

Report - District Council of Mallala
Full investigation - *Ombudsman Act 1972*

Complainant	Councillor Marcus Strudwicke and Ombudsman 'own initiative' investigation, section 13(2) <i>Ombudsman Act 1972</i>
Council member	Mayor Duncan Kennington
Council	District Council of Mallala
Ombudsman reference	2015/09576
Council reference	CON12/586
Date complaint received	16 November 2015
Issues	<ol style="list-style-type: none">1. Whether the council failed to conduct a review of the former Chief Executive Officer within the six month probationary period stipulated by her contract2. Whether the former Mayor failed to act diligently in coordinating meetings of the Chief Executive Review Committee and provide members with all relevant information in a timely manner.

Jurisdiction

The complaint is within the jurisdiction of the Ombudsman under the *Ombudsman Act 1972* (the **Ombudsman Act**).

Section 13 (1) and (2) of the Ombudsman Act provides:

- (1) Subject to this Act, the Ombudsman may investigate any administrative act.
- (2) The Ombudsman may make such an investigation either on receipt of a complaint or on the Ombudsman's own initiative and, where a complaint is made, the Ombudsman may investigate an administrative act notwithstanding that, on the face of it, the complaint may not appear to relate to that administrative act.

The first issue, which was raised by the complainant, but not, as he later clarified, the subject of his specific complaint, was investigated pursuant to section 13(2) of the Ombudsman Act.

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from the council
- considering the *Ombudsman Act 1972* (**the Ombudsman Act**), the *Local Government Act 1999* (**the Local Government Act**) and the Code of Conduct for Council Members (**the Code of Conduct**)
- providing the parties with my provisional report for comment, and considering their responses
- preparing this report.

Standard of proof

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

In response to my provisional report Cr Strudwicke expressed concern that the issues he raised in his original complaint were not accurately reflected in the issues identified in the heading of the provisional report.

In particular, Cr Strudwicke stated that issue 1 was not a question he raised in his original complaint. According to Cr Strudwicke:

- it was his view, and the view expressed in two separate sets of legal advice, that the probationary period expired the day before the committee met for its review meeting i.e. expired on 4 November 2015
- it was also his view at the time of submitting the complaint that the former Chief Executive Officer, Ms Márton, had become a fixed term employee
- it was, therefore, his view at the time of submitting the complaint that the council had failed to conduct the review within the probationary period stipulated by the contract and, 'it was in acknowledging this failure, that I questioned the role of the former Mayor and former CEO'.

Cr Strudwicke stated:

I therefore agree with the findings (52 & 53) in regard to Issue 1, however, point out that this was not an issue I raised. Both of the issues I raised were more concerned with sentence 51, that is, **why council did not undertake the review within the probationary period** [Cr Strudwicke's emphasis].

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.

Issue 2 reasonably addresses the first item I raised in my complaint, that is “...that the Mayor Duncan Kennington has failed to act diligently in managing the coordination of the CEO Review Panel meetings, and that this has lead [sic] to council failing to meet all its obligations under the CEO Contract of Employment”[.]

However, I did not raise Issue 1, as in my view, that matter was not in contention. **Rather, I raised the role of the CEO in providing advice to the Mayor** [Cr Strudwicke’s emphasis].

In my initial complaint I wrote “I am also concerned that the CEO Katrina Márton failed to ensure that the policies and lawful decisions of the council were implemented in a timely and efficient manner; in that she failed to assist the Mayor in providing appropriate advice on the calling and timing of the CEO Panel review meetings, and advice on the agenda items to be considered by the Panel to meet Councils [sic] contractual requirements, thereby allowing the CEO Probation period to lapse”.

In relation to the fact that Cr Strudwicke was not specifically seeking investigation of issue 1, that matter was raised by his complaint, and I have power, by virtue of section 13(2) of the Ombudsman Act, to investigate that issue.

I consider that it was appropriate to investigate ex-Mayor Duncan Kennington’s involvement in the council’s failure to conduct the review given that he was an elected member and the complaint raised a potential breach of Part 3 of the Code of Conduct. An act of a council member that may constitute grounds for complaint under the Local Government Act is taken to be an ‘administrative act’ for the purposes of the Ombudsman Act.³ It is envisaged by the Local Government Act, however, that the council will be responsible for handling complaints about council employee conduct, including chief executive officers (i.e. Ms Márton).

While I acknowledge that Cr Strudwicke’s complaint specifically raised Ms Márton’s involvement in the council’s failure to conduct the review, I decided that in all of the circumstances it was neither necessary nor justifiable for me to investigate that issue further, and I have notified Cr Strudwicke, Ms Márton and the council accordingly.

