

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

Agency	Department of Environment, Water and Natural Resources
Ombudsman reference	2014/03852
ICAC reference	2014/000029
Date of referral	6 June 2014
Issue to be assessed	Whether Mr A, an employee of the Department of Environment, Water and Natural Resources committed an act of maladministration in public administration by failing to organise payment of contractors on time

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 maladministration in public administration within the meaning of that Act (**the referral**).

The referral arose out of a report made to the Office for Public Integrity alleging that Mr A committed an act of maladministration in public administration by failing to organise payment of contractors on time.

Action taken

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

- assessing the information provided by the Commissioner
- assessing the information provided to my Office by the reporter
- taking evidence on oath from:
 - Mr A
 - Ms B, Business Manager, Customer and Commercial Services, Department of Environment, Water and Natural Resources (**the department**)
 - Ms C, Executive Director, Water and Climate Change for the department
- interviewing staff in the department's corporate finance section by telephone
- seeking and assessing information from the department
- considering the ICAC Act and the Ombudsman Act
- preparing a provisional report and seeking the views of the reporter, the department, Mr A and Ms C and the Commissioner
- preparing this final report.

Standard of proof

The standard of proof I have applied in the 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;¹ 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 ...²

Response to my provisional report

1. The reporter responded by email commenting on various factual issues and making submissions on the investigation.
2. The department responded by letter that it did not wish to make comment on the content or finding of my provisional report.
3. Ms C responded by email that she had no substantive comment on my provisional report.
4. Mr A responded by telephone stating that he denied that there was any discussion about 'blaming SA Water' at the lunch meeting referred to in paragraph 58 of my provisional report.
5. I have considered all of the parties' responses and my view remains as set out in my provisional report.

Background and evidence obtained in the investigation

6. In 2011 the State government commenced an initiative, with Commonwealth funding, to upgrade water and wastewater infrastructure and to develop a water conservation program in the Amata and Mimili communities of the Anangu Pitjantjatjara Yankunytjatjara Lands (**the project**).
7. The State government and the Commonwealth agreed an implementation plan³ (**the plan**) in relation to the project. Under the plan, the State government was required to report on project milestones in the plan (**the milestones**). Payment of Commonwealth funding installments was linked to those milestones.
8. The Commonwealth Department of Sustainability, Environment, Water, Populations and Communities (**SEWPAC**), the State Department for Water (**the department**) (now the Department of Environment, Water and Natural Resources) and SA Water were responsible for implementing the plan.
9. In August 2011 the department and SA Water signed a Memorandum of Administrative Agreement (**MAA**).⁴ The department's responsibilities under the MAA included

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

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

³ Implementation Plan for COAG Strategy on Water and Wastewater in Remote Communities - South Australia.

⁴ Memorandum of Administrative Arrangement executed by the Chief Executive for the Department for Water and the Chief Executive for SA Water, date unknown.

'ensuring payment of invoices from/endorsed by the Project Agency [i.e. SA Water] is carried out within 30 days of the invoice date.'

10. The second milestone (**milestone 2**) in the plan was:
 - Procurement and contracting of Amata water supply upgrade works.
 - Procurement of Mimili water treatment plant and associated works.
 - Submission of a progress report to the satisfaction of the Committee⁵ and the Commonwealth.
11. Milestone 2 was linked to a funding installment of \$2,150,000. The State government was due to report on milestone 2 in July 2011.
12. SA Water and the department were project managers for the Amata water infrastructure upgrade component of the project (**the Amata upgrade**). The department was project sponsor for negotiating funding with the Commonwealth and payment of contracts which were overseen by SA Water. SA Water had ultimate responsibility for provision and maintenance of water services to Amata.
13. Mr A was the manager of Urban Water Economics and Water Security in the department at the relevant time.
14. The process for payment of invoices for the Amata project was as follows:
 - contractors provided invoices to SA Water
 - SA Water certified that those invoices were correct
 - once certified as correct, invoices were provided to the department, generally to Ms D, a Senior Project Officer in the department, at first instance (with Mr A sometimes being copied in)
 - the department (usually Ms D) then organized for the invoices to be placed on the Basware system
 - once entered on Basware, invoices would be forwarded to Mr A
 - Mr A would then code the invoices and forward them to 'whoever had the appropriate delegation and in whatever form and process the department had for forwarding invoices to the appropriate people.'⁶
 - Invoices were usually paid by Shared Services using the Masterpiece program.
15. On 12 August 2011 Mr A reported to SEWPAC on milestone 2.
16. SEWPAC requested further information from Mr A before it would approve a payment for milestone 2 including confirmation of procurement and contracting, and documentation relating to a project at Mimili (**the Mimili documentation**).⁷ Between August 2011 and December 2011 the department and SEWPAC corresponded on the requirements for meeting milestone 2. The department also corresponded with SA Water about SEWPAC's requirements.
17. In October 2011 Central and Civil Plumbing Pty Ltd (**the contractor**) was contracted by SA Water to undertake works for the Amata upgrade which included construction of a watertower.

