

## Report

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

Public Authority	City of Victor Harbor
Public Officers	Cr Peter Charles
Ombudsman reference	2017/11639
ICAC reference	2017/000155
Date of referral	2 November 2017
Issue	Whether Cr Peter Charles deceived members of the public by posting an incorrect media release on social media about the Whale Centre in breach of the Code of Conduct for Elected Members thereby committing misconduct in public administration

## Jurisdiction

This matter was referred to the Ombudsman by 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 misconduct 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.
- (2) In this section—

**Commissioner** means the person holding or acting in the office of the Independent Commissioner Against Corruption under the ICAC Act;

**ICAC Act** means Independent Commissioner Against Corruption Act 2012;

**Office** means the Office for Public Integrity under the ICAC Act.

These issues concern alleged breaches by Cr Charles of clauses 2.5, 2.7, 2.8, 3.1 and/or 3.2 of Part 3 of the Code of Conduct for Council Members (**the Code**). Clause 2.25 of Part 2 of the Code sets out the disciplinary action that can be taken against elected members in breach of the Code. As a contravention of Part 2 can therefore constitute grounds for disciplinary action under the *Local Government Act 1999*, I have considered these matters under section 5(3)(a) of the ICAC Act.

The referral is based on one report made to OPI.

## Investigation

My investigation has involved:

- assessing the information provided by the reporter
- seeking a response from Cr Charles
- considering the Code, the ICAC Act and the Ombudsman Act
- preparing this report.
- providing the council and the reporter with my provisional report for comment, and considering their responses
- providing Ms Victoria MacKirdy, Chief Executive Officer with my provisional report for her information
- preparing this report.

## Standard of proof

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

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

## Response to my provisional report

In response to my provisional report, Cr Charles responded by email on 31 May 2018. Cr Charles accepted the findings of the provisional report and will abide by the recommendation.

The reporter responded by email on 6 June 2018. The reporter appreciated the investigation and accepted my recommendation.

## Background

1. Cr Charles is an elected member of the City of Victor Harbor (**the council**).

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

<sup>2</sup> *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

### *Whale Centre*

2. The Whale Centre in Victor Harbor is funded by the council and currently runs at a loss.
3. On 10 April 2017 the council held a special council meeting to receive its 2017/18 draft budget V0.3 'for the purpose of considering further service level options to enable development of the draft Annual Business Plan.' The meeting was not confidential nor did the council move into confidence during the meeting. The council livestreams ordinary and special council meetings.
4. The minutes of the special council meeting of 10 April 2017 record the following:

SC292017 Moved: Cr Terry Andrews  
 Seconded: Cr Peter Charles

That the 2017/18 draft budget reflect the continuation of the operation of the Whale Centre.

*4:48pm Cr Peter Charles withdrew his support in seconding the motion*

**LAPSED FOR WANT OF A SECONDER**

SC302017 Moved: Cr Peter Charles  
 Seconded:

That the matter lie on the table.

**LAPSED FOR WANT OF A SECONDER**

SC312017 Moved: Cr Moira Jenkins  
 Seconded:

That the 2017/18 draft budget reflect the discontinuation of the operation of the Whale Centre in its current form.

*5.03pm Cr Moira Jenkins withdrew her motion*

**WITHDRAWN**

5. The effect of the above motions meant that the existing arrangement continued, being the operation of the Whale Centre funding being maintained with the draft budget in full.
6. On 11 April 2017 the 'Friends of the Encounter Coast' Facebook group posted a media release as follows:

MEDIA RELEASE on behalf of Cr Terry Andrews  
 Tuesday Morning 11<sup>th</sup> April

The Whale Centre at Victor Harbor will close.  
 Victor Harbor council voted and agreed to close the Whale and Marine Centre last night.

This education and tourist facility, that has been running at Victor Harbor for the last 18 years, is still one of the main tourist attractions. The council will redeploy staff and save \$40,000 by closing it.

"The public will and should be outraged by this decision".

"This decision is short sighted and will send out the wrong message about our council(sic), Cr Andrews said.

A possible white knight in the form of Will Hendriks and Scott Hicks, renowned international film director and local residents may be coming to the rescue. A meeting tomorrow night, Wednesday, at Victor Harbor in the McCracken Convention Centre, will launch the Granite Island Concept Interpretative Centre and Sculptor Park and be offering a solution to solve the problem.

"I personally commissioned a report from a top PR Company (Field Public Relations) showing the shortcomings of our admin in promoting the Whale Centre and the Horse Tram. Unfortunately the administration and councillors were reluctant to even receive the report, let alone act on it" Cr Terry Andrews said.

The launch, which was by invitation, is now open to the public and they are invited to attend.