The Acting Chief Executive Officer of the council, Mr James Miller, responded that he had no comments to make on my provisional report.

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

Background

1. On 4 May 2015 Ms Katrina Márton was appointed as Chief Executive Officer of the District Council of Mallala (**the council**).
2. Ms Márton was recruited using the services of McArthur, a recruiting service.
3. The term of Ms Márton’s contract (**the contract**) was for five years. Ms Márton resigned as Chief Executive on 10 December 2015.
4. Clause 3 of the contract stated:

3. PROBATIONARY PERIOD

- 3.1 The Employer engages the CEO for a probationary period of six months from the Commencement Date.
- 3.2 The Employer must review the CEO’s performance and discuss it with the CEO before the end of the probationary period. The Employer may also

³ Section 263A(4) Local Government Act; section 3, Ombudsman Act.

discuss the CEO's performance with the CEO during the probationary period.

- 3.3 Before the conclusion of the six-month probationary period, the Employer must undertake an assessment of the CEO's performance to date and record its assessment in writing.
- 3.4 If the Employer determines in its written assessment that the CEO's performance has not met expectation and/or requires improvement, the parties agree that the probationary period may be extended by the Employer for a period of up to three months. In such circumstances, the CEO will be given a copy of the written assessment.
- 3.5 At any time during the probationary period (including the extended period contemplated at Clause 3.4), either party may terminate the employment by giving one month's notice to the other party.
- 3.6 If the Employer terminates the employment during the probationary period, it may pay one months'[sic] pay to the CEO in lieu of service. This right of termination (if exercised) is at the Employer's absolute discretion and without further liability.
- 3.7 The parties agree that the probationary period, including the possible extension of the probationary period to nine months, is fair and reasonable for the Employer to assess the CEO's performance.

5. Clause 29 of the contract stated:

VARIATION

This Agreement shall only be varied by further agreement of the parties in writing.

6. According to the contract, Ms Márton's probationary period (**the probationary period**) ended on 4 November 2015.
7. While the council established a Chief Executive Officer Review Committee (**CEORC**) for the purpose of undertaking the review of Ms Márton's performance (**the review**), as set out below, that review did not occur during Ms Márton's employment with the council.
8. According to the council the CEORC members were first provided with a copy of the contract at an ordinary council meeting on 13 April 2015. While the copy of the contract had not yet been executed at the time, the council told my investigation that CEORC members accepted the contract and its terms.
9. The former Mayor of the council, Mr Duncan Kennington, was the presiding member of the CEORC.
10. In June 2015 Mr Duncan Kennington, approached Mr Matthew Hobby of McArthur to facilitate the CEORC process. The council subsequently received a quotation from Mr Hobby for his services.
11. On 16 June 2015 Ms Márton emailed the former governance officer, Ms Jo-Ann Tanti, asking her to provide administrative assistance for the CEORC, to coordinate meetings with Mr Hobby and finalise the procurement process for McArthur's services. That email was copied to Mr Kennington, Cr Marcus Strudwicke and Cr Karen McColl and Ms Andrea Humphrys.
12. On 16 June 2015 Cr Strudwicke emailed Ms Tanti (copied to Mr Kennington, Cr McColl, Ms Márton and Ms Humphrys) addressing Mr Kennington:

As member of the panel, I am a[sic] disappointed that I have not been consulted on the decision to contract Mathew [sic] Hobby to assist the panel. The panel should have met and determined the way forward, and whether to utilise a different approach than we have previously. McArthurs were involved in the CEO recruitment, and have an interest in the CEO appraisal, as they guarantee their performance in a successful recruitment. I do not think it is appropriate for Mathew [sic] to be involved in the appraisal as there is a clear conflict of interest.

13. On 17 June 2015:

- Mr Kennington emailed Ms Tanti (copied to CEORC members) noting that he had discussed the matter with Cr Strudwicke 'who has made some good points' and asking Ms Tanti to organise a time for the CEORC to meet. Ms Tanti responded querying whether Mr Kennington proposed a 'Committee Meeting or simply a directions discussion'.
- Cr Strudwicke emailed Mr Kennington (copied to Ms Tanti, Cr McColl, Cr Terry-Anne Keen, Cr Tom Summerton and Ms Humphrys):

All meetings if [sic] the panel should be committee meetings, not informal discussions. This is a process that should be minuted and kept formal. The intention of the meetings is to decide next steps, and no decision can be made outside a formal meeting. One of the decisions will be the appointment of the independent member, and the TOR will clarify whether that needs to be ratified by the council. I have requested a copy of the current terms of reference as they are not on the website, and it would perhaps be useful if we all are cognisant of the details within them before the meeting.

