

## REDACTED FINAL REPORT

Investigation pursuant to referral  
Section 24(2)(a) *Independent Commissioner Against Corruption Act 2012*

Public Authority	Rural City of Murray Bridge
Ombudsman reference	2015/09171
ICAC reference	2015/000775
Date of referral	28 October 2015
Issues to be assessed	<ol style="list-style-type: none"><li>1. Whether the former Chief Executive Officer of the Rural City of Murray Bridge committed maladministration by consistently failing to act in relation to breaches of the <i>Development Act 1993</i> by a company</li><li>2. Whether the Mayor of the Rural City of Murray Bridge committed maladministration by consistently failing to act in relation to breaches of the <i>Development Act 1993</i> by a company</li><li>3. Whether the Rural City of Murray Bridge committed maladministration by consistently failing to act in relation to breaches of the <i>Development Act 1993</i> by a company</li></ol>

### 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 potential issues of maladministration in public administration within the meaning of that Act (the referral).

The referral arose out of a report to the Office for Public Integrity (the OPI).

The referral gives rise to three issues.

### Action taken

Using my powers under the *Ombudsman Act 1972*, I have conducted an investigation of the issue in response to the referral by:

- assessing the information provided by the Commissioner
- seeking a written response from Mr Peter Bond, Mr Brenton Lewis and the council
- seeking a further written response from Mr Bond

- interviewing Mr Andrew Meddle by telephone
- seeking information from Mr Clarry Fisher
- seeking the views of the Commissioner on my draft provisional report
- considering:
  - the ICAC Act and the Ombudsman Act
  - the *Development Act 1993* (**the Development Act**)
  - the *Local Government Act 1999* (**the Local Government Act**)
- preparing a provisional report and providing it to the parties for comment
- preparing this final report.

### Standard of proof

The standard of proof I have applied in my investigation and this 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 (*Briginshaw*), I have considered the nature of the complaint and the allegations made and the consequences if they were to be upheld. *Briginshaw* recognises that greater care is needed in considering the evidence in some cases;<sup>1</sup> and 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

Mr Michael Sedgman, the current Chief Executive Officer of the council, responded to my Office noting that he accepted the conclusion in my provisional report and did not seek to comment on my views.

None of the other parties provided a response to my provisional report.

My view remains as set out in my provisional report.

### Background and evidence obtained in the investigation

1. The company manufactures at a site (the site).
2. The site is comprised of:
  - [
  - 
  - 
  - .]
3. Allotment [X] is within the Primary Production Zone under the council's current Development Plan. Allotments [Y], [Z] and [ZZ] are within the Light Industry Zone.

### *The development applications*

4. The company has lodged eight applications for development approval since 2004:

<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.

- on 20 December 2004 the company lodged an application (**the first application**) for a 'light industrial complex'
  - on 14 November 2008 the company lodged an application (**the second application**) for construction of six sheds at the site and a 'soft zone' including planting of vegetation
  - on 21 May 2009 the company lodged an application (**the third application**) for a 'soft zone' including landscaping and a building for retail display and staff amenities
  - on 22 August 2011 the company lodged an application (**the fourth application**) for approval for development described as 'Industrial sheds, carpark and offices' on Allotment [X] (including retrospective approval)
  - on 25 August 2011 the company lodged an application (**the fifth application**) for development described as 'Industrial sheds and carpark' on Allotment [X] (including retrospective approval)
  - on 21 December 2012 the company lodged an application (**the sixth application**) for 'Uninhabited Display Units' on Allotment [Y] and an application (**the seventh application**) for development described as 'concrete fence' on Allotments[Y], [X] and [Z]
  - on 14 August 2014 the company lodged an application (**the eighth application**) for variation to the fourth application including:
    - modifications to the stormwater management system
    - construction of a dam
    - modifications to concrete walling
    - construction of a colourbond fence.
5. Of the eight development applications lodged by the company:
- Development Approval has been granted in relation to the first application in its entirety
  - Development Approval has been granted in relation to certain stages only of:
    - the second application (construction of six sheds at the site)
    - the fourth application (site works and drainage for the site plus concrete block walls)
    - the fifth application (industrial sheds and carpark)
  - the following applications were withdrawn by the company:
    - the sixth application (uninhabited display units on Allotment [Y])
    - the seventh application (concrete fence on Allotments[Y], [X] and [Z])
  - Development Approval has not been granted in relation to:
    - the third application (a 'soft zone' including landscaping, a building for retail display and staff amenities)
    - the eighth application (a variation to the fourth application which covered modifications to the stormwater management system, construction of a dam, modifications to concrete walling and construction of a colourbond fence)
    - remaining stages of the second, fourth and fifth applications (including planting of vegetation, industrial sheds, carparks and offices).

#### *The alleged illegal development*

6. On the basis of the information provided to my investigation it appears that:
- the company has undertaken the following development at the site without approval from the council:
    - at least sixteen buildings
    - two concrete slabs (including one with a roof)
    - a stormwater detention basin.
  - the company also:

- failed to comply with condition 1 of the Development Approval for the fourth application
  - failed to comply with condition 1 of the Building Rules Consent granted to stages 3, 4, 6, 7 and 8 of the fifth application
  - failed to comply with condition 2 of the Building Rules Consent granted to stage 5 of the fifth application
  - breached section 67(1) of the Development Act given that no certificate of occupancy has been granted in relation to any building at the site that requires such a certificate.
7. I simply note that at this stage, the breaches are alleged only and have not been proven in a court.

*Steps taken by the council in relation to the illegal development*

8. The council provided a comprehensive response to my investigation which included correspondence between the council and the company from the years 2004 to 2015 and documents relating to the various development applications. While I have considered all of that information in detail, I have highlighted below what are in my view the key events and correspondence for the purposes of my investigation.

**2009**

9. The council appears to have first become aware that there were issues with the company's compliance with the Development Act in 2009. At that time, the council raised the issue of unauthorised concrete blocks at the site.
10. On 2 June 2009 the council's Building Fire Safety Committee (**BFSC**) inspected the site and on 9 July 2009 wrote to the company outlining a list of outstanding items in relation to installation of fire safety equipment at the site.
11. On 9 December 2009 the BFSC wrote to the company seeking written confirmation that all matters raised in the BFSC's previous correspondence had been attended to. It is not clear whether the company provided a response.

**2010**

12. On 6 July 2010 the BFSC wrote to the company outlining the BFSC's expectation that certain fire safety measures would be undertaken. It is not clear whether the company provided a response.

**2011**

13. On 27 April 2011 the council inspected the site and on 28 April 2011 wrote to the company in relation to 'illegal development' and '[b]reaches of the Public and Environmental Health Act 1997'. That letter identified the following illegal development:
- The expansion and placement of transportable units and waste control containers on allotment [X], land that is zoned as Primary Industry under Council's Development Plan.
  - The construction/erection of large warehouse type buildings on Allotment [X], land zoned as Primary Industry under Council's Development Plan.
  - The construction and erection of a supposedly temporary building on Allotment [X], land zoned as Primary Industry under Council's Development Plan.

- The construction of additions to existing buildings on allotment [Y] without seeking development approval, under the Development Act 1993 and Regulations 2008.
- The construction and erection of [a] supposedly temporary building on allotment [Y] without seeking development approval under the Development Act 1993 and Regulations 2008.
- Failure to complete the Landscaping, Carparking and stormwater control as per Development Plan Consent Conditions: (1), (2) (11) (12) & (4).
- Further Council is aware of non-compliance issues with the requirements of Councils Building Fire Safety Committee.
- Breaches of the Public and Environmental Health Act 1997 Waste control Regulations 2010 and as this breach is serious a Public and Environmental Health Act Notice is enclosed. (Refer Condition (11) of the Development Plan Consent).

That letter also stated:

Council has in the past made every effort to work with the company management to resolve previous breaches and it now appears that this effort was to no avail.

You are therefore required within 30 days of the date of this correspondence to remove all structures buildings and transportable units from Allotment [X], Land Zoned Primary Industry under Council's Development Plan. Cease discharging effluent onto allotment [X] and carry out the requirements of the Public and Environmental Health Act (Notice enclosed).

You are further required to provide Council with complete Plans, Engineers calculations, Specifications and details for the additions to the two (2) existing structures and the temporary building.

Further you are required to implement a program to complete the landscaping and Stormwater control within 30 days from date of this correspondence and comply with Note 5 of Councils Development Plan Consent.

