

## BOARD OF INQUIRY INTO THE MCCRAE LANDSLIDE

### Statement of Paul Willigenburg

I, Paul Willigenburg of 1 **Irrelevant & Sensitive**, retired, say as follows:

1. I am one of the registered owners of the property located at Unit 3, 613 Point Nepean Road, McCrae in the State of Victoria (**Property**). I have owned the Property jointly with my wife, Denise Willigenburg, since 24 August 2006.
2. The Property was our primary residence until 15 November 2022, when the second of two landslides occurred in the vicinity of the Property – the first having occurred the day before, on 14 November 2022 (together, **the November 2022 landslides**) – resulting in us being unable to occupy it. I discuss this further at paragraphs 10 to 25 below.
3. Following the landslide on 15 November 2022, Denise and I entered into a rental agreement with the registered owner of the property located at 607-609 Point Nepean Road, McCrae (**Rental Property**), to reside there whilst we were unable to occupy our Property. Denise and I resided at the Rental Property from 21 November 2022 to 17 October 2023, and again from 23 February 2024 to 14 January 2025.
4. On 14 January 2025, a further landslide caused damage to the Rental Property, such that we could no longer occupy it. I provide my recollection of the events of January 2025 at paragraphs 119 to 133 below.
5. I make this statement to provide the Board of Inquiry with my recollections of the landslides that occurred in the vicinity of the Property in November 2022 and which damaged the Rental Property in January 2025, along with my engagement with the Mornington Peninsula Shire Council (**the Council**) in the intervening period.

### The Property and the Rental Property

6. The Property is a two-storey, four-bedroom townhouse. It is located behind Unit 4, 613 Point Nepean Road and is hidden from view from Point Nepean Road. The front of the Property faces an east / south-easterly direction and consists of a private driveway that is accessible through Penny Lane.
7. The Property is positioned downslope from 10-12 View Point Road, McCrae, which is located at the top of the escarpment, and owned and occupied by Gerrard and Bronwyn Borghesi (**the Borghesi Property**). The rear of the Borghesi Property and a set of stairs on the escarpment lead to a small pocket of land. That pocket of land opens onto Penny Lane, which is located at the rear of the Property.

8. Annexed and marked "**PW-1**" is a photograph of the front of the Property taken on 30 April 2021 from the private driveway. Unit 4, 613 Point Nepean Road is visible in the foreground of the photograph.
9. The Rental Property is two doors down from the Property, separated by Penny Lane. It is a one-storey, four-bedroom house. The backyard of the Rental Property was, prior to 14 January 2025, directly in front of the property located at 3 Penny Lane, McCrae.

### **The November 2022 Landslides**

#### *Monday 14 November 2022*

10. On 14 November 2022, Denise and I were awake at approximately 5.00 am, preparing for a one week holiday to Tasmania. We were due to depart from Melbourne Airport to travel to Tasmania at around 11.30 am.
11. At around 6.30 am, Denise and I were in our bedroom on the second floor of the Property, when we heard a loud noise that seemed to me to come from the rear of the Property. The noise sounded to me like a tree trunk cracking in half.
12. Denise and I went downstairs to the first floor of the Property and into the living room at the rear of the first floor, where there were glass sliding doors that opened onto our back garden. I raised the blinds that were still closed at that time, and opened the sliding doors to inspect where the noise had come from. I could not see anything that would explain the noise we had heard and I did not notice anything unusual, so I closed the back doors and Denise and I returned to preparing for our trip.
13. We departed the Property later that morning.

#### *Tuesday 15 November 2022*

14. At approximately 11.00 am on 15 November, I received a telephone call from my son, Christopher, who had been residing at the Property with Denise and me. Christopher told me that there had been a major landslide at the Property at around 6.00 am that morning.
15. I was both shocked and confused by Christopher's phone call. I did not really understand what had occurred and my key concern was for Christopher's safety. Christopher told me that he was safe and went on to explain that:
  - (a) He had been inside the Property when he heard what sounded like something crashing into the rear of the Property. He went outside to inspect what had occurred and found that soil and debris had slid down the escarpment from the Borghesi Property and smashed through the fence at the rear of our Property.

- (b) The soil and debris had not entered our house, but there was a significant amount of mud and water present in the back garden of the Property. Ben Wells who, at that time, was the registered owner of 3 Penny Lane, McCrae, had been assisting Christopher to sweep some of the mud and water out of the Property throughout the course of the morning.
  - (c) Several representatives from the Victoria State Emergency Service (**Vic SES**) attended the area shortly after the landslide, and one of those representatives told Christopher that he should take our dog and evacuate the Property as soon as possible.
  - (d) Around mid-morning, just prior to Christopher phoning me, Benjamin Essing, a member of the Council's Statutory Building Team, inspected the Property and issued Christopher with an Emergency Order prohibiting occupation of the Property (**the First Emergency Order**). As a result, Christopher had arranged to stay with our eldest son, John Paul, that night.
  - (e) Another representative from the Council, Andrew Joseph, who I now know was the Resilience and Recovery Coordinator for the Council, had advised Christopher that the Council would hold an emergency meeting for residents affected by the landslide the following morning, in the driveway of 2 Penny Lane, McCrae. The meeting was intended to be an information session for affected residents, to discuss what had occurred and what the next steps would be.
16. Immediately after that phone call, Christopher sent to me, via text message:
- (a) a video recording that he had taken with his mobile phone, of the damage to the fence at the rear of the Property. The video showed the debris in the backyard of the Property and a steady stream of water and mud flowing down the escarpment. Annexed to this Statement and marked "**PW-2**" is a copy of that video recording.
  - (b) a photograph of the First Emergency Order dated 15 November 2022, signed by Mr Essing. The Order stated that occupation of the Property was prohibited and that "*evidence of soil stabilisation on the land*" was to be provided "*to the satisfaction of the Municipal Building Surveyor*". Annexed to this Statement and marked "**PW-3**" is a copy of the First Emergency Order.
17. My understanding of the First Emergency Order was that it prevented me and my family from occupying the Property. I did not understand the First Emergency Order to require me to take any action in relation to the Property, because the landslide had not originated from my Property. The landslide had occurred on or around the Borghesi Property and caused soil and debris to slide down the escarpment.