7. Cr Charles posted a link to the above media release on his personal Facebook page as follows:

Peter Charles Sorry Council has not made funding available to keep "Whale Centre" open past the end of the Whale season. Possibly closing at the end of those school holidays! BUT Good News Awaits ://Eventbrite.com.au/granite-island-2020-special...Book your ticket and see what Ausi Film Director Scott Hicks has produced on the VISION-

8. Comments follow seeking clarification of this post including the following:

Michelle Maxwell: ...Weren't we told a number of times by two other Councillors that this was only a preliminary discussion?

Michelle Maxwell: Meg. I am totally confused by Councillor Peter Charles above comment that the Whale Centre may close at the end of these school holidays when we have consistently been told over the last 24 hours that this was only initial discussions.

Peter Charles: that's the result of tonight's workshop not at all in concrete further workshop coming and then public consultation

Meg Storer: He's excited about the Granite Island Sculpture Park proposal and trying to generate buzz about it. I don't want people panicking over it too much (edit, thank you Peter) although personally I'm doubting the Whale Centre will continue as it is for the long term. I'm just writing an update on my petition detailing the entire meeting, but basically they have let it as what it says in the agenda (may close at the end of the whale season in October 17)

Peter Charles: that's correct

Peter Charles: Meg Storer check out the link get your tickets and see film produced by Scott Hicks on the night, or wait for Adelaide media coverage Thursday: 13<sup>th</sup> April.

9. On 11 April 2017 at 1:49pm the council's former Chief Executive Officer, Mr Graham Maxwell sent an email to all elected members and senior managers of council's administration as follows:

Good Afternoon Members

Today two elected members (Peter and Terry) have released Facebook posts advising the community that the Council has resolved to close the Whale Centre and that the closure will be effective from the end of October (end of the Whale Centre). Both posts promote the public meeting announcement to be delivered tomorrow night by the Breakwater Group as being the saviour of everything in this regard.

I have also become aware that media releases have been sent to the Advertiser, Channel 10 and potentially other media outlets.

This raises significant concerns about members(sic) understanding of the decisions made last night and certainly raises questions about what interests are being represented by such inaccurate exposure.

Just to refresh members(sic) recollection, the record in relation to the Whale Centre debate last night shows as follows -

...

The above series of motions which each lapsed for want of a seconder resulted in the status quo remaining - that is, the continuation of the operation of the Whale Centre in its current form has been maintained within the draft budget in full. I recall stating to the meeting that by default the Whale Centre budget would remain as presented.

This is an example of why the council has nominated spokespersons. Further, the distribution of such material when Council is not yet halfway through the draft budget development stage is premature and provocative. It will not be hard to imagine the public relations disaster that the broad distribution of incorrect information via Facebook and to the media will have. I cannot overly stress how serious this is.

### *Granite Island Interpretive Centre and Sculpture Park (the sculpture park)*

10. On 27 August 2014 council administration signed a lease agreement to hold sculpture installations on Granite Island, the causeway and the waters between Granite Island and Warland Reserve with Sculpture by the Sea Incorporated. This contract was for three years and expired on 31 December 2016. I have not been informed as to a contract extension between the council and Sculpture by the Sea Incorporated however on 5 January 2018 Sculpture Encounters - Granite Island, was launched by the SA Government and Sculptures by the Sea Incorporated. The council's website reports that eight permanent and two temporary sculptures have been installed around Granite Island as part of a three year pilot program, with more sculptures being added every six months for the next three years with all permanent works available for sale.
11. On 26 September 2016 Cr Charles brought a proposal before council about a sculpture park at Granite Island. The motion was as follows:

OC5292016

Moved: Cr Peter Charles

Seconded: Cr Terry Andrews

1. That the City of Victor Harbor Council show their support to enhance and progress these projects by way of advice such as providing information and contacts if required.
2. That this motion does not include any implied or actual financial support.

### **LOST**

12. The creator of the proposal, Mr Will Hendriks is an artist and sculptor with links to Victor Harbor via his son, Mr Shane Hendriks, Director of Advance Building Constructions in Port Elliot. The sculpture park proposal is not and has never been endorsed by the council, but Cr Andrews has publicly supported the proposal.
13. On 12 April 2017 the sculpture park proposal was officially launched in Victor Harbor with the speakers being Mr Hendriks, Mr Scott Hicks, Cr Andrews and Mr Dale Elliot (Granite Island 2020 Spokesperson). Cr Andrews referred to the launch and was actively building public support and attendance at the launch on social media, as evident in the above media release about the Whale Centre.
14. A 'Personal Invite' to the launch was sent 'To all our volunteers' from 'Cr Terry Andrews', and the official launch documentation in leaflets and on email listed 'Councillor, Terry Andrews' as a guest speaker on the evening. A video file has been

provided to my investigation showing Cr Andrews formally speaking at the event. Cr Andrews described himself as the 'facilitator' of the sculpture park with the council.

### Relevant law

15. Section 5(3) of the ICAC Act provides:

(3) *Misconduct in public administration* means—

- (a) contravention of a code of conduct by a public officer while acting in his or her capacity as a public officer that constitutes a ground for disciplinary action against the officer; or
- (b) other misconduct of a public officer while acting in his or her capacity as a public officer.

