, and are responsible for fining and prosecuting people who commit offences under the Act – including offences relating to occupying or using buildings without occupancy certificates. This case has highlighted a possible weakness in the regulatory regime whereby an inherent conflict of interest exists when councils regulate those developments for which they are also proponents.

Council adopted a revised compliance and enforcement policy on 26 July 2017, which states at Clause 3.2:

> It is Council's Policy that Compliance Officers will enforce relevant legislation and carry out compliance inspections in relation to development in a fair, equitable and consistent manner with a zero tolerance approach to unlawful and unauthorised development and non-compliance with development consent conditions.
>
> Zero tolerance is the strict enforcement of legislation.

Council applying different rules to itself (as an occupant) to those it applies as a regulator undermines the integrity of the regulatory system and erodes trust. Council should hold itself to the same, if not higher, standards as those to which it holds the public it regulates. Public authorities must be accountable for their actions. A high standard of integrity and honesty is critical to ensure public confidence in Council's ability to carry out its functions properly.

The General Manager has not recognised this, and has paid insufficient regard to the gravity of the EP&A Act breaches.

The fact that no serious incident occurred is not evidence that the risk was low. In this investigation, we have not assessed the extent to which the Council may have been exposed to financial risk – for example if there was a possibility that any insurance cover would have been voided, or otherwise adversely affected by the lack of occupancy certificates.

It seems the risk of embarrassment if the events were to be cancelled or relocated was given priority over and above:

- the duty of the Council to comply with its legal obligations
- risk to the safety of the public and staff using the building
- risk to the building itself, in the event damage occurred
- possibly, the financial risk that unlawful behaviour may invalidate insurance coverage.

Although the General Manager stated publicly in Council's media release of 13 June 2017 that he was comfortable with the risk of being held personally responsible for allowing the Centre to be used, he has not accepted responsibility for the breaches. The evidence shows that he has attempted to shift responsibility to other people and the advice he states they gave him.

In his statements to the community, the General Manger has said, in effect, that the offences were justifiable and involved low risk to safety. This minimises the very real physical risks to which people, including Council staff on site, were exposed by attending the ball and the conference. It also displays a disregard for the legislation that Council otherwise regulates and is required to uphold.

The Centre is classified by the BCA as a high-risk venue due to its nature as an assembly building. The occupation of an uncertified building involved accepting risks that could not be known, on behalf of people who were unaware of the risks and had not consented to expose themselves to those risks. Three months after the events in question, the General Manager himself acknowledged that the handrails were not safe and that he could not in good conscience authorise an event being held in the Centre.

Finally, the General Manager's initial responses to us about the nature of the conduct were not borne out by the material that was subsequently provided in response to further queries.

The General Manager's initial characterisation of the PCA's concerns in May 2017 as being limited to a lack of documentation was inaccurate. The evidence pointed to significant defects and missing and incomplete works.

Further, the certification documentation provided to us on 26 July 2017 did not support the General Manager's claim that the missing certificates had been provided to the PCA in the intervening period since the May events.

4. The Telstra contract

As noted at 3.1 above, on 16 March 2016, Council accepted the tender for construction works for the Centre upgrade submitted by the builder. Council further resolved that:

> Council authorises the Acting General Manager to seek from the successful tenderer the option for variation of tendered price with inclusion of the following additional items: ...

Twenty-one additional items were listed including, relevantly, 'AV to foyer, lounge and bar'. Council also resolved to 'proceed with further additional items if within Civic Centre Upgrade Budget as defined in the signed Funding Agreement.'

As the project manager for the Centre upgrade, in January 2016, the architects had already obtained a fee proposal for the provision of AV services for $142,559.87 from Pro AV Solutions.

After commencing with the Council on 4 April 2016, the General Manager formed the view that the amount set aside by the architects for the AV technology was insufficient to achieve Council's goals for this component of the upgrade project, which he said was to ensure state-of-the art upgradable technology. The General Manager therefore requested Telstra to provide a fee proposal for AV solutions during a 'meet and greet' visit by Telstra in May 2016.

After receiving the proposal, the General Manager executed a contract with Telstra for AV services on 30 June 2016 totalling $611,541.15. The Telstra contract was said to have replaced the earlier proposal submitted by Pro AV Solutions to the architects in January 2016.

4.1. Internal concerns about the contract

Council's COO from April 2017, raised concerns about the process followed to engage Telstra. An email dated 22 May 2017 from the COO to the General Manager headed 'AV scope' asked a range of questions about how and why the contract was executed. Specifically:

- how Telstra came to be awarded the contract - when the matter went to tender, who else tendered, who undertook the evaluation, and how Council authorised the execution of the contract
- who prepared the scope for the AV component; who undertook a technical evaluation of the scope; who undertook a review between the Telstra scope and the scope originally provided by the architects
- how the change in scope was communicated to the architects as project manager; how the disruption caused to the builder had been 'valued' [i.e. disruption arising from the introduction of a third party the builder did not control – whether there was consideration for either monetary compensation or time]
- what motivated the change in provider from the builder (with Pro AV as subcontractor) to Telstra.

According to a Mayoral Minute dated 22 August 2017 (submitted to the Council meeting of 30 August 2017), the General Manager telephoned the Mayor on 29 May 2017 and advised her that the COO had raised concerns directly with him about the execution of the Telstra contract. The Mayoral Minute recorded the concerns as follows:

- the General Manager did not have delegation (or authorisation) from Council to approve expenditure of the contracted amount
- Council had not undertaken a competitive tendering process as required by the *Local Government Act 1993* (**LGA**)
- these actions may have amounted to misconduct.

The COO's view, as expressed in an email to the General Manager on 30 May 2017, was that the information needed to be fully disclosed to elected members at the earliest opportunity, and that it was necessary to engage a third party to audit the process and review the events that resulted in the decision to award the contract to Telstra.

On 1 June 2017, the COO followed up the matter with a memo to the Mayor in which he recommended that an independent party be engaged to undertake a probity review. The memo stated that:

- the General Manager had decided to remove the audio visual scope from the the builder contract (for circa $230k)
- the General Manager had decided to award a similar audio visual scope to Telstra (for circa $611k)
- a competitive tender process was not undertaken
- a technical evaluation of the scope was not undertaken
- advice from the architects was ignored
- the General Manager did not have the delegation to execute the contract
- the expenditure was not authorised.

It is our view that the COO's report to the Mayor met the criteria set out in the *Public Interest Disclosures Act 1994* (**PID Act**) to be considered a public interest disclosure (PID). The report was not recognised or treated as a PID. To prevent a similar situation from arising again, Council should ensure all staff receive appropriate PID awareness training.

An email from the mayor to the General Manager dated 8 June 2017 records that the mayor had met with the COO on or about 5 June. The Mayor contacted a legal officer at Local Government NSW who had advised that a probity audit was required. In June 2017, Council accordingly engaged O'Connor Marsden (**OCM**) to undertake a probity audit into the execution of the Telstra contract.

Although the OCM audit was described in Council's media release of 13 June 2017 as 'a full probity audit of the project management around the Civic Centre refurbishment', it was in fact limited to a probity audit of 'the processes associated with the execution of a contract between Council and Telstra for audio visual (AV) services'.

OCM reported on 10 August 2017, stating in its summary of findings that:

- it was intended the Telstra proposal would replace the earlier proposal obtained by the architects on the basis that the Telstra services were of a higher standard in line with the funding agreement requirements
- based on interviews undertaken, the acceptance of the Telstra proposal was intended to be in accordance with the Council resolution of 16 March 2016
- while the General Manager and PCG may have formed the view that execution of the Telstra contract was within the General Manager's delegation, this would only be correct if the contract was through the builder as the successful tenderer
- the Telstra contract should have been the subject of a new Council resolution, as it was a separate contract over the value of $150,000
- Council should consider seeking a retrospective resolution (or report for Council's information) for Council to enter into a contract with Telstra for these services on the basis of Telstra being a supplier on an existing NSW Government panel contract such as the ICT Services Scheme, consistent with s 55(3)(g) of the LGA
- nothing came to OCM's attention to suggest that the General Manager acted inappropriately.