- Ms Tanti responded to that email noting that there was a requirement of three days' notice to the public of a committee meeting and that the terms of reference needed to be adopted first.
- Cr Strudwicke responded to Mr Kennington (copied to Ms Tanti, Cr McColl, Cr Terry-Anne Keen, Cr Tom Summerton and Ms Humphrys):

I can see no point in meeting if we are not able to make any decision. If we need to wait for terms of reference, then that is a decision for council, and so no role for our committee. (If the issue is simply timing, then of course there is no reason we could not have a special meeting, for which virtually no notice is required.) If a special meeting is called, I will be there, but will not be attending an informal meeting where there is no agenda, and no actions available to us. It would just be a waste of time.

...

Lastly, were we not required to undertake a three month review of the CEO performance?

14. According to Cr Strudwicke, he did not receive a response to his query about the three month review.
15. On 28 August 2015 a meeting of the CEORC (**the 28 August meeting**) was held. Three agencies (one of which was McArthur) had been approached by Mr Kennington to provide proposals to act as external facilitators of the review process. Those proposals were considered by the CEORC at the 28 August meeting. According to the minutes of that meeting, a motion was carried to engage the services of AME Recruitment Adelaide (**AME**) as external facilitator of the review process. The consultant from AME involved in this matter was Mr Adam Kennedy, the General Manager.

16. On 14 October 2015 Cr Strudwicke emailed Mr Kennington and all council members:

Under the draft CEO contract that councillors were provided with, the CEO was engaged for a probationary period of six months. (As I have not seen a copy of the signed contract, I can't confirm whether this was retained in the final version.) Consequent to this provision, the contract also stated that performance must be reviewed before the end of the six month probationary period. I am concerned that we have not yet commenced this process. Can you provide an update on the provisions of the contract regarding probation and review, to ensure we do not miss any of the required contractual deadlines.

17. Mr Kennington responded to Cr Strudwicke by text that he would 'get the meeting within two weeks.'

18. On 19 October 2015 an Ordinary Council meeting was held at which a motion was carried to change the CEORC's terms of reference (**the terms of reference**) so as to include all council members on the CEORC. A motion was also carried to review the terms of reference in light of the fact that all council members were now included on the CEORC and have the relevant changes brought back to the council.

19. On 26 October 2015 Cr Strudwicke emailed Mr Kennington:

On 14 October 2015 you messaged me that you would 'get a CEO review meeting happening within two weeks'. I have yet to receive a notice of meeting and 14 days is this Thursday. When will this meeting take place?
Have you sought any advice regarding consequences of us not reviewing the CEO performance before the expiration of the 6 month probation period?

20. On 27 October 2015 Cr Steve Jones emailed Mr Kennington (marked 'URGENT') and stated:

Hi Duncan, in light of confirmation of make up CEO review committee I believe to comply with contractual requirements an urgent meeting will be and is required before month end of October 2015, on that basis I ask that you arrange/call a special meeting of CEO Review Committee as per requirements, can you please respond by return email thanks

21. On 29 October 2015 Cr Anne Picard emailed Mr Kennington:

As a new member of this committee please provide me with a copy of the CEO employment contract, and any other related documentation, prior to the meeting. I believe it appropriate that all new members of this committee receive this information.

22. On 29 October 2015 Mr Kennington emailed all council members, Ms Tanti, Ms Márton and Mr Kennedy:

I've just verified with the HR company that it's ok to hold the meeting on Thursday. An agenda will follow. I'm currently seeking document sought by Anne for all members.

23. On 1 November 2015 Ms Tanti emailed all council members and Ms Márton and Mr Kennedy attaching an agenda for a CEORC meeting scheduled for Thursday 5 November 2015.

24. On 2 November 2015:

- Cr Strudwicke emailed Mr Kennington:

I notice in the agenda, that there is no item listed to discuss clause 3 of the CEO contract, (Probationary Period)

As the deadline for a range of actions is listed in the contract as 4 November 2015, such as a review, and a written report on performance, why is this item not on the agenda? When will [sic] be dealing with this, and what advice have you sought regarding the failure of council to meet these deadlines for probationary review specified within the CEO contract?

- Cr Picard emailed the CEORC members:

I would still like a copy of the CEO's contract of employment and any other correspondence or related documents relating to this matter as previously requested. I note that the time and date of the meeting is not within the 6 month probationary period of time, as advised in the details sent to date below. I therefore ask if legal advice has been received, as this seems to me (as a casual observer having only just become a member of the committee) that the Council might possibly be in breach of the contract.

