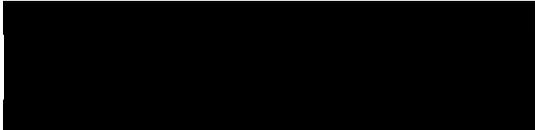


## Final Report

Full investigation pursuant to referral under  
section 24(2)(a) of the *Independent Commissioner Against Corruption Act 2012*

Public Authority	Alexandrina Council
Public Officer	Mr Neville Styan
Ombudsman reference:	2017/00905
ICAC reference:	2017/000919
Date of referral:	23 January 2017
Issues	<ol style="list-style-type: none"><li>1. Whether Mr Neville Styan committed maladministration in public administration by failing to obtain development approval prior to the council's Goolwa Wharf Recreational Boating Facility being constructed in 2010/2011</li><li>2. Whether a practice adopted by the Alexandrina Council in relation to the 2010/2011 Goolwa Wharf Recreational Boating Facility development resulted in the substantial mismanagement of public resources</li><li>3. Whether, in relation to the 2010/2011 Goolwa Wharf Recreational Boating Facility development, the Alexandrina Council engaged in an administrative act that appears to have been contrary to law by undertaking the development without Building Rules Consent</li><li>4. </li></ol>

### Jurisdiction

This matter was referred to me by the Independent Commissioner Against Corruption (**the Commissioner**) pursuant to section 24(2)(a) of the *Independent Commissioner Against Corruption Act 2012* (**the ICAC Act**), as raising a potential issue of maladministration within the meaning of that Act (**the referral**).

Section 14B of the Ombudsman Act provides:

**14B—Referral of matter by OPI or ICAC**

- (1) If a matter is referred to the Ombudsman under the ICAC Act, the matter—
- (a) will be taken to relate to administrative acts for the purposes of this Act; and
  - (b) must be dealt with under this Act as if a complaint had been made under this Act and—
    - (i) if the matter was the subject of a complaint or report under the ICAC Act—as if the person who made the complaint or report under that Act was the Complainant under this Act; or
    - (ii) if the matter was assessed under that Act after being identified by the Commissioner acting on the Commissioner's own initiative or by the Commissioner or the Office in the course of performing functions under any Act—as if the Commissioner was the complainant under this Act.

the

In addition to investigating this matter on the basis of the Commissioner's referral, I have also used my own initiative power (section 13(2) of the Ombudsman Act) to investigate whether the council acted contrary to law.

**Investigation**

My investigation has involved:

- assessing the information provided with the ICAC referral
- seeking information from the Alexandrina Council (**the council**)
- seeking a response from relevant council staff and council members, including Mr Neville Styan, Mr Kym McHugh OAM and Mr John Coombe OAM.
- seeking further information from the council's current CEO Mr Glenn Rappensberg.
- considering the *Development Act 1993* and the *Development Regulations 2008*
- preparing a provisional report and providing it to the parties for comment
- preparing this report.

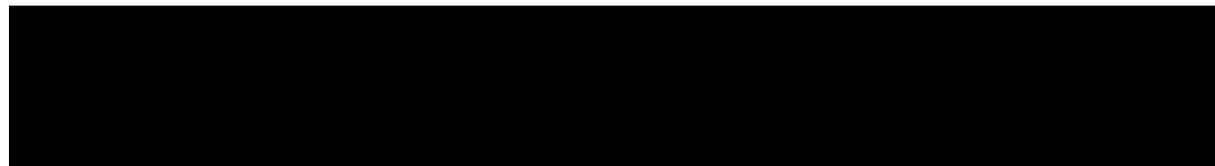
**Response to my provisional report**

In response to my provisional report Mr Styan made the following points:

- Design details were provided to the council consultant engineer, [X], prior to construction of the pontoons commencing. While [X] stated he needed some 'final details' prior to issuing certification he gave no indication that there may be a problem with the design. Mr Styan states [X] gave him the impression certification was imminent
- It was always Mr Styan's intention to obtain full development approval prior to proceeding with the project, and he did not proceed with the project in the belief that any omissions with regards to the approval process could be rectified retrospectively
- In Mr Styan's view, even if [the engineering firm] had provided the final design details requested, [X] would have certified the design and the pontoons would have failed in the same way. He asserts that [X] only withdrew his offer to certify the pontoons after they had failed
- Given his workload as General Manager, and having no reason to suspect private certification would not be given, Mr Styan's failure to obtain building rules consent was an honest error of judgement compounded by time pressures to complete the project in time for the Wooden Boat Festival
- Mr Styan initiated risk minimization processes prior to the commencement of the project by appointing an on-ground Project Manager and engaging a specialist consultant to provide advice and monitor technical design and construction aspect of the project
- Mr Styan rejects the view expressed in my preliminary report that he committed maladministration in public administration.