18. In the weeks that followed, I asked Claudio Flores, Municipal Building Surveyor for the Council, if I was required to take any action in relation to soil stabilisation, as stated in the First Emergency Order, and Mr Flores said words to the effect of "*no, don't worry about that*". I do not recall exactly when I spoke with Mr Flores, but it is likely that I phoned him after I returned to McCrae from Tasmania on 21 November 2022.

*16 November 2022*

19. On the morning of 16 November 2022, I received a telephone call from Christopher who told me that he and John Paul had attended a meeting of local residents in the driveway of 2 Penny Lane, McCrae. Christopher told me that the meeting was conducted by Mr Joseph and that there were several attendees including:
- (a) Mr and Mrs Borghesi;
  - (b) John D'Helin (owner of 14-16 View Point Road, McCrae) and his son Julian D'Helin;
  - (c) Jacinta Archer (owner of Unit 1, 613 Point Nepean Road, McCrae);
  - (d) Louise Buckley (owner of Unit 2, 613 Point Nepean Road, McCrae);
  - (e) Jonathon McLean (son of the owners of 2 Penny Lane, McCrae);
  - (f) representatives from the Vic SES; and
  - (g) representatives from Victoria Police.
20. Christopher told me that, during the meeting, he learned the following:
- (a) Prior to the landslide on 15 November 2022, a smaller landslide had occurred on 14 November 2022, which displaced an irrigation system located underneath a set of stairs at the rear of the Borghesi Property. Those stairs lead down the escarpment. The displacement of the irrigation system had caused water to flow into the escarpment for over 24 hours before it was stopped by South East Water, and this had contributed to the landslide on 15 November 2022. I surmised from this that the noise I had heard on the morning of 14 November 2022 was the initial landslide.
  - (b) The irrigation system had been installed by Mr and Mrs Borghesi at an earlier point in time, to water the vegetation on the escarpment. I did not know, prior to this conversation, that Mr and Mrs Borghesi had arranged for the installation of an irrigation system on the escarpment.

- (c) There had been a significant amount of rainfall in the area in the days preceding 14 November 2022. That rainfall may have contributed to the landslides on 14 and 15 November 2022.
- 21. I do not now recall whether Christopher told me who specifically provided that information to him. In any case, Christopher went on to relay to me the following additional points of discussion from the meeting:
  - (a) First, John D'Helin told Mr Joseph and the other meeting attendees that, on several occasions prior to 15 November 2022, he had reported to the Council that there were drainage issues at the top of the escarpment on Prospect Hill Road and on View Point Road. I was not aware of any drainage issues at that point in time.
  - (b) Mr Joseph told the attendees that the Council intended to engage geotechnical specialists to determine what works were required at and around the landslide site, to ensure the safety of the houses affected by the landslides. This would need to occur before we could return to our Property. I do not now recall whether Christopher told me which houses, aside from our Property, had been affected by the landslides.
  - (c) Mr Borghesi told the attendees that he had obtained the appropriate permits for all works that he had undertaken on the escarpment. He confirmed he would contact his insurer to arrange for an independent inspection of the landslide site, and if it was determined that any works he had undertaken had caused the landslides on either 14 or 15 November 2022, he would pay for the works required.
- 22. Although I was still shaken by the news of the landslide, I was satisfied, based on my conversation with Christopher, that the Council was taking steps to ascertain what works would be required to make the area safe enough for us to return to our Property, and that Mr Borghesi was cooperating with the Council. As such, I remained in Tasmania with Denise, and turned my attention to arranging alternative accommodation in McCrae for my family and me. We did not, at that time, know how long we would be displaced from the Property.
- 23. Between 16 and 20 November 2022, I made phone calls to:
  - (a) CHU Insurance (CHU), the insurer for the Body Corporate of the complex that the Property is a part of, to enquire whether CHU would pay the rent for any temporary accommodation I was able to secure. The person I spoke with from CHU confirmed CHU would do so.
  - (b) Several real estate agents operating in the McCrae area to enquire about available rental properties.

(c) Mr Wells who, at that time, was the Property Manager for the Rental Property which was being used as a holiday rental.

24. Through Mr Wells, I was able to arrange a lease of the Rental Property and I moved into the Rental Property with Denise and Christopher, when Denise and I returned from Tasmania on 21 November 2022.
25. At approximately 10.15 am on 20 November 2022, Christopher sent me two photographs of the backyard of the Property, which showed the collapsed fence at the rear of the Property and the soil and debris that had entered the backyard following the 15 November 2022 landslide. Christopher telephoned me to tell me that he was at the Property moving some of our belongings from it into the Rental Property. Annexed to this Statement and marked "PW-4" are the two photographs that Christopher sent to me.

#### **Engagement with the Council between December 2022 and June 2023**

26. Following my return from Tasmania, Mr Wells told me that, in addition to the Council engaging a geotechnical engineer to assess the affected area, the Council had issued Mr and Mrs Borghesi with an Emergency Order which required them to arrange another geotechnical assessment of the landslide site. I do not recall specifically when I spoke with Mr Wells though it was likely in the week of 21 November 2022.
27. Throughout December 2022, I liaised with Mr Essing and Mr Flores from the Council in relation to the timing of the geotechnical reports that the Council and Mr Borghesi were obtaining, and the recommendations arising from them. My primary concern was that any works required to enable us to move back into our Property would be undertaken in a timely manner.
28. My communications with Mr Essing and Mr Flores throughout December 2022 initially gave me confidence that the Council was taking all necessary steps to ensure that I would be able to re-occupy my Property. However, by mid-2023, Mr Essing and Mr Flores had become less responsive to my requests for updates, and there were ongoing delays with reviews of the geotechnical reports and commencement of the works the reports recommended. My confidence in the Council's commitment to ensuring that Denise and I and other displaced residents could return to our respective homes was waning.
29. I discuss these matters in more detail below.