Has a previous meeting been held by the committee specifically to review any matters under probationary period requirement and subsequently reported to Council? Whose responsibility is it to make sure such matters are attended to?

25. On 3 November 2015 council members were provided with a copy of the executed contract. The following email exchanges occurred:

- Mr Kennington responded to Cr Picard:

I sought advice from Jo-anne + Adam

- Cr Jones emailed Mr Kennington, copied to the council members:

I refer to earlier email regarding timing of Review committee [sic] meeting, if CEO review is adjourned to a future date for any reason eg. Shortfall in documentation presented can that be cause for any CEO contractual difficulty or legal argument, as a new member of Review Committee I need to have a clear understanding of all facets of review proceedings.

- Cr Strudwicke emailed Mr Kennington, copied to the council members:

Can you please provide all members with a copy of the advice received from Jo and Adam or at least provide us with a summary of that advice? Given the significant financial implications of 'getting it wrong', I would hope you have any advice in writing. If I was Mayor and the responsibility for this process fell on me, I would have sought legal advice on the missed deadlines in the contract, not just a staff opinion, to ensure council was adequately protected, and that I was not seen as negligent. Several members have requested a copy of the signed CEO contract. Only part of the contract appears in the agenda. Under clause 22(1) of our meeting procedures, the CEO must provide a copy of documents requested, and that if a member is unwilling to vote on the issue without the document, then no vote can take place. (I presume this is what Cr Jones is alluding too [sic] in his earlier email.)

I would suggest that the signed CEO contract be provided to all members today, otherwise we may find ourselves adjourning the meeting prematurely with councillors unwilling to vote on any motion related to the contract.

- Mr Kennedy emailed the council members, copied to Ms Tanti:

Please find attached a copy of Katrina's Contract of Employment.

To clarify, the purpose of the meeting Thursday is to agree a set of KRA's against which Katrina can report progress (Katrina has agreed to these measures). The KRA's are outlined in Katrina's Contract of Employment and have an interim measurement at the 6 month mark and 12 month mark (i.e. the Annual Performance Review). Without these KRA's being approved there is nothing for Katrina to be measured against. Procedurally, given Katrina has agreed to the 6 month and 12 month KRA's any changes made by the Performance Review Committee on Thursday will need to be

signed off by Katrina. Once all are in agreement the process of reporting against these measures can take place.

Katrina's contract of employment allows for the Probationary Period to be extended by up to 3 months with agreement from both parties and it is the application of this clause which has allowed the Probationary Period to be extended by up to 3 months with agreement from both parties and it is the application of this clause which has allowed the Probationary Period to be extended by two weeks to allow for the 6 month review to take place. The Contract of Employment allows for such an extension.
I look forward to seeing you all on Thursday afternoon.

26. On 4 November 2015 the probationary period expired.
27. On 5 November 2015 the CEORC met. According to Cr Strudwicke, at that meeting, Mr Kennington and Mr Kennedy gave verbal assurances that Ms Márton had agreed to extend the probationary period. According to the minutes of that meeting a motion was carried (moved by Cr Strudwicke and seconded by Cr Jones):

that the Committee obtain detailed legal advice through the Mayor on the CEO's contract and implication of missing the 6 month deadline for the probation period review.

28. On 6 November 2015 Norman Waterhouse provided Mr Kennington with legal advice to the effect that:
- once a probationary period has expired, and neither party has made, or proposed, any changes to the employment relationship, the employee's position is deemed to be confirmed
 - although it is not common practice, there is nothing at law to prevent the parties from entering into a further agreement to extend the probationary period after the period has expired (**the Norman Waterhouse advice**).
29. On 9 November 2015 Mr Kennedy advised the council members that:

Katrina [i.e. Ms Márton] has agreed to extend the probationary period for sufficient time for the 360 degree review process to take place (approx. 4 weeks) provided the 360 degree review is a fair cross section of stakeholders. It is critical that any decision made in regards to ongoing employment of Katrina is seen as having been made in a fair and reasonable way. A 360 degree survey meets this need. A report will be presented to the CEO Performance Review Committee late in November at which time a decision will need to be made in regards to Katrina's ongoing tenure.