In response to my provisional report the principal officer of Alexandrina Council, Mayor Parkes, noted:

- Mr Styan had made a substantial contribution to the development of infrastructure in the City of Alexandrina
- acknowledged that in this instance Mr Styan did not follow proper process.
- acknowledged that the council had failed to ensure all planning approvals had been granted prior to commencing construction of the pontoons, and accepted the Ombudsman's conclusion that this amounted to maladministration in public administration
- indicated that to reduce the risk of a similar failure in the future, the council will introduce the following processes:
  - peer review of major projects at the executive level to ensure visibility and shared expertise at a high level
  - project methodology and governance improvements for all capital projects to document the key steps and track their completion, including legislative obligations
  - centralised procurement advice and control that will codify expectations of consultants and contractual matters with respect to service delivery
- acknowledged the breach of section 32 of the Development Act and expressed regret this occurred. Mayor Parkes outlined the steps the council proposed to take to address this issue:
  - creating a new temporary Business Adviser position to provide technical peer review advice to the CEO in relation to major projects
  - ensuring staff are appropriately trained in Development Act requirements.
  - peer review of major projects at Executive meetings
  - project methodology and governance improvements for all capital projects to document the key steps required and to track their completion, including legislative obligations
- indicated that the council had learned from the experience and was committed to raising the standards of the organization to prevent a recurrence.



Having considered all the parties responses, my view remains as set out in my provisional report.

## Background

1. In early 2010 the Alexandrina Council (**the council**) commenced planning for a development at the Goolwa Wharf precinct. The proposal was to construct floating pontoons for the short term mooring of recreational boats, and to widen an existing boardwalk known as Hector's Jetty. This was a joint project with the then Department for Water (**DFW**), to the extent it was to include an upgrade to DFW's river vessel waste disposal facility at the site.
2. The project was to be coordinated and managed by the council's then General Manager Infrastructure Planning & Design, Mr Neville Styan.

3. The concept design (including technical specifications) was prepared with the assistance of [X], a marine engineer engaged by the council to provide advice and other assistance throughout the life of the project.
4. Mr Styan prepared and lodged the initial development application (455/243/10) on 11 March 2010. Although he failed to indicate the type of consent he was seeking on the form, it is not in dispute that he could only seek planning rules consent at that stage given the final design would not be finalised until after the tender process had been completed.
5. Because of the location and nature of the development, section 37 of the *Development Act 1993* together with Regulation 24 and schedule 8 of the *Development Regulations 2008* required the council to refer the application to three “relevant” bodies, and to await their response, prior to making any decision. In this case the relevant bodies were:
  - The Minister for the River Murray - on the basis the proposed development was within the River Murray Protection Area.
  - The Environment Protection Authority - on the basis the proposed development involved an activity of major environmental significance.
  - The Department of Environment & Heritage - on the basis the proposed development impacted on Crown Land.

The council, as the relevant authority, complied with its obligations in this regard. None of the relevant bodies objected to the development proceeding.

6. On 27 July 2010 the Town Planner, Mr David Zanker, signed a ‘Decision Notification Form’ advising the council that Development Plan Consent had been approved. The details on the front of that notice indicated that Building Rules Consent was still required, as was Development Approval. It was specifically noted that:

No work can commence on this development unless a DEVELOPMENT APPROVAL has been obtained.

7. On 27 August 2010 the project was put out to tender. Six companies with demonstrated experience in the construction of floating pontoons, boardwalks and the installation of marine piles were invited to submit tenders ‘for the design and construction of the works on a lump sum basis.’ The companies invited to submit tenders were selected from a list provided by the Department of Transport, Energy and Infrastructure. The design specifications (as prepared by [X]) were included in the tender documents, and it was a condition that all works comply with relevant Australian Standards and the Building Code of Australia, including: Australian Standard 3962 - Guidelines for design of Marinas; and AS4997 - Guidelines for the Design of Maritime Structures.
8. The closing date for the submission of tenders was 14 September 2010. It was specified in the documents that construction was to be completed by the end of January 2011.
9. After the closing date Mr Styan conducted an initial assessment of all tender submissions. The tenders were further evaluated by DFW staff, Mr Styan and [X] at a meeting the following day. After participants were satisfied that [Y’s] tender was compliant with all contract requirements, [Y] was identified as the preferred tenderer. On 17 September 2010 representatives from [Y] were interviewed by Mr Styan, DFW staff and [X]. The purpose of the interview was to:

clarify the contents of [Y’s] tender, and to also ensure all conditions of the tender had been met. [Y] also outlined their proposed construction methods and material for the

floating pontoons, piles and the widening of the wooden boardwalk. (This summary provided by Styán at council meeting on 20 September 2010).