A copy of the OCM audit report was attached to the Mayoral Minute of 22 August 2017. The matter was dealt with in a closed session on 30 August 2017 under s 10A(2)(g) of the LGA. The minutes of the meeting recorded that Council resolved:

- to receive the Mayoral Minute of 22 August 2017

- to note the findings in the OCM report
- that the General Manager report back to Council by the December 2017 Ordinary Council meeting on progress with implementing the recommendations of the OCM report.

Despite the resolution that the General Manager report by the December 2017 Ordinary Council meeting, the General Manager did not report to council until its meeting on 28 March 2018 in a report dated 8 March 2018, which recommended that:

1. Broken Hill City Council Report No. 44/18 dated March 8, 2018, be received
2. as per the O'Connor Marsden Independent Probity Audit Report and given the circumstances, Broken Hill City Council retrospectively accept the Telstra tender for upgraded Audio Visual equipment as part of the Civic Centre Refurbishment Project.
3. That Council note progress and compliance on the remaining items.

At the meeting on 28 March 2018, Council resolved that:

1. Broken Hill City Council Report No. 44/18 dated March 8, 2018, be received.
2. Council note progress and compliance on OCM recommendations 1 - 5.

4.2. Issues investigated

We considered whether:

- Council's resolution of 16 March 2016 that authorised the Acting General Manager to seek a variation of tendered price for the provision of AV services (among other items) constituted a delegation (or authorisation) to the General Manager that allowed him to enter into the Telstra contract
- the General Manager could have entered into the Telstra contract regardless of whether the 16 March 2016 resolution authorised him to do so, by virtue of the contract being exempt from the tendering requirements of the LGA
- an evaluation report, as required by the Tendering Guidelines, was or should have been prepared
- the General Manager had reported to Council on the progress of the Centre upgrade project as required by the OLG in its Capital Expenditure Guidelines from the date of his appointment (4 April 2016) until at least July 2017
- in closing the meeting on 30 August 2017, based on the General Manager's advice, the Council satisfied the requirements of LGA s 10A(2).

The following sections provide a more detailed discussion of these issues.

4.3. The 16 March 2016 resolution did not authorise the contract

The OCM report found that the General Manager may have believed that his acceptance of the Telstra fee proposal was in accordance with Council's resolution of 16 March 2016, which expressly allowed variations to the the builder construction contract.

However, OCM concluded that, regardless of any advice the General Manager may have received in this regard, Council's authorisation for variations would have only extended to variations through the existing the builder contract and not an entirely separate contract such as the one entered into with Telstra.

The Telstra contract should have therefore been subject to a new Council resolution and, given its value, Council should then have complied with the tendering requirements of the LGA.

When Council made a resolution to accept the tender submitted by the builder for the construction of the Centre upgrades on 16 March 2016, Council also made a resolution to authorise the then Acting General Manager to:

> seek from the successful tenderer the option for variation of tendered price with inclusion of the following additional items: ...

The 21 additional items included 'AV to foyer, lounge and bar'.

The resolution also stated that Council resolved to 'proceed with further additional items if within Civic Centre Upgrade Budget as defined in the signed Funding Agreement.'

The resolution only authorised the General Manager to seek the option for variation of tendered price with the inclusion of 21 additional items, including AV to the foyer, lounge and bar from the successful tenderer. It follows that the resolution did not authorise the execution of the Telstra contract because that contract was separate to the the builder contract.

According to emails from the architects (discussed below), Council instructed the architects in mid-June 2016 – just prior to the Telstra contract execution – to remove the AV scope from the builder's contract (referred to as a 'negative variation'). The General Manager confirmed in his statement that the architects authorised a variation on 3 August 2016, which removed the Telstra works from the contract with the builder.

According to his witness statement, the General Manager executed the contract between Telstra and Council on 30 June 2016 not realising that it was a contract between Telstra and Council, rather than Telstra and the builder. He said that 'it was only after the Telstra contract was entered into that he realised the significance of the fact that Council, and not the builder, was the principal contracting with Telstra'.

It is difficult to understand how the General Manager could have believed he would have had the authority to execute a contract on behalf of the builder.

Conflicting advice has also been provided by the General Manager about whether he was aware that the Telstra contract was separate to and not a variation of the the builder contract at the time he executed it.

According to his witness statement, the General Manager 'was not aware that by the architects authorising a variation on 3 August 2016 to exclude the AV scope from the the builder contract, a direct contract was created between Council and Telstra'. He explained:

> In or around August 2016, [staff member] and I attempted to balance the budget and realized that the AV works had been taken out of the contract...When I discovered that the AV works had been taken out of the budget I realized that there had been a negative variation...

However, on 29 June 2016 a staff member of the architects responded to an inquiry from the General Manager and advised that the architects had been instructed by the Deputy General Manager the previous week 'that the additional AV work that [the General Manager] had been speaking to Telstra about was not to be part of the scope of work which the architects and the builder were to be involved with and that council would deal with it themselves'.

It is difficult to accept that the General Manager was unaware of the exclusion of the AV component from the builder's contract, given that Council gave the instructions to the architects to do so and the General Manager was involved or at least should have been aware of these discussions.

Interactions between Council and the architects after the Telstra contract was executed confirm that Council expressly instructed the architects to remove the AV package from the builder's variation 1.

In an email dated 18 July 2016 to the Deputy General Manager and the General Manager, the architect's Practice Manager said:

> We continue to be unclear about how Telstra's involvement is being incorporated in the project.
>
> Under Council's instruction the AV package was removed from the V01 scope of work…
>
> The AV work that was included in the first tender is to be removed from the Scope of work that is now under the separate contract between Telstra and the Council.

Given Council's instruction to remove the AV package from the scope of work, the architect's Practice Manager said he was alarmed when he received advice from Council on or about 15 November 2016 that money for the Telstra contract had to be found within the builder's contract. In an email dated 17 November 2016, the architect's Practice Manager said:

> You can imagine our alarm when we were told on Tuesday that $600+k for the Telstra deal has to be found within the builder/BHCC building contract when we advised and were asked to confirm by BHCC on 28th and 29th June 2016 that it had been deleted.

In his witness statement the General Manager expressed surprise at the architect's Practice Manager's confusion in regard to this issue:

> On or around 20 July 2016, I received an email from [the COO] outlining confusion as to the inclusion of the Telstra works in neither the builder or the architect contract. It was unclear to me as to why [the COO] was expressing confusion as we had been in previous correspondence surrounding the Telstra contract…

The email of 20 July 2016 from the architect's Practice Manager to the Deputy General Manager and the General Manager clearly states the Telstra work 'is not in our scope of work nor is it in the builder's':

> We are aware Telstra are on site this week but not through any contractual arrangements.
>
> The architects are getting request from Telstra regarding coordination of their works.
>
> The Telstra work is not in our scope of work nor is it in the builder's.
>
> If push came to shove Telstra are probably on the site illegally!
>
> From what we know there may still be double ups or gaps between the Telstra scope and the builder contractual scope.
>
> Guys, we need direction from the Council or Telstra if you so advise, as to how to manage this.

Not only is there evidence that Council and the General Manager were aware that the Telstra contract was not a variation to the builder contract, there is also evidence Council in fact gave instructions to specifically exclude the AV from the builder's scope of work.

The Redenbach Lee submission itself has confirmed that 'it was intended that Telstra was to enter into a direct contract with Council to ensure that the delivery of AV services to the project was done in a streamlined and effective manner'.

This being the case, the Telstra contract was clearly not authorised by the 16 March 2016 resolution, and should have been the subject of a new resolution and the tendering requirements of the LGA. This should have been clear to the General Manager.

4.4. The retrospective ratification of the contract

The Redenbach Lee submission accepted that the General Manager may have initially believed the Telstra contract was in accordance with Council's resolution of 16 March 2016 and acknowledged that there might have 'originally been ambiguity' in whether the Telstra works formed part of the variations to the builder contract. However, the submission argued that the ambiguity had been 'cured' through:

- the negative variation applied to the builder contract on 3 August 2016 (i.e. the removal of the AV scope from the builder contract)
- Council's retrospective Resolution of 29 November 2017
- Council's Take Over Notice issued to the builder on 29 November 2017.

The negative variation of 3 August 2016 excluded 'all other associated AV work, i.e. wires, electrical/electronic equipment and the like' from the builder contract. However, it is not evident how this variation is related to whether the Telstra contract was properly executed a month earlier. As previously discussed, the variation shows only that Council was aware that Telstra was a separate contract.