30. While a meeting of the CEORC was scheduled for 9 November 2015, for various reasons it did not eventuate.
31. On 9 November 2015 Cr Strudwicke emailed Ms McColl, the council members and Mr Kennedy:

The more I think about this, the more concerned I get.
I think we need to get some clear advice on how we proceed. I had thought that was Adam's role, but I presume that is not part of the package Duncan negotiated.
I believe the best way forward would be to get further legal advice.
We need to inform Normans of the full details of the situation we are in. I gather from the email advice from Sathish Dasan, that he was informed by Duncan that Katrina had agreed to an extension under the original terms of the contract, but it now transpires that her agreement to extend is much more complex.
We now need further advice on this including what roles can be done by the committee and what has to go back to council for resolution. Is the agreement from Katrina a contract variation, or what other status? We need to have a legal basis for each step from now on.
Under the Local Government Act, the Mayor can delegate some of his functions, so I suggest you seek approval of the Mayor to use his powers to obtain legal advice. A quick phone call could suffice.

I really think this is the only way to ensure we don't create more of a mess than we are already in, and in these circumstances we can't afford to get the process wrong, as it could cause us significant expenditure if it all goes bad.

32. On the same day Mr Kennedy responded:

I have provided my recommendation on how to proceed. A 360 degree review is the most fair and equitable basis (and the most common method used in Local Government) - my advice was based on protecting the Panel as best I could if Fair Work was to be involved down the track. You can ignore my advice and proceed down an alternative path such as just having the Elected Body undertake completion of the survey - however from your comments at the last meeting a number of issues exist (in your opinion) between the CEO and the Community, the CEO and Staff and the CEO and the Local Paper - by undertaking a 360 degree review you get the opportunity to garnish feedback from these people and the CEO herself. Some of the issues EM's consider the CEO has may well be apparent to the CEO already - we won't know this until we ask.

I am not clear on how you want to proceed - there is an opportunity to encapsulate the issues you describe as being at crisis point but at the same time every attempt is made to stop such qualification. It is not a fair process to simply keep making statements about the CEO's performance but then shy away from an opportunity to establish some facts.

At all times I have tried to find a path which ensures a positive and productive outcome for all. The Contract of Employment does not specify the measurement tool nor the amount of consultation which the Review Committee can do. I cannot see where we are prevented from following the path suggested. Katrina is in agreement the Review Panel simply needs to meet and agree the process and whom will be surveyed.

I am not sure what more a lawyer will tell you.

33. On the same day Cr Strudwicke responded to Mr Kennedy:

I am somewhat confused. I think you need to be very clear in the advice you give. Your earlier email suggested that Katrina's agreement to extend the probation by 4 weeks, and the use of a 360 review were connected. Ie [sic] that she had agreed provide [sic] we undertake the 360 review with broad stakeholder input.

The contract leaves it to the panel to select the method of assessment, although specifies the criteria to assess against, and if a particular method was being imposed as part of an agreement to extend probation, then that would have to go back to council. I did ask for a copy of the agreement reached with Katrina, which would have clarified things, but it has not been forthcoming. Perhaps you can send it through now? If Katrina is simply agreeing to extend the probation period, without further condition, then the committee can certainly consider a 360[sic] review as a possible option. I have at no time said I was opposed to such a review. I expressed reservations about the value of the external participants, and asked for further details on who would choose the external members. That information was also not forthcoming.

We are only a committee and have no delegated authority to do anything other than make recommendations to council.

As far as seeking legal advice, I think it is prudent. On the 3 November, when responding to concerns about whether we were in breach of the probation requirements, the Mayor assured it was OK, having 'sought advice from Jo-Ann and Adam'. Clearly the advice from Normans discounts the Mayors [sic] assurances.

34. Mr Kennedy further responded to Cr Strudwicke:

I am very confused now. You are suggesting that the advice from Jo-Ann and I was in fact different from that from Normans - I am of the opinion that they are in line - should both parties agree to the extension when the extension is granted.

Katrina's agreement to an extension was based upon the use of a 360 degree survey approach. I agree the contract specifies the criteria to be used - this is what I used to develop the Performance Review Survey document circulated today. The meeting from last Thursday seemed to be in favour of a KPI survey - the issue now is whether it is just the Elected Body completing the review or if, as the case in most Councils, a broader base of information collection is warranted. I can't understand why the matter needs to be

referred back to the Council - Katrina is only asking for a fair and objective assessment process to be adopted.

The choice of External Respondents is a negotiation point between Katrina and the CEO Review Panel.

The alternative is that should Katrina not agree to extend her probation then she is effectively confirmed in the position.

Do you have a preferred way forward - maybe if we establish what it is you are looking for we can work as a group to achieve an outcome which you are happy with?

35. Mr Kennedy included an undated copy of Ms Márton's email to Mr Kennedy and Mr Kennington:

I write to confirm that I have agreed to briefly extend my probation period in order that 360 degree reviews may be conducted at the request of the committee.