#### *December 2022 to March 2023*

##### December 2022

30. On 1 December 2022, Mr Essing sent an email to me and Mr Flores, referring to an email I had sent to Mr Joseph on the same date relating to "the Emergency Order issued". Mr Essing's

email confirmed that the Emergency Order would remain in force until "*such time as it is complied with to the satisfaction of the Municipal Building Surveyor*". He stated that the Council had not yet received the geotechnical report it had commissioned, and that he and Mr Flores would review the report once they received it, before advising whether it was safe for me to return to the Property.

31. I have not located a copy of the email that I sent to Mr Joseph, though I surmise, from the email I received from Mr Essing, that I had enquired whether the First Emergency Order remained in force.
32. On or around the same date, I had a telephone conversation with Mr Flores in which he told me that the Council had engaged Cardno Geotechnical Experts (**Cardno**) to prepare the geotechnical report.
33. A few days later, on 5 December 2022, Mr Essing sent me a further email in which he advised that Mr Borghesi had until close of business that day to submit the geotechnical report he had commissioned, to the Council. Mr Essing named CivilTest Pty Ltd (**CivilTest**) as the geotechnical firm preparing that report and confirmed he would provide me with an update once he received more information.
34. On 7 December 2022, Mr Essing sent me an email confirming that the Council had received both geotechnical reports from Cardno and Civil Test. Mr Essing stated that he could not release the reports to me as a peer review of the reports was pending, and various officers and departments within the Council were also reviewing the reports. He confirmed that he would let me know when the reports could be released.
35. Given that the Council had received two geotechnical reports in relation to the affected area, and Mr Essing was communicating with me frequently, I was satisfied that the appropriate steps were being taken to deal with any damage caused by the November 2022 landslides. I understood the reports would propose certain rectification works for the affected area, which would need to be undertaken before I could return to my Property, and that this would take some time, but I was pleased that the process seemed to be playing out in a timely manner.
36. Annexed and marked "**PW-5**", "**PW-6**" and "**PW-7**" respectively, are copies of Mr Essing's emails to me dated 1, 5 and 7 December 2022.
37. Around two weeks after receiving Mr Essing's 7 December 2022 email, I telephoned Mr Flores to ask for an update on the status of the review of the reports. Mr Flores told me that another contractor was reviewing the recommendations made in the CivilTest report. I do not recall the specifics of that conversation but on 20 December 2022, I sent Mr Essing an email stating:

*Claudio advised on Friday that the works plan submitted by Gerry of View Point Road is to be reviewed by an independent contractor.*

*Is this underway? If so how long might this take?*

*As I mentioned on Friday there are a number of other residents who are anxious for the slope to be made safe.*

38. I was beginning to become concerned that the review of the reports was taking longer than I had expected it would take, and I had not been made aware of any proposed works for the affected area or the timing of those works. I knew that it was unlikely any work would be undertaken over the Christmas / New Year period, and I was becoming anxious that this would further delay our return to the Property.

39. Mr Essing responded to my email on the same date, stating:

*Yes I believe that to be the case that the proposed contractors methodology for the works has just as of Friday been justified / supported by an independent Geotechnical Engineer, however the Shire's review remains pending in the context of stage 1 works to Penny Lane in the first instance and further feedback to the other two stages proposed...*

40. Mr Wells had told me in a conversation, at around the same time, that CivilTest had developed a three-stage plan for rectification works of the affected area. I understood Mr Essing's email to be referring to those works, but I did not have a thorough understanding of what the proposed works would involve.

41. Copies of my emails with Mr Essing on 20 December 2022 are annexed to this Statement and marked "PW-8" and "PW-9" respectively.

42. On 21 December 2022, Mr Wells forwarded to me an email that he had received from Mr Essing the day before, which stated that the Council had:

*... recently received a methodology plan for three stages of works proposed to make safe in the interim and to provide more permanent longer term stabilisation to the land slope. At this stage the plan is pending review by Cardno Geotechnical experts and Shire Engineers.*

43. Mr Essing's email to Mr Wells provided the following summary of the three stages of proposed works (3-Stage Plan):

*Stage 1 works proposed for Christmas / New Year break consists of clearing vegetation/debris in Penny Lane to make way for 4 tonne of rocks berm within 10-12 View Point Road property boundary to stabilise / prevent further soil slippage from the upslope region.*



*Stage 2 works include construction of a Gabion Wall in early 2023 subject to Planning Approval after removal of debris at the toe of the slope and along the slope followed by engineered fill finished to a 25 degree slope.*

*Stage 3 Long term stabilisation proposed for first quarter of 2023 under dry conditions, installation of new retaining structures to the head scarp, restoration of a walkway, back filling of tension cracks and re-vegetation under the supervision of a Geotechnical Engineer. (sic)*

44. My reaction to receiving Mr Wells' email was mixed. I was pleased that there was finally a plan in place to stabilise the area affected by the landslides. However, I was frustrated that I had not received that level of detail from Mr Essing, despite making enquiries of him on 20 December 2022.

45. On 22 December 2022, I sent an email to Mr Essing to express my frustration. I stated:

*It seems we get no information but our neighbours do*

*...*

*We are both pissed off: I'm hearing the person on the hill has got rid of his contractor: too expensive or not prepared to do his bidding.*

*I want to say much more but need to be careful as we don't know who to trust anymore.*

*No plans: no detail : no timings: just some proposals.*

46. On 23 December 2022, Mr Essing responded to my email stating that the Council was doing everything it could to enable us to return to our Property as soon as possible. He reiterated to me the information that Mr Wells had forwarded to me on 21 December 2022.
47. Copies of the email from Mr Wells dated 21 December 2022, my email to Mr Essing on 22 December 2022, and Mr Essing's response on 23 December 2022 are annexed to this Statement and marked "PW-10", "PW-11" and "PW-12", respectively.