Your co-operation to resolve these matters would be to your advantage however if Council does not receive an adequate response further action will be instigated.<sup>3</sup>

14. On 19 May 2011 the council issued the company with an enforcement notice dated 19 May 2011 pursuant to section 84 of the Development Act (**the enforcement notice**).
15. The enforcement notice related to various structures. The enforcement notice stated that no development consent had been given or issued for the change of use of the land or the placement of the structures. The enforcement notice directed the company to:
  1. Cease and refrain from carrying out any further development
  2. Remove the [structures] from the Land.

The compliance date was specified as 24 June 2011.

16. The company did not appeal against the enforcement notice. On 24 May 2011 the company responded to the enforcement notice. The company stated that it wished to work with the council to promptly address all issues and sought a meeting with the council to brief the council on its development applications and timing thereof.<sup>4</sup>

<sup>3</sup> Letter from Mr Clarry Fisher to [the company owner] dated 28 April 2011.

<sup>4</sup> Letter from [the company owner] to Mr Clarry Fisher dated 24 May 2011.

17. I understand that the enforcement notice has only partly been complied with and that the remaining non-compliance was not pursued by the council on the basis that the company indicated that it would work with the council to resolve issues at the site.
18. In May and June 2011 various council staff met with the company owner at the site to discuss alleged illegal development. According to a file note by Mr Clarry Fisher, Manager, Health and Building Compliance, council staff (including Mr Peter Bond, who was at that stage Chief Executive Officer of the council) met with the company owner to discuss the illegal development on or around 2 June 2011. According to that file note:
- [The company] have put in place various persons with the right expertise to resolve the outstanding issues and provide council with all the appropriate documentation to gain the required approvals under the Development Act 1993 and Development Regulations 2008 and council's development plan[.]  
Council has received an undertaking by [the company owner] [the company] dated 24 May indicating that they will work towards resolving the outstanding issues.
19. On 16 June 2011 and 10 August 2011 the company wrote to the council seeking an extension of time to lodge necessary development plan consent applications. On 22 and 25 August 2011 the fourth and fifth applications were lodged.
20. On 15 December 2011 the BFSC issued a Notice of Fire Safety Defect (**the fire safety notice**) to the company pursuant to section 71(2) of the Development Act.

## 2012

21. On 15 September 2012, Mr Fisher provided Mr Bond with a list of items to be addressed in relation to the company. Those points were described as:
- Compliance with Building Fire [S]afety Committee requirements
  - Position of external concrete block walls adjacent to boundaries
  - Engineers [sic] calculation for concrete block walls adjacent to boundaries
  - Backfilling of concrete block walls Eastern side of [the company]
  - Removal of vegetation
  - The re-establishment of vegetation
  - Erection of warehouses and other structures without development approval
  - Installation of adequate Waste Water Control systems
  - Installation of appropriate storm water retention ponds
  - An overall site plan indicating position of all structures, transportable camp location, carparks, storm water management, Landscaping and vehicle circulation details
  - Non-compliance with previous Development Approvals and Conditions.
- Agreements have been reached in the past with [the company] to ensure development application [sic] are lodged and whilst Council has received the DA, work on site had already commenced before any assessment of the DA had taken place or approval issued even though council had received guarantees that this would not occur again.
- The development being carried out on site keeps on changing the dynamics for the requirements of Building Fire Safety, egress and access requirements, parking and traffic movement, size of Waste [W]ater control systems and stormwater requirements on site.
- Further site works have been carried out on allotment [Z] to the South that has diverted stormwater onto the [xxxx] site.
22. On 15 September 2012 there was a meeting between Mr Bond, the council's General Manager, Mr Simon Bradley, the council's Acting Manager, Planning, Ms Cherry Getsom, a Senior Planner at the council and Mr Fisher. According to Mr Fisher, at that

meeting both Ms Getsom and Mr Fisher were instructed not to take any further action in relation to the company.<sup>5</sup>

23. On 2 November 2012 Mr Fisher notified Mr Bradley and Mr Bond that:

[The company] are in the process of erecting another building out in front of their site adjacent to [street], no DA.<sup>6</sup>

24. On 4 November 2012 Mr Bond responded to Mr Fisher and Mr Bradley:

Thanks for the update Clarry. I did try to contact [a company consultant] [a consultant for [the company]] on Friday following receipt of your email. Left a message for him to call me and provide an explanation. Meeting [the company] on Thursday.<sup>7</sup>

25. It appears that around this time Mr Bond met with the company owner (along with Mr Brenton Lewis (who was not Mayor at this stage but was employed in his previous position as Chief Executive of Regional Development Australia Murraylands & Riverland Inc) and a company employee.

26. On 15 November 2012 (then) Mr Lewis emailed the company owner and a company employee, (copied to Mr Bond) stating:

[the company owner]

Thank you for the opportunity to meet with you and [a company employee], at [the company] last week, as usual it is always mind blowing to see your innovation and growth. Also thank you for lunch [sic] it was great to talk over the opportunity to share some food and wine.

I have followed up the adjoining land owner and she is willing to meet with you in the early new year as she has a busy period between now and Xmas. I suggested say February? She saw the planning application in the local paper and I explained that to her, she will not be opposed to the changes required.

On the matter of your interest in assisting people that are homeless [emergency & short term] for various reasons I have commenced some discreet conversation and will be back to you when it gets to the next stage, Peter Bond will be involved in all further discussions before we come back to you.<sup>8</sup>

27. On 16 November 2012, the company owner responded to Mr Lewis and a company employee (copied to Mr Bond) stating:

Thanks and look forward to both development [sic] to happen.

It was a pleasure to see you, Peter and Allan [sic] in [xxxxx] and been able to spend [sic] bit of time together.

[xxxxx] will soon be the centre for housing and multy storey [sic] solution, and I do really hope that local builders will take advantages and benefits from a very unique innovative system.

Thanks again.<sup>9</sup>

28. On 5 December 2012 Mr Bradley emailed Mr Bond:

Just an update on the [the company] Development Applications. Regarding the first DA (Category 1), Daniel believes that the proposed development is more than "light industry" as suggested by [the company] consulting planner and agreed to by Cherry, but is "heavy

<sup>5</sup> Email from Mr Clarry Fisher to Mr Steven Strelan dated 10 November 2015.

<sup>6</sup> Email from Mr Clarry Fisher to Mr Simon Bradley dated 2 November 2012.

<sup>7</sup> Email from Mr Peter Bond to Mr Clarry Fisher and Mr Simon Bradley dated 4 November 2012.

<sup>8</sup> Email from Mr Brenton Lewis to the company owner and a company employee dated 15 November 2012.

<sup>9</sup> Email from [the company owner] to Mr Brenton Lewis and a company employee, ccd to Mr Peter Bond dated 16 November 2012.

industry” which therefore results in the DA being a Category 3. Cherry is therefore questioning her judgement. This obviously has huge implications in terms of timelines in assessing the DA and loss of credibility, both of which I do not want to occur.

I have asked Cherry to receive independent advice from a legal planner to assess which Category the DA it is. We should have this advice today.

I'll let you know more when the information comes to hand.<sup>10</sup>

29. Mr Bond responded to Mr Bradley on 6 December 2012 stating:

This is a big call on the part of the Planners and one that could aggravate our relationship with [the company] and potentially cause claim against us based on our initial call and the time it has taken us to deal with the DA.

I have discussed the matter with Daniel and outlined my concerns. [The company] will need to be kept informed on the process and outcome of our direction. A Cat 2 determination would be manageable over the existing site so let's keep fingers crossed.<sup>11</sup>

30. On 6 December 2012 Mr Bond responded to a query from a consultant for the company, about a proposed meeting to discuss legal issues about processing and categorization stating:

Yes I will be there and yes I have been asking many questions from my end as to the late call on the Cat 3 matter. We will be open to discussion on Monday, but the more information that can be gathered prior to the meeting will assist in a direction forward.