16. Section 63 of the Local Government Act provides:

#### 63 - Code of conduct for members

- (1) The Governor may, by regulation, prescribe a code of conduct to be observed by the members of all councils.
- (2) Council members must observe the code of conduct

17. Clauses 2.5, 2.7, 2.8, 3.1-3.3 of Part 3 of the Code of Code of Conduct provide:

- 2.5 Ensure that personal comments to the media or other public comments, on Council decisions and other matters, clearly indicate that it is a private view, and not that of the Council
- 2.7 Deal with information received in their capacity as Council members in a responsible manner
- 2.8 Endeavour to provide accurate information to the Council and to the public at all times
- 3.1 Act honestly at all times in the performance and discharge of their official functions and duties
- 3.2 Perform and discharge their official functions and duties with reasonable care and diligence at all times
- 3.3 Not release or divulge information that the Council has ordered be kept confidential, or that the Council member should reasonably know is information that is confidential, including information that is considered by Council in confidence.

### **Whether Cr Charles deceived members of the public by posting an incorrect media release on social media about the Whale Centre in breach of the Code thereby committing misconduct in public administration**

18. In response to this allegation against him Cr Charles has informed my investigation:
- in regard to the first motion SC292017 *that the Budget reflect the continuation of the Whale Centre* he seconded and then withdrew support because of the debate about the expensive repairs, disability additions and occupational health and safety concerns including white ants, lack of air conditioning
  - seven other council members chose not to second the motion also

- he attempted to save the pending closing of the Whale Centre by laying the motion on the table until the council knew if another leaseholder could be found but there was no seconder
  - the final outcome at the council meeting was that there were no funds for continuation and the general consensus was that the Whale Centre had to close after the October school holidays and whale season as part of a transition plan and its operation moved to another location
  - that he has a permanent disclaimer on his Facebook page that states “My Facebook comments are my personal views and not necessarily those of the City of Victor Harbor Council.”
  - his Facebook comments clearly state ‘the result of tonight’s workshop not at all in concrete(sic) further workshop coming and then public consultation.’
  - he had no ulterior motive in promoting the launch when discussing the Whale Centre in social media it was just that ‘a good businessmen never lets a chance go by I guess. I am still promoting it to this day and so are many others.’
19. It is clear from Cr Charles’ response that he may have genuinely believed that the Whale Centre was likely to close after the October school holidays but it was inaccurate to share information that stated:
- the Whale Centre ‘will’ close
  - the council voted and signed to ‘close’ the Whale Centre.
20. In my view, Cr Charles, in sharing the media release, breached clauses 2.5, 2.7 and 2.8 of the Code because:
- the information he shared on his Facebook page was not accurate
  - he failed to indicate that it was his opinion (and not fact) that the Whale Centre would close
  - he did not responsibly manage the information he received as an elected member about the Whale Centre when he shared the incorrect media release by Cr Andrews.
21. Because Cr Charles was not acting in the performance and discharge of his official functions and duties when sharing the media release on social media he did not breach clauses 3.1 and 3.2 of the Code.
22. I also consider that Cr Charles did not breach clause 3.3 of the Code because the information contained in the Whale Centre ‘media release’ did not contain information that was confidential.
23. I do not consider that Cr Charles’ promotion of the sculpture park project to be contrary to the Code, particularly as he does have the disclaimer attached to his Facebook page. I would caution him however on the use of social media in his capacity as an elected member.

### Opinion

In light of the above, I consider that Cr Charles breached section 63 of the Local Government Act and clauses 2.5, 2.7 and 2.8 of the Code of Conduct, and on that basis committed misconduct in public administration for the purposes of section 5(3)(a) of the ICAC Act.

My view is that sharing the ‘media release’ was contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act because Cr Charles breached the Code and therefore section 63 of the Local Government Act.

On that basis I recommend under section 25(2) of the Ombudsman Act in accordance with section 263B of the Local Government Act that Cr Charles offer a public apology at a public meeting for sharing incorrect information to the general public which was misleading.

### Summary and Recommendation

In light of the above, my final view is that Cr Charles breached section 63 of the Local Government Act and clauses 2.5, 2.7 and 2.8 of the Code of Conduct, and on that basis committed misconduct in public administration for the purposes of section 5(3)(a) of the ICAC Act.

To remedy this error, I recommend under section 25(2) of the Ombudsman Act the Cr Charles offer a public apology at a public meeting for sharing incorrect information to the general public which was misleading.

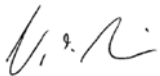
### Final comment

In accordance with section 25(4) of the Ombudsman Act the agency should report to the Ombudsman by **6 August 2018** on what steps have been taken to give effect to the recommendations above; including:

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

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

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



Wayne Lines  
**SA OMBUDSMAN**

7 June 2018