REPORT TO THE CHAIRPERSON OF THE OTAGO REGIONAL COUNCIL

CONCERNING THE MANAGEMENT BY THE OTAGO REGIONAL COUNCIL OF MATTERS ARISING FROM THE DEPOSITING OF DEMOLITION

MATERIAL IN THE CLUTHA/MATA-AU RIVER ON 9 MARCH 2021 IN BREACH OF THE RESOURCE MANAGEMENT ACT, 1991

Sir Graham Panckhurst QC, KNZM

Introduction.

1.1 On 9 March 2021 employees of Andrew Haulage 2011 Limited (AHL), a Balclutha based earthmoving company, commenced deposited contaminated material into the Clutha River adjacent to land that comprised part of AHL's work yard. The purpose was to prevent further erosion of the river bank. Mr Colin Calteaux, the managing director of AHL, was in charge of, and managed, the project. A man walking alongside the riverside observed the activity, returned home and told his wife he had seen rubble being dumped to create three spurs jutting into the river. She viewed the area the next morning, saw ongoing activity and phoned the Otago Regional Council (ORC) pollution line to report the matter.

1.2 That afternoon two council employees drove from Dunedin to Balclutha to investigate the site. They were approached by Mr Calteaux who said he embarked on the work after consulting two ORC engineers, and with the belief it was a permitted activity. After hearing Mr Calteaux's account the ORC employees informed him the depositing of material was almost certainly a breach of the water plan, so an investigation would follow.

1.3 Indeed, an investigation was commenced by the ORC Regulatory and Communications directorate (hereafter called Compliance). On 18 March three ORC engineers provided file notes, that confirmed there had been contact with Mr Calteaux; in that he was referred to a rule that could render the work a permitted activity, provided several criteria were met. On 24 March Compliance interviewed Mr Calteaux under caution, with his lawyer present. He provided further detail; while adhering to the claim he made on site fourteen days earlier.

1.4 Compliance recognised a problem existed. Allegations had been made against ORC engineering personal. This meant Compliance was conflicted; and it was no longer appropriate for it to continue in the investigation role with fellow ORC staff members implicated. On 29 March Compliance sought the Chief Executive's approval to hand over the investigation to the Environmental Protection Authority (EPA). And, on 7 April a formal request for EPA support was lodged; and granted on 15 April.

1.5 The investigation was completed in early July 2021 when the EPA provided a 24-page report that reached conclusions concerning: what AHL did; the environmental impacts that resulted; and that breaches of the Resource Management Act, 1991, (RMA), had occurred. The EPA recommended that Compliance serve infringement notices on Mr Calteaux and the Company, educational letters on AHL employees; and warning and educational letters to two ORC engineers, and an educational letter to the Council as well.

1.6 These outcomes were met with dismay by the ORC engineers in particular. For reasons discussed later they had not provided evidence of their discussions with Mr Calteaux to the EPA, Various initiatives were taken in an endeavour to persuade the EPA to reconsider matters, but to no avail.

1.7 The ORC Councillors were likewise concerned that they had not been informed of the EPA investigation and report until late on 19 July, when they were warned of a likely newspaper article to be published in the Otago Daily Times (ODT) the next day. Adverse publicity followed, including comments from a councillor that ORC staff had shown a "lack of transparency" to both councillors and the public.

1.8 On 8 December 2021 the councillors resolved that their Chair was to instruct the writer to conduct an inquiry into the ORC's handling of matters associated with AHL depositing contaminated material in the Clutha River on 9 March 2021, and to provide recommendations as to any changes to ORC policies and procedures that would enable the ORC to better meet the obligations contained in its mission statement, vision statement and values. A further resolution noted that the Council would approve terms of reference for the inquiry, once representations from the Chief Executive on draft terms were considered, and final terms were settled in conjunction with the writer.

1.9 After some disagreement, revised terms of reference were drafted and approved in a further resolution, namely that the writer would inquire into, and report on:

1. How, in fact, matters associated with AHL's depositing contaminated material into the Clutha River on 9 March 2021 were handled by those employees involved in the task.
2. Whether such matters were handled in a compliant, and appropriate, manner.
3. Whether changes to policies and procedures are needed to better meet the standards and obligations aspired by ORC in its various values statements.
4. What recommendations are proposed in order to effect change to ORC's policies and procedures.

1.10 The terms were followed by an outline of how the inquiry would be conducted. This included that the inquiry would be based on documents provided by ORC, and interviews with staff members conducted without the involvement of lawyers; and there would be no formal hearing. Interviews would be recorded, staff members would not be identified in the report, nor would staff suffer adverse employment consequences, and the principles of natural justice and procedural fairness would apply. The anonymity and employment protections reflected a further Council resolution passed on 9 February.

1.11 The inquiry was not conducted under the Inquiries Act 2013; rather pursuant to the terms and outline described above. This meant there was no power to compel anyone to give evidence and that, in effect, the inquiry was narrowed to ORC staff who enjoyed the protections described above, and the Chief Executive (CE), the Chair and Councillors..

1.12 The report is divided into four sections:

a. Was removal of the contaminated material and remediation of the site managed in a competent. and timely, manner.
b. Why was evidence from the engineers not provided to the EPA; and what were the consequences of this.
c. Was communication, both internally and externally, managed in a transparent and appropriate manner.

d. Conclusions, and what changes to ORC's policies and procedures are required.

1.13 Approximately 6,000 documents were provided for consideration and twelve witnesses were interviewed, including the Chair and the CE on two occasions. The absence of compulsive powers was of no consequence; as all interviewees were cooperative and forthcoming. Likewise, requests for any information not included in the documentation was promptly provided.

Was Removal of Waste and Remediation Managed in a Competent and Timely Manner?

A Timeline.

2.1 To answer this question it is necessary to set out the sequence of events before waste removal, and site remediation, took place in mid June 2021. Throughout the outline the actions of individuals are simply referred to as emanating from Compliance, or Engineering, in order to preserve staff members anonymity.

9 March. AHL personal commenced depositing demolition waste into the Clutha River.

10 March. A member of the public reported ongoing depositing on the ORC pollution line.

12 March. Two ORC staff drove to Balclutha to inspect the site and take water samples. They were approached by Mr Calteaux who said he authorised the work because ORC engineers had told him it was a permitted activity.

12 March. The Otago Daily Times (ODT) published an article based on information provided by the woman who reported the depositing, namely that the demolition rubble was shocking and entirely inappropriate; while a ORC spokesman said he could not comment as the council had only just been alerted.

16 March. E3 Scientific was engaged to collect various samples and provide a report on whether the rubble contained contaminants, the likely environmental impacts and some advice on how to remove the rubble out of the river.

!7 March. ORC provided a report to E3 that confirmed the source of the rubble, a nearby demolished hardware store, was contaminated and on the Ministry of the Environment's Hail List (hazardous activities and industries list).

18 March. E3 emailed the ORC advising that their onsite work was complete, some of the rubble was hazardous and posed a health and safety risk, and that the area should be taped off to warn people of the risk of stepping on the waste.

23 March. ORC staff visited the site to take further water samples, and tape off the waste site.

31 March. E3 emailed an update: soil and water results received; lead and zinc samples exceeded landfill criteria; ecology lab results awaited; and report a week or so away.

12 April. AHL lawyer advised that his client was keen to develop a remediation plan with ORC as soon as possible; and willing to engage an expert to advise on methodology at AHL's expense.

22 April. E3 provided a draft report for ORC comments.

29 April. Compliance personal meet and resolved to issue abatement notices to ORC engineering to: prepare a remediation plan for removal of the waste from the river bed and to remediate the riverbank area. EPA agreed with this course of action.

2 May. A Wynn Williams lawyer (acting for ORC), EPA and ORC personal meet to discuss the two proposed abatement notices.

3 May. ORC compliance advised it had no comments on the draft report; and E3 delivered its Environmental Site Assessment Report.

4 May. Compliance emailed other parties to advise that it could not establish who owned the land where the incident occurred; but a review of databases suggested it was Crown land. Wynn Williams advised: a. ORC engineering should provide the remediation plan; b. the plan should identify the required consents because there was no rule to rely on; c. once the plan was done consider an abatement notice to AHL, but it being the owner/occupier is problematic and ORC is not the inhabitant owner, but AHL might qualify as occupier; d. or, discuss whether to issue an abatement notice to AHL accompanied by a collaborative effort proposal to undertake remediation work with ORC?

14 May. Compliance emailed ORC engineering to advise that it would like Engineering to lead preparation of the remediation plan, including: any requirements to be met, a methodology for removal of waste so sediment mobilisation was minimised, find a disposal site for hard waste, and undertake the riverbank remediation work.

17 May. Engineering responded noting that they were still not informed of the intent of the investigation and this concern was pending over, and affecting, staff. And, was there not a conflict of interest, given Engineering was still to be investigated and wouldn't a better option be for Compliance to engage external advisors who consult with Engineering? The next day Engineering repeated its concern that it was inappropriate for it to prepare the plan, but it would recommend an external consultant and provide comment on the plan before it was approved.

19 May. Engineering recommended Geo-solve and Tonkin Taylor as remediation experts due to their understanding of river management. Compliance responded that it was considering issuing an abatement notice to AHL instead.

24 May. Wynn Williams provided comments on a draft abatement notice, including whether Compliance had considered a collaborative AHL/ Compliance approach to remediation, or whether AHL was to bear the cost, and responsibility, independently. Compliance responded that it did not wish to be a party in the matter; and asked whether given the risk of floods would a pragmatic solution be to have AHL remove the waste before a consent was obtained?

25 May. Wynn Williams responded that it was important not to advise AHL to do anything unlawful, particularly when it was alleged ORC gave faulty advice to AHL. Instead, he lawyer suggested that a consent may not be required if removal of the waste would not "disturb the riverbed", alternatively, that a RMA section 87BB "deemed permitted activity" would avoid the need for a consent, as would the use of an existing ORC global consent. Duncan Cotterill (AHL's lawyer), aware of the pending abatement notice, emailed Compliance to say the willingness of AHL to assist had never been in question, only the remediation methodology; and suggested an abatement notice was not necessary.

26 May. Compliance personal met and the General Manager opted for a pragmatic approach; namely to require AHL to undertake the work, resort to a deemed permitted activity, with no abatement notice and to later obtain a retrospective consent. He also urged that removal of the waste proceed ASAP.

27 May. Compliance after staff consideration, and Wynn Williams advice, resolved to provide a memo to AHL to explain their thinking, and agreed to a collaborative approach with AHL, but to serve an abatement notice to formalise matters as required in ORC's enforcement policies (not for compulsion reasons).

8 June. Compliance served the abatement notice on AHL requiring removal of the waste, and also a deemed permitted activity notice.

11 June. Compliance agreed to an amendment sought by AHL to the abatement notice; deletion of the requirement to use sediment curtains during the removal process because the river flow made their use impractical.

14 June. Mr Calteaux advised ORC that work to remove the waste, and remediate the site, would commence straight away because rain/increased river flow was expected. The work was completed the following day under ORC observation.

17 June. Inspection of the work undertaken by Compliance and was considered it to be a very good job; as shown in the photographs taken. Mr Calteaux confirmed that waste had been taken to a Dunedin disposal location and verified this.

Two Periods of Interest.

2.2 The timeline reveals two periods of interest. The first from 11 March when investigation of the incident began to 3 May when the Environmental Report was delivered, (a total of 53 days), was characterised by the lack of progress in relation to removal/remediation planning. It seems that delivery of the Environmental Report was viewed as necessary before a removal/remediation plan could be prepared.

2.3 But, this was essentially an environmental report although it also included a focus on risks posed by the fill material while it retained in situ. The conclusions reached were:

- that it was unlikely the fill material posed a risk to members of the public who ventured onto the site because contaminant concentrations were low, although slightly elevated concentrations were identified, but these did not exceed guideline values.
- however, the fill material posed other physical risks to both people and the environment from sharp and unstable hard fill; fines from the fill and additional erosion causing degraded water quality downstream from low-level contamination and suspended sediments, but these did not exceed guideline values.
- the presence of the three groynes had altered flow patterns and would cause additional riverbank erosion and accretion.
- high flow conditions could wash the fill material downstream and cause additional physical hazards.
- the ecological habitat adjacent to the fill sites appeared to be downgraded, and riverbed benthic communities had suffered from slippage and smothering caused by hard fill such as concreate blocks.

2.4 Two recommendations were made; namely that “Based on the ecological findings, potential for mobilisation during high flow events, and physical risks to human health, it is recommended that this fill be removed as soon as possible with practical steps taken to ensure that the mobilisation of sediment and fill material is minimised --- and sediment curtains, if available, should be used to contain disturbed sediment”. Secondly, because of the concentrations of heavy metals in some soil samples if material was taken off site for disposal it must go to a landfill consented to receive material of this kind.

2.5 So, 53 days had passed with no or little progress having been made towards development of a removal and reinstatement methodology. But, a report had been acquired that identified environmental risks and the likely consequences of AHL's actions; a report that was to be of considerable help when the EPA provided enforcement recommendations, and Compliance made the final enforcement decisions.

The Second Period.

2.6 This began on 4 May and ended on 15 June. The search for a solution to the methodology problem began in earnest. Unfortunately, it was not until late May that Wynn Williams suggested options, Compliance opted for a pragmatic approach, and a section 87BB deemed permitted activity was adopted. This became a collaborative approach with AHL, that proved to be successful. The work was completed on 15 June without problem, and to a good standard, but by then 42 days had passed.

Was Site Remediation Effected in a Timely, Manner?

2.7 The answer is obviously no. For demolition material of this nature to be left in the Clutha River for 95 days was simply unacceptable. Why did this happen? The incident was unusual in two respects. First, the Engineering General Manager cannot recall another example of a depositing event of this nature over the last 17 years. Secondly, and of greater significance, was the fact that ORC engineers were allegedly complicate, something that came to light immediately after the event. Normally, Engineering would have assumed responsibility for removal and remediation; and Compliance would have conducted the investigation.

2.8 But, it was evident that for Compliance to undertake its normal role was inappropriate; and Engineering was in a quandary as to what its role was, given the circumstances. Ordinarily, its staff would seek out the person responsible for the depositing and evaluate whether they had the means to right their wrong under Engineering' control and supervision. But, to make contact with Mr Calteaux would have been viewed as inappropriate, because of the allegations he had made. This was a reasonable and understandable concern. Instead, both directorates sought more information; Compliance by interviewing Mr Calteaux, and Engineering by obtaining file notes from the three engineers on 18 March. The same day E3 emailed Compliance to advise that their work at the incident site was complete; being confirmation that the material could be removed as far as E3 was concerned. By then two weeks had passed, and apart from the incident site having been taped off from the public, little had been done at the site by the ORC.

2.9 Engineering remained in a waiting phase. Compliance was deciding whether to engage the EPA and by 15 April this was a fait accompli. On 14 May Compliance requested Engineering to provide a remediation plan. Three days later Engineering responded that it would be inappropriate to do so if Mr Calteaux was to undertake the work, as contact with him would be awkward; and Engineering's involvement may be construed as inappropriate given that later on Compliance may have to take enforcement action against the engineers. Instead, however, Engineering offered to assist by recommending two external consultants and providing comment on the plan before it was approved. The following day two consultants were recommended.

2.10 Again, the concerns raised were reasonable and cannot be criticized. Engineering was side-lined because Mr Calteaux alleged its engineers were complicit. And, the concern about working with him or his staff was real, as by this time AHL was to undertake the removal/remediation work. A complaint of conflict of interest could well have been upheld on the basis of these concerns. The prudent course for a local authority was to act as Engineering did.

2.11 In late May Compliance decided to remediate the incident site using a deemed permitted activity notice and to collaborate with AHL, as formalised by an abatement notice. This was similar to the approach that Engineering would have adopted had the remediation been their responsibility. An approach to the offender seeking their co-operation in righting the wrong is a standard approach. Here it was the obvious approach as well, since Mr Calteaux had offered to remove the rubble on day one and through his lawyer had confirmed this offer. Also, AHL had the capability to do the work and in mid-June, under Compliance supervision, and relying on a remediation plan obtained and paid for by the Company, the work was undertaken without problem. But, by then 95 days had elapsed, when ideally no more than a few weeks was a reasonable time for a remediation of this nature.

Why Did a Delay of This Magnitude Occur?

2.12 Compliance was out of its comfort zone; with the EPA handling the investigation and Engineering side-lined, on account of the conflict of interest. The directorate had no engineering experience; yet faced the task of planning and overseeing remediation of the site. Experienced engineers would not have regarded this a particularly difficult job; but one to be done as soon as possible. Preparation of a method statement, a review of its content, engagement of a consent planer, and an approach to AHL or its lawyer would be first steps. If an environmental report was sought it would be done at the onset, and as soon as environmental work on site was complete (not delivery of the report) the rubble would be viewed as able to be removed. Once a plan and consent were to hand, the work would proceed with AHL as contractor, and the engineer as supervisor.

2.13 As explained above, however,time had been lost while a decision was considered and taken to engage the EPA. Compliance then awaited delivery of the environmental report, and did not take the required engineering steps in parallel, rather in sequence. This caused the delay. How could Compliance have avoided such a delay? Seeking advice from Engineering was seen as inappropriate, given that it was side-lined in relation to AHL matters. But, instead, an engineering firm could have been engaged to undertake the job, or perhaps to advise Compliance on how to ensure the work was completed as promptly as possible.

The EPA Report and an Absence of Engineering Evidence.

A Timeline.

3.1 As with the previous section of the report a timeline of certain events is required in order to understand, and examine, why the three engineers did not provide evidence to the EPA despite invitations to do so; and how this failure affected the investigation and triggered some significant consequences for both staff members and the ORC.

26 November 2020. A new ORC engineer was introduced to Mr Calteaux by another engineer at the AHL depot.

18 December. The same two engineers accepted an invitation to go to the depot and meet with AHL management and staff at the conclusion of an end of year meeting. (A dispute concerning discussion on this occasion will be considered later).

23 February 2021. A different engineer met with Mr Calteaux to discuss an unrelated job, and during their return to the depot was asked about using demolition material to fix an erosion issue. The engineer suggested they go to the Clutha River site where he explained a rule to Mr Calteaux that could enable use of the demolition fill.

18 March. On request, the three engineers provided file notes that briefly explained their contacts with Mr Calteaux.

24 March. Compliance staff interviewed Mr Calteaux under caution concerning the incident, and in the presence of his lawyer.

25 March. ORC advised their insurance broker of a potential claim under their QBE statutory liability policy arising from the incident.

15 April. EPA agreed to undertake the investigation.

26 May. EPA indicated they wanted to interview two engineers, and anyone else that Engineering suggested.

28 May. Engineering advised the EPA that it would provide its view next week. ORC advised its broker that it required legal support and wished to use a Dunedin lawyer. The broker responded that QEB accepted the need for legal advice, but a lawyer on their panel must be engaged and recommended two legal firms.

1 June. ORC advised the broker that Darroch Forrest was its preference; and told the EPA that the lawyer would be in touch.

4 June. Darroch Forrest reported that there was a possible conflict in their acting for both ORC and the engineers, given that the council could pursue employment action if staff were found to be at fault.; and explained that time with the two engineers was required, after which interview advice would be provided the next week.

8 June. EPA advised that time was short because they were working to have the report finalised by 2 July.

9 June. Engineering asked Darroch Forrest to seek all information held by the EPA, in particular that from AHL; and that a request be made for questions to be provided before the engineer interviews.

10 June. Engineering and their lawyer met and decided: the two engineers would not be interviewed, all three engineers would be told about insurance cover, their entitlement to legal representation and that one joint statement would be provided instead of interviews.

14 June. EPA sent question lists for two engineers, and requested responses by 18 June.

14-15 June. Darroch Forrest lawyer conducted interviews with all three engineers.

EPA requested a copy of the audio recording of Mr Calteaux's interview by Compliance on 24 March.

16 June. Compliance staff who went to the incident site and met Mr Calteaux on 12 March emailed a job sheet and other material to EPA, as requested.

18 June. Darroch Forrest sent a five-page draft letter containing the engineers' version of their contacts with Mr Calteaux and contextual matters, for consideration. Engineering considered and obtained local legal advice on the draft.

23 June. Discussion, and redrafting, resulted in an internal consensus that the draft letter was problematic and that rather than sending it Darroch Forrest should request the EPA to provide further information before Engineering could provide evidence, since it had no details of the AHL case.

25 June. Darroch Forrest emailed back and advised: section 6(c) of the Official Information Act, 1982, (OIA) enabled investigators to decline disclosure of evidence, the EPA may well complete their report absent evidence from Engineering, this would risk criticism of the council, the engineers' accounts were consistent and credible, and that an "informal approach" to her counter-part at the EPA may clarify whether reliance on section 6(c) was likely. At a morning telephone conference with ORC personal the informal approach by the lawyer was favoured. A phone call to the EPA produced the response "we don't want to risk prejudicing the outcome of the investigation and we need to treat ORC just as we would any member of the public", and that a draft report would be concluded that day. (the quotation is taken from a telephone log kept by the EPA person).

29 June. Engineering instructed Darroch Forrest to proceed with an OIA request under urgency. The request was lodged, Engineering asked that finalisation of the report be delayed. EPA replied no, because of statutory time limits, but that evidence would still be received.

30 June. EPA declined to process the OIA request under urgency. Darroch Forrest advised Engineering that their engineers must be told no joint statement had been given and that there could be "individual consequences". ORC's broker was requested to arrange individual lawyers for each of the three engineers.

2 July. A lawyer from Parker Cowan contacted Engineering to confirm she was acting for two of the engineers and required information. A response to her raised the concern that there were three engineers who required advice and that separate representation was needed. The lawyer

confirmed she was now to act for only one engineer. Th broker confirmed that QBA would arrange the engagement of two more lawyers.

5 July. Engineers were told that lawyers had been appointed and would contact them this week.

(The three engineers confirmed when interviewed by the writer that they had telephone contact with their respective lawyers, probably on or soon after 5 July, but that there was no change in their situations as a result of the respective discussions. Nor is there any documentary evidence pertaining to these consultations).

8 July. Darroch Forrest requested the EPA to refine Engineering's OIA request. EPA confirmed this would be done. EPA sent a copy of the Investigation Report to Compliance.

9 July. EPA and Compliance met for a briefing on the report, and the steps to follow.

13-14 July. Compliance sent infringement notices to Mr Calteaux and AHL, and a warning letter, and an education letter, respectively; education letters to AHL staff members; a warning letter to the ORC, and education letters to two engineers.

15 July. EPA asked Engineering if their OIA request remained alive, and were told it was not withdrawn.

28 July. Engineering told Darroch Forrest that the OIA response was overdue; and their lawyer inquired and was told by the EPA that Compliance had been supplied a copy of the investigation file. Engineering asserted that section 14 of the OIA applied, and the request remained alive.

30 July. EPA advised Engineering the investigation file had been vetted and would be provided by the end of the following week.

3 August. Engineering received the investigation file, but some information was withheld and this was considered unsatisfactory.

6 August. The broker advised that QBE had closed its file because ORC was not facing a prosecution and insurance cover was at an end.

10 August. Engineering engaged Darroch Forrest to continue providing advice, to be paid for by the ORC.

13 August. Darroch Forrest asserted to the EPA that on the basis of the limited information provided to Engineering to date there was no evidential foundation to show the two engineers had effectively authorised the depositing of waste into the Clutha River; and absence such evidence the education and warning letters should be withdrawn.

16 August. Compliance gave Engineering a full copy of the investigation report.

20 August. The EPA responded to the 13 August email, that all issues concerned with enforcement should go to Compliance (Compliance has delegated responsibility for enforcement decisions and the EPA only provided recommendations).

3 September. After a lengthy drafting process the lawyer for Engineering sent a six page letter of complaint to the EPA that included:

a. the directorate would have written sooner, but it only obtained a copy of the investigation report after a redacted version had been provided to the media;
b. because information requests made to the EPA were not met during the investigation Engineering had been unable to determine whether it was appropriate to provide evidence;
c. by reference to paragraphs in the investigation report assertions made by Mr Calteaux were criticized as inaccurate, and the evidence of the three engineers was set out;
d. this showed there was no evidential foundation for both the conclusions reached, and the enforcement recommendations that were provided; and
e. the EPA should revise the report and based on the actual facts make different recommendations.

13 September. The EPA responded stating that the two engineers were invited to interviews, or to answer written questions, but elected not to; the report was based on an accurate account of the information the EPA had; the investigation file had been sent to Compliance; and the Authority considered its involvement in this matter to be concluded.

15 September. Compliance considered the EPA response and emailed Engineering stating that they had discussed matters with the EPA; the engineers had ample opportunity to be involved in the process, but chose not to; the report was satisfactory and enforcement decisions were based on the best information available at the time; Compliance agreed that EPA's role was complete; and that after a further review a full response would be provided in due course.

24 September. Darroch Forrest emailed Compliance to provide suggestions for their full response. These included that: compressed timeframes impacted on Engineering's ability to participate; the EPA raised interviewing 78 days after the incident and staff needed time to take independent advice; the EPA declined to provide information and there was an information barrier between Engineering and Compliance; the EPA expressed concern in the report that staff had not provided evidence; staff had faced abusive criticism; and one option was to confront these concerns by issuing a summary letter to the ORC and retracting the warning and educational letters.

Compliance responded that day. The information provided was useful, but too late; decisions could only be made on the information available; staff had opportunities to provide evidence but did not do so, and this was hard to understand; their evidence would have been added material, but may not have changed the outcome; staff had voiced willingness to better understand regulatory processes and this was positive for the future; while the stress on staff was regrettable.

27 September. One of the affected engineers resigned. Compliance issued amended educational letters to the two engineers, because the language previously used could have more accurately reflected the investigation process and findings.

Late October. Having discussed various ways to address their concerns Engineering requested Darroch Forrest to document events related to the incident, discuss the ongoing concerns and provide recommendations for further action. This document was then to be provided to the Chief Executive for her consideration. The Darroch Forrest recommendations included: ORC could judicially review the warning letter served on the Council, or complain to the Ombudsman about the issue of the letter; engage a criminal lawyer to provide an opinion on whether there was

evidence to justify the warning letter (taking into account the engineers evidence provided to the EPA after delivery of the report); the Council itself could determine whether there was an evidential basis to overturn the warning letter; and also review the engagement of the EPA by Compliance, and whether parameters were needed to define the roles of the two entities, define information sharing and timeframes, and how Compliance would manage enforcement recommendations; or the Council could promote internal/external education campaigns.

! November. Darroch Forrest lodged a complaint to the Ombudsman against the EPA. There were two matters of complaint: namely that an ORC request for the EPA to provide information concerning Mr Calteaux's allegations against Engineering staff had been wrongly declined; as had a request that the information be supplied as a matter of urgency.

The Investigation.

3.2 After the EPA agreed to conduct the investigation in mid-April, Compliance provided the investigation file they had already compiled. In late May interviews with Engineering staff were sought and early in June it was made clear the EPA was working to an early July report date. On 15 June Compliance sent the original audio recording of Mr Calteaux's March interview to the EPA, so it could be transcribed. On 9 June Darroch Forrest was instructed by Engineering to seek all information held by the EPA. This was the beginning of an issue that was to paralyse progress for some months. Instead of proceeding with interviews, or providing answers to questions, or one single statement, the belief became that the engineers should not provide their side of the story until they had details of AHL's case.

3.3 This notion was flawed. The case concerning the incident was still at the investigation stage. The EPA was under no obligation to reveal the information it held. It is normal for the police, and other prosecutors, to not reveal evidence of a matter under investigation. To do so may enable the suspect to fashion responses to their own advantage. However, the Criminal Disclosure Act 2008 requires the prosecution to disclose its hand, but only if and when a court proceeding has commenced; or put another way when a charge has been laid. In this instance, where the likely penalty was an infringement offence, section 21(8) of the Summary Proceedings Act 1957 applied. It provides that anyone charged with an infringement may challenge it by filing a notice of hearing with no admission of liability; and a court hearing is triggered. Then, section 9(d) of the Criminal Disclosure Act provides that disclosure rights are available to the defendant. Here, none of the parties under investigation by the EPA became entitled to disclosure.

3.4 The only option was to seek disclosure of Mr Calteaux's version of events under the OIA, which Darroch Forrest did, under urgency on 29 June. But section 6(c) of the OIA provides that if the availability of official information would be likely to prejudice the maintenance of the law (including an investigation), the information may be with-held. Significantly, four days earlier the Darroch Forrest lawyer had telephoned her EPA counter-part and was told all information would be with-held (see 25 June in the timeline). This came as no surprise to her, as her experiense was that it was commonplace for such disclosure requests to be declined.

3.5 Unfortunately, Engineering decided to persevere with the OIA request, and in due course the EPA completed and delivered its report. The opportunity for the engineers to provide their side of the story was lost. And, the complaint to the Ombudsman remains unanswered.

Could This Have Been Avoided?

3.6 Had the Engineering personal accepted that the OIA request was doomed and that delivery of the EPA report was imminent, the only and most obvious option was to reconsider providing the engineer's evidence to the EPO as soon as possible. The Darroch Forrest lawyer was alive to this; on 30 June she stressed the need to advise the engineers of developments and to obtain lawyers to act for each of them. Legal principles apply in this situation. Lawyers acting for a defendant should explain the pros and cons of providing, or not providing, evidence; and may also give advice as to the approach they favour. However, caselaw dictates that the lawyer must inform the defendant that the decision, one way or the other, is for them to make. Particularly, where the decision is whether to give evidence at trial (as opposed to here, where the issue was whether to provide evidence at the investigation stage), caselaw strongly recommends that lawyers obtain a signed statement that confirms the defendant's decision.

3.7 Engineering discussed legal representation for the engineers; someone suggested the best course was to engage experienced Dunedin based criminal counsel and the names of two Queens Counsel were mentioned in an email. This was a very good suggestion. The engineers had prepared file notes that outlined their respective contacts with Mr Calteaux, and in mid-June Darroch Forrest had interviewed them in greater detail as well. Local counsel could have been provided these accounts, and then advised the engineers in person, and promptly. Indeed, given the nature of the three engineers accounts one QC could have seen all three engineers, and decided whether there was any conflict of interest that made separate representation a necessity.

3.8 But, ORC's legal costs arising from the incident were still being met by QBE, and when the need to engage lawyers for the engineers was raised the response was that only counsel on the QBE list would be appointed. Lawyers from three firms, two in Auckland and one in Queenstown, were engaged early in July. Whether they were criminal lawyers is unclear. Telephone contacts with the three engineers occurred, but at interviews with the writer each engineer recalled their consultation, but said nothing happened as a result of them. The EPA report was delivered a few days later.

3.9 The report out-lined evidence Mr Calteaux had given concerning his contacts with the engineers. This was relatively brief, which was not surprising given it was unchallenged. He said two engineers had visited the AHL depot together so a new ORC employee stationed in Balclutha (A) could be introduced by (B). Mr Calteaux said during this visit he asked B whether AHL could put demolition material into the river to cover an eroded area near the yard; and B replied to the effect that "he could not see any reason why not". Subsequently, he tried to contact B but couldn't. Then later, on a day when he and A had inspected another river work site, he took A to where he intended to place the material, discussed the intended work with him, and A said he thought "it would be better to build a couple of spurs

rather than trying to cover the whole bank". Mr Calteaux made no mention of a third engineer, (C).

3.10 Mr Calteaux's evidence was based on the transcribed record of his interview by Compliance. The EPA report described the advice provided by A and B as "cursory" and not given in a "planning context", and then commented "they both should have seen the risk inherent in the approach from Colin Calteaux and averted it quickly" by referring him to the ORC regulatory section. The EPA then made a finding that "their advice was taken as permission".

3.11 Had it been provided, A an B's evidence would have been markedly different, and supplemented by C's account. B, an ORC engineer for five years, agreed he had introduced A to personal after the conclusion of an AHL staff meeting on 18 December 2020; but both he and A said there was no discussion that day as described by Mr Calteaux. B had no contact with Mr Calteaux about putting demolition material in the river, and no knowledge of this happening until 10 March when A phoned him and reported the incident.

3.12 A's evidence was that on about 18 February he received a phone call from Mr Calteaux who asked about using clean rock from the yard to stabilise the river bank where it had been eroded. He contacted C for advice, and was told to look at the Otago water plan, in particular rule 13, which he did. Later in February he visited another river site with Mr Calteaux, who again raised the erosion repair; and A had a copy of rule 13.5.1.4 with him which he showed to Mr Calteaux. A pointed out that the permitted activity rule included various criteria that had to be met, including the use of only clean material and completion of the work inside 10 hours. This conversation did not occur at the incident site, which A did not see until 10 March when he was contacted and went there promptly. He saw waste being deposited and soon after spoke to Mr Calteaux telling him the material used was not cleanfill and it would have to be removed.

3.13 On 23 February C had picked up Mr Calteaux to visit a job site at Stirling and on the return journey the erosion problem was raised. C said he had time to have a quick look and they drove to the river. There was a brief conversation during which C mentioned the permitted activity rule and said demolition material could be used for the repair but it had to be clean, and he suggested how the work should be done to meet the 10 hour requirement. C is a senior engineer who has been with the Council since 2003.He knew Mr Calteaux reasonably well and had no idea why he had not mentioned this discussion when interviewed.

3.14 This evidence was of course available to the Engineering team. While they did not know exactly what Mr Calteaux had said when interviewed, it was obvious he must have provided a version that shifted responsibility to the engineers. This meant there was a ''he said/we said" dispute. It could only be properly resolved by the EPA if they had both sides of the story. From a legal perspective it was for the three engineers to decide whether their evidence was provided or not. It may well be that the engineers were never fully aware of their right to make that decision. And, Engineering's concern to establish what Mr Calteaux had told Compliance before evidence was provided may also have influenced their thinking.

3.15 Engineering was also in a fix. An issue of this kind was new to them. Normally, their role would have been to handle the remediation of the insult to the river, not grapple with the legal and other complexities of an investigation. The delay before the EPA sought evidence from the engineers, coupled with advice that early July was the report completion date, came as a surprise. Not having the services of an experienced Dunedin criminal lawyer was also unfortunate.

3.16 That said, it is still difficult to understand why providing evidence in some shape or form was not viewed as essential to achieving the best outcome. Engineering knew that A and C had told Mr Calteaux any fill used must be clean and this was good reason in itself for providing evidence. The deposited rubble was a glaring problem, obvious to anyone who viewed the incident site after the event. Rather than being cleanfill as defined in the water plan, the waste included: concrete blocks, broken concrete slabs, reinforcing steel, bricks, timber, metal flashings, fibreboard, cement board, plastic and electrical wiring. This alone suggested that Mr Calteaux could not have believed he had permission to deposit the demolition material.

3.17 That he knew deposited material had to be clean was also touched upon in the EPA report under the heading "Concerns Regarding Evidence" at paragraph 14.1. The ORC staff who went to the incident site on 11 March to inspect and take water samples were approached by Mr Calteaux who volunteered that both A and B told him "it was ok to put the material there if it was clean". But, this admission was described as "anecdotal" and "not obtained under caution"; so that it was not evidence against Mr Calteaux, and only indicated the engineers were aware of the cleanfill requirement. This dismissal of the admission was generous to say the least. Such a significant remark made in a serious context can hardly be dismissed as anecdotal; and given that he arrived at the site and volunteered the remark renders the contention that a caution was required somewhat dubious.

3.18 Generally, it would have been a better look for the engineers to provide evidence, rather than be seen as not having done so. Likewise, from the perspective of the Council it was desirable to have provided evidence and be seen as cooperating with the investigator. This was a concern recognised by the authors of some internal emails written as the debate on what to do unfolded. But unfortunately, risk seemed to become the main concern – that not having Mr Calteaux's version of his contacts with the engineers was somehow a major disadvantage.

The Consequences.

3.19 The consequences as a result of not providing evidence have been significant. They include:

- first and foremost, the criticism, frustration and stress experienced by some engineers following media accounts of the outcome of the EPA investigation. These men, however, spoke very favourably of their manager's attention and care for their wellbeing throughout and after the investigation,
- findings in the EPA report that could not have been made had the engineer's evidence been provided. Indeed, given the difference between the two versions the tone of the report may well have been quite different,

- media coverage of the incident and the EPA report gave rise to public concern, to the detriment of the Council's reputation,
- relations between Compliance and Engineering became strained to some extent for a short time, and
- actions taken in an endeavour to challenge the content of the EPA report, and obtain more favourable findings and recommendations, resulted in unproductive staff time and legal costs, incurred at the expense of the ORC.

Communication and Transparency : Internal and External.

4.1 There are three aspects to this section of the report. These are communication between the staff and the CE, the CE/staff and the elected councillors, and the ORC and the media/public. Of necessity, assessments are made by reference to the incident, the investigation, the EPA report and the aftermath; since these are the matters that the writer has examined by reference to the documentary trail, and interviews with ORC personal.

Staff and the CE.

4.2 The Local Government Act 2002, section 44(2), provides that a CE is responsible for providing leadership to the staff; employing staff on behalf of the local authority; and negotiating the terms of employment of the staff; while sub-section (4) provides that a CE is the principle administrative officer. The CE alone is employed by the Council. So, the CE and her staff are in a day to day working relationship; while the CE is answerable, and reports, to the Council (the elected Councillors).

4.3 The ORC workforce, presently about 260 people, is divided into five directorates: Corporate Services; Strategy, Policy and Science; Regulatory and Communications; Operations; and Governance, Culture and Customer. Each directorate is headed by a General Manager, and beneath them are Managers of segments of the larger directorates. The General Managers of Regulatory and Communications, and Operations; and the Manager Compliance and Manager Engineering, respectively, have been interviewed because of their involvement in the AHL matter.

4.4 This means that the assessment of staff and CE communications is based on the interviews with the above personal; and the documentary material, emails and meeting notes, pertaining to staff/CE communication. These sources revealed no problems and indicated that staff and CE communication operated well. The CE was available for regular "one on one" discussions with the General Managers; while communication between other staff and the CE was easy and of a nature to be expected in an organisation of this size.

CE/Staff and Councillors/Media.

4.5 This communication line is problematic; as the Clutha River incident demonstrated. Firstly, a matter was not well reported to the Audit and Risk Subcommittee on 30 May 2021. [redacted] potential insurance claims that had been notified to the ORC insurer for the year from 1 April 2020 to 1 April 2021. There had been 13 notifications, none of which had resulted in a claim to that point. The 11th claim was in March 2021 and was described as "River works in the Clutha River". A brief summary of this matter stated:

- Media reported that "truckloads of demolition material' had been "dumped on the Clutha riverbank".
- Unclear at time of notification, whether Council had any knowledge of the dumping.

4.6 On 11 March the dumping had been mentioned in the daily media wrap (a heads up available to staff and Councillors). It said a complaint had been made to the pollution hotline and we are looking into the matter. The next day the Otago Daily Times (ODT) published an article that outlined what the complainant had seen, her concerns and that the ORC thought the depositing was in breach of the water plan. So, to this point the incident was a low level matter that did not need to be reported to Councillors.

4.7 [redacted]. On 7 April [redacted] reported the engagement of the EPA and that the Engineering team needed legal advice because the affected engineers would be interviewed in the course of an investigation. Yet, the report signed off on 30 April and provided to the Subcommittee for its 13 May meeting stated that it was "unclear at the time of notification" whether the Council had any knowledge of the dumping. By then, while the incident remained low level, management had become much more complex given a conflict of interest, the EPA's engagement and the unusual division of responsibility between Compliance and Engineering. The author of the Subcommittee report knew of these developments. Asked why in writing the summary for the 30 April report [redacted] did not take account of these developments, [redacted] said because [redacted] was only thinking about what was known to the council at the time of notification. [redacted] But, whether a more explanatory summary, in a list of 13 potential claims, would have captured the attention of the Committee is debatable.

4.8 A further and more serious communication issue occurred in July in relation to the EPA report, enforcement recommendations, and the enforcement actions taken by Compliance. On 8 July Compliance received the EPA report in advance of a joint meeting on the following day. The EPA outlined the content of the report and a discussion followed concerning the enforcement recommendations. These were for two infringement notices and an education letter to AHL; two infringement notices and a warning letter to Mr Colteaux; warning letters to three AHL staff members; an education letter to the ORC; and warning letters to two ORC engineers. Compliance, however, had the last say as it was their delegated responsibility to decide upon enforcement actions. The recommendations for the ORC and the two engineering staff members were reversed; so that the ORC was to receive a warning letter, and the engineers' education letters. On 12 July the CE was briefed by Compliance concerning the report and the final enforcement decisions. The notices and letters were sent by Compliance on 13-14 July.

4.9 On Friday, 16 July an ODT journalist requested the EPA and ORC to provide details of the EPA report, and the enforcement actions. After the weekend, on Monday 19 July the journalist made a further request for the ORC to provide full details of the investigation report, whether there would be prosecutions, details of the recommendations, and why the investigation was referred to the EPA. At 5.20pm that day Compliance responded. The email stated: because ORC staff may have provided advice to the offender there was a potential conflict of interest and the EPA was engaged to investigate; Compliance thanks the EPA for conducting a thorough and robust investigation; the recommendations included infringement notices and formal warnings; but, further details of the enforcement actions will not be provided "as the process is still subject to appeal".

4.10 At 7.55pm the CE emailed Councillors to advise that: the ODT had been in touch regarding an investigation into material deposited in the Clutha River; the material had been removed, but there was a suggestion the deposit was made on ORC advice; so the EPA was asked to conduct an investigation; the Council had received a warning letter, but there was no enforcement action against staff, and the offending company had action taken against it. The CE added there will likely be a media article tomorrow.

4.11 This came as a total shock to Councillors. The 11-12 March heads up and ODT article (see paragraph 4.6) aside, Councillors had been told nothing about subsequent events. The Deputy Chair of the Council immediately replied by email to the CE asking for more details. A flurry of emails followed. The next day the ODT published articles concerning the incident, based in the main on comments made by Mr Calteaux. He outlined his version of events and acknowledged that AHL had received infringement notices. The Deputy Chair was also interviewed by the ODT and said the matter was extraordinarily embarrassing and that the lack of transparency was an insult to the public, and Councillors. The Chair of the Audit and Risk Subcommittee spoke to colleagues expressing her embarrassment that the river incident was not recognised as such on the 30th April, but was assured she was not at fault.

4.12 The reason advanced by ORC for being unable to answer the ODT questions was flawed. Compliance said that further details could not be given because "the process is still subject o appeal". The enforcement actions were a mix of infringement notices, and warning/education letters. Only the infringement notices are statutory enforcement actions. The letters are known as informal actions. A warning letter may be used when an offence against the RMA has been committed, but a penalty is not considered necessary. The warning is recorded, and will be considered should there be a further non-compliance. An education letter simply provides advice intended to assist the person in avoiding further problems. It has no further purpose. An infringement results in a fee, payable as the penalty. Once paid the infringement is at an end. Alternatively, instead of paying the fee the offender may decide to file a "notice of hearing" which triggers a court hearing; at which the person may admit guilt, but contest the monetary amount; or deny guilt and have a District Court hearing.

4.13 The reference to "appeal" was wrong; as only a notice of hearing could be filed, not an appeal notice. In this instance Mr Calteaux and AHL promptly paid the fees and the matter was at an end. Coincidently, the money was paid on 19 July; the day Compliance said the process is still subject to appeal. Even if unaware of the payment when the appeal process was asserted, Compliance should have learnt of the payment within a short time and accepted there was no process that justified ongoing suppression of information.

4.14 However, this did not happen. Various explanations from different sources were provided to the ODT and internally, as to when the report would be released. These included 28 days (the time limit for filing a hearing notice), 56 days for an unexplained reason, insurance and HR considerations, and that a delay was best practice. In the end, the EPA had the last say. It did not release the report publicly on 8 July because Compliance had to consider the recommendations, adopt or make changes and then send out letters. Technically, this was the final step in the process, but it was reasonable to wait and see if the fees were paid. On

16 August the EPA provided redacted reports to the ODT, Councillors and Engineering; and probably others. The names of the AHL employees, and the ORC engineers were redacted. Why a delay of 30 days occurred suggests that the limit of 28 days for filing a hearing notice was probably adopted.

4.15 On 22 July the Chair and the CE met to discuss matters. The Chair had a list of questions to which he sought answers on behalf of the Councillors. The CE indicated she would not be able to answer all the questions, and she needed assurance that information provided would remain confidential. The Chair said he would have appreciated earlier advice on the AHL incident, a better relationship and an explanation on why information was not shared sooner. The CE responded that she had to manage ORC risk, insurance risk, the involvement of two directorates, the integrity of the regulatory function, and staff needs. Deliberately, she chose not to become appraised of the investigation details until 14 July and, in addition, investigation was not the Councillors' role.

4.16 There was another meeting on 27 July. Improved communication was discussed, and the concerns on both sides were aired, but without any meaningful progress.

4.17 The communication void and absence of transparency that occurred in relation to the Clutha River incident was significant. It began as a minor event, but quickly became a matter of some complexity that needed to be drawn to the attention of Councillors, as well as being a matter of public interest.

Conclusions and Recommendations.

Conclusions.

5.1 5.1 It was convenient to divide the incident investigation into three parts, but at this point it is necessary to look at the investigation as a whole, and reach conclusions on the more significant matters; what caused them and whether change is needed and attainable.

A Delay of 95 Days.

5.2 The first significant matter is the delay of 95 days before the rubble was removed and the riverbank remediated. As already acknowledged Compliance struggled when faced with this task on account of not having the required expertise. The obvious solution was to seek advice. The existence of a Chinese wall meant that Engineering could not provide advice, much less provide a remediation plan. Unfortunately, Compliance did not seek advice elsewhere; instead staff focused on engagement of the EPA, awaited delivery of the environmental report and eventually located a way to remove/remediate the incident site.

5.3 Time was of the essence, but not achieved. Environmental risk prevailed over a long period, to the embarrassment of the ORC. On the other hand, eventually AHL undertook the removal and remediation work and met expenses, Compliance supervised and the remediation was a success. Fortuitously, environmental damage was minimal. At interview the General Manager acknowledged that problems were encountered. It must be rare for one directorate to inherit the role of another directorate. The chance of a further failure of this kind is probably low.

No Evidence Provided.

5.4 This is the key factor that gave rise to the EPA finding that ORC engineers had led Mr Calteaux to believe he had permission to deposit demolition material in the Clutha River. Opportunities to provide their side of the story were not taken up. Engineering personal became convinced that only if details of the offender's evidence were provided was it safe for the three engineers to respond. This belief was mistaken. Investigators need not provide such details, and generally do not do so. Risk aversion prevailed at the expense of judgement. Sadly, the consequences were significant, particularly for the engineers who were harangued.

5.5 A raft of factors contributed to this outcome. Towards the end of May the EPA sought to interview the engineers. The ORC asked their insurer to appoint a local criminal lawyer. QBE said only a lawyer on their list could act. EPA advised that the time limit for delivery of their report was early July. Engineering decided to provide one written statement from the three engineers. A draft statement was prepared, but considered to be problematic. OIA requests to obtain Mr Calteaux's evidence failed. Three lawyers were appointed early in July to act for the engineers. Two were in the North Island and one in Queenstown. Telephone contact occurred with the three engineers, but to no avail. On 8 July time expired, when the EPA report was provided to Compliance.

5.6 While Engineering failed to ensure that the engineers' side of the story was told, these circumstances suggest it is highly unlikely a failure of this kind will be repeated. It was obvious that a "he said/we said" dispute demanded that the engineers' evidence be heard. Had a criminal lawyer discussed the situation with the engineers face to face, their evidence would surely have been provided.

A Communication Void/No Transparency.

5.7 It is difficult to fathom how and why advice concerning developments in the river incident were not communicated to Councillors. Initially it was a low level event. But, a day later allegations that implicated Engineering staff members emerged. Compliance recognised the existence of a conflict of interest. It could not investigate a matter when another directorate was implicated. Then the EPA was engaged, a significant development given that the Authority had only recently acquired the power to conduct investigations. This cluster at least warranted a mention from the CE to the Chair in April.

5.8 On 14 June the Compliance General Manager advised the CE at a one-on-one meeting that Engineering had declined invitations to be interviewed, and he could not understand why. At a similar meeting on 30 June the CE was told that Engineering had engaged a lawyer. If not earlier, matters certainly came to a head in early July. The EPA released its report to Compliance on 8 July. That the engineers had not provided evidence was noted; and recommendations were made for the issue of an education letter to the ORC, and warning letters to two engineers. There was another one-on-one meeting on 12 July to report the Compliance enforcement decisions. On 14 July the ORC warning letter was served on the CE by the Manager Compliance.

5.9 Finally, on 19 July following two ODT requests for information, the CE at 7.55 pm shared some details with Councillors and advised them to expect media articles. Then followed a hiatus of 30 days before redacted copies of the EPA report became more readily available.

5.10 The failures to remediate promptly, and to ensure evidence was provided, were due to mistakes made by Compliance and Engineering. The mistakes were significant, as were the consequences. But, the context in which both events occurred was out of the ordinary, and also complex to some extent. Genuine mistakes happen in a large organisation with a workforce of 260 people. What then matters most is whether lessons are learnt and remedial steps are taken.

5.11 The communication failure, and absence of transparency, is in another league. Good communication between staff and the CE; and also the CE and Councillors, is crucial in an organisation of this size and kind. Staff to CE communication occurred, but the blockage between the CE and Councillors was inexplicable. Such a failure cannot be put down to mistake, rather that the relationship between the CE and, the Chair and Councillors, was unwell, if not broken.

5.12 As for transparency, again the failure was serious indeed. The Local Government Official Information and Meetings Act,1987, begins with a statement on the purpose of the Act, namely "to increase progressively the availability to the public of official information held

by local authorities". What occurred in this instance was the antithesis of the statutory purpose. Advice and information was not shared willingly, nor accurately and promptly. ODT articles published following the release of some information speak for themselves; as do subsequent articles that covered aftermath issues and events. This coverage has been an embarrassment to the Council, at a time when positive council news should have featured.

Recommendations.

5.13 The initial resolution that gave rise to this inquiry stated that the writer was to inquire into ORC's handling of matters arising as a result of AHL depositing material in the Clutha River and provide recommendations as to any changes to ORC policies and procedures. The inquiry into how matters were handled revealed that mistakes were made, but mistakes that were unusual and which had little connection to the ORC policies and procedure documents.

5.14 The failure of Compliance to remove rubble and remediate as soon as possible was caused by a lack of expertise and not seeking advice at the onset. Recommendations concerning these aspects are not likely to serve any useful purpose. Such work is ordinarily managed by Engineering who do not require recommendations on basic issues of this nature.

5.15 Similarly, whether Engineering failing to ensure that the engineers' evidence was heard calls for recommendations is debatable. A judgement was required. The writer considers the correct answer was obvious, for the reasons explained. Insurance cover was a significant factor throughout the Engineering teams thinking. The standard requirement that an insured must not admit liability became a concern to some of the team, but realistically the engineers' evidence of what they had told the offender would not have breached this requirement. A more real problem was QBE's insistence that only lawyers on their panel would be briefed. QBE was meeting legal costs incurred during the investigation. Had Engineering insisted on briefing a local criminal barrister insurance cover would probably have lapsed. But, meeting this cost internally would likely have been justified, given the advantage in gaining expert local advice in haste.

5.16 Action is needed in relation to communication and transparency. Unfortunately, the problems exposed in July 2021 in relation to the Clutha River incident are not unique. Subsequent ODT articles referred to a rift between the staff/CE and councillors. Interviewees during the inquiry commented on the existence of a divide between staff and councillors. In essence it seems the problem is that staff think that councillors do not stick to their role of strategic direction and policy; and if monitoring performance councillors do not treat staff with respect. Councillors, however, consider that staff seek to influence strategy and policy; and as for communication that they are only told what staff wants them to know. If these perceptions are shown to be correct there are fundamental problems related to leadership, and culture.

5.17 The Local Government Act 2002 defines the responsibilities and roles of councillors and the CE; and very pragmatic advice is provided by the Auditor General, concerning problems and how best to manage them. Indeed, ''Managing the Relationship Between a Local Authority's

Elected Members and its Chief Executive", (July 2002), grapples with the very issues mentioned in the previous paragraph. The writer is reluctant to draft a recommendation based on unexplored perceptions, particularly when sound advice is readily available.

5.18 However, a number of suggestions or lessons are gathered below, some in the form of questions, for consideration and discussion:

- Compliance should have taken advice when confronted with a removal and remediation task for which the staff lacked experience.
- Engineering should have recognised that providing evidence from the engineers was crucial in a "he said/we said" context.
- Was the work and expenditure of Engineering when seeking to reopen the investigation and challenge the EPA findings realistic and justified?
- Was there adequate contact between the CE and senior staff representatives from Compliance and Engineering to review progress in relation to the incident when both directorates faced unusual issues?
- Should Engineering have engaged a local criminal barrister, irrespective of QBE's willingness to provide panel lawyers?
- A draft media policy document prepared by Compliance in October 2021 is to be commended for providing good guidance to staff on a range of matters, but the media obligations section is focussed on LGOIMA information requests; whereas in reality most media requests are made informally as was the case in July 2021. Should not informal requests be introduced before the existing formal request outline.
- Should the CE and the Chair establish a protocol to define matters that need to be communicated to Councillors.
- Does the communication and transparency problem between councillors and staff/CE require expert intervention to provide guidance on re-establishing a workable relationship?

Sir Graham Panckhurst

16 May 2022