I continue to provide assurance to [the company] that we are in support of their operation and that we will work towards a resolution of their planning, building ad[sic] fire safety issues. This process has been frustrating for both parties.<sup>12</sup>

31. On 12 December 2012 Mr Fisher emailed Mr Daniel Hermann, a Senior Policy Planner at the council (copying in Mr Bond and Mr Bradley) stating:

Had a phone [c]all from [...] who lives on [...] road directly adjacent [the company]. As discussed yesterday rubbish is blowing off the [the company] site onto the [xxxxx] tennis courts and into the rear of the adjoining owners. Also evidentially [sic] at 5.45am this morning on the [the company] site they started ripping out more trees and placing more concrete blocks on [the company] land behind these properties. I know you are meeting with them today and it may be worth raising the above issues to clarify what they are doing.<sup>13</sup>

32. On 21 December 2012, a consultant for the company, wrote to Mr Hermann stating:

The company commits to have an application submitted to the Department of Health for the installation, use and ongoing maintenance for a Waste Water Treatment Plant to be located on Lot [Y] by no later than 25.1.2013.<sup>14</sup>

33. On 21 December 2012 the company lodged the sixth application.

## 2013

<sup>10</sup> Email from Mr Simon Bradley to Mr Peter Bond dated 5 December 2012.

<sup>11</sup> Email from Mr Peter Bond to Mr Simon Bradley dated 6 December 2012.

<sup>12</sup> Email from Mr Peter Bond to a company consultant dated 6 December 2012.

<sup>13</sup> Email from Mr Clarry Fisher to Mr Daniel Hermann copied to Mr Peter Bond and Mr Simon Bradley dated 12 December 2012.

<sup>14</sup> Letter from a company consultant to Mr Daniel Hermann dated 21 December 2012.

34. On 9 April 2013 Mr Andrew Meddle, General Manager of Sustainable Communities at the council, emailed Mr Bond and Mr Bradley (copied to Mr Fisher and Mr Keiron Barnes, the council's Manager, Planning) stating:

Sorry to trouble you while you are out of the country, but know you will want to be aware of this one before the phone rings...

[The company] have begun significant earth moving operations without any form of planning consent, which is adversely impacting on a neighbor. Compliance have been out and investigated what is happening and land raising operations have taken place close to the neighbor and vehicles operating in this area can see clearly over the 2m wall surrounding the property. The property is also cloaked with dust and windblown soil from the operation.

Daniel and Kieron have met with [the company] last Friday to progress their assessment, which was positive. However, this step is not. I have asked Compliance to revisit and ask them to stop the illegal operations. If this fails I will consider whether we will have to tell them to stop as they are creating unreasonable living conditions for the neighbor.

Hope this updates you adequately and I will try to avoid formal action.<sup>15</sup>

35. On 9 April 2013 Mr Bond responded to Mr Meddle:

Sounds like [the company owner] has become impatient! Again!

Give [a company consultant] [sic], a call and outline your concerns. He will endeavor to mediate a solution with [the company owner]. Better for you to do this as compliance are seen to be more confrontational to [the company].<sup>16</sup>

36. On 12 April 2013 Mr Barnes, Mr Fisher and Ms Getsom met with a company consultant at the site to discuss the illegal development. The council staff also met separately with two residents to discuss their concerns and view the earthworks.

37. On 15 April 2013 Mr Barnes emailed a company consultant (copying in various other people) stating:

Thank you for your email and your time last Friday. I agree that this matter has become urgent. The negative impacts that the unauthorized earthworks have had, and will continue to have, on the neighbouring residential properties to the east are, in my opinion, unacceptable. As discussed, these impacts relate to the generation of significant amounts of dust and noise as well as increasing the potential for overlooking and the visual impact of [the company] activities from the rear yards of the dwellings. I have attached a couple of photos taken on Friday from the neighbouring properties for your information.

While I note that [the company] has lodged a development application for a number of existing structures (including storage sheds, offices, display units, stormwater detention ponds, car parks, boundary wall etc), this application does not include the filling of land to the extent that has occurred, nor does it include the construction of retaining walls around the boundary to contain the fill (which appears to be approximately 2m in height).

Given the above, it was agreed last Friday that [the company] would take immediate action to reduce the impact of the fill on the adjoining residences to the east. This would either involve the removal of the dirt, or the erection of a **temporary** structure to reduce the impact of dust and noise. Please note that any temporary structure may require development approval in itself. Therefore, you are requested to liaise with Council's Planning and Building Officers should you wish to pursue the temporary structure option rather than remove the dirt.

<sup>15</sup> Email from Mr Andrew Meddle to Mr Peter Bond and Mr Simon Bradley copied to Mr Clarry Fisher and Mr Kieron Barnes dated 9 April 2013.

<sup>16</sup> Email from Mr Peter Bond to Mr Andrew Meddle, copied to Ms Ros Kruger dated 9 April 2013.

38. On 17 April 2013 Mr Fisher emailed Mr Bond stating:

I have had 2 phone calls from the adjoining owner to [the company] last night and at 12 noon today indicating that [the company] have not ceased carrying out the filling against the concrete blocks.

I think Keirons [sic] response was quite clear that they were to cease any further work in this area until they provided certain information and received Council development approval.

Where do you want us to go from here.[sic]<sup>17</sup>

39. Between 15 April 2013 and 23 April 2013 numerous emails were exchanged between the council and the company in relation to unauthorized development and earthworks.

40. On 23 April 2013 Mr Barnes emailed Mr Fisher stating:

I have agreed to postpone the meeting with [the company] for a week as [a company consultant] has stated that they are working on an alternative solution which would involve the creating of an earth mound.

41. Between 23 April 2013 and 7 May 2013 numerous emails were exchanged between the council and the company in relation to unauthorized development and earthworks.

42. According to the information provided by the council, it appears that the first time that the council sought legal advice on the company's non-compliance with the Development Act was in May 2013.

43. In May and June 2013 the council's lawyers, Hilditch Lawyers, raised the following issues with the council:

- as the company were undertaking unlawful works they should stop immediately
- there was no reason to provide the company with further opportunities to proceed in breach of the Development Act
- seeking clarification of when the unapproved works first commenced, given that the council only had 3 years from the date of the undertaking of works in which to commence proceedings
- urging that all communication should be in writing
- noting that another section 84 notice may need to be issued but that it could only be issued in respect of work undertaken in the last 12 months
- reminding the council of its obligations to the public generally (e.g. its duty of care to minimize the risk of flooding).

44. On 4 June 2013 the council emailed a company consultant stating:

Council has made it quite clear that it will not agree to the undertaking of any further unapproved works on site. That was made clear in the correspondence from Hilditch Lawyers dated 20 May 2013 which you have referred to in your email.

Council does not accept that any "flooding" which may have arisen is the result of any "Stop Work" notice. It would plainly have arisen as a result of substantial unapproved development undertaken by [the company] on its land. There is no approved engineering documentation. There is no approved plan for the undertaking of works and management of associated flooding issues. Council of course accepts no responsibility for any consequences which may flow from unlawful development undertaken by [the company]. Quite clearly [the company] undertakes unlawful works at its own significant risk. As you would expect, council does not see the undertaking of further unlawful works as a solution to the current situation.

---

<sup>17</sup> Email from Mr Clarry Fisher to Mr Peter Bond dated 17 April 2013.

The only works which Council may contemplate permitting on site prior to the grant of any required development approval (if/when granted) are works which move toward reinstating the land to its “pre-development” state. If you instruct your engineers to identify a short-term solution which achieves this outcome then Council will consider it. If you implement any other alternative then Council will simply take the view that you have chosen to ignore the correspondence from Hilditch Lawyers referred to above and will instruct its solicitors to commence legal proceedings without further notice to you.

With respect, [the company’s] current response to council’s significant concerns is leaving council with little alternative but to commence legal proceedings.

Once again you are reminded that Council reserves its rights to produce all correspondence between us to the Court should legal proceedings become necessary.<sup>18</sup>

45. Discussions and correspondence between the council and the company about various issues continued in 2013 and 2014.

## 2014

46. On 25 June 2014 the council’s lawyers wrote to the company:
- noting that while Development Plan Consent had been granted for the fourth application, neither Building Rules Consent nor full Development Approval had been granted for that application
  - noting that Mr Barnes had met with the company on 22 May 2014 at the site to discuss various matters and observed that not all earthworks undertaken on the site were in accordance with the Development Plan Consent and further earthworks that were not the subject of any development authorization had been undertaken
  - noting that the council had not received any application to vary the fourth application (as required based on the council’s discussions with the company) or an application in relation to construction of an unauthorized dam
  - reminding the company of the prohibition in section 32 of the Development Act against unapproved development
  - stating that:
    - Council considers that both the development of the “additional dam” and the development already undertaken on the Subject Land which is the subject of the DP Consent are unlawful and in breach of the Act.
  - Seeking a response as to the next steps to be taken by the council and reserving the right to commence legal proceedings.<sup>19</sup>
47. In 2014 and early 2015 discussions and correspondence between the council and the company in relation to various issues (including stormwater management, concrete walls and earthwork) continued.
48. On 14 August 2014 the eighth application was lodged.
49. On 10 December 2014 Mr Bond met with the company owner, Mr Lewis (by that stage Mayor of the council) and [redacted]. I understand that [redacted] had a business relationship with the company owner and assisted him with various planning matters. According to Mayor Lewis, at the meeting, Mr Bond raised the issue of the company’s non-compliance and sought an agreement from the company that it would work co-operatively with the council and meet agreed timelines.