I also confirm that by agreeing to this brief extension, I am not accepting an extension of my probation period per se, and this is not an acceptance on my behalf of any proposal to formally extend my probation period to three month or otherwise.

Please advise if you require any further clarification.

36. Cr Strudwicke further responded to Mr Kennedy:

I am happy with the KPI survey you have developed. We can tick that off as a point of agreement.

I would like further discussion on the external respondents. I anticipate we would do that at the next meeting, and I assume negotiated[sic] with Katrina.

The initial question of whether it is the panel, or a broader group, that does the assessment, is where I am unclear, and still seeking firm advice. I don't know if this is a decision within our delegations, or whether it must go to council. It may be perfectly fine for the panel to make that decision, but that has not been confirmed.

I am just mindful that we have already made a mess of the process by not addressing the probation issue earlier, and that we have a majority of panel/council members who want to keep all options available during the probation period retained in the mix in case they're required.

I am still not clear from Katrina's email where her agreement to extend sits within the context of the probation period. I don't have the legal knowledge to understand the finer legal detail of her response.

37. On 10 November 2015 the council members were informed by Ms McColl that Mr Kennington was unwell.

38. On 12 November 2015 Ms McColl emailed the council members and Mr Kennedy:

As you are aware, given the absence from official duties of the Mayor, I have, as the current Deputy Mayor, in accordance with section 51(6) of the Local Government Act 1999, accepted the role of acting Mayor. In this capacity, I have sought advice from Michael Kelledy of KelledyJones Lawyers in respect of the CEO review process and generally. The advice I have received is as follows -

- Whilst the employment contract of the CEO has not been sighted, it is safe to say that if the contractual probationary period of employment has expired (even it is only by one day) then the CEO has become a fixed term employee of the Council for the balance of the contracted term. This means that the employment relationship continues in accordance with all of the terms and conditions of the contract with the exception of the probationary provision:
- Relevantly, I have sighted email correspondence by which the CEO initially agreed to a 360 degree review process to be undertaken and for this purpose agreed to a brief extension of the probationary period - but that offer is subject to the caveat that it is not an agreement to "an extension of my probationary period per se and....not an acceptance... to formally extend my probationary period to three months or otherwise." I say initially agreed because subsequent email correspondence from the CEO this week notes that the probationary period has

lapsed and she will not agree to discuss anything further with the Review Committee until she has received legal advice - for these purposes the CEO has engaged Mellor Olson [sic] Lawyers. Not an unexpected move on the part of the CEO in these circumstances, in my opinion, which may be seen as a step towards a constructive rather than combative process;

- Concurrently, there has been pressure upon you, as the acting Mayor, to call a special meeting of the CEO Review Committee, the primary purpose of which would be to approve the 360 process in terms of the Appraisal Surveys and the commencement of the process;
- I confirm that a special meeting of the Review Committee may indeed be called by yourself in your role as the acting Mayor or by any other two members of the Review Committee. It is and always has been, therefore, open to the members who are pressing you to call the special meeting, to do so themselves (provided that there are at least two members who wish to hold the special meeting as a matter of urgency);
- However, in all of the circumstances, it is my advice that there is no current pressing need for an urgent meeting of the Review Committee - but there is clearly a need in the near future to convene a meeting (whether special or otherwise) at least for the purposes of setting the KPIs for the CEO, a task which I always recommend be completed within three months of the commencement of the employment term. There is no need for an immediate meeting of the Review Committee for a number of reasons - there is no unqualified agreement of the CEO to extend the probationary period (she is, therefore, a fixed term employee without any of the attendant risks that exist during the probationary period), the CEO has indicated that she is unwilling to further treat with the Committee until she has received legal advice and it has been indicated that Mellor Olson [sic] will be in contact to discuss the situation and that contact has not yet been made;
- Whilst Mellor Olson[sic] should not be allowed to leave the Council waiting for an inordinate period of time, it would be a meaningless exercise for the Review Committee to meet before the contact has been made. However, once we understand what the issues (if any) are that Mellor Olson [sic] wish the Committee to consider, at that time a special meeting should be held with a degree of urgency and the calling of that meeting to occur in strict compliance with the legislative requirements for such. In this regard, it appears to me that the only legislative failure of the previously aborted special meeting of the Review Committee for 9 November, was that the four hour minimum timeframe was not satisfied - the Notice and Agenda that I have sighted are otherwise sufficient to meet the legal requirements;
- In the meantime, it is appropriate for you to provide members with an electronic or printed copy of the current draft Appraisal Survey for their consideration and possible future use.