The Council resolution of 29 November 2017 stated:

1. That Mayoral Minute No. 9/17 dated November 28, 2017, be received.
2. That having regard to the substantial breaches of contract by the Contractor, and associated damage and loss sustained by Council, the General Manager be authorised in relation to contract number T16/3 [the contract between Council and builder]:
   a) To take over the works, including but not limited to in such case where works must be subcontracted by Council without further tender due to the extenuating circumstances, remoteness of locality or the unavailability of competitive or reliable tenderers, and pursue such remedies as is required to mitigate the losses; and
   b) Pursue such losses as advised by Council's solicitors, Redenbach Lee, from time to time.

The Redenbach Lee submission argued that 'the Council retrospectively resolved on 29 November 2017 to procure Telstra as a supplier of AV services for the Project'. However, it is noted that the resolution made no mention of the Telstra contract.

The Redenbach Lee submission n further stated that the resolution of 29 November 2017 'was in accordance with the exemption of s 55(3)(i) of the LGA to proceed without tendering based on extenuating circumstances'. It is noted that the resolution was made for the purpose of taking over the builder works due to substantial breaches of contract and associated damage and loss sustained by Council. It had nothing to do with the provision of AV services. Extenuating circumstances would need to have existed at the time the contract was entered into, i.e. 30 June 2016. Whether or not there were extenuating circumstances months after the contract was executed does not have any bearing on the decision to enter into the contract without a tendering process.

In her witness statement of 13 February 2019, the Mayor claimed that 'on or about 28 March 2018, Council passed a further retrospective resolution which authorised and confirmed Telstra to be the contractor to provide completion of the AV services for the project'. Although the Mayor stated that a copy of this resolution was attached, the attachment was a copy of the minutes of Council's meeting of 28 March 2018. The only item concerning the Centre was Item 17. The report was deemed confidential under s 10A(2)(g) of the LGA and the resolutions recorded were as follows:

1. That Broken Hill City Council Report No.44/18 dated March 8, 2018, be received.
2. That Council note progress and compliance on OCM recommendations 1-5.

The resolution appears to refer to the General Manager's confidential report to Council dated 8 March 2018. The 8 March report's first recommendation relevantly stated: 'as per the OCM recommendation that Council retrospectively resolve with Telstra for the AV services in the circumstances'. The 8 March report's first recommendation was based on OCM's original recommendation that:

> Council should consider seeking a retrospective resolution (or report for Council's information) for Council to enter into a contract with Telstra for these services on the basis of Telstra being a supplier on an existing NSW Government panel contract such as the ICT Services Scheme consistent with section 55(3)(g) of the LGA.

We sought the views of OLG on whether a retrospective resolution could be passed by Council. The OLG advised that where a person purports to exercise a function of the Council without the delegation to do so, it is open to the governing body of the Council to subsequently formally endorse or adopt the earlier decision by resolution, thereby 'regularising' it (i.e. making it legally effective). In other words, Council can ratify the acts of the General Manager in circumstances where he had no authority to execute the relevant act.

Although the contract itself may have been ratified by Council's later resolution, this does not mean that the execution of the Telstra contract on 30 June 2016 complied with the tendering requirements of the LGA. The characterisation of either the resolution of 29 November 2017 or 28 March 2018 as a retrospective authorisation to procure Telstra as a supplier of AV services is not supported by the facts. Even if there had been a retrospective authorisation, this did not cure the failure to comply with the LGA tendering requirements considered below.

4.5. The tendering requirements

LGA s 55(1) requires councils to invite tenders before entering into any contract for the provision of goods and/or services unless one of the exemptions in s 55(3) apply.

Most of the 17 exemptions set out in s 55(3) could not possibly have applied to the Telstra contract.

The first consideration in deciding whether an exemption applies is the amount of the contract. Section 55(3)(n) of the LGA stated at that time that the tendering requirement in s 55 did not apply if the contract involved an estimated expenditure or receipt of an amount of less than $100,000, or such other amount as may be prescribed by the regulations. The amount prescribed at that time by clause 163(2) of the Regulation was $150,000.

This information is also provided on Council's website:

> Tenders…must be invited by Council when it is intended that Council enter into a contract for any of the following which is estimated to be in the amount of $150,000 or more, including GST: …
>
> (c) Provision of goods and services to Council…

As the Telstra contract was above the exemption threshold, this exemption did not apply.

It is further noted that while $150,000 was at that time the threshold above which tenders were required to be invited, the OLG recommended in its Tendering Guidelines for NSW Local Government October 2009 (**Tendering Guidelines**) that, as a matter of best practice, councils should consider tendering even for contracts of lesser amounts to ensure they obtain best value. The Tendering Guidelines are prepared under s 23A of the LGA and councils are required to take them into consideration before exercising any of their functions.

A second potentially relevant exemption is provided in s 55(3)(g):

> a contract for the purchase of goods, materials or services specified by the NSW Procurement Board or the Department of Administrative Services of the Commonwealth, made with a person so specified, during a period so specified and at a rate not exceeding the rate so specified

Under the NSW Procurement Board's Procure IT Framework, state government agencies procuring ICT goods and service can use the NSW ICT Services Scheme, which is a prequalification scheme enabling agencies to enter into contracts without a tendering process.

Telstra is an approved supplier under the ICT Services Scheme and therefore Council could have entered into the contract without tendering, as allowed by the s.55(3)(g) exemption. However, the contract was not entered into through the ICT Services Scheme and did not follow the scheme's requirements and recommended processes. Among other things, the ICT Services Scheme requires that eligible buyers must place orders with suppliers using specified order forms. This was not done in this case. Further, the ICT Services Guidelines for Customers state that agencies should select a sufficient number of suitable suppliers to 'ensure probity, fairness and value in keeping with the NSW Procurement Policy Framework'. The recommended minimum number of quotations for contracts over $150,000 is three. It follows that the exemption provided for in s 55(3)(g) also does not apply.

A third potentially relevant exemption from the tendering requirements is set out in s 55(3)(i):

> a contract where, because of extenuating circumstances, remoteness of locality or the unavailability of competitive or reliable tenderers, a council decides by resolution (which states the reasons for the decision) that a satisfactory result would not be achieved by inviting tenders.

Under this exemption, a resolution by Council has to be passed before the procurement proceeds. As no such resolution was passed before the Telstra contract was executed, the exemption did not apply.

Even if the value of the contract had been within the allowable tendering exemption, the General Manager's conduct deprived Council of the opportunity of undertaking an assessment to determine if the contract offered best value, which is a best practice recommendation under both the Tendering Guidelines and the NSW Procurement Policy.

4.6. The General Manager's reliance on advice

The General Manager has repeatedly stated he relied on advice by Council staff and contractors when executing the Telstra contract, which he said had led him to believe certain things in relation to the AV services portion of the project that he later found to be untrue.

The general manager's report to Council's meeting of 28 March 2018 stated that he executed the Telstra contract based on assurances by staff and the architects that:

- Council was able to get a further quote on upgrading the AV
- the Pro AV quote could be replaced by the new quote
- funds still available from variation 1 could be used to fund the upgrade to the AV solution
- this could be done as a variation of current work and a new AV provider would not impact the project.

The General Manager's report recorded his explanation as follows:

> Being new to the Council and the project and not knowing what had gone before me, this led me to ask three questions, one of the architects and two of my staff; the question to the architects was 'has the Pro AV team started purchasing the equipment'?; the architects undertook to find that out and the final answer was no.
>
> The question to staff, that is the Councils Project Manager and then Finance Manager was, 'could we get a further quote on upgrading the AV and if we wanted to, could we replace it with the current quote'; the Project Manager advised that we could, and this was confirmed by the architects.
>
> I then asked of the Finance Manager, 'given that there were still funds available from variation 1, could we use those funds to upgrade the AV solutions'? The answer was yes. The architects advised that Council would need to make a decision quickly so they could let Pro AV know what was happening.