10. [Y's] tender bid was [xxxxx - xxxxxx] lower than that of other tenderers.
11. A resolution was passed at the council meeting held on 20 September 2010 formally awarding the tender to [Y].
12. [Y] subsequently engaged the services of an engineering firm [the engineering firm] to design the pontoons and boardwalk. The council was provided with the first set of the design drawings and calculations prepared by [the engineering firm] in early December 2010.
13. The pontoons were constructed and installed between December 2010 and February 2011.
14. Structural problems with the pontoons soon became apparent, with concrete surfaces cracking and support brackets repeatedly fracturing. While [Y] repaired some defects, it became clear the pontoons continued to deteriorate.
15. A structural assessment of the pontoons was conducted by [X], who had been re-engaged by the council for that purpose, in April 2013. [X] identified numerous defects with the structure and his recommendations included the replacement of the six main pontoons. [X] prepared a further report for the council in May 2014, detailing design and construction deficiencies with the pontoons. The pontoons were eventually removed and disposed of.
16. Despite ongoing efforts, the council was unsuccessful in getting [Y] to meet its contractual obligations. Being in dispute, and in accordance with the terms of the contract, [Y] and the council proceeded to arbitration.
17. The arbitrator published her Award on 3 March 2015. She found the pontoons were not fit for purpose and awarded the Council \$639,600.00. The council did not however recover anything from [Y] as the company went into liquidation shortly after the Award was published.
18. The council subsequently sought legal advice on whether it had a cause of action against [the engineering firm] and/or [X].
19. In 2016 the council decided against pursuing further legal action. By this stage the council had already spent \$328,462.00 on legal fees related to the development. This was in addition to the \$639,600.00 outlaid on the development itself.
20. However, in April 2018 the council resolved to proceed with a civil claim against [the engineering firm] and/or [X], authorising the expenditure of \$23,500 for the purpose of applying to the court for permission to initiate proceedings out of time.

### Relevant law

21. Section 5(4) of the ICAC Act provides:

(4) *Maladministration in public administration*—

(a) means—

- (i) conduct of a public officer, or a practice, policy or procedure of a public authority, that results in an irregular and unauthorised use of public money or substantial mismanagement of public resources; or

- (ii) conduct of a public officer involving substantial mismanagement in or in relation to the performance of official functions; and
- (b) includes conduct resulting from impropriety, incompetence or negligence; and
- (c) is to be assessed having regard to relevant statutory provisions and administrative instructions and directions.

Section 5(5)(a) and (d) of the ICAC Act provides:

- (5) Without limiting or extending the conduct that may comprise corruption, misconduct or maladministration in public administration, this Act applies to conduct that -
  - (a) occurred before the commencement of this Act..[.]
  - (d) is conduct of a person who was a public officer at the time of its occurrence but who has since ceased to be a public officer.

22. Section 32 of the Development Act 1993 provides:

Subject to this Act, no development may be undertaken unless the development is an approved development.

23. Section 33(1) of the Development Act, inter alia, provides:

- (1) A development is an approved development if, and only if, a relevant authority has assessed the development against, and granted a consent in respect of, each of the following matters (insofar as they are relevant to the particular development):
  - (a) the provisions of the appropriate Development Plan ("development plan consent ");
  - (b) the provisions of the Building Rules ("building rules consent")....

24. Section 34(1)(a) of the Development Act provides:

**34—Determination of relevant authority**

- (1) Subject to this Act, the relevant authority, in relation to a proposed development, is ascertained as follows:
  - (a) where the proposed development is to be undertaken within the area of a council, then, subject to paragraphs (ab) and (b), the council is the relevant authority (and, subject to paragraph (b)(ii), the council may act as the relevant authority even if it is to undertake some or all of the relevant development itself)[:]

**Whether Mr Neville Styan committed maladministration in public administration by failing to obtain development approval prior to the council's Goolwa Wharf Recreational Boating Facility being constructed in 2010/2011**

25. While it was the council carrying out the development, it was the council's General Manager, Infrastructure Planning & Design, Mr Styan, who had responsibility for coordinating and managing the project from its inception to its completion. By letter dated 13 April 2018 Mr Styan advised me that his role and responsibilities with regards to the development were as follows:

- Prepare Goolwa Wharf Precinct consultation documents and oversee the creation of concept designs for the Precinct.
- Prepare budget estimates for the Goolwa Wharf Precinct.
- Undertake consultation with Elected Members, key stakeholders and the broader community in relation to 9 identified key sites within the Goolwa Wharf Precinct.