#### January 2023

48. In early January 2023, I telephoned Mr Flores to request an update on when the 3-Stage Plan devised by CivilTest would be implemented. Mr Flores told me that Cardno was considering the 3-Stage Plan and once they approved it, the next step would be for design documentation to be drawn up so that the Plan could be effected.
49. By late January 2023, I had not received any confirmation or communication from the Council as to whether the 3-Stage Plan had been approved or not, and no works had commenced in

the area near the Property. Accordingly, on 27 January 2023, I sent an email to Mr Essing requesting an update and stating:

*10 weeks locked out of our house: whilst we expect the process to take some time at least we could have the plan approved by now.*

50. I did not receive any response from Mr Essing nor any other contact from the Council representatives I had been dealing with in January 2023.
51. In or around mid-January 2023, Mr D'Helin sent an email to Councillor, Antonella Cell, from the Council, copying me and Mr Wells, and requested a meeting to discuss the landslides that had occurred in November 2022 and the fact that no action had been taken to ensure the safety of the properties surrounding the landslide site. Ms Cell agreed to meet with us on 17 January 2023, and the meeting took place at Mr D'Helin's house.
52. During the meeting, both Mr D'Helin and I told Ms Cell that we were becoming frustrated by the lack of action being taken by the Council to make the landslide site safe. Ms Cell told us that she would take our comments back to the Council, but that she could only confirm for us, whether or not the Council staff we had been dealing with had followed Council protocols in their communications and information sharing with us. My impression of the meeting was that Ms Cell could not take any steps to assist us in ensuring the Council took steps to make the landslide site safe enough for the surrounding properties to be occupied. I do not recall whether Ms Cell provided us with any further response after the meeting on 17 January 2023.

#### February 2023

53. On 4 February 2023, I sent an email to Mr Kendrick Koa from CHU, in which I had pasted a series of questions that had been posed to the Council and the Council's answers. I do not now recall whether I asked the questions of the Council or whether the questions and answers were provided to me by someone else, but I wanted to ensure Mr Koa and CHU were aware of the information the Council had provided.
54. One of the questions posed to the Council was whether the cause of the November 2022 landslides had been established and whether measures would be put in place to ensure it did not occur again. The Council's response to that question was that it could not ensure a landslip would not occur again given the geology of the soil in the area. The Council otherwise confirmed that:
  - (a) Cardno's review of the 3-Stage Plan would be completed within two weeks, but that timeframes for the work, once approved, were still unknown.
  - (b) Mr Borghesi had engaged Maw Civil Group (**Maw Civil**), a construction company, to undertake the works proposed in the 3-Stage Plan.

55. A copy of my email to Mr Koa dated 4 February 2023 is annexed to this Statement and marked "PW-13".
56. In early to mid-February 2023, I noticed that there was a large wet patch underneath a platform that was located around 75% of the way up the escarpment toward the Borghesi Property. The remaining area had started to dry out after the November 2022 landslides, but that particular patch of land remained very wet. Given I was aware that Mr D'Helin had already brought drainage issues to the Council's attention at the 16 November 2022 meeting, I was concerned the wet patch may have something to do with either the drainage issues, the November 2022 landslides, or both.
57. On 13 February 2023, I sent an email to Mr Flores stating that I had been pleased to hear from Mr Essing that the review of the 3-Stage Plan was due to be completed that day. I do not recall speaking with Mr Essing and I have not located any email that I received from Mr Essing on that date. However, my email to Mr Flores suggests I received some communication from him. In any case, I went on to ask Mr Flores a series of questions about the review, and to advise Mr Flores of a *"significant wet area around and underneath the platform at the top of the slope"*. I told Mr Flores that it had *"been there for a while now"* and attached photographs of the same.
58. On 14 February 2023, Mr Flores replied to my email, confirming that the review of the 3-Stage Plan had been completed and the Plan was considered acceptable. Mr Flores stated that the next step was for Mr Borghesi to arrange for design documentation to be drawn up. That documentation would also need to undergo a review before any works would commence. I did not know why Mr Borghesi, rather than the Council, was responsible for arranging design documentation to be drawn up, but I thought the likely reason was that the landslide had originated from the Borghesi Property.
59. Mr Flores otherwise confirmed that he would make enquires about the wet patch of land that I had brought to his attention. I did not receive any further correspondence from Mr Flores about the wet patch.
60. Copies of my email to Mr Flores on 13 February 2023, and Mr Flores' response of 14 February 2023 are annexed to this Statement and marked "PW-14" and "PW-15" respectively.
61. I was, at this point in time, becoming increasingly frustrated at the time it was taking for any works that would ensure the safety of the landslide site to commence. I had not been provided with copies of the CivilTest or Cardno reports, and was entirely reliant on the information Mr Essing and Mr Flores were providing to me.
62. In or around mid-February 2023, I also had several conversations with Mr Wells, Mr D'Helin and Mr Jon McLean (owner of 2 Penny Lane, McCrae), in relation to the status of the 3-Stage Plan. I do not recall the specifics of those conversations, but I remember that my neighbours

were equally frustrated with the length of time being taken for any works to commence in the affected area.

63. During those conversations:
- (a) I told my neighbours about the email I had sent to Mr Flores drawing his attention to the wet patch and the fact that I had not received any response.
  - (b) Mr D'Helin reiterated that he had previously raised with the Council that there were drainage issues on View Point Road.
  - (c) Mr Wells told us that water continued to run near his property and he was concerned about it.
  - (d) Mr D'Helin and Mr McLean told us that, in February 2021 and June 2022, Mr and Mrs Borghesi had removed a large gum tree from the escarpment, and cleared land and vegetation from the escarpment. They had also modified the stairs located at the rear of the Borghesi Property, which lead down the escarpment, throughout 2022. This included installing an additional platform next to the existing platform at the top of the stairway, and slowly replacing the old timber frames of the stairway with new timber.
64. I did not know, prior to this time, that Mr and Mrs Borghesi had undertaken any works on the escarpment. I began to worry that there was a connection between the drainage / water issues we had all noticed, the works undertaken on the escarpment by Mr and Mrs Borghesi, and the landslides that had occurred on 14 and 15 November 2022. However, given that I had not yet received the geotechnical reports, nor any information from the Council as to the cause of the landslides, I could only speculate.
65. On 17 February 2023, Mr Wells forwarded to me, Mr D'Helin and Mr McLean, an email that he had sent to Mr Essing and Mr Flores that day, to advise them that:
- (a) There was "*considerable water*" running from View Point Road onto Penny Lane and being collected in the drainage system at the back of his property. That water had been running continuously since November 2022.
  - (b) He had noticed signs that the water was running under the soil on the land where the landslip had occurred.
  - (c) He was concerned that the surrounding residents had not yet been made aware of the content of the geotechnical reports the Council and Mr Borghesi had commissioned and / or whether the cause of the November 2022 landslides had been identified.