> The advice provided to me was that as we were assessing variations it could be done as a variation as part of the current work, and a new AV provider would not impact the project...
>
> The quote came in, it was a bit more than anticipated (it was however like Teac vs Bose in terms of the technology offerings) and I then assembled the BHCC team together and asked the aforementioned questions again, with the same responses confirmed; we could replace Pro AV with another contractor and the budget permitted it...
>
> At the time I was asking the advice of the team (the architects and Council) who knew the history of the engagement of the architect/project managers and building contractor and the finer points of the project far more intimately than I did, I had no reason to doubt the advice.
>
> In hindsight and knowing what I do now about this project and the personnel Council engaged to oversee the project, this issue would not have occurred.

In his witness statement, the General Manager reiterated his reliance on advice from his staff:

> Between April 2016 when I commenced as General Manager of Council, and the execution of the Telstra contract form on 30 June 2016, no Council manager alerted me to, or advised me that there was any potential issue or concern relating to entering into the contract with Telstra.

The Redenbach Lee submission offered further reasons for executing the contract:

- The General Manager's observations of the minimal value for money outcome the initial builder contract's AV PC Sum proposal would achieve if executed.
- The Funding Agreement which provided a $689,000 allowance for the installation of state of the art and easily-upgradable integrated technology. The Telstra AV proposal fell within this allowance, at $611,541.15.
- Telstra telephone ports were existing in the centre ticket office and comms room, which could be utilised to the extent of reducing costs to Council.
- The email advice of Council's Manager Information Services, who reviewed Telstra's proposal.

The evidence does not support the General Manager's claims that he was wrongly advised by staff and contractors and that this was the chief reason the Telstra contract was executed without Council authorisation and contrary to the tendering requirements.

4.6.1. Advice by the architects

According to his own account, the question the General Manager asked the architects was limited to whether the Pro AV team had started purchasing equipment. This was a factual inquiry, not a request for advice on whether he had the authority to execute the Telstra contract.

On 17 June 2016, the General Manager forwarded an email from Telstra attaching a draft Statement of Work to the architects and invited comments.

The General Manager's witness statement refers to a verbal confirmation around this time from a staff member at the builder that there would be no adverse issues with a change of the AV services and AV system, and that the builder only wanted to coordinate the work and get on with delivering the project. However, this is not supported by documentary evidence and is contradicted by advice from a staff member of the architects of 21 June 2016.

On 21 June, the staff member of the architects responded to the General Manager's email of 17 June citing some concerns and saying that time and cost were the biggest issues. Specifically, the staff member of the architects thought that any extra scope would add time to the program for construction, but advised she had asked the builder to respond to the query. There is no evidence to show whether the staff member of the architects got back to the General Manager after checking with the builder, and no evidence to suggest the General Manager followed up.

On 29 June 2016, the staff member of the architects responded in an email to a further inquiry from the General Manager advising that the architects had been instructed by the Deputy General Manager the previous week that 'the additional AV work that you have been speaking to Telstra about is not to be part of the scope of work which the architects and the builder were to be involved with and that council would deal with it themselves'. Weeks later, the architects excluded the monetary allowance and any additional AV scope from variation 1.

According to both the OCM report and the architect's Practice Manager's email of 17 November 2016, the architects did not in fact agree to include the Telstra contract as a variation of tendered price for the builder's contract works. The architect's Practice Manager's email said the architects:

> ...could not see the value in the additional costs over what had already been proposed, and that the additional $400k did not fit within the budget...

This would strongly suggest that the General Manager could not have been advised that the builder and the architects had no issues with the change of AV service provider. In any case it is clear that Council instructed the architects to exclude the allowance for AV services from variation 1 and that this was known to the General Manager.

4.6.2. Advice by Council staff

According to the General Manager's witness statement, in April, May and June 2016 he was involved in various meetings with the Deputy General Manager. According to the General Manager's account, his deputy's advice was that:

- there were no impediments to changing the AV works and services contractor
- the existing Project budget was sufficient for the Telstra works and services
- the expanded works and services would meet Council's obligations under the Infrastructure NSW funding deed
- the Council resolution at its 16 March 2016 meeting provided approval for the Telstra contract in place of the Pro AV contract.

The General Manager said he relied heavily on the Deputy General Manager's advice 'confirming that there were no impediments in obtaining a further quote to upgrade the AV solution and replace Pro AV... the staff member of the architects also confirmed this advice and advised the work could be done as a variation with no impact to the Project.'

The Deputy General Manager is no longer employed by Council and has not provided a statement. No written records of the advice given by the Deputy General Manager have been provided by Council.

The only documentary evidence of the advice from the staff member of the architects are the two emails referred to above, which do not say the work could have been done as a variation. In fact, as discussed above, the email of 29 June 2016 shows that the staff member of the architects advised that the Telstra works were outside the architects/the builder's scope.

The General Manager claimed in his witness statement that during a meeting on 6 June 2016 he was advised there was no impediment to changing contractors. He stated:

> On or around 6 June 2016, I attended a meeting of the PCG, also attended by the Mayor, [two senior staff members], [Council's Executive Manager Strategic City Development] [and] [staff members of the architects]. In this PCG meeting [a representative of the architect] confirmed that there was no impediment to changing contractors. I recall that the consensus of this meeting was that there was no impediment to replacing AV works with Telstra. And that the additional scope of works and services as verbally discussed by the Telstra representatives were within the terms of the Infrastructure NSW funding agreement, and the terms of the Council approval of 16 March 2016. My understanding of this replacement was that it would just be a swap from contract A (with Pro AV) to contract B (with Telstra).

The meeting minutes consist of one page, which lists attendance and 'Item Details' (an agenda). One of the listed items is 'Confirm with funding body-authority to proceed with variation 1 Actioning Officer [Deputy General Manager] - COMPLETE.' There is no mention of the discussion the General Manager referred to in his witness statement.

The statement of the former Mayor referred to this meeting as follows:

> In or about June 2016 I attended a Project Control Group (PCG) meeting with the General Manager to discuss Variation 1 to the builder contract, and the AV works. I told the General Manager that the Pro Av proposal did not meet the expectations of the Resources for Regions grant and the aims of Council for quality audio visual systems. I also reiterated that any budget surplus for the project ought to be spent on AV works so Council could have the highest quality AV they could afford. The meeting discussed that Council could explore other options for audio visual system, considering that it would be more efficient and economical to find an alternative then retrofitting changes following the delivery of the Pro AV works.'

This discussion is not recorded in the minutes either.

On 29 June 2016 the General Manager emailed council's Manager Information Services the Statement of Works and asked him to provide comments. The General Manager stated that, based on the reply to this email, he understood the Manager Information Services 'felt the Telstra solution would be a good outcome'. However, the General Manager did not say this in the email. Instead, he said:

> Thanks for the opportunity to review the AV project scope. I'm no AV system expert but the proposal appears to cover the critical AV services. I'm unclear from the SOW though what the actual networking requirements will be & who is actually coordinating that part of the project.

In closing, the manager expressed concerns about the adequacy of project management:

> I am concerned about the lack of coordination from Councils side around the Civic Centre project. Is there an overall project manager? The communications around what is being proposed, a project plan detailing when & who is undertaking various tasks etc. hasn't been sighted & IT have only been included in recent weeks without any background briefings...
>
> A project of this scope requires some dedicated resources from Council to ensure a successful outcome.

A staff member of the architects had emailed the General Manager on 29 June 2016 – the day before he executed the contract with Telstra – advising him that the AV work that he had been speaking to Telstra about was not part of the scope of work which the architects and the builder were to be involved in, and that the AV scope had been removed from variation 1.

The architect's Practice Manager's email of 17 November 2016 to the General Manager and others records that the architects were asked by Council to confirm the AV scope had been removed on 28 & 29 June 2016. Yet it appears the General Manager did not contact the architects to clarify this issue before executing the Telstra contract.

While it is not possible to determine with certainty what advice the General Manager was given, even on the General Manager's own account his explanation for entering into the contract is not satisfactory.

The General Manager's qualifications include a Bachelor of Business, Majoring in Management, Master's Degree in Environment and Local Government and Master's Degree, Juris Doctor. He has also been employed in the local government and state sectors in senior positions for over 15 years. Senior council officers in the position of general manager would be expected to be aware of the provisions of the LGA and to work with and within that Act and other legislation. The Council's own website sets out the requirement imposed by LGA s 55, that 'Tenders...must be invited by Council when it is intended that Council enter into a contract for any of the following which is estimated to be in the amount of $150,000 or more, including GST'. The amount of the Telstra contract was well over the $150,000 threshold.