⁵ The reference to the 'Committee' is a reference to the Project Management Committee established by the State Government.

⁶ Interview with Mr A dated 26 June 2014.

⁷ Email to Mr A dated 8 November 2011.

18. On 10 November 2011 the contractor invoiced the department for \$381,700 (including GST) (**the first invoice**) in relation to supply and freight of various materials for the Amata upgrade. The first invoice was due to be paid in 30 days.
19. On 11 November 2011 SA Water emailed Ms D with a copy of the first invoice. The invoice was copied to Mr A. The invoice was not entered onto the Basware system at that time.
20. On 25 November 2011 SA Water emailed Ms D a copy of SA Water's letter to the contractor accepting its tender (**the tender letter**) stating:

Note that these monies are now committed and are required for payments to the contractor. The contractor is on site and construction is scheduled for completion within weeks.⁸
21. On 28 November 2011 Ms D emailed Mr A forwarding SA Water's email of 25 November 2011 and noting the urgency of ensuring continuing payments.
22. On 8 December 2011 SA Water emailed Ms D:

I understand the first progress claim forwarded to you from the contractor undertaking the works is due around 10/12/11.
Could you please advise whether this invoice will be paid at that time.

Thanks
23. On 8 December 2011 Ms D emailed Mr A forwarding SA Water's email and stating 'I think it is reasonable to ask the Commonwealth for partial payment.'
24. On 12 December 2011 SA Water emailed Mr A:

I draw your attention to the attached invoice from the contractor undertaking works on site in Amata.
The invoice in the amount of \$347,000 (ext [sic] GST) is now overdue.
The works in Amata are likely to be complete by mid-January, and consequently all payments to contractor (total - \$1,094, 797 excluding GST and any variations) would be due around mid-February 2012.
Could you please advise when this invoice will be paid.
25. On 12 December 2011 SA Water emailed Mr A:

It is of some concern that it appears funding has not been yet released by DSEWPAC for the contract commitments for the Amata Water Upgrade project.

The delays with the Mimili project or Amata Wastewater project should not impact on the release of these funds. I am sure we had an absolute assurance from [...] that if work was going to be completed (in the next month/quarter) then funding would be released i.e. Part milestone payments when required.

Mimili documentation is 98% complete and under review since the initial design work was undertaken almost three years ago. We plan to put the treatment plant project to tender in January and the reticulation works project will be called shortly after. We will provide tender documents as soon as possible.

The Amata wastewater documentation has also been delayed due to priority FaHCSIA housing program related works at Kaltjiti, however we expect to have the Amata works completed and put to tender by 30 March 12.

⁸ Email to Ms D dated 25 November 2011.

The progress payment (ref:email below) is now critically required as the contractor requires cash flow to be able to continue with the project to completion. It would be unreasonable to expect the contractor to carry this debt along with other progress payments due shortly for completed works to date. (All three bores have been equipped, rising mains have been installed to one bore and 30% completed to others. The new tanks stand and works within the water compound are expected to be completed prior to xmas). Works will be approximately 80% complete at 30th December and the project is due to be practically complete [sic] by mid January.

The MoU between SA Water and DFW agrees that progress payments will be made within 30 days.

"2.1.10 ensuring payment of invoices from/endorsed by the Project Agency is carried out within 30 days of the invoice date."

Could you please confirm asap if the outstanding payment has been made or when you expect it will be paid.

I note it is some time since we had a steering committee meeting which may provide a means of clarifying any issues or concerns we have at the moment.

If we can assist in any way or you wish to discuss please give me a call.

Please note I will be on annual leave from CoB Friday 16 December 11 returning 3 January 12.

26. On 13 December 2011 Mr A emailed SA Water:

My apologies for the stuff up at our end - thinks [sic] have been a bit hectic - no excuse I know.

Have just finalised details with the C/W re the Milestone 2 payment. All they need to know now is when will the procurement documentation for the Mimili upgrade be completed and when it is likely to go out to tender. They will progress the payment ASAP if we can cover off on these two issues. Are we able to provide something back on these before the end of the day?