66. On 21 February 2023, Mr Wells sent another email to me, Mr D'Helin and Mr McLean, stating that he had not received any response from the Council to his email and had therefore lodged the drainage problem as a complaint with the Council online.
67. Mr Wells' emails to me dated 17 and 21 February 2023 are annexed to this Statement and marked "PW-16" and "PW-17", respectively.
68. I received no further communications from the Council about the 3-Stage Plan or drainage / water issues in the area in February 2023.
69. In late February 2023, I received a report prepared by Logocon, a structural engineering company that CHU had engaged to report on the landslide. I understood, from conversations with CHU representatives, that CHU had obtained the report to consider the insurance position in relation to my Property and other affected properties in the same complex. The Logocon report made comments about the construction on the slope having contributed to the November 2022 landslides.
70. I did not really understand what this meant at the time I reviewed the report, and I recall that I asked Mr Wells about it. Mr Wells explained to me that construction in this context referred to any natural or unnatural works that had occurred on the escarpment. I found this interesting as it was information that I had not previously received, but in any case, I understood that CHU would review the report and use it to consider next steps in relation to our insurance claim with them.

#### March 2023

71. On 1 March 2023, Mr Wells forwarded to me, Mr D'Helin and Mr McLean an email that he had received from Brenden Trebilco, a Civil Engineer, Drainage, employed by the Council, in response to the email Mr Wells sent to the Council on 17 February 2023, referred to at paragraph 65 above. The email confirmed that "*drainage works, including installation of new pits and pipes and renewal of the kerb*" would commence shortly. It did not specify where those works would be undertaken. The email stated:

*The landslip issue is definitely a complicated one but the drainage works should definitely help resolve some of the overland flow issues off the infrastructure.*

72. In his email to us, Mr Wells stated:

*... I have a sense from reading below that they feel it has certainly contributed to the slide and hence the immediate response.*

73. Mr Wells' email added to my suspicion that the drainage / water issues that my neighbours and I had raised with the Council had in some way contributed to the November 2022 landslides.

74. On the same date, I sent an email to Mr Essing and Mr Flores asking for an update on the timing for implementation of the 3-Stage Plan. By this point in time, I had been displaced from my Property for approximately 14 weeks and I was very concerned that the works would be further delayed with the onset of autumn, followed by winter and wet weather.
75. I did not receive any response from the Council to my 1 March 2023 email.
76. The email from Mr Wells to me, and my email to Mr Essing dated 1 March 2023 are annexed to this Statement and marked "PW-18" and "PW-19" respectively.

#### **Engagement of McGuinness Legal, May 2023 – April 2024**

77. My communications with the Council in April and May 2023 were limited. I had stopped contacting Mr Flores and Mr Essing to request updates, because I had lost confidence in the Council's commitment to remediating the affected area for residents to return to their homes. I saw that a Council employee was visiting the affected area almost daily, and appeared to be inspecting the escarpment. On some occasions, I saw the worker looking up at the slope from Point Nepean Road and taking photographs of it, and on other occasions, I saw him enter the restricted area and walk to the back of Mr McLean's property. I do not know what the worker was doing on Mr McLean's property. However, no works had commenced around the affected area and the Council had not provided me with any updated information as to the status of the 3-Stage Plan or any other proposal that would enable me to return to my Property.

#### *CHU determination*

78. On 5 May 2023, Mr Koa from CHU sent an email to me and Mr McLean to advise that CHU had reviewed the geotechnical report prepared by Civil Test and the report prepared by Logocon. Mr Koa stated:

*Logocon's report states that the preliminary slope stability analysis indicates that the proximate cause of the slope failure on the neighbouring site is inadequate construction of the slope at an excessively steep angle beyond the safe slope angle making the slope unstable and susceptible to failure. The inadequate construction of the slope has resulted in the eventual failure.*

...

*As such, I regret to advise that we are unable to pay the claim as the damage is caused by factors outside the policy terms.*

79. A copy of Mr Koa's email to me dated 5 May 2024 is annexed to this Statement and marked "PW-20".
80. I began to panic when I received Mr Koa's email because:

- (a) there had been no progress with the works required to make the area safe enough for us to return to our Property, such that we did not know how long we would continue to be displaced from our Property; and
- (b) CHU declining our insurance claim meant that Denise and I would be liable to repay the rent that CHU had covered for the Rental Property from 21 November 2022 onwards. We would also be liable to continue to pay rent moving forward, for an indefinite period of time. Rent was around \$4,000 per month.

81. I phoned the Body Corporate Manager, John Bowers, almost immediately after receiving Mr Koa's email on 5 May 2023, and told him that CHU had declined our insurance claim. Mr Bowers was sympathetic and told me that the Body Corporate would appeal CHU's decision. I do not know the exact date that Mr Bowers commenced the appeal process, but I recall that it was very quickly after 5 May 2023.