Even if a general manager is not familiar with particular provisions of the LGA or tendering requirements, he or she can seek advice from:

- officers within Council who have expertise in the relevant LGA provisions
- OLG
- Council's Audit, Risk and Improvement Committee
- Council's solicitors.

It does not appear that the General Manager pursued any of these options before executing the Telstra contract.

It is of concern that the General Manager and Council have failed to acknowledge the seriousness of executing a contract the size of the Telstra contract without following legislative tendering requirements, and have instead sought to justify the General Manager's conduct by asserting he relied on advice received from Council staff and the architects.

4.7. Failure to conduct a proper evaluation

There are important public interest principles underpinning tendering processes that ensure councils are open, transparent and accountable, and that they promote fairness and competition and obtain best value on behalf of their ratepayers and residents.

The Tendering Guidelines state councils should form a tendering review or evaluation panel for each tendering process. The panel is responsible for:

- preparing an analysis of the tenderer's performance against the criteria and a detailed financial analysis and comparison of the tenders
- making a recommendation to council to award or not award a contract
- ensuring contracts are kept with council's other legal documents, keeping minutes of panel meetings, and documenting decisions.

According to the OCM report, although there appeared to be support from the Mayor and key Council staff on the PCG for the acceptance of the Telstra proposal, no market testing was conducted for these services. The assessment of the proposal was limited to an exchange of emails between the General Manager and the Manager Information Services, who said he was not an AV systems expert. The emails between the General Manager and the architects were not about market testing, and the General Manager's account of his discussions with the Deputy General Manager does not mention market testing.

As noted by the OCM report, when evaluating tenders, the General Manager should normally remain 'at arm's length' from the process in view of the General Manager's overall responsibility for making decisions on actions taken by Council staff.

Even if it could be accepted that the General Manager executed the contract under the mistaken belief it was part and parcel of the approved tender for the Centre refurbishment project, the way in which the contract was executed meant there was no opportunity to test whether the proposal provided the best value for money. The process lacked transparency and exposed Council to a heightened corruption risk.

ICAC's Direct Negotiations: Guidelines for Managing Risks, published August 2018, highlights the risks involved when direct negotiations occur without first undergoing a competitive process:

> The closed nature of direct negotiations can create opportunities for dishonest and partial conduct and is more likely to lead to allegations and perceptions of corrupt conduct. Having to compete for a government contract, in a fair and transparent manner, is a significant obstacle for corrupt individuals.

4.7.1. Failure to comply with OLG's Capital Expenditure Guidelines

According to the OCM audit, no reports were made to Council on the progress of the Centre refurbishment, despite this being required by the OLG in its Capital Expenditure Guidelines (issued December 2010). The lack of reporting appears to have been the case until at least July 2017. Since that time, reports have been made to Council meetings, but have been discussed in closed session.

The Capital Expenditure Guidelines are issued by OLG under s 23A of the LGA. They are not mandatory, and a failure to follow them is not a breach of the LGA. However, it is OLG's expectation that councils will comply with them.

The Guidelines require councils to put in place reporting mechanisms for all capital expenditure projects as follows:

> **12 Reporting**
>
> Councils must put mechanisms in place to report on all aspects of the project. Minimum reporting requirements for all capital expenditure projects include:
>
> quarterly reporting to the council on the progress of the project
>
> quarterly reporting to the council on the costs and budget variances regarding the project. Where costs and budget variances are reported by line item, the report should also include the impact on the total project
>
> any issue that may have an adverse impact on the project (this may include monetary and non-monetary inputs and outcomes). The risk management plan may be relevant in this regard
>
> reporting capital works projects in council's annual report, which is considered to be best practice.

The OCM report noted that the lack of reporting up until September 2016 may have been caused by the fact that elected members, including the then Mayor, were part of the PCG.

However, the Capital Expenditure Guidelines do not provide for an exception to the reporting conditions where some councillors are otherwise aware of the matters required to be reported on. Although reporting started in July 2017, it occurred in closed meetings. It is therefore unclear whether those reports adequately addressed the management of the project and provided monthly financial statements for the project as required.

An article in the Barrier Daily Truth published 27 July 2018 stated that a Councillor had submitted a Notice of Motion asking questions about the Centre. He was quoted as saying: 'As a Councillor I want to know what's going on with the Civic Centre. I still don't know what the final cost is to Council.' The Mayor was quoted as saying that question could not be answered 'as it is still in a legal debate' and that the Notice of Motion would appear at the August meeting.

A Council media release titled 'Wrap of August Meeting' said that Councillor put forward 18 Notices of Motion, which included 'Council to report to the community the costs around the Civic Centre and associated legal action'. The media release said Councillors voted against the motion as it was already the subject of a Council report later in the night. The minutes of the meeting show that the report was discussed in a confidential session.

In their further submissions, the Mayor and other councillors objected to our conclusion that the General Manager did not appropriately report to Council on the progress of the Civic Centre project. However, we note that Council had resolved at its meeting on 30 August 2017 to note the OCM report (and, presumably, accept its findings). The OCM report found that no reports were made to Council on the progress of the Centre refurbishment, despite this being required by the Capital Expenditure Guidelines. The site visits/walk throughs and informal briefings Council's further submission relies on to show that reporting occurred, do not in fact satisfy the requirements of the OLG Guidelines as described above.

4.8. The Council meeting on 30 August 2017 was improperly closed

As noted above, following receipt of the OCM audit report, the Mayor submitted a Mayoral Minute dated 22 August 2017 to the Council meeting of 30 August 2017.

The matter was dealt with in closed session under s 10A(2)(g) of the LGA, which prescribes the circumstances in which parts of a meeting can be closed to the public as follows:

> The matters and information are the following:
>
> (g) advice concerning litigation, or advice that would otherwise be privileged from production in legal proceedings on the ground of legal professional privilege

When the Mayoral Minute was dealt with by Council, the Council resolved that 'the meeting be closed to the public in accordance with Section 10(A) of the LGA in order for the confidential items to be considered.'

Council made this resolution on the basis of advice from the General Manager, which was added to the Mayoral Minute and was as follows:

> (General Manager's Note: This report considers probity audit of Telstra contractual arrangements with Broken Hill City Council and is deemed confidential under Section 10A(2)(g) of the *Local Government Act, 1993* which contains advice concerning litigation, or advice that would otherwise be privileged from production in legal proceedings on the ground of legal professional privilege).

Closing a meeting to the public is conditional on the information that is considered being 'advice concerning litigation, or advice that would otherwise be privileged from production in legal proceedings on the ground of legal professional privilege' as specified by s 10A(2)(g) of the LGA. Even where the information satisfies the requirements in s 10A(2)(g), the meeting may only be closed if the additional requirements specified in s 10B(2) are satisfied. Section 10B(2) specifies that a meeting is not to be closed during the receipt and consideration of information or advice referred to in s 10A (2)(g) unless the advice concerns legal matters that:

> (a) are substantial issues relating to a matter in which the council or committee is involved, and
>
> (b) are clearly identified in the advice, and
>
> (c) are fully discussed in that advice.

It does not appear that either the Mayoral Minute or the OCM report itself contained matters that could be considered to fall within s 10A(2)(g).

The purpose of the Mayoral Minute was to advise the Council of the concerns raised by the COO about the General Manager's execution of the Telstra contract, which was alleged to have been outside his delegation and in possible breach of the Tendering Guidelines. The Minute recounted the actions taken in response to those concerns, including that the Mayor:

- called each councillor to advise them
- called Local Government NSW (**LGNSW**) who advised her it sounded like a 'simple process issue' and that a probity audit should be conducted
- appointed council's Finance Manager to engage an auditor (and the Finance Manager then sought advice from the chair of the Audit, Risk and Improvement Committee)
- met with the COO and established what his concerns were.

The OCM report, which was attached to the Minute, concerned OCM's investigation of concerns raised by the COO.