- Prepare Council reports and consult with Council on budget allocations within the current budget and 10-year Long Term Financial Plan.
- Coordinate the creation of the Technical Specification for the Goolwa Wharf Recreational Boating Facility Tender with technical input from [X].
- Liaise closely with the Department for Water (DFW) to ensure the design of Council's facility complimented DFW's River Vessel Waste Disposal Station which was to be upgraded in conjunction with the Goolwa Wharf Recreational Boating Facility.
- Oversee development approval processes in relation to Council's Recreational Boating Facility and DFW's River Vessel Waste Disposal Station.
- Prepare the funding application seeking funding for Council's project from the South Australian Boating Facilities Advisory Committee (SABFAC).
- Liaise with DFW senior staff to negotiate the Department's financial contribution towards the project to joint project.
- Undertake joint tendering (with DFW) of Council's Recreational Boating Facility and DFW's River Vessel Waste Disposal Station.
- Undertake the joint tender assessment of the submitted tenders with DFW staff utilising [X] for the assessment of technical aspects of the tenderer's designs.
- Undertake the interview of [Y] with DFW staff and [X] in attendance.
- Prepare Council reports recommending [Y] as the preferred tenderer. (Please note that DFW had utilised [Y] extensively for previous river vessel waste disposal stations and provided a strong reference for [Y]).
- Maintain a broad oversight of progress of the project. For this project Council utilised the services of an in-house Project Manager to undertake daily coordination and supervision of construction activities and attend regular site meetings. (copies of the site meeting minutes are available in Alexandrina Council's records system).
- Coordinate [X] Consulting Engineer to attend hold point inspections of the project.
- Monitor expenditure budgets and authorise contractor payments. Provide updated financial reports to DFW in relation to their financial contribution towards the project.

26. Mr Styan stated that he completed and signed the development application form. Given it was a 'design and construct' tender he was aware that at that stage it was only possible to obtain Planning Consent, with Building Rules Consent only being possible after the successful tenderer had submitted 'full engineering designs'. Mr Styan set out the process he intended to follow as:

- Lodge the planning application to first achieve Planning Consent. It was the Planning Department's role and jurisdiction to determine if the application had to be referred to Council's DAP. It was my understanding however that referral to DAP was not required.
- Engage [X] to review the tenderer's design of the facility and undertake private certification.
- Seek building rules consent (from Council's Building Section) after [X] had issued private certification.
- Install pontoons after achieving Building Rules Consent.

27. In his response Mr Styan made several references to [X] being engaged to review [Y's] design in order to issue private certification. He indicates that he made repeated requests to [Y] to provide technical design information. He also stated he:

Relied heavily on [X] to seek information from [Y's] Design Engineer, in relation to design calculations for the pontoons...

28. It is clear from his response that Mr Styan continued to seek 'private certification' from [X] during the construction phase of the development, and for over two years after the effective completion of the project.
29. In terms of [X's] role in the project Mr Styan stated:
- [X] was engaged to provide assistance with:
- creation of the initial concept design of the facility to ensure the adequate provision of space between the pontoons to cater for a range of vessel sizes. [X] Johnalso undertook an initial determination of wave climate data for that location (this final assessment of wave climate data was the responsibility of the tenderer however, as stipulated in the tender specification.)
  - provide significant input into the creation of the Technical Specification to be included with tender documentation.
  - interview the preferred tenderer with myself and DFW staff present to ensure the tenderer's construction methodologies and materials were suitable for the facility.
  - undertake an independent review of the successful tender's design calculations in order to issue Private Certification.
  - attend site inspections at nominated key hold points throughout construction of the project.
30. Mr Styan described [X's] role as 'somewhat fluid throughout the process, and he was contacted/utilised when required.' Mr Styan also confirmed that there was no written contract between the council and [X] formally setting out the terms of his engagement - something I consider surprising given the importance of his role as far as the development was concerned.
31. There is evidence to support Mr Styan's contention that he was originally intending to obtain Building Rules Consent prior to construction commencing. There is also evidence showing he intended to rely on [X's] certification of the design to achieve this. I refer in particular to:
- an email Mr Styan sent [X] on 22 September 2010 in which he stated:
 

Hi [X],  
Please find attached a certificate **to be filled out by you when undertaking the private certification of [Y's design]**. (my emphasis)  
I have spoken to our Building Surveyors and as long as you comply with the requirements as set out there are no issues with you certifying the final design.