They have indicated, however, that due to a change of policy they cannot release a part payment. If we can't satisfy the above two queries, then we will have to get the matter resolved at CE level.

In the interim I will discuss with finance what we may be able to do to cover this invoice.

Hopefully get this sorted out before the end of the week.

I am just off to a meeting now until 12:00, but will be back in the office this arvo if you want to discuss.

Again, my apologies.

27. On 13 December 2011, SA Water emailed Mr A:

I have just been informed that unfortunately the late payment has already impacted on the project.

The new tower was to be installed this Wednesday with CoD arrangements in place with the tower manufacturer/installer. The contractor cancelled delivery yesterday due to cash flow concerns and inability to meet [sic] these CoD arrangements. The new tower will now be installed early January and the community water supply will be provided through a temporary pumping system in the interim, which is not an ideal way to leave a community over the xmas period.

The payment arrangements with the Commonwealth seem to be somewhat untenable and it would be unwise to let further contracts until funding is provided to ensure timely payments can be made.

By all means escalate to CE as this appears to be an isolated policy and not overarching Commonwealth Government policy as FaHCSIA have no problem providing up front funding with Commonwealth Grant conditions applied. There is also the pertinent point that policy has changed after this program commenced and we received no prior notice of this change in policy. If I am not mistaken the first milestone was most certainly part paid.

The FaHCSIA arrangements work extremely well by the way.

I expect SA Water will seek some assurances before we let the contract for the next package of work. We will send details and documents of the Mimili project to you later today.

Please let me know if any further details are required.

28. On 13 December 2011 Mr A responded by email to SA Water indicating that the matter would be progressed as a matter of urgency. Mr A did not escalate the matter to his Chief Executive at that stage.
29. Mr A has told my investigation that he had a conversation with a 'finance person' or 'business manager' at around this time and confirmed that the department itself had no capacity to pay the invoice. He understood there to be an informal policy that the department could not pay invoices over \$100 000 due to cash flow issues. Mr A has told the investigation that he believes that he told SA Water that the department could not pay the invoice.
30. On 13 December 2011, SA Water forwarded Mr A documentation relating to the Mimili project (**the Mimili documentation**).
31. On 14 December 2011 Mr A emailed SEWPAC the Mimili documentation and stated:

Can you please advise if this now meets your requirements for milestone 2 and what the processing date for receiving payment is likely to be.

Unfortunately this delay in payment has already impacted on the project.

The new tower was to be installed this Wednesday with CoD arrangements in place with the tower manufacturer/installer. The contractor cancelled delivery yesterday due to cash flow concerns and inability to meet [sic] these CoD arrangements. The new tower will now be installed early January and the community water supply will be provided through a temporary pumping system in the interim, which is not an ideal way to leave a community over the xmas period.
32. On 15 December 2011 Mr A asked Ms B, his unit's business manager to hold off payment of the invoice until confirmation of payment had been received from SEWPAC.
33. On 20 December 2011 SEWPAC emailed Mr A stating that based on the information provided by Mr A on 14 December 2011, Mr Brennan would recommend payment for Milestone 2. He stated that due to Christmas, the payment would be processed in January.
34. On 21 December 2011 Mr E, Acting Executive Director Policy and Strategy for the department wrote to the Acting Director, Cities and Towns, Urban Water Security Branch for SEWPAC confirming that the second milestone had been completed and

asking for the release of the second milestone payment to be arranged as a matter of urgency.

35. On 23 December 2011 SA Water emailed Mr A:

As discussed yesterday could I please have a date when the Contractor will be paid. We are in breach of Contract and apart from interest payments we could be incurring demobilization and remobilization costs and significant project delays. We need to provide the Contractor some assurance that he will be paid very soon!

36. It is alleged that on 23 December 2011 Mr A told SA Water that invoices would be processed that day. Mr A has told the investigation that he may have communicated that it was 'in the system.'
37. It is alleged that on 24 December 2011 as Mr A was getting ready to leave for holidays Ms D asked him if he had organized payment as promised, to which he responded 'yes'. Ms D checked with her business manager and no payments had been authorized.
38. On 4 January 2012 SA Water put temporary pumping in place. I understand that the temporary pumping failed at some stage resulting in short term disruption to the community's water supply. The failure of that temporary pump is likely to have been caused by a power outage. It appears that a back-up generator was not able to be started because a key was not found.
39. On 6 January 2012 the invoice was paid. A request for urgent payment was made by Ms B and authorized by Ms C (then Executive Director, Water and Climate Change in the department).⁹
40. On 31 January 2012 Mr A provided a briefing minute to the Chief Executive of the Department which included:

3.1 The Steering Committee met on the 8 August 2011 to discuss the Progress report due for Milestone 2. The DSEWPaC representative did not attend and did not provide any notice, although they were represented at the previous meeting of the group. There has been a high staff turnover which has impacted negatively on the processing of milestone payments outlined in the Implementation Plan.