Neither of these documents were capable of attracting legal professional privilege. That privilege attaches only to material prepared for the dominant (or prevailing) purpose of (a) providing legal advice, or (b) use in reasonably anticipated litigation. The OCM report was the product of a probity audit, and was not prepared by a lawyer. As such, the Report could not have provided Council with legal advice.[5] Nor could the report be characterised as being prepared for the dominant purpose of use in reasonably anticipated litigation. For litigation to be 'reasonably anticipated', there must be a 'real prospect' of litigation.[6] The test is an objective one, having regard to the circumstances at the time the document is produced, and it is not sufficient that the individual claiming the privilege has taken the view that proceedings were reasonably anticipated.[7]

There was no litigation reasonably anticipated at the time the relevant documents were prepared, meaning that legal professional privilege could not attach. It follows that the material should not have been dealt with in a closed meeting.

4.8.1. Inadequate information provided to OLG

On 12 March 2018, the Deputy Ombudsman wrote to the General Manager in some detail setting out his views on the issues under investigation until that point in time. The Deputy Ombudsman's letter set out the facts in relation to the EP&A Act breaches and concerns he had with the General Manager's responses and noted:

- that as Council was a regulatory authority under the EP&A Act, any fines imposed by Council on Council would be paid to Council
- the findings of the OCM report
- that s 55 of the *Local Government Act 1993* (**LGA**) requires tenders to be called for where the anticipated cost of a contract exceeds $150,000.

Given the concerns, the Deputy Ombudsman suggested to the General Manager that a formal and public apology by him for breaches of the EP&A Act, which acknowledged their seriousness in light of Council's regulatory role under the EP&A Act, would be an appropriate way forward.

In order to decide whether the matter should be further investigated or discontinued, the Deputy Ombudsman made formal suggestions under s 31 AC of the Ombudsman Act that the General Manager:

1. provide a copy of the Deputy Ombudsman's letter to the OLG, as council's oversight body, for its determination as to whether it considered a formal and public apology were appropriate and sufficient action to address the breaches of the EP&A Act

2. provide a copy of the OCM report to the OLG for its consideration about any action required in view of the apparent breach of the tendering provisions of the LGA.

The General Manager did not provide the OLG with a copy of the Deputy Ombudsman's letter dated 12 March 2018. Instead, on 16 March 2018 he emailed the OLG's Manager of Governance and asked for advice on what he described as 'an inadvertent breach of the tender regs'. The General Manager did not explain either the context or the substance of the Deputy Ombudsman's concerns and suggestions and advised OLG in the following terms:

> I was wanting to seek your advice with regard to this matter as attached, which in essence amounts to an inadvertent breach of the tender regs. As you will see, as soon as I became aware of this, we took action to conduct a probity audit.

5. See *National Employers' Mutual General Insurance Association Limited v Waind* (1979) 141 CLR 648; *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1998) 153 ALR 393 (VSCA); *Singapore Airlines v Sydney Airports* Corporation [2004] NSWSC 380 (appealed on other grounds *Sydney Airports Corporation Ltd v Singapore Airlines Ltd* [2005] NSWCA 47).
6. See *Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority* (2002) 4 VR 332 at 341.
7. See *Ensham Resources Pty Limited v Aioi Insurance Company Limited* [2012] FCAFC 191 at [50]ff.

Attached are the following documents:

1. Tender report from March 2016
2. Mayoral minute to Council August 2017
3. OCM report August 2017
4. Draft Progress/actions report to Council March 2018

What I am keen to confirm before I send this report to Council, is whether the advice from OCM in recommending a retrospective resolution of Council is the most appropriate way to progress.

The Civic Centre project I inherited upon my commencement has been a bit of an ordeal so just wanted to double check actions.

The Deputy Ombudsman subsequently provided a copy of his 12 March 2018 letter to the then Acting Chief Executive Officer of OLG and sought his opinion on Council's actions.

In a letter dated 17 May 2018, the OLG's Acting Chief Executive advised us that:

- the information examined did not show that the General Manager had viewed Council's alleged breaches of the EP&A Act as being serious
- the General Manager had the benefit of the Deputy Ombudsman's letter of 12 March 2018 before seeking advice from OLG, but chose not to disclose that letter to the OLG.
- the OCM report did not make recommendations addressing Council's broader internal control systems
- the minutes of the 11 September 2017 meeting of Council's Audit, Risk and Improvement Committee indicated the Committee had received the OCM report, but the minutes did not establish if the Committee had been advised of the broader deficiencies in the Centre refurbishment project management, or if the Committee had been asked to provide any advice on the issues raised by the OCM report
- given the public interest in Council's management of what was a large and very public project, it would be in the public interest for the findings of our investigation to be acknowledged by Council and for Council to provide assurance that the system deficiencies that had contributed to the difficulties in managing the Centre refurbishment project were identified and remedied.

4.9. Conclusions – Telstra contract

The available evidence establishes that:

- the Telstra contract was not a variation to the builder construction contract, and as such was not authorised by Council's resolution of 16 March 2016
- the General Manager executed the Telstra contract on 30 June 2016 without Council authorisation
- the Telstra contract was executed contrary to the tendering requirements of s 55 of the LGA because:
  - It was for an amount well in excess of $150,000, which is set by Regulation as the threshold above which tenders must be invited
  - It was not executed for goods, materials or services as specified by either the NSW Procurement Board or the Department of Administrative Service of the Commonwealth, i.e. the exemption under s 55(3)(g) of the LGA did not apply to it. While Telstra was an approved supplier under the NSW ICT Services Scheme, the contract was not made in accordance with the requirements of that scheme
  - The exemption from tendering available under s 55(3)(i) of the LGA due to extenuating circumstances, remoteness or unavailability of competitive or reliable tenderers did not apply to the Telstra contract as there was no resolution by Council to this effect as required by s 55(3)(i).

The General Manager submitted that, having being only recently appointed prior to executing the contract, he had relied on advice provided by staff, which led him to believe Council's 16 March 2016 resolution authorised him to execute the Telstra contract.

However, the records of the communications the General Manager had with Council staff at the relevant time do not support his submissions that staff had advised him he was authorised to execute the contract. Information was available to the General Manager, prior to his executing the contract, which confirmed that it was not a variation of the builder contract and as such was not authorised by the 16 March 2016 resolution of Council.

The General Manager did not report to Council on the progress of the Centre upgrade project as required by the OLG in its Capital Expenditure Guidelines from the date of his appointment on 4 April 2016 until at least July 2017.

The General Manager failed to provide adequate information to the OLG following the Deputy Ombudsman's suggestions, and instead sought to minimise the seriousness of his failure to follow the tendering requirements of the LGA.

In closing the meeting on 30 August 2017, based on the General Manager's advice to do so, the Council did not satisfy the requirements of LGA s 10A(2).

While Council's further submissions referred to the OCM's view that there was nothing to suggest that the General Manager had acted inappropriately in executing the Telstra contract, we do not accept that view (for the reasons discussed above).

5. Findings

5.1. EP&A Act

Having regard to the available evidence and the conclusions reached in relation to the EP&A Act breaches, I find that:

- the conduct of Broken Hill City Council was contrary to law or otherwise wrong under s 26(1)(a) and (g) of the Ombudsman Act in that Council breached the EP&A Act by allowing the Civic Centre to be used by council staff and the public without an occupation certificate as required by the EP&A Act for events between 3 and 7 October 2016 and for events on 12, 19 and 20 May 2017
- the conduct of the General Manager of Broken Hill City Council, was contrary to law or otherwise wrong under s 26(1)(a) and (g) of the Ombudsman Act in that the General Manager allowed the Civic Centre to be used by Council staff and the public without an occupation certificate as required by the EP&A Act for events between 3 and 7 October 2016 and for events on 12, 18, 19 and 20 May 2017.

5.2. Telstra contract

Having regard to the available evidence and the conclusions reached in relation to the execution of the Telstra contract, I find that:

- the conduct of the General Manager in executing a contract with Telstra on 30 June 2016 for $611,541.15 was unreasonable or otherwise wrong under s 26(1)(b) and (g) of the Ombudsman Act, because the contract was executed:
  - without the relevant authorisation or delegation from Council
  - without complying with the tendering obligations prescribed by LGA s 55
  - without complying with OLG's Tendering Guidelines
- the conduct of the General Manager, in failing to report to Council on the progress of the Civic Centre project as required by the OLG's Capital Expenditure Guidelines, in the period April 2016 until at least July 2017, was unreasonable or otherwise wrong under s 26(1)(b) and (g) of the Ombudsman Act.