<sup>18</sup> Email from Mr Keiron Barnes to a company consultant dated 4 June 2016.

<sup>19</sup> Letter from Mr James Hilditch to [the company owner] dated 25 June 2014.

50. On 10 December 2014 [redacted] emailed Mr Bond thanking him for the opportunity to catch up. Mr Bond responded to that email, copying in the company owner and Mayor Lewis:

Pleasure [redacted].

Great to see [the company owner] again and discuss all the wonderful opportunities for the future. Have a safe trip OS [the company owner] and talk when you get back.

Kind Regards  
Peter.

51. On the same day the company owner responded to Mr Bond, [redacted] and Mayor Lewis:

Peter

Was good to catch up with you and [a company consultant]...

We have a very challenging year ahead of us for all.

Thanks for your help and support as I believe we should not be too far away now to expand all of our operations that will create the benefits required for the region

I hope to catch up in the new year and start working on the homeless project that is always very close to my heart and mind.

Have a safe and Merry Xmas followed by the start of a good new year.

Kindest regards  
[the company owner].

## 2015

52. On 4 February 2015 Mr Meddle wrote a memo to Mr Bond:

Further to our meeting this morning where you instructed me to:

- Stop Clarry Fisher & Malcolm Perry inspecting the [the company] site to gain evidence in support of the allegations of illegal building work;
- Take ownership of these issues and manage an outcome, which attempts to avoid formal action through mediation; and
- Follow a Kieron Barnes style approach to compliance through conciliation rather than confrontation.

I can advise that I have discussed this matter further, by holding a meeting with Malcolm Perry, Clarry Fisher and Kieron Barnes. I am now in possession of an even more complete picture than I was first thing this morning. This complements the email trail which I have copied you into as soon as I had read Malcolm Perry's first concerning email and subsequent correspondence. All are clear of the political sensitivity of these matters and have expressed concerns about treating these matters differently to our normal approach.

Clarry Fisher and Malcolm Perry have been instructed not to visit the property.

....

The [the company] site is becoming very difficult to manage from a planning, building and fire safety perspective. There is clearly no intent to engage with Council before starting new illegal works. This approach undermines any trust the Council can have in due process or procedures being followed. This approach to safety is very concerning, particularly given recent the [sic] death on site from an operational accident.

To update you as to the Council's side of the story. Malcolm Perry attended, with a group of about 20 other building surveyors, an AIBS event at the [the company] site on Monday. The purpose of this visit was to promote the [xxxxx] and the transformation this could have for the building industry. The purpose of these visits is for members to gain a better

understanding of products available and to obtain information to assist them with their daily work. The latter was not provided on this occasion. Attendance at these events involves payment by the Council.

During this visit Malcolm Perry noted that illegal development was being undertaken. He spoke with [redacted] at the time and also agreed to call [redacted] to discuss further. He did this on Tuesday and [redacted] was not pleased.

The matter was referred to me and I referred it to you, knowing the sensitivity. Kieron and I discussed and I asked him not to get involved in light of the situation with death threats made by [...]. Given the seriousness you advised me to contact [redacted] and for the compliance team to speak with [a company consultant] and to arrange a visit rather than turning up unannounced. Both these things happened and Clarry Fisher spoke with a company consultant to arrange to visit today. I was unable to get hold of [redacted] in person, but left a message with his receptionist. I have not had a call back.

[redacted] is evidently annoyed by Malcolm Perry's use of his site visit. However, had not significant illegal development been underway there would have not been an issue. This development will put lives at risk and is not a trifling matter.

Today Kieron has spoken with [a company consultant] and subsequently received an email and drawings. [The company] now wish to speak with the Council about a further retrospective application. However, the issue they have flagged up do not address all of the issues outstanding. In essence they are seeking to address:

- Two significant infill developments between sheds (very approximately 20m wide by 50m long and 6m high);
- Deleting two structure which have consent from a previous assessment process;
- Resizing a further building; and
- Regularising the position of a number of small structures on the northern boundary of the site.

There is no attempt to regularise the position regarding the significant illegal storage lagoon immediately adjacent to [...]<sup>20</sup> property.

The existing developments also have significant outstanding concerns. These are:

- No assessment has been undertaken with regards to the increased loading on the existing structures;
- The gap between the units now being infilled was necessary from a fire safety perspective;
- A sprinkler system will now be required for all these units;
- The CFS will be a consultee on any application given the increase in footprint with the potential for directed compliance;
- The CFS have advised the Council that they have concerns over fire safety measures at the site and that these have not been addressed;
- The Council's Building Fire Safety Committee visited the site, assessed it and served a Notice on [the company] requiring measures to be undertaken to ensure fire safety. These have not been sought of [sic] provided for the new works; and
- Procedural compliance in many areas is being flouted.

I remain concerned that [...] may be enraged if he sees Kieron Barnes on site and so would not wish him to visit the site. Also it should be noted that [the company] have never made an offer to [...] to buy [...] property, although they did purchase one nearby.

## CONCLUSION

Whilst it would be preferable to have a great working relationship with all the players involved, I do not believe that it is possible given our overriding regulatory and safety needs. I can ask Kieron Barnes to assist me in leading our approach here, but from a

<sup>20</sup> The identity of this person is not relevant for the purposes of this investigation.

development and building perspective, all are concerned that this is sending out the wrong message to [the company]. There is no good faith here on their part.

I will attempt to mediate an approach to regularising the breaches of development and building control, but do not hold out much hope for a simple resolution in the latter case. The Council's Development Assessment Panel is scheduled for 20<sup>th</sup> February 2015, where reports on both the above properties are expected, although these will only partially deal with the matters raised.

An investigation by the Ombudsman has been undertaken,<sup>21</sup> another is expected and an ICAC investigation has also been alleged. The Council is exposed significantly if it has not followed due process and treated these as we would treat any other illegal development observed.

53. On 6 February 2015 the council issued a stop work notice to the company which required the company to immediately stop work on any buildings that did not have Development Approval, 'specifically the infill of the buildings closest to the North Western boundary Allotment.'
54. On 16 February 2015 the council's lawyers emailed Mr Barnes (copied to Mr Meddle) highlighting that the council would gain nothing from further delaying enforcement action.<sup>22</sup>
55. On 17 February 2015 Mr Meddle wrote a memo to Mr Bond which included:

Those involved in the project met today and discussed efforts to date and future action. All were advised of the need to secure regularisation of the safety breaches as our priority. The approach to this was outlined as:

- Collect evidence;
- Prepare legal files;
- Prepare for legal action;
- Meet with [the company] to discuss our findings and agree a new way forward - hopefully during the week commencing 23<sup>rd</sup> February 2015;
- Serve a Section 85 Notice under the Development Act following the above discussion;
- Defer proceedings through the ERDC, whilst the above timetable is worked through;
- Achieve compliance through negotiation;
- Engender mutual trust and the delivery of a service which meets the needs of both parties; and
- Legal action would be used as a last resort.

...

#### 4. Concerns over the long-term handling of this matter

The long-term handling of this matter raises significant concerns for the Council. There is a history of taking a '*softly softly*' approach to unauthorised development at this site, which exposes the Council to a risk of negligence. There is also a history of *post facto* applications indicating no track record of wishing to apply for consent before undertaking development activities. This approach has been allowed to grow and could have been *nipped in the bud* with action some time ago, well before the current General Manager - Sustainable Communities and Manager-Planning were employed.

The Council now has a reputation of being a *soft touch* with regards to compliance at [the company], which has led to frustration amongst surrounding landowners and has now cemented itself as the business as usual practice for [the company]. This is clearly evidenced by their widespread disregard for legal compliance not just with regard to

<sup>21</sup> While it is not clear which Ombudsman investigation is being referred to here, I note that in August 2014 a complainant in relation to [the company's] development was advised that this Office was not able to investigate the matter on the basis that it could be reviewed by the council in the first instance.