The attachment set out the requirements of a 'certificate of independent technical expert' issued pursuant to Regulation 88 of the Development Regulations.
  - an email he sent DFW staff on 12 October 2010 Mr Styan stated:
 

This morning Council staff met with [Y staff] to discuss the commencement of the project. I understand Said and Bob [DFW] are meeting [Y] tomorrow.....  
We are also going out to public consultation this Thursday for a minimum 21 day period. After the consultation period ends I'm keen to get things moving asap. **The 21 days should give [Y staff] time to get the detailed design completed and certified by [X]...** (my emphasis)

- minutes of a Council Meeting held on 20 September 2010 record:

It is intended that Alexandrina Council will act as the contract Principal with [X] and Council's Project Officer undertaking project management.....

It is expected that an additional \$40,000 will be required to fund [X's] project management costs, contingencies and private certification of the detailed design.

32. Development Regulation 88 provides that where an independent technical expert certifies that the technical details, plans and specifications of a proposed building work complies with the requirements of the Building Code, and sets out the basis on which the certificate is given, then the relevant authority (in this case the council) must accept that the building work complies with the Building Rules.
33. In effect, if [X] had issued a valid certificate pursuant to Regulation 88 then Building Rules Consent would have been achieved once the application was submitted and formally processed by the council. That did not occur in this case.
34. I note that one possible impediment to [X] validly issuing a Regulation 88 certificate, was Development Regulation 85, which states that in order to be an 'independent technical expert' a person must not have been 'involved in any aspect of the relevant development (other than through the provision of preliminary advice of a routine or general nature)'. The evidence provided to me indicates that [X's] involvement went well beyond 'preliminary advice of a routine or general nature'. He clearly had significant input into the technical specifications used in the original concept design.
35. Whether [X] was capable of issuing a valid certificate for the purposes of obtaining Building Rules Consent remains a moot point given that no such certificate was issued. The evidence indicates that the principal reason [X] was not in a position to issue a Regulation 88 certificate was because [the engineering firm] and [Y] did not provide the council and/or [X] with the information they requested.
36. In the final analysis it was not for [X] to ensure Building Rules Consent was obtained prior to the development proceeding. He was an external consultant, and the fact he did not issue a Regulation 88 certificate, whatever the reason, did not make him responsible for Building Rules Consent not being obtained. That responsibility was the council's (as the developer), and in particular Mr Styan's.
37. The council, through Mr Styan, was managing this aspect of the project and clearly if adequate design details had not been provided by [Y] this in itself should have been reason to exercise caution before proceeding with construction. The fact it meant compliance with section 32 of the Development Act could not be achieved should have been conclusive, and construction plans should have been put on hold until the issue was resolved.
38. It is not in dispute that the council was keen to have the pontoons constructed and installed in time for the Goolwa Wooden Boat Festival to be held in February 2011, indeed, in his response Mr Styan stated:

It was acknowledged that construction of the new facility would have to be achieved in very tight timeframes. The mayor, CEO and I were extremely optimistic that the facility would be constructed in time for the 2011 Wooden Boat festival and hence made every effort to achieve this outcome.
39. During a closed 'briefing' meeting held on 8 August 2016, where Mr Styan updated elected members on legal advice with regards to the prospect of the council successfully suing [X] and [the engineering firm], Mr Styan reflected on how the project could have been managed better:

We didn't achieve development approval because **of the time pressures of the project**. We would have got development approval. We would have had [X] undertake his technical assessment. Chances are he would have issued his certificate on that design.... (my emphasis)  
(audio recording of meeting at 33:12min).