Recommendations

5.3. Provisional recommendations

I provisionally recommended that:

1. A copy of any final report by the Ombudsman be provided to Council to be tabled in an open meeting
2. A copy of any final report by the Ombudsman be provided to Council's Audit, Risk and Improvement Committee
3. The Audit, Risk and Improvement Committee provide advice to Council and to the Ombudsman on what actions Council should take to ensure that it complies with the tendering provisions of the Local Government Act, the Regulation and the Office of Local Government's Tendering Guidelines in future, and to address the system deficiencies in Council's project management processes identified in the Ombudsman's report and a report of O'Connor Marsden
4. Council enter into a reciprocal agreement with an appropriate council for regulating projects where Council is the proponent or DA applicant, in order to avoid any actual or perceived conflicts of interest arising where the Council is effectively regulating itself
5. Council organise the delivery of public interest disclosure training for all staff and managers
6. Council consider whether any action should be taken against the General Manager under his employment contract and/or the Code of Conduct
7. The Office of Local Government undertake a performance audit of Council.

5.4. Council's further submissions on the provisional recommendations

In relation to provisional recommendations 1 and 2, Council submitted that the tabling of a report in an open meeting would be detrimental to the long-term interests of Council and the community and may potentially compromise the ongoing litigation against the builders and the architect. Council expressed the view that it would be inappropriate to publish the report in any open forum at all. In support, Council stated that the provisional statement contained a number of inconsistencies with the Councillors' lived experience(s).

Instead of tabling a copy of my final report in an open meeting, Council proposed to resolve, subject to my confirmation, that it:

1. issue a direction instructing all staff to, prior to the occupation of a new or existing building, sight a copy of the relevant occupation certificate (whether interim or final), irrespective of the advice of any contracted building professional
2. Issue a direction instructing all staff to, prior to any variation of a contract by a defaulting contractor, review (where necessary) a copy of the relevant Council Resolution authorising the engagement of said contract
3. Update the Code of Conduct policy in accordance with (1) and (2) above.

Although I have no objection to Council taking the above actions, the action in themselves do not remedy the failings found by the investigation and would not prevent a similar situation from occurring again.

In relation to provisional recommendation 3, Council advised that the Audit, Risk and Improvement Committee has engaged an independent auditor to carry out an internal audit program on Council's procurement processes and management are currently carrying out the suggested recommendations. No further advice has been provided on the audit and its recommendation, which makes it difficult to assess whether it adequately addresses the provisional recommendation.

In response to provisional recommendation 4, Council advised that it has updated its processes to ensure an independent body now acts as an assessor or regulator where required. I have not received any advice about who the independent body is and in what circumstances matters are referred to it. It is therefore not possible to say whether this action addresses the provisional recommendation.

In response to provisional recommendation 5, Council advised that PID training to all staff was delivered on 18 July 2017 and is now included in annual Code of Conduct reviews. Council is committed to continually improving its practices and procedures.

Council did not accept provisional recommendation 6. It advised that it supports the decisions made by the General Manager given the circumstances in which they were made. According to Council's submission, The General Manager's actions were understandable given he was new to the role, significantly stretched across multiple roles, running multiple projects and reliant upon advice from persons who are either no longer employed by Council, or third parties with whom Council is in complex litigation. Council further expressed that there was no mal-intent on the part of the General Manager and he was genuinely seeking a pragmatic solution to ensure the best outcomes for the delivery of the Civic Centre project and the wider community. On this basis, Council maintained that the initiation of any adverse action under the General Manager's employment contract and/or the Code of Conduct would be unfair and unnecessary in the circumstances.

My views on the General Manager's actions are outlined in the report. However, whether any action is taken against the General Manager is ultimately a matter for Council and the Mayor in their capacity as the General Manager's employer.

5.5. Final recommendations

I have considered Council's submissions to the provisional recommendations. They do not sufficiently address my concerns as described in this report. I therefore recommend:

1. the Department of Planning, Industry and Environment (**DPIE**) decide what, if any, action it should take against Council in relation to the alleged breaches of the EP&A Act by Council
2. the Office of Local Government (OLG) decide what, if any, action it should take against Council in relation to the alleged breaches of the EP&A Act by Council and the failure to comply with tendering requirements in respect of the Telstra contract, and work with Council to ensure its processes are strengthened to prevent similar situations from arising in the future
3. DPIE and OLG jointly review relevant policy and legislation to identify whether changes are necessary or desirable to avoid the potential for actual or perceived conflicts of interest that arise from councils' having an interest as a development proponent and a duty as a regulator under the EP&A Act
4. Council provide a copy of this report to Council's Audit, Risk and Improvement Committee
5. Council's Audit, Risk and Improvement Committee provide further advice to Council on what actions Council should take to ensure that it complies with the tendering provisions of the Local Government Act, the Regulation and the Office of Local Government's Tendering Guidelines. The advice should also address the system deficiencies in Council's project management processes identified in this investigation report and O'Connor Marsden's report

6. Council enter into or review any current reciprocal agreements with an appropriate council for regulating projects where Council is the proponent or DA applicant, in order to avoid any actual or perceived conflicts of interest
7. Council make any such reciprocal agreements publicly available
8. Council continue the regular delivery of public interest disclosure refresher training for all staff and managers
9. Council consider whether it should take any action against the General Manager under the Code of Conduct in light of the findings in this investigation report.

Following advice from Council, the Department of Planning, Industry and Environment and the Office of Local Government about actions to be taken to address the recommendations, I will consider the need to make a special report to Parliament on the investigation under s 31 of the Ombudsman Act.

5.6. Reporting Requirement

I require Broken Hill City Council, the Department of Planning, Industry and Environment and the Office of Local Government to report on the progress of their implementation of the recommendations within three months of the date of this report and two monthly after until such date as all recommendations have been implemented.

Michael Barnes
NSW Ombudsman

5.7. Compliance with the recommendations

Since the finalisation of the investigation, DPIE, OLG and Council have reported on their compliance with the recommendations:

Recommendation 1

As OLG and DPIE are now in the same cluster, the OLG issued a warning to the Mayor in a letter dated 18 February 2020. A warning is an informal action where a breach has been established and DPIE has determined that no formal action is warranted in the circumstances.

Recommendation 2

OLG reported in July 2020 that it had been monitoring Council's implementation of the recommendations. OLG advised they were satisfied that the Council had implemented all of the recommendations and strengthened its processes.

Recommendation 3

OLG advised that the relevant governance and policy sections of DPIE had met to discuss any changes that may be necessary or desirable to avoid the potential for the issues identified in the report to occur at councils, but that work was yet to commence.

Recommendation 4

Council reported that each member of the Audit, Risk and Improvement Committee has been provided a copy of the final investigation report and that the report was to be tabled formally to the committee at the meeting of 20 February 2020.

Recommendation 5

On 30 June 20 the Mayor reported that the Audit, Risk and Improvement Committee's review of Council's updated procurement framework was presented to the Committee at its meeting on 29 May 2020.

Recommendations 6 and 7

The following resolutions were passed in the extraordinary Council meeting of 13 January 2020:

- That Council note the engagement of external or independent third parties to assess development applications where it is the proponent.
- That an MOU be established where the reciprocal agreement to assess development applications is with another council and this process be publicly advised.
- That where Broken Hill City Council uses an independent third party such as a consultant to assess development applications for which it is the proponent, Council engage the consultant from an industry panel established through local government procurement and this process be publicly advised.

Council was in the process of drafting an MOU that would be used for the purpose of formalising any reciprocal agreement it enters into with another Council to assess development applications where it is the DA proponent.

Recommendation 8

Public interest disclosures training for staff was scheduled for the week beginning 10 February 2020.