3.2 The Milestone 2 payment was originally scheduled for 7 September 2011, but will now not be paid until 7 February 2012. This is in spite of the State meeting all Milestone 2 requirements and providing DSEWPaC with appropriate supporting document in August 2011.

3.3 DSEWPaC staff have continually raised issues which are either out of scope of the Implementation Plan requirements or had already been addressed satisfactorily through the provided documentation. The level of detail that DSEWPaC has insisted on the State providing has been the primary driver for the delay in payment and suggests that they are unable to understand the difficult nature of managing infrastructure projects in Aboriginal communities. The impact of delays on the communities has been raised with DSEWPaC by me in writing on at least two occasions.

3.4 DFW and DSEWPaC agreed to the provision of partial milestone payments where necessary to ensure the project is not compromised by any reporting or approval delays. Partial payment arrangements were negotiated for Milestone 1.

3.5 On 2 November 2011, DSEWPaC informed DFW that they were no longer able to process partial payments, in conflict with their original assurances.

⁹ Request for Urgent EFT dated 5 January 2012.

3.6 In addition, the MAA between DFW and SA Water does not provide a mechanism to mitigate any failure of DSEWPac to provide milestone payments in a timely fashion.

The minute suggested that the Chief Executive write to SEWPAC highlighting the issues to be 'caused by any future late payments and the unnecessary information requirements of the Commonwealth.'

41. It is alleged that at a lunch meeting on 20 January 2012, Mr E told Ms D and Mr A that the matter would be handled by saying that SA Water was at fault for the disruption to the water supply as it did not have a contingency plan.
42. On 1 February 2012, the Chief Executive wrote to the Secretary, SEWPAC expressing concern that the milestone 2 payment was to be pushed back to 7 February 2012 and that, in addition to delays in the milestone 1 payment, the delays to the milestone 2 payment exposed 'the community, contractor and project manager, SA Water, with unacceptable risks that were not of their own making.' The letter stated:

SA Water, in recent discussions with the DFW, have quite expectedly expressed their concerns that they do not believe they should be unfairly exposed to such risks, nor should the contractors undertaking works on this program. Unreasonably delayed payments are also creating unacceptable cash flow problems within my Department. As such, I respectfully seek assurances that this risk be mitigated through an absolute undertaking that funds will be released once tender costs are known. SA Water does not intend entering into contracts until adequate funding (at least matching contract value) is provided to DFW, Please note the tender validity period for SA Water procurement is 90 days.

The letter also sought that SEWPAC reconsidered its policy of not allowing part payment against milestones.

43. In July 2012, at the instigation of the department, SEWPAC and the State government agreed a revised implementation plan¹⁰ (**the revised plan**) which changed the previous requirement that completion of infrastructure works must occur before payment could be made to instead provide for part of the funding to be released on completion of tendering processes to enable the engagement of contractors and then part payment on completion of construction.
44. On 29 May 2014 Treasurer's Instruction 11 (**TI 11**) was amended to include the following at clause 11.9 (which was not included in TI11 at the time of the incident):

Public authorities must not withhold payment, beyond the timeframes set out in clause 11.8, of undisputed creditors' accounts on cash management grounds without the approval of the Treasurer or the Treasurer's delegate.

Relevant law

45. 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

¹⁰ See email from SEWPAC to Mr A, ccd to Ms C dated 10 July 2012.

- (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 Mr A committed an act of maladministration in public administration by failing to pay the contractor on time

46. While it may be arguable that Mr A's conduct resulted in an 'irregular' use of public money (being the late payment), there is no allegation or evidence of any unauthorized use of public money for the purposes of section 5(4)(a)(i) of the ICAC Act.
47. Instead, the issue is whether Mr A's conduct in failing to escalate payment of the invoice to those within the department with the necessary financial authorization involved 'substantial mismanagement of public resources' for the purposes of the section 5(4)(a)(i) of the ICAC Act or that it involved 'substantial mismanagement in or relation to the performance of official functions' for the purposes of section 5(4)(a)(ii) of the ICAC Act. In considering those issues the question of whether Mr A's conduct was improper, incompetent or negligent is relevant.
48. Arguably, any disruption to the water supply at Amata, while a serious consequence, was not reasonably foreseeable. Regardless of the consequences, the question remains whether Mr A's failure to progress payment of the contractor, particularly in circumstances where he was aware that there was a risk that the contractor would not continue work without payment, constituted mismanagement and whether that mismanagement was 'substantial'.