<sup>22</sup> Email from Mr Syd McDonald to Keiron Barnes, copied to Andrew Meddle dated 16 February 2015.

development matters, but also with other legislative regimes including water resources, waste water, environmental health and fire safety.

Staff feel unsupported in achieving compliance in this area, despite the best efforts of managers, given the length of time matters have been unresolved. The scale of the task which now faces the Council and [the company] should not be underestimated. To achieve compliance will be a resource hungry and expensive process for both parties, which could have easily been avoided. The ratepayer will now foot the bill for significant costs whether or not this proceeds to Court.

56. On 17 February 2015 Mr Bond emailed [redacted] including:

I remain of the view that a partnered approach forward is still our best option and would support a meeting of all parties next week to reinforce that approach. Andrew also supports that process. We are concerned however that any breach of agreements formed will be a breach of trust that will potentially lead us into the ERD court for a determination of the non-compliance issues. None of us want that. [The company owner] and his team need to be disciplined and very mindful that creative expansion outside of the agreed master plan compromise the fundamentals of that partnership. I doubt I would have any choice but to support a compliance based approach at that point. We have historically got [another company] over the line with this partnered approach rather than using the big stick approach.

57. On 25 February 2015 Mayor Lewis met with Mr Fisher and Mr Anthony Brown. According to the file note of that meeting provided by the council:

Clarry advised that in [sic] October 2012, Peter Bond, Simon and he had a meeting at [the company] explaining that there were some big issues to be addressed. Clarry gave the Mayor a copy of the issues.

Clarry explained some of the issues that he had encountered including that [the company] had torn out all the trees along the border of the site and on 16<sup>th</sup> July 2014 there was a water leak. He gave the Mayor a copy of the memo associated with this and Clarry explained that [the company] had received information from their solicitors that they wouldn't do any more work.

On 3<sup>rd</sup> February 2015 [the company] invited 14 building surveyors to their factory at a cost of \$100 each. Malcolm from the Council attended and noticed that there were a number of non compliance issues including fire exits and he noticed there were no fire hydrants at fire exits etc and it was evident that they had not complied with the recommendations of the Building Fire Safety Committee. He also advised that there were 3 buildings at the back of the site that hadn't got development approval

58. On 2 March 2015 Mr Bond and Mayor Lewis met with Mr Fisher and Mr Anthony Brown. According to the file note of that meeting prepared by Mr Brown:

Peter Bond explained that there was a complicated background and to put it into context there was a possibility if getting 500-600 new employees and they were looking at \$10 million worth of government investment. He added that on one side he was trying to stimulate growth and on the other side he was trying to make sure that construction was compliant. He acknowledged that there were lots of issues with [the company] and he did state that if it wasn't possible for Council to work with them to get them compliant they would have to close down. Peter read the email from Clarry. Peter stated that we need to partner with [the company] to get them over the line and not throw the book at them.

Clarry stated that [the company] had undertaken more work after they had said they would not. He explained that [the company] had invited Malcolm Perry and others to a workshop where Malcolm noticed the work was not compliant. This included the issue regarding infill between the two buildings. Clarry said that if anything happened he had concerns that the costs could run into millions of dollars plus a possible death could result. Peter Bond advised that the burden sits with him as CEO and he advised that he had been walking a tightrope between compliance and economic growth. He explained to

Clarry that after recent events, Peter called a meeting with [xxxxxxx] [sic] and the Mayor to agree what needed to be done to go forward. He advised that [the company] had confirmed that they would comply and he explained that there would be specific deliverables signed by [the company]. He emphasised to Clarry that it was his call as CEO to make a value judgement based on the email as set out on the 3<sup>rd</sup> February which is why he stated that Clarry should not attend the site.

....

[Mr Bond stated] that things were moving fast and Andrew and Kieron were working in a joint partnership with [the company]. If things were to stop the site could close down and there would be no manufacturing.

....

Clarry said that this is a huge project and he said I [Mr Fisher] admire [the company owner] for what he wants to do but he gets to a point that he couldn't care less what Council wanted. On these sheds he doesn't have planning approval. For example, if somebody falls off there is no scaffolding and there has already been one death. Peter said that he couldn't trust [the company owner] to comply with what had been agreed therefore [the company] needed to come up with a framework.

Clarry advised that he had given to [the company] some guidance adding that we have a notice that they have not done anything. Peter showed Clarry an email stating that if they can't deliver on this the State Government wants our reassurances. He said to Clarry you will head up compliance issues with the whole project led by Kieron if they don't achieve compliance then we can only do so much.

Clarry said that I [Mr Fisher] want them to achieve compliance but it will cost millions to become compliant. He added that he's not against economic development.

....

The Mayor said as part of the process to become compliant all schedules and timelines would be signed off by both parties. ... I want to see a team sit with them. This will be number one priority and needs to be fixed. Safe work SA will be looking to ensure that processes are in place to make everything compliant. Therefore we need a list of items to undertake. We need to prioritise with timeframes. The Mayor stated that the timeframes must be reasonable. Clarry responded saying I[sic] am quite happy with that. My [sic] whole feeling was the exposure to the council. Whereas you [sic] said Peter that the responsibility lies with you [sic] I would feel responsible if anything happened.

Peter stated that there is a line with [the company owner] which can't be crossed anymore but the benefits of the economic impact of what he was doing were too big not to keep trying. Clarry stated that he was glad to hear that as he was hearing that they were a protected cow.

....

59. During March and April 2015 the council undertook inspections of the site and correspondence between the council and the company continued.
60. On 2 April 2015 a Notice of Fire Safety Defect was served on the company by the council.
61. It appears that the issues at the site were first brought to the attention of council members at a meeting on 10 March 2015 in a confidential report. At that meeting, the council unanimously voted to authorize compliance action to be undertaken:

Including the serving of legal Notices and any necessary action through the Courts, to secure a remedying of the development and fire safety breaches at this site, should officers believe that a negotiated outcome is not possible.

62. Since that time the council has taken steps to progress court action against the company with its lawyers.
63. [redacted]
64. [redacted]
65. Further updates were provided to the council members in June, September and December 2015.
66. On 2 June 2015 the council's lawyers sent a letter to the company's lawyers making clear the council's intention to pursue civil enforcement proceedings and identifying those breaches which the council intends to pursue.
67. [redacted]

### Relevant law/policies

68. 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.

### Whether the former Chief Executive Officer of the Rural City of Murray Bridge, Mr Peter Bond, consistently failed to act in relation to breaches of the *Development Act 1993* by the company

69. Mr Bond first started acting in the role of Chief Executive Officer in early 2012.
70. Mr Bond told my investigation:

As Chief Executive Officer (CEO) of the Rural City of Murray Bridge I was responsible to the Council for effectively leading the team to take enforcement action in relation to non-compliance[sic] development against [the company]. During the course of this process I was also leading the Council administration through a process of Organisational Review (at the request of Council) with the objective of introducing change to align the organisation with the strategic direction, legislative requirements and core values required of my team by Council. The main reason Council had requested the Organisational Review was to align staff with the key core values Council wanted staff to portray to their community; principally being Accountable, Respectful, Innovative, Collaborative, Inclusive and having Integrity.

It was with these core values in mind that staff were directed to achieve compliance on [sic] the [the company] through a process of collaboration and open dialogue between Council, staff and stakeholders; not through the bullish and confrontational approach

demonstrated and applied at times by Councils [sic] Building Compliance Officers leading up to the [the company] issue.

It was because of concern over the inflexible [sic] and lack of focus on customer needs demonstrated historically by Building Compliance Officers that I delegated the direct responsibility to negotiate a collaborative approach to rectifying the non-compliance issues on the [the company's] site to a team of Council officers, led by the General Manager Sustainable Communities and consisting of Planning and Compliance staff - all reporting back to the CEO.

71. In relation to his relationship with the company, Mr Bond responded:

[The company] employ in excess of 220 people with a [sic] salaries of approximately \$15million and an annual turnover in excess of \$200 million per annum. With proposed expansions by [the company] based around their new building panel designs, it was forecast that [the company] would expand its employee base to in excess of 600 employees, thus potentially tripling their net worth to the local economy and that of the States [sic] economy.

Given the closure of GMH and other key employment generators in SA more recently, the challenge of keeping [the company] in the state as well as them ultimately being compliant with regards to the Development Act was a key focus area and a significant challenge.