40. In my view there is little doubt the desire to have the development completed, or at least substantially completed, in time for the Wooden Boat Festival was a factor that led to the construction and installation of the pontoons without independent expert certification - and therefore without Building Rules Consent.
41. In light of the above, it is my view that the Goolwa Wharf Recreational Boating Facility development undertaken by the council in 2010/2011 proceeded without Building Rules Consent, and therefore was in contravention of Section 32 of the *Development Act*. As it was the role of Mr Styan, General Manager of Infrastructure Planning and Design, to oversee and manage the development, I consider he bore primary responsibility for this occurring.
42. One of the principal reasons Building Rules Consent is required prior to developments proceeding is to ensure that the design of the structure meets the technical requirements of the Building Code of Australia and other relevant Australian Standards. It is an important step in the development assessment process, and one specifically designed for the purpose of reducing the risk of sub-standard developments going ahead - the very thing that occurred in this case. The fact that this council development appears to have failed to adhere to the council's own development processes (as well as the Development Act) is, at the very least, perplexing.
43. In considering whether Mr Styan's failure to obtain Building Rules Consent amounted to maladministration in public administration I have had regard to the definition in section 5 of the ICAC Act. It is not in dispute that Mr Styan was a public officer at the relevant time, and subsection (5) establishes that notwithstanding the events and conduct in issue took place prior to the commencement of the ICAC Act it nevertheless is captured by the legislation.
44. In my view any failing on Mr Styan's part should be assessed against the following limbs of the definition of 'maladministration in public administration' contained in s5(4) of the ICAC Act, namely that his conduct:
  - resulted in the substantial mismanagement of public resources (s5(4)(i)); or
  - involved substantial mismanagement in or in relation to the performance of his official functions (s5(4)(ii)).
45. In assessing Mr Styan's conduct against s5(4)(i) it is my view that his failure to obtain Building Rules Consent amounted to 'mismanagement' in that he bore responsibility for ensuring that the project was carefully managed, and progressed in accordance with relevant procedural and legislative requirements, and he did not discharge that responsibility. Given that council funds were used to pay for the non-approved development and, as discussed below losses associated with sub-standard building work, I consider that this amounted to the mismanagement of public resources.
46. In order for maladministration to be established, not only must there have been mismanagement, there must have been a substantial mismanagement of public resources.
47. Based on the information provided, the council has sustained significant losses as a result of the failure of the pontoons, and the subsequent insolvency of [Y]. In addition to

more than \$600,000.00 spent on construction costs, a significant amount has been spent on legal fees in the course of seeking advice and pursuing legal remedies.

48. It does not automatically follow that because a large amount of public funds was involved that Mr Styan's mismanagement of the project was substantial. The test for establishing maladministration, as outlined in the subsection, is not 'the mismanagement of substantial public resources', it is the 'substantial mismanagement of public resources'.
49. What Mr Styan failed to do was to seek and obtain Building Rules Consent prior to commencing the development. The evidence indicates that Mr Styan recognized the need for this to be obtained, but that the pressure of having the development completed in time for the Wooden Boat Festival led him to proceed without it.
50. There is debate over the extent to which the ultimate failure of the development was the result of poor workmanship or poor design. It appears both may have been factors, and this is an issue that will be canvassed in greater detail should the council be successful in initiating civil proceedings against [X] and [the engineering firm] or their respective businesses. What is clear is that had the design been finalised and certified in accordance with the Development Act and Regulations the risk of financial losses to the council would have been reduced.
51. It appears from the available evidence that throughout the project Mr Styan relied on [X], the consultant marine engineer he had engaged on behalf of the council for the very purpose of providing guidance and specialist advice on technical engineering issues. This was not a case where a development proceeded without any regard for the engineering specifications necessary to meet the relevant Australian Standards, it was however a case where the ultimate result was a product that was not fit for purpose.
52. In my view the failure to obtain Building Rules Consent involved the mismanagement of council funds. It was a fundamental error on a significant piece of infrastructure that, in my view, rendered its construction unlawful. The implications in terms of cost and inconvenience to both the council and ratepayers have been significant and ongoing. In my view the inescapable conclusion is that this was a substantial mismanagement of public resources that amounted to maladministration within the meaning of s5(4)(a)(i) of the ICAC Act.
53. For similar reasons it is my view that Mr Styan's conduct in not obtaining Building Rules Consent also amounted to substantial mismanagement in the performance of his official functions such that it amounted to maladministration within the meaning of s5(4)(a)(ii) of the ICAC Act.

## Opinion

In light of the above, my view is that Mr Styan committed maladministration in public administration for the purposes of sections 5(4)(a)(i) and 5(4)(a)(ii) of the ICAC Act, by failing to obtain full development approval prior to the construction of the Goolwa Wharf Recreational Boating Facility.

## **Whether a practice adopted by the Alexandrina Council in relation to the 2010/2011 Goolwa Wharf Recreational Boating Facility development resulted in the substantial mismanagement of public resources**

54. The extent to which other council employees, or elected members, were aware that Building Rules Consent had not been obtained for the project is not entirely clear from the available evidence. Certainly the Mayor at the time, Mr Kym McHugh OAM,

maintained in his response to me of 13 April 2018, that he was not aware of this deficiency:

When the construction began in late 2010 I was not aware that development Approval had not been granted, if indeed this was the case.