Responsibility for payment of the invoice

49. Under the administrative arrangements for the Amata Upgrade (**the administrative arrangements**), the department had to ensure payment of invoices regardless of Commonwealth funding. In that regard, I note the following:
- Under the plan:
 - the State government had responsibility for fully funding the project after accounting for financial contributions from the Commonwealth and any third party.¹¹
 - The Commonwealth was not required to release funding until it was satisfied that milestone 2 had been met. Information required for milestone 2 included evidence of 'procurement and contracting' in relation to the Amata and Mimili works to meet milestone 2.¹²
 - the State bore the risk should the costs of a project exceed the estimated costs.¹³
 - Under the MAA:
 - the department had a responsibility to pay invoices within 30 days.¹⁴
50. I also note that TI 11 as in force at the time required:
- 11.7 The Chief Executive of each public authority shall ensure that undisputed creditors' accounts are processed promptly.
- ...

¹¹ Clause 13 of the plan.

¹² Table 1 - Project Milestones and Payment Schedule in the plan.

¹³ Clause 25 of the plan.

¹⁴ Clause 2.1.10 of the MAA.

- 11.7.3 For all other undisputed invoices or claims, payment should be made within thirty days of the date of the GST compliant invoice or the date the GST compliant invoice is first received by the public authority.¹⁵

51. I am satisfied that payment of the invoice on 6 January 2012 was late¹⁶ and that Mr A was aware of the fact that the invoice was already overdue before he went on Christmas leave. That said, I do not consider that Mr A was solely responsible for the delay.
52. I accept that there was a delay in the invoice being entered on to the Basware System. That said, at the least, the fact that the invoice remained unpaid should have come to Mr A's attention on 28 November 2011 when Ms D emailed him forwarding SA Water's email of 25 November 2011 and noting the urgency of ensuring continuing payments. I note, however, that both Mr A and the department assert that the unpaid invoice first came to Mr A's attention on 8 December 2011.¹⁷ I do not consider that anything turns on that apparent discrepancy.

Whether Mr A's conduct involved substantial mismanagement of public resources or substantial mismanagement in or in relation to official functions

53. While I consider that there were other steps that Mr A, or the department itself, could have taken to progress payment of the invoice, on balance, I do not consider that Mr A's conduct constituted substantial mismanagement.
54. I do not consider that there was any improper motive behind Mr A's conduct in choosing to hold off on payment of the invoice until Commonwealth funding linked to milestone 2 had been paid. Mr A told the investigation:

Given that I thought we were so close to finalizing the arrangement with the Commonwealth and that we could pay it. I mean, you know, there's a range of - potentially a range of potential options which could have been explored I guess, you know, but I believe I did, you know, what seemed to be rational and right at the time.

55. While the investigation has not been provided with documentary evidence of such a specific directive or policy, I accept that there was a process within the department that its corporate finance staff (**corporate finance**) be notified of invoices for significant amounts (roughly \$100,000 or over) before payment.¹⁸ I understand that this process was to ensure that the department had sufficient funds to cover invoices (and draw down from Treasury if necessary) so that the department did not go into overdraft. Ms Susan B told the investigation that there was not usually any significant delay in paying invoices once corporate finance had been notified. I understand that in the usual course, Mr A's Executive Director, Ms C (who had financial authorization to pay the invoice in question) would notify corporate finance of those larger bills before payment was authorized.
56. Mr A has told the investigation that he had arranged for the invoice to be processed for payment in his absence (apparently by Ms B) as soon as the Commonwealth funding became available to the department. While Ms C could not recall precisely how and when the unpaid invoice came to her attention, it is clear that she was aware of it by 5 January 2012. Once the invoice came to Ms C's attention she authorized an urgent payment for the following day.

¹⁵ Treasurer's Instruction 11 as effective 26 July 2011.

¹⁶ While Ms C suggested to the investigation that there are different approaches across government as to when an invoice is first 'received' by a public authority for the purposes of T111, the MAA was clear that payment was to be made within 30 days of the date of invoice. Mr A's own belief was that the invoice was due to be paid by 11 December 2011.