As CEO directly responsible for the role of fostering economic development and promoting jobs growth in our local area and in partnership with RDA and other key stakeholders. [sic] I was also responsible for the difficult task of ensuring that the injection [the company] provided into South Australia's economy was not lost to NSW. This required a working relationship with [the company] that demonstrated trust and a collaborative approach that not only provided [the company] with the confidence to deal positively with the Council, but also move towards the urgent need for compliance over their site at [xxxxx].

The partnered or collaborative approach was not an excuse for [the company] to avoid their compliance obligations. That approach did however recognise the significant number of non-compliance issues that required remediation and that a holistic approach based on a level of risk and cost benefit matrix; not a single issue approach, was the best way forward.

My role as CEO in managing the [the company] issue was essentially to act as a conduit that provided leadership and direction to my staff, information sharing with the Mayor, key staff and Council, and a point of trust and collaboration with RDA, [the company] and the State Government Agencies.

....

[The company's] problems were a product of the popularity of their product. Demand outstripped Council ability to deliver the necessary planning and compliance support. In the end "enough was enough" and a way had to be found to force or encourage [the company] to become compliant both in a land use and building compliance context. It was an acknowledged fact that the Managing Director of [the company] did not respond well to the rule book approach preferred by Councils [sic] Compliance team.

72. Mr Bond also identified the following issues that he considered relevant to the council's dealings with the company:

- the company made accusations of bullying and corruption against at least one compliance officer from the council which Mr Bond states:
  - challenged confidence in the ability and capacity of the Compliance Officers to effectively carry out their role
- some of the council staff appeared compromised in their dealings with the company

- the company had indicated that it had a 'dossier' on council mismanagement of activities against the company that it would use against the council if the need arose
- Mr Bond had concerns over the health and welfare of council staff
- Mr Bond was:
  - always mindful that the legislative requirements that sat around [the company's] non-compliance needed to be delivered on
- jobs retention and growth were key drivers for the council and the community and a key target area for Mr Bond as determined by the council as part of his 'performance outcome'
- the State Government (i.e. Department of State Development and Coordinator General) worked with the council to encourage compliance, provide incentives for compliance as well as incentivising expansion of business at Monarto
- the council actively sought rezoning of the company's land for the company to expand their site
- the council's reputation - the council sold a philosophy that its area was 'open for business'; it was Mr Bond's role as Chief Executive to head up the economic development portfolio of the council
- relationships were encouraged between industry and council on a leader to leader basis which was the most effective way to stimulate economic growth and opportunity
- his understanding that the council would work cooperatively through the issues of non-compliance to achieve compliance outcomes within set timeframes
- potential exposure to legal costs 'through legal challenges by the company against the actions of Councils Compliance Officers'
- the former and current Mayor were fully briefed on all issues and progress in relation to the company on a regular basis.

73. In relation to the issue of whether Mr Bond instructed council employees to not gather evidence in relation to the company's non-compliance, Mr Bond initially responded:

At no time that I am aware, did I instruct Council employees not to gather evidence in relation to [the company's] non-compliance. As CEO of the Rural City of Murray Bridge and as outlined above in the background information provided in relation to CEO roles and responsibilities I was acutely aware that any officer of the Council including the CEO should not instruct against due process. To the best of my ability I enacted legislation and my legal responsibilities dutifully and in the best interest of Council and its community.

I do however recall directing Andrew Meddle, General Manager Sustainable Communities not to include one of Councils Compliance Officers (Clarry Fisher) on the Compliance Audit Team involved in the recording of evidence relating to non-compliance [sic] breaches on the [the company] site. The reason for that decision was more related to the confrontational manner in which that officer carried out his compliance duties, rather than the ability of the officer to enact compliance legislation. The direction also had consideration for the officers health and welfare given that officer was demonstrating high levels of anxiety and workplace stress. I was reluctant to add to the officers [sic] anxiety with what would have been a complicated and confronting process.

It was also my held view in making that call, that the Officer would also have aggravated the opportunity for a partnered approach with [the company] achieving compliance. That officer as I understand it later held a meeting with Mayor Lewis voicing concern over being taken off the Compliance Audit Team.

The Mayor and myself discussed the matter later and I agreed to allow the Compliance Officer to lead the compliance component of the Audit Team under the guidance of the Manager Planning and the General Manager Sustainable Communities. This was on the agreed understanding that delivery of the compliance needs of Council would once again be on a partnered and cooperative approach between [the company] and Council.

It is recorded in an email from the CEO to Andrew Meddle on 5<sup>th</sup> February 2015 that Council should not turn a blind eye to the breaches by [the company]. From that email and out of frustration with [the company's] continued and ongoing compliance breaches a meeting was called for 10<sup>th</sup> February 2015 with [the company's] Managing Director, [the company owner], [a company consultant] [sic], [the company], Mayor Brenton Lewis and myself.

As an outcome of that meeting an ultimatum was put to [the company] by the CEO to deliver on the Councils [sic] needs relating to compliance breaches or I would instruct my Compliance Audit Team to immediately inspect the [the company] with a view to closing the operation down until compliant.

74. My investigation put Mr Meddle's memo of 4 February 2015 (**the memo**) to Mr Bond and sought a response, given that the memo appeared to contain contemporaneous evidence that contradicted Mr Bond's denial that he instructed council employees not to gather evidence in relation to the company's non-compliance.

75. Mr Bond responded:

Firstly the claim that I directed Mr Meddle to stop Clarry Fisher & Malcolm Perry inspecting the [the company] site on that particular day is correct. The intent of that direction however was not designed to stop the process of auditing the compliance issues related to the [the company] site, but to pause the process until I had been given the benefit of a full briefing of the inspection intent and to allow me in my role as CEO to advise on the most appropriate actions that served the compliance needs as well as the interests of the Council and the broader community. As CEO I was placed by Council in the sometimes conflicted position of leading and delivering economic growth on behalf of our community as well as leading many other roles including compliance. Part of that role was to lead the Councils[sic] effort in relation to delivering win-win outcomes for businesses such as [the company]. Upon finding out that a compliance team was about to visit the [the company] site I did not believe that I had been given the full benefit of a briefing on the intent of the visit. The intent of my direction to Mr Meddle was therefore more to do with allowing me as CEO to have the time to assess the implications of the intended visit and to then offer advice and direction on the appropriate course of action that would resolve the compliance issues as well as keep [the company] operational.

Mr Meddles[sic] record that I had asked him to take ownership of these issues and manage an outcome which attempts to avoid formal action through mediation is in essence correct. Once again contextually this should not be interpreted as a direction by me to avoid the need for a compliance audit or urgent action on the part of [the company] to remedy those compliance concerns that were of an urgent nature. The ultimate outcome that is now evidenced is that the Compliance Audit [sic] has been completed with cooperation between [the company] and Council; That Audit Team was representative of Planning and Building Compliance, a team makeup that provided for a more balanced outcome. It has now led to a mediated and agreed[sic] between Council and [the company] that will deliver[sic] compliance as well as jobs growth to the region.

...

In closing I reiterate my previous statements in relation to this matter. At no time that I am aware, did I instruct Council employees not to gather evidence in relation to [the company's] non-compliance (The direction to stop a process on one day should not be interpreted as an intend[sic] to stop the gaining of evidence at a later time).

As CEO of the Rural City of Murray Bridge at that time I was acutely aware that any officer of Council including the CEO should not instruct against due process. To the best of my ability and knowledge I enacted legislation and my legal responsibilities dutifully and in the best interest of Council and its community.

If my understanding of the current state of play with [the company] is correct, my direction in relation to due process has been vindicated.