As Mayor I would not ordinarily satisfy myself that Development Approval had been obtained before council proceeded with a significant infrastructure development. I would assume that it had. It was standard practice, and I and the council would expect, that Development Approval would be obtained before Council commenced its own infrastructure project. No different from a member of the public or a developer...

55. Mr John Coombe OAM, the council's Chief Executive at the time construction began, advised me in his response that:

Given the passage of time on this matter, and not having access to any council documentation I find it somewhat difficult to respond to your specific question. However, I would have expected the two General Managers for Infrastructure and Planning to have been responsible, as part of their duties, to ensure all necessary approvals and processes were in place and obtained for this substantial development. As the Chief Executive, I was not involved in the development approval process as there were protocols in place to ensure legislative compliance to this and all development applications. I see no reason why development and building approval was not obtained for this project..

56. The minutes of a council meeting held on 6 April 2010 record that elected members were advised by the Manager of Planning, Mr Zanker, that Mr Styan had lodged a development application for the construction of the pontoons and boardwalk. Other than stating Crown Lands approval was required no reference is made in the minutes to other requirements that would be necessary prior to planning approval being granted. Following Mr Zanker presenting his report the following motion was passed:

Moved Cr Medlyn seconded Cr Saunders that **council grants consent** for D/A 455/243/10 **to proceed for the construction** of floating pontoons and a boardwalk at the historic Goolwa Wharf precinct subject to approval of Crown Lands. (my emphasis)

57. The minutes of a council meeting held on 6 September 2010 record that the following motions were passed:

**Moved Cr Tuckwell seconded Cr Saunders:**

Council supports the widening of the Hector's Jetty Boardwalk to a 4 metre width at an anticipated cost of \$220,000 and proceeds with the construction of this component pending acceptance of the tender at the Council meeting on the 20th September 2010.

Council supports the construction of a 2m wide boardwalk linking Hector's Boardwalk to the DWLBC floating pontoons at an anticipated cost of \$40,000 and proceeds with the construction of this component pending acceptance of the tender at the Council meeting on the 20th September 2010.

Council supports the construction of 3 mooring fingers adjacent to DWLBC's main stem floating pontoon at an anticipated cost of \$50,000 and proceeds with the construction of this component pending acceptance of the tender at the Council meeting on the 20th September 2010..[:]

58. The minutes of a council meeting held on 22 November 2010 record that Mr Styan presented a report to the council which included the following:

At the meeting of the 20th September 2010, Council awarded the tender for the construction of the Goolwa Wharf Recreational Boating Facility (GWRBF) to [Y]. At that

stage confirmation of a second round of funding from the Department of Transport Recreational Boating Facilities Levy Fund had not been received.

To ensure completion of the facility prior to the 2011 Wooden Boat Festival, Council agreed to split the tender in to two parts and authorised the construction of the predominately Council and Department for Water (DFW) funded components including:

- Construction of floating pontoons and associated piles, timber boardwalks and gangplanks for the Department for Water River.
- Widening of the existing timber boardwalk (Hector's Boardwalk).
- Construction of 3 mooring fingers adjacent to DFW's main stem floating pontoon.
- Construction of a 2 metre wide boardwalk linking Hector's Boardwalk to the DFW floating pontoon.
- Installation of heritage lighting along the widened boardwalk.

Council has previously voted that once notification of external funding had been received, the remaining components associated with the construction of the facility including the 95 metre x 3metre wide main header floating pontoon and 3 x 1.2 metre finger pontoons should commence.