¹⁷ Response of the department dated 7 August 2013; Interview with Mr A on 26 June 2014.

¹⁸ Interview with Mr A on 26 June 2014; Interview with Ms C on 6 May 2015; Interview with Ms B on 27 April 2015.

57. I note Ms C's comments to the investigation that:

If we had known.. possibly.. we would have escalated it quicker within the agency..

I also note that, when asked why the matter was not escalated sooner, Ms C responded:

I think that the amount of work and some of the indications received from the Commonwealth..or..[was] that it was going to be resolved.

58. It appears that the possibility of funding sources other than Commonwealth funding was not explored by the department in any depth. At the very least, I consider that Mr A should have brought the invoice to Ms C's attention before he went on leave and had discussions about that issue. While I accept that Mr A may have discussed the possibility of SA Water funding with SA Water informally, no formal steps were taken to progress that issue. Nor does it appear that the possibility of seeking an advance from Treasury was discussed.

59. That said, Mr A's failure to escalate the matter and to wait for the Commonwealth funding should be considered in the following context:¹⁹

- the department was a relatively small department at the time with significant budgetary constraints
- his branch's money was largely external or 'hypothecated' funding linked to specific projects (i.e. it was not possible to use money from one project for other projects).
- any appropriation from Treasury to cover the project was largely used on staffing and the department did not have a large discretionary fund that could be used to cover contingencies such as late payment by the Commonwealth.
- there was little flexibility built into the arrangements with the Commonwealth which would have facilitated payment.

60. I also accept that there was a particular cash flow issue within the department at the relevant time (although the evidence as to the department's actual capacity to pay the invoice remains unclear). The investigation has not been able to establish with any certainty whether Mr A spoke with a staff member from the department's finance section who told him that the invoice could not be paid from the department's funds. That said, on balance, I accept that at the very least Mr A had a reasonable basis for concluding that there were budgetary constraints that would impact on the department's ability to pay the invoice itself.

61. While there may have been an element of mismanagement on Mr A's behalf in not escalating the matter to executive level sooner, I am not satisfied that it constituted substantial mismanagement on his behalf. I also query whether in the context of the general budgetary constraints discussed above, that there would have been a different outcome if Mr A had escalated the matter sooner. I also note that:

- Mr A took significant steps to pursue the Commonwealth funding
- Mr A had organized for the invoice to be paid in his absence as soon as the Commonwealth funding came through
- Steps were taken by Ms C and Ms B to fast track payment of the invoice once it came to Ms C's attention around 5 January 2012 and it was paid the following day.

¹⁹ Interview with Mr A on 26 June 2014; Interview with Ms C on 6 May 2015.

Whether Mr A was improper, incompetent or negligent in failing to progress the payment

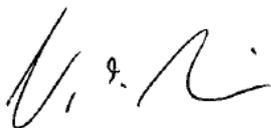
62. For completeness, I do not consider that Mr A was improper, incompetent or negligent in failing to progress payment of the contract in a timely manner.
63. There is no evidence of any impropriety on Mr A's part. I have noted the allegation about a lunch meeting between Mr A, Ms D and Mr E on 20 January 2012. Mr A has told my investigation that the meeting was held to discuss a minute to the department's chief executive and references to SA Water were in response to a draft minute which he felt was not representative of the facts. Mr A denied that there was any discussion about 'blaming SA Water'. According to Mr A there was a more general discussion about SA Water's contingency plans. It does not seem unreasonable that Mr A would raise the robustness of those contingency plans as part of that general discussion.
64. Further, I am not satisfied that Mr A was negligent (or incompetent) in that he 'forgot' to organize payment. To the contrary, Mr A took significant and reasonable steps to progress the issue with SEWPAC. Mr A was not responsible for the delays in the milestone 2 funding being released.

Conclusion and final comments

In light of the above, I do not consider that Mr A committed an act of maladministration in public administration within the meaning of section 5 (4) of the ICAC Act.

I note that since the incident occurred in 2011, steps were taken by the department to ensure that under the revised plan part of Commonwealth funding can be released on completion of tendering processes. While this may facilitate payment of contractors in future, the State needs to ensure that it fulfils its obligations to pay contractors regardless of any possible delays in Commonwealth funding.

I also note that TI 11 has since been amended to clarify that public authorities must not withhold payment of undisputed accounts on 'cash management' grounds without approval of the Treasurer or the Treasurer's delegate.



Wayne Lines
SA OMBUDSMAN

19 June 2015