- 
76. My investigation sought clarification from Mr Meddle about the matters outlined in the memo. Mr Meddle told my investigation that he recalled that around the time of the memo, Mr Bond was particularly concerned that Mr Perry had 'unleashed World War Three'. [redacted] had told Mr Bond that when Mr Perry attended a study visit at the company (i.e. an unrelated event rather than a council inspection) he drew attention to certain examples of the company's non-compliance. Mr Meddle understood that Mr Fisher was included in the direction by Mr Bond because of previous issues at the site. Mr Meddle's view was that Mr Bond's direction was related only to the particular officers involved.
77. Mr Meddle confirmed to my investigation that he felt he could continue to send other officers on to the site, and stated that a senior planner and building officer were back on the site within days of the memo. Mr Meddle also pointed out that Mr Perry has since been back on the site and has prepared a detailed affidavit in relation to the company's non-compliance.
78. According to Mr Meddle, Mr Bond asked him (i.e. Mr Meddle) to take charge of issues relating to the company's non-compliance and to take a 'softer' approach. Mr Meddle's recollection was that once Mr Bond had an opportunity to consider the situation, matters continued as usual.
79. I note in that regard the fact that the council issued a stop work notice to the company two days after the memo was written. I also note Mr Meddle's memo of 17 February 2015 which stated:
- Those involved in the project met today and discussed efforts to date and future action. All were advised of the need to secure regularisation of the safety breaches as our priority. The approach to this was outlined as:
- Collect evidence;
  - Prepare legal files;
  - Prepare for legal action;
  - Meet with [the company] to discuss our findings and agree a new way forward - hopefully during the week commencing 23<sup>rd</sup> February 2015;
  - Serve a Section 85 Notice under the Development Act following the above discussion;
  - Defer proceedings through the ERDC, whilst the above timetable is worked through;
  - Achieve compliance through negotiation;
  - Engender mutual trust and the delivery of a service which meets the needs of both parties; and
  - Legal action would be used as a last resort.
80. While I note that despite his earlier response, Mr Bond subsequently admitted that, at the time of the memo, he instructed Mr Meddle and Mr Fisher not to collect evidence, I accept that Mr Bond did not intend to stop the collection of evidence per se. While I query the appropriateness of Mr Bond's instruction to Mr Meddle, I note that it occurred in the context of what Mr Bond perceived as personal issues with the officers involved that had the potential to further aggravate the situation with the company.
81. Mr Bond summarised the reasons for the delays by the council in taking enforcement action in relation to the company's non-compliance with the Development Act as:
- Continued failure by [the company] to meet Councils [sic] compliance deadlines and to distil from building activity on the sight [sic] - thus resulting in the meeting of 10 February 2015 outlined above;
  - Continued attempts by Council and later the Department of State Development and the Coordinator General to encourage [the company] to agree to a compliance program that was agreed on by all parties and that dealt with the risk concerns

outlined by our compliance officers. This sequence of events seriously protracted the earlier timelines requested of [the company] by Council;

- Continued distractions occurred to allow a singular focus on to the process of delivering compliance outcomes brought on through the needs of the CEO to deal with claims of intimidation and corruption against Council Compliance Officers, threats of court action against Council that required attention, dealings through intermediates to seek a resolution to the apparent confrontation that existed between Compliance Officers of Council and [the company] as well as ongoing issues between [the company] and their neighbours.

It would be fair to say that representing the range of issues that contributed to the delays in achieving compliance could not be articulated thoroughly in this response. Ultimately it is still my held view that the partnered approach to compliance by [the company] with agreed delivery timelines has turned out to be the most effective way forward for all concerned.

The emotion, frustration and accusations that flowed freely from both sides in the lead up to this outcome were disappointing and in the end possibly led to accusations of Mal-Administration [sic] against me as the CEO at that time. I do however reject any such inference of maladministration on my part in my dealing with the non-compliance issues that existed at [the company].

Any costs that Council may have borne in pursuing a partnered approach towards compliance on the [the company] site have been well spent in preserving an industry worth in excess of \$200million turnover per annum to our local economy.

Yes it has been a long and drawn out process, but one would need to wonder the consequences of a singularly compliance focused approach to the issues that confronted us back in 2012, with potentially 220 plus jobs gone from the region and the potential for a further 400 lost.

The Councils [sic] and local communities [sic] shared goal of jobs retention and growth at [the company] and more generally was not a pre-determinant [sic] to turning our back on the need for compliance, particularly for those who worked on the [the company] site. Those non-compliance issues and their degree of risk were identified as part of the compliance audit process and an agreed program to deliver compliance was finalised cooperatively between both parties. The biggest detriment if this were not the outcome would have been the loss to the local community of a significant employer.

82. In relation to the issue of compliance with any relevant policies, Mr Bond responded:

I am not cognisant with all the policies related to enforcement under the Development Act and have never professed to be. As was my process over the dealings with [the company] I took my advice from [sic] the officers of Council who had the relevant qualifications and delegations. To the best of my knowledge my directions to staff were not contrary to such policy.

83. In closing, Mr Bond responded:

In the context of the allegations, this response provides an extensive overview of the issues and logic used in the dealings with [the company], both as a Council and as an individual. It should be apparent from this information that the overarching objective at hand was to preserve [the company] as a going concern in South Australia whilst ensuring their compliance in relation to relevant legislative breaches that had been identified. This was a complex and challenging task for all concerned.

It is pleasing to see that the adopted approach that I promoted as CEO and as I understand continued after my departure from that role in the middle of 2015 have proven to be successful in working towards both objectives. The alternative approach of direct action by our compliance team would have more likely resulted in the relocation or closure of this significant manufacturing business and the loss of hundred of jobs and significant injection into SAs [sic] Gross State Revenue.

In closing I would like to highlight that the partnered approach preferred by myself and supported by the Mayor, Senior Executive and to the best of my knowledge Council itself, did not at anytime require any directive from the Office of the CEO to block or impede compliance actions against [the company]. It merely sought to broker a more conciliatory way forward for all parties that identified those compliance breaches, prioritised them in order of relevant risk and to required a programmed response from [the company] in order to deliver agreed outcomes. Thankfully that was the ultimate outcome.

84. While I accept that Mr Bond attempted to respond frankly to my investigation, in my view, however, his response demonstrates a concerning lack of insight into the council's role in administering the Development Act.
85. I note with concern the following:
- it is a criminal offence to undertake development contrary to Division 1 of Part 4 of the Development Act<sup>23</sup>
  - the company's alleged breaches of the Development Act were numerous and serious, extending from at least 2009 to 2015; while Mr Bond only started acting as Chief Executive in 2012, it should have been clear from the history of the matter that the company took the approach of undertaking unauthorised development first and seeking retrospective approval for that development after it had occurred
  - while it may be appropriate in some circumstances to work 'with' a non-compliant developer to achieve compliance, given the company's history, it should have been clear to Mr Bond that that approach was not appropriate in relation to [the company] and that stronger enforcement action was necessary
  - Mr Bond directed Mr Meddle to instruct council staff not to gather evidence of breaches
  - Mr Bond was aware of the issues at the site, those issues being consistently and appropriately raised by council staff, in particular Mr Fisher and Mr Meddle, and also in no uncertain terms by the council's lawyers
  - in my view it is not appropriate for a council to view itself as a 'collaborator' with a developer; instead, it is important that a council, as the regulating authority, maintains an appropriate detachment and takes enforcement action (whether that involves court action or not) as necessary in accordance with the Development Act.
86. It is also concerning that Mr Bond has raised the following matters as being relevant to the council's approach to enforcement:
- the allegations of bullying and corruption by the company against council officers and the threat of court action by the company
  - the council's reputation as being 'open for business'
  - community desire for jobs retention and growth.

In my view, those matters were not relevant considerations. I also note that Mr Bond did not refer to the fact that the illegal development created potential safety and amenity issues (and I note in that regard that the council received serious complaints from neighbouring properties over the years).

87. I also note with concern the following comment by Mr Bond:

I am not cognisant with all the policies related to enforcement under the Development Act and have never professed to be. As was my process over the dealings with [the company] I took my advice from [sic] the officers of Council who had the relevant qualifications and

<sup>23</sup> sections 44 and 45 of the Development Act.

delegations. To the best of my knowledge my directions to staff were not contrary to such policy.