39. I will refer to the legal advice referred to by Ms McColl as **the Kelleidy Jones advice**.
40. On 12 November 2015 Ms Márton's lawyers, Mellor Olsson, wrote to Ms McColl (in her capacity as Acting Mayor) noting that the probationary period had lapsed and that while Ms Márton had previously communicated to Mr Kennedy that she would be willing to undergo a 360 degree review despite the expiry of the probationary period, 'given the acrimonious nature of recent communications from Councillors', Ms Márton withdrew her consent to participate in a voluntary review (**the Mellor Olsson letter**).
41. On 27 November 2015 Mr Kennington resigned as Mayor for health reasons. As Ms McColl's term as Deputy Mayor expired and Cr Strudwicke was elected as Deputy Mayor on 16 November 2015, Cr Strudwicke has been Acting Mayor since that time.
42. On 10 December 2015 Ms Márton's employment with the council ended, apparently by mutual agreement between herself and the council.

Relevant law

43. Section 25 of the Ombudsman Act provides:

25—Proceedings on the completion of an investigation

- (1) This section applies to any investigation conducted by the Ombudsman as a result of which the Ombudsman is of the opinion that the administrative act to which the investigation relates—
 - (a) appears to have been made contrary to law; or
 - (b) was unreasonable, unjust, oppressive or improperly discriminatory; or
 - (c) was in accordance with a rule of law or a provision of an enactment or a practice that is or may be unreasonable, unjust, oppressive or improperly discriminatory; or
 - (d) was done in the exercise of a power or discretion and was so done for an improper purpose or on irrelevant grounds or on the taking into account of irrelevant considerations; or
 - (e) was done in the exercise of a power or discretion and the reasons for the act were not but should have been given; or
 - (f) was based wholly or in part on a mistake of law or fact; or
 - (g) was wrong.
- (1a) This section does not apply to an investigation conducted under section 14.
- (2) In the case of an investigation to which this section applies in which the Ombudsman is of the opinion—
 - (a) that the subject matter of the investigation should be referred back to the appropriate agency for further consideration; or
 - (b) that action can be, and should be, taken to rectify, or mitigate or alter the effects of, the administrative act to which the investigation related; or
 - (c) that the practice in accordance with which the administrative act was done should be varied; or
 - (d) that any law in accordance with which or on the basis of which the action was taken should be amended or repealed; or
 - (e) that the reason for any administrative act should be given; or
 - (f) that any other steps should be taken,

the Ombudsman must report that opinion and the reasons for it to the principal officer of the relevant agency and may make such recommendations as the Ombudsman thinks fit.
- (3) The Ombudsman must send a copy of any report or recommendation made under subsection (2) to the responsible Minister and, in the case of a report or recommendation relating to the sheriff, to the State Courts Administration Council.
- (4) The principal officer of an agency in relation to which a recommendation is made under subsection (2) must, at the request of the Ombudsman, report to the Ombudsman within a time allowed in the request on what steps have been taken to give effect to the recommendation and, if no such steps have been taken, the reason for the inaction.
- (5) If it appears to the Ombudsman that appropriate steps have not been taken to give effect to a recommendation made under this section, the Ombudsman may make a report on the matter (containing a copy of the earlier report and the recommendation) to the Premier.
- (6) Where the Ombudsman reports to the Premier under subsection (5), the Ombudsman may forward copies of the report to the Speaker of the House of Assembly and the President of the Legislative Council with a request that they be laid before their respective Houses.

44. Section 62(2) of the Local Government Act provides:

A member of a council must at all times act with reasonable care and diligence in the performance and discharge of official functions and duties.

45. Clause 3.2 of the Code of Conduct provides that council members must:

Perform and discharge their official duties with reasonable care and diligence at all times.

Whether the council failed to conduct a review of the former Chief Executive Officer within the six month probationary period stipulated by her contract

46. The council acknowledged to my investigation that it had failed to meet the deadline to conduct a formal review of Ms Márton's performance in accordance with the contract. Ms Sheree Schenk, Governance Officer for the council (whose employment at the council only commenced after the relevant time) told my investigation:

I understand that the CEORC failed to set Key Performance Measures/Indicators in order to conduct a review within the six month probationary period (refer item 4.)

However, it appears that the CEORC had commenced the process of undertaking a formal review of Ms Márton's performance before the end of the six month probationary period. In accordance with clause 6 of the CEORC's Terms of Reference, former Mayor Kennington had obtained proposals from three experienced Local Government human resource organisations with a view to engage the services of an external facilitator to administer the development, review and monitoring of the relationships expressed in the contract. These proposals were presented to the CEORC at [a] meeting held on 28 August 2015, and AME Recruitment were subsequently elected as the external facilitator (refer items 3 and 4).