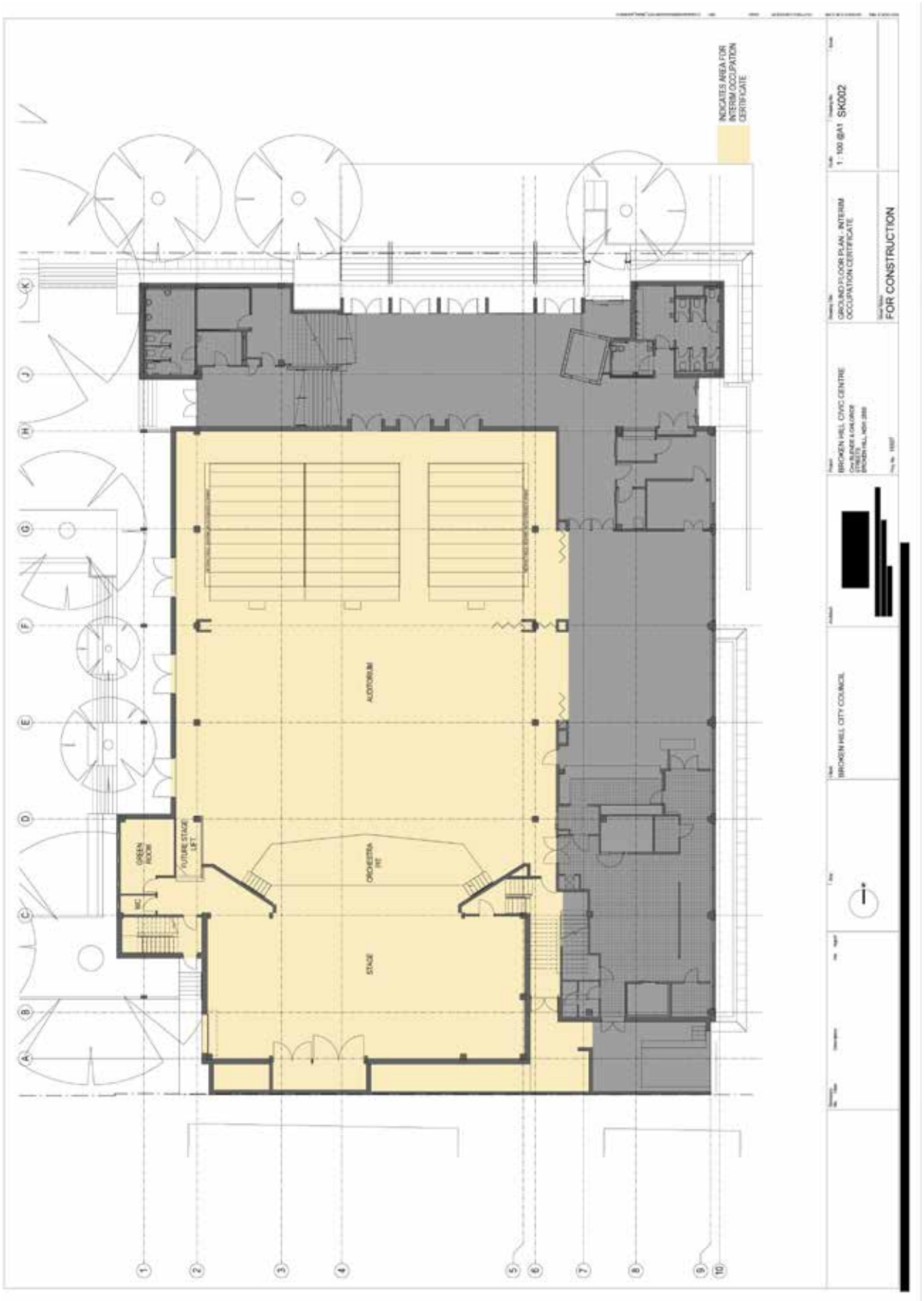
Recommendation 9

A resolution was passed at an extraordinary Council meeting on 13 January 2020:

- That the Mayor discuss future training requirements with the General Manager.

The Mayor also advised that she had commenced counselling the General Manager and working with him to ensure that the errors of the past are never repeated.

Appendix A


INDICATES AREA FOR INTERIM OCCUPATION CERTIFICATE
SK002
GROUND FLOOR PLAN - INTERIM OCCUPATION CERTIFICATE
FOR CONSTRUCTION
BROKEN HILL CITY COUNCIL
AUDITORIUM
ORCHESTRA PIT
STAGE
FUTURE STAGE LIFT
GREEN ROOM
WC

Appendix B

Appendix C

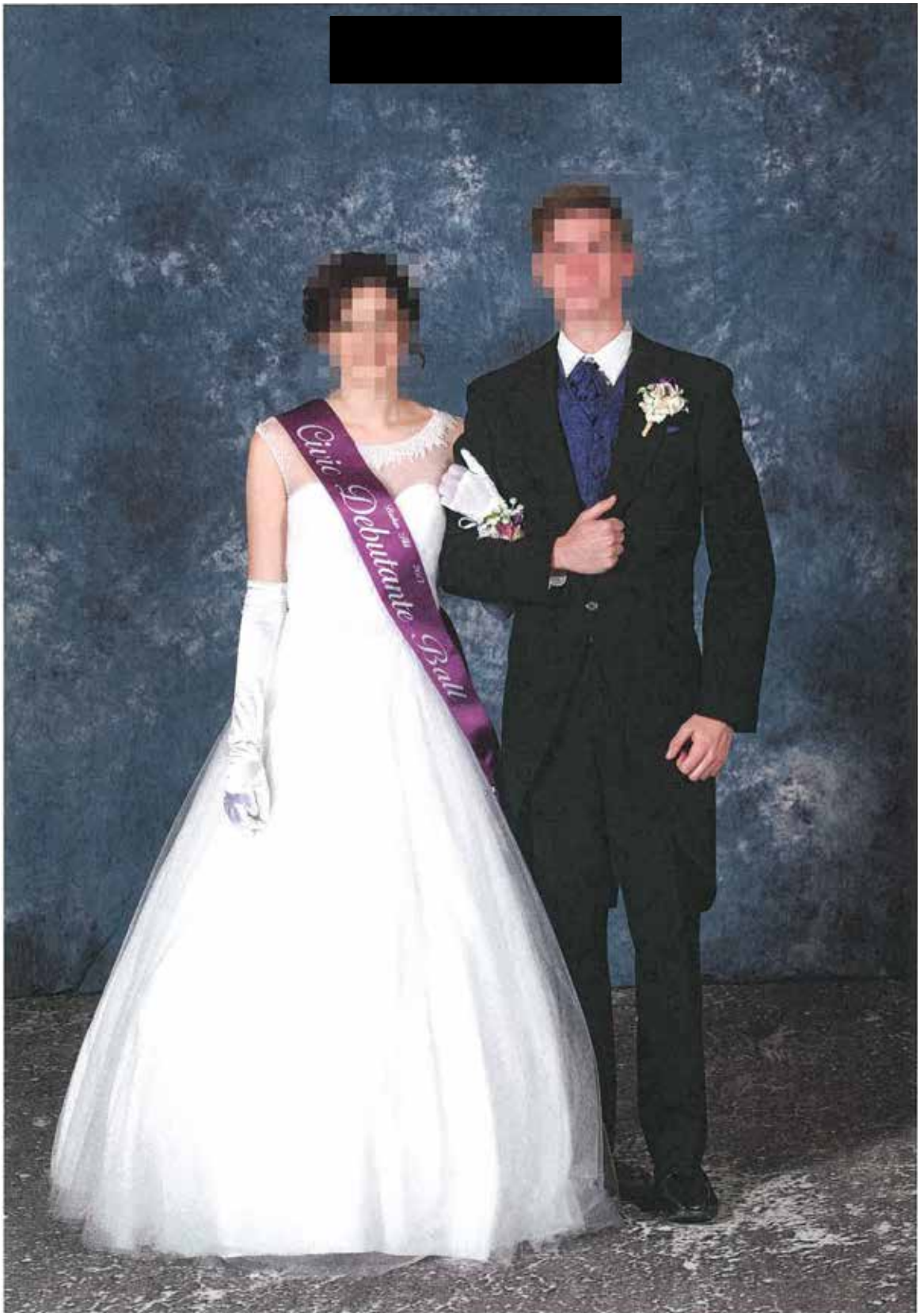
Broken Hill Council Retweeted

NSW Nationals
@NSWNationals

.@MarkCoultonMP and Kevin Humphries join Deputy Premier @JohnBarilaroMP to open #BrokenHill Civic Centre. #NatCon17 #brokenhill #NSWoutback

Mark Coulton, Asst Min Trade, Tourism & Investment and 2 others

Appendix D



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