88. While I accept that Mr Bond may not have had the same in-depth knowledge of policies as the officers 'on the ground', it appears that Mr Bond does not appear to have made any enquiry as to whether the council had relevant policies in place and whether the council's approach to the company's non-compliance was consistent with those policies.
89. That said, having considered all of the concerns noted above, I have also noted the following:
- Mr Bond only started acting as Chief Executive in 2012 and that some of the alleged breaches by the company pre-dated that time
  - I accept that the council made genuine attempts to work with the company to achieve compliance; this was not a situation in which the non-compliance was simply 'off the radar'
  - I accept Mr Bond's explanation for taking Mr Fisher off the file and I note that that aspect of the matter has not been referred by the Commissioner
  - while Mr Bond ultimately admitted that he told Mr Meddle to direct Mr Perry and Mr Fisher to stop collecting evidence, I note that this was only a temporary measure which occurred in the context of taking a 'conciliatory' approach to the non-compliance, and that enforcement action was subsequently taken
  - I accept that it may be challenging for a council to balance the need to ensure compliance with the Development Act is enforced against avoiding unnecessary detriment to relationships with key stakeholders in a council area
  - I do not consider that Mr Bond had any improper motive in taking the approach that he took
  - I accept that Mr Bond genuinely considered that it was in the interests of the community as a whole to ensure that the company continued to operate, and provide jobs in the area
  - I note that the company gave the council various assurances and continued to lodge development applications (some of which were approved), albeit often after development had occurred
  - I note that the council was working closely with Regional Development Australia, the Department of State Development, the Coordinator General and key council staff to ensure that the company's threats to relocate did not come to fruition
  - it is understandable that the council would consider court action, with its associated costs, as a last resort.
90. While I consider that Mr Bond's approach to the company's non-compliance was flawed, on balance, however, I do not consider that Mr Bond's conduct constituted maladministration for the purposes of the ICAC Act. While I consider it particularly inappropriate that the council should have continued to take such a 'collaborative' approach to managing the company's non-compliance given the matter's history, I do not consider that Mr Bond's conduct constituted 'substantial mismanagement in or in relation to his official functions' [my emphasis]. That said, I address the issue of whether there was 'substantial mismanagement of public resources' and/or an administrative error on behalf of the council (as opposed to Mr Bond) in my discussion of the third issue below.

## Opinion

91. I do not consider that Mr Bond committed maladministration for the purposes of section 5(4) of the ICAC Act.

---

**Whether the Mayor of the Rural City of Murray Bridge, Mr Brenton Lewis consistently failed to act in relation to breaches of the *Development Act 1993* by [the company]**

92. Prior to being elected as Mayor, Mayor Lewis was Chief Executive of Regional Development Australia Murraylands & Riverland Inc. Mayor Lewis was elected Mayor of the council in November 2014 and subsequently briefed by Mr Bond on the company's non-compliance.
93. On 10 December 2014 Mayor Lewis attended a meeting between Mr Bond, [the company owner] and [redacted] for the company. According to Mayor Lewis, at that meeting, Mr Bond raised issues of the company's non-compliance and sought an agreement from the company that it would work co-operatively with the council and meet agreed timelines.
94. Mayor Lewis told my investigation that it was the responsibility of the Chief Executive to ensure legislative requirements of the council were met, with the support of staff who have been delegated authority and/or appointed as Authorised Officers.
95. While it does appear that Mayor Lewis was involved in both internal and external discussions about the company's non-compliance, and appeared to take an active interest in the matter, I accept that generally the responsibility for ensuring breaches of the Development Act were enforced on a day to basis lay with council administration rather than the Mayor. I also note that Mayor Lewis' involvement as Mayor post-dated much of the history of non-compliance, given that he commenced as Mayor in November 2014 and by early 2015 the council was taking steps towards enforcement action.
96. It has been raised that Mayor Lewis had previous dealings with [redacted] who had some involvement with the company. Mayor Lewis responded to my investigation:

My first meeting with [redacted] occurred prior to my appointment as Mayor of the Rural City of Murray Bridge in November 2014.

My previous role was Chief Executive of Regional Development Australia Murraylands & Riverland Inc. In this role I was constantly looking for business and investment attraction to the region to drive economic development. [redacted] is a local businessman who invests and develops business opportunities.

[redacted] became interested in a new building product being developed by [the company]. Through this connection he cultivated a business relationship with [the company owner] the owner of [the company].

As Mayor I dealt with both gentlemen from time to time especially on the [redacted] Project being undertaken and financed by both parties.

[redacted] was assisting [the company owner] with compliance and planning issues with the Rural City of Murray Bridge and advising him in other business matters of [the company] including land acquisition for [the company] expansion plans and dealing with the State Government.

[redacted] has reached a business arrangement with [the company] for distribution of panelling building products. I am not aware of the details of that business agreement other than [redacted]

I continue to be updated by [redacted] on a range of developments he is undertaking in the Rural City of Murray Bridge.

97. Ultimately, given my comments above, I do not consider that much turns on Mayor Lewis' relationship with [redacted] and I do not make any findings in that regard.

### Opinion

98. I do not consider that Mayor Lewis committed maladministration for the purposes of section 5(4) of the ICAC Act.

### **Whether the Rural City of Murray Bridge consistently failed to act in relation to breaches of the *Development Act 1993* by The company**

#### *Alleged maladministration under section 5(4) of the ICAC Act*

99. To find that the council has committed maladministration, I would need to be satisfied that there was a practice, policy or procedure of the council that resulted in substantial mismanagement of public resources.
100. According to the agency, the estimated costs to date in taking enforcement action against the company from 31 March 2013 to the time of writing is \$104,723.50.
101. On balance, I am unable to find that the fact that the council incurred those legal fees constituted substantial mismanagement of public resources.
102. In reaching that conclusion, I am conscious of the fact that the council's lawyers had to spend time piecing together the long and complicated history of the matter appears to have contributed to the council's overall legal fees. That said, it is not possible to ascertain with any certainty the extent to which those fees would have been reduced if the council had taken legal action earlier.

#### *Administrative error under the Ombudsman Act*

103. I have also considered whether the council's approach to enforcement and failure to take legal action at an earlier point constituted an administrative error for the purposes of the Ombudsman Act.
104. I acknowledge that the council took steps to enforce compliance by the company. In particular, I note that the council issued an enforcement notice in 2011 (although I understand that the company remains partly non-compliant with that notice). There were also fire safety notices, numerous letters, inspections and meetings between the council and the company during the relevant period.
105. That said, overall, there does not appear to have been a clear strategy of escalation in relation to the company's continued and serious non-compliance between 2009 and 2015. In my view, it was not appropriate for the council to continue to take a 'collaborative' approach while the company appeared to consistently undertake development without Development Approval.
106. It is also surprising and somewhat concerning that the company's serial non-compliance was only first brought to council members' notice in March 2015.
107. In my view, the overall approach of the council to the company's non-compliance, particularly as discussed in relation to Mr Bond's involvement (see issue one above – although noting that Mr Bond was only in the Chief Executive role for part of the matter's history) was wrong, in the sense that the council should have acted earlier and failed to act. I also consider, as discussed in relation to Mr Bond, that the council's failure to act was based on irrelevant considerations.

108. The council has provided my investigation with its 'Unlawful Development Enforcement Policy' (**the policy**) adopted on 14 September 2015. There does not appear to have been such a policy in place before that date.
109. I note that while the policy simply refers to 'civil enforcement proceedings under section 85 of the Act' as one of a number of enforcement actions under the heading 'Formal Action', there is no guidance as to when a matter will be escalated to civil enforcement proceedings. There is only detailed guidance as to prosecution and expiation, both of which are punitive measures rather than direct means of enforcement action to achieve a particular result.
110. In my view, the policy should make clear to council staff the circumstances in which it may be appropriate to take civil enforcement proceedings under section 85. The policy should also make clear that there are statutory timeframes for taking such action.

### Opinion

111. My opinion is that:
- I do not consider that the council committed maladministration for the purposes of section 5(4) of the ICAC Act
  - I consider that the council took into account irrelevant considerations for the purposes of section 25(1)(d) of the Ombudsman Act
  - I consider that the council acted in a manner that was wrong for the purposes of section 25(1)(g) of the Ombudsman Act.

### Conclusion

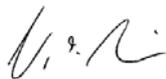
112. In light of the above, I consider that:
- Mr Bond did not commit an act of maladministration in public administration within the meaning of section 5(4) of the ICAC Act
  - Mayor Lewis did not commit an act of maladministration in public administration within the meaning of section 5(4) of the ICAC Act
  - the council did not commit an act of maladministration in public administration within the meaning of section 5(4) of the ICAC Act
  - the council took into account irrelevant considerations for the purposes of section 25(1)(d) of the Ombudsman Act
  - the council acted in a manner that was wrong for the purposes of section 25(1)(g) of the Ombudsman Act.

### Summary and Recommendations

To remedy the error under section 25(1)(d) and (g), I recommend under section 25(2) of the Ombudsman Act that the council review the policy in light of this report and amend it as necessary, in particular, to provide guidance as to when a matter will be escalated to civil enforcement proceedings and any relevant statutory requirements (including time limitations) for such proceedings.

In accordance with section 25(4) of the Ombudsman Act, I request that the council report to me by **14 October 2016** on what steps have been taken to give effect to my recommendation/s above; and, if no such steps have been taken, the reason(s) for the inaction.

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

A handwritten signature in black ink, appearing to read 'W. Lines'.

Wayne Lines  
**SA OMBUDSMAN**

9 August 2016