While Council sought legal advice in relation to the terms of the contract, including the implications of missing the six month review deadline, and the possibility of extending the probationary period, I am unable to determine whether Ms Márton's probationary period was in fact extended in accordance with the contract (refer items 6 and 7).

Please note, however, that Ms Marton's employment with the District Council of Mallala formally ceased on 10 December 2015 (refer items 16 and 17).

47. Item 6 (as referred to by Ms Schenk) is the Norman Waterhouse advice.
48. Item 7 (as referred to by Ms Schenk) is the Mellor Olsson letter.
49. It is clear that the review was not conducted within the six month probationary period as required by clause 3.2 of the contract, or at all.
50. I acknowledge that this matter raises issues of contractual interpretation that have not been tested in court and it is not my role to make a finding in relation to those issues. That said, I accept that it is at least arguable, as advised by Kelledy Jones, that the effect of the probationary period lapsing was that Ms Márton became a fixed term employee.
51. I note that while Mr Kennedy and Mr Kennington appear to have been under the impression that the probationary period had been appropriately extended, in my view the probationary period does not appear to have been extended in accordance with the contract. In that regard I note that clause 3.4 of the contract is exhaustive in dealing with the circumstances in which the probationary period may be extended. Under clause 3.4 the probationary period may only be extended for up to three months where the council has determined in a written assessment that the CEO's performance has

not met expectations and/or requires improvement. That written assessment does not appear to have occurred.

52. Regardless, I further note that, as set out in the Mellor Olsson letter, Ms Márton withdrew in writing whatever consent she initially gave to participate in a review.
53. I do not consider that this was a situation in which the council neglected its contractual obligations altogether. It is clear from the documents provided to my investigation that Mr Kennington was aware of the need to conduct the review within the probationary period and took the steps to ensure that it occurred (for example, approaching three agencies and subsequently engaging Mr Kennedy to facilitate the review process, organising the change of the terms of reference).
54. That said, the council has not offered any explanation as to why the review did not occur within the probationary period.

Opinion

55. In light of the above, I consider that by failing to meet its obligations under the contract to organise the review as required, the council acted in a manner that was wrong within the meaning of section 25(1) of the Ombudsman Act.
56. I do not make any recommendations given that both Mr Kennington and Ms Márton have since left the council and the contract is no longer on foot.

Whether the former Mayor failed to act diligently in coordinating meetings of the Chief Executive Review Committee and provide members with all relevant information in a timely manner

57. Section 62(2) of the Local Government Act and clause 3.2 of the Code of Conduct require a standard of 'reasonable' care and diligence that applied to Mr Kennington as a council member. While I acknowledge the frustration of Cr Strudwicke and other council members at what appeared to be Mr Kennington's failure to act in a timely manner to organise the review (despite their many reminders), on balance, I do not consider that the information provided is sufficient to support a finding that Mr Kennington breached section 62(2) of the Local Government Act or clause 3.2 of the Code of Conduct. In all of the circumstances I do not consider it is necessary or justifiable to investigate this allegation further.
58. In reaching that conclusion, I have noted:
 - this was a not a situation in which the review was 'off the radar' for Mr Kennington; to the contrary, he took steps to organise Mr Kennedy to facilitate the process and some of the delays were beyond his control
 - while it is unfortunate that Mr Kennington delayed seeking legal advice as to the effect of the lapse of the probationary period, to a certain extent, Mr Kennington appears to have been acting on the advice of Mr Kennedy and other council administration staff
 - while the delay in providing all members of the CEORC with an executed contract was unfortunate, a copy of the unexecuted contract was provided at an ordinary Council Meeting on 13 April 2015
 - Mr Kennington has since resigned from the council as a result of health issues and I do not consider that, in the circumstances, there is a public interest in pursuing investigation of him further.

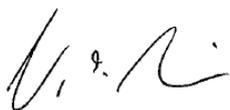
Summary and final comments

59. In summary:

- in relation to the first issue, I consider that, by failing to meet its obligations under the contract, the council acted in a manner that was wrong within the meaning of section 25(1) of the Ombudsman Act
- in relation to the second issue, I consider that there is not sufficient evidence that Mr Kennington breached clause 3.2 of the Code of Conduct and thereby committed an administrative error and I do not consider it necessary or justifiable in all of the circumstances to investigate this allegation further.

60. While I have made a finding of error against the council, I do not consider it necessary in all of the circumstances to make any recommendations pursuant to section 25(2) of the Ombudsman Act.

61. I intend to send a copy of my final report to the Minister for Local Government.



Wayne Lines
SA OMBUDSMAN

16 June 2016