*Decision to engage McGuinness Legal*

82. The CHU decision, coupled with the lack of action from the Council, prompted my sons to encourage me to seek legal advice. I was unsure what a lawyer could assist us with, but I was feeling as though I could no longer trust the Council to take the steps necessary to ensure that Denise and I would be able to return to our Property. We were about to be significantly out-of-pocket given that CHU was no longer paying our rent, and there was no planned date for us to return to our Property.
83. On 8 May 2023, Denise and I engaged the services of Paul McGuinness OAM, of McGuinness Legal. I do not recall the date that we first met with Mr McGuinness, but on 14 June 2023, I instructed McGuinness Legal to send a letter to Mr Flores requesting copies of the geotechnical report prepared by Cardno, which, by that time, had changed its name to Stantec Incorporated (**Stantec**). On or around the same date, Mr McGuinness told me that he had received a telephone call from Mr Flores to advise him that the letter had been referred to the Council's legal team. I have not been able to locate a copy of the 14 June 2023 letter.
84. In the period between late May and early June 2023, I also observed the Council undertaking works on the drainage system on View Point Road. I understood these works to be the works foreshadowed in the email from Mr Trebilco to Mr Wells on 1 March 2023, which I have referred to at paragraph 71 above. However, I had not seen any other works commence around the landslide site. To the best of my knowledge, neither the Council nor Mr Borghesi had made any progress in arranging design documentation to be drawn up for implementation of the 3-Stage Plan.
85. Accordingly, on 28 June 2023, I instructed Mr McGuinness to send a letter to Mr Flores that referred to the 14 June 2023 letter and the telephone call he received from Mr Flores in

response. The letter stated *"You will appreciate that this matter is now critical and requires Council's response"*. It also requested a teleconference.

86. On 29 June 2023, Mr McGuinness provided me with an email he had received from Mr Flores, stating that the Council was under no obligation to disclose information to me. He suggested that I make an application for the information I was seeking through the Council's Freedom of Information process. He noted that Stantec was peer reviewing a site stability geotechnical report that Mr and Mrs Borghesi had provided and that the review could either result in approval of the proposed design or alterations being made to it. He could not provide a date by which the works would commence.
87. I did not know whether Stantec was still reviewing the CivilTest report, or whether Mr Flores' email was referring to another report that Mr and Mrs Borghesi had obtained. In any case, I took Mr Flores' comments to mean that there was still no approved plan in place and no timeframe for me to return to my Property.
88. On 12 July 2023, I instructed McGuinness Legal to send:
  - (a) A letter to Mr and Mrs Borghesi requesting copies of the geotechnical reports they had obtained and the details for their insurer. The letter noted that we intended to engage a geotechnical engineer to confirm the appropriateness of proposals to make the area around our Property safe and that we would seek payment from them of the costs associated with obtaining that report.
  - (b) A letter to Mr Flores which reiterated our request for the geotechnical reports the Council had obtained in respect of the affected area. The letter stated that, as impacted parties, it was appropriate that we have access to information about securing the area to make it safe for residents.
89. On or around the same date, I instructed McGuinness Legal to engage AS James, a geotechnical engineering firm, to prepare a report for us, on the impact of the November 2022 landslides on and around our Property and works that would be required to make the area safe enough for us to move back into the Property.
90. Shortly after 12 July 2023, Mr McGuinness told me that Mr and Mrs Borghesi had provided him with the contact details for their insurer, RACV Insurance (**RACV**), and, on 25 July 2023, I instructed McGuinness Legal to send a letter to RACV requesting the geotechnical report that Mr Borghesi had commissioned. I cannot recall whether RACV responded to that request or whether I received a copy of the CivilTest report at that time.
91. The Council did not respond to the 12 July 2023 letter and so, on 26 July 2023, I instructed McGuinness Legal to send a further letter to Mr Flores asking for a response within 7 days.



The letter asked Mr Flores to identify "*what technical report support work has been done and will be done*" and to provide a timeframe for any such works, amongst other things.

92. On 3 August 2023, Mr McGuinness sent me an email that he had received from Kunal Sood, the Senior Legal Counsel for the Council, in response to the 12 and 26 July 2023 letters. The email reiterated that the Council was "*unable to comply with your "request for information" in the manner proposed*" and noted I could make an application under the "*Freedom of Information Act 1982*".
93. On 24 August 2023, Mr McGuinness sent me a further that he had received from email from Mr Sood, stating:

*Conscious of the inconvenience caused to your clients due to the temporary dislocation, we are constantly reviewing the situation and considering if there is any change of circumstances that warrant the lifting of the emergency order issued by the Council's building surveyor.*

*To provide you an update, the rectification works, which will ensure the safety of all impacted parties, are expected to commence in middle to late September.*

94. On 25 August 2023, I instructed McGuinness Legal to send a further letter to the Council reiterating that Denise and I were concerned that we had not been privy to the critical documents and planning proposals for works that were required to make safe the area around our Property. The letter stated that we were eager to engage in a meaningful conversation with the Council.
95. To the best of my recollection, the Council did not respond to that letter.
96. Copies of the correspondence referred to at paragraphs 83 to 94 above are annexed to this Statement and marked "PW-21" to "PW-22".
97. Given that McGuinness Legal had not been able to elicit any meaningful response from the Council, and having regard to the advice that Denise and I had received, I instructed McGuinness Legal to send a letter to the Council on 7 September 2023, to advise them that Denise and I would be returning to the Property.
98. A copy of the 7 September 2023 letter is annexed to this Statement and marked "PW-23".
99. On 17 October 2023, I moved back into the Property with Denise. Very shortly after, in October 2023, Mr McGuinness contacted me to advise that representatives from the Council had agreed to meet with us because they were concerned about us occupying the Property. I was pleased that our return to the Property had finally instigated some response from the Council.

100. On 1 November 2023, I attended the meeting that had been arranged with Council representatives, at the McGuinness Legal offices. Mr McGuinness accompanied me and approximately 10 persons attended for the Council, including Mr Flores and Matt Glover, then Municipal Building Surveyor for the Council. I did not know the other persons in attendance, but I recall some of them introducing themselves as legal representatives for the Council. This was the first face-to-face meeting I had had with any Council representatives with whom I had been dealing, in the year-long period since the November 2022 landslides.
101. At the outset of the meeting, Mr Glover stated that he was worried for Denise's and my safety if we continued to occupy the Property. I told Mr Glover that I considered the Property to be safe, because the slope appeared to have dried out following the drainage works the Council had undertaken on View Point Road in June 2023. I also stated that the Council representative who I had noticed attending the affected area in the months following the November 2022 landslide had not been there recently. These two factors indicated to me that the Council no longer had concerns about the area.
102. I recall one of the Council's representatives stating during the meeting that the Council was continuing to work to develop a plan for the affected area. This led to some discussion about the works Mr and Mrs Borghesi had undertaken on the escarpment in 2021 and 2022, referred to at paragraph 63 above. I do not now recall who raised the works undertaken by Mr and Mrs Borghesi or why those works became a topic of discussion, though I do recall one of the Council representatives telling me that Mr and Mrs Borghesi were no longer engaging with their insurer in relation to the proposed 3-Stage Plan. Notwithstanding, I left the meeting feeling slightly more positive than I had felt in the preceding months, as the Council representatives had reassured me that it was still working towards undertaking the works required by the 3-Stage Plan.
103. In around mid-November 2023, I also attended the Annual General Meeting of the Body Corporate. During that meeting, Mr McLean told me that CHU had reversed the determination it had made on 5 May 2023, and would provide insurance coverage to us. Mr Bowers confirmed what Mr McLean had said.
104. The period between 5 May 2023 and November 2023 caused me a considerable amount of stress, worry and frustration. However, by December 2023, I was residing in my Property again and I was feeling more optimistic that rectification works were still going to be undertaken to ensure the safety of the area, and would be commenced as soon as possible.