59. A motion was subsequently passed accepting the funding and providing authority for the funds to be used on the development.
60. Mr Glenn Rappensberg, the current Chief Executive of the council, has advised me by letter dated 26 April 2018 that the council does not have, nor did it have in 2010, a specific policy relating to developments undertaken by the council itself. The current Manager of Planning and Development, Ms Sally Roberts, informed Mr Rappensberg that officers responsible for carrying out these functions are aware of, and governed by, the procedures specified in the relevant legislation.
61. These minutes make it clear that elected members were kept informed of the progress of the development and authorised the release of funds for its construction.
62. Mr Kym McHugh OAM indicates that any consideration or decision he made in relation to the development was made on the assumption that development approval had been obtained. I have no reason to doubt his evidence in this regard, and I consider it likely other councillors proceeded on the same assumption.
63. While council members may well have passed resolutions relating to this project on the assumption appropriate planning approvals were in place, what this case demonstrates is that proceeding on such an assumption is fraught. At the very least I believe councillors should have satisfied themselves planning approval for the project had been granted, even if by simply asking a question to this effect, prior to passing any resolution for construction to begin. Obviously it would have been sufficient if the council's planning staff had presented council with a report, oral or written, that specifically stated such approvals were in place. I have been unable to find any evidence such representations were made in this case.
64. In the final analysis, this was a council development. Although it may have been Mr Styan's responsibility for planning and overseeing the project, ultimately it was the council, as the developer, who was responsible for the development going ahead without necessary approvals. In my view the council's failure in this case is made more serious by virtue of its status as an authority for approving the development application of others. It is a failure that has the potential to undermine community confidence in the council and its processes.
65. I have already indicated, at paragraph 45 above, that I consider Mr Styan's failure to obtain Building Rules Consent amounted to the mismanagement of public resources. In assessing whether the council, as a public authority, engaged in maladministration in

public administration the relevant test is whether a practice, policy or procedure of the council resulted in the substantial mismanagement of public resources.

66. For the reasons discussed above it is my view that the practice adopted by council in this case, in not ensuring all planning approvals had been granted prior to the construction of the pontoons and boardwalk commencing, resulted in the mismanagement of public resources. Given the mismanagement involved a breach of the Development Act, when the council itself was a relevant authority under that Act, and given that it exposed the council to a higher risk of financial loss, I consider this to have been a substantial mismanagement of public resources such that it meets the test prescribed in section 5(4)(a)(i) of the ICAC Act.

### Opinion

In light of the above, my view is that the council committed maladministration for the purpose of section 5(4)(a)(i) of the ICAC Act.

### **Whether, in relation to the 2010/2011 Goolwa Wharf Recreational Boating Facility development, the Alexandrina Council engaged in an administrative act that appears to have been contrary to law by undertaking the development without Building Rules Consent.**

67. Section 32 of the Development Act states that no development may be undertaken unless it is an approved development. In order to be an approved development the relevant authority, in this case Alexandrina Council, must have assessed and granted both Development Plan and Building Rules Consent (Section 33(1)).
68. As discussed above, it is not in dispute that the Goolwa Wharf Recreational Boating facility development commenced without Building Rules Consent having been granted by the relevant authority.

### Opinion

It is therefore my view that by proceeding with the development without appropriate consents the council appears to have acted contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act by breaching Section 32 of the Development Act.

Section 25(2) of the Ombudsman Act states that where I form an opinion that an administrative act is contrary to law I (i) must notify the principal officer of the council, and (ii) may make such recommendations as I think fit.

I am conscious of the fact the events which gave rise to this investigation occurred almost eight years ago, and that most of the key players are no longer employed at, or elected members of, the Alexandrina Council. In the circumstances I do not consider it necessary to make any formal recommendation, although clearly this matter should serve as a reminder to members and executive staff of the current council of the need to ensure compliance with the legislative requirements of the Development Act when undertaking council development projects. Mr Rappensberg response to my provisional report indicates the Council have learnt from the experience and that further steps will be implemented to reduce the risk of a similar situation occurring in the future.

In terms of who is ultimately liable for losses sustained by the council, that is a matter which may yet be determined by a court, and is not a subject I propose to comment on here.



- 69. [REDACTED]
- 70. [REDACTED]
- 71. [REDACTED]
- 72. [REDACTED]
- 73. [REDACTED]

**Opinion**

[REDACTED]

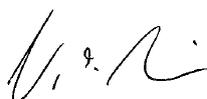
**Summary**

In light of the above, my view is that:

1. Mr Neville Styan committed maladministration in public administration within the meaning of sections 5(4)(a)(i) and 5(4)(a)(ii) of the ICAC Act by failing to obtain full development approval prior to the construction of the council’s Goolwa Wharf Recreational Boating Facility.
2. A practice adopted by the Alexandrina Council, namely failing to ensure all planning approvals had been granted prior to the construction of the Goolwa Wharf Recreational Boating Facility in 2010/2011 resulted in maladministration in public administration within the meaning of section 5(4)(a)(i) of the ICAC Act.
3. By proceeding with the development without appropriate consents the council appears to have breached Section 32 of the Development Act and thereby acted contrary to law for the purposes of section 25(1)(a) of the Ombudsman Act.

[REDACTED]

5. For the reasons discussed above I do not consider it necessary to make any formal recommendation.



Wayne Lines  
SA OMBUDSMAN

18 December 2018