



Final Report (Individuals De-identified)
Full investigation - *Ombudsman Act 1972*

Council	District Council of Tumby Bay
Ombudsman reference	2020/04920
Council reference	R21/2165, R21/5918 and R21/19350
Date complaint received	9 October 2020
Issues	Whether the council's response to reports of asbestos was unreasonable

Jurisdiction

My Office received a complaint on 9 October 2020. The complainant alleged that they had made multiple complaints over a period of 12-18 months to the District Council of Tumby Bay (**the council**) about a mound of asbestos. The complaint is within the jurisdiction of the Ombudsman under the *Ombudsman Act 1972*.

My Office has treated this complaint as a disclosure in accordance with the *Public Interest Disclosure Act 2018*. That disclosure attracted the protections of the *Public Interest Disclosure Act 2018*.

Section 16 of the Ombudsman Act provides that the Ombudsman must not entertain a complaint 'if it is made after 12 months from the day on which the complainant first had notice of the matters alleged in the complaint', unless it is proper to do so 'in all the circumstances of the case.'

It is alleged that the council failed to take adequate action when it was alerted to a report of asbestos at a site in Port Neill. The complainant does not appear to have had any contact with the council after 18 February 2019 and did not make a complaint to my Office until 9 October 2020. However, an error of this nature could result in environmental and health consequences. Due to the potential seriousness of the issue, I consider it is proper to investigate the complaint.

On 7 October 2021 the *Independent Commissioner Against Corruption (CIIPC Recommendations) Amendment Act 2021* and related amendments to other Acts came into force. Schedule 1 of the *Ombudsman Regulations 2020* provides:

- (1) The Ombudsman Act 1972 as in force before the commencement of Schedule 1 of the Independent Commissioner Against Corruption (CIIPC Recommendations) Amendment Act 2021 continues to apply in connection with—
 - (a) any complaint, report or investigation referred to in clause 70 of that Schedule; and
 - (b) a complaint made on or before 25 August 2021 under any of the integrity Acts

In light of this, as the complaint was received prior to 25 August 2021, the complaint has continued to be considered in accordance with the version of the *Ombudsman Act 1972* in force prior to 7 October 2021.

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from the council
- seeking further information from the council
- considering the *Environment Protection Authority Guidelines*
- considering the *National Environment Protection (Assessment of Site Contamination) Measure 1999 schedule B2*
- considering council policies
- preparing the provisional report and seeking the views of the parties
- considering the responses to my provisional report made by the District Council of Tumby Bay, the complainant and Environment Protection Authority
- making additional enquiries with the District Council of Tumby Bay in relation to responses to my provisional report
- preparing this final report.

Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in some cases.¹ It is best summed up in the decision as follows:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved ...²

Procedural fairness

I provided my provisional report to the complainant, the Chief Executive Officer (CEO) of the council and the Mayor of the council. I also provided the provisional report to the Chief Executive of the Environment Protection Authority (EPA) given its regulatory function in relation to environmental issues. I received a response from the complainant, the CEO of the council and the Chief Executive of the EPA.

I have carefully considered all of the responses and addressed those responses as I consider necessary in the body of this report.

The complainant in their response raised concerns about the confusion in relation to the location of the site of the asbestos. This appears to be in relation to the council's records that described multiple locations of where the asbestos was located. My provisional report outlined that as the council has referred to the same 'Port Neill site' in its responses it is my understanding that the same site was inspected by the council in September 2018 and

¹ This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at pp449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

² *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

February 2019 and that it was the same site that the asbestos material was removed from in December 2020.

The complainant also raised that in addition to reporting the asbestos over the phone, they sent an email to the council including photographs of the asbestos. The complainant has stated that they called the council after sending the email to confirm receipt. The complainant was unable to provide a copy of the email or specific dates of when the email was sent. My Office has made enquiries about whether the council has any record of receiving this email. The council was unable to locate any email from the complainant's email address. The council also referred the matter to its Information Technology provider to 'undertake a search of all current and former email accounts' to identify any emails that have been received by the council but may not have been recorded. The council has stated that it was unable to find any email from the email address provided from this process. My Office has therefore been unable to obtain evidence that the email was received by the council. In any event, I do not consider that this information would change my view that the council's response to the reports of asbestos was unreasonable or that this would change my recommendations. In light of this, I do not consider it in the public interest to take further action in relation to this issue.

The complainant also raised issues about the EPA. In their initial complaint received on 9 October 2020, the complainant stated that they had contacted the EPA to report asbestos at the Port Neill site. My Office made enquiries in relation to this allegation and the EPA had no records of the contact and therefore I had previously advised that I considered that an investigation into the EPA was not necessary or justified.

From the information provided by the council, the council only recorded that the complainant contacted the council on three occasions. The complainant stated that they had contacted the council 'many times mor[e] than three'. I have noted that in my provisional report, I found that it is unclear how many times the complainant contacted the council, however that I was satisfied that the complainant contacted the council at least three times. I do not consider that this information changes my view or that it requires me to change my recommendations.

The EPA's response to my provisional report stated:

- Overall the report recommendations will strengthen the council's approach to the management of asbestos generally, thereby reducing associated risks for its community.
- While the EPA is happy to provide feedback to the council as it develops its asbestos guideline there would also be value in the council consulting with SafeWork SA in developing this guideline, to ensure that safe operating processes for the management of asbestos by council employees are appropriately included.
- The South Australian Local Government Association (**the Association**) may also have resources to assist councils in developing appropriate and consistent asbestos management approaches, similar to this model policy from NSW:
https://nambucca.nsw.gov.au/files/Model_Asbestos_Policy_for_NSW_councils.pdf.

I have considered the EPA's response. My investigation did not find an error with providing adequate safety to council employees in managing asbestos risks. In light of this, whilst I consider the suggestions made by the EPA valuable, ultimately, the EPA's response did not persuade me to alter my recommendations. I have however written to the council communicating the EPA's suggestions provided to my Office. In response to this, the council has indicated that the procedures have been provided to SafeWork SA. The council also sought advice from the Association in relation to whether it had any similar resources to the Model Asbestos Policy for NSW Councils. The council has stated that the Association 'does not have a similar policy and [the Association] has no plans to develop one at this time.' I am pleased that the council has acted on the suggestions from the EPA. I will continue to monitor the implementation of recommendation one.

The council provided a response to my provisional report. The council agreed with my provisional recommendations. The council's response primarily involved the council's implementation of the provisional recommendations. The council confirmed that it has consulted with the EPA for advice on processes that should be implemented by the council to manage asbestos risks. While I have not been advised of the specifics of these discussions, I understand that the EPA suggested 'several minor amendments that will now be incorporated into the final procedures'. The council has provided my Office with its draft procedures the *Local Nuisance and Litter Control Act 2016 Procedure - Litter (identifying and measuring) (Litter Procedure)* and the *Local Nuisance and Litter Control Act 2016 Evidence Collection Procedure (Evidence Collection Procedure)*. The Litter Procedure provides a requirement that if it cannot be 'confirmed with certainty that asbestos/asbestos containing material is not present' the council must arrange for a sample to be collected. The Litter Procedure also appears to set out processes for managing asbestos risks.

In relation to my provisional recommendation two, the council has confirmed that it has organised for training of authorised officers to 'ensure they have the requisite knowledge and skills to competently assess and manage environmental health risks'. This was undertaken on 2 September 2021.

Whilst I acknowledge that the council has acted quickly to implement recommendation two, I consider it appropriate that the recommendation remains in my report and will obtain further confirmation of the training provided in due course.

Background

The complaint

1. The complainant made a complaint to my Office on 9 October 2020.
2. The complainant alleged that there was exposed asbestos near a beachside carpark within the District Council of Tumby Bay (**the council**) area.
3. The complainant alleged that they had repeatedly contacted the council and no action had been taken to remove the asbestos. The complainant alleged that they had contacted the council four times over 12-18 months and that they had discussed the matter with three different officers.
4. My Office commenced an investigation into the complainant's allegations and requested responses from the council to assist in the investigation.

First inspection

5. In September 2018 the complainant contacted the council about asbestos material within the council area. This contact was not documented by the council, however, council officer A has stated they remember taking the call.
6. The council confirmed that after the complainant made their complaint in September 2018, council officer A and council officer B, carried out an inspection of the site that included:
 - the identification of general litter
 - 'signs of erosion'
 - the removal of 'red bricks'.
7. The complainant contacted the council again on 11 October 2018 stating that asbestos was still visible at the site.

8. This contact was recorded on the council's customer request recording system as customer request CR18/792. That customer request recorded that council officer A left a phone message for the complainant on 19 October 2018 stating that '[council officer B] has visited site and visible asbestos has been removed - will organise posts/fence to restrict access to minimise further erosion'. This phone message appears to be the first time the complainant was notified of the inspection in September 2018.
9. The council has stated in correspondence to my Office that at the inspection in September 2018 there was 'no visible sign of asbestos' at the site. This appeared inconsistent with the customer request CR18/792 record that stated that 'visible asbestos has been removed.'
10. My Office requested clarification from the council as to whether the council had identified 'visible asbestos' at the inspection in September 2018. The council confirmed that no asbestos was identified or removed during the inspection and clean-up in September 2018. The council has stated that the reference to 'visible asbestos' being removed in the customer request CR18/792 was entered incorrectly by council officer A.
11. The council submits that as there were no visible signs of asbestos when the site was inspected in September 2018, no sample was taken to test if asbestos was present.
12. The pine post rails were constructed after the inspection in September 2018 in an attempt to 'minimise further erosion'. This decision to construct the pine post rails appears to be made in response to a discussion between council officer A and council officer B. There does not appear to be a council record of when this discussion occurred or when the pine post rails were constructed. However, it appears that the construction occurred sometime before 14 February 2019. The council already owned the pine post rails and the construction was carried out by council employees³.

Second inspection

13. On 13 February 2019 the complainant contacted the council again. The customer request CR19/147 recorded that the complainant had said they had 'called multiple times in the past 6 months regarding asbestos that has been dumped near the Port Neill Golf Club carpark'.
14. Council officer C appears to have contacted the complainant on 13 February 2019 to obtain the location of the site.
15. On 14 February 2019, council officer C inspected the site. They took photographs of the site and the customer request CR19/147 recorded that there were '2 to 3 x A4 size pieces of asbestos partially visible'.
16. Council officer C sent a text message to the complainant on 18 February 2019. The text message advised that they had taken photographs of the site and had spoken to their supervisor. The text message outlined that the supervisor would take the photographs to the next executive meeting.
17. My investigation has not located any further correspondence between the complainant and the council after council officer C sent that text message on 18 February 2019.
18. The matter was considered by the 'council executive officers'. The council executive officers concluded that the photographs 'indicated only general litter on the surface and

³ The work was undertaken by council employees and therefore there was no invoice for work undertaken. The only documentation provided by the council of the construction of the pine post rails is the photographs taken by council officer C on 14 February 2019.

- partially buried material'. Based on this consideration, the pine post rails that had been constructed were determined to be appropriate.
19. The council maintains that it was of the view that the photographs taken by council officer C presented 'no visible evidence of asbestos'. This appeared inconsistent with the customer request CR19/147 record that '2 to 3 x A4 size pieces of asbestos partially visible'.
 20. My Office requested clarification as to whether the council had identified asbestos during the inspection in February 2019.
 21. The council maintains that the comments about asbestos at the site recorded in the customer request CR19/147 are '[council officer C]'s opinion only'. The council maintains that 'there was no confirmation of asbestos' as no testing was undertaken. The council maintains that the photographs taken of the site 'do not indicate that there was asbestos material present such as to justify testing'.
 22. On 16 October 2020 council officer D stated in an email to an officer of the DEW⁴ that after council officer C inspected the site, it appears 'no further action has been taken by council since this time'. Council officer D determined that council officer C sought advice from a more senior level of council, however, that this advice was 'never received'.
 23. My Office made enquiries with the council as to why there was no further direction from the council after council officer C raised concerns. In response to these enquiries, the council stated that 'asbestos material became visible, overtime, due to erosion at the Site. However, prior to the erosion occurring, the information before the Council only indicated definitively that there was general litter at the Site.' Based on this assessment, the council believed the construction of pine post rails to minimise erosion was an appropriate action.
 24. The council has not provided my Office with any further documentation from 2018 and 2019 that records the reasons why it considered no further action was required. The council has confirmed that the decision to take no further action was discussed verbally.
 25. It appears that as the council believed that it had appropriately assessed that no asbestos was visible, it did not consider any further action was required between February 2019 and October 2020.

Complaints received

26. The council was able to identify two phone calls from the complainant recorded in the council's record management system on 11 October 2018 and 13 February 2019. There is also a previous phone call referred to in the council's customer request records that occurred sometime during September 2018.
27. Based on the evidence provided to my Office it is unclear how many times the complainant had contact with the council, however, I have satisfied myself that the complainant contacted the council at least three times.
28. The council has confirmed there were no other complaints about asbestos at this site from other members of the public.

Testing and removing the asbestos

⁴ Email received on 16 October 2020.

29. After the complaint was made to the Ombudsman on 9 October 2020, my Office made preliminary enquiries with the council, DEW and the EPA to determine which agency was responsible for removing the asbestos.
30. On 1 December 2020, the council formally responded to my enquiries confirming that it was of the view that removing the asbestos was its responsibility.
31. From 16 October 2020 until 3 December 2020, the council corresponded with the EPA and DEW representatives to:
 - determine the 'exact location' of the asbestos material
 - gain some advice on the appropriate action by the council
 - gain advice on removing the asbestos.
32. The council organised a sample of the material to be tested.
33. On 25 November 2020 the council was provided with the sample results that showed that 'chrysotile asbestos' was detected.
34. On the 26 November 2020 the EPA recommended to the council that the 'asbestos material be removed by a licensed removalist and disposed of at a licensed facility.'
35. The council organised the removal of 'any visible asbestos material' and the removal of 'partially buried' material. The council confirmed that 'all located asbestos material was removed'.
36. The council, after the removal of asbestos, sought the guidance of the Eyre Peninsular Landscape Board (EPLB). The EPLB has added 'clean fill material and some additional plantings appropriate to the area to minimise any further erosion'.

Source of the asbestos

37. The council determined that there was not sufficient evidence of illegal dumping in the circumstances. The source of the asbestos may have been from 'old beach shacks'.⁵ However, there is no confirmation of this as stated in an email from an officer of the EPA, that stated that 'no one has any actual evidence of this and it is only conjecture'.⁶ There also does not appear to be 'any historical evidence of any structures in this area'.⁷

Location

38. There have been multiple descriptions recorded of where the asbestos was located. This includes:
 - 'asbestos near the boat ramp at Port Neill'⁸
 - 'near the Port Neill Golf Club carpark'⁹
 - carpark 1 1/2 kms South of Port Neill at the edge of the golf course¹⁰
 - Approximately at '-34.127030°S, 136.347793°E'.¹¹

⁵ Included in an email from an officer of the EPA to an officer of DEW received on 10 November 2020.

⁶ Included in an email from an officer of the EPA to council officer A received on 26 November 2020.

⁷ Included in an email from council officer A to an officer of the EPA received on 25 November 2020.

⁸ Recorded on the customer request CR18/792.

⁹ Recorded on the customer request CR19/147.

¹⁰ By the complainant in their complaint to the Ombudsman on 9 October 2020.

¹¹ Included in an email from council officer D to an officer of DEW received on 16 October 2020.

39. Whilst these records describe the location of the asbestos differently, based on the evidence provided to my Office, it is my understanding that these descriptions are all referring to the same site.¹²

Legislation

40. The council has outlined that illegal dumping of asbestos is dealt with in accordance with the *Local Nuisance and Litter Control Act 2016*.¹³
41. The council has a *Regulatory Services Enforcement Policy 6.01* that manages environmental health concerns.¹⁴
42. The council confirmed that it did not have 'a specific policy or guideline for managing asbestos in the council area'.
43. The council has outlined that it was required to 'refer to EPA guidelines and the EPA, where necessary'. My Office has reviewed the EPA guidelines including:
- *Waste definitions Guideline*
 - *Guidelines for the assessment and remediation of site contamination*
 - *Wastes containing asbestos - removal, transport and disposal.*
44. The *Guidelines for the assessment and remediation of site contamination* section 11.7 provides:
- 11.7 Asbestos Guidance on the assessment of asbestos is provided in Schedule B2 of the ASC NEPM.
45. The *National Environment Protection (Assessment of Site Contamination) Measure 1999 schedule B2* section 11.2 provides:
- 11.2 Preliminary site investigation
As for all site assessments, the PSI should include a desktop study (including assessment of site history) and a site inspection. This should be carried out by a qualified and experienced assessor/competent person.
- As noted in WA DoH (2009a), asbestos contamination needs to be identified early in the assessment process and properly handled to ensure that disturbance does not result in dissemination of asbestos contamination and hence delays and additional investigation effort.
46. The *National Environment Protection (Assessment of Site Contamination) Measure 1999 schedule B2* section 11.2.2 provides:
- The site inspection should include a comprehensive assessment based on a grid-based walkover by a qualified and experienced assessor/competent person to determine whether visual indications of asbestos contamination are present. The assessment report should specifically comment on the presence or absence of asbestos material and the inspection method employed.
- The identified areas should be surveyed in more detail (noting condition and distribution) together with any suspect locations identified as a result of the site history investigations. After noting the size and condition of fragments, all visible asbestos should be removed.

¹² Whilst the Port Neill boat ramp appears to be in a different location to where the asbestos was removed in December 2020, as the council has referred to the same 'Port Neill site' throughout its responses to the Ombudsman, it is my understanding that the site inspected by the council in September 2018 is the same location as where the asbestos was removed in December 2020. The other descriptions provided appear to be referring to the same site.

¹³ The council has confirmed that in these circumstances, as there was 'insufficient evidence' of a breach of this Act by an individual, it does not appear relevant to the circumstances of the complaint.

¹⁴ My Office has reviewed this policy and as there does not appear to be sufficient evidence of a breach of the policy by an individual, it does not appear relevant to the circumstances of the complaint.

Where the site is thickly vegetated, then confidence in the visual inspection results will be lower. Where appropriate, some careful vegetation clearance may clarify the situation. The default assumption by the assessor should be that any suspect material contains asbestos and further investigation/appropriate management action initiated.

Where confirmation is required regarding the nature of suspect material, laboratory analysis is required. This should be undertaken by a National Association of Testing Authorities Australia (NATA) (or its mutual recognition agreement partners)-accredited laboratory in accordance with Australian Standard AS 4964 - 2004: *Method for the qualitative identification of asbestos in bulk samples*.

Soil contamination by free asbestos fibres may be deduced from the site history and, if suspect material is identified in the site walkover, confirmation of the presence or absence of fibres may be determined according to AS 4964-2004. Where significant amounts of free asbestos fibres may have been exposed over time, the immediate surrounding area should also be considered contaminated. If free fibres are detected, the focus should then be on management, as there is yet no validated method of reliably estimating the concentration of free asbestos fibres in soil.

A video and/or photographic log may assist with site documentation.

47. The *National Environment Protection (Assessment of Site Contamination) Measure 1999 schedule B2* section 11.2.3 provides:

Sampling

Sampling during a PSI is generally not recommended, since either an asbestos management strategy may be adequately defined without it or because it is evident that a DSI will be necessary. Limited sampling during the PSI may be appropriate, however, in the following circumstances:

- to confirm that suspect material contains asbestos

Whether the council's response to reports of asbestos was unreasonable

First inspection

48. The first inspection was undertaken by council officer A and council officer B in September 2018. That inspection was in response to a service request from the complainant alerting the council that there was asbestos at the site.
49. The council has not provided my Office with documentation of the inspection from September 2018. However, this inspection is referred to in the council's customer request record CR18/792 that recorded the council's actions after the complainant called again on 11 October 2018.
50. In response to the complainant's phone call on 11 October 2018 council officer A left a phone message alerting the complainant that an inspection had occurred in September 2018.
51. It is unclear what information was provided to the complainant as the customer request CR18/792 recorded that council officer A advised the complainant that '[council officer B] has visited site and visible asbestos has been removed - will organise posts/fence to restrict access to minimise further erosion'.
52. This record appears inconsistent with the council's response to my enquiries that there was no visible asbestos at the site in September 2018.
53. The council has responded to this inconsistency stating that this was incorrectly entered and that the documentation should 'correctly indicate that no asbestos material was visible and only general litter items were removed from the site during the inspection in September 2018'.

54. Council officer B has also confirmed there was no asbestos identified at the inspection in September 2018.
55. It is unclear to me, whether asbestos was identified during the inspection in September 2018. I find it problematic that the statement 'asbestos has been removed' was incorrectly entered into the council's record management system. I also note that there does not appear to be a record from the time outlining the reasons why the council was sufficiently certain that asbestos was not present.
56. The inspection in September 2018 occurred because a member of the public reported asbestos at the site. This suggests there was some evidence of material that could contain asbestos. For this reason, I query how council officer A and council officer B could have been certain that asbestos was not present, given that a member of the public was able to identify it. The council also does not appear to have made any further enquiries with the complainant about what they considered was asbestos and whether the council was inspecting the correct site.
57. I consider that the council could not have been certain that asbestos was not present at the site and therefore further action should have been taken for the following reasons that:
- the *National Environment Protection (Assessment of Site Contamination) Measure 1999 schedule B2* section 11.2.2 outlines that 'the default assumption by the assessor should be that any suspect material contains asbestos and further investigation/appropriate management action initiated'
 - the *National Environment Protection (Assessment of Site Contamination) Measure 1999 schedule B2* section 11.2.2 also outlines that 'where confirmation is required regarding the nature of suspect material, laboratory analysis is required'
 - given this is such a serious issue that has significant health and environmental consequences the council should have taken further action to ensure members of the public were not exposed to this risk
 - it is clear that the site is publicly accessible land which should have heightened the importance of requiring certainty about whether asbestos was present.
58. In light of this, I consider that the council should have taken further action in accordance with the *National Environment Protection (Assessment of Site Contamination) Measure 1999 schedule B2* section 11.2.2 and it would have been reasonable to suspect that asbestos was at the site and to act on that assumption. The council should have also taken a sample of the site and tested it to confirm whether asbestos was present.
59. The council has stated that on the basis that there was no asbestos visible, it considers that it took sufficient action to address the complainant's concerns. The council has stated that 'asbestos material was buried at various instances where the Council's officers attended the Port Neill site to investigate'.
60. It therefore appears that the council accepts that asbestos was likely present at the site in September 2018 however was buried. In light of this, even if I accept the council's statement that the asbestos was buried during September 2018 and was only uncovered later due to erosion, the council should have taken further action to confirm whether asbestos posed a risk to members of the public.
61. In the absence of testing the site and making further enquiries with the complainant about the asbestos, the council could not have been sufficiently certain that asbestos was not present.

62. In light of the above, I consider that the council's response to the report of asbestos in September 2018 was unreasonable and therefore consider the council acted in error for the purposes of the Ombudsman Act.

Second inspection

63. The second inspection of the site by the council occurred as a result of the complainant making another phone call to the council on 13 February 2019. In that phone call, the complainant raised concerns that asbestos had been dumped at a site in Port Neil and that they had called multiple times about this issue within the last six months.
64. This complaint was classified as requiring 'urgent action' and was escalated to council officer C. Council officer C appears to have called the complainant to obtain information about the location of the site. They informed the complainant that they would inspect the site the next day and would provide the complainant with 'details'.
65. It appears that council officer C inspected the site on 14 February 2019. Council officer C took photographs of the area and recorded that '2 to 3 x A4 size pieces of asbestos [are] partially visible' in the council record management system.
66. Council officer C then provided a text message to the complainant on 18 February 2019 stating that:
- sorry for not getting back to you sooner, I went and took photos of the dump site you referred to on the 13 February 2019. I have spoken to my supervisor and provide a copy of the photos, who will take them to the next executive council meeting [council officer c] DCTB.
67. It appears that after the inspection, council officer C provided the photographs to their supervisor, council officer A and that after this, council officer A provided the photographs and 'all documentation of the complaint' to the council executive officers.
68. The executive officers determined that 'only general litter on the surface and partially buried material' was present at the site and that no asbestos material was visible. They did not consider the photographs provided sufficient evidence to take further action. In light of this the council considered that the construction of the pine post rails was appropriate.
69. There appears to be some verbal discussion about this decision, however the council has not provided documentation of why the executive officers considered that no further action was required.
70. That decision by the executive officers does not appear to have been provided to the complainant. I consider that it would have been appropriate to have provided an update to the complainant that the council's executive officers had determined that no further action was required, given the seriousness of their complaint.
71. The council also maintains the view that the photographs taken at the inspection on 14 February 2019 do not 'indicate that there was asbestos material present' and that the 'material identified by council officer C was only confirmed as asbestos upon receipt of the sample results on 25 November 2020 from [...]'.
72. I consider that, based on the photographs of the site it was not clear that the presence of asbestos could be discounted. I cannot understand how the council relied on these photographs to determine that no further action was required especially when considered in conjunction with council officer c's opinion that they had identified asbestos at the second inspection. It appears that it was uncertain whether the material

at the site contained asbestos. Due to this uncertainty the suspected material should have been tested.

73. I find it very concerning that the council would decide not to test the site for asbestos after both the complainant and council officer C had identified what they believed was asbestos at the site. Council officer C also had recorded this in the council's records management system. The decision not to test the area to confirm whether asbestos was present appears contrary to the weight of evidence provided by the complainant and council officer C.
74. In light of this the council could not have been certain that asbestos was not present.
75. In accordance with the *National Environment Protection (Assessment of Site Contamination) Measure 1999 Schedule B2 section 11.2.3*, I consider that sampling should have been undertaken 'to confirm that suspect material contains asbestos.'
76. I note that the council has acknowledged that it should have been more responsive and has stated that council officer C's concerns 'should have triggered an internal process where an assessment could have been made about whether the material that council officer C considered was asbestos could be identified as such.'
77. The council has also accepted that 'thorough testing procedures at that time would have identified asbestos at the site'.
78. I acknowledge that the asbestos was removed and no longer poses a threat to members of the public. However, the complainant first alerted the council that asbestos was present in September 2018. The failure to take further action resulted in a significant delay in the removal of the asbestos until December 2020. I also note that the council only tested and removed the asbestos once a complaint was made to my Office.

Opinion

In light of the above, I consider that the council acted in a manner that was unreasonable within the meaning of section 25(1) of the Ombudsman Act in its response to reports of asbestos at the site.

Summary and Recommendations

In light of the above, my final view is that the council has acted in error in its response to reports of asbestos at the site.

I have considered whether any recommendations are appropriate in the circumstances. The council has previously stated that a policy review would be undertaken by April 2021 to ensure complaints that concern environmental health matters are accurately and appropriately managed. In its response to my provisional report, the council provided its draft procedures to facilitate this.

The council has also advised that its staff have undertaken training in relation to recommendation two. Despite this, I consider it appropriate that my foreshadowed recommendations outlined in my provisional report remain and that my Office continue to monitor implementation of my recommendations.

Therefore, under section 25(2) of the Ombudsman Act I make the following recommendations to remedy the error I have identified:

Recommendation one

I recommend (a) that the council's guideline:

- sets out clear processes to identify potential asbestos material and processes to confirm whether asbestos is present
- include a requirement that a sample be taken for analysis if the council cannot confirm with certainty that asbestos is not at the site

and (b) that the council consult the EPA for advice on what other processes should be included in its guideline to manage asbestos risks.

Recommendation two

I recommend that the council:

- organise training for officers who have risk management responsibilities to ensure that those officers are able to competently assess and manage environmental health risks appropriately.

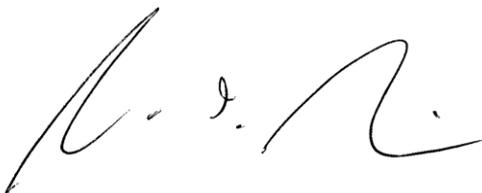
Final comment

In accordance with section 25(4) of the Ombudsman Act, I request that the council report to me by 15 December 2021 on what steps have been taken to give effect to my recommendations above; including:

- details of the actions that have been commenced or completed
- relevant dates of the actions taken to implement the recommendations.

In the event that no action has been taken, reason(s) for the inaction should be provided to the Ombudsman.

I have also sent a copy of my report to the Minister for Planning and Local Government as required by section 25(3) of the *Ombudsman Act 1972*.



Wayne Lines
SA OMBUDSMAN

24 November 2021