#### **2024 Emergency Orders**

105. Throughout December 2023 and January 2024, Denise and I resided in our Property. We did not experience any issues in the Property and we had no correspondence with the Council in that period.

106. On 1 February 2024, Mr Flores knocked on our door and hand delivered to me a letter that requested an inspection of the Property. The letter stated:

*As your property has been impacted by the landslip, I am following up on the Council issued Emergency Order EO-147/22 that directed you to cease occupation of the dwelling.*

*Council undertook a recent site visit of the property which has raised concerns that the dwelling is being occupied in contravention of Emergency Order EO-147/22.*

107. I do not know what site visit had occurred earlier. However, on 5 February 2024, I signed a consent form allowing Mr Flores to inspect the Property, and, at 1.00 pm on 6 February 2024, Mr Flores conducted that inspection. Following the inspection, Mr Flores handed to me an emergency order that required Denise and I to evacuate the Property immediately on the basis that the inspection had identified "*immediate safety concerns*" (**the Second Emergency Order**).
108. I promptly contacted Mr McGuinness by phone and told him that we had received the Second Emergency Order but could not evacuate the Property immediately as we needed to arrange alternative accommodation. Mr McGuinness told me that he would contact the Council to ask if we could have more time, and revert to me. Mr McGuinness phoned me shortly after, and told me that the Council was willing to allow us some time to find accommodation, but had stressed that we should leave the Property as soon as possible.
109. Annexed and marked "**PW-24**" to "**PW-26**" are copies of the letter from Mr Flores dated 1 February 2024, the consent form signed by me dated 5 February 2024, and the cover letter to the Second Emergency Order dated 6 February 2024. I have not been able to locate a copy of the Second Emergency Order.
110. Later on 6 February 2024, I contacted CHU to advise that we had received the Second Emergency Order and to ask if CHU would cover the cost of us renting another property. The person from CHU that I spoke with confirmed that CHU would cover those costs, and, in the days that followed, I made arrangements to rent the Rental Property again. On 23 February 2024, I moved back into the Rental Property with Denise and Christopher.
111. From 6 February 2024 onwards, Denise and I received 6 Emergency Orders prohibiting occupation of the Property on 20 February 2024, 24 February 2024, 26 February 2024, 28 February 2024, 3 March 2024, and 12 March 2024. Copies of the covering letters to each of those Emergency Orders are annexed to this Statement and marked "**PW-27**". I have only been able to locate the Emergency Orders dated 20 February 2024, 3 March 2024, and 12 March 2024. These appear behind the corresponding covering letters at "**PW-28**".

112. The Emergency Order dated 20 February 2024 prohibited occupation of the Property for a period of 14 days, whilst the Emergency Orders dated 3 and 12 March 2024 prohibited occupation of the Property for a period of 48 hours. Save for that difference, the Emergency Orders continued to refer to the inspection on 6 February 2024. I do not know why the Council issued 6 Emergency Orders in February and March.
113. On 14 March 2024, Mr Flores provided me with a Building Order in relation to the Property. I did not understand the difference between the Building Order and the Emergency Orders that had been issued to me. I have not been able to locate a complete copy of the Building Order but I have located the second page of it and note that it states occupation of the Property was prohibited until such time as 10-12 View Point Road had been made safe to the satisfaction of the Municipal Building Surveyor. I did not understand why the Council had issued the Building Order to me in circumstances where it had already issued 6 Emergency Orders prohibiting occupation of the Property and the Building Order seemed to me to relate to 10-12 View Point Road needing to be made safe, as opposed to my Property.
114. I did not engage with any Council representatives during this period, as I was angered by the Emergency Orders and the fact that no works had commenced on the affected area.

#### **Building Appeals Board Proceedings**

115. As a result of the events outlined at paragraphs 83 to 113 above, in April 2024, I instructed McGuinness Legal to commence proceedings before the Building Appeals Board.
116. By that time, McGuinness Legal had received and provided me with a report prepared by AS James, which recommended, amongst other things, that a debris flow barrier be installed at the base of the escarpment or as a substitute to the rear fence of our Property and other properties on Point Nepean Road. The debris flow barrier was intended to temporarily ensure that our Property would be safe enough for us to reside in, while the 3-Stage Plan was implemented. A copy of the AS James report is annexed to this Statement and marked "PW-29".
117. On the basis of that report, Denise and I sought an order that the Council and / or Mr and Mrs Borghesi cover the costs associated with the work involved in having a debris flow barrier erected at the rear of our Property.
118. I have been informed by Mr McGuinness that judgment in this proceeding has been delayed as a result of the landslides that occurred in January 2025 and other matters. Given that judgment is pending, I have not provided any other details of this proceeding in this Statement.

#### **January 2025 Landslides**

119. In early to mid-December 2024, I noticed that the spoon drains on Penny Lane and in front of the Rental Property were full of water and the ground on either side of the drains was saturated

and spongy. This seemed strange to me because there had been no rain in that period. Accordingly, on 16 December 2024, I lodged a report with the Council online, to advise them of the same. I submitted two photographs of the drains and the spongy ground to the Council with my report. I received a generic response stating that my notification would be reviewed.

120. Annexed to this Statement and marked "PW-30" are the photographs that I took of the drain on 16 December 2024, my notification to the Council of the same date, and the Council's response.
121. I did not receive any further response from the Council.

*Monday 6 January 2025*

122. On the morning of 6 January 2025, I was walking towards Penny Lane with Denise and we saw a large number of people on the driveway of 3 Penny Lane. I noticed the owners of that property standing there, together with Mr Glover from the Council, representatives from the Vic SES and several others. I had not yet met the owners of 3 Penny Lane, but I had seen them coming and going from the Property after their purchase of it. I now know them to be Nick and Kellie Moran.
123. Denise and I approached the group and introduced ourselves to Mr and Mrs Moran. We asked them what had occurred and they told us that there had been a landslide behind their property the previous night. They explained that a significant amount of soil slid down the escarpment and smashed into the back of their house, almost injuring their daughter. I offered Mr and Mrs Moran my sympathies and told them that Denise and I were the owners of the Property but had been displaced from it following landslides in the area in November 2022. I told Mr and Mrs Moran they could contact me to discuss any issues arising as a result of the landslide, if they needed to. Mr and Mrs Moran thanked me, and I returned to the Rental Property with Denise.
124. The following morning, on 7 January 2025, I found a document in my letterbox titled 'Landslip McCrae Jan 25 3 Penny Lane and 10-12 View Point Owners – Action Items' on the Council's letterhead. The document listed what appeared to be action items in relation to the Borghesi Property and 3 Penny Lane following the 5 January 2025 landslide, but in respect of the Rental Property, it stated "N/A". On that basis, I took no action in relation to it. A copy of the document is annexed to this Statement and marked "PW-31".
125. Between 6 and 13 January 2025, I saw Mr and Mrs Moran attend the property at 3 Penny Lane frequently. I also saw Mr Glover attend the property at approximately 9.00 am almost every day.
126. On or around 8 or 9 January 2025, I saw a team of three or four people attend the property at 3 Penny Lane and noticed that they were removing mud from the back of the property. I also saw a steady stream of water flowing down from the property into Penny Lane during that period. The stream of water remained consistent in that period.

Monday 14 January 2025

127. On the morning of 14 January 2025, I was seated in the lounge room at the front of the Rental Property while Denise was in the laundry. At around 8.45 am, I heard a deep rumbling sound coming from the rear of the Rental Property and, within seconds of that sound, there was a loud crash. I heard Denise yell "*the house has come down*" and saw her running from the laundry toward me. Denise and I were both panicked and we ran out of the house through the front door, together.
128. As we came out of the house, I turned left to look towards the rear of the Rental Property and I immediately saw that the house at 3 Penny Lane had lurched forward into the backyard of the Rental Property. The house looked as though it had split in half and seemed to be hanging over the rear fence of the Rental Property. There was glass and timber everywhere. I was in complete shock and I do not recall Denise or me saying anything to one another in that moment.
129. I noticed someone lying near the front gate of 3 Penny Lane and I ran toward them. As I approached, I saw that it was Mr Glover and that he was lying on his side with shards of glass lodged into his forehead. He was moaning in pain, but he was conscious, and I asked him what had happened. Mr Glover told me that he had been inside the house at 3 Penny Lane, he had heard a rumbling sound, and he had run to the deck of the property and jumped from it.
130. By that time, another neighbour who I knew to be Mike O'Neill, and Mr D'Helin had approached, along with two other persons who I did not know. One of the persons that I did not know was holding a mobile phone and Mr O'Neill asked him to call 000 to request an ambulance. Once he had done so, he handed the phone to me so that I could speak with the operator, as I was closest to Mr Glover. The operator I spoke with asked questions about where Mr Glover was and whether he was conscious.
131. As I was answering the operator's questions, Mr O'Neill said words to the effect of "*the house is still shifting, we need to move*". I heard sounds coming from the house that I attributed to movement occurring. I told the operator that we needed to move Mr Glover because we were concerned the house might slide down further. The operator told me we would need to drag Mr Glover rather than lift him and so, Mr O'Neill and the man who had provided the mobile phone helped me to drag Mr Glover as gently as we could, away from 3 Penny Lane and until we were in front of 2 Penny Lane.
132. At that point in time, police officers, representatives from the Vic SES and an ambulance began to arrive and the area filled with people very quickly. Paramedics attended to Mr Glover and within around 15 minutes, Denise and I, and other neighbours who had gathered outside 2 Penny Lane, were ushered to the bottom of Penny Lane near Point Nepean Road by police officers and the Vic SES responders. I do not now recall whether I spoke initially with a police officer or a responder from the Vic SES, but I remember telling one of those persons that Denise

and I were the owners of the Property and had been residing in the Rental Property. Shortly after, one of the Vic SES responders told Denise and me that we could have a couple of minutes to enter the Rental Property to collect any medication we might need, but would need to vacate the Property immediately after doing so.

133. As the Vic SES responders continued to secure the area, we were asked to move further away from it, until we were in front of 613 Point Nepean Road. We remained in that area for several hours, speaking with other neighbours and with the Vic SES responders and police officers. During that time, I:
- (a) telephoned each of my sons to tell them that there had been a major landslide and to let them know that Denise and I were safe;
  - (b) arranged for Denise and me to stay with my youngest son while we organised alternative accommodation; and
  - (c) provided a police officer with the contact details of the owners for several of the properties in the affected area.

#### **Post 2025 Landslides**

134. In the weeks following the landslide on 14 January 2025, both the Property and the Rental Property were broken into and burglarised. Denise and I were not permitted to access either of the properties until mid-April 2025 to assess any damage and compile a list of missing items. We noted that a laptop, watches and jewellery had been taken, along with memorabilia that I had kept for many years and which was sentimental to me.
135. It has now been 2.5 years since Denise and I were displaced from our Property following the November 2022 landslides. To date, we have not been told when, or if, we will be able to return to the Property or the Rental Property.

Dated:

14/5/25

Irrelevant & Sensitive

Paul